S233757

IN THE SUPREME COURT OF CALIFORNIA

BIANKA M.,

Petitioner,

v.

THE SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,

Respondent;

GLADYS M.,

Real Party in Interest.

AFTER A PUBLISHED DECISION BY THE COURT OF APPEAL
FOR THE SECOND APPELLATE DISTRICT, DIVISION THREE
CASE NO. B267454

BRIEF OF *AMICUS CURIAE* AT THE REQUEST OF THE CALIFORNIA SUPREME COURT

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AMICUS CURIAE BRIEF

INTEREST OF AMICUS CURIAE

This *amicus* brief has been prepared and is being filed pursuant to this Court's order of November 16, 2016, requesting an amicus brief in place of a respondent's brief in *Bianka M. v. Superior Court* (2016) 245 Cal.App.4th 406, 416, review granted and opinion superseded sub nom. *M., Bianka v. S.C.* (2016) 370 P.3d 1052. The brief was drafted by L. Rachel Lerman, a partner at the law firm of Barnes & Thornburg LLP, and the attorney to whom the order was directed. Assistance was provided by Barnes & Thornburg associate Joseph Wahl.

While the *amicus* brief is being submitted in place of a respondent's brief as directed by the order, we are not advocates for any party. Instead, in keeping with the engagement letter that we drafted and this Court signed, we have taken a neutral approach. We have carefully reviewed the briefs filed to date, the lower court opinions, and relevant state and federal authorities. While we agree with some of the Court of Appeal's rulings, we disagree with others. We also agree with Petitioner in some, but not all, respects. Our conclusions are summarized in the Introduction to this brief, below.

Dated: February 14, 2017

BARNES & THORNBURG LLP

By 

L. Rachel Lerman

One of the Attorneys for *Amicus Curiae*

ISSUES PRESENTED

1. Whether a Superior Court may deny a child's request for Special Immigrant Juvenile ("SIJ") classification findings on the ground that the request was not made during a bona fide child welfare proceeding.

2. Whether a Superior Court may deny a child's request for SIJ classification findings on the ground that parentage of the child's alleged, noncustodial father has not been adjudicated, when the alleged father fails to respond after receiving all of the due process the law requires.

a. Whether joinder of, and/or personal jurisdiction over, the child's alleged father are necessary preconditions to making the SIJ status finding that her father abandoned her.

b. Whether it is appropriate for a Superior Court to ask a child seeking SIJ status findings to seek a stipulation of parentage from the alleged father she claims abandoned her.

INTRODUCTION

This case requires this Court to rule on issues of first impression concerning the role of California juvenile courts in making the findings that an undocumented minor must obtain before she can apply to the federal government (specifically, the United States Customs and Immigration Service, or "USCIS") for SIJ classification under the federal Immigration and Nationality Act ("INA").

Originally enacted in 1990, the SIJ statute has been amended several times over the years. Most recently, in 2008, the statute was amended to clarify that it applies to children for

whom "reunification with one or both ... parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law." (8 U.S.C. § 1101 (a)(27)(J).)[1]

Under the current version of the statute, children like Bianka M. ("Bianka"), who are able to reunite with a single parent living in the United States, may apply to the federal government for SIJ classification if they obtain findings from a state juvenile court that: (1) the child is "dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States"; (2) "reunification with 1 or both" parents is "not viable due to abuse, neglect, abandonment, or a similar basis found under State law"; and (3) "it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence." (*Id.*)

Bianka left Honduras by herself at the age of 10, and traveled to California to rejoin her mother, Gladys, who left Honduras herself in 2005. As Bianka and her mother testified, Bianka cannot go back to Honduras to live with her biological father, Jorge, because he abandoned Gladys (the mother of his

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[1] Originally, the statute required that a child seeking SIJ classification be "deemed eligible for long-term foster care." The language "deemed eligible for long-term foster care" was defined through regulation to mean that a court made a determination that family reunification is not a viable option. (See 8 CFR § 204.11(a)(1993).)

four children) while she was pregnant with Bianka, and declared he would rather see Bianka dead than be obliged to support her. Jorge never married Gladys, so he is classified by California law as Bianka's "alleged" father, giving him limited due process rights. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 449; Dkt. No. 3, Petitioner's Appendix of Exhibits ("AE") 303.)

Specifically, as an alleged father, Jorge is entitled to notice and an opportunity to be heard with respect to Bianka's petition to be placed in Gladys' sole custody. (*Id.*) Should he wish to be heard, he may seek to obtain "presumed" father status under California law. (See Fam. Code, § 7611 [outside of marriage, a presumed father is one who takes the child into his home and holds her out as his own].) Unless Jorge seeks and obtains presumed father status, his due process and parental rights extend no further.

Both of the lower courts were concerned that a parent might use the SIJ statute to kidnap a child from the custody of a parent living in another country. Noting these concerns, the Superior Court ruled that it could not grant Bianka's request for an order placing her in her mother's sole custody, or make a finding that Jorge abandoned her, without first determining Jorge's paternity in a proceeding to which Jorge was joined as a party.

The Court of Appeal granted writ review and affirmed the Superior Court based on its conclusions that (1) Bianka's custody petition was not bona fide, but based solely on her desire to obtain the findings needed to apply for SIJ status; and (2) "a

request for sole legal and physical custody in a parentage action necessarily requires a court to consider the parentage of both parents," so the Superior Court did not abuse its discretion in requiring Bianka to join Jorge, who received inadequate notice in this case. The Court of Appeal recognized that it could be difficult for Bianka to establish personal jurisdiction over Jorge, and suggested that Bianka might obtain a stipulation of parentage from him.

As discussed in Bianka's opening brief on the merits and in this brief, *infra*, the Court of Appeal's first conclusion is mistaken. Federal authorities, and now California Code of Procedure Section 155, which the Legislature clarified after the Court of Appeal's decision in this case was filed, provide that the question of whether an application for SIJ classification is made pursuant to a bona fide state court proceeding is one for the federal authorities, not the state courts, to address and decide.

The Court of Appeal's second conclusion is correct in part and mistaken in part. First, it appears that the notice Jorge received in this case was inadequate, as the Court ruled. California's custody and parentage statutes do not specify whether Jorge is entitled to notice that Bianka seeks a finding he abandoned her, but California dependency law strongly suggests that he is. California Rules of Court further suggest that Jorge is entitled to receive notice in Spanish, if he cannot read or understand English. Once notice has been corrected, however, there is no need for Bianka to join Jorge or demonstrate that he is subject to personal jurisdiction, as the Court further ruled.

The due process protections already in place under California law ensure that California custody proceedings are not used to deprive a presumptive parent of custody or parental rights. Indeed, the Uniform Child Custody Jurisdiction and Enforcement Act (the "UCCJEA"), codified in the California Family Code at §§ 3400 et seq., was drafted in part to protect against kidnapping of a child by one of her parents.

The UCCJEA requires that "all persons entitled to notice under the law of this state as in child custody proceedings between residents of this state" receive notice and an opportunity to be heard. (Fam. Code, § 3425.) The Uniform Parentage Act, codified in the California Family Code at §§ 7600 et seq., provides that "notice of [a parentage] proceeding shall be given to every person identified as the biological father or a possible biological father[.]" (Fam. Code, § 7666.) Upon receiving notice, an alleged father may exercise his right to be heard and seek to obtain presumed father status.

In keeping with these statutes, the California courts of appeal have consistently held, until now, that "[t]he requirements of due process of law are met in a child custody proceeding when, in a court having subject matter jurisdiction over the dispute [under the UCCJEA], the out-of-state parent is given notice and an opportunity to be heard." (*In re Marriage of Torres* (2002) 62 Cal.App.4th 1367, 1378 ("*Torres*"), citing *In re Marriage of Leonard* (1981) 122 Cal.App.3d 443, 459 ("*Leonard*"); see also *In re A.S.*, (2009) 180 Cal.App.4th 351, 362 [holding that a court "does not err by terminating a biological father's parental rights

when he has had the opportunity to show presumed father status and has not done so."].)

Once Jorge receives proper notice, it is up to him to respond in a timely fashion. If he does not, California law entitles him to nothing more. The same is true if he comes forward but cannot establish presumed father status.

In either of these circumstances, amicus submits that the Superior Court may and should proceed to adjudicate Bianka's custody case and make the SIJ classification findings set forth in 8 U.S.C. § 1101 (a)(27)(J).

STATUTORY BACKGROUND

A. The SIJ Provision

Congress enacted the SIJ provision of the INA in 1990 to protect undocumented minor immigrants who were eligible for long-term foster care. Congress has amended the statute several times over the years, most recently in 2008. While the SIJ statute is federal law, and was enacted based on federal authority over immigration matters, it relies on state juvenile courts to determine several underlying issues of fact.[2]

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[2] The SIJ statute originated as a narrow solution to a child welfare problem noted by California advocates. (See S. Daugherty, *Special Immigrant Juvenile Status* (2015) 80 Brook. L. Rev. 1087, 1092.) The statute provided children eligible for long-term foster care with the opportunity for a green card, federal benefits, and legitimate employment. (*Id.*) It incidentally benefited the State because federal benefits "decreased reliance on wholly state-funded services provided to undocumented immigrants." (J. Baum et al., *Most in Need But Least Served:*

The 1990 version of the statute extended to undocumented immigrant children who were eligible for long-term foster care because their parents were unavailable to provide for them. (8 U.S.C. § 1101 (a)(27)(J) (1990).)

In 1997, Congress amended the law to specify that an immigrant child applicant be deemed eligible for long-term foster care *due to abuse, neglect, or abandonment* (Pub. L. 105-119, 111 Stat. 2460 (1997)), a concept that was implied but not expressly stated in the original version of the statute.

In 2005, Congress added a provision relevant to SIJ classification proceedings in conjunction with the 2005 Reauthorization of the Violence Against Women Act ("VAWA 2005"). (Dep't of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 826, 119 Stat. 2960, 3065-66, Rule 12.4(a), (c), (e), pp. 116-117.) The new provision protects abused children by barring government officials from making personal contact, or compelling immigrant minor applicants to make personal contact, with the parent who allegedly abused or abandoned them. (8 U.S.C. § 1357(h) [providing that a child seeking SIJ classification "shall not be compelled to contact the alleged abuser"]; see M. Fitzpatrick and L. Orloff, *Abused, Abandoned, or Neglected: Legal*

Legal and Practical Barriers to Special Immigrant Juvenile Status for Federally Detained Minors (2012) 50 Fam Ct. Rev. 621, 623, cited in Daugherty, *supra.*)

Options for Recent Immigrant Women and Girls (2016) 4 Penn St. J.L. & Int'l Aff. 614, 628.)[3]

In 2008, Congress amended the SIJ statute again, this time pursuant to the William Wilberforce Trafficking Victims Protection Reauthorization Act ("TVPRA") of 2008. (Pub. L. 110-457, § 235, 122 Stat. 5044.) Under the 2008 version of the statute, which is the law today, state courts must 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." (8 U.S.C. § 1101 (a)(27)(J).)

B. California Parentage and Custody Statutes

1. The Uniform Child Custody Jurisdiction and Enforcement Act

The UCCJEA is a revised form of the UCCJA, which was amended and renamed in 1997. (*In re A.C.* (2005) 130 Cal.App.4th 854, 860 [noting that cases interpreting the UCCJA are instructive in deciding cases under the UCCJEA except where there is a conflict between the two statutory schemes]; see also Jurisdiction and Litigation Choices, Cal. Prac. Guide Family L. Ch. 7-A ["The UCCJA and UCCJEA are similar but not

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[3] See 146 Cong. Rec. H9046 (2000), at 126, H.R. Rep. No. 109-233 (2000) (explaining that "Congress created special protections for victims of domestic violence against disclosure of information to their abusers and the use of information provided by abusers ... to ensure that immigration enforcement agents and government officials covered by this section do not initiate contact with abusers, call abusers as witnesses or relying on information furnished by or derived from abusers to apprehend, detain and attempt to remove victims[.]").

identical. Notably, the UCCJEA eliminates inconsistencies with the preemptive [Federal Parental Kidnapping Prevention Act] ...; strengthens the jurisdictional standards, thus removing the incentive under prior law to move children out of state for the purpose of relitigating custody/visitation disputes; and establishes uniform methods for enforcing custody and visitation orders."].) The UCCJEA has been adopted by nearly every state in the nation and is codified in the California Family Code at §§ 3400 et seq.

The purpose of the UCCJEA is "to avoid jurisdictional competition between states or countries, promote interstate cooperation, avoid relitigation of another state's or country's custody decisions and facilitate enforcement of another state's or country's custody decrees." (*Schneer v. Llaurado* (2015) 242 Cal.App.4th 1276, 1287 (citation omitted); see also *In re Marriage of Nurie* (2009) 176 Cal.App.4th 478, 496-497 ("*Nurie*") [UCCJEA also serves to deter parental kidnapping].)

The UCCJEA is the "'exclusive method of determining subject matter jurisdiction in custody disputes involving other jurisdictions[,]'" including foreign jurisdictions. (*In re Karla C.* (2010) 186 Cal.App.4th 1236, 1268 (quoting *In re Marriage of Sareen* (2007) 153 Cal.App.4th 371, 376).

A California court has subject matter jurisdiction when, as here, California is the "home state" of the child at the start of the proceeding. (*Ibid.*, citing Fam. Code, § 3421, subd. (a)(1).)

The UCCJEA applies to any "child custody proceeding," which the Act defines to include proceedings "for ... the

termination of parental rights" and for "protection from domestic violence." (Fam. Code, § 3402, subd. (d); see also *In re Marriage of Fernandez-Abin* (2011) 191 Cal.App.4th 1015, 1037-1038.)

2. The Uniform Parentage Act

The Uniform Parentage Act governs determinations of parentage. (*Jason P. v. Danielle S.* (2014) 226 Cal.App.4th 167, 174, citing *K.M. v. E.G.* (2005) 37 Cal.4th 130, 138; see *id.* [the Act "provides a comprehensive scheme for judicial determination of paternity, and was intended to rationalize procedure, to eliminate constitutional infirmities in then existing state law, and to improve state systems of support enforcement"], citation and quotations omitted.)

Under the Uniform Parentage Act, a woman may establish parentage "by proof of her having given birth to the child, or under this part." (Fam. Code, § 7610, subd. (a).) A man who is married to the mother at the time of birth is presumed to be the child's father. (Fam. Code, § 7611.) A man who is not married to the child's mother is not presumed to be the child's father unless he marries or attempts to marry her after the birth and/or "receives the child into his or her home and openly holds out the child as his or her natural child." (*Id.*, subd. (d).)

The Section 7611 paternity presumptions reflect "the state's interest in the welfare of the child and the integrity of the family," rather than the interests of the alleged or biological father. (*In re Jesusa V.* (2004) 32 Cal.4th 588, 611, citation and quotations omitted.) "'The statutory purpose [of section 7611] is to distinguish between those fathers who have entered into some

familial relationship with the mother and child and those who have not.'" (*Jason P., supra,* 226 Cal.App.4th at pp. 177, quoting *In re T.R.* (2005) 132 Cal.App.4th 1202, 1209.) "'The paternity presumptions are driven by state interest in preserving the integrity of the family and legitimate concern for the welfare of the child. The state has an 'interest in preserving and protecting the developed parent-child ... relationships which give young children social and emotional strength and stability.'" (*Id.*, quoting *In re Nicholas H.* (2002) 28 Cal.4th 56, 65.)

STATEMENT OF THE CASE

A. Bianka's Petition to Be Placed in Her Mother's Sole Custody and Her Request for SIJ Classification Findings

Bianka, who is now 13 years old, traveled from Honduras to the United States alone and without documentation in 2013. (*Bianka M. v. Superior Court* (2016) 245 Cal.App.4th 406, 416, review granted and opinion superseded sub nom. *M., Bianka v. S.C.* (216) 370 P.3d 1052 ("*Bianka M.*").) After a brief federal detention, she was reunited with her mother, Gladys, in California. (*Ibid.*) Gladys is a citizen of Honduras who left that country for the United States in 2005. (*Ibid.*; AE 3.) Gladys left Bianka in the care of an older daughter; she contacted her daughters regularly by phone and sent money to support Bianka. (Bianka M., supra, 245 Cal.App.4th at p. 416; AE 3, 9.) Bianka left Honduras when her sister was no longer able to care for her. (AE 9-10.)

According to Gladys, Bianka was fathered by Jorge, a resident of Honduras. (AE 331.) Gladys testified that she and Jorge never married, but were in a relationship for about fifteen years and had four children together, including Bianka. (AE 303.) Gladys also testified that Jorge beat her while she was pregnant with Bianka, that he left her during the pregnancy, that he never contacted Bianka or provided for her, and that he said he would rather see Bianka dead than have to support her. (AE 332-342.)

On December 12, 2014, Bianka filed a petition in the California Superior Court for the County of Los Angeles under the Uniform Parentage Act, seeking an order placing her in Gladys' sole custody to ensure Bianka a stable home. (AE 11, 105.)

She also asked the Superior Court to make the three findings needed to seek SIJ classification from the federal government, namely: (1) that she is in her mother's custody, (2) that her reunification with "1 or both" parents in Honduras "is not viable due to [her alleged father's] abuse, neglect, abandonment," and (3) that it would not be in her "best interest to be returned" to Honduras. (8 U.S.C. § 1101(a)(27)(J); *Bianka M.*, *supra*, 245 Cal.App.4th at p. 417.)

Jorge was not named or otherwise identified in this petition and there is no evidence in the record indicating that Jorge was served at the time of filing. (*Bianka M.*, *supra*, 245 Cal.App.4th at p. 418.) Bianka did, however, serve Jorge with her request for

appointment of a guardian ad litem to assist her in the Uniform Parentage Act action. (*Ibid.*)

On April 23, 2015, Bianka filed a pretrial request for order, seeking a custody order and an order containing SIJ findings, based on her representation that her father abandoned her before she was born and physically abused her mother during her pregnancy with Bianka. (*Ibid.*) The request for order indicated that a hearing would take place on July 14, 2015. (*Ibid.*)

On June 3, 2015, Bianka filed a proof of service showing that her counsel had sent Jorge conformed copies of the petition and request for order, together with the supporting documents, via regular U.S. mail, on May 28, 2015. (*Ibid.*; AE 125, 302.) Bianka's counsel also advised Jorge by telephone of the hearing on the RFO. (*Bianka M., supra,* 245 Cal.App.4th at p. 418; AE 126, 301.)

On June 24, 2015, Bianka filed another proof of service, this time showing that Jorge had been personally served with copies of the petition, the RFO, and the supporting documents. (*Bianka M., supra,* 245 Cal.App.4th at p. 418.) None of the documents served on Jorge indicate that Bianka is seeking an abandonment finding. (*Id.* at p. 435.) Jorge never responded, appeared, or participated in the proceedings. (AE 302.)

B. The Superior Court's Decision

The Superior Court held a hearing on July 14, 2015, at which Bianka and Gladys both testified, and issued a decision denying Bianka's petition on August 24, 2015. (*Bianka M., supra,* 245 Cal.App.4th at p. 418.) The Superior Court "noted the

unusual procedural posture of the case and expressed concern that Bianka had not named her alleged biological father as a party in the parentage action[.]" (*Ibid.*) The Superior Court concluded that it could not grant Bianka's request for an order placing her in her mother's sole custody or make a finding that Jorge abandoned her without first determining Jorge's paternity. (*Ibid.*; see AE 309-310.)

The Superior Court also opined (erroneously, as we explain at pages 38-41, below) that parentage actions are *in personam* actions. It therefore concluded that it could not make a custody determination unless and until Bianka joined Jorge and showed that he was subject to personal jurisdiction. (AE 305, 307; see *Bianka M., supra,* 245 Cal.App.4th at pp. 418-419.)

The Superior Court "denied the [request for orders] regarding custody and making SIJ findings, without prejudice to further application after Jorge had been properly joined, personal jurisdiction issues had been resolved, and a determination of parentage had been made." (*Bianka M., supra,* 245 Cal.App.4th at p. 419.)

C. The Court of Appeal's Decision

The Court of Appeals affirmed the Superior Court's decision in a published opinion dated March 2, 2016. (*Bianka M., supra,* 245 Cal.App.4th 406.)

The Court of Appeal acknowledged that "[i]t is the federal government, through the [USCIS], which makes the determination to grant (or deny) the child's petition for adjustment of status." (*Id.* at p. 421.) But the Court added that

Congress and the USCIS appear to "rely upon our state courts to issue orders containing findings required to support an SIJ petition in the context of an ongoing, bona fide proceedings relating to child welfare, rather than through specially constructed proceedings designed mainly for the purpose of issuing orders concerning SIJ findings." (*Id.* at p. 422.) "As a practical matter," therefore, the Court concluded, "[California] courts ... should bear in mind the factors considered by the USCIS when [they] review[] a petition for SIJ status." (*Id.* at pp. 421-422.) Because the Court inferred that Bianka's custody action was "brought only to obtain SIJ findings," it held that it "was not a bona fide custody proceeding under the [Uniform Parentage Act]." (*Id.* at p. 428.)

The Court of Appeal also agreed with the Superior Court "that a request for sole legal and physical custody in a parentage action necessarily requires a court to consider the parentage of both parents[,]" and that, because Jorge's identity and whereabouts were known, it was not an abuse of discretion to require his joinder. (*Id.* at p. 419; see *id.* at pp. 424-425, 430.) The Court recognized that it would be difficult for Bianka to establish personal jurisdiction over Jorge, and suggested that she might obtain a stipulation of parentage from him. (*Ibid.*)[4]

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[4] The Court agreed with Bianka that "abandoned" should be defined under Family Code Section 3402, subdivision (a), to mean "left without provision for reasonable and necessary care or supervision," rather than under Family Code Section 7822, which requires a finding of intent to abandon. (*Bianka M., supra*, 245 Cal.App.4th at p. 424.)

This Court granted review on May 25, 2016, and Petitioner filed her opening brief on the merits on July 25, 2016. On November 16, 2016, this Court requested that the undersigned *amicus* file a brief in this case, to which Petitioner may respond.

LEGAL DISCUSSION

I. AS A MATTER OF FEDERAL AND CALIFORNIA STATE LAW, THE SUPERIOR COURT CAN AND MUST MAKE SIJS FINDINGS WITHOUT CONSIDERING THE "BONA FIDE" NATURE OF THE PROCEEDING.

A. Under Federal Law, the Federal Government Has Responsibility for Determining Whether an Application Is "Bona Fide."

In admonishing trial courts to "bear in mind the factors considered by the USCIS when it reviews a petition for SIJ status," the Court of Appeal took note of the concerns Congress has expressed over potential abuses of the SIJ classification process. (*Bianka M., supra*, 245 Cal.App.4th at pp. 421-422.) But the authority to address these concerns lies exclusively with the federal government.

As noted above, the 1997 version of the SIJ statute provided for the U.S. Attorney General to consent to "the dependency order serving as a precondition to the grant of [SIJ] status." (Dep't of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act 1998, § 113, 8 U.S.C. § 1101 (a)(27)(J), Pub. L. 105-119, 111 Stat. 2440, 2460 (Nov. 26, 1997).) In enacting that provision, Congress stated that it was for the *Attorney General* "to determine that neither the

dependency order nor the administrative or judicial determination of the alien's best interest was sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent resident, rather than for the purpose of obtaining relief from abuse or neglect." (H. Rept. 105-405, 1st Sess., § 113 (Nov. 13 1997).)[5]

In 2008, Congress revised the consent provision to require the Department of Homeland Security (the "DHS"), through the USCIS, to "consent[] to the grant of special immigrant juvenile status" instead of the Attorney General. (TVPRA 2008, § 235, 8. U.S.C. § 27(J)(i), Pub. L. 110-457, 122 Stat. 5044, 5079-80.) A 2009 USCIS memorandum observes that this consent constitutes "an acknowledgement that the request for SIJ classification is bona fide." (D. Nuefeld and P. Chang, *Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions* (USCIS March 24, 2009).)

In 2011, the DHS proposed new Rules, which, although never enacted, charged the *USCIS* with determining "whether the alien has established ... that the State court order was sought primarily to obtain relief from abuse, [or] neglect, ... and not

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[5] Consistent with the traditional division of authority between the federal and state governments, the Committee also clarified that the involvement of the Attorney General was not intended to encroach upon the state court's authority over child welfare determinations: "[t]he conferees intend that the involvement of the Attorney General is for the purposes of determining special immigrant juvenile status and not for making determinations of dependency status." (H. Rept. 105-405, *supra,* § 113.)

primarily for the purpose of obtaining lawful immigration status; and that the evidence otherwise demonstrates that there is a bona fide basis for granting special immigrant juvenile status." (76 Fed. Reg. 54978, 54985 (Sept. 6, 2011).)

And on October 26, 2016 – after the Court of Appeal issued its opinion in Bianka M., and after Petitioner filed her Opening Brief on the Merits in this appeal – the USCIS promulgated new policy guidelines explicitly stating that state courts should apply state law only, and should not usurp the role of the UCSIS in making SIJ determinations. (USCIS Policy Manual, vol. 6, Immigrants, pt. J, Special Immigrant Juveniles (Jan. 5, 2017).) The current USCIS Policy Manual states that the state court's factual findings must be predicated solely on considerations of state law: "[t]here is nothing in the Immigration and Nationality Act (INA) that *allows or directs* a juvenile court to rely upon the provisions of the INA or otherwise deviate from reliance upon state law and procedure in issuing state court orders." (*Id.*, ch. 1, § A, fn.1, emphasis added.)

These interpretations of the SIJ statute make clear that the federal government is the sole authority tasked with deciding whether a request for SIJ classification is bona fide.[6] The Court

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[6] An agency's position that has not been subject to the formal rulemaking process involving notice and comment is not entitled to deference, but may nevertheless serve as persuasive authority. (See *Christensen v. Harris County* (2000) 529 U.S. 576, 587 [agency interpretations that are not the product of formal rulemaking are entitled to respect ... but only to the

of Appeal thus erred as a matter of federal law in ruling that the California trial courts should decide whether an application for custody that requests SIJ classification findings is bona fide.

B. Under California Law, State Courts Are Not to Consider Motive in Making Preliminary Findings for SIJ Status Applicants.

The Court of Appeal also erred as a matter of California law. Before the decision in *Bianka M.*, California courts of appeal consistently cautioned state juvenile courts against encroaching on the role of the USCIS by evaluating the perceived merits of an immigrant's application for SIJ classification.[7]

To the extent any question remains, the California Legislature amended Code of Civil Procedure Section 155 after the Court of Appeal's decision was filed to clarify that "[t]he

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extent that those interpretations have the power to persuade"], internal quotation marks omitted).)

[7] See *Leslie H. v. Superior Court* (2014) 224 Cal.App.4th, 340, 351 (holding that "state court's role in the SIJ process is not to determine worthy candidates for citizenship, but simply to identify abused, neglected, or abandoned alien children under its jurisdiction who cannot reunify with a parent or be safely returned in their best interests to their home country."); *In re Israel O.* (2015) 233 Cal.App.4th 279, 289 (holding that the role of a state court in the SIJ process was to make the prerequisite child welfare factual findings, not to determine the motivation of the child making the application); *Eddie E. v. Superior Court* (2015) 234 Cal.App.4th 319, 329, 331 (holding that "[i]t is not the state court's role to weed out applications based on a court's perception of the lack of good faith of a particular applicant . . . [I]t is the USCIS's role to determine whether the petitioner has applied for SIJ status primarily for the purpose of obtaining relief from abuse, neglect, or abandonment, not the state court's role.").

asserted, purported, or perceived *motivation of the child seeking classification as a special immigrant juvenile shall not be admissible* in making the findings under this section." (Code Civ. Proc., § 155, subd. (b)(2), emphasis added.) Furthermore, the trial court "shall not include nor reference the asserted, purported, or perceived motivation of the child seeking classification as a special immigrant juvenile in the court's findings under this section." (*Ibid.*; see 2015 Cal. Assembly Bill No. 1603, California 2015-16 Regular Session [identifying this revision as a clarification, not a substantive change].)[8]

Because the Legislature has clarified that California courts are not to consider motive or "bona fides" in making SIJ findings, the Court of Appeal's decision to the contrary should be reversed.

II. A SUPERIOR COURT SHOULD ENSURE THAT AN ALLEGED FATHER IS AFFORDED DUE PROCESS – NAMELY, NOTICE AND AN OPPORTUNITY TO BE HEARD AND TO SEEK TO CHANGE HIS PARENTAL STATUS.

The Uniform Parentage Act and the UCCJEA both provide that an alleged father is entitled to notice and an opportunity to be heard and/or to seek presumed father status, which will determine whether he has any further parental rights. If the

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[8] Because the amendment clarifies existing law, rather than changing it, there is no issue of retroactivity. (See *Satyadi v. W. Contra Costa Healthcare Dist.* (2014) 232 Cal.App.4th 1022, 1028-1029, citing *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 471–472, and *Western Security Bank v. Superior* (1997) 15 Cal.4th 232, 243.)

alleged father does not come forward, due process entitles him to nothing more.

A. An Alleged Father Is Entitled to Notice of Status, Custody, and Dependency proceedings.

Under the Uniform Parentage Act,

> [N]otice of [a parentage] proceeding shall be given to every person identified as the biological father or a possible biological father in accordance with the Code of Civil Procedure for the service of process in a civil action in this state at least 10 days before the date of the proceeding, except that publication or posting of the notice of the proceeding is not required.

(Fam. Code, § 7666, subd. (a).) "Proof of giving the notice shall be filed with the court before the petition is heard." (*Ibid.*; see Code Civ. Proc., § 415.40 [service on a person outside the state of California may be made "in any manner provided by this article or by sending a copy of the summons and of the complaint to the person to be served by first-class mail, postage prepaid, requiring a return receipt"].)[9]

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[9] No notice is required under the Uniform Parentage Act when: (1) the "relationship to the child has been previously terminated or determined not to exist by a court"; (2) the "alleged father has executed a written form to waive notice, deny his paternity, relinquish the child for adoption, or consent to the adoption of the child"; (3) the "whereabouts or identity of the alleged father are unknown or cannot be ascertained"; or (4) "the alleged father has been served with written notice of his alleged paternity and proposed adoption, and he has failed to bring an action [to determine existence or nonexistence of parent and child relationship] pursuant to subdivision (c) of Section 7630 within 30 days of service of the notice or the birth of the child, whichever is later." (Fam. Code, § 7666, subd. (b).)

Under the UCCJEA, "[n]otice must be given in a manner reasonably calculated to give actual notice but may be by publication if other means are not effective." (Fam. Code, § 3408, subd. (a).) "Proof of service may be made in the manner prescribed by the law of this state or by the law of the state in which the service is made." (*Id.*, subd. (b); see also Fam. Code, § 3425, subd. (a) ["Before a child custody determination is made under this part, notice and an opportunity to be heard in accordance with the standards of Section 3408 must be given to all persons entitled to notice under the law of this state as in child custody proceedings between residents of this state[.]"].)

California courts have recognized that the rules for giving notice under the UCCJEA are not as "detailed and stringent as the rules for service of summons and proof of service in ordinary civil actions[.]" *In re Marriage of Torres* (1998) 62 Cal.App.4th 1367, 1379.) California courts have thus approved notice in UCCJEA cases where notice was served by UPS or fax (*id.* at p. 1380) and where it was provided orally to the absent parent's attorney in open court (*Nurie, supra,* 176 Cal. App. 4th at p. 494).

The *manner* of service employed by Bianka here – via U.S. mail – was proper, as the courts implicitly recognized. The *content* of the notice provided, however, was probably deficient.

First, as the Court of Appeal observed, Jorge did not receive notice that "Bianka seeks an order specifically finding that Jorge abandoned her and/or committed acts of domestic violence against Gladys," because the documents served on him did not

set forth all of the requested SIJ findings. (*Bianka M., supra*, 245 Cal.App.4th at p. 435.)

While the UCCJEA does not indicate whether an absent parent must be put on notice when a party seeks findings of abandonment or abuse, California statutes regulating dependency proceedings, which are initiated by a probation officer or social worker seeking to remove a child from parental custody or terminate the rights of a parent who abuses or abandons her, are instructive.

In such cases, California requires that the child's mother and "the father or fathers, presumed and alleged," be given notice of the petition. (Welf. & Inst. Code, § 290.2; see also *id.*, § 300.2 [dependency statutes serve "to provide maximum safety and protection for children who are currently being physically, sexually, or emotionally abused, being neglected, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm."].)[10] Dependency law further requires that "each alleged father" who can be identified and located "shall be provided notice ... that the child is the subject of proceedings under [Welf. & Inst. Code] Section 300 and that the proceedings could result in the termination of parental rights[.]" (*Id.*, § 316.2.)

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[10] The UCCJEA applies to allegations of abuse and abandonment, and covers dependency proceedings in interstate and international cases. (*In re M.M.* (2015) 240 Cal.App.4th 703, 715.)

Although Bianka does not expressly seek termination of Jorge's parental rights (if any), and it is not clear that SIJ findings result in termination of parental rights in any event, she does seek findings that Jorge abandoned her and abused her mother. The Court of Appeal thus properly ruled that "Bianka must provide Jorge with notice of the specific findings of abuse, neglect or abandonment she seeks." (*Bianka M., supra*, 245 Cal.App.4th at pp. 435-436 [observing that, "[i]t would be extremely problematic for our courts to make a factual finding of abuse ... where the alleged abuser did not have notice of and an opportunity to rebut the allegation."]; but cf. *In re J.H.* (2007) 158 Cal.App.4th 174, 183-185 [holding that, "[u]nless there is no attempt to serve notice on a parent, ... errors in notice do not automatically require reversal but are subject to the harmless beyond a reasonable doubt standard of prejudice[,]" and concluding that failure of notice was harmless where father "knew about the dependency proceedings at some point" but "expressed no interest or willingness to reunify with [the child]"], citations omitted.)

The Court of Appeal also expressed concern that, while Bianka filed a proof of service representing that Jorge was "personally served with copies of the petition, the RFO and the supporting documents," "[t]here is no indication in the record these legal documents were translated from English into Spanish." (*Bianka M., supra*, 245 Cal.App.4th at p. 418.) The Court of Appeal said nothing further about this matter, but California dependency law recognizes a parent's right to receive

notice in a language he understands. California Rules of Court, Rule 5.667(b), as amended in 2006, requires that a parent or guardian who does not read English must receive notice in the language he is believed to speak. This Court could therefore conclude that, if the Superior Court finds that Jorge does not speak or read English, it should require Bianka to serve him with copies of the relevant documents, including the requested SIJ status findings, translated into Spanish.

B. An Alleged Father Is Also Entitled to an Opportunity to Be Heard and to Seek Presumed Father Status.

As the Court of Appeal recognized, California law accords additional due process rights to fathers in parentage, custody, and dependency actions based on their status as presumed, biological, or alleged fathers. (*Bianka M., supra*, 245 Cal.App.4th at p. 426, citing *Francisco G. v. Superior Court* (2001) 91 Cal.App.4th 586, 595 [discussing father's status in dependency action]; *Zacharia D., supra*, 6 Cal.4th at pp. 448-449 [same]; see also *Gabriel P. v. Suedi D.* (2006) 141 Cal.App.4th 850, 857 [discussing unwed father's status in his paternity action].)

An "alleged" father is one "who may be the father of a child, but whose biological paternity has not been established, or, in the alternative, has not achieved presumed father status." (*Zacharia D., supra*, 6 Cal. 4th at p. 449, fn. 15.) "A biological or natural father is one whose biological paternity has been established, but who has not achieved presumed father status" as defined in Family Code Section 7611. (*Ibid.*) A "presumed" father is one can show that he was married to the mother at the time of birth;

that he signed a voluntary declaration of paternity; that he married or attempted to marry the child's mother after the child is born, and agreed either to have his name on the birth certificate or to provide child support; or that he "receiv[ed] the child into his or her home and openly [held] the child [out] as his ... natural child." (Fam. Code, § 7611.)[11]

As the Court of Appeal here recognized, "[p]resumed fathers are vested with greater parental rights than alleged or biological fathers." (*Bianka M., supra*, 245 Cal.App.4th at p. 426, citing *Zacharia D., supra*, 6 Cal.4th at pp. 448-449.) Alleged or biological fathers have limited due process rights: they are entitled only to notice, an opportunity to be heard, and an opportunity to seek presumed father status. An alleged father's "'desire to establish a personal relationship with [his] child, without more, is not a fundamental liberty interest protected by the due process clause.'" (*In re A.S.* (2009) 180 Cal.App.4th 351, 359, quoting *In Re Christopher M.* (2003) 113 Cal.App.4th 155, 160 [observing that "'[p]arental rights do not spring full-blown from the biological connection between parent and child. They

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[11] Similar rules apply in dependency cases. A parent seeking to establish a parent-child relationship sufficient to avoid the termination of parental rights must show that he or she has "maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (Welf. & Inst. Code, § 366.26, subd. (c)(1)(A); see *In re Hunter S.* (2006) 142 Cal.App.4th 1497, 1504 ["lack of visitation may virtually assure[ ] the erosion (and termination) of any meaningful relationship between [parent] and child."], citation and quotations omitted.)

require relationships more enduring.'"], quoting *Lehr v. Robertson* (1983) 463 U.S. 248, 260.)

California courts have repeatedly and consistently held that, where an alleged father is concerned, due process "requires only that he 'be given notice and 'an opportunity to appear and assert a position and attempt to change his paternity status.'" (*Christopher M., supra*, at pp. 159-160; see also *Francisco G., supra*, 91 Cal.App.4th at p. 596 ["An alleged father is entitled to notice of [dependency] proceedings, which provides an opportunity for him to appear and assert a position."], citation omitted; *Torres, supra*, 62 Cal.App.4th at p. 1378 ["The requirements of due process of law are met in a child custody proceeding when, in a court having subject matter jurisdiction over the dispute, the out-of-state parent is given notice and an opportunity to be heard."], citing *Leonard, supra*, 122 Cal.App.3d at p. 459; *A.S., supra*, 180 Cal.App.4th p. 362 ["This court has consistently held that a biological father's rights are limited to establishing his right to presumed father status, and the court does not err by terminating a biological father's parental rights when he has had the opportunity to show presumed father status and has not done so."], citing *In re Ninfa S.* (1998) 62 Cal.App.4th 808, 811; *In re Spencer W.* (1996) 48 Cal.App.4th 1647, 1652-1655; *In re Jason J.* (2009) 175 Cal.App.4th 922, 935.)

An alleged father may seek to alter his parental status by establishing one or more of the rebuttable presumptions set forth in Family Code Section 7611 (listed above). An alleged father may also seek to join a custody or dependency proceeding. (Cal.

Rules of Court, rule 5.24(c)(2) ["A person who has or claims custody or physical control of any of the minor children subject to the action, or visitation rights with respect to such children, may apply to the court for an order joining himself or herself as a party to the proceeding."].) If the alleged father fails to come forward (or tries but fails to establish presumed father status), his rights extend no further.

In sum, contrary to the Court of Appeal's ruling, California law places the burden on *Jorge* to come forward and show that he is a presumed father, should he wish to do so, and not on *Bianka* to prove that he is her biological or presumed father.

C. Bianka's Due Process Rights, and the Interest of the State as Parens Patriae, Weigh in Favor of Prompt Adjudication and Must Be Taken into Account if Jorge Appears and Establishes Presumed Father Status.

Even if Jorge could establish presumed father status, and nothing in the record suggests he can, the Superior Court would need to balance Jorge's parental rights against the rights of Bianka and the interests of the State as parens patriae.

California courts have repeatedly held that "each child has a compelling interest to live free from abuse and neglect in a stable, permanent placement with an emotionally committed caregiver." (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 223, citing *In re David B.* (1979) 91 Cal.App.3d 184, 192-193.) The State, too, has a compelling interest in seeing that children are protected. (*Id.* ["'The welfare of a child is a compelling state interest that a state has not only a right, but a duty, to protect.'"],

quoting *In re Marilyn H.* (1993) 5 Cal.4th 295, 307; see also *In re Lucero L.* (2000) 22 Cal.4th 1227, 1252 (Chin, J., concurring) ["a parent has important interests at stake, but so too does the child and the state as parens patriae."].)

These interests, like all due process interests, are subject to balancing. "Children have constitutional rights ... and [t]he interest of parents in maintaining their relationship with their children must be balanced with the interests of the child in secure and sufficient parenting." (*Fenn v. Sherriff* (2003) 109 Cal.App.4th 1466, 1485–86, citations omitted.) Even the right of a *presumed* father to custody of his children "is not absolute and must be balanced against a child's fundamental right ... to have a placement that is stable [and] permanent." (*H.S. v. N.S.* (2009) 173 Cal.App.4th 1131, 1139–1140, citing, inter alia, *In re Jasmon O.* (1994) 8 Cal.4th 398, 419; *In re Marilyn H.* (1993) 5 Cal.4th 295, 306.)

If Jorge comes forward *and* succeeds in establishing presumed parenthood, the Superior Court will need to balance his interests against those of Bianka and the State. If he does not come forward or if he comes forward but fails to establish presumed parent status, his interests are "largely abstract" and are fully covered by notice and an opportunity to be heard. (See *Jesusa V., supra,* 32 Cal.4th at p. 611.)

Whether or not Jorge responds, the Superior Court should proceed with alacrity given the minor child's "need for prompt resolution" in matters concerning the family. (*In re Micah S.* (1988) 198 Cal.App.3d 557, 566 (Brauer, J., concurring) [urging

courts to consider "the child's, not the adult's, sense of time"]; see *id.* at p. 567 ["[I]]t is clear that in the balancing process which inheres in any Due Process analysis, the pendulum must swing farther away from preoccupation with parents' rights and towards the protection of the waifs."].)[12]

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[12] The Uniform Parentage Act establishes that an alleged father must come forward within 30 days. (See Fam. Code, § 7666, subd. (b)(4) [notice requirement waived as to an] "alleged father [who] has been served with written notice of his alleged paternity and the proposed adoption, and ... has failed to bring an [parentage] action ... within 30 days of service of the notice"]; see also Cal. Rules of Court, rule 5.24(e)(3) [an "appropriate response" must be filed within 30 days].) The UCCJEA sets no time limit for responding to notice of a custody proceeding, but provides that a party wishing to challenge registration of a foreign custody determination must come forward within 20 days. (Fam. Code, § 3445, subd. (c), (e); cf. *Wipranik v. Superior Court* (1998) 63 Cal.App.4th 315, 319 [holding 10 days was sufficient as a matter of due process to prepare for a Hague Convention hearing].) In light of these authorities and the due process concerns stated above, *amicus* respectfully suggests that this Court instruct the Superior Court to establish on remand a reasonable deadline for Jorge to respond, not to exceed 30 days.

D. The Superior Court Need Not Establish that Jorge is Bianka's Biological Father Before Making SIJ Findings.

1. The Superior Court may confirm Bianka's custodial status without establishing Jorge's status as her biological parent.

Bianka seeks a finding that she has been "placed under the custody of ... an individual" – namely, her mother – "by a State or juvenile court located in the United States," as required by the SIJ statute, 8 U.S.C. § 1101(a)(27)(J).[13] The Court of Appeal properly concluded that, because "the record appears to contain sufficient evidence to establish Gladys is Bianka's natural mother, the question of her parentage is unlikely to present a significant obstacle in this case." (*Bianka M., supra,* 245 Cal.App.4th at p. 425.) The Court of Appeal also correctly observed that, "so long as notice and a meaningful opportunity to be heard are provided, a custodial order may be made at any point in the proceedings." (*Ibid.*, citing Fam. Code, § 3022 [authority to issue custody order at any time].)

The Court of Appeal thus appeared to recognize that California law does not require the Superior Court to establish the parentage of an alleged non-custodial parent before making a finding that a child is in her mother's custody. Indeed, it noted

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[13] As the Superior Court properly found, "[Gladys'] testimony and declaration that she is Bianka's natural mother "is sufficient to establish that she is [Bianka's] mother." (AE031; see Fam. Code, § 7610, subd. (a) [a woman's status as a child's natural mother is established by proof of her having given birth to her].)

that the Uniform Parentage Act does not require the courts to establish the parentage of both parents to make custody orders. (*Bianka M., supra*, 245 Cal.App.4th at p. 428 ["Bianka was not required to name Jorge as a respondent in her action to establish a parental relationship with Gladys."], citing Fam. Code, § 7635, subd. (b); see also *Scott v. Superior Court* (2009) 171 Cal.App.4th 540, 544 ["parentage in favor of the *party seeking custody*/visitation must be established" under the UPA], emphasis added, citations omitted.)

Yet the Court of Appeal also opined that "an uncontested action under the [Uniform Parentage Act] between a child and one parent is not an appropriate means by which to adjudicate both parents' custody rights." (*Bianka M., supra*, 245 Cal.App.4th at p. 427.) *Amicus* respectfully disagrees. As discussed above, the SIJ statute expressly allows the Secretary to accord special immigration status to a child who finds a home in the United States with only one parent. (See 8 U.S.C. § 1101(a)(27)(J) (2008).) As a result, state courts may, as here, find themselves presiding over non-adversarial proceedings in which SIJ findings are requested. While such proceedings are not typical, the Court of Appeal recognized they are not precluded by law. (See *Bianka M., supra*, 245 Cal.App.4th at p. 427 [stating that, while Bianka's parentage action "is certainly a novel use" of the Uniform Parentage Act, it "is not expressly prohibited under the UPA or the applicable rules of court."].)

Because California law allows courts to make custody orders in favor of a natural mother without demanding proof of

the alleged father's parentage, this Court should conclude that the Superior Court need not consider the parentage of an alleged father before making an SIJ finding that a child is in her mother's custody. By the same token, this Court should conclude that the Superior Court may not decline to make a custody finding based on Bianka's failure to establish the parentage of her alleged father.

2. The Superior Court may find that Bianka was abandoned by Jorge without establishing his biological parentage.

Bianka seeks a finding that "reunification with [one] or both of [her] parents is not viable due to abuse, neglect, [or] abandonment," as set forth in the SIJ statute, 8 U.S.C. § 1101(a)(27)(J). The Court of Appeal decided that, "in an action under the [Uniform Parentage Act], it would be inappropriate for a court to find that Bianka's father abandoned her without first determining paternity." (*Bianka M., supra,* 245 Cal.App.4th at p. 427.)

Amicus once again respectfully disagrees. First, as the Court of Appeal recognized, the Uniform Parentage Act does not require *both* parents to be named in a parentage action. (*Bianka M., supra,* 245 Cal.App.4th at p. 428.) Second, we have found nothing in the law that requires the Superior Court to make a finding that an alleged father is a biological father before it makes a finding of abuse or abandonment. As discussed above, a superior court may terminate the parental rights of an alleged or biological father who fails to come forward or is unable to change his parental status after receiving proper notice.

Accordingly, if Jorge fails to come forward after receiving proper notice, the Superior Court should proceed to make the second SIJ finding based on the undisputed testimony of Bianka and Gladys.[14]

E. The Superior Court may make SIJ findings without joining or acquiring personal jurisdiction over a non-responsive alleged father.

1. Joinder is neither indispensable for the court to make an order nor necessary to the enforcement of any judgment.

The Court of Appeals recognized that if Bianka's alleged father could not "be located or identified, joinder would be inappropriate." (*Bianka M., supra*, 245 Cal.App.4th at p. 430-434.) The Court nevertheless ruled that it was appropriate for the Superior Court to order that Jorge be joined, albeit under the permissive joinder section of California Rules of Court, rule 5.24(e)(2), because he *can* be located and identified. (*Id.* at p. 429 [disagreeing with Superior Court that joinder was mandatory under Cal. Rules of Court, rule 5.24(e)(1)].)

The permissive joinder provision of the California Rules of Court provides that "[t]he court may order that a person be joined as a party to the proceeding if the court finds that it would be *appropriate* to determine the particular issue in the proceeding

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[14] The SIJ statute also requires a finding that SIJ classification is in the best interest of the child. (8 U.S.C. § 1101(a)(27)(J).) The Superior Court found that it would not be in Bianka's best interests to be returned to Honduras. (AE 311.)

and that the person to be joined as a party is either *indispensable for the court to make an order* about that issue *or is necessary to the enforcement* of any judgment rendered on that issue." (Rule 5.24(e)(2), emphasis added.)

The Court of Appeal appeared to believe that Bianka must join Jorge in order to protect his due process rights, "especially ... given the serious nature of the allegations (abandonment, neglect, domestic violence)[.]" (*Bianka M., supra*, 245 Cal.App.4th at p. 419.) But due process does not require joinder of both parents in a parentage, custody, or dependency proceeding, even if the proceedings may result in findings of abuse or abandonment and/or lead to termination of parental rights.

Because the Superior Court may accord Jorge due process without making him a party, joinder is not "indispensable for the court to make an order"; nor is it "necessary to the enforcement" of any judgment. (Cal. Rules of Court, rule 5.24(e)(2).) This Court could therefore find that the Court's decision was an abuse of discretion, based on these legal conclusions. (*Schnabel v. Superior Court* (1994) 30 Cal.App.4th 758, 763.)

If this Court decides that joinder was not an abuse of discretion, however, it should instruct the Superior Court on remand to "direct that a summons be issued" pursuant to California Rules of Court, rule 5.24(e)(3). Pursuant to that rule, Jorge will have 30 days after service to file an appropriate response. (*Id.*) If he fails to do so, the Superior Court may and should proceed without him.

2. The Superior Court may make SIJ findings without establishing personal jurisdiction over a non-responsive alleged father.

The Court of Appeal ruled that "Bianka will not only need to join Jorge to the action but must also establish a basis for personal jurisdiction over him," although it acknowledged that this "may prove difficult for Bianka and other similarly situated children seeking SIJ status." (*Bianka M., supra,* 245 Cal.App.4th at pp. 430-431.)[15]

The Court reasoned that, "in the absence of personal jurisdiction over Jorge, any order regarding his parentage and any default judgment would necessarily be void and subject to a motion to vacate in the future." (*Id.* at p. 431, citing *County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1227 [holding judgment of paternity void in the absence of personal jurisdiction over father].) But *Gorham* does not hold so broadly.

Gorham was a case involving an order of child support, as were the cases on which it relied. (See *Gorham, supra,* 186 Cal.App.4th at p. 1227 ["in any action 'to enforce a duty of support or some other personal obligation growing out of the parent-child relationship, personal jurisdiction over [a] defendant [is] essential.'"], quoting *Hartford v. Superior Court* (1956) 47

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[15] As the Court of Appeal recognized, "the UCCJEA allows a parent to participate in pending child custody proceedings without submitting to personal jurisdiction in this state." (*Bianka M., supra,* 245 Cal.App.4th at p. 432, citing Fam. Code, § 3409, subd. (a).)

Cal.2d 447, 454.) *Gorham* does not speak to "status" determinations like custody, which is at issue here.

As the court in *Marriage of Leonard, supra,* explained more than thirty-five years ago, "status" is "a relationship between two persons, which is not temporary in its nature, is not terminable at the mere will of either and with which the State is concerned. Marriage is a status ... and so too is the relationship of parent and child, whether natural or adoptive." (122 Cal.App.3d at pp. 453-454, citing *Shaffer v. Heitner* (1977) 433 U.S. 186, 208 fn.30.) The concept of "status" in a child custody proceeding "implies more than the state's concern with the relationship of the parties. It encompasses the right and obligation of the state in its parens patriae role to consider the welfare of the child subject to its jurisdiction and to make a determination that is in the best interests of the child." (*Id.* at p. 454, citing, inter alia, *Stanley v. Illinois* (1972) 405 U.S. 645, and observing that "there are many custody proceedings where an absent parent cannot be located and a requirement of personal jurisdiction would prevent a valid custody order"].)

The drafters of the UCCJEA likewise remarked that, "[t]here is no requirement for technical personal jurisdiction, on the traditional theory that custody determinations, as distinguished from support actions, are proceedings in rem or proceedings affecting *status*." (UCCJA (1988) § 12 comment, 9 U.L.A. 274 (1988); *see* Barbara Ann Atwood, *Child Custody Jurisdiction and Territoriality*, 52 Ohio St. L.J. 369, 403 (1991); Fam. Code, § 3421 , subd. (c) ["Physical presence of, or personal

jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination."].)[16]

California courts have thus (until now) uniformly held that a trial court with subject matter jurisdiction need not establish personal jurisdiction over an absent parent before ruling on custody issues. As the court in *Marriage of Leonard*, *supra*, stated:

> Personal jurisdiction over the out-of-state parent is not required to make a binding custody determination, entitled to recognition by other states under both the UCCJA requirement of comity ... and the standards of the Full Faith and Credit Clause of the United States Constitution.

(122 Cal.App.3d at p. 459, citation omitted; accord *Torres, supra*, 62 Cal.App.4th at pp. 1378-1379; *In re Marriage of Fitzgerald & King* (1995) 39 Cal.App.4th 1419, 1428-1429; see also *Nurie*, *supra*, 176 Cal.App.4th at p. 494 [rejecting absent mother's claims that order awarding custody to father violated due process, because mother received proper notice but forfeited her rights when she "simply failed to avail herself" of her opportunity to be heard].) "Indeed," one court ruled, "requiring personal jurisdiction] would thwart the purpose of the [UCCJA], which is

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[16] "[W]ith the exception of adoption, ... virtually all cases that can involve custody of or visitation with a child" are "'custody determination[s]'" under the UCCJEA. (Preamble to UCCJEA, § 4 [cases may involve "neglect, abuse, dependency, wardship, guardianship, termination of parental rights, and protection from domestic violence proceedings"].)

to provide a forum to resolve custody issues." (*Fitzgerald, supra,* 39 Cal.App.4th at p. 1429.)

The Vermont Supreme Court recently followed *Marriage of Leonard* in its decision in *In re R.W.* (Vt. 2011) 39 A.3d 682, citing the case for the proposition that "status jurisdiction applies to cases involving termination of parental rights. ... and is a matter of state concern." (*Id.* at p. 693, citing *Leonard, supra*; see *id.* [concluding that "a child's home state has jurisdiction to adjudicate the status of a child present there even if the parents lack minimum contacts with the forum."]; see also *id.* at pp. 692, 696-697, and 694 [listing cases applying status jurisdiction to both custody and termination proceedings]; accord *Hudson v. Hudson* (1983) 35 Wash. App. 822, 833 [holding that "a petitioner need not demonstrate minimum contacts ... between the absent parent and the forum in custody proceedings" under that state's enactment of the UCCJA]; see also J. M. Shaughnessy (2015) *The Other Side of the Rabbit Hole: Reconciling Recent Supreme Court Personal Jurisdiction Jurisprudence with Jurisdiction to Terminate Parental Rights*, 19 Lewis & Clark L.Rev. 811 [817-827 [discussing jurisdiction under the UCCJEA].)[17]

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[17] While Bianka does not seek a protective order in this case, a number of out-of-state courts have applied status jurisdiction in actions seeking such orders. (E.g., *Hemenway v. Hemenway* (Vt. 2010) 992 A.2d 575, 581–582 ["A protective order which 'prohibits the defendant from abusing the plaintiff ... serves a role analogous to custody or marital determinations, except that the order focuses on the plaintiff's protected status'"], quoting *Caplan v. Donovan* (Mass. 2008) 879 N.E.2d 117, 122-124; see also *Bartsch v. Bartsch* (Iowa 2001) 636 N.W.2d 3, 6-10

Because Bianka does not seek to impose any obligations, financial or otherwise, on Jorge through this action, personal jurisdiction is not required here under the UCCJEA as enacted in California and interpreted by California courts.

In sum, a superior court need not join or establish personal jurisdiction over an alleged father to make a binding custody or dependency decision that imposes no obligations on him. This Court should conclude that the Superior Court in this case need not join or establish jurisdiction over Jorge to make SIJ classification findings.

F. The Court of Appeal's suggestion that Bianka seek a stipulation of parentage from Jorge is contrary to federal law and Bianka's due process rights.

Mistakenly believing that SIJ classification findings made by a superior court lacking personal jurisdiction over Jorge would be void, the Court of Appeal suggested that a child could ask "the nonresident parent [to] stipulate[] to parentage." (*Bianka M., supra*, 245 Cal.App.4th at p. 431 ["that stipulation constitutes a general appearance, and establishes personal jurisdiction, in the lawsuit."].)

[same]; but cf. *Mannise v. Harrell* (N.C. 2016) 791 S.E.2d 653, 660; *Fox v. Fox* (Vt. 2014) 106 A.3d 919, 927 [disagreeing]; see also Note, *Developments in the Law – The Constitution and the Family: State Interests in the Family* (1980) 93 Harv. L. Rev. 1198; A. A. Dorland, Note, *Civil Procedure-Orders for Child Protection and Nonresident Defendants: The UCCJA Applies and Minimum Contacts Are Unnecessary* (1999) 25 Wm. Mitchell L. Rev. 965.)

As set forth above, the Superior Court need not establish personal jurisdiction over Jorge before making the SIJ classification findings, so the proposed stipulation is not necessary. It is also contrary to the INA, which provides that a child seeking SIJ classification "shall not be compelled to contact the alleged abuser":

> An alien described in section 1101(a)(27)(J) of this title who has been battered, abused, neglected, or abandoned, shall not be compelled to contact the alleged abuser (or family member of the alleged abuser) at any stage of applying for special immigrant juvenile status, including after a request for the consent of the Secretary of Homeland Security under section 1101(a)(27)(J)(iii)(I) of this title.

(8 U.S.C. § 1357(h).)

The purpose of this provision is "to ensure that abusers and criminals cannot use the immigration system against their victims," e.g., by "interfering with or undermining their victims' immigration cases, and encouraging immigration enforcement officers to pursue removal actions against their victims." (146 Cong. Rec. H9046 (2000), at 126, H.R. Rep. No. 109-233 (2000) ["This Committee wants to ensure that immigration enforcement agents and government officials ... do not initiate contact with abusers, call abusers as witnesses or rely[] on information furnished by or derived from abusers to apprehend, detain and attempt to remove victims[.]"].) This reasoning applies with equal weight at the state court level.

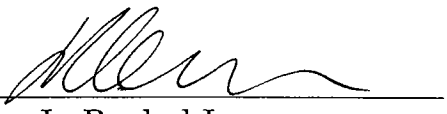
The Superior Court and Court of Appeal were properly concerned with protecting Jorge's due process rights. But California also has a compelling interest in protecting Bianka's

rights. As discussed above, California courts have repeatedly held that "each child has a compelling interest to live free from abuse and neglect in a stable, permanent placement with an emotionally committed caregiver." (*In re Dakota H.*, *supra*, 132 Cal.App.4th 212, 223.) "'The welfare of a child is a compelling state interest that a state has not only a right, but a duty, to protect.'" (*Ibid.*, citation omitted.)

CONCLUSION

For the foregoing reasons, this Court should reverse the Court of Appeal's decision denying Bianka's request for writ relief. It should order the Court of Appeals to remand with instructions to the Superior Court to grant Bianka's custody request and make the requested SIJ findings, once Jorge has received proper notice of the order and findings that Bianka seeks and has had a reasonable amount of time in which to respond.

Dated: February 14, 2017 **BARNES & THORNBURG LLP**

By 

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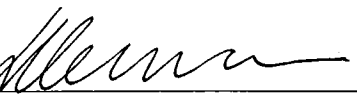
One of the Attorneys for *Amicus Curiae*

CERTIFICATE OF COMPLIANCE

[Cal. Rules of Court, Rule 8.204(c)]

This brief consists of 12,791 words as counted by the Microsoft Word version 2010 word processing program used to generate the brief.

Dated: February 14, 2017 **BARNES & THORNBURG LLP**

By 

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PROOF OF SERVICE BY OVERNIGHT MAIL

[C.C.P. § 1013(c)]

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, Jessica L. Stephens, declare as follows:

I am employed in the County of Los Angeles, State of California, and over the age of eighteen years. I am not a party to the within action. I am employed by Barnes & Thornburg LLP, and my business address is 2029 Century Park East, Suite 300, Los Angeles, California 90067. I am readily familiar with the firm's practice of collection and processing correspondence for mailing with an overnight/express mail carrier. Under that practice it would be deposited with an overnight/express mail carrier on that same day thereon fully prepaid at Los Angeles, California in the ordinary course of business. The envelope was sealed and placed for collection and mailing on that date following ordinary business practices.

On February 14, 2017 I served the within document entitled: **BRIEF OF *AMICUS CURIAE* AT THE REQUEST OF THE CALIFORNIA SUPREME COURT** on the parties in the action by placing a true copy thereof in an envelope addressed as follows:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on February 14, 2017 at Los Angeles, California.

Print Name: Jessica L. Stephens

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