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IN THE

Supreme Court of Pennsylvania

No. 108 MAP 2023

LICELY JUAREZ VELASQUEZ,

Appellant,

vs.

LIZARDO MARROQUIN MIRANDA,

Appellee.

On appeal from the judgment of the Superior Court of Pennsylvania dated June 20, 2023, in No. 2688 EDA 2022

BRIEF OF *AMICUS CURIAE* NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT, INC. IN SUPPORT OF APPELLANT

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I. Interest of *Amicus Curiae*

Amicus curiae National Immigrant Women's Advocacy Project, Inc. ("NI-WAP"), is a nonprofit training, technical assistance, and public policy advocacy organization. NIWAP promotes the implementation and use of laws and policies that improve legal rights, services, and assistance to immigrant women and children who are victims of child abuse and neglect, child abandonment, domestic violence, sexual assault, stalking, human trafficking, and other crimes.

In furtherance of this mission, NIWAP worked closely with Congress to draft the immigrant protections included in the Violence Against Women Act, the Trafficking Victims Protection Act, and their respective reauthorizations. These statutes expanded protections for children eligible for Special Immigrant Juvenile ("SIJ") status. NIWAP then worked with the U.S. Citizenship and Immigration Services ("USCIS") to fully implement SIJ protections.

As a national resource center, NIWAP also offers technical assistance and training to a wide range of professionals working with immigrant children who are victims of crime, abuse, neglect, and/or abandonment. NIWAP has a particular focus on and expertise in conducting legal trainings regarding immigration-law issues that arise in state family-court cases, including trainings relating to SIJ status. A key focus of these trainings is to explain that SIJ judicial determinations, which are made

by state courts, are a prerequisite to an immigrant child's ability to file for SIJ status.[1] For this reason, it is in the best interest of an immigrant child for the state court to make an SIJ judicial determination any time the state court makes a custody, guardianship, dependency, placement, or delinquency determination.[2] However, courts often fail to make SIJ judicial determinations because of confusion surrounding the SIJ laws and regulations, which have become a legal morass due to delayed regulation implementation and outdated case law. NIWAP's extensive experience in this area of law gives it a unique ability to provide guidance on how Pennsylvania courts should proceed in fulfilling their role under the SIJ statute.

In accordance with Pennsylvania Rule of Appellate Procedure 531(b)(2), NIWAP confirms that no party other than NIWAP and its counsel contributed financially to the preparation of this brief or authored any part of this brief.

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[1] References made herein to immigrants refer to noncitizen immigrants.

[2] Studies show multiple benefits to a child—and to the child's community—of obtaining lawful permanent resident ("LPR") status, which is one of the many benefits of obtaining SIJ status. For instance, children who obtain LPR status exhibit decreased disciplinary problems and aggression; substantial increases in educational achievement, including improved school grades, high school graduation rates, and bachelor's degree graduation rates; and similar substantial improvements in sleep quality, nutrition, communication, interaction with adults and friends, and participation in after-school activities. *See* LESLYE E. ORLOFF ET AL., NAT'L IMMIGRANT WOMEN'S ADVOC. PROGRAM, TRANSFORMING LIVES: HOW THE VAWA SELF-PETITION AND U VISA CHANGE THE LIVES OF SURVIVORS AND THEIR CHILDREN AFTER EMPLOYMENT-AUTHORIZATION AND LEGAL IMMIGRATION STATUS (2021), https://niwap library.wcl.american.edu/pubs/transforming-lives-final-report.

II. Introduction

In her petition to seek sole legal custody over her children, S.M.J. and E.M.J. ("the Children"), Licely Juarez Velaquez requested that the Delaware County Court of Common Pleas make SIJ judicial determinations so the Children could apply for SIJ status. Despite granting Ms. Velaquez sole legal custody, the Court of Common Pleas denied the Children's petition for SIJ judicial determinations.[3]

The Superior Court of Pennsylvania affirmed the trial court's decision, albeit on different grounds. Relying on *Osorio-Martinez v. Attorney General United States*, 893 F.3d 153 (3d Cir. 2018), the Superior Court held that SIJ status is available only when a child is essentially a ward of the United States—that is, when the child has been adjudicated dependent or has been legally committed to the custody of a state agency or an individual or entity appointed by the state or juvenile court. *Velasquez v. Miranda*, 297 A.3d 837, 848 n.6 (Pa. Super. 2023). However, as discussed below, this is contrary to applicable law.

In the short time since the Superior Court issued its opinion in this case, it has

[3] Recent amendments changed the terminology of the SIJ regulations to clarify that state courts are (a) identifying children who, under state best-interest laws, have been abused, abandoned, or neglected by a parent and (b) making a determination about custody, guardianship, dependency, or placement of the child based on findings of fact. Under the SIJ statute, state courts do not make a final decision regarding SIJ eligibility, but rather issue findings and subsequent conclusions of law required by the SIJ statute. Prior to the new regulations, the state-court process was called issuing SIJ-status findings or predicate orders, but under the new regulations, the state courts make SIJ judicial determinations. Special Immigrant Juvenile Petitions, 87 Fed. Reg. 13066, 13069 (Mar. 8, 2022) (to be codified at 8 C.F.R. pts. 204, 205, 245); 8 C.F.R. § 204.11(a) (2022).

recognized the confusion surrounding SIJ laws and regulations and has highlighted the need for guidance from this Court and the Pennsylvania General Assembly in ruling on requests for SIJ judicial determinations. *Rivas v. Villegas*, 300 A.3d 1036, 1049 n.15 (Pa. Super. 2023) (requesting "further guidance from the Pennsylvania Supreme Court and General Assembly . . . to clarify those problems that will continue to challenge our orphans', juvenile, and family courts.").

Any confusion regarding the role of Pennsylvania courts in the process of obtaining SIJ status jeopardizes the ability of a child who is otherwise eligible for SIJ status to receive the protections created for them by Congress. A state court's SIJ judicial determinations, which include findings of fact and conclusions of law, are mandatory prerequisites to an eligible child's ability to apply for SIJ status and have it adjudicated by the USCIS. *See, e.g.*, *In re Danely C.*, No. M2016-02054-COA-R3-JV, 2017 WL 5901022, at *8 (Tenn. Ct. App. Nov. 29, 2017) (unpublished) (quoting *E.C.D. v. P.D.R.D.*, 114 So.3d 33, 36 (Ala. Civ. App. 2012)) ("[a] juvenile court's failure to include the findings relevant to SIJ status 'effectively terminates the application for legal permanent residence, clearly affecting a substantial right' of the child."). These judicial determinations provide essential information to the federal government in making the ultimate SIJ status determination. It is critical that state courts fulfill their role in the process of obtaining SIJ status by making SIJ judicial determinations.

In the present case, the trial court's failure to make SIJ judicial determinations for the Children, and the Superior Court's affirmance of the trial court's decision, deprive the Children of their opportunity to apply for SIJ status. These decisions also reflect, and compound, the confusion among state courts regarding (1) the state court's role in the process of obtaining SIJ status, (2) the definition of a qualified juvenile court, and (3) the federal SIJ statute's requirement that state courts apply state law in making SIJ judicial determinations. This confusion is understandable; it stems from the statutory and regulatory history of the SIJ statute. But it is not inevitable. This Court can and should uphold the rights of immigrant children applying for SIJ status and, at the same time, remove the confusion from this area of Pennsylvania law.

III. Argument

A. Delayed amendment of the SIJ regulations has created confusion as to the limited yet vital role of state courts in the process of obtaining SIJ status. This Court should clarify that role.

SIJ status is a critical form of humanitarian immigration relief that provides a pathway to lawful permanent residence for immigrant children in the United States who are unable to be reunited with one or both of their parents due to abuse, abandonment, neglect, or a similar basis under state law. Immigration and Nationality Act § 101(a)(27)(J), 8 U.S.C. § 1101(a)(27)(J). Since its enactment by Congress in 1990 and through each of its amendments, the SIJ statute has consistently permitted

qualifying immigrant children to remain in the United States, thereby fulfilling the goal of protecting abused, neglected, and/or abandoned immigrant children, including those who entered the United States without inspection. *See, e.g.*, *Yeboah v. U.S. Dep't of Just.*, 345 F.3d 216, 221 (3d Cir. 2003).

Recognizing that the federal government maintains exclusive jurisdiction over immigration while the states have a particularized expertise in determinations regarding the best interests and welfare of a child, Congress delegated a limited yet vital role to state courts in the process of obtaining SIJ status. *See* Special Immigrant Juvenile Petitions, 87 Fed. Reg. at 13069; 8 C.F.R. § 204.11(c); *see also In re Jose H.*, 40 N.Y.S.3d 710, 716 (N.Y. App. Div. 2016). Specifically, the federal SIJ statute provides a preliminary role for state courts in the process for obtaining SIJ status, while leaving the ultimate immigration decision to the federal government. 8 U.S.C. § 1101(a)(27)(J).

Unfortunately, the respective roles of the state courts and the federal government have become obscured by inconsistent precedent, which was primarily caused by delayed amendment of the SIJ regulations. The original SIJ statute required state juvenile courts to (1) "declare[] [the child] dependent on a juvenile court located in the United States," (2) "deem[] [the child] eligible by that court for long-term foster care," and (3) determine "it would not be in the alien's best interest to be returned to

the alien's or parent's previous country of nationality." Immigration and Nationality Act, Pub. L. No. 101-649, § 153(a)(3), 104 Stat. 4978, 5005–06 (1990).

In 2008, as part of the Trafficking Victims Protection and Reauthorization Act ("TVPRA"), Congress adopted amendments to the SIJ statute, one of the most significant being the elimination of the long-term foster care requirement. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(d), 122 Stat. 5044, 5079 (2008). In its place, Congress required a judicial determination that reunification with "1 or both" of an immigrant child's parents was not viable due to abuse, neglect, or abandonment. *Id.*

The elimination of the foster-care requirement was designed to expand the class of immigrant children who are eligible for relief from deportation: children could now qualify for SIJ status without their parents having to relinquish custody to the state and without any formal termination of parental rights of the non-abusive parent. *See* KAVEL JOSEPH ET AL., NAT'L IMMIGRANT WOMEN'S ADVOC. PROGRAM, APPENDIX B: SPECIAL IMMIGRANT JUVENILE STATUS LEGISLATIVE HISTORY 2 (Dec. 19, 2017), https://niwaplibrary.wcl.american.edu/wp-content/uploads/Appendix-B-SIJS-Legislative-History.pdf. Prior to the 2008 amendment, non-abusive parents were forced into the excruciating decision of having to "surrender their immigrant child to long-term foster care" in order for their child, who had been abused, abandoned, or neglected by the child's other parent, to qualify for the protections of SIJ

status. *Id.* With the removal of the foster-care requirement, lawmakers explicitly recognized that separation of a child from their non-abusive parent was "antithetical to the child's best interest." *Id.* This amendment opened the door for children to qualify for SIJ status while continuing to live with their non-abusive parent.

Additionally, the 2008 amendments allowed state courts to issue judicial determinations "whenever jurisdiction can be exercised under state law to make care and custody determinations"; such determinations "are no longer confined to child protection proceedings alone." *In re Israel O.*, 182 Cal. Rptr. 3d 548, 550 (Cal. Ct. App. 2015) (citing *Leslie H. v. Superior Court*, 168 Cal. Rptr. 3d. 729, 737 (Cal. Ct. App. 2014)); *see generally* § 235, 122 Stat. at 5079. In other words, the dependency requirement for SIJ status could be satisfied by a finding that the child was "placed in the custody of an individual or entity appointed by a state or juvenile court." *Marcelina M.-G. v. Israel S.*, 973 N.Y.S.2d 714 at *5 (N.Y. App. Div. 2013); *In re Hei Ting C.*, 969 N.Y.S.2d 150 at *2 (N.Y. App. Div. 2013). State courts make this appointment governing who will be responsible for the child's custody and care every time a state-court judge in a family or juvenile court proceeding issues a custody, guardianship, placement, or dependency order regarding a child.

Despite the important changes to the SIJ eligibility criteria in the 2008 amendment, the government failed to update the federal regulations implementing the SIJ statute until more than a decade later. It was not until 2022 that SIJ implementing

regulations were updated to clarify the law that state-court judges must apply when issuing SIJ judicial determinations in accordance with the 2008 amendments. *See* Special Immigrant Juvenile Petitions, 87 Fed. Reg. at 13066; 8 C.F.R. § 204.11(c). Thus, between 2008 and 2022, state and federal courts were placed in the difficult position of interpreting new statutory language that overruled conflicting, outdated regulations.

In the 2022 regulations, the Department of Homeland Security ("DHS") made three important updates to the implementing regulations for SIJ status. First, the definition of what constitutes a "juvenile court" for purposes of SIJ status was updated: it is "[a] court located in the United States that has jurisdiction under State law to make judicial determinations about the dependency and/or custody and care of juveniles." Special Immigrant Juvenile Petitions, 87 Fed. Reg. at 13069; 8 C.F.R. § 204.11(a). The term "juvenile court," as used in the SIJ statute, now includes any family, juvenile, probate, or other state court that has jurisdiction to issue orders regarding the custody, placement, or dependency of the child. *See* U.S. CITIZENSHIP AND IMMIGR. SERV., IMMIGRATION RELIEF FOR ABUSED, ABANDONED, OR NEGLECTED CHILDREN SPECIAL IMMIGRANT JUVENILE CLASSIFICATION 1 (2024), https://niwaplibrary.wcl.american.edu/wp-content/uploads/OPS-Special-Immigrant-Juvenile-Classification-V7-508-Compliant.pdf.

Second, the 2022 regulations emphasized "deference to State courts on their determinations of custody or dependency under State law." Special Immigrant Juvenile Petitions, 87 Fed. Reg. at 13079; 8 C.F.R. § 204.11(c). In this way, DHS clarified that the determination of whether "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" should be interpreted broadly under the relevant state laws to determine whether the evidence supports a determination that child has experienced one of these forms, or a similar form, of maltreatment. 8 U.S.C. § 1101(a)(27)(J).

Third, the "1 or both" language of the reunification requirement inserted into the SIJ statute by the 2008 TVPRA amendment means that if reunification with just one of the petitioner's parents is not viable, the petitioner has satisfied this part of the required judicial determination. Special Immigrant Juvenile Petitions, 87 Fed. Reg. at 13080; 8 C.F.R. § 204.11(c).

As a result of the above, the current law states that an immigrant child is eligible for SIJ status if the immigrant child meets the following criteria: (1) the child must be under the age of 21; (2) the child must be unmarried; (3) the child must be physically present in the United States at the time of filing their SIJ petition; and (4) the child must have obtained SIJ judicial determinations from a state juvenile court. 8 U.S.C. § 1101(a)(27)(J). In making the SIJ judicial determinations, state juvenile

courts should include the following three conclusions of law, as well as findings of fact with supporting evidence as they relate to each of the conclusions of law: (1) the court has exercised its jurisdiction as authorized by state law to issue orders regarding the dependency, placement, and/or custody and care of an immigrant child; (2) it is not in the child's best interest to return to the home country, or last habitual residence, of the child or the child's abusive parent; and (3) reunification with one or both of the child's parents is not viable due to abuse, abandonment, neglect, or a similar basis under state law. *Id.*

As the federal government intended, state courts play an indispensable role in the process of obtaining SIJ status. It is not the place of state courts, however, to determine whether a child is worthy of citizenship. Instead, state courts are asked to use their expertise to determine whether the child has suffered parent-perpetrated abuse, abandonment, neglect, or other maltreatment as defined by state law, as well as what is in the best interest of the child regarding their custody, care, and ability to heal from any maltreatment. In doing so, state courts develop a strong record by making factual findings and conclusions of law that will advise the federal government in making the ultimate immigration decision. If a state court fails to make the SIJ judicial determinations to which a child is rightfully entitled, an immigrant child who has been subjected to maltreatment by a parent will not receive the critical protections that Congress sought to provide when it established the SIJ statute.

In all cases, state courts with jurisdiction over children must make SIJ judicial determinations when requested by following and applying the broadened, updated SIJ federal regulations and statute.

B. The Court of Common Pleas erred when it failed to make the requested SIJ judicial determinations despite being a qualified juvenile court.

The Superior Court relied on outdated regulations and misconstrued the definition and role of a juvenile court under the SIJ statute when it refused to correct the Court of Common Pleas' failure to issue the requested SIJ judicial determinations. Any court that has jurisdiction under state law to issue orders regarding the placement, dependency, or custody and care of children must make SIJ judicial determinations when requested. 8 U.S.C. § 1101(a)(27)(J). These courts include those handling custody, protective orders, divorce proceedings, and many other family-law courts in addition to dependency courts adjudicating foster-care cases. *See* Special Immigrant Juvenile Petitions, 87 Fed. Reg. at 13079; 8 C.F.R. § 204.11(c).

As discussed in Section III.A. above, the 2022 regulations clarified who is eligible for SIJ status and which state courts are qualified to make the requisite underlying judicial determinations. *See* 8 C.F.R. § 204.11(a). Specifically, the definition of "juvenile court" under the SIJ statute was expanded to mean "[a] court located in the United States that has jurisdiction under State law to make judicial determinations about the **dependency and/or custody and care** of juveniles." *Id.* (emphasis added). This includes the Court of Common Pleas. *See* U.S. CITIZENSHIP AND

IMMIGR. SERV., *Chapter 2 - Eligibility Requirements*, POLICY MANUAL (Jan. 24, 2024), https://www.uscis.gov/policy-manual/volume-6-part-j-chapter-2.[4]

Because the name of the state court is irrelevant under the SIJ statute definition of "juvenile court," the issue is whether the state court has jurisdiction under state law over child welfare and can make best-interest-of-the-child determinations. Special Immigrant Juvenile Petitions, 87 Fed. Reg. at 13077; 8 C.F.R. § 204.11(c). This definition covers any family, juvenile, probate, or other state court that has jurisdiction under state law to issue court orders regarding the custody, placement, or dependency of a child. *See* LESLYE E. ORLOFF & RAFAELA RODRIGUES, NAT'L IMMIGRANT WOMEN'S ADVOC. PROGRAM, SPECIAL IMMIGRANT JUVENILE STATUS BENCH BOOK: A NATIONAL GUIDE TO BEST PRACTICES FOR JUDGES AND COURTS 11 (2018), https://niwaplibrary.wcl.american.edu/wp-content/uploads/SIJS-Bench-book-complete-with-correct-cover-page.pdf. State courts make such custody and placement determinations regarding children in a wide range of court proceedings,

[4] When providing this definition in 2022, DHS explicitly declined to specify which types of courts have this jurisdiction out of concern that such a list might be interpreted as exhaustive. Special Immigrant Juvenile Petitions, 87 Fed. Reg. at 13077; 8 C.F.R. § 204.11(c). Recognizing that the name of the courts qualified to make these determinations often varies from state to state, DHS sought to avoid limiting determinations to too few courts. *Id.* Instead, DHS clarified that the key issue is whether the state court, under state law, has jurisdiction in the proceeding to award custody and/or placement of the child or to issue dependency orders to help remedy the harm the child has suffered. *Id.*

including those that address dependency, delinquency, civil protection orders, custody, divorce, guardianship, paternity and child support, adoption, and termination of parental rights. *Id.*

Further, the SIJ statue "places no restriction on what is an appropriate proceeding"; instead, the court making SIJ judicial determinations need only meet the definition of a juvenile court as provided by the federal regulations. 8 U.S.C. § 1101(a)(27)(J); *Simbaina v. Bunay*, 109 A.3d 191, 200 (Md. Ct. Spec. App. 2015). Therefore, SIJ judicial determinations can be issued in proceedings, such as the one here, in which the natural parent seeks custody or guardianship. *See, e.g.*, *Linares-Mendez v. Cazanga-Payes*, 121 N.Y.S.3d 659 (N.Y. App. Div. 2020); *Jimenez v. Perez*, 42 N.Y.S.3d 248 (N.Y. App. Div. 2016); *Amaya v. Rivera*, 444 P.3d 450 (Nev. 2019).

In fact, a state juvenile court may not refuse to exercise jurisdiction over a child for SIJ purposes simply because it finds the child is "already thriving in the custody of [the non-abusive parent]." *Y.G.P. v. A.H.R.*, No. A-4357-15T1, 2017 WL 3091780, at *4 (N.J. Super. Ct. App. Div. July 21, 2017) (unpublished).[5] State courts that have refused to issue SIJ judicial determinations and failed to consider the

[5] If a state juvenile-court judge has determined that it is in the child's best interest to remain in the care and custody of their non-abusive parent in the United States, it necessarily follows that it would not be in the child's best interest to return to their home country. *E.P.L. v. J.L.-A.*, 190 A.3d 1002, 1008 (D.C. 2017).

child's best interest solely because a natural parent was seeking custody have been overturned on appeal and ordered to make SIJ judicial determinations. *See, e.g.*, *Castellanos v. Recarte*, 36 N.Y.S.3d 217 (N.Y. App. Div. 2015); *In re Sanchez Bonilla*, 982 N.Y.S.2d 373 (N.Y. App. Div. 2013). This Court should follow suit and reverse the Superior Court's decision. The Superior Court focused exclusively on the issue of whether the Children were adjudicated dependent or placed in the custody of a state agency or an individual appointed by the state or juvenile court. *Velasquez*, 297 A.3d at 847. In a footnote, the Superior Court stated that "the statute contemplates a scenario where the court **appoints** an individual or entity to have custody over the child at issue." *Id.* at 848 n.6. The Superior Court then held that, because "[Ms. Velaquez] is the biological parent of Children and she sought to exercise sole custody of Children over the rights of Father," the Court of Common Pleas did not appoint her to have custody of the Children. *Id.*

The Superior Court's misguided analysis of the SIJ statute stems from the confusion created by the delay between the 2008 TVPRA amendments and the 2022 implementing regulations. Specifically, the Superior Court relied on the Third Circuit's interpretation of the eligibility criteria for SIJ status in *Osorio-Martinez v. Attorney General United States*, 893 F.3d 153 (3d. Cir. 2018). *See Velasquez*, 297 A.3d at 845–47. In *Osorio-Martinez*, the Third Circuit quoted outdated implementing regulations referencing pre-2008 statutory language, such as the requirement that the

juvenile be "eligible for long-term foster care," among other obsolete, and no longer legally correct, requirements. *Osorio-Martinez*, 893 F.3d at 168–170. By relying on *Osorio-Martinez*, the Superior Court failed to interpret the SIJ statute as broadly as Congress and DHS intended.

In order to fulfill the broad intentions of Congress, this Court should require the issuance of SIJ judicial determinations upon request, just as many other courts across the nation have done. *See, e.g., Romero v. Perez*, 205 A.3d 903, 908 (Md. App. Ct. 2019) ("[W]hen a party requests SIJ status findings in his or her pleadings, the circuit court **must** undertake the fact-finding process . . . and issue 'independent factual findings regarding' the minor's eligibility for SIJ status") (emphasis added); *Hernandez-Lemus v. Arias-Diaz*, 100 N.E.3d 321, 323 (Mass. 2018) ("A judge simply may not decline to make findings; he or she must make the findings – whether favorable or not – concerning those criteria."); *Chevez-Gaitan v. Carrillo-Aguilar*, 135 Nev. 626, at *1 (Nev. App. May 9, 2019) ("when there is evidence . . . to support [SIJ] findings, the court shall issue an order setting forth such findings") (unpublished); *Guardianship of Saul H.*, 514 P.3d 871, 877 (Cal. 2022) ("a court 'shall issue' an order containing SIJ predicate findings if 'there is evidence to support those findings'"). This requirement should apply regardless of whether the SIJ judicial determinations are favorable or unfavorable to the petitioner because, at the very least, any refusal to issue SIJ judicial determinations deprives the petitioner of

a developed record and the information needed to make a valid appeal. *See, e.g.*, *E.C.D.*, 114 So. 3d at 36.

The Court of Common Pleas failed to follow the federal regulations governing its role in the process of obtaining SIJ status. For that reason, its decision, and the Superior Court's misguided affirmance of that decision, should be overturned. This Court should also direct the issuance of the SIJ judicial determinations in this case and provide explicit guidance to lower courts regarding their role in making SIJ judicial determinations to eliminate any future confusion among Pennsylvania courts.

C. When SIJ judicial determinations are requested, state courts must apply state law in the same manner they apply state family law and state family-law procedures in all other custody and family-law cases adjudicated in Pennsylvania.

The Court of Common Pleas failed to follow through on its determination of the facts under state-law definitions of abuse, neglect, and abandonment when it omitted the findings required by the SIJ statute. The Superior Court failed to correct this error due to its reliance on outdated precedent. The SIJ statute explicitly codifies the requirement that state law governs both factual findings and state-court jurisdiction when making SIJ judicial determinations. *See* 8 U.S.C. § 1101(a)(27)(J)(i); *see also* § 235(d), 122 Stat. at 5079–80.

In keeping with this requirement, when making SIJ judicial determinations, state courts across the country have applied state law to determine whether a child experienced maltreatment. *See, e.g.*, *H.S.P. v. J.K.*, 121 A.3d 849, 859 (N.J. 2015);

Romero, 205 A.3d at 914–16; *In re Pedro J.C.*, 105 A.3d 943, 955 (Conn. App. Ct. 2014); *In re Juvenile 2002-098*, 813 A.2d 1197, 1201 (N.H. 2002).

Pennsylvania should emulate other state courts that have followed the SIJ statute by applying their state laws defining abuse, neglect, and abandonment to the facts of the case of the immigrant child seeking SIJ judicial determinations, just as those definitions would apply in other custody and all family-law cases, without regard to whether the child's maltreatment occurred in the state, the United States, or abroad. *See*, *e.g.*, *B.R.L.F. v. Sarceno Zuniga*, 200 A.3d 770, 777 (D.C. 2019) (applying District of Columbia law); *Lopez v. Serbellon Portillo*, 469 P.3d 181, 183 (Nev. 2020) (applying Nevada law); *In re Guardianship of Xitumul*, 137 N.E.3d 945, 954 (Ind. Ct. App. 2019) (applying Indiana law); *In re Danely C.*, 2017 WL 5901022, at *8 (remanding to trial court with instructions to apply Tennessee law).

In recognition that state courts are best positioned to make determinations regarding the best interests and welfare of a child, Congress and DHS have accepted potential inconsistencies in outcomes between different states, noting that "[t]he relevant SIJ statutory language does not define abuse, neglect, or abandonment. Because the determination of parental maltreatment is a matter of State law, and the definitions of abuse, neglect, and abandonment vary from State to State, creating a standardized process or modified categorical approach would undermine Congress's

instruction concerning the State's role in these determinations." Special Immigrant Juvenile Petitions, 87 Fed. Reg. at 13081.

Although there may be differences among various states, courts within the same state should consistently apply that state's laws in making SIJ judicial determinations. In Pennsylvania, the Superior Court has already recognized that such consistency is currently lacking:

> We take this moment to acknowledge that the law in this area has not been fully developed. While the statute was enacted in 1990, its interpretation and application in this Commonwealth has been limited until very recently. *See Orozco; see also Velasquez v. Miranda*, ___ A.3d ___, 2023 WL 4069151 (Pa. Super. June 20, 2023).
>
> Moreover, the statute creates a unique procedural caveat where the ultimate determination is of the federal immigration nature, but preliminary factual determinations are made by state courts. *See Orozco*, 284 A.3d at 477 (citation omitted). Since the statute's enactment, no settled interpretation or application of the SIJ statute has been developed among the states, and there is no unified body of law for considering what evidence will be sufficient to support SIJ findings. As such, the courts of this Commonwealth may face confusion and produce inconsistent results in future proceedings as we see this type of case occurring often in the future. Consequently, we note that further guidance from the Pennsylvania Supreme Court and General Assembly may help to clarify those problems that will continue to challenge our orphans', juvenile, and family courts.

Rivas, 300 A.3d at 1049 n.15.

In the present case, the trial court necessarily considered the role of "abandonment, abuse or neglect, or a similar basis under state law" when it determined whether reunification of the Children with their father was viable. *Velaquez*, 297

A.3d at 843. The Superior Court never discussed this issue, however, instead focusing on other portions of the case and appeal. *Id*. at 843–48. State courts are responsible for making factual findings and deciding whether the facts of the case support issuance of SIJ judicial determinations, as "[n]ew federal regulations expressly allow petitioners for [SIJ] status to submit evidence of a state court determination 'as to how the basis is legally similar to abuse, neglect, or abandonment under State law' for purposes of determining that reunification is not viable." *Guardianship of Saul H.*, 514 P.3d at 886 (citing 8 C.F.R. § 204.11(d)(4)(i)). The lower courts in this case ignored the explicit text of the SIJ statute by refusing to apply state law to the issues raised by Ms. Velasquez. *See Velasquez*, 297 A.3d at 843–48.

This Court should reverse the decision of the Superior Court and, in doing so, clarify the vital role state courts play in the process of obtaining SIJ status. Such clarity is essential not only for the sake of the Children in this case, but also for all immigrant children who depend on Pennsylvania courts to fulfill their vital role in this process.

IV. Conclusion

For the reasons discussed above, NIWAP respectfully requests that the Court reverse the decision of the Superior Court and provide guidance to Pennsylvania courts that is consistent with the updated regulations found at 8 C.F.R. § 204.11(a).

Dated: February 1, 2024

Respectfully submitted,

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PA. R.A.P. 127 CERTIFICATION

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

/s/ *Stefanie M. Lacy*

WORD-COUNT CERTIFICATION

I certify that the foregoing brief includes 5,445 words, calculated as required by Pennsylvania Rules of Appellate Procedure 2135(a)(1) and 531(b)(3) and determined by the word-counting feature of Microsoft Word.

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PROOF OF SERVICE

I hereby certify that, on February 1, 2024, I served a copy of the foregoing document to the following by U.S. Mail, postage-prepaid, which service satisfies the requirements of Pa.R.A.P. 121:

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