S271265

IN THE SUPREME COURT OF CALIFORNIA

GUARDIANSHIP OF S.H.R.
S.H.R.,
Petitioner and Appellant,

v.

JESUS RIVAS et al.,
Real Parties in Interest.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION ONE
CASE NO. B308440

REPLY BRIEF ON THE MERITS

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REPLY BRIEF ON THE MERITS

INTRODUCTION

The answer brief begins, "No one should have to endure poverty and gang violence." (ABOM 11.) We agree, but that is not what this case is about. The point of Saul's petition for Special Immigrant Juvenile (SIJ) findings and of his appeal is that no child in California should be treated by their parents the way Saul was treated in the years before he left his home as a 16 year old.

Most responses to the answer brief have been stated in Saul's opening brief. Thus, to keep repetition to a minimum, this brief focuses primarily on new arguments made by the answer brief and on noting significant issues the brief does not discuss.

LEGAL ARGUMENT

I. Statutory language and history demonstrate the Legislature's intent to have courts defer to evidence that children submit to obtain SIJ findings.

Saul's opening brief made clear that the superior court should have made SIJ findings in his case regardless of which standard of review the court used. But the brief also showed the Legislature intended that evidence presented in SIJ-findings

petitions should be viewed through a deferential lens. (OBOM 24–33.)

The unusual language of this statute and the history of its enactment shows the Legislature has decided that, if anyone should be given the benefit of the doubt in court, it is a child in a SIJ proceeding seeking protection from parental abuse, neglect, or abandonment.

The Legislature has directed that when a child asks a California court to make the necessary findings for them to apply to the federal government for SIJ status, "[i]f . . . there is evidence to support those findings, . . . the court shall issue the order" making those findings. (Code Civ. Proc., § 155, subd. (b)(1) (§ 155).) It even specifies that the supporting evidence "may consist solely of . . . a declaration by the child." (*Ibid.*) The Court of Appeal in *O.C. v. Superior Court* (2019) 44 Cal.App.5th 76, 83 (*O.C.*) correctly paraphrased the statutory command this way: "if substantial evidence supports the requested SIJ findings, the issuance of the findings is mandatory."

The answer brief spends considerable time (ABOM 22–44) trying to disprove the point. But nowhere does it explain why the Legislature used the language it did if not to require a deferential

standard for reviewing evidence submitted with a SIJ-findings petition.

If the Legislature intended nothing more than a customary evidentiary review, it could have simply said "the court may make" SIJ findings when requested. Instead, the statute is more elaborate and descriptive: "[i]f . . . there is evidence to support those findings, . . . the court shall issue the order" making the findings. (§ 155, subd. (b)(1).) What is the purpose of that additional language? The answer brief doesn't say. Rather, under its—and the Court of Appeal's—interpretation, the language is surplusage, which is a construction to be avoided (see *Kaanaana v. Barrett Business Services, Inc.* (2021) 11 Cal.5th 158, 172; *Hudec v. Superior Court* (2015) 60 Cal.4th 815, 828).

The answer brief argues that the *O.C.* court's interpretation of the standard of review would leave California court SIJ-findings orders vulnerable to federal nullification because the court would not actually be making factual findings. As the opening brief explained, this concern is unfounded. (OBOM 31–33.)

In its argument, the answer brief asserts we "cit[ed] nothing" supporting the point that a substantial evidence

determination is equivalent to a factual finding. (ABOM 29.) To the contrary, we relied on an established definition of substantial evidence as stated by this court (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 51 ["Substantial evidence is not any evidence—it must be reasonable in nature, credible, and of solid value"]; see OBOM 31), and explained that assessing the reasonableness, credibility, and value of evidence is a factual exercise. It is a more circumscribed factual determination than in most other cases, as the Legislature intended, but the evaluation of evidence is a factual undertaking nonetheless. And unlike an appellate court's substantial evidence review, section 155 requires a determination by *this* factfinder—the superior court—not a decision about what a hypothetical trier of fact might do.

The answer brief's reliance on *Reyes v. Cissna* (4th Cir. 2018) 737 F.Appx. 140 [nonpub. opn.] is also misplaced. The court there held that evidence of abuse, abandonment, or neglect submitted to the United States Citizenship and Immigration Services (USCIS), that had not been submitted to a state juvenile court, should not be considered. (*Id.* at p. 145.) It quoted from the USCIS policy manual that "the Agency 'relies on the

expertise of the juvenile court in making child welfare decisions and does not reweigh the evidence to determine if the child was subjected to abuse, neglect, abandonment, or a similar basis under state law.' " (*Ibid*., emphasis omitted; quoting U.S. Citizenship and Immigration Services, Dept. of Homeland Security, USCIS Policy Manual (2021) Eligibility Requirements, vol. 6, pt. J, ch. 2, § D <https://www.uscis.gov/book/export/html/68600> [as of Mar. 11, 2022].) Here, however, Saul submitted ample evidence to the superior court for that court to make its factual determinations under the specific statutorily established standard of review.

Newly amended federal regulations adopted by the Department of Homeland Security are also relevant. Instead of "factual findings," the regulations provide that various state court "judicial determinations" are prerequisites to the granting of SIJ status. (E.g., 87 Fed.Reg. 13111 (Mar. 8, 2022) [to be codified at 8 C.F.R. § 204.11(c)(ii), Apr. 7, 2022] ["The juvenile court must have made a judicial determination that parental reunification with one or both parents is not viable due to abuse, abandonment, neglect, or a similar basis under State law"].) Significantly, the regulations now further state that "*Judicial*

determination means a *conclusion of law* made by a juvenile court." (87 Fed.Reg. 13111 (Mar. 8, 2022) [to be codified at 8 C.F.R. § 204.11(a), Apr. 7, 2022], second emphasis added.) Thus, even if a superior court's finding of substantial evidence is considered a legal conclusion, as the answer brief would have it, that would be the kind of "conclusion of law" USCIS is looking for.

Nor is it convincing to claim—as the answer brief does, but the Court Appeal does not—that the Legislature, by requiring superior courts to give deference to evidence submitted by children seeking SIJ findings, violates constitutional separation of powers principles. As this court has said, "The separation of powers limitation on the Legislature's power to regulate procedure is narrow. Chaos could ensue if courts were generally able to pick and choose which provisions of the Code of Civil Procedure to follow and which to disregard as infringing on their inherent powers. . . . Only if a legislative regulation truly defeats or materially impairs the courts' core functions, including . . . their ability to resolve controversies, may a court declare it invalid." (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1104, emphasis omitted.) A weighted standard of review does not

materially impair a court's ability to resolve controversies. Moreover, finding a constitutional violation here would jeopardize the validity of other statutes that direct specific weighted standards of review for superior courts, such as Government Code section 830.6 (public entity's design immunity established if, among other things, "the trial or appellate court determines that there is any substantial evidence" of the design's reasonableness) and Penal Code section 1385, subdivision (c)(2) ("the [superior] court shall consider and afford great weight to evidence offered by the defendant to prove" various mitigating circumstances in deciding whether to dismiss an enhancement).

II. An appellate court cannot defer to superior court factual findings that are based on legal error.

The Court of Appeal said that, because the superior court's findings were adverse, Saul had to show " ' "the evidence compels a finding in [his] favor . . . as a matter of law." ' " (*Guardianship of S.H.R.* (2021) 68 Cal.App.5th 563, 574 (*S.H.R.*).) The answer brief claims "[t]here is nothing novel about th[at] standard of review." (ABOM 44.) Actually, considering the context in which the standard of review was applied, it is unprecedented.

What the answer brief and the Court of Appeal opinion fail to acknowledge is that deferential appellate review of findings is precluded when the findings are based on incorrect law. (See OBOM 34–35.) Here, the answer brief all but ignores Saul's demonstration that the superior court's decision here was indeed infected with serious legal error, a point we now discuss.

III. The superior court erroneously based its ruling on the "poverty alone" rule.

Saul's opening brief explained in detail that SIJ findings of neglect or abandonment should be made regardless of whether a child's mistreatment occurs in circumstances of poverty and that the superior court's ruling to the contrary—relying on what the court called a "poverty alone" rule—was legal error. (OBOM 35–40.) The answer brief's response, near its end (ABOM 57–58, 65), is as unconvincing as it is short.

According to the answer brief, Saul has "harped on a single sentence" in the superior court's ruling and, if the "poverty alone" rule is inapplicable, that "does not undermine the superior court's analysis of neglect and abandonment." (ABOM 57–58.) Those statements are at odds with the superior court's own explanation of its ruling.

Family poverty was not mentioned in some offhand reference that was plucked out of context from the superior court's statement of decision. Rather, it was the very foundation of the court's ruling from the inception.

The superior court began its analysis by stating: "A review of the Petition only raises one issue for the Court to decide. Does the poverty of the family, which resulted in Saul being required to leaving [*sic*] school and begin working at an early age, qualify as 'neglect' or 'abuse' under California Code of Civil Procedure, Section 155." (AA 162.)

The court then justified not making SIJ findings by stating the law is "clear that 'poverty alone' is not a basis for judicial, neglect-based intrusion: '[I]ndigency, by itself, does not make one an unfit parent.' " (AA 168.) It also stated that Saul's parents' requiring him to "leave school and start working to help support himself and the family" is not neglect because, "in actuality, each of these complaints arises from the same root cause—namely, their poverty." (*Ibid*.)

The superior court also wrote that it had raised the poverty issue at the hearing on the petition.[1] (AA 162–163.) Indeed it did. The statement of decision merely formalized in writing the court's views at the hearing: "Where they lived, their poverty breeds two things; a need for family members, including children, to help, and in those kind[s] of environments can lead to violence. But being poor or living in [an] impoverished country is not a basis to grant a SIJS [findings] petition. . . . [P]overty in and of itself is not a basis for the granting of a SIJS [findings] petition." (AA 87.)

Given the centrality of the "poverty alone" rule to the superior court's decision, the answer's assertion that inapplicability of the rule to SIJ-findings proceedings "does not undermine the superior court's analysis of neglect and abandonment" (ABOM 57–58) is wrong. At a minimum, the Court of Appeal should have required the superior court to reevaluate Saul's petition without relying on that inapposite rule.

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[1] A factual correction: Saul's petition was not filed in February 2020 (ABOM 13), but in December 2019, the day after he turned 18 (AA 52).

IV. The social worker's evaluation should be considered.

The Court of Appeal did not consider a social worker's detailed evaluation Saul submitted to the superior court, saying the evaluation "was not authenticated or introduced into evidence." (*S.H.R.*, *supra*, 68 Cal.App.5th at p. 572, fn. 3.) The opening brief explained this was error for various reasons, including that Saul had no chance to cure any problems, which were raised for the first time in the appellate court's opinion. (OBOM 48–51.)

The answer brief raises different alleged procedural deficiencies about the evaluation, ones not mentioned by either the superior court or the Court of Appeal. Over 18 months after Saul submitted the evaluation and the superior court ruled, the answer brief now claims the Court of Appeal correctly disregarded the evaluation because it was hearsay and did not meet the requirements for a declaration. (ABOM 48–53.) The lateness of these technical objections dooms them.

The evaluation was submitted in response to the superior court's invitation to Saul's counsel to "file whatever additional documents you want." (AA 91.) The superior court never indicated the evaluation suffered from any evidentiary flaws,

neither during the 26 days between the submission of the evaluation and the superior court's ruling nor in the ruling itself.[2]

" ' "[I]t is settled law that incompetent testimony, such as hearsay or conclusion, if received without objection takes on the attributes of competent proof when considered upon the question of sufficiency of the evidence to support a finding." ' " (*People v. Panah* (2005) 35 Cal.4th 395, 476; see Cal. Law Revision Com. com., 29B pt. 1A West's Ann. Cal. Evid. Code (2011 ed.) foll. § 140 ["when inadmissible hearsay or opinion testimony is admitted without objection, . . . it constitutes evidence that may be considered by the trier of fact"]; see also *Gonzalez v. Mathis* (2021) 12 Cal.5th 29, 39 [in reviewing a summary judgment, the court " ' " 'consider[s] *all* the evidence set forth in the moving and opposing papers *except that to which objections were made and sustained*' " ' " (emphasis added)].)

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[2] The answer brief asserts the silence about the evaluation in the superior court's statement of decision leads to the "logical conclusion" that the court "rejected" the evaluation. (ABOM 51.) That is an unreasonable assumption and contrary to the law that parties should be given an opportunity to cure evidentiary deficiencies. A more reasonable assumption is that the superior court didn't mention the evaluation because nothing in it changed the court's (mistaken) belief that mistreatment caused by "poverty alone" did not support SIJ findings.

Objections are important because they give the proponent of the evidence a chance to cure any deficiencies. (*People v. Partida* (2005) 37 Cal.4th 428, 434.) This is particularly significant in SIJ-findings proceedings that are unopposed, as most are, because only the court can alert the petitioner to the need to fix flaws. The answer brief suggests that Saul could have filed a supplemental declaration with facts contained in the evaluation. (ABOM 51, 52.) But that claim makes our point. Saul was never told that a supplemental declaration was necessary to take the place of the evaluation.

Raising technicalities late is particularly inappropriate in SIJ-findings proceedings. In section 155, the Legislature has sought to eliminate procedural and evidentiary obstacles for children seeking those findings. This is consistent with the approach of other states' courts. (See, e.g., *In re J.J.* (Md.Ct.Spec.App., Feb. 9, 2022, No. CAE21-04129) 2022 WL 390835, at p. *9 [nonpub. opn.] [in SIJ-findings proceeding, affidavits "should be admitted and considered by the court" even though "[i]t is unclear from the transcript if these documents were admitted into evidence at the hearing," "particularly in light

of the lack of any countervailing evidence that would cast doubt on their authenticity"].)

Moreover, belatedly pressing technicalities ignores the realities of petitioning for SIJ findings. Petitioning children, if they are represented at all, are most often represented by attorneys at nonprofit public interest organizations with crushing caseloads and often limited resources.

V. Saul established that reunification with his parents is not viable due to neglect or abandonment.

Saul's opening brief explained in detail that, whether under a deferential standard of review or otherwise, he established the neglect or abandonment necessary to require SIJ findings under section 155. (OBOM 51–60.) That discussion, which we do not repeat, for the most part responds to the contrary view in the answer brief (ABOM 53–56, 58–65). We offer a few additional comments.

Neglect or abandonment

In harmony with federal law, section 155, subdivision (b)(1)(B), provides that SIJ findings depend on, among other things, evidence that "reunification of the child with one or both of the child's parents was determined not to be viable because of

abuse, neglect, abandonment, or a similar basis pursuant to California law." California law states various criteria for establishing abuse, neglect, abandonment, or similar bases. The answer brief suggests that a child seeking SIJ findings must meet the strictest relevant criterion.

An example is the answer brief's discussion of abandonment. Saul's opening brief explained that his parents' lack of financial support fits the statutory standards that allow a child to be made a dependent of the juvenile court (Welf. & Inst. Code, § 300, subd. (g) [when a "child has been left without any provision for support"]) or that give a court temporary emergency jurisdiction of an abandoned child (Fam. Code, §§ 3402, subd. (a) [when a child has been "left without provision for reasonable and necessary care or supervision"], 3424, subd. (a)). (See OBOM 54–55.) Either of those standards falls under the rubric "abuse, neglect, abandonment, or a similar basis pursuant to California law" (Code Civ. Proc., § 155, subd. (b)(1)(B)).[3]

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[3] The dependency standard in Welfare and Institutions Code section 300, subdivision (g), does not specifically label being left without provision for support as abuse, neglect, or abandonment. But it is equivalent to abandonment (see *Sara M. v. Superior Court* (2005) 36 Cal.4th 998, 1005, 1009–1011, 1016) or, at the

The answer brief seeks a harsher standard, relying on a case that says abandonment requires " 'an actual desertion, accompanied with an intention to entirely sever, so far as it is possible to do so, the parental relation and throw off all obligations growing out of the same.' " (*In re Daniel M.* (1993) 16 Cal.App.4th 878, 882; see ABOM 53.) That definition arose in construing a statute that is inapposite here—the predecessor to current Family Code section 7822, under which parental rights can be terminated to allow for a child's adoption. (E.g., *In re Daniel M.* [stepfather sought to terminate father's parental rights so stepfather could adopt child, who was living with his mother and the stepfather].) As explained in the opening brief, SIJ proceedings do not result in the termination of parental rights. (OBOM 37–39.)[4]

More important, however, is that a child seeking SIJ findings should not have to establish *every* standard of abuse,

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least, is a "basis" that is "similar" to abandonment "pursuant to California law" (Code Civ. Proc., § 155, subd. (b)(1)(B)).

[4] The new federal regulations provide that a state juvenile court "is not required to terminate parental rights to determine that parental reunification is not viable." (87 Fed.Reg. 13111 (Mar. 8, 2022) [to be codified at 8 C.F.R. § 204.11(c)(ii), Apr. 7, 2022].)

neglect, or abandonment. Rather, *any* standard of "abuse, neglect, abandonment, or a similar basis pursuant to California law" (§ 155, subd. (b)(1)(B)) should be enough. And Saul did establish neglect or abandonment under California law.

Nonviability of reunification

One required SIJ finding, if the evidence supports it, is that "reunification of the child with one or both of the child's parents was determined not to be viable" because of abuse, neglect, abandonment, or a similar basis. (§ 155, subd. (b)(1)(B).) Saul presented evidence of that nonviability. (See OBOM 57–60.)

The answer brief cites *Perez v. Cuccinelli* (4th Cir. 2020) 949 F.3d 865 (*Perez*) (en banc) in support of the denial of Saul's SIJ-findings petition. That is curious.

The brief isolates the Court of Appeals' conclusion that "reunification must be presently non-viable" (*Perez*, *supra*, 949 F.3d at p. 874) in arguing that past nonviability is not enough. (ABOM 58.) But the appellate court was not analyzing whether *past* mistreatment had caused present nonviability. Rather the statement was made in the context of reversing a USCIS decision that had rejected SIJ status because a state emergency custody order was *temporary* and did not indicate the child's reunification

was " '*permanently* not viable.' " (*Perez* at pp. 870–871, emphasis added; see *id.* at p. 873 ["neither a finding of the permanent non-viability of reunification nor a permanent custody order is required"].) The court also recognized "Congress's efforts to expand eligibility for SIJ status and increase protections for vulnerable immigrant children." (*Id.* at p. 878.)

The crux of the answer brief's argument is that a child must show that the past neglect or abandonment would persist if they returned to their parents. (See, e.g., ABOM 59 [evidence of Saul's forced labor starting at age 10 is insufficient to show nonviability because "[n]o 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"].) As we explained, that should not be the test in SIJ-findings proceedings.

Unless it is clear that the effect of past mistreatment is no longer a factor in preventing reunification, reunification should be considered not viable. Nonviability can be proved, of course, by showing that the same mistreatment will recur upon reunification. But it may also be established by recognizing the

natural irreparable damage to the parent-child relationship caused by abuse, neglect, or abandonment in the past. As one court stated, courts should " 'assess the impact of the history of the parent's past conduct on the viability . . . of a forced reunification.' " (*Kitoko v. Salomao* (Vt. 2019) 215 A.3d 698, 708.)

Requiring a likelihood that past mistreatment will reoccur could put SIJ relief out of reach for most 18-to-20-year-olds who, like Saul, have a proven history of neglect or abandonment, but are now less susceptible to that bad conduct. However, such a rule would frustrate the intents of Congress and the Legislature, both of whom have specifically acted to make SIJ findings and SIJ status available to those under 21 who have suffered neglect or abandonment. And there is no evidence that either body intended the wounds of the past be ignored.

The answer brief does allow that a parent-child relationship might be "so damaged by past conduct as to make reunification unworkable." (ABOM 63.) Establishing that fact, the brief assures, "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." (ABOM 65.)

Saul did present evidence of his continuing anger at his parents' forcing him to work as a young boy and making him stop his education prematurely, but that evidence was in the social worker's evaluation (AA 132), which the answer brief (erroneously) argues cannot be considered. Apparently, the brief believes that Saul would have been entitled to SIJ findings if only he had expressed his anger in his declaration instead of, or in addition, to the social worker.

Such life-altering consequences as the chance to obtain SIJ status should not turn on the kind of technicalities to which the answer brief resorts. More important, Saul's anger should not be required to be expressed at all. The nature and long duration of the neglect and abandonment Saul suffered alone establishes the nonviability of reunification. Reunification decisions in SIJ-findings proceedings should not be based on whether a child is angry at or fearful of their parents, but rather on whether the parent has abused, neglected, or abandoned the child.

The superior court and Court of Appeal rulings in this case are detached from the letter and the spirit of Congress's SIJ legislation and of the complementary statutes enacted by the Legislature. Petitions for SIJ findings should be evaluated, first

and foremost, for the benefit of undocumented children who have suffered parental abuse, neglect, or abandonment.

CONCLUSION

For the reasons stated here and in the opening brief, this court should reverse the Court of Appeal's judgment and direct the Court of Appeal to order the superior court to (re)appoint a guardian for Saul and to make the findings specified in section 155, subdivision (b)(1).

March 14, 2022

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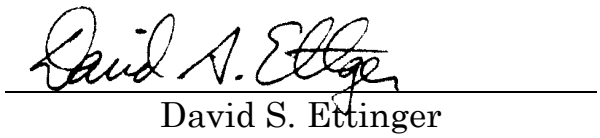
By: 
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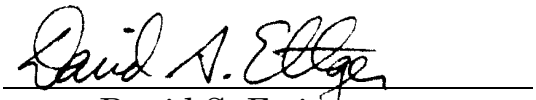

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

3/14/2022

Date

/s/David Ettinger

Signature

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