Supreme Court Case No. S271265

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA
En Banc

Guardianship of S.H.R.

S.H.R.
Petitioner and Appellant,

vs.

JESUS RIVAS et al.
Real Parties in Interest.

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

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

ANSWERING BRIEF ON THE MERITS

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Pro Bono Counsel Appointed To
Argue Positions Adopted in Court of Appeal Opinion

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INTRODUCTION

No one should have to endure poverty and gang violence. And the drive to seek a better life in the United States is commendable and inspirational.

None of that, however, controls the outcome of this case, which turns instead on questions about courts' factfinding power. Hopefully, Saul (for whom we have great empathy) has some other path to remain in the United States. But a challenge to the superior court's decision on Saul's petition for Special Immigrant Juvenile (SIJ) findings is not the right one.

As pro bono counsel appointed by this Court to argue the positions articulated by the Court of Appeal, we urge the Court to affirm. In fact, Saul's position would end up harming rather than helping immigrant children in California who seek SIJ status from the federal government.

Preponderance of the evidence. The "substantial evidence" decisional standard that the opening brief urges would restrict a superior court to asking whether a hypothetical factfinder, who ignores contrary evidence, contrary inferences, and credibility concerns, could possibly find in a petitioner's favor. Code of Civil Procedure section 155 never mentions such a unique factfinding standard. Instead, it empowers superior courts to actually "make the factual findings . . . ." (Code Civ. Proc., § 155, subd. (a)(1).)

The Legislature made this statute's purpose clear: to give superior courts jurisdiction to make the findings necessary for an

immigrant child to petition the federal government for SIJ status. And federal law is equally clear that in making such findings, state courts must weigh the evidence and actually find that the facts are in the petitioner's favor—not just reach the legal conclusion that substantial evidence could support findings in the petitioner's favor by a hypothetical reasonable factfinder.

The opening brief's heart is in the right place. But the standard it urges will not help immigrant children. It will result only in worthless superior court orders that may well serve to justify federal denials of children's petitions for SIJ status. That is not what the Legislature intended, and it will help no one. This Court should read section 155 to require proof by a preponderance of the evidence, the default—and lowest—burden of proof for factual findings under California law.

Appellate standard of review. The Court of Appeal properly understood that it was bound to affirm unless the evidence compelled the contrary conclusion as a matter of law. There is nothing remarkable about this standard of review. This Court and the intermediate appellate courts consistently apply it—even when the evidence is undisputed—when the party with the burden of proof appeals a trial court's determination that the party failed to carry that burden.

Merits. The superior court did not commit reversible error on the merits. The admissible evidence and permissible inferences from it left ample room for a judicial determination that Saul failed to establish that reunification with his parents is unviable. Saul's suggestion that courts presume present

unviability based on any instance of past mistreatment ignores federal and state law. Worse, it may well lead the federal government to reject all SIJ findings issued by California courts.

The Court should affirm the superior court's denial of the requested SIJ findings.

STATEMENT OF THE CASE

A. Saul's petition for SIJ findings.

In the superior court, Saul was represented by counsel. (See, e.g., AA 52, 102.)

In February 2020, he filed his petition for SIJ findings, contending that reunification with one or both of his parents "is not viable" because of "neglect" and "abandonment." (AA 52-53 [not selecting the third option, "abuse"].) Saul included his signed declaration, which stated the following:

Home life and poverty. In El Salvador, Saul "lived with both of [his] parents" as well as his younger siblings and maternal grandfather. (AA 56.) His older sisters lived there as well until they left for the United States. (*Ibid.*)

His mother and maternal grandfather do not work and his "father has not been able to find work for a couple of years." (AA 56.) His "family depends mostly on [his] older sisters and [him] to provide money." (*Ibid.*)

Agricultural work. "From the time [he] was ten until [he] was fifteen years old, [he] spent [his] entire summers working in the fields helping [his] grandfather. [They] would

collect fruit and vegetables under the hot weather. [He] would be under the sun for six to seven hours every day. After working in the fields, [he] would be completely exhausted." (AA 56.) "[His] grandfather would give [him] money for [his] labor which [he] would use to buy things [he] needed such as food, clothes, and shoes." (*Ibid.*) Saul's declaration provided no further description of his experiences working for his grandfather.

Gang threats. "Life in El Salvador became difficult for [Saul] when gang members began harassing [him]. There were three separate incidents in which gang members threatened to kill [him] and [his] family if [Saul] refused to join their gang." (AA 57.)

The first two confrontations occurred when gang members approached Saul outside of class on a school day. (AA 57.) The gang members were "waiting for" Saul and told him that if he did not join their gang, they would kill Saul or his family. (*Ibid.*) In both instances, Saul's parents "went to the police." (*Ibid.*) But "the police did nothing" other than take notes. (*Ibid.*) "The police cannot protect [him]"; he "think[s] the police are afraid of the gang members, who will go after them or their family members if they investigate the incidents." (AA 58.)

After the second threat on Saul's life at the school, he "became very afraid that the gang would again be there waiting for [him] after school. [His] parents made [him] stop going to school and start working." (AA 57.)

Saul then began working at a car wash. (AA 57.) He "used half of the money [he] made at the car wash to buy food for [his] parents, grandfather, and younger siblings. The other half [he] would add it to [his] savings." (AA 58.) But that provided no escape from gang threats. A different gang member approached him at the car wash and told him "to pay '*la renta*,' the gang tax" and threatened to make Saul "disappear." (*Ibid.*)

Saul told his parents about this incident and his fear of the gang members and that he "wanted to leave the country because" he did not feel safe in El Salvador. (AA 58.) "It was difficult and stressful to continue living in El Salvador. [He] lived in constant fear that the gang members would return to [his] work and kidnap or kill [him]. The gang members have killed many young people in [his] neighborhood. [He] know[s] of three different people who were killed by gang members. [He] did not want to risk losing [his] life." (*Ibid.*)

Although his parents thought "it would be too dangerous for" Saul to leave, he chose to leave El Salvador "without telling them" in June 2018 and arrived in the United States. (AA 58.)

His declaration expressed that he was afraid that if he returned to El Salvador, neither his parents nor the police could protect him from gang threats. (AA 58.) He felt "happy and cared for" with his cousin in the United States, where he could continue his education and "feel safe, far from the threatening gang members." (AA 59.)

B. The superior court hearing and the court's offer to permit Saul to file additional documents.

On June 25, 2020, the superior court held a hearing on Saul's petition. (AA 83-93.) The judge expressed that based on Saul's declaration, he could not make findings in Saul's favor on either of two key "requirement[s]."

First, the superior court explained that Saul's declaration was not sufficient to show that his parents had committed abuse, neglect, or abandonment. (AA 86-89.) Second, the superior court explained that "there's no evidence that he cannot be reunited with one or both of his parents, which is also a requirement." (AA 89.) "Based on the fact that the petitioner cannot articulate either standard," the court was inclined to deny Saul's petition. (*Ibid.*)

However, the superior court offered that "[i]f you'd like more time, I'll give it to you." (AA 90.) "I'm more than happy to give you additional time" to file "additional information" and briefing, the court explained, offering "a month" to do so. (AA 90-91.) The court explained that once Saul filed those documents, the matter would be "deemed under submission and I'll issue a written statement of decision." (AA 91.) Saul's counsel accepted this timeline. (*Ibid.*)

C. Saul's supplemental filing.

On July 30, 2020, Saul's counsel filed the promised supplemental memo of points and authorities in support of his

petition. (AA 102-161.) Attached to that document were the following:

1. The same declaration by Saul that had been "previously submitted" (AA 104, 123-127), although the superior court had previously stated that this declaration did not provide sufficient evidence for the requested findings; and

2. A "Psychological Evaluation of Licensed Social Worker Roxana Alas." (AA 104, 129-135.)

The social worker's psychological evaluation asserts numerous supposed factual details about Saul's experiences in El Salvador—far more detailed and graphic than Saul's declaration—and about Saul's feelings toward his parents. (Compare AA 123-127 with AA 129-134.) The psychological evaluation presents this information as Saul's responses to an out-of-court clinical interview by the social worker "about [Saul's] personal history." (AA 129.) It is replete with quotations of what Saul purportedly told the social worker. (AA 129-134.) For instance, the psychological evaluation—but not Saul's own declaration—states that:

- Saul's work in the fields involved numerous "unsafe working" conditions, including that Saul would "'work[] non-stop'" from 6 am to 6 pm; used a "machete"; suffered from multiple sunburns that were so severe that it caused his skin to peel and that would not heal because of recurring sun exposure; was "often getting dehydrated causing him to shake and experience shortness of

breath"; would often get cuts during his work; and was provided "limited food" while working (AA 130);

- Saul's "deplorable working conditions" included "'no running water and no restroom'" (*ibid.*);
- The work also involved "dangers of exposures to animals such as snakes, scorpions, chinch bugs, and bees" that would often bite him in the fields, causing "'welts that were painful'" and would take days to heal without rest (*ibid.*);
- Saul was exposed to "pesticides and chemicals with no protection" and hazardous "terrain" that could "easily" have led to a "major injury" (*ibid.*);
- Saul's "parents were aware of the safety risks and still sent him to work in a hazardous environment" (*ibid.*);
- Saul feels "anger towards his parents due to their expectation for him to work at an early age and limiting his educational opportunities" and anger toward the El Salvador "'government'" that "'can't do anything'" about the gangs (AA 131-132).

The psychological evaluation also included the social worker's conclusions that (1) Saul met some—but not all—of the criteria for PTSD and therefore merited a diagnosis of "prominent features of PTSD" and (2) the experiences described in the evaluation would be classified as "child abuse" in California. (AA 133-134.)

On the last page, the social worker signed the psychological evaluation below a sentence that states, "I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge." (AA 135.)

Although Saul's counsel was given the opportunity to provide any additional evidence they saw fit (AA 90-91), they did not file a declaration by Saul himself attesting to any of the factual details from the social worker's evaluation. They did not file a supplemental declaration based on personal knowledge. Instead, they chose to re-file Saul's declaration that accompanied the original petition for SIJ findings. (AA 104, 123-127.)

D. The statement of decision.

On August 25, 2020, the superior court issued a minute order that "announces its intended decision," along with a nine-page "Statement of Decision." (AA 162-170, 172.)

Abuse, neglect, or abandonment. First, the superior court concluded that Saul had failed to show abuse, neglect, or abandonment under California law. (AA 165-169.) For each form of mistreatment, it cited a definition or definitions under California law and then found that the evidence before it did not establish that conduct. (AA 165-168.) The decision also discussed that the poverty of Saul's family should not weigh into whether his parents mistreated him under California law. (AA 162, 168-169.)

Reunification. Second, the superior court found that "no evidence is provided, which suggests that should Saul be

returned to El Salvador reunification with one or both parents absent a finding of other factors is not possible or viable." (AA 165.) The court found that all the conduct at issue "arose while [Saul] was a minor" and that now that Saul is 18 and more independent, "the Court cannot conclude that" the identified family issues "will continue to exist" if he returns to El Salvador. (AA 169-170.)

E. The Court of Appeal opinion.

The Court of Appeal affirmed. (*Guardianship of S.H.R.* (2021) 68 Cal.App.5th 563 (*S.H.R.*).) It made several key holdings:

Trial court standard. First, the Court of Appeal held that SIJ findings must be proven by a preponderance of the evidence. "Because section 155 does not specify a burden of proof," the court found this question governed by Evidence Code section 115, which prescribes preponderance of the evidence as the default standard except as otherwise provided by law. (*S.H.R.*, *supra*, 68 Cal.App.5th at p. 574.) As further support, the court observed that the substantial evidence test proposed by Saul is generally "aimed at determining a legal issue" of the sufficiency of evidence rather than at making a factual finding in the first instance. (*Id.* at p. 576.) The court also noted that a substantial evidence standard would "not satisfy the federal requirement that the state court actually find the required facts." (*Ibid.*)

Appellate review standard. Second, the Court of Appeal stated the ordinary appellate standard of review for a trial court's factual findings: When "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. Specifically, the question becomes whether the appellant's evidence was (1) uncontradicted and unimpeached and (2) of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding." (*S.H.R.*, *supra*, 68 Cal.App.5th at p. 574, internal quotation marks omitted, citing multiple cases.)

Support for trial court's findings. Third, applying this standard, the Court of Appeal held that the evidence before the superior court did not compel the court to find that (1) Saul's parents abandoned or neglected him or that (2) their past conduct makes Saul's reunification with his parents "not viable." (*S.H.R.*, *supra*, 68 Cal.App.5th at pp. 577-582.) Additionally, the Court of Appeal explained that it would reach the same conclusion about nonviability even if it reviewed that issue de novo. (*Id.* at p. 580.)

Social worker's declaration. As to the social worker's psychological evaluation, the Court of Appeal observed that—based on the record—the document was not "admitted into evidence" and was not "considered" by the superior court. (*Id.* at p. 572, fn. 3.) Accordingly, the Court of Appeal did "not consider it." (*Ibid.*)

ARGUMENT

This brief is structured to track the three issues identified in this Court's order appointing pro bono counsel, although those issues do not precisely track the opening brief's statement of the issues presented.

I. A Petitioner Seeking SIJ Findings Must Establish The Required Facts By A Preponderance Of The Evidence.

A. Overview of the SIJ process.

The federal Immigration and Nationality Act (8 U.S.C. § 1101 et seq.) authorizes the United States Citizenship and Immigration Services (USCIS) to grant Special Immigrant Juvenile (SIJ) status to certain undocumented children under state judicial supervision because of parental abuse, neglect, or abandonment. (8 U.S.C. § 1101(a)(27)(J).) SIJ status eases access to a visa, grants relief from deportation in some cases, and provides a path to long-term permanent residency. (8 U.S.C. §§ 1153(b)(4), 1201(a)(1)(A), 1227(c), 1255(a), (h).)

An immigrant receives federal SIJ status if: (1) the immigrant is under 21 years old and unmarried; (2) the immigrant is dependent on a juvenile court or under the custody of a court-appointed guardian; (3) the immigrant's "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"; (4) it would not be in the immigrant's best interest to be returned to his or her home country; and (5) "the Secretary of

Homeland Security consents" to the SIJ status. (8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11(c).)

State courts' role. Although SIJ status is a decision made by a federal agency and reviewed by federal courts, state courts play a critical, threshold role in attaining the federal status. Federal law charges state courts with making some of the underlying determinations, including custody or guardianship status and whether reunification with the child's parents is not viable due to past mistreatment under state law. (8 U.S.C. § 1101(a)(27)(J)(i), (ii); 8 C.F.R. § 204.11(d)(2); Petition for Amerasian, Widow(er), or Special Immigrant, USCIS Form I-360 <https://www.uscis.gov/sites/default/files/document/forms/i-360.pdf> [as of Mar. 5, 2022], pp. 8-9.)

Federal agency use of state court order. USCIS determines whether an immigrant has met the requirements for SIJ classification by reviewing the juvenile court order and the supporting evidence. (U.S. Citizenship and Immigration Services, USCIS Policy Manual (2021), vol. 6, pt. J <https://www.uscis.gov/policy-manual/volume-6-part-j> [as of Mar. 5, 2022] (USCIS Policy Manual), ch. 2 ["Eligibility Requirements"].) "To be eligible for SIJ classification, the petitioner must submit a juvenile court order(s) with the following determinations and provide evidence that there is a reasonable factual basis for each of the determinations," including that the juvenile court "[d]eclares, under the state child welfare law, that the petitioner cannot reunify with one or both of the petitioner's parents due to abuse, neglect, abandonment, or

a similar basis under state law . . . ." (*Ibid.*) "USCIS generally defers to the court" and "does not go behind the juvenile court order to reweigh evidence and make independent determinations about the best interest of the juvenile and abuse, neglect, abandonment, or a similar basis under state law." (*Ibid.*)

However, "USCIS looks at the documents submitted in order to ascertain the role and actions of the [state] court . . . ." (USCIS Policy Manual, ch. 3 ["Documentation and Evidence"].) Juvenile court orders "must provide the required judicial determinations regarding dependency or custody, parental reunification, and best interests" along with "the factual basis for the court's determinations (for example, the judicial findings of fact) . . . ." (*Ibid.*, original parenthetical.) "Where the factual basis for the court's determinations demonstrates that the juvenile order was sought to protect the child and the record shows the juvenile court actually provided relief from abuse, neglect, abandonment, or a similar basis under state law, USCIS generally consents to the grant of SIJ classification." (*Ibid.*) When the court order does not include the "facts that establish a factual basis for all of the required determinations, USCIS may request evidence of the factual basis for the court's determinations" (*ibid.*) or deny the petition for SIJ status outright (*Reyes v. Cissna* (4th Cir. 2018) 737 Fed.Appx. 140, 145 (*Reyes*) [affirming USCIS's denial of SIJ status and refusal to consider additional affidavits when state court's SIJ findings lacked sufficient factual basis]).

Code of Civil Procedure section 155. The California Legislature enacted Code of Civil Procedure section 155 to empower superior courts to make the judicial findings necessary for an immigrant to petition USCIS for SIJ status. This includes what the statute refers to as the "*factual findings* . . . [t]hat reunification of the child with one or both of the child's parents was determined not be viable because of abuse, neglect, abandonment, or a similar basis pursuant to California law." (Code Civ. Proc., § 155, subds. (a)(2), (b)(1)(B), italics added.)

———♦———

Code of Civil Procedure section 155 requires courts to make actual "factual findings" on the SIJ requirements. It does so because the Legislature's intent in enacting section 155 was to ensure that immigrant children in California have access to the type of court order that would help them attain SIJ status from the federal government. Anything less would be of no real-world value. Because the statute does not identify a burden of proof to obtain those factual findings, the default preponderance of the evidence standard applies: The child must show that it is more likely true than not that reunification with the child's parents is unviable due to past abuse, neglect, or abandonment.

The opening brief, however, urges that section 155 be interpreted to permit superior courts only to review a child's evidence under the substantial evidence standard: that is, to decide merely that the evidence is such that a hypothetical "reasonable trier of fact" *could* make the finding that reunification is not viable. (OBM § I; *S.H.R., supra*, 68

Cal.App.5th at p. 575.) For the multitude of reasons discussed below, the Court should reject that interpretation.

B. The statutory text requires actual "factual findings."

The opening brief's statutory interpretation turns entirely on a single clause of section 155—"and there is evidence to support those findings"—read out of context from the rest of the statute. Properly interpreted, section 155 requires the court to actually make factual findings. It is not enough for the superior court simply to decide, applying a substantial evidence standard, that the evidence *could* support a ruling in favor of the petitioner.

First, even the opening brief does not contend that the cited clause should be interpreted literally. The statute provides that "[*i*]*f 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, *and 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*, which shall include all of the following findings . . . ." (Code Civ. Proc., § 155, subd. (b)(1), italics added.) The opening brief cannot bring itself to argue that this should be taken literally to mean that "any evidence" compels the court to make affirmative findings of fact. (OBM 31.) Rather, it reads into the statute a requirement that the superior court first determine that the child's evidence is "reasonable, credible, and of solid value," such

that a reasonable trier of fact could agree with the petitioner. (OBM 27, 31.)

Second, the opening brief's gloss on the statutory text impermissibly conflicts with other language in the statute. Courts do not "consider the statutory language in isolation; rather, we look to the entire substance of the statutes in order to determine their scope and purposes." (*Skidgel v. California Unemployment Ins. Appeals Bd.* (2021) 12 Cal.5th 1, 14.) Courts "construe the words in question in context" and "harmonize the various parts" of a statute. (*Ibid.*) Here, the remainder of section 155's text is incompatible with Saul's theory that the "'role of the superior court' in evaluating a SIJ petition under section 155 is 'to determine . . . whether there is evidence that *could* support a ruling in favor of the petitioner'"—rather than to actually decide the factual issues. (*S.H.R., supra*, 68 Cal.App.5th at pp. 575-576, original italics; see also *In re S.A.* (2010) 182 Cal.App.4th 1128, 1140 [substantial evidence standard forecloses weighing of evidence and drawing adverse inferences].) Instead, section 155 repeatedly makes clear that the court must engage in actual factfinding on the existence of the SIJ factual issues. For instance:

- Section 155 begins by creating superior court jurisdiction "to *make the factual findings* necessary to enable a child to petition the" USCIS for SIJ status. (Code Civ. Proc., § 155, subd. (a)(1).) "To make the factual findings" is not the same as merely to determine that a reasonable jurist *could* make the findings by ignoring adverse evidence and inferences.

- The statute then explains what "factual findings" must be made: those "set forth in paragraph (1) of subdivision (b)." In turn, paragraph (1) of subdivision (b) requires "[*t*]*hat* reunification *was determined not to be viable*." (Code Civ. Proc., § 155, subds. (a)(2), (b)(1)(B), italics added.) A determination that reunification is not viable requires stronger proof than a determination merely that a reasonable factfinder could think so.

- Section 155 states that as part of finding that reunification is not viable, the "court shall indicate the date on which reunification *was determined* not to be viable." (Code Civ. Proc., § 155, subd. (b)(1)(B), italics added.) This is meaningless and impossible if the court is merely to determine that some hypothetical jurist could have found reunification not to be viable.

- The statute authorizes the court to "make additional findings" only if requested by a party. (Code Civ. Proc., § 155, subd. (b)(2).) By addressing the *making* of additional findings, the statute necessarily means that the determination of nonviability is an actual factual finding—not a mere determination that a hypothetical jurist could conclude something.

As the Court of Appeal put it, section 155 clearly envisions the superior court's "factfinding" role, and a mere substantial evidence determination "is not a factual finding at all." (*S.H.R., supra*, 68 Cal.App.5th at pp. 575-576.)

The opening brief insists—citing nothing—that a determination that "a child's evidence is substantial is a factual finding" because it requires the superior court to decide that the evidence is "reasonable in nature, credible, and of solid value." (OBM 31.) But those are *legal* determinations about the *quality* of the evidence—not factual findings. (See, e.g., *Smith v. Selma Community Hospital* (2010) 188 Cal.App.4th 1, 24, fn. 20 ["Whether substantial evidence exists to support the administrative decision is a *question of law*," italics added]; accord *Angelier v. State Board of Pharmacy* (1997) 58 Cal.App.4th 592, 598, fn. 5.) For instance, whether evidence is "credible" on substantial evidence review is limited to the legal issue of whether the evidence favoring one side is so "inherently improbable" that there is a "physical impossibility that [the evidence is] true." (*Bloxham v. Saldinger* (2014) 228 Cal.App.4th 729, 750.) That is categorically different from a witness's credibility, which may be considered only when a court engages in actual factfinding, not when it reviews for substantial evidence. (*In re S.A., supra*, 182 Cal.App.4th at p. 1140.)

Besides, section 155 describes the "factual findings" that must "be made." (Code Civ. Proc., § 155, subds. (a)(2), (b)(1)(B) [that reunification is not viable].) It is no answer to say that a court makes some finding in determining that "a child's evidence is substantial." That is still not the required factual finding.

Third, because section 155 requires actual factual findings without stating a burden of proof, Evidence Code section 115 supplies the default burden: proof by a preponderance of the

evidence. As directed by this statute, "Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." (Evid. Code, § 115; see also *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 861 ["As a general rule, the 'party desiring relief' bears the burden of proof by a preponderance of the evidence"].)

The Legislature is presumed to know this. (See *City of Morgan Hill v. Bushey* (2018) 5 Cal.5th 1068, 1083 ["'we presume that the Legislature has knowledge of all prior laws and enacts and amends statutes in light of those laws'"], quoting *People v. Pieters* (1991) 52 Cal.3d 894, 907 (conc. & dis. opn. of Broussard, A.J.).) When it enacted a statute requiring the court to make SIJ findings if "there is evidence to support those findings," the Legislature presumably meant when the petitioner has met the default evidentiary burden—not a "substantial evidence" standard that is mentioned nowhere in the statute and is not a factfinding standard at all.

Fourth, the Legislature knows how to use the substantial evidence standard when it intends to. (See footnotes 1 and 2, *post* [listing statutes that explicitly employ the "substantial evidence" standard].) It did not mention this standard in section 155.

Fifth, the opening brief repeatedly relies on a statement in *O.C. v. Superior Court* (2019) 44 Cal.App.5th 76, 83 (*O.C.*) that has no persuasive value. In pure dicta, *O.C.* stated that "if substantial evidence supports the requested SIJ findings, the issuance of the findings is mandatory." (*Ibid.*; see *S.H.R., supra*,

68 Cal.App.5th at p. 575 [disclaiming *O.C.*'s statement as dicta].) The only issues in *O.C.* were the superior court's failure "to cite California statutory or case law" and to check off a box on the form order—core requirements under both section 155 and USCIS's process. (*O.C.*, *supra,* 44 Cal.App.5th at pp. 80-82.) The nature and quality of the evidence supporting the factual findings was not remotely at issue. *O.C.* had no occasion to consider or decide the issue presented here, which is why it provided no analysis for the stray sentence on which the opening brief relies.

C. The Legislature's intent should be understood in light of the purpose of providing SIJ findings that are adequate to support SIJ status under federal law.

To understand section 155's meaning, the Court should look to the federal requirements for a qualifying state court order. After all, meeting the federal standard was *expressly* the statute's purpose. (Code Civ. Proc., § 155, subd. (a)(1).) Other than providing deserving children with documentation needed to apply for SIJ status through the federal process, a superior court's section 155 order has no value whatsoever. (See § I.A., *ante*.) A court's conclusion merely that substantial evidence exists would fall far short of the federal standard, making its order a worthless scrap of paper. That cannot be what the Legislature intended.

The Court's "fundamental task here is to determine the Legislature's intent so as to effectuate the law's purpose." (*People v. Gonzalez* (2017) 2 Cal.5th 1138, 1141.) Section 155 begins by

stating its purpose: To allow California courts "to make the factual findings necessary to enable a child to petition the United States Citizenship and Immigration Services for classification as a special immigrant juvenile pursuant to Section 1101(a)(27)(J) of Title 8 of the United States Code." (Code Civ. Proc., § 155, subd. (a)(1).) The legislative history announces that same purpose. (Legis. Counsel's Dig., Sen. Bill No. 873, Stats. 2014, Ch. 685 (2013-2014 Reg. Sess.) Summary Dig., p. 1.)

If section 155 is to achieve that sole purpose, the superior court must do more than determine that substantial evidence exists under which a hypothetical jurist *could* reasonably find that reunification is not viable due to neglect, abandonment, or abuse. Federal law clearly requires more than that.

The federal requirements for a valid and useful state court order are clear. Federal law "*requires the state court to find . . . 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.'" (*Osorio-Martinez v. Attorney General United States of America* (3d Cir. 2018) 893 F.3d 153, 169 (*Osorio-Martinez*), quoting 8 U.S.C. § 1101(a)(27)(J)(i), italics added.) "Because [federal law] references this finding as made under state law, the record must contain evidence of a judicial determination *that the juvenile was subjected to such maltreatment* by one or both parents under state law." (U.S. Citizenship and Immigration Services, *Matter of D-Y-S-C-*, Policy Memorandum (Oct. 11, 2019) pp. 5-6 <https://www.uscis.gov/laws-and-policy/policy-memoranda> [as of

Mar. 5, 2022], italics added.) The court's order "must provide the required judicial determination" and "the factual basis for the court's determinations (for example, the judicial findings of fact)." (USCIS Policy Manual, ch. 3.)

A determination that substantial evidence exists does not cut the mustard. A superior court does not determine *that* reunification is unviable—the federal requirement—by merely deciding under the substantial evidence standard that some hypothetical, "reasonable trier of fact *could*" determine that reunification is unviable (*Conservatorship of O.B.* (2020) 9 Cal.5th 989, 1005 (*O.B.*)).

In contrast, an order based on proof by a preponderance of the evidence undoubtedly satisfies federal law. Under that standard, the superior court weighs the evidence, and its order under section 155 represents the superior court's conclusion that the SIJ findings are more likely to be true than not true. (See *Romero v. Perez* (Md.Ct.App. 2019) 205 A.3d 903, 912 [adopting preponderance of evidence standard for SIJ findings]; *In re B.A.A.R.* (Nev.Ct.App. 2020) 474 P.3d 838, 842 [same].)

The California Legislature intended to create a system by which courts "make the factual findings necessary to enable a child to petition the United States Citizenship and Immigration Services for" SIJ classification. (Code Civ. Proc., § 155, subd. (a)(1).) Section 155 should not be interpreted to lead to court orders that clearly fail to comply with federal requirements and that therefore will not "enable a child to petition" USCIS for SIJ classification. Courts do not even follow a statute's "plain

meaning" if "a literal interpretation would result in absurd consequences the Legislature did not intend." (*Meza v. Portfolio Recovery Associates, LLC* (2019) 6 Cal.5th 844, 856.) Here, the statute's plain language makes no mention of "substantial evidence," so there is no reason at all to interpret it in a way that violates the Legislature's express purpose.

The opening brief offers four meritless responses:

First, it argues that "a determination that a child's evidence is substantial *is* an actual finding of the required facts." (OBM 32.) Not so. It is a legal determination—not a factual one. (§ I.B., *ante*.) And even setting aside this distinction, federal law on its face requires a determination "*that* '*reunification* with 1 or both of the immigrant's parents *is not viable*'" (*Osorio-Martinez, supra,* 893 F.3d at p. 169, quoting 8 U.S.C. § 1101(a)(27)(J)(i), italics added)—not merely a determination that a child's evidence on this issue is substantial.

Second, the opening brief observes that USCIS "does not go behind the juvenile court order to reweigh evidence and make independent determinations . . . ." (OBM 32-33, quoting USCIS Policy Manual, ch. 2.) But that is because USCIS expects and requires juvenile courts to weigh the evidence and make independent determinations in the first instance; in that case, USCIS does not "reweigh" what has already been weighed. In contrast, the opening brief's theory seems to be that nobody should ever weigh an immigrant child's evidence—not California courts and not USCIS. There is no way that that is acceptable under federal law. It is one thing to recognize that USCIS will

defer to state courts when they are doing the job the federal statute allows them to do; it is quite another to believe that the USCIS will accept state court determinations that expressly do not do what the federal statute requires.

Third, the opening brief argues that it is for the Legislature to fix section 155 if it does not comply with the federal requirements. (OBM 32-33.) But that argument assumes—against all logic and canons of statutory interpretation—that the Legislature intended (in the first place) to provide SIJ orders that do not comply with the federal requirements.

It is the task of this Court to interpret the statute's meaning, which does not mention the substantial evidence standard but *does* express the purpose of empowering California courts to "make the factual findings necessary to enable a child to petition the United States Citizenship and Immigration Services for" SIJ classification. (Code Civ. Proc., § 155, subd. (a)(1).) The Court should not read a substantial evidence standard into the statute that would thwart its express purpose.

Fourth, the opening brief argues that the Court should leave it to the "federal system" to decide whether a superior court's substantial-evidence determination satisfies the SIJ requirements. (OBM 33.) But federal law already makes clear that this determination is not sufficient. The question is whether or not this Court should interpret section 155 in accord with its express purpose of satisfying federal law.

Severe consequences will follow if this Court interprets this statute without regard to this purpose. USCIS may deny SIJ status outright when a state court order does not include the requisite findings and factual basis for those findings. (E.g., *Reyes, supra,* 737 Fed.Appx. at p. 145 [affirming USCIS's denial of SIJ status].) The Court should not force every immigrant child in California to make do with useless findings of substantial evidence until USCIS and the federal courts deny enough SIJ petitions to motivate the Legislature to "fix" a misinterpretation of its original intent.

The opening brief's approach might help Saul and others get a section 155 order, but this would be a hollow victory. The approach would ultimately hurt deserving immigrant children who could otherwise have quickly moved through the federal system with SIJ findings that comply with federal requirements. (See 8 U.S.C. § 1232(d)(2) [requiring SIJ status petitions to be adjudicated within 180 days of filing].) To achieve the Legislature's purpose of providing a mechanism by which immigrant children can obtain "the factual findings necessary to enable [them] to petition" USCIS for SIJ status, the Court should interpret section 155 to require actual factfinding, proven by a preponderance of the evidence.

D. Applying the substantial evidence standard in this context would be unlike any other use of this standard in all of California law, and it would violate separation of powers principles.

1. The opening brief conflates burdens of proof and standards of review.

The opening brief begins by noting that "[b]urdens of proof and standards of review are different things, and one does not negate the other." (OBM 26.) It explains, for instance, that "'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.'" (OBM 26-27, quoting *O.B., supra,* 9 Cal.5th at p. 995.) Likewise, the opening brief says that a "preponderance of the evidence burden of proof can coexist with a substantial evidence standard of review. Indeed, they should do so in SIJ-findings cases." (OBM 27.)

We couldn't agree more. But that in no way helps Saul. A burden of proof (such as the preponderance of the evidence) "coexists" with a standard of review (such as substantial evidence) because the former is applied by the factfinder and the latter by the reviewing court. The reviewing court examines the sufficiency of the evidence "in support of a *finding*" made by a jury or a trial judge, and in doing so, the reviewing court needs to be conscious of the burden of proof that existed below. (*O.B., supra,* 9 Cal.5th at p. 995, italics added.)

In other words, a substantial evidence "standard of review" presumes that another factfinder has made actual *findings* to review. The standard questions whether a "reasonable trier of fact"—the court or jury below—"could have made the finding that is now challenged on appeal." (9 Cal.5th at p. 1005.) It requires an appellate court to defer to that *other factfinder's* reasonable inferences, credibility determinations, and rejection of evidence (even uncontradicted evidence). (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874; *Adoption of Arthur M.* (2007) 149 Cal.App.4th 704, 717; *In re S.A., supra,* 182 Cal.App.4th at p. 1140.)

The concept has no application when no findings have yet been made, such as when a petitioner presents evidence to a trial court and asks the court to make certain findings. The concept certainly cannot be used—as the opening brief suggests—to redefine "preponderance of the evidence" to mean "substantial evidence."

2. The Legislature has occasionally tasked trial courts with determining whether substantial evidence supports a litigant's position, but not in any way similar to what the opening brief seeks here.

The opening brief notes one instance in which the Legislature has tasked trial courts with determining substantial evidence—that is, where substantial evidence is *not* used as a "standard of review." As appointed amicus curiae, we provide additional examples here. But none is remotely like what the

opening brief desires here: None requires a court to make factual findings—to declare what is factually true—simply because some hypothetical, reasonable factfinder *could* ignore all conflicting evidence and inferences and then make those findings.

The opening brief points to Government Code section 830.6. (OBM 32.) That statute does not change a plaintiff's burden of proof. Instead, it creates a defense against public entity liability for alleged design defects on public property when the trial court "determines that there is any substantial evidence" supporting the public entity's quasi-legislative decision to adopt the challenged design. (Gov. Code, § 830.6.) Like an appellate standard of review, it defers to a previously made, official finding unless that finding was unreasonable.

That is nothing like what the opening brief proposes. The opening brief seeks deference not to any independent *determination* by a state tribunal or quasi-legislative body, but to the petitioner's own theory and inferences, and to award relief based on that deference. It is no overstatement to say that our courts never—never—operate this way.

We have identified several other statutes that explicitly direct trial courts to apply a substantial evidence analysis. But again, none of those statutes alters the plaintiff's or petitioner's burden of proof. And none mandates that the court—upon a finding of substantial evidence—must issue factual findings in the plaintiff's or petitioner's favor based on the court's view that some reasonable factfinder *could* find in the plaintiff's or petitioner's favor. Instead, under all of these statutes, the

existence of substantial evidence either (1) affords the court discretion to order relief[1] or (2) triggers a procedural or jurisdictional consequence[2]—not the making of a factual finding in favor of the party who bears the burden of proof.

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[1] See Pub. Contract Code, §§ 10421, 10521 (upon finding "substantial evidence" of a violation of public contract laws, a court "*may* issue a temporary injunction" to prevent further such dealings, italics added); Fam. Code, § 3027.5, subd. (b) (upon finding "substantial evidence" that a parent knowingly made a false report of sexual abuse, a court "*may* order supervised visitation or limit [that] parent's custody or visitation," italics added); Pen. Code, § 1370, subd. (a)(1)(G) (upon finding "substantial evidence" of a change in symptoms of a defendant found incompetent to stand trial, "the court *may* appoint [an expert] to opine as to whether the defendant has regained competence," italics added); Welf. & Inst. Code, § 319, subd. (c)(2) (court has discretion to extend child's temporary custody if, among other things, "[t]here is substantial evidence that a parent, guardian, or custodian of the child is likely to flee the jurisdiction of the court"). The exercise of such discretion implies a determination that it is more probable than not that the relied upon substantial evidence is the better evidence.

[2] See Rules of Court, rule 4.130 (substantial evidence of a party's incompetence triggers a competence hearing or suspension of proceedings); rule 5.645(a)(1) (same); Welf. & Inst. Code, § 709, subd. (a)(3) (same); Code Civ. Proc., § 340.3, subd. (b)(2)(C) (barring commencement of civil action arising from a murder when "substantial evidence was presented [at criminal trial] that the person committed the crime because he or she was a victim of intimate partner battering"); Fam. Code, §§ 3421, subd. (a)(2)(B), 3422, subd. (a)(1), 9210 (predicating jurisdiction on availability of "substantial evidence" on an issue); Prob. Code, § 1991, subd. (a)(3) (same).

3. Section 155's legislative history discloses no intent to introduce a radically novel use of the substantial evidence standard.

If, as Saul suggests, the Legislature (1) intended section 155 to impose a substantial evidence standard without explicitly saying so and (2) intended that that standard function unlike anything known to California law (see § I.D.2., *ante*), one would expect the legislative history (let alone the statutory language) to hint that such a radical departure was intended. But the legislative history contains nothing on the subject.

Saul is correct that the legislative history indicates an intent to help children who want to seek SIJ status. (OBM 29-31.) For example, when it amended section 155, the Legislature wanted to (1) ensure "that the [SIJ] findings may be made at any point in a proceeding"; (2) "specify that the evidence to support [SIJ] findings may consist solely of, but is not limited to, the [child's] declaration"; and (3) "provide that the asserted, purported, or perceived motivation of the child seeking classification as a special immigrant juvenile is not admissible in making findings . . . ." (Legis. Counsel's Dig., Assem. Bill No. 1603, Stats. 2016, Ch. 25 (2015-2016 Reg. Sess.) Summary Dig., pp. 1-2.)

But that does not mean that the Legislature also intended everything and anything that might help children receive SIJ findings, including making "substantial evidence" the burden of proof. To infer that the Legislature intended this sub silentio, radical departure from statutory, judicial, and factfinding norms

(§ I.D.1-2., *ante*) would depart utterly from how courts typically interpret statutes. And as discussed above, this standard would not actually help such children, since a substantial evidence determination would not entitle petitioners to SIJ *status* under federal law. (§ I.C., *ante*.) All that it would do is impede the children from obtaining findings that satisfy USCIS requirements.

4. Reading the substantial evidence standard into section 155 would violate the principle of separation of powers.

There is another problem. The opening brief posits a world where the Legislature can force courts to issue "findings of fact" that a child indeed was the victim of abuse, neglect, or abandonment and that reunification indeed is not viable, while forbidding the courts from actual deciding those issues. But that would violate the constitutional principle of separation of powers.

Imagine a superior court that concludes, based on adverse evidence, inferences, and credibility determinations, that it is nearly certain that a child's reunification with his parents *is* viable. On the other hand, the court also decides that a hypothetical reasonable factfinder could come to the opposite conclusion after rejecting adverse evidence, inferences, and credibility determinations. In the opening brief's view, the court would have to affirmatively declare to be factually true that which the court believes to be almost certainly false.

Why? Because the Legislature supposedly told the court to ignore its core responsibility of adjudicating factual issues and determining the truth before declaring the facts. That would violate the principle of separation of powers. (See Cal. Const., art. III, § 3.) Applying the law to the facts is among the courts' core powers. (See *McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 372 [discussing when an agency may exercise the "judicial powers" of "determin[ing] facts" and "apply[ing] the law to those facts"]; *People v. Marquez* (2020) 56 Cal.App.5th 40, 49 [in performing their core function of "resolv[ing] specific controversies," "courts interpret and apply existing laws"].) Therefore, for example, it violates the separation of powers to delegate to an administrative agency the power to determine facts without judicial review. (See *Communities for a Better Environment v. Energy Resources Conservation and Development Commission* (2020) 57 Cal.App.5th 786, 814.)

Likewise, if section 155 dictates judicial factfinding on nothing more than a party's presentation of substantial evidence, as the opening brief suggests, the statute would violate the separation of powers, as it would "materially impair" the court's exercise of its core powers. (*Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 58-59.) Whenever possible, a statute should be read to avoid a constitutional violation like this. (See *People v. Engram* (2010) 50 Cal.4th 1131, 1161-1162 [interpreting an ambiguous statute in a way that avoids violating

the separation of powers]; accord *Case v. Lazben Financial Co.* (2002) 99 Cal.App.4th 172, 184-185.)

This is not a problem "for the Legislature" to solve. (OBM 33.) Because the language of section 155 readily permits another reading, this is a problem of statutory interpretation—the special purview of this Court. The Court may avoid this problem by reading section 155 to require proof by preponderance of the evidence.

II. The Court of Appeal Correctly Stated The Standard Of Review Of The Superior Court's Determination That Saul Failed To Carry His Burden Of Proof.

There is nothing novel about the standard of review that the Court of Appeal articulated. California appellate courts have consistently applied it—in every setting—when the party who had the burden of proof in the trial court contends that the court erred in making findings against him. In fact, this Court's opinion in *Roesch v. De Mota* (1944) 24 Cal.2d 563 (*Roesch*) is the source of that standard, and *Roesch* held that it applied even when the evidence is undisputed.

Here, the Court of Appeal recognized that when an appellant challenges a superior court's factual findings, an appellate court's review is governed by the substantial evidence standard. (*S.H.R., supra*, 68 Cal.App.5th at p. 574.) It also recognized a well-established nuance of that standard: Where, as here, "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. Specifically, the question becomes whether the appellant's evidence was (1) *uncontradicted and unimpeached* and (2) *of such a character and weight as to leave no room for a judicial determination that it was insufficient* to support a finding." (*Id.* at pp. 574-575, collecting cases, internal quotation marks and citations omitted, italics added.)

This is in no way unusual. California courts have long recognized and applied this standard of review when the trier of fact concluded that the party with the burden of proof did not carry the burden and that party appeals. (E.g., *Estate of Herzog* (2019) 33 Cal.App.5th 894, 904; *Almanor Lakeside Villas Owners Assn. v. Carson* (2016) 246 Cal.App.4th 761, 769; *Dreyer's Grand Ice Cream, Inc. v. County of Kern* (2013) 218 Cal.App.4th 828, 837-838; *In re I.W.* (2009) 180 Cal.App.4th 1517, 1527-1528, disapproved on other grounds by *O.B.*, *supra*, 9 Cal.5th at p. 1010, fn. 7.)

Indeed, this Court's own opinion is the source for this standard. (*Roesch*, *supra*, 24 Cal.2d at pp. 570-571; see *In re I.W., supra*, 180 Cal.Appl.4th at p. 1528, quoting *Roesch*.) In *Roesch*, "the trial court found and concluded that the plaintiffs and those equally charged with them in sustaining the burden had not proved payment by a preponderance of evidence. The problem here is not whether the appellants on the issue of payments failed to prove their case by a preponderance of the evidence. That was a question for the trial court and it was

resolved against them. The question for this court to determine is *whether the evidence compelled the trial court to find in their favor* on that issue." (*Roesch, supra*, 24 Cal.2d at pp. 570-571, italics added.)

What's more, *Roesch* held that this standard of review applies even when the evidence was undisputed. "These appellants contend that the testimony of Mr. Manuel was uncontroverted and that it required a finding in their favor. It may be assumed that his *testimony was uncontradicted and unimpeached*, but it would not necessarily follow that it was *of such a character and weight as to leave no room* for a judicial determination that it was insufficient to support a finding in favor of payment." (*Roesch*, *supra*, 24 Cal.2d at p. 571, italics added.) That is because factfinding depends on inferences drawn from the evidence, and "notwithstanding the fact that the evidence upon which the inference is founded is undisputed or without conflict, an appellate court has not the power to draw an inference different from that which the [factfinder] has deduced." (*Hamilton v. Pacific Elec. Ry. Co.* (1939) 12 Cal.2d 598, 603 (*Hamilton*).) For the same reason, this Court's much more recent decision in *Boling v. Public Employment Relations Bd.* (2018) 5 Cal.5th 898, 912 (*Boling*) also held that substantial evidence standards—not de novo review—apply even when the evidence is undisputed.

Here, while Saul presented undisputed evidence on his past experiences as a child in El Salvador, he needed the superior court to further infer from this evidence that reunification with

his parents is not viable based on past neglect and abandonment. The superior court did not draw those inferences. The Court of Appeal was not permitted to draw its own contrary inferences. As the Court of Appeal recognized, it was required to affirm unless the evidence was "of such a character and weight as to leave no room for a judicial determination that it was insufficient . . . ." (*S.H.R.*, *supra*, 68 Cal.App.5th at p. 575.)

The two cases on which the opening brief relies do not support a change in this long-followed approach.

First, Saul quotes *Boling, supra,* 5 Cal.5th at p. 912 for the rule that "'the application of law to undisputed facts *ordinarily* presents a legal question that is reviewed de novo.'" (OBM 33-34, italics added.) But as noted, *Boling* itself did not apply that general rule, for the same reason that that rule does not apply here. Instead, *Boling* held that the substantial evidence standard still applied because "it is settled that when conflicting inferences may be drawn from undisputed facts," as in Saul's case, "the reviewing court must accept the inference drawn by the trier of fact so long as it is reasonable." (*Boling, supra*, 5 Cal.5th at pp. 912-913, citing *Hamilton, supra*, 12 Cal.2d at pp. 602-603.)

Second, Saul cites *O.C.*, *supra*, 44 Cal.App.5th at p. 82, where the court used the de novo standard in an SIJ case because its "analysis involve[d] the application of law to undisputed facts." (OBM 34.) But that was because the court's "analysis" in *O.C.* did not involve considering the evidence that supported the superior court's factual findings. Instead, the issue in *O.C.* was the superior court's failure to "cite any state authority to support

its findings," which made the SIJ findings useless for purposes of petitioning USCIS for SIJ status. (*O.C., supra*, 44 Cal.App.5th at p. 85.)

III. The Superior Court Did Not Commit Reversible Error In Denying Saul's Petition For SIJ Findings.

Saul was required to establish *both* that (1) his parents committed "abandonment" or "neglect" under California law *and* that (2) his "reunification" with his "parents [is not] viable because of" that abandonment or neglect. (Code Civ. Proc., § 155, subd. (b)(1)(B).)[3] The superior court did not commit reversible error in concluding that he failed to establish either—much less both—of these facts.

A. The superior court did not commit reversible error in finding against Saul on the issues of abandonment and neglect.

1. The lower courts correctly ignored the social worker's inadmissible psychological evaluation.

Much of the opening brief's statement of the evidence and argument turns on facts drawn from a social worker's psychological evaluation—including facts concerning Saul's "unsafe working environment," such as the long working hours,

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[3] A petitioner seeking SIJ findings can also rely on a showing of past "abuse." (Code Civ. Proc., § 155, subd. (b)(1)(B).) Like the Court of Appeal, we do not address abuse because neither Saul's original petition for SIJ findings (AA 53) nor the opening brief (OBM 51-57) raised abuse.

the lack of running water or toilet, Saul's use of a machete, and the threat of dehydration, sunburns, cuts, pesticide exposure, snakes, and significant bug bites. (See OBM 17-21, 52-57; AA 129-135; pp. 17-19, *ante*.) The Court of Appeal, however, correctly disregarded that document as having not been admitted by the superior court into evidence or having been discounted by it. (*S.H.R., supra*, 68 Cal.App.5th at p. 572, fn. 3.) Three different rules bar the psychological report from evidence.

First, the psychological report, like any other "statement not made by a witness testifying in court before the fact finder," constitutes incompetent hearsay evidence when offered for its truth. (*Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 608 (*Kulshrestha*), citing Evid. Code, § 1200, subd. (a).) The hearsay exclusion applies equally to declarations under penalty of perjury, except when permitted by a statute. (*Windigo Mills v. Unemployment Ins. Appeals Bd.* (1979) 92 Cal.App.3d 586, 597 (*Windigo*); Code Civ. Proc., § 2015.5 [permitting declarations "[w]henever, under any law of this state or under any rule, regulation, [etc.], any matter is required or permitted to be supported, evidenced, [etc.], by the sworn statement, declaration, [etc.], in writing of the person making the same"]; see, e.g., Code Civ. Proc., § 437c, subd. (d) [expressly permitting declarations on motions for summary judgment].) The same goes for a declaration by a putative expert, such as a psychologist, if used as a conduit for otherwise inadmissible case-specific hearsay. (See *People v. Valencia* (2021) 11 Cal.5th 818, 838-839.)

Section 155 expressly permits "a declaration by the child" to serve as evidence in support of SIJ findings. (Code Civ. Proc., § 155, subd. (b)(1).) It does not authorize otherwise inadmissible additional declarations as possible evidence.

Second, even if section 155 permitted additional declarations, the psychological report would not satisfy the statutory requirements of an admissible declaration. Even when permitted by statute, a declaration is evidence only if it either (1) is executed within California and states the "place of execution" or (2) states that it is declared "under the laws of the State of California." (Code Civ. Proc., § 2015.5; see *Kulshrestha*, *supra*, 33 Cal.4th at p. 612 ["a declaration is defective under section 2015.5 absent an express facial link to California or its perjury laws"].) The psychological evaluation did not meet either requirement. It was signed under penalty of perjury, but without reference to the "place of execution" or "the laws of the State of California." (AA 135.)

Third, at most, the psychological report could support admission of the social worker's personal knowledge. (See Evid. Code, § 702.) But most of the report, including all description of Saul's working conditions and experiences in El Salvador, merely repeats statements that Saul purportedly told the social worker in response to the social worker's "question[s] about his personal history," about which the social worker does not claim personal knowledge. (AA 129-134.) This is double hearsay, inadmissible as evidence of the truth of the matter. (See *Windigo*, *supra*, 92 Cal.App.3d at p. 599.)

Saul offers three arguments for considering the social worker's declaration despite these defects; each fails.

a. Saul argues that when the superior court granted him leave to submit further briefing, the court "told Saul's counsel to 'file whatever additional documents you want.'" (OBM 49.) But that cannot reasonably be understood as meaning that the court would ignore rules of evidence. If Saul's counsel thought these facts were important, they could have had Saul prepare a supplemental declaration attesting to them. Instead, they simply re-filed the barebones declaration that Saul had previously signed. (AA 104, 123-127.)

b. Saul argues that the "superior court never suggested that there was a problem with the evaluation" and that the Court of Appeal made its evidentiary "objection" "too late." (OBM 48-50.) That isn't the correct way to think about this situation. There was no adverse party to make evidentiary objections. But that does not mean that the superior court was *required* to admit plainly inadmissible evidence—or to give it any weight, even if the court did admit it. It is a party's and counsel's obligation to present admissible evidence, not a court's obligation to explain to them in advance what will be admissible.

The superior court's statement of decision does not mention, much less wrestle with, the psychological evaluation. Instead, it refers only to the inadequacy of "the Declaration," presumably meaning Saul's declaration. (AA 162-170.) The logical conclusion is that the superior court rejected the inadmissible report. (*S.H.R., supra,* 68 Cal.App.5th at p. 578,

fn. 10.) After all, the superior court's decision "is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) Moreover, if Saul's counsel thought this issue was unclear, they could have objected to the written statement of decision. Because they did not, the presumption applies that the superior court found the report inadmissible or gave it no weight. (See Code Civ. Proc., § 634.)

c. Saul argues that any "evidentiary obstacles" should be "eliminate[d]" for children seeking SIJ findings. (OBM 50.) Neither law nor logic supports that view. Code of Civil Procedure section 155 requires "evidence," and it presumably means admissible evidence. The concerns that justify "[s]pecial evidentiary rules for dependency hearings" do not apply here. (*In re I.C.* (2018) 4 Cal.5th 869, 884, cited at OBM 50.) Saul was fully capable of preparing a second declaration after the superior court gave his counsel the chance to offer further evidence. His counsel chose not to ask Saul to supplement his declaration with the additional facts that he purportedly told the social worker. What's more, counsel was informed that the moment they filed their additional papers, the matter would be submitted, meaning that the procedural safeguards for such "special rules" (including cross-examination) would not be in place. (AA 91; *In re I.C., supra,* 4 Cal.5th at pp. 886-887.)

The superior court was not required to admit the hearsay and double hearsay statements in the social worker's written report. And even if the court did admit these statements, it could

permissibly give them little or no weight because despite Saul's availability to declare these facts himself, he did not include them in his own sworn declaration—severely undermining their credibility.

2. The superior court did not err in finding that Saul failed to establish abandonment.

The Family Code defines "abandonment" as leaving a child "without provision for reasonable and necessary care or supervision." (Fam. Code, § 3402, subd. (a).) Abandonment requires "an actual desertion" that "sever[s] the relationship . . ." (*In re Daniel M.* (1993) 16 Cal.App.4th 878, 882; see *In re Guardianship of Rutherford* (1961) 188 Cal.App.2d 202, 206 ["The settled and oft repeated definition of abandonment is . . . [']an actual desertion'"], quoting *In re Moore's Estate and Guardianship* (1918) 179 Cal. 302, 305.)

Saul's declaration did not compel the superior court to conclude that his parents abandoned him. Although the declaration states that his mother does not work and that his father "has not been able to find work for a couple of years," his declaration does not state that his parents had ever left him without provision for his care or supervision, much less that they deserted him. He lived with both his parents until he chose to leave El Salvador in June 2018. (AA 56, 58.) In fact, when he raised the subject of leaving the country without his parents, they "insisted" he stay with them because they thought it would be too dangerous for him to leave. (AA 58.) He ultimately left "without telling them" (*ibid.*)—not the other way around.

Saul argues that his "parents did not financially support him" and that abandonment exists when the "'child has been left without *any* provision for support.'" (OBM 54, italics added, quoting Welf. & Inst. Code, § 300, subd. (g).) But Saul never states that his parents ever failed to make arrangements for his care while he was in El Salvador.

Instead, his and his family's needs were consistently met by his older sisters, who live in San Francisco, by Saul's own work (mostly under the care and supervision of his grandfather, and which paid enough that Saul could also build his personal savings), and by other sources that Saul's declaration alludes to but does not identify. (AA 56 [his family depends "mostly" on him and his older sisters], 58 ["I used half of the money I made to buy food for my parents, grandfather, and younger siblings. The other half I would add it to my savings"].) His parents never left him without "any" support. (OBM 54.) That his parents could not afford his family's care entirely on their own is not the equivalent of abandonment, or, at the very least, a reasonable trier of fact was not required to conclude it was.

3. The superior court did not err in finding that Saul's parents did not commit neglect.

"Neglect" is "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." (Pen. Code, § 11165.2, quoted in *S.H.R., supra*, 68 Cal.App.5th at p. 577; OBM 52.) This Court has also

defined "neglect" as a parent's "(1) 'failure or inability' to 'adequately supervise or protect' the child [citation] or (2) 'willful or negligent failure' to . . . provide the child with adequate food, shelter, or clothing . . . ." (*In re Ethan C.* (2012) 54 Cal.4th 610, 628, quoting Welf. & Inst. Code, § 300, italics omitted, cited in *S.H.R., supra*, 68 Cal.App.5th at p. 578.)

Saul's declaration did not compel the superior court to conclude that his parents committed neglect:

Work in fields. Saul's declaration states that he "spent [his] entire summers working in the fields helping [his] grandfather" to "collect fruit and vegetables under hot weather," that he "would be under the sun for six to seven hours every day," and that, by the end, he felt "completely exhausted." (AA 56.) These facts do not *compel* the conclusion that this work involved a lack of adequate supervision, an absence of adequate food, shelter, or clothing, or "harm or threatened harm" to Saul's "health or welfare." (Pen. Code, § 11165.2; Welf. & Inst. Code, § 300.) Perhaps a reasonable trier of fact could infer such a potential for harm from these facts. But a reasonable trier of fact was not compelled to do so. And even if the Labor Code prohibits work by a child under the age of 16, a Labor Code violation does not automatically constitute "neglect" under California law.

As further support for the argument that this work constituted neglect, the opening brief points to the social worker's written, secondhand account of Saul's description of conditions in the fields. (OBM 52-54.) But these facts do not appear in Saul's declaration, and the superior court was not required to admit

double hearsay from an inadmissible written declaration. (§ III.A.1., *ante*.) And even if admitted into evidence, the court was not required to give the declaration any weight, given that Saul's counsel decided not to introduce these facts through Saul's own declaration.

Removal from school. Although the California Education Code generally requires parents to send their children to school (Ed. Code, § 48200), it is a different matter whether a decision to pull a child from school constitutes "neglect." Here, Saul's parents took him out of high school because it was the only way to protect him from gang members' repeated threats against his life—gang members so dangerous that "the police are afraid of the gang members, who will go after them or their family members if they investigate" gang threats. (AA 57-58.)

The death threats were made at or directly outside of the school, and Saul was "very afraid that the gang would" always "be there waiting for [him] after school." (AA 57.) And the threats were highly credible. (AA 58 ["The gang members have killed many young people in [Saul's El Salvador] neighborhood"].)

A reasonable trier of fact could conclude that under these circumstances, keeping Saul from school—where he would face substantial risk of being killed—was the most reasonable and prudent way of protecting Saul and providing for his health and welfare. Saul does not suggest what else his parents could possibly have done to protect him.

4. The opening brief's other claims of legal error do not merit reversal.

The opening brief asserts two additional errors regarding the trial court's findings on abandonment and neglect. Neither is sufficient to warrant reversal.

First, Saul says that although the superior court's written statement of decision "suggests it was applying California law" rather than El Salvador standards, "that was not reflected at a hearing" in statements that the court made from the bench. (OBM 42.)

Irrelevant. "[A] judge's comments in oral argument may never be used to impeach the final order . . . ." (*Silverado Modjeska Recreation & Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 300.) A superior court's statements from the bench indicate nothing more than its tentative thinking, which is not binding on the court. (*Ibid.*) It is the superior court's August 25 statement of decision that matters, not the statements from the bench two months earlier. (AA 83 [June 25 hearing], 162 [August 25 decision].)

Second, the opening brief harps on a single sentence of the statement of decision that "poverty alone" is not sufficient for a neglect-based intrusion into parenting rights. (OBM 35-40.) The opening brief explains the origins of the "poverty alone" rule and that it does not apply to SIJ findings because "parental rights are not at stake . . . ." (*Ibid.*) Assuming arguendo that this is true, it does not undermine the superior court's analysis of neglect and

abandonment. As demonstrated above, a reasonable trier of fact could have concluded that Saul did not establish abandonment or neglect. (§ III.A.2.-3., *ante*.)

B. The superior court did not commit reversible error in finding that Saul had failed to establish the nonviability of reunification.

1. The superior court permissibly found that Saul failed to establish that reunification is unviable.

The meaning of "not viable" under SIJ law is unsettled. (*S.H.R.*, *supra*, 68 Cal.App.5th at p. 580.) Some courts have interpreted it to mean that the child's reunification with his or her parents is not possible, while others interpret it only to mean that reunification is "not practicable or workable." (*Ibid.*) The Court of Appeal assumed, without deciding, that "not viable" meant "the less demanding, practical or workable standard," which "'calls for a realistic look at the facts on the ground in the country of origin and a consideration of the entire history of the relationship between the minor and the parent in the foreign country.'" (*Ibid.*) This brief assumes likewise.

The analysis turns on whether reunification is "presently non-viable." (*Perez v. Cuccinelli* (4th Cir. 2020) 949 F.3d 865, 874 (*Perez*); 8 U.S.C. § 1101(a)(27)(J)(i) [requirement is that reunification "*is* not viable," italics added]; Code Civ. Proc., § 155, subd. (a)(1) [calling for findings "within the meaning of" 8 U.S.C. § 1101].)

The evidence here leaves ample "room for [the superior court's] judicial determination" (*Estate of Herzog*, *supra*, 33 Cal.App.5th at p. 904) that Saul's reunification with his parents is currently viable, even assuming that his parents years ago neglected or abandoned him under California law standards. (*S.H.R.*, *supra*, 68 Cal.App.5th at pp. 579-582.) In fact, the Court of Appeal reached "the same conclusion as the trial court" on this issue even under a de novo standard of review. (*Id.* at pp. 579-580.)

Work in fields. The fact that Saul's parents required him to work in agricultural fields during summers until the age of 15 to help support the family does not require the inference that reunification is presently unviable. No evidence suggests that if he returned to his parents' home now, at the age of 20 (or 18, at the time of the superior court's decision), he would be forced to undertake similar agricultural work, or any other work that exposes him to similar conditions. (AA 56-60.) To the contrary, the evidence establishes that after his work in the fields ended, he continued living with his parents in El Salvador for a year and worked instead at a car wash. (AA 57-58.) These facts strongly indicate that his parents would not insist that he work as a farm laborer again. (AA 57.)

Moreover, the opening brief contends that Saul's parents "knowingly" subjected him to a variety of significant health and environmental dangers while he worked in the fields. (OBM 52-53.) None of those asserted facts, however, are found anywhere in Saul's declaration. (AA 56-60.) They appear only as double

hearsay in the inadmissible psychological evaluation that the superior court correctly chose not to admit or to afford any weight, not being attested to by Saul himself. (§ III.A.1., *ante*.) The superior court permissibly concluded that Saul's parents would no longer require him to work in the fields, as evidenced by his last year in El Salvador.

Education. The decision of Saul's parents to pull him out of school to protect him from gang violence does not mandate a superior court inference that reunification with his parents is not presently viable. Saul himself seems to appreciate that his parents acted out of love, to protect him from credible death threats by relentless gangs. His parents "could not protect" him from the gang members, but not for lack of trying. (AA 57.) Even an armed police force could not protect him; Saul says the officers are "afraid of the gang members, who will go after them or their family members if they investigate" a gang incident. (AA 57-58.) Though it is deeply regrettable that Saul missed out on years of education, the superior court reasonably concluded that Saul understood that his parents had no other choice—the gang members would always be waiting for him outside of class and the death threats were real—making his reunification with parents who love him presently viable.

Financial support. The alleged failure to provide Saul with financial support while he lived in El Salvador does not require the superior court to infer that reunification is not currently viable. Saul's declaration does not state or suggest that he left El Salvador due to his parents' financial condition or their

failure to provide for him. Rather, it states that he left because he was afraid of gang violence there. (AA 57-58.) Moreover, the superior court could reasonably conclude that at his current age, he is not dependent on his parents for financial support. Indeed, his declaration states that "half of the money" he made at an El Salvador car wash was sufficient "to buy food for [his] parents, grandfather, and younger siblings" and that he was able to "add" the rest of his income to his savings. (AA 58 ["to my savings," rather than to his parents' savings].)

Saul's anger. The opening brief points to a statement from the social worker's declaration that Saul reported "'feeling anger towards his parents due to their expectation for him to work at an early age and limiting his educational opportunities.'" (OBM 59-60.) As demonstrated above, that is not admissible evidence. (§ III.A.1., *ante*.)

But even if it were considered, this expression of "anger" would not *require* a factfinder to infer that Saul's reunification with his parents is unviable. The lengthy report of Saul's social worker referred to this anger only once, briefly. (AA 132.) Other evidence, moreover, suggests that Saul's anger is ameliorated by a deep love for his parents: The social worker observed that Saul "was affected by speaking of his concern for the safety of his family . . . and his eyes started getting watery" (AA 131-132) and that Saul's dreams express anxiety for his mother's safety (AA 134). That an 18-year-old regards his parents with mixed emotions is entirely typical. The superior court was not required to conclude from this that reunification is unviable when the

evidence also makes clear that Saul loves and is protective of his parents and that they love and are protective of him.

———♦———

The opening brief says that 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." (OBM 58.) The Court of Appeal made no such presumption. All it said was that Saul had failed to put on evidence that required the superior court to determine the issue in his favor.

2. There is no merit to Saul's argument that a child's current age and changed circumstances are irrelevant in analyzing SIJ issues.

Saul begins from the premise that, by statute, "for federal SIJ purposes, [he] is considered a child until he turns 21." (OBM 41, citing 8 U.S.C. § 1101(b)(1).) From this, he concludes that "courts should not treat children over 18 differently than children under 18" in deciding whether reunification is viable due to neglect or abandonment, and that the lower courts erred in deciding that he does not "need the level of support for a child." (OBM 41-42.) The conclusion does not follow from the premise.

Federal and state law ensures that immigrants are eligible for SIJ status until they turn 21 years of age. (8 U.S.C. § 1101(b)(1); 8 C.F.R. § 204.11(c)(1); Prob. Code, § 1510.1, subd. (d).) But that does not mean that an immigrant's age is

irrelevant to the factual question of whether reunification is not viable due to neglect, abandonment, or abuse.

For instance, what constitutes neglect for an 18-year-old can be very different than what constitutes neglect for a 2-year-old. Neglect is the "failure or inability . . . to adequately supervise or protect" a child. (*In re R.T.* (2017) 3 Cal.5th 622, 629.) A parent who regularly leaves their 2-year-old at home for hours at a time undoubtedly commits neglect. But leaving an 18-year-old (or even a younger teen) at home alone is typical in California, and nobody would call it neglect. The idea that "courts should not treat children" differently based on their age when deciding whether reunification is viable due to neglect goes against common sense and any reasonable conception of what Congress or the California Legislature intended.

Similarly, it is entirely possible that reunification is presently viable notwithstanding past neglect, given the child's current age and circumstances. Reunification may well remain viable if, for example, conduct that constituted neglect when the child was younger would no longer count as such, or if the relations between parent and child were not so damaged by past conduct as to make reunification unworkable.

Indeed, the child's current age and the effect of the passage of time is inherently part of the factual determination. The statute speaks in the present tense in asking whether reunification "*is* not viable." (8 U.S.C. § 1101(a)(27)(J)(i), italics added; cf. Code Civ. Proc., § 155, subd. (a)(1) [calling for the findings "within the meaning of" 8 U.S.C. § 1101].) "That clearly

and unambiguously means reunification must be presently non-viable." (*Perez, supra,* 949 F.3d at p. 874.) Any evaluation of present nonviability must consider present circumstances, including the child's current age.

The child's greater age and the passage of time will not always change the equation. Some abuse is too severe for that. But the fact that an individual is statutorily eligible for SIJ status until they are 21 does not make age irrelevant to SIJ findings.

3. There is no merit to Saul's suggestion that there should be a presumption in his favor on the nonviability of reunification.

The opening brief contends that "if there is a history of abuse, neglect, or abandonment, the presumption should be that the past mistreatment makes reunification not viable," and that "to rebut this presumption" requires other evidence to the contrary. (OBM 59.) Neither Congress nor the California Legislature suggested the existence of any such presumption. Nor would it suffice to meet USCIS's federal requirements for awarding SIJ status.

Federal law requires a determination whether reunification is not viable due to certain causes. That analysis focuses on present viability. (*Perez, supra,* 949 F.3d at p. 874.) Past mistreatment is, of course, highly relevant. But it cannot determine in itself the core question of *present* viability of reunification. Moreover, petitions for SIJ findings typically

involve no adverse parties, making a presumption in favor of the petitioner effectively irrebuttable and thus negating the statute's independent requirement to find that reunification is not viable.

Contrary to what the opening brief says, it is not "too large a burden" to expect a child seeking SIJ findings to proffer evidence of why past acts of abuse, neglect, or abandonment by the child's parents make reunification unworkable or impracticable. (OBM 59.) This showing does not require evidence of "current conditions in a different country" where they "no longer reside." (*Ibid.*) It requires no more than the child's own statement that based on the parents' past mistreatment, the child is so fearful or angry that reunification is not workable. The child can also state a belief that the conditions leading to the child's mistreatment persist and that the mistreatment will likely continue. Saul, who was represented by counsel, did none of that.

4. The opening brief's array of other legal arguments are inapplicable.

Poverty alone. Saul argues that the superior court wrongly applied the "'poverty alone' rule to withhold SIJ findings . . . ." (OBM 36.) Even if that were true, it would not impact the question of whether reunification is viable. The superior court invoked the poverty of Saul's family only in connection with whether the alleged mistreatment constituted neglect or abandonment. (AA 162, 168-169.) Assuming that neglect did occur here, it would not alter the analysis of whether the superior court was required to find that reunification is not presently viable.

California law. Similarly, Saul suggests that the superior court applied El Salvador law—rather than California law—in "determining whether [he had] been abused, neglected, or abandoned." (OBM 42-44.) Even assuming that were true, it does not infect the superior court's conclusion that Saul did not establish that reunification is not presently viable.

C. Saul's argument that the superior court misunderstood its role does not demonstrate reversible error.

The opening brief devotes an entire section to arguing that the superior court mistakenly thought its role was to determine Saul's SIJ *status* rather than to consider making the SIJ *findings* that the USCIS would later consider in determining SIJ status. (OBM 45-46.) This is truly much ado about nothing. The opening brief is complaining about a typo.

It is true that the first heading in the statement of decision reads, "Petition for Special Immigrant Juvenile Status." (AA 162.) But the decision's substance makes clear that it is addressing only the SIJ *findings* that a superior court has the power to consider. It does not discuss any issues relevant only to SIJ *status*. (E.g., 8 U.S.C. § 1101(a)(27)(J)(iii) [predicating SIJ status on whether "the Secretary of Homeland Security consents"].)

In any event, Saul does not make any showing of prejudice. Nor could any such argument conceivably be made. The superior court considered only whether to make the SIJ *findings* that it

was empowered to decide. (*F.P. v. Monier* (2017) 3 Cal.5th 1099, 1107 ["[A]t least since 1851, our generally applicable statutes have precluded reversal for errors in civil cases absent prejudice," italics omitted].)

CONCLUSION

A petitioner bears the burden of proving SIJ findings by a preponderance of the evidence. The "substantial evidence" standard that Saul invents is absent from the language of section 155, runs counter to Code of Civil Procedure section 155 and Evidence Code section 115, defeats the Legislature's purpose of empowering California courts to make findings that can support federal SIJ status, and ultimately harms immigrant children in California by blocking their path to SIJ status.

The Court of Appeal correctly stated the well-established standard of review of a superior court's decision that the appellant failed to carry his burden of proof. This Court itself established that standard of review.

On the merits, the superior court did not commit reversible error: The evidence and permissible inferences left room for a reasonable factfinder to conclude that Saul had not established that reunification is unviable due to neglect or abandonment.

Therefore, the Court should affirm the decision of the Court of Appeal.

DATED: March 7, 2022

Respectfully submitted,

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By: /s/ *Stefan C. Love*
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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this **ANSWER BRIEF ON THE MERITS** contains **13,964** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

DATED: March 7, 2022

/s/ *Stefan C. Love*

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On March 7, 2022, I hereby certify that I electronically served the foregoing **ANSWER BRIEF ON THE MERITS** through the Court's electronic filing system, TrueFiling. I certify that all participants in the case who are registered TrueFiling users and appear on its electronic service list will be served pursuant to California Rules of Court, rule 8.70. Electronic service is complete at the time of transmission:

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/s/ *Pauletta L. Herndon*
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STATE OF CALIFORNIA
Supreme Court of California

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3/7/2022

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