IN THE SUPREME COURT
OF THE STATE OF NEBRASKA

Case No. S-17-001056

In the Matter of the Guardianship of
CARLOS ORTIZ DIAZ, a minor child

ON APPEAL FROM THE COUNTY COURT OF LANCASTER COUNTY, NEBRASKA
The Honorable County Judge Holly J. Parsley

AMENDED BRIEF OF *AMICI CURIAE* IMMIGRANT LEGAL CENTER, NATIONAL IMMIGRATION LAW CENTER, AND PUBLIC COUNSEL

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Amici accept and adopt the Appellant's Statement of Jurisdiction.

STATEMENT OF THE CASE

Amici accept and adopt the Appellant's Statement of the Case.

PROPOSITIONS OF LAW

I.

The Immigration and Nationality Act ("INA") explicitly entrusts state courts—who already have the authority to find facts—with the task of making factual findings regarding the best interest of juveniles who may be eligible to seek classification as a Special Immigrant Juvenile ("SIJ").

8 U.S.C. § 1101(a)(27)(J); *In re Erick M.,* 284 Neb. 340, 820 N.W.2d 639 (2012); *In re Interest of Luis G.,* 17 Neb. App. 377, 764 N.W.2d 648 (2009).

II.

A condition precedent for seeking SIJ classification is obtaining a state court order in relation to a minor who is "dependent on a juvenile court" or has been "placed under the custody of … an individual … appointed by a State or juvenile court;" finding (1) that his or her "reunification with 1 or both" parents "is not viable due to abuse, neglect, abandonment, or a similar basis found under State law;" and (2) that it would not be in his or her "best interest to be returned to" his or her country. Binding federal regulations confirm that the statute's use of the phrase "State or juvenile court" is intended to be construed broadly and includes any "court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles."

8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11(a); *In re Erick M.*, 284 Neb. 340, 820 N.W.2d 639 (2012).

III.

Under 8 U.S.C. § 1101(a)(27)(J), dependency upon a state court is simply one of several alternatives that can satisfy the first prong of the SIJ definition. A minor could also meet the SIJ definition if he or she is "legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by" a state court. Therefore, if a Nebraska court exercises jurisdiction, grants a petition for guardianship, and appoints a guardian for a ward, it has unequivocally "placed [that juvenile] under the custody of … an individual … appointed by" the court.

8 C.F.R. § 204.11(a); *Matter of Menjivar*, 29 Immig. Rptr. B2-37 (AAO Dec. 27, 1994) (explaining that "the acceptance of jurisdiction over the custody of a child . . . makes the child dependent upon the juvenile court," including "in a guardianship situation"); *Matter of L-L-M-G-*, 2017 WL 913610 *4 (AAO Dec. Feb. 13, 2017) (noting that "the statute [subsequent to *Menjivar* was] amended to include child custody placements in addition to juvenile dependency"); *In re Guardianship of D.J.*, 682 N.W.2d 238, 246 (2004) ("A guardianship is … a temporary *custody* arrangement established for the well-being of a child.") (emphasis added).

IV.

Apart from making the best interest findings described in 8 U.S.C. § 1101(a)(27)(J), state courts play no other role in determining eligibility for SIJ classification or subsequent eligibility for lawful permanent residence. Such determinations related to the granting or denying of immigrant benefits are left exclusively to the federal government. The Eighth Circuit has held that "the federal government 'has broad, undoubted power over the subject of immigration and the status of aliens,'"

and that where there is a "pervasive[] … federal regulatory regime" there must be "exclusive [federal] governance."

In re Erick M., 284 Neb. 340, 820 N.W.2d 639 (2012); *Keller v. City of Fremont*, 719 F.3d 931, 939 (8th Cir. 2013), citing *Arizona v. U.S.*, 567 U.S. 387, 399-400 (2012).

STATEMENT OF FACTS

Amici accept and adopt Appellant's Statement of Facts.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Undersigned counsel motioned for leave to file an *amicus curiae* brief on behalf of the Immigrant Legal Center ("ILC") on March 16, 2018. Undersigned then filed an amended motion on March 23, 2018 on behalf of ILC, Public Counsel, and the National Immigration Law Center ("NILC"). The statements of interest of *amici* provided in the March 23, 2018 motion are hereby incorporated by reference. On April 13, 2018, this Court granted undersigned's amended motion, providing leave to file this *amicus* brief on or before April 20, 2018.

SUMMARY OF ARGUMENT

In the case at bar, the County Court erred by refusing to make factual findings related to Carlos Ortiz Diaz because it (1) misunderstood its role in the SIJ process by reaching the issue of his eligibility for SIJ; and it (2) misinterpreted federal immigration laws. Not only was there no occasion for the County Court to construe federal immigration law, the Court wholly misapprehended that a juvenile can obtain SIJ classification when he is placed in the custody of an individual appointed by the Court.

Federal law regarding SIJ eligibility explicitly entrusts state courts with the task of making findings of fact regarding the best interest of the child in relation to whether (1) reunification is viable due to parental abuse, neglect or abandonment, and whether (2) return to the child's country of

origin is in his or her best interest. Immigration officials, who are not well-positioned to render such determinations, look to state courts to make these best interest findings. However, this reliance upon state courts to make findings of fact is not an invitation to render an opinion regarding eligibility for SIJ classification. Rather, such matters fall exclusively within the purview of federal immigration authorities.

Here, the ward was placed under the custody of an individual appointed by the County Court in the course of a guardianship proceeding. The Court—not asked to determine the ward's eligibility for SIJ classification—was simply asked to make findings of fact regarding parental reunification and the ward's best interest. By refusing to make those findings—a decision apparently predicated upon the Court's misunderstanding of federal law and its inappropriate consideration of the ward's eligibility for SIJ classification—the County Court erred.

ARGUMENT

Modern American jurisprudence has embraced the concept of protecting and ensuring that vulnerable members of our community have access to safety, security, and justice. *See* Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People*, 30 CARDOZO L. REV. 1, 28 (2008). Under Nebraska law, the judiciary is charged with the responsibility of protecting one of our most vulnerable populations—youth who have been abused, abandoned, or neglected by their parents and who are left with little power over their own situation. *See* NEB. REV. STAT. § 43-246 (acknowledging the responsibility of courts "[t]o assure the rights of all juveniles to care[,] protection[,] and a safe and stable living environment[;] and to development of their capacities for a healthy personality, physical well-being, and useful citizenship"); *see also In re Interest of L.D.*, 224 Neb. 249, 263, 398 N.W.2d 91, 100 (1989) (describing children who have been subjected to abuse at

the hands of their parents as "impressionable children in their formative years, not impersonal flotsam and jetsam adrift on a sea of indecision or, much worse, societal insensitivity or apathy.").

Moreover, when abused, abandoned, or neglected children lack immigration status, their lives can continue to unravel, even when the parental mistreatment ends, as they are left without the ability to attain self-sufficiency and are extremely susceptible to further victimization. *See* Center On Gender & Refugee Studies, *A Treacherous Journey: Child Migrants Navigating the U.S. Immigration System* (2014), www.uchastings.edu/centers/cgrs-ddocs/treacherous_journey_cgrs_kind_report.pdf (last visited March 28, 2018).

To address this problem, Congress created the Special Immigrant Juvenile ("SIJ") classification for vulnerable youth who—like Carlos Ortiz Diaz—have been abused, abandoned, or neglected by their parents and who do not have citizenship or a support system in the United States. H.R. REP. NO. 105-405 (1998). Indeed, the SIJ statute was crafted to allow children whose reunification with one of their parents is not viable—and whose best interest is not served by being returned to their country of origin—to remain in the United States, and work towards permanency and self-sufficiency. *See Zheng v. Pogash*, 416 F. Supp. 2d 550, 558 (S.D. Tex. 2006) ("[T]he purpose of SIJ [is] to offer relief for alien minors from abuse, neglect, or abandonment.")

Likewise, the Nebraska legislature has recognized the need for, but limited nature of, state court involvement in the SIJ process. *See* NEB. REV. STAT. §§ 43-3812, 4505(3)(h); *In re Erick M.*, 284 Neb. 340, 341-42 (2012)("The court's findings in an 'eligibility order' are a prerequisite to SIJ status, but they are not binding on federal authorities' discretion whether to grant a petition for SIJ status").

As such, the lower court erred when it refused to make findings of fact regarding Carlos Ortiz Diaz, thereby depriving him of the opportunity to access the safety and security that can come after a

child is given SIJ classification. Specifically, the County Court—apparently misunderstanding the process related to making these special findings of fact—erred by misinterpreting federal immigration laws and reaching the issue of the minor child's eligibility for SIJ classification. *Amici* therefore offer the instant brief to explain the purpose, history, and proper interpretation of the SIJ statute; the complex and detailed regulatory scheme crafted by Congress and federal authorities to govern the process of seeking SIJ classification and permanent residence; and to put in context the important, but circumscribed, role state courts play in that process.

Amici also cross-reference and support the arguments set forth in the brief submitted by Professor Keven Ruser, of the University of Nebraska College of Law, and Nebraska Appleseed, which note that as a matter of state law the County Court had the authority to make special findings of fact and erred by refusing to do so in this case.

A. PURPOSE, BACKGROUND, AND HISTORY OF THE SPECIAL IMMIGRANT JUVENILE CLASSIFICATION

Over the last twenty-five years, Congress has revisited, revised, and overhauled the SIJ statute a number of times. *See infra* at 7-9. Yet, the unifying theme throughout all of those changes has been the intent to protect vulnerable immigrant youth. Indeed, the legislative history associated with the SIJ statute—throughout its evolution and various iterations—confirms that Congress's overarching goal has always been to provide eligible immigrant youth with a pathway to obtain safety, security, and relief from abuse, abandonment, or neglect. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 153, 104 Stat. 4978, 5005-06 (1990) (amended by Miscellaneous and Technical Immigration and Nationality Amendments of 1991, Pub. L. No. 102–232, 105 Stat. 1733 (1991)); Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 105-119, § 113, 111 Stat. 2440 (1997); and William Wilberforce Trafficking

Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 § 235(d) (2008)).

1. IMMIGRATION ACT OF 1990; MISCELLANEOUS AND TECHNICAL IMMIGRATION AND NATIONALITY AMENDMENTS OF 1991

Congress passed the Immigration Act of 1990 on November 29, 1990 (signed into law by President George H. W. Bush), which created a new immigration classification called SIJ. *See* Pub. L. No. 10-649, § 153, 104 Stat. at 5005-06. Section 153 of the Immigration Act of 1990 outlined that to be eligible for SIJ, there had to be a juvenile court order that deemed the immigrant child eligible for long-term foster care, and that found it not to be in the child's best interest to return to the child's country of origin. *See* Sh'ana Harris, *Abused, Neglected, and Abandoned by State Juvenile Courts: The Call for Reform in Special Immigrant Juvenile Status*, 50 VAL. U.L. REV. 185, 192 (2015) ("Harris"). However, issues arose with Section 153 of the Immigration Act related to, among other things, access to permanent residency. *Id.* Congress addressed these issue through the Miscellaneous and Technical Immigration and Nationality Amendments of 1991, Pub. L. No. 102–232, 105 Stat. 1733 ("Technical Amendments"). *Id.*

Federal rules implementing the Technical Amendments clarified that Congress' intent was to "reduce[] or eliminate[] the obstacles facing" SIJ eligible youth by facilitating their transition to lawful permanent residency and entrusting state courts with the responsibility to determine the best interest of the child. *See* 58 Fed. Reg. 42843-01 (1993). The rules also note that Congress did not intend to put impractical "consultation requirements" on juvenile courts related to SIJ eligibility as this task "could delay action urgently needed to ensure proper care" of eligible youth. *Id.*

2. IMMIGRATION ACT OF 1997

In 1997, Section 13 of Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act ("1997 Amendment"), added two requirements: (1) that the child be eligible for long-term foster care *due to abuse, neglect, or abandonment*; and (2) that the SIJ petitioner obtain the consent of the Attorney General in certain circumstances. *See* Harris at 193-196; Pub. L. No. 105-119, § 113, 111 Stat. 2440 (1997). While the 1997 Amendment clarified the categories of children eligible for SIJ classification, it unnecessarily placed burdensome requirements on children needing immediate relief and created an issue of "aging-out" of the foster care system before the children could obtain SIJ classification. *See* Harris at 193-196.

3. WILLIAM WILBERFORCE TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT OF 2008

Fortunately, the long-term foster care requirement was removed from the SIJ statute by the William Wilberforce Trafficking Victims Protection Reauthorization Act ("TVPRA") of 2008 (signed into law by President George W. Bush), which continues to control SIJ eligibility. Pub. L. No. 110-457, 122 Stat. 5044 § 235(d) (2008). The TVPRA "provide[s] critical protections for . . . unaccompanied minors who come to the United States," and "seeks to create a better screening of unaccompanied minors who may be the victims of trafficking…, safer repatriation of any youth removed from the United States, more compassionate environments for children in immigration custody, and broader legal protections and access to services for these youth." *See* Angie Junck et al., *Special Immigrant Juvenile Status and Other Immigration Options for Children and Youth*, 3-10 — 3-11 (3d ed. 2010).

Importantly, the TVPRA addressed many inadequacies of prior SIJ statutes. In addition to eliminating the restrictive language of "long-term foster care," it "mandate[d] the expeditious

adjudication of Special Immigrant Juvenile applications, requiring … [a decision] within 180 days after [filing];" and it removed the SIJ petition filing fee. *See* Harris at 196-197. Additionally, the TVPRA amended the SIJ statute to make clear that dependency on a juvenile court was no longer required when the child was "placed under the custody of … an individual … appointed by" a state court. *See* Pub. L. No. 110-457, 122 Stat. 5044 § 235(d) (2008); *Matter of L-L-M-G-*, 2017 WL 913610 *4 (AAO Dec. Feb. 13, 2017) (noting that "the statute was … amended [by the TVPRA] to include child custody placements in addition to juvenile dependency").

* * * * *

The foregoing legislative history reveals a carefully crafted statutory and regulatory scheme—that Congress and federal agencies have refined over the years—with the overarching purpose of providing a cohesive framework to protect vulnerable immigrant youth. While there have been a number of changes in that time, the thread that ties those changes together is Congressional intent to safeguard the best interest of the child by looking to state courts to make limited findings of fact.

For over two-and-a-half decades, state courts across the country have taken up Congress's call and have routinely made special findings regarding the best interest of children who may be eligible to seek SIJ classification. *See Guardianship of Penate*, 76 N.E.3d 960 (Mass. 2017); *Simbaina v. Bunay*, 109 A.3d 191 (Md. Ct. Spec. App. 2015) (finding that Congress entrusted to state courts—more experienced with such matters—to make "child welfare determinations regarding abuse, neglect, or abandonment, and a child's best interest."); *Leslie H. v. Superior Court*, 168 Cal. Rptr. 3d 729, 737 (Cal. Ct. App. 2014); *In re Estate of Nina L.*, 41 N.E.3d 930 (Ill. App. Ct. 2015); *Matter of Maria P.E.A. v. Sergio A.G.G.*, 975 N.Y.S.2d 85 (N.Y. App. Div. 2013); *E.C.D. v. P.D.R.D.*, 114 So. 3d 33 (Ala. Civ. App. 2012). In the next section, *Amici* will discuss the complex

and multilayered process of moving from the state court's factual findings, to SIJ classification, and finally to permanent residence.

B. PROCESS OF OBTAINING LAWFUL PERMANENT RESIDENT STATUS THROUGH SPECIAL IMMIGRANT JUVENILE CLASSIFICATION

The process of seeking SIJ classification and applying for permanent residence is multifaceted, and reflects a detailed statutory and regulatory scheme carefully crafted by Congress and federal immigration authorities. It is within the context of this pervasive regulatory scheme that Congress has given state courts an important, but circumscribed, role to play.

1. PREDICATE ORDER FROM STATE COURT

As stated above, for an immigrant juvenile to seek SIJ classification, the very first step involves seeking certain special factual findings from a state court. *See* 8 U.S.C. § 1101(a)(27)(J). These findings are made in relation to a juvenile that "has been declared dependent on a juvenile court located in the United States" ***or*** who has been *"legally committed to, or* ***placed under the custody of****, an agency or department of a State, or* ***an individual*** or entity ***appointed by a State*** *or juvenile* ***court*** located in the United States." *Id.* (emphasis added). Thus, dependency on a juvenile court is simply one of several alternatives that can satisfy the first prong of the SIJ definition. *Id.*

Specifically, a minor can meet the SIJ definition if "placed under the custody of … an individual … appointed by" a state court. *Id.* Therefore, where a Nebraska court exercises jurisdiction, grants a petition for guardianship, and appoints a guardian for a ward, it has unequivocally "placed [that juvenile] under the custody of … an individual … appointed by" the court. *See Matter of L-L-M-G-*, 2017 WL 913610 *4 (AAO Dec. Feb. 13, 2017) (noting that "the statute was amended to include child custody placements in addition to juvenile dependency."); *In re*

Guardianship of D.J., 682 N.W.2d 238, 246 (2004) ("A guardianship is … a temporary *custody* arrangement established for the well-being of a child.") (emphasis added)

If the child has been placed in the custody of an individual appointed by the court, then the child will satisfy the SIJ definition provided that the state court finds that:

(1) "[R]eunification with 1 or both" parents "is not viable due to abuse, neglect, abandonment, or a similar basis found under State law;" and

(2) "[I]t would not be in the [immigrant's] … best interest to be returned to [his or her] country of nationality."

8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11(a); *In re Erick M.*, 284 Neb. 340, 341-42, 820 N.W.2d 639 (2012); *State v. Luis G.*, 17 Neb. App. 377, 764 N.W.2d 648 (2009).

A juvenile cannot apply to USCIS to seek SIJ classification without having first secured the necessary factual findings issued by a state court. *See* Heryka Knooespel, *Special Immigrant Juvenile Status: a "Juvenile" Here is not a "Juvenile" There*, 19 WASH. & LEE J. C.R. & SOC. JUST. 505, 512 (2013). Without the state court findings, the SIJ Petition could be rejected. *See* Instructions to I-360: Petition for Amerasian, Widow(er), or Special Immigrant, U.S. Citizenship and Immigration Services, OMB No. 1615-0020, available at https://www.uscis.gov/system /files_force/files/form/i-360instr.pdf?download=1.

As such, state courts have an important role to play in the process because without the special findings, the process of seeking SIJ cannot commence. *See* 58 Fed. Reg. 42842, 42847 (Aug. 12, 1993); Donald Neufeld, Acting Associate Director for Domestic Operations, U.S. Citizenship and Immigration Services, Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions (March 24, 2009); *Matter of W-A-A-D-*, 2016 WL 6920224 *2 (AAO Dec. Oct. 27, 2016) ("USCIS is not the fact finder in regards to these issues of child welfare

under state law. Rather, the statute explicitly defers such findings to the expertise and judgment of the" state court).

However, apart from making the findings described in 8 U.S.C. § 1101(a)(27)(J), state courts take no other part in determining eligibility for SIJ classification or subsequent eligibility for lawful permanent residence. *See infra* at 13-15. Such determinations related to the granting or denying of immigration benefits are left exclusively to the federal government. *See id.*; *In re Erick M.*, 284 Neb. 340, 341-42 (2012)("The court's findings in an 'eligibility order' … are not binding on federal authorities' discretion whether to grant a petition for SIJ status"); *Keller v. City of Fremont*, 719 F.3d 931, 939 (8th Cir. 2013), citing *Arizona v. U.S.*, 567 U.S. 387, 399-400 (2012).

Similarly, obtaining a state court order with these special findings is not tantamount to immigration status; nor does it guarantee USCIS will grant a petition for SIJ classification. *In re Erick M.*, 284 Neb. at 341-42. Immigration officials have the exclusive authority to grant or deny the SIJ petition. *See* Heryka Knooespel, *Special Immigrant Juvenile Status: a "Juvenile" Here is not a "Juvenile" There*, 19 WASH. & LEE J. C.R. & SOC. JUST. 505, 512 (2013). And, there are a number of complex and time-consuming steps to undertake before a juvenile with such special findings can obtain permanent residency. These steps are discussed below.

2. PETITION FOR SPECIAL IMMIGRANT JUVENILE CLASSIFICATION

After obtaining the predicate findings from a state court, a juvenile seeking SIJ classification must then file the state court's factual findings—supported by additional evidence related to the child's age—along with a Form I-360 Petition for Amerasian, Widow(er), or Special Immigrant to United States Citizenship and Immigration Services ("USCIS"). *See* U.S. Citizenship and Immigration Services, *SIJ Petition Process*, available at https://www.uscis.gov/archive/sij-petition-process (last visited March 26, 2018) ("SIJ Petition Process"); *see also* Form I-360: Petition for

Amerasian, Widow(er), or Special Immigrant, U.S. Citizenship and Immigration Services, OMB No. 1615-0020, available at http://www. uscis.gov/sites/default/files/files /form/i-360.pdf.

After the I-360 Petition and supporting evidence are received, USCIS then conducts an independent analysis—which can involve an interview—regarding whether the SIJ petitioner may qualify to be classified as a "Special Immigrant Juvenile." *See* Neufeld Memorandum, Acting Associate Director, USCIS, HQOPS 70/8.5 (March 24, 2009); Yates Memorandum, HQADN 70/23, entitled Memorandum #3—Field Guidance on Special Immigrant Juvenile Status Petitions (May 27, 2004). In addition to evaluating the sufficiency of the I-360 petition and evidence in support, USCIS will also consider whether the SIJ petitioner meets the federal definition of a child by being *inter alia* unmarried and under the age of 21 in light of the *Perez-Olana Settlement Agreement*. *See* 8 U.S.C. § 1101(b)(1); *Perez-Olano, et al. v. Holder, et al.*, 2:05-cv-03604-DDP (C.D. Cal.); USCIS Policy Memo, PM-602-0034, *Implementation of the Special Immigrant Juvenile Perez-Olano Settlement Agreement* (April 4, 2011); *see e.g.*, *Pierre v. McElroy*, 200 F. Supp. 2d 251, 252 (S.D.N.Y. 2001).

If USCIS finds any additional evidence is needed to adjudicate the I-360 Petition, it may issue a request for evidence ("RFE"). *See* 8 CFR § 103.2(b)(8)(i), (iv). Additionally, if USCIS believes the evidence provided in response to an RFE is still insufficient, it may issue a Notice of Intent to Deny before issuing a final decision. *See* 8 CFR § 103.2(b)(16)(i).

Once USCIS is satisfied with the evidence presented and concludes that the requirements of 8 U.S.C. § 1101(a)(27)(J), 8 C.F.R. § 204.11(a), and 8 U.S.C. § 1101 (b)(1) are met, it then will grant the petition and issue an I-797 Approval notice. *See* SIJ Petition Process, *supra* at 12. However, this approval does not guarantee residency, nor does it provide an opportunity to access employment authorization. *See infra* 14-15; *see generally* 8 C.F.R. § 274a.11(a)-(c) (containing no provision that

would allow individuals with only an approved SIJ petition to obtain employment authorization). It is simply the first of several steps required to obtain permanent residence. *Id.*

After the I-360 SIJ petition is granted, then an applicant must wait—depending upon the child's nationality—for a visa to become available. *See* SIJ Petition Process, *supra* at 12. The visa bulletin is managed by the U.S. State Department. *See* U.S. Department of State – Bureau of Consular Affairs, Visa Bulletin For March 2018, available at https://travel.state.gov/content /travel/en/legal/visa-law0/visa-bulletin/2018/visa-bulletin-for-march-2018.html (last visited March 26, 2018); Employment-Based Fourth Preference (EB-4) Visa Limits Reached for Special Immigrants From El Salvador, Guatemala, and Honduras, available at https://www.uscis.gov/news/employment-based-fourth-preference-eb-4-visa-limits-reached-special-immigrants-el-salvador-guatemala-and-honduras (last visited April 8, 2018). Currently, there are no visas available for SIJ applicants from Mexico, El Salvador, Guatemala, or Honduras; SIJ applicants from these countries are facing wait times from a year and nine months to almost two-and-a-half years. *See id*. (indicating visas are available for applicants from Mexico who submitted their SIJ Petitions prior to July 1, 2016; and for applicants from El Salvador, Guatemala, or Honduras, who filed before December 1, 2015.)

3. APPLICATION TO REGISTER PERMANENT RESIDENCE OR ADJUSTMENT OF STATUS

Once a visa is available, a juvenile with an approved SIJ Petition must then file the Form I-485, Application to Register Permanent Residence or Adjust Status, along with related forms and supporting evidence to seek permanent residence. *See* SIJ Petition Process, *supra* at 12. Yet, before permanent residence can be awarded, the juvenile must appear for a biometrics appointment, where his or her fingerprints and facial features are cross-checked against national security and state

and federal criminal databases. *See* U.S. Citizenship and Immigration Services, *SIJ: After You File*, available at https://www.uscis.gov/archive/sij-after-you-file#Receipts (last visited April 8, 2018) ("SIJ: After You File"). He or she must also obtain a full medical screening, conducted by a designated U.S. Civil Surgeon, using the Form I-693, Report of Medical Examination and Vaccination Record. *See* U.S. Citizenship and Immigration Services, *SIJ: Forms You May Need*, available at https://www.uscis.gov/archive/sij-forms-you-may-need (last visited April 8, 2018). The Form I-693 must also be submitted to USCIS for analysis. *See id*.

Then, the child may be required to appear for another interview before a trained USCIS officers who will place the juvenile under oath and check for any grounds of inadmissibility that would prevent the child from be awarded permanent residency. *See* 8 U.S.C. § 1255(a), (h); 1182(a)(1)-(9); *see also* SIJ: After You File, *supra*. Any one of these grounds, or a negative hit on one of the security checks, could disqualify the juvenile and result in the denial of his or her application. *See id.* Only after the USCIS officer is satisfied that the juvenile is eligible for residency will that status be awarded. *See id*.

* * * * *

In sum, the issuing of a state predicate order which makes findings related to (1) whether parental reunification is viable due to abuse, abandonment, or neglect, and (2) whether it is in the child's best interest to be returned to his or her country, is simply the first step in a complex process for the child to obtain permanent residency status.

As such, obtaining the necessary factual findings from a state court in no way guarantees an immigration benefit; rather, it simply allows the child to be considered for SIJ classification. *See Erick M.*, 284 Neb. 340, 341-42 (2012) ("The court's findings in an 'eligibility order' are a

prerequisite to SIJ status, but they are not binding on federal authorities' discretion whether to grant a petition for SIJ status").

C. REFUSAL TO ISSUE SPECIAL FINDINGS, AS THE COURT WITH EXCLUSIVE JURISDICTION, IMPEDES THE FUNCTION AND PURPOSE OF THE FEDERAL ADJUDICATING AGENCY.

As outlined above, the entry of special state court findings of fact regarding the ward, Carlos Ortiz Diaz, is simply the first step in a complex and detailed process in the path towards obtaining residency through an SIJ classification. *See supra* at 10-15. It by no means guarantees permanent resident status. *See id.*

Congress has carefully crafted a detailed and multi-stepped system to screen, vet, and process immigrants who are eligible to pursue SIJ classification and residency. *Id.* However, if Nebraska Courts refuse to make these factual findings—not because there is insufficient evidence, not because of the viability of parental reunification, and not because of concerns rooted in the best interest of the child, but because of misconceptions related to their role in the process—the entire edifice fashioned and fine-tuned by Congress will fall.

In the case at bar, the County Court erred by refusing to make factual findings related to the child's best interest because it (1) misunderstood its role in the SIJ process by reaching the issue of the child's eligibility for SIJ; and it (2) misinterpreted federal immigration laws related to SIJ.

1. THE COUNTY COURT MISUNDERSTOOD ITS ROLE IN THE SIJ PROCESS BY REACHING THE ISSUE OF ELIGIBILITY FOR SIJ CLASSIFICATION.

As explained above, Congress has entrusted state courts with the task of making findings of fact regarding the best interest of the child in relation to whether reunification is viable due to

parental abuse, neglect, or abandonment, and whether return to the country of origin is in the child's best interest. *See supra* 6-9. However, this expectation of state courts to make findings of fact is not as an invitation to render an opinion regarding eligibility for SIJ classification. *See In re Erick M.*, 284 Neb. at 341-42 ("The court's findings in an 'eligibility order' … are not binding on federal authorities' discretion whether to grant a petition for SIJ status").

In fact, consistent with the Supremacy Clause of the U.S. Constitution, federal authorities have made clear that states courts have no role to play in the process of determining eligibility for SIJ classification or residency. *See* 58 Fed. Reg. 42843-01 (1993); *see also Keller v. City of Fremont*, 719 F.3d 931, 939 (8th Cir. 2013) (explaining that "the federal government 'has broad, undoubted power over the subject of immigration and the status of aliens,'" and that where there is a "pervasive[] … federal regulatory regime" there must be "exclusive [federal] governance."), citing *Arizona v. U.S.*, 567 U.S. 387, 399-400 (2012). Accordingly, it was error for the County Court below to even reach the issue of whether Carlos Ortiz Diaz satisfied the first prong of 8 U.S.C. § 1101(a)(27)(J) in relation to whether he was "dependent" upon the court. This task should have been left for USCIS. *See Erick M.*, 284 Neb. at 341-42.

2. THE COUNTY COURT MISINTERPRETED FEDERAL IMMIGRATION LAW RELATED TO SIJ.

I. DEPENDENCY

However, even assuming the County Court properly reached the issue of dependency, the Court misunderstood the SIJ statute. As explained above, under 8 U.S.C. § 1101(a)(27)(J), dependency upon a state court is simply one means of satisfying the first prong of the SIJ definition. A minor could also meet the SIJ definition if he or she is "placed under the custody of … an individual … appointed by" a state court. *Id.*; *Matter of L-L-M-G-*, 2017 WL 913610 *4 (AAO Dec.

Feb. 13, 2017) (noting that "the statute was … amended [by the TVPRA] to include child custody placements in addition to juvenile dependency").

Because the County Court granted the petition for guardianship in this case, and appointed a guardian for Carlos Ortiz Diaz, it unequivocally "placed [that juvenile] under the custody of … an individual … appointed by" the court. As such, the requirements of 8 U.S.C. § 1101(a)(27)(J) are satisfied, and the County Court's conclusion to the contrary was error. *See Matter of L-L-M-G-*, 2017 WL 913610 *4 (AA) Dec. Feb. 13, 2017); *In re Guardianship of D.J.*, 682 N.W.2d 238, 246 (2004) ("A guardianship is … a temporary custody arrangement established for the well-being of a child."); *see also* 8 C.F.R. § 204.11(a).

II. THE SIJ PARENTAL BAR

Additionally, the County Court misunderstood 8 U.S.C. § 1101(a)(27)(J)(iii)(II), which provides that no parent of a child granted SIJ classification may "thereafter, by virtue of such parentage, be accorded any right, privilege, or status under" immigration law. *Id*. ("SIJ parental bar"). The Court expressed concern over this provision, and seems to have relied upon its misapprehension of this SIJ parental bar, in part, to justify its refusal to make findings of fact in this case. However, that decision was rooted in at least two different legal errors. The Court misconstrued both (1) the consequences of making factual findings, as well as (2) how the particular "SIJ parental bar" provision of 8 U.S.C. § 1101(a)(27)(J)(iii)(II) functions.

First, as explained above, the County Court's factual findings would not *per se* result in SIJ classification or permanent residency for the ward. *See supra* at 12-15. Rather, there are a number of steps between obtaining the special factual findings and an eventual grant of SIJ classification by USCIS. *Id.* As such, the mere fact that the a court makes these factual findings would not, taken alone, trigger the "SIJ parental bar" of section 1101(a)(27)(J)(iii)(II) (providing that "no natural …

parent of any" child "*provided special immigrant status* … shall thereafter, by virtue of such parentage, be accorded any … status under" immigration law). Instead, the "bar" would only become effective upon the child's obtaining an SIJ classification. *See id.*

Second, the "parental bar" of section 1101(a)(27)(J)(iii)(II) simply prevents the parent of a child—who has an SIJ classification—from obtaining an immigration benefit as a result. Because a child without status is also incapable of providing an immigration benefit to his parent, the County Court's refusal to issue findings of fact in this case produced the same outcome as if the "parental bar" applied. By refusing to make the factual findings, Carols Ortiz Diaz was foreclosed from obtaining SIJ classification and permanent residency. *See supra* 12-15. As such, he is presently incapable of according any benefit under immigration law to his parents. *See id.* Therefore, any refusal to make the requested factual findings in this case out of concern for triggering the "parental par"—which already effectively applies—would be clearly misplaced. It also serves as a perfect illustration for why state court judges are not invited to weigh in on SIJ eligibility determinations.

* * * * *

It would be a manifest miscarriage of justice and deprivation of due process to permit Nebraska state courts to stonewall abused, abandoned, and neglected children—eligible for federal immigration benefits made available by Congress—by refusing to make factual findings, particularly where there is sufficient evidence to do so, and the court's recalcitrance is rooted in legal error. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("[T]he Due Process Clause applies to all 'persons' within the United States, including" immigrants); *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (Immigrants, "even … whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments.")

Upholding the lower court's decision in this case—which was predicated upon several patent errors of law—would produce an unjust result by depriving Carlos Ortiz Diaz of his rights under federal law and the U.S. Constitution. *See id.*

CONCLUSION

For these reasons, *amici curiae* respectfully support the request of Appellant that this Court reverse and remand this matter for the County Court to make the requested special findings of fact described in 8 U.S.C. § 1101(a)(27)(J) regarding Carlos Ortiz Diaz.

Dated this 16th day of April 2018.

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