In the Supreme Court of the State of California

BIANKA M., **Petitioner,** **v.** **THE SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,** **Respondent,** **GLADYS M.,** **Real Party in Interest.**	Case No. S233757

Second Appellate District, Division Three, Case No. B267454

AMICUS BRIEF OF ATTORNEY GENERAL XAVIER BECERRA IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

LEGISLATION

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATEMENT OF INTEREST

This case presents questions of substantial importance to the Attorney General and the State of California.[1] Congress created "Special Immigrant Juvenile" (SIJ) status for vulnerable children who have immigrated to the United States, and who cannot be reunified with a parent outside of this country because of abuse, neglect, or abandonment. A child who attains this status and receives an SIJ visa may then apply to obtain permanent residency. Thousands of children who potentially satisfy the SIJ criteria live in California. Many of them, including petitioner Bianka M., came to our country from Central American nations that suffer from crime, violence, and a lack of economic opportunity. The decision of the Court of Appeal below would make it exceedingly difficult for a substantial category of these children to seek an SIJ visa from the federal government—children like Bianka, who are living with one parent in California, and who allege that they have been abused, neglected, or abandoned by another parent who lives abroad. California has a *parens patriae* interest in protecting the welfare of these children and ensuring that they can pursue any substantial claim for remaining lawfully in the United States under the SIJ statute. That interest is heightened by recent events in which our immigrant population has become the target of fear-mongering and overt political attacks.

The Attorney General also has an interest in ensuring that California's laws are correctly interpreted and applied. In this case, the lower courts held that Bianka could not pursue a state-court order finding that she satisfies the SIJ criteria—a prerequisite to applying for an SIJ visa with the federal government—without first joining her alleged father and

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[1] This brief is filed pursuant to rule 8.520(f)(8) of the California Rules of Court.

establishing that the court has personal jurisdiction over him. The law does not support that joinder requirement. Moreover, existing law adequately protects the interests of foreign parents in this type of proceeding by requiring that they receive notice and an opportunity to be heard before the family court takes action. The Court of Appeal's analysis also stands in tension with Code of Civil Procedure section 155, which streamlines the state portion of the SIJ visa process by directing that the superior courts—including the "family court divisions"—"shall issue" an SIJ order when presented with evidence that a child satisfies the criteria.[2]

ARGUMENT

In recent years, thousands of children have immigrated to California from Mexico and Central America. Many of these children were abandoned, abused, or neglected by a parent in their country of origin, and are eligible for SIJ status (and permanent residency in the United States) based on that mistreatment. These children cannot pursue an SIJ visa from the federal government, however, without first obtaining an order from a state court finding that they satisfy the SIJ criteria. For children like petitioner Bianka M., living with one parent in California, who are not a party to any ongoing dependency or delinquency proceeding, the only way to secure such an order is by initiating a proceeding in the family court.

Bianka properly initiated a family court proceeding, asking the court to make a maternity determination regarding her mother, Gladys M.; to award Gladys sole legal and physical custody over her; and to issue an

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[2] The State agrees with Bianka, and the court-appointed amicus curiae, that a superior court may not deny a child's request for an SIJ order on the ground that the request was not made during a "bona fide" child welfare proceeding. (See PBOM 19-30; Brief of Amicus Curiae L. Rachel Lerman, pp. 17-21.) This brief does not offer further argument on that issue.

order finding that Bianka satisfies the criteria for SIJ status because she was abandoned by her alleged father, Jorge, who lives in Honduras. She served copies of her parentage petition and her request for SIJ and custody orders on Jorge. So far as the State is aware, Jorge has never claimed custody or visitation rights over Bianka, or disputed any of the allegations Bianka has made against him. Nevertheless, the family court insisted that Bianka's action could not proceed until she had joined Jorge as a party and established personal jurisdiction over him in California. The practical consequence of that decision, which the Court of Appeal affirmed, is to bar Bianka from pursuing an SIJ visa—unless the man whom she accuses of abandoning her decides to submit, voluntarily and affirmatively, to the personal jurisdiction of a California family court.

The rulings of the lower courts in this case may have been founded on an understandable desire to protect the rights of an absent party, but they are neither necessary for that purpose nor consistent with the law. Under the circumstances of this case, neither the Rules of Court, nor the Family Code, nor any other law required Bianka to join Jorge as a party to her parentage action, and the family court abused its discretion by requiring joinder of Jorge in the absence of any such requirement. Jorge's participation was not necessary to the just resolution of any of the issues Bianka sought to litigate, and the joinder order not only delayed but entirely frustrated the proceedings. Nor was joinder necessary to protect Jorge's interests. The law requires that natural, presumed, and alleged parents must receive notice and an opportunity to be heard before an action such as this moves forward, and the record reflects that Jorge received the required notice in this case. Nothing more was required to ensure fairness to all potentially concerned parties while allowing Bianka to proceed with an action that is necessary for her to establish her legal rights and protect her present and future welfare.

It critically important to Bianka—and to the State—that this Court swiftly resolve her writ proceeding. It has been nearly two years since Bianka filed her request for an SIJ order in the family court. Without that order, she is unable to pursue an SIJ visa with the federal government, which could allow her eventually to obtain lawful permanent residency in the United States. Meanwhile, members of Congress have introduced proposals to further restrict the availability of SIJ visas in the future.[3] And the federal government has apparently embarked on an expanded effort to apprehend and remove immigrants who are here without visas or other legal documentation.[4]

I. CALIFORNIA HAS A STRONG INTEREST IN ENSURING THAT CHILDREN LIKE BIANKA CAN PURSUE SIJ VISAS

Congress established SIJ status to protect a subset of immigrant children for whom removal would be especially dangerous. Thousands of children who are potentially eligible for SIJ status live in California, and this State has a *parens patriae* interest in protecting their health and well being. In service of that interest, our Legislature has adopted laws to facilitate and streamline the SIJ process. A substantial portion of SIJ-eligible children, including Bianka, live with one of their parents in California and can only obtain an SIJ order through a family court proceeding. For such children, the joinder requirement imposed by the

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[3] See Sen. No. 52, 115th Cong., 1st Sess. (2017), § 1; H.R. No. 495, 115th Cong., 1st Sess. (2017), § 3; H.R. No. 391, 115th Cong., 1st Sess. (2017), § 3.

[4] See, e.g., John Kelly, Sect. of Homeland Security, mem. regarding Implementing the President's Border Security and Immigration Enforcement Improvements Policies, Feb. 20, 2017, p. 3 <https://go.usa.gov/xXQQC> [as of Apr. 5, 2017] [directing the Commissioner of Customs and Border Patrol to "immediately begin the process of hiring 5,000 additional Border Patrol agents" to "detect, track, and apprehend" undocumented immigrants].

family court in this case would make it exceedingly difficult at best, and impossible at worst, to pursue an SIJ visa.

A. Congress Established SIJ Status to Protect Certain Immigrant Children for Whom Removal from the United States Would Be Particularly Dangerous

Congress created SIJ status to protect especially vulnerable children who cannot be reunited with one or more parent because of neglect, abandonment, or abuse, and whose best interests are not served by returning to their country of origin. (See *In re Israel O.* (2015) 233 Cal.App.4th 279, 283.) While removal can be traumatic for any child, it is particularly dangerous for this class of children. If removed to their country of origin, abused children may end up back in the custody of their abuser. (See, e.g., *Leslie H. v. Superior Court* (2014) 224 Cal.App.4th 340, 345-346.) Abandoned and neglected children may be sent back to a country they know little about, without a parent to provide for and protect them. (See, e.g., *Israel O.*, *supra*, at p. 285.) Moreover, many SIJ-eligible children come from countries marred by crime, violence, and poverty. (See *post*, p. 20.) For those children, the consequences of returning to such a country can be deadly.[5]

Unlike most forms of relief from removal, the SIJ procedure requires children to navigate both state and federal legal systems. (See generally

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[5] Cf. Brodzinsky & Pilkington, *US Government Deporting Central American Migrants to Their Deaths*, The Guardian (Oct. 12, 2015) <https://www.theguardian.com/us-news/2015/oct/12/obama-immigration-deportations-central-america> [as of Apr. 5, 2017] [documenting the cases of three youths sent back to Honduras or Guatemala who were killed within four months of being removed]; De Leon, *Guatemalan Youth Slain 17 Days After Being Deported From U.S.*, Los Angeles Times (May 9, 2004) <http://articles.latimes.com/2004/may/09/news/adfg-deport9> [as of Apr. 5, 2017] [youth removed to Guatemala found dead within 17 days of his return].

Judicial Council of Cal., Memorandum (Sept. 30, 2016) ("Judicial Council Memorandum"), pp. 3-6 <http://www.courts.ca.gov/documents/jc-20141028-item1.pdf> [as of Apr. 5, 2017] [detailing SIJ application process].) While the federal government retains the authority to grant or deny an SIJ petition, state courts "play an important and indispensable role in the SIJ application process." (*Leslie H.*, *supra*, 224 Cal.App.4th at p. 348.) Congress has delegated certain tasks to state courts in light of their "institutional competence . . . as the appropriate forum for child welfare determinations regarding abuse, neglect, or abandonment, and a child's best interests." (*Israel O.*, *supra*, 233 Cal.App.4th at p. 284.)

To begin the SIJ petition process, a child must obtain a state-court order finding that:

> (1) the child is "dependent" upon a juvenile court or has been "committed to, or placed under the custody of" a state entity or other individual or entity;
>
> (2) the child cannot be reunified with "1 or both" parents "due to abuse, neglect, abandonment, or a similar basis found under state law"; and
>
> (3) it is not in the child's "best interest to be returned to [his] or [her] parent's previous country of nationality or country of last habitual residence."

(8 U.S.C. § 1101(a)(27)(J).) Children who live with one parent in the United States, such as Bianka, may establish that they cannot be reunified with "1 or both" parents by "showing an inability to reunify with *one* parent due to abuse, neglect, abandonment, or a similar basis under state law." (See *Eddie E. v. Superior Court* (2015) 234 Cal.App.4th 319, 332, original italics.)[6]

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[6] See also *Israel O.*, *supra*, 233 Cal.App.4th at pp. 290-291; *Marcelina M.-G. v. Israel S.* (N.Y. App. Div. 2013) 112 A.D.3d 100, 102; *In re Estate of Nina L. ex rel. Howerton* (Ill.App.Ct. 2015) 41 N.E.3d 930,

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If (but only if) a state court enters an SIJ order, the child may file an SIJ petition with the United States Citizenship and Immigration Services (USCIS). (*Israel O.*, *supra*, 233 Cal.App.4th at p. 285.) USCIS then conducts its own inquiry into whether the child satisfies the SIJ criteria.[7] If the child meets these requirements, USCIS may grant the petition. (*Ibid.*) Approval of an SIJ petition does not guarantee approval of an application for adjustment of legal immigration status. The child must submit a separate application to USCIS, asking it to adjust his or her status to that of a lawful permanent resident. (8 U.S.C. § 1255.)[8] A lawful permanent resident may become a naturalized citizen after five years. (See *Israel O.*, *supra*, 233 Cal.App.4th at p. 283, citing 8 U.S.C. § 1427(a).)

Federal law caps the number of "special immigrant" visas that USCIS may issue at approximately 10,000 per year. (See Fragomen, et al., *The Basic Employment-Based Preference Structure*, 2 Immigr. Law & Business § 12:2 (2d ed. Apr. 2016 update) [citing 8 U.S.C. § 1153(b)(4)].) Federal law also limits the number of visas USCIS may grant to "natives of any

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938. But see *In re Erick M.* (2012) 284 Neb. 340. As of this writing, the most recent statement of the federal government agreed that a child is eligible for SIJ status if he or she is living in the United States with "the non-abusive custodial parent." (U.S. Citizenship and Immigration Services, Immigration Relief for Abused Children: Special Immigrant Juvenile Status <https://go.usa.gov/xXx6y> [as of Apr. 5, 2017].)

[7] See generally U.S. Citizenship and Immigration Services, Policy Manual, Volume 6, Part J, Chapter 4 - Adjudication <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartJ-Chapter4.html> [as of Apr. 5, 2017].

[8] Children who are already in removal proceedings in immigration court submit their application to the immigration judge. (See 8 C.F.R. § 1245.2(a)(1)(i) [for individuals in removal proceedings, "the immigration judge hearing the proceeding has exclusive jurisdiction to adjudicate any application for adjustment of status"].)

single foreign state . . . ." (See 8 U.S.C. § 1152(a)(2).) These provisions can create a backlog of children who meet the SIJ criteria, but whose status remains unadjusted. The possibility of a backlog underscores the importance, for children who want to obtain an SIJ visa, of obtaining the required state-court order quickly, in order to enter the queue for SIJ status as early as possible.

B. The Number of Immigrant Children Arriving in the United States and the Number of SIJ Petitions Filed Have Jumped in Recent Years

Beginning in late 2011 and early 2012, the United States witnessed a dramatic increase in the number of immigrant children arriving at its borders.[9] During 2011, the U.S. Border Patrol apprehended 16,067 unaccompanied minors.[10] That figure jumped to 24,481 unaccompanied minors in 2012, 38,833 in 2013, and 68,631 in 2014.[11] The Border Patrol apprehended 40,035 unaccompanied minors in 2015 and 59,757 in 2016.[12]

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[9] The data discussed in this section correspond to the fiscal year for the year stated.

[10] See U.S. Border Patrol, U.S. Border Patrol Fiscal Year 2011 Sector Profile, <https://go.usa.gov/xXx6p> [as of Apr. 5, 2017] ("2011 Sector Profile"). Immigrant children who arrive at the border may or may not be accompanied by an adult. Because federal law grants special protections to "unaccompanied alien children," (6 U.S.C. § 279), information about these two categories of minors is kept separately.

[11] See U.S. Border Patrol, U.S. Border Patrol Fiscal Year 2012 Sector Profile, <https://go.usa.gov/xXx6G> [as of Apr. 5, 2017]; United States Border Patrol, U.S. Border Patrol Fiscal Year 2013 Sector Profile, <https://go.usa.gov/xXx6A> [as of Apr. 5, 2017];]; U.S. Border Patrol, U.S. Border Patrol Fiscal Year 2014 Sector Profile, <https://go.usa.gov/xXx6s> [as of Apr. 5, 2017].

[12] See U.S. Border Patrol, U.S. Border Patrol Fiscal Year 2015 Sector Profile, <https://go.usa.gov/xXx6M> [as of Apr. 5, 2017]; U.S. Border Patrol, U.S. Border Patrol Fiscal Year 2016 Sector Profile, <https://go.usa.gov/xXx6e> [as of Apr. 5, 2017] ("2016 Sector Profile").

The number of accompanied minors apprehended by the Border Patrol also grew between 2011 and 2016.[13]

The vast majority of children who have arrived at the United States border since 2011 came here from El Salvador, Guatemala, Honduras, and Mexico. During 2016, for example, more than 98% of unaccompanied minors came from one of those four countries.[14] The most commonly identified reasons for this migration are crime, violence, and lack of educational and economic opportunity.[15] For example, the homicide rates in El Salvador, Honduras, and Guatemala are among the highest in the world.[16] Between 30% and 60% of the population of those three countries lives below the poverty line.[17]

As the number of immigrant children arriving in the United States has increased, so too have the numbers of SIJ petitions received and granted by USCIS.[18] In 2010, USCIS received 1,646 petitions and granted 1,590

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[13] Compare 2011 Sector Profile, *supra* [7,022 accompanied minors apprehended during 2011] with 2016 Sector Profile, *supra* [42,507 accompanied minors apprehended during 2016].

[14] See U.S. Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016 <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016> [as of Apr. 5, 2017]; see also *ibid.* [reporting similar statistics for 2012-2014].

[15] See U.S. Government Accountability Office, Central America: Information on Migration of Unaccompanied Children from El Salvador, Guatemala, and Honduras (Feb. 2015), p. 4, <http://www.gao.gov/assets/670/668749.pdf> [as of Apr. 5, 2017] ("Information on Migration of Unaccompanied Children from El Salvador, Guatemala, and Honduras").

[16] *Id.* at p. 2.

[17] *Ibid.*

[18] See U.S. Citizenship and Immigration Services, Number of I-360 Petitions with a Classification of Special Immigrant Juvenile (SIJ) by Fiscal Year and Case Status 2010-2016, <https://go.usa.gov/xXx6u> [as of Apr. 5,

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petitions; by 2014, those figures had grown to 5,776 petitions received and 4,606 petitions granted.[19] In 2015 and 2016, the number of petitions USCIS received (11,500 and 19,475, respectively) exceeded the total number of special immigrant visas available (around 10,000).[20] The rising number of petitions has created a backlog of children whose SIJ petitions have been granted but who cannot yet file an application for adjustment of status. During 2016, for example, USCIS stopped issuing SIJ visas to most immigrants from El Salvador, Guatemala, Honduras, or Mexico; applicants who did not have an approved SIJ petition by the cut-off date were required to apply for an adjustment of status in a future year.[21]

C. California Has a Strong Interest in Protecting the Ability of Immigrant Children to Apply for SIJ Status

California has a significant interest in ensuring that immigrant children who reside within its borders can fully and effectively pursue any valid claim for remaining in the United States that is available to them. Both this Court and the United States Supreme Court have recognized the State's "'*parens patriae* interest in preserving and promoting the welfare'" of all children who live in California. (*In re Sade C.* (1996) 13 Cal.4th 952,

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2017] ("USCIS Statistics"). Both accompanied and unaccompanied minors may apply for SIJ status. (See Judicial Council Memorandum, *supra*, p. 3, fn. 6.)

[19] USCIS Statistics, *supra*.

[20] *Ibid.*

[21] See U.S. Citizenship and Immigration Services, Employment-Based Fourth Preference (EB-4) Visa Limits Reached for Special Immigrants From El Salvador, Guatemala and Honduras <https://go.usa.gov/xXYba> [as of Apr. 5, 2017]; U.S. Citizenship and Immigration Services, Employment-Based Fourth Preference (EB-4) Visa Limits Reached for Special Immigrants From Mexico <https://go.usa.gov/xXYbC> [as of Apr. 5, 2017].

989, quoting *Santosky v. Kramer* (1982) 455 U.S. 745, 766.) California is currently home to a significant number of immigrant children who have recently entered the United States. Between October 2013 and February 2017, for example, 21,344 unaccompanied minors were released to sponsors in California—more than any other State.[22] Many of these children have a substantial claim that they satisfy the SIJ criteria. Protecting such children from the harmful consequences of improper removal is part of the State's "right" and "duty" to "protect children." (See *In re Phillip B.* (1979) 92 Cal.App.3d 796, 801.)

The State also has a strong interest in keeping families together when possible. A significant number of children who reach the United States unaccompanied are, like Bianka, released by the Border Patrol into the custody of a parent.[23] Many of these children satisfy the SIJ criteria. Allowing them to pursue permanent residency in the United States under the SIJ statute can help keep supportive family units intact, which promotes the "substantial state interests in family stability . . . ." (*In re Jesusa V.*

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[22] The federal agency responsible for the care and custody of unaccompanied minors (the Office of Refugee Resettlement) is required to release unaccompanied minors into the custody of qualified parents, guardians, relatives, or other "sponsors" during the pendency of removal proceedings. (See Office of Refugee Resettlement, Children Entering United States Unaccompanied, Section 2, <http://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2> [as of Apr. 5, 2017].) Of the 164,909 unaccompanied minors released to sponsors between October 2013 and February 2017, 21,344—nearly 13% of the total—were released to sponsors in California. (Office of Refugee Resettlement, Unaccompanied Children Released to Sponsors by State <http://www.acf.hhs.gov/orr/programs/ucs/state-by-state-uc-placed-sponsors> [as of Apr. 5, 2017].)

[23] See, e.g., Hlass, *States and Status: A Study of Geographical Disparities for Immigrant Youth* (2014) 46 Colum. Hum. Rts. L. Rev. 266, 277-278 [about 45 percent of unaccompanied minors were released to parents in 2011 and 2012].

(2004) 32 Cal.4th 588, 611.) Conferring legal status on these children also offers long-range financial benefits to both the child and the State. For example, several studies have concluded that immigrants who attain legal status earn significantly more than those who do not.[24] These increased earnings, in turn, improve the prospects that immigrants and their families will live a stable and successful life, while also boosting the State's economy and increasing tax revenues.[25]

Bianka's case provides a powerful example of the benefits of allowing eligible children to pursue SIJ visas. The family court found that Bianka lives happily with her mother in Los Angeles, where she is "thriving" in school. (2 AE 304; see also opn. p. 6.)[26] The court also found that it is not in Bianka's best interest to be sent back to Honduras, both because of the "overall violence" in that country and because there are no "available relatives to care for" Bianka there. (2 AE 311.) No interest would be served by removing Bianka from her secure and happy home with her mother, and her school where she is learning to become a productive member of our community, and sending her back to Honduras without first allowing her a fair opportunity to pursue permanent residency through the SIJ process.

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[24] See, e.g., Lynch & Oakford, The Economic Effects of Granting Legal Status and Citizenship to Undocumented Immigrants, Center for American Progress (Mar. 20, 2013), p. 4 <https://cdn.americanprogress.org/wp-content/uploads/2013/03/EconomicEffectsCitizenship-1.pdf> [as of Apr. 5, 2017].

[25] *Id.* at p. 2.

[26] "AE" refers to the Petitioner's Appendix of Exhibits.

D. California Has Streamlined the Process for Obtaining an SIJ Order

Consistent with its interests in ensuring that eligible children can pursue an SIJ visa, the State has adopted several laws to make it easier for children to obtain a state-court SIJ order. In 2012, the Legislature passed Senate Bill 1064, mandating that the Department of Social Services provide guidance to counties to assist children with SIJ petitions. (Stats. 2012, ch. 845, § 17, codified at Welf. & Inst. Code, § 10609.97.) Three years later, the State adopted Assembly Bill 900, which gives probate courts jurisdiction to appoint guardians for unmarried individuals between the ages of 18 and 21 "in connection with a petition to make the necessary findings regarding [SIJ] status." (Stats. 2015, ch. 694, § 3, codified at Probate Code § 1510.1, subd. (a).)[27]

Most significant here, the Legislature removed several procedural barriers to obtaining an SIJ order when it added section 155 to the Code of Civil Procedure in 2014. (See Stats. 2014, ch. 685, § 1.) Among other things, section 155 provides that any division of the superior court—including (but not limited to) juvenile, probate, and family courts—has jurisdiction to issue an SIJ order. (Code Civ. Proc., § 155, subd. (a)(1); see also Judicial Council Memorandum, *supra*, p. 7.) It also establishes that a court "shall issue" an SIJ order upon request, so long as there is evidence to support the findings. (Code Civ. Proc., § 155, subd. (b)(1).) At the time the Court of Appeal issued its decision, section 155 provided that the evidence supporting an SIJ finding "may consist of . . . a declaration by the

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[27] Federal law allows individuals up to the age of 21 to apply for SIJ status. (See 8 C.F.R. § 204.11(c)(1).) Prior to Assembly Bill 900, minors in California were largely "unable to obtain the findings from the superior court necessary to seek [SIJ] status and the relief that it was intended to afford them, solely because probate courts [could not] take jurisdiction of individuals 18 years of age or older . . . ." (Stats. 2015, ch. 694, § 1.)

child who is the subject of the petition." (Stats. 2014, ch. 685, § 1.) More recently, the Legislature amended this provision to clarify that a child may satisfy the evidentiary requirements for obtaining an SIJ order based "solely" on her own declaration. (See Stats. 2016, ch. 25, § 1.) The Legislature also amended section 155 to allow superior courts to enter an SIJ order at "any point in a proceeding regardless of the division of the superior court or type of proceeding" if the other requirements for an SIJ order are met, (subd. (a)(2)), and to preclude courts from attempting to assess the "asserted, purported or perceived motivation of the child seeking classification" when issuing SIJ orders (subd. (b)(2)).[28]

The Judicial Council has helped to implement these statutes. In 2014, the Council issued a memorandum to the Presiding Judges and Court Executive Officers of the Superior Courts to help them "anticipate and effectively address issues" arising from section 155 and the "expected increase in SIJ filings in juvenile, family, and probate guardianship proceedings." (Judicial Council Memorandum, *supra*, p. 2.) The Council also adopted several new Rules of Court to guide superior courts in issuing

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[28] The Legislature has taken other steps to assist immigrant children. For example, in 2011, the State passed the "California Dream Act," which, among other things, allows undocumented students who attend California's public universities to apply for private scholarships. (See Stats. 2011, ch. 93, § 4; Stats. 2011, ch. 604, § 2.) In 2013, the State allocated $3 million to California's Department of Social Services to contract with non-profit organizations to provide legal services to unaccompanied minors in removal proceedings. (See Press Release, Governor Edmund G. Brown, *Governor Brown Signs Legislation To Help Unaccompanied Minors* (Sept. 27, 2014) <https://www.gov.ca.gov/news.php?id=18734> [as of Apr. 5, 2017].)

SIJ orders. (See, e.g., Cal. Rules of Court, rules 5.130, 7.1020.) And it created new forms that facilitate the process of pursuing an SIJ order.[29]

E. Children Like Bianka, Who Live with a Parent in California and Are Not the Subject of Dependency or Delinquency Proceedings, May Obtain an SIJ Order Only from the Family Court

The appropriate path for an immigrant child who lives in California to pursue an SIJ order depends on the child's personal circumstances. In some cases, the child is already the subject of an ongoing court proceeding. That is true, for example, of children who have been declared a dependent of the court in dependency proceedings (Welf. & Inst. Code, § 300), or a ward of the court in delinquency proceedings (*id.*, §§ 601, 602). Children in this category may file a request for an SIJ order in the juvenile court as part of their ongoing proceedings. (Code Civ. Proc., § 155, subd. (a)(1); see also Judicial Council Forms, form JV-356.) Other children may pursue an SIJ order in probate court by initiating a guardianship proceeding. (Cal. Rules of Court, rule 7.1020(a), (b); see also Judicial Council Forms, form GC-220.) That avenue is available only to those who satisfy the criteria for appointment of a guardian, such as children who have no living parents, or for whom parental custody would be detrimental. (See, e.g., *In re Guardianship of Olivia J.* (2000) 84 Cal.App.4th 1146, 1152-1153.)

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[29] See Judicial Council Forms, form FL-356, Confidential Request for Special Immigrant Juvenile Findings—Family Law <http://www.courts.ca.gov/documents/fl356.pdf> [as of Apr. 5, 2017]; Judicial Council Forms, form GC-220, Petition for Special Immigrant Juvenile Findings <http://www.courts.ca.gov/documents/gc220.pdf> [as of Apr. 5, 2017]; Judicial Council Forms, form JV-356, Request for Special Immigrant Juvenile Findings <http://www.courts.ca.gov/documents/jv356.pdf> [as of Apr. 5, 2017]. Some of these forms have been adopted as rules of court. (See Cal. Rules of Court, rule 5.7(a) ["All forms adopted or approved by the Judicial Council for use in any proceeding under the Family Code . . . are adopted as rules of court"].)

None of these paths is available to a child like Bianka, who is not the subject of an ongoing dependency or delinquency proceeding but instead is already living happily with one of her parents in California. These children cannot be the subject of a dependency proceeding unless they fall into one of ten specific categories of children who may be adjudicated to be a dependent child of the court. (See Welf. & Inst. Code, § 300.) They cannot file a request in probate court, because the Probate Code precludes a child's parent from being appointed his or her guardian. (Prob. Code, § 1514, subd. (b).) And they cannot institute a delinquency proceeding, which may only be initiated by the State under appropriate circumstances. (See Welf. & Inst. Code, § 602.)

The only path for such children to pursue an SIJ visa runs through family court, where the rules permit them to request an SIJ order in the context of any proceeding "under the Family Code in which a party is requesting sole physical custody of the child." (Cal. Rules of Court, rule 5.130(b)(2); see also Judicial Council Forms, form FL-356.) In some cases, there may be an ongoing family court proceeding in which an SIJ order may be requested, such as a petition for dissolution of marriage or adoption.[30] If there is not, a new proceeding must be initiated.

The Family Code allows a child to initiate such a proceeding by filing a parentage action under the Uniform Parentage Act (UPA), seeking a legal determination that the person she lives with in California is in fact her mother or father. (See Fam. Code, § 7630; see also Judicial Council Forms,

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[30] Bianka's mother cannot file a petition to legally separate from or divorce Bianka's father, because Bianka's parents were never married. Bianka is not likely to be the subject of an adoption petition, because she is living happily with her mother.

form FL-200.)[31] In the context of a parentage action, the child may request an order awarding sole custody to the parent she is living with in California (see Fam. Code, §§ 3021, subd. (f), 3022, 7637), which the court may issue after making a determination of maternity or paternity regarding that parent (see *Scott v. Superior Ct.* (2009) 171 Cal.App.4th 540, 544; opn. pp. 15, 17). After the court has issued a custody order, the child may seek an SIJ order based on evidence of abandonment, abuse, or neglect by a parent. The Court of Appeal observed that this is "a novel use of [the] statutory scheme" governing parentage actions. (Opn. p. 18.) That may be; but, as the Court of Appeal also noted, "such a parentage action is not expressly prohibited under the UPA or the applicable rules of court." (*Ibid.*) And for a child like Bianka, it may be the only way to seek the state-court order that is a prerequisite for pursuing an SIJ visa.

II. THE SUPERIOR COURT ABUSED ITS DISCRETION BY REQUIRING JOINDER OF BIANKA'S ALLEGED FATHER

The rule embraced by the family court and the Court of Appeal in this case imposes a new and additional requirement on Bianka and other children in her position. Under that rule, which would likely prove fatal to the prospects of such children obtaining an SIJ visa, the child may not pursue a custody order or an SIJ order without first naming her absent parent as a party to the family court proceeding and establishing that the court has personal jurisdiction over that person. In the typical case, that requirement will not be satisfied unless the child can secure the voluntary and active cooperation of an absent parent—often residing in a distant

[31] Although parentage actions typically arise out of disputes over child support or custody and visitation rights (see opn. p. 17), nothing in the Family Code precludes a child from filing a parentage petition and asking a court to declare the existence of an uncontested parental relationship.

land—who stands accused of previously neglecting, abandoning, or abusing the child. California law does not support any such joinder requirement.

In imposing this requirement, the lower courts expressed concerns about protecting the interests of parents. (See, e.g., opn. p. 4.) Those concerns are understandable. Parentage actions occur frequently in the family courts of this State. The outcomes can be life-altering. Courts should be vigilant in preserving the ability of all concerned to protect their interests, and should be wary of setting precedents that could have harmful or unintended consequences for other proceedings.

But the Court of Appeal undervalued the protections already in place to safeguard the rights and interests of absent parents. The Family Code requires that every natural parent, presumed parent, or alleged father must receive notice of a parentage action—and an opportunity to be heard—before the action may proceed.[32] The Rules of Court mandate the joinder of any person who claims custody or visitation rights regarding the child who is the subject of the action. When a parent in another country is provided notice of a parentage action concerning a child in California, and asserts a claim of custody or visitation rights, the family court is obligated to join that parent as a party.

A family court is not, however, obligated to order joinder of an alleged father in the circumstances present here: where the action does not seek any determination regarding his paternity and where, after receiving

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[32] A "presumed" parent must fall within one of several categories enumerated in Family Code section 7611. A "natural" parent is one whose biological paternity or maternity has been established, but who has not achieved presumed parent status as defined in Family Code section 7611. (See *In re Zacharia D.* (1993) 6 Cal.4th 435, 449, fn. 15.) An "alleged" father refers to a man who may be the father of a child, but who has not achieved presumed father status or whose biological paternity has not been established. (*Ibid.*)

notice of the action, he has not asserted custody or visitation rights or attempted to participate in the action in any other way. Indeed, under these circumstances, it was an abuse of discretion to require joinder. As explained below, participation by Bianka's alleged father is not necessary or indispensable to the just resolution of any of the issues that Bianka asked the family court to resolve, and requiring joinder has not only delayed but entirely frustrated the proceeding. Moreover, imposing a joinder requirement undermines Code of Civil Procedure section 155, which was adopted to ensure that any child who satisfies the SIJ criteria will be able to seek a predicate order in an appropriate division of the superior court—including in the family court. Requiring the joinder of a distant and allegedly hostile or unfit parent would make it nearly impossible for Bianka, and many other children who are in a similar situation, to seek an SIJ order in California.

A. California Law Protects the Interests of Absent Parents by Requiring Notice and an Opportunity to Be Heard in Parentage Actions

The Family Code does not require that parents, presumed parents, or alleged fathers be made parties to an action under the Uniform Parentage Act. Instead, it directs only that those persons "*may* be made parties." (Fam. Code, § 7635, subd. (b), italics added.) At the same time, the Family Code requires that natural parents, presumed parents, and alleged fathers "*shall* be given notice . . . and an opportunity to be heard." (*Ibid.*, italics added.) Notice must be given at least ten days before the date of the relevant family court proceeding. (Fam. Code, § 7666, subd. (a); see also *id.*, § 7635, subd. (b) [incorporating the notice procedures of section 7666

by reference].)[33] Proof of the notice must be filed with the court before it considers the petition. (*Id.*, § 7666.) The method of giving notice must comply with requirements for service of process in civil actions (*ibid.*), which generally demand personal delivery, first-class mail coupled with an acknowledgement of receipt, or "substitute service" (*i.e.*, personal delivery to another competent person along with sending the documents by first-class mail to the person to be noticed). (Code Civ. Proc., §§ 415.10-415.40; see generally Fam. Code, § 3408, subd. (a) [under the Uniform Child Custody Jurisdiction and Enforcement Act, notice "required for the exercise of jurisdiction when a person is outside this state may be given in a manner prescribed by the law of this state for service of process or by the law of the state in which the service is made"].)[34]

These requirements help to ensure that a natural parent, presumed parent, or alleged father is aware of any ongoing parentage action that might affect his interests, and can seek to participate in that action if he so

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[33] This notice requirement is excused only in a few narrow circumstances, including actions in which the "whereabouts or identity of the alleged father are unknown or cannot be ascertained." (Fam. Code, § 7666, subd. (b)(3).)

[34] To the extent that the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters applies, different service procedures may be required. (See generally *Kott v. Superior Court* (1996) 45 Cal.App.4th 1126, 1133-1136.) The nation where Bianka's alleged father resides, Honduras, is not a signatory to that Convention. (See The Hague Conventions: Signatures, Ratifications, Approvals and Accessions <https://assets.hcch.net/docs/ccf77ba4-af95-4e9c-84a3-e94dc8a3c4ec.pdf> [as of Apr. 5, 2017].) Neither is El Salvador or Guatemala. (*Ibid.*) The requirements of the Inter-American Service Convention and Additional Protocol do not currently apply to people in Honduras (or El Salvador or Guatemala) for the same reason. (See Inter-American Service Convention and Additional Protocol <https://travel.state.gov/content/travel/en/legal-considerations/judicial/service-of-process/iasc-and-additional-protocol.html> [as of Apr. 5, 2017].)

chooses. For example, if an alleged father wishes to claim custody or visitation rights regarding the child, the rules permit him to make an appearance and assert that claim. (See Cal. Rules of Court, rule 5.24(c)(2).) When the person advancing such a claim resides in a different country (or a different part of the United States), practical difficulties associated with participating in a legal proceeding in California can sometimes arise. In appropriate cases, however, tools are available to lessen those difficulties. (See, e.g., Judicial Council Forms, form FL-679 [request for appearance by telephone]; Fam. Code, § 3430, subd. (d) [authorizing court to order a party to pay travel expenses of out-of-state party in custody proceedings]; Fam. Code, § 5700.316, subds. (a), (f) [authorizing party outside state to testify by telephone "or other electronic means" in parentage action]; cf. *In re Marriage of Leonard* (1981) 122 Cal.App.3d 443, 458-459 [discussing similar provisions and concluding that they "minimize the necessity for travel" and lessen the expense associated with "litigating in a forum a continent away"].)[35]

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[35] The court-appointed amicus suggests that the notice in this case "was probably deficient" because it was not translated into "the language [Jorge] is believed to speak." (Brief of Amicus Curiae L. Rachel Lerman, pp. 23, 26.) As a matter of policy, it may be desirable for notice to be translated into the native language of the recipient where practicable. But the relevant statutes and rules do not appear to require translation under the circumstances presented here. (See Fam. Code, §§ 7635, subd. (b), 7666, subd. (a); Code Civ. Proc., §§ 415.10-415.40.) The court-appointed amicus notes that "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." (Brief of Amicus Curiae L. Rachel Lerman, pp. 23, 26.) As the amicus acknowledges, however, that rule is specific to dependency proceedings under Welfare and Institutions Code section 300 *et seq.*; it does not apply to this type of proceeding. In any event, this Court need not resolve this question in the present case.

B. In Circumstances Not Presented Here, Joinder of an Absent Parent May Be Mandatory

Although the Family Code does not itself require the joinder of any absent parent to a parentage action, there are circumstances in which joinder becomes mandatory. California precedent generally requires that the person whose paternity or maternity will be decided by the court must be a party who is subject to the court's personal jurisdiction. (See, e.g., *County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1227 ["[E]ven though a statutory scheme may empower the trial court to determine paternity . . . in a family law matter, such power only extends 'to parties over whom it has personal jurisdiction.'"].) In this case, Bianka satisfied that requirement. Her parentage petition sought to establish maternity, and she named her mother Gladys (a California resident) as the respondent. Because her petition did not seek to establish Jorge's paternity, this precedent did not require Bianka to join him as a party or establish personal jurisdiction over him.

In addition, the family court must "order that a person be joined as party to the proceeding" if it learns that the person "claims custody or visitation rights with respect to" the child at issue. (Cal. Rules of Court, rule 5.24(e)(1)(A).) This mandatory joinder rule protects the interests of those who receive notice of a parentage action and take the affirmative steps necessary to assert custody or visitation rights regarding the child. It does not apply here, however, because Bianka's alleged father has never asserted a claim of custody or visitation rights.[36]

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[36] The Court of Appeal suggested that the rule for mandatory joinder might apply here because "there is no admissible evidence in the record before us which establishes whether Jorge does or does not wish to claim any custody or visitation rights in this case." (Opn. p. 10, footnote omitted.) That misconstrues the rule. Rule 5.24(e)(1) requires mandatory

(continued...)

The approach to mandatory joinder in rule 5.24(e)(1)(A) has additional benefits. If a foreign parent advances a claim of custody or visitation rights in a manner that constitutes a general appearance, that act may "operate[] as a consent to jurisdiction of the person." (*Fireman's Fund Ins. Co. v. Sparks Construction, Inc.* (2004) 114 Cal.App.4th 1135, 1145.)[37] This helps to avoid the possibility that a parentage action brought in California will be stymied by the lack of personal jurisdiction over a natural parent, presumed parent, or alleged father who lives outside California but whose joinder is required by rule 5.24(e)(1)(A).

C. Under the Circumstances of This Case, It Was an Abuse of Discretion to Require Joinder of Bianka's Alleged Father

Even where joinder is not mandatory, the family court has discretion to order joinder in appropriate circumstances. (See Cal. Rules of Court, rule 5.24(e)(2).) In this case, the family court did not exercise that discretion. It relied on rule 5.24(e)(1)'s mandatory joinder provision (see opn. p. 20)—which, as explained above, does not apply here (*ante*, pp. 33-34). The Court of Appeal nonetheless held that the family court acted within its discretion, on the theory that the joinder order would have been appropriate if made under the discretionary joinder provision in rule

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(...continued)
joinder of a person only if the court discovers that he "claims custody or visitation rights." It does not require the other parties to the proceeding to introduce evidence (beyond the provision of notice and a failure to respond) establishing that the person *disclaims* custody or visitation rights.

[37] Cf. 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"]; *In re Vanessa Q.* (2010) 187 Cal.App.4th 128, 135 ["A general appearance occurs when the defendant takes part in the action and 'in some manner recognizes the authority of the court to proceed'"].

5.24(e)(2). That holding was incorrect. Under the circumstances of this case, it would have been an abuse of discretion for the family court to order the joinder of Bianka's alleged father under rule 5.24(e)(2).

The rule governing discretionary joinder in family court proceedings directs that the

> 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 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.

(Cal. Rules of Court, rule 5.24(e)(2); see also Code Civ. Proc., § 389 [joinder of necessary and indispensable parties].) To determine whether it is appropriate to resolve such an issue (and, thus, to require joinder), the family court must consider the "effect upon the proceeding." (Cal. Rules of Court, rule 5.24(e)(2).) In particular, the court must consider: whether "resolving that issue will unduly delay the disposition of the proceeding"; whether "other parties would need to be joined to make an effective judgment between the parties"; whether "resolving that issue will confuse other issues in the proceeding"; and whether "the joinder of a party to determine the particular issue will complicate, delay, or otherwise interfere with the effective disposition of the proceeding." (*Id.*, rule 5.24(e)(2)(A)-(D).)

Rule 5.24(e)(2) does not provide a basis for joinder of Bianka's alleged father. Bianka's parentage petition alleges that Gladys is her mother, and Bianka seeks two orders from the family court: an order awarding sole legal and physical custody to Gladys, and a separate order making the predicate findings necessary to establish Bianka's eligibility for an SIJ visa. The action thus requires the family court to address three core issues: (1) Gladys's maternity; (2) the requested custody order; and (3) the

requested SIJ order. Jorge was not indispensable to the court's resolution of any of those issues, and he was not necessary to the enforcement of any judgment rendered on those issues.

First, Bianka did not seek a determination respecting Jorge's paternity. She only sought a maternity determination regarding Gladys, who was properly named as a party. (See *Gorham*, *supra*, 186 Cal.App.4th at p. 1227.) The State is not aware of any basis for concluding that an alleged *father* is indispensable to a family court's determination of *maternity* under the Uniform Parentage Act.

Second, regarding the custody order, a family court in a parentage action may "make an order for the custody of a child during minority that seems necessary or proper." (Fam. Code, § 3022; see *id.*, § 3021, subd. (f) [noting that section 3022 applies to actions under the Uniform Parentage Act].)[38] Before making such an order, the court generally must establish parentage in favor of the person who will be awarded custody, which requires that person to be named as a party. (See *Scott*, *supra*, 171 Cal.App.4th at p. 544; see also opn. p. 15 ["[I]n an action brought under the UPA, the court must determine parentage of the proposed custodial parent(s) before making a custody order"], italics omitted.) Here, Bianka requested an order awarding sole legal and physical custody to Gladys, which required her to name Gladys as a party.[39] It was not necessary, however, for Jorge to be named as a party. An award of sole custody to one parent

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[38] The court is authorized to make such an order "during the pendency of a proceeding or at any time thereafter." (Fam. Code, § 3022.)

[39] An order of sole legal custody gives one parent "the right and the responsibility to make the decisions relating to the health, education, and welfare of a child." (Fam. Code, § 3006.) An order of sole physical custody directs that the child "shall reside with and be under the supervision of one parent, subject to the power of the court to order visitation." (*Id.*, § 3007.)

may be made without joining the other alleged (or natural or presumed) parent as a party, so long as the absent parent receives notice of the proceeding and an opportunity to be heard. (See *Marriage of Leonard*, *supra*, 122 Cal.App.3d at p. 459 ["Personal jurisdiction over the out-of-state parent is not required to make a binding custody determination"]; see also Fam. Code, § 3406.)

Third, Jorge was not necessary or indispensable to the issuance of an SIJ order. In enacting Code of Civil Procedure section 155, the Legislature adopted an expedited framework, requiring superior courts to issue predicate orders even when the only evidence before the court is a declaration by the child who is the subject of the proceeding. Section 155 does not impose any requirement that the superior court join a child's parents as parties before making the findings required by the SIJ statute. Indeed, the statute contemplates that SIJ orders will be issued in the context of probate and juvenile delinquency proceedings in which parents typically are not parties.[40]

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[40] Probate courts typically issue SIJ orders in a proceeding where the child (or someone else on her behalf) has filed a guardianship petition. (Prob. Code, § 1510.) Guardianship petitions are usually filed when both of the child's parents are dead or where parental custody would be detrimental to the child. (See, e.g., *B.F. v. Superior Court* (2012) 207 Cal.App.4th 621, 628; *Suleman v. Superior Court* (2010) 180 Cal.App.4th 1287, 1295-1297.) Any living parents are entitled to notice of the hearing on such a petition (Prob. Code, § 1511), but, as the Court of Appeal acknowledged, "parents are not parties in a guardianship proceeding." (Opn. p. 26.) The parties to a juvenile delinquency proceeding are typically the State and the child. Although parents have certain rights in such proceedings, and may be represented by their own counsel, they are not themselves parties. (See, e.g., Welf. & Inst. Code, § 630, subd. (a) [notice of detention hearing]; *id.*, § 633 [notice of reasons for custody, nature of proceedings, and right to counsel]; *id.*, § 658, subd. (a) [notice of jurisdiction hearing].)

The family court required Jorge to be joined because it believed it could not issue an order awarding sole custody to Gladys, or an SIJ predicate order, without first determining Jorge's paternity. (See 2 AE 305, 309, 310.) As explained above, however, there was no need to make a parentage determination regarding Jorge before issuing either order. (*Ante*, pp. 35-37.) Moreover, the factors set out in rule 5.24(e)(2) show that it would have been inappropriate for the family court to insist on determining the issue of paternity in this proceeding, even as a discretionary matter. Injecting the issue of paternity into this case threatened to "unduly delay the disposition of the proceeding." (Cal. Rules of Court, rule 5.24(e)(2)(A).) It required joining Jorge and establishing personal jurisdiction over him. At best, that would "complicate, delay, or otherwise interfere with the effective disposition of the proceeding" (*id.*, rule 5.24(e)(2)(D)); at worst, it would prove impossible and obstruct the action altogether. (See opn. p. 22 [acknowledging that establishing personal jurisdiction over a foreign parent "may prove difficult"].)

As the Court of Appeal acknowledged, there are limits on a family court's discretion to order permissive joinder under Rule 5.24(e)(2). (Opn. p. 8.)[41] A trial court's action on a matter resting within its discretion is always "'subject to the limitations of the legal principles governing the subject of its action . . . .' [Citations.]" (*Sargon Enterprises, Inc. v. U. of So. Cal.* (2012) 55 Cal.4th 747, 773.) Any action "'that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an "abuse" of discretion.'" (*Ibid.*)

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[41] Cf. *Morrical v. Rogers* (2013) 220 Cal.App.4th 438, 461 ["We review a trial court's determinations under Code of Civil Procedure section 389 for abuse of discretion"]; *Lungren v. Community Redevelopment Agency* (1997) 56 Cal.App.4th 868, 875 [same].

In this case, the legal principles that governed the family court's discretion included Code of Civil Procedure section 155. By that statute, the Legislature established that children may seek an SIJ order in the "family court division[] of the superior court," as well as other divisions. (Code Civ. Proc., § 155, subd. (a)(1).) The family court is the sole forum in which a child like Bianka—who lives with one parent in California, and is not a ward or dependent of the juvenile court—can seek an SIJ order. (See *ante*, pp. 26-28.) The Legislature also directed that the family court "shall issue" an SIJ order if one is requested and there is evidence to support the predicate findings required by the federal SIJ statute, even if that evidence consists of nothing more than "a declaration by the child who is the subject of the petition." (Code Civ. Proc. § 155, subd. (b)(1).)[42] Here, the family court had before it a declaration from Bianka, as well as additional evidence in the form of a declaration from her mother Gladys, and it concluded that this evidence "support[ed] a finding that it would not be in the best interests of [Bianka] to be returned to Honduras." (2 AE 311, bold omitted.) Section 155 was intended to allow a child to seek and obtain an SIJ order from the family court under exactly these circumstances. The family court's decision to require joinder, however, made it virtually impossible for Bianka to apply for an SIJ visa—absent some unexpected act of benevolence from the very person who, according to the Bianka, abandoned her. The family court abused its discretion.

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[42] As noted above, the Legislature recently amended section 155, effective June 27, 2016. (*Ante*, p. 25.) All of the provisions described in this paragraph predated that amendment and remain part of the current statute.

D. The Court of Appeal's Policy Concerns Do Not Provide a Basis for Requiring Joinder

The Court of Appeal devoted much of its opinion to describing the harms that it feared would result from any decision allowing Bianka's action to go forward without her alleged father as a party. It was concerned about issuing any decision that might "erode the substantial protections afforded to parents involved in international custody disputes under state, federal and international law." (Opn. p. 4.) While the court's attention to the possible implications of its decision is commendable, the concerns it identified do not warrant a joinder requirement. Bianka's parentage action may proceed without requiring the joinder of her alleged father, in a way that respects Bianka's best interests, the Legislature's framework for SIJ proceedings, and the important protections discussed by the Court of Appeal that guard parental rights in custody disputes.

1. Custody determination

The Court of Appeal expressed concern about how a custody determination made in Jorge's absence would affect his interests. In the court's view, the custody order requested by Bianka would be "tantamount to a termination of [Jorge's] parental rights" (opn. p. 18), and it would be inappropriate to issue "such an order in a nonadversarial proceeding to which the noncustodial parent is not a party" (*id.* at pp. 18, 22). As this Court has recognized, however, "an award of sole legal and sole physical custody of a child to one parent does not serve to 'terminate' the other's parental rights or due process interest in parenting." (*In re Marriage of Brown & Yana* (2006) 37 Cal.4th 947, 958, citing *In re Marriage of Harris* (2004) 34 Cal.4th 210, 227.) And a family court may issue such an award even if it lacks personal jurisdiction over the non-custodial parent. (See *Marriage of Leonard, supra*, 122 Cal.App.3d at p. 459.)

Moreover, California law already contains tools for absent parents to protect their rights in the context of a parentage action seeking an award of sole custody. As discussed above, the Uniform Parentage Act directs that notice of any action must be given to any natural parent, presumed parent, or alleged father, and requires the family court to give those persons "an opportunity to be heard." (Fam. Code, § 7635, subd. (b).) A person who receives notice of an ongoing family court proceeding and asserts a claim of custody or visitation rights must be joined to the proceeding. (See Cal. Rules of Court, rule 5.24(e)(1)(A).) In addition, the family court retains continuing jurisdiction to modify or set aside any order or judgment issued as part of an action under the Uniform Parentage Act. (Fam. Code, § 7642; see *id.*, § 3422, subd. (a) [family court has continuing jurisdiction over the determination of custody].) If the court issues a custody order and then learns of some new information or changed circumstance affecting that order, it may revisit the issue of custody. These existing protections undermine any contention that a joinder requirement, for every case in which sole custody is requested, is necessary to protect the interests of absent parents. (See opn. p. 20.)

2. SIJ determination

The Court of Appeal also worried about how an SIJ order could affect the interests of an alleged father who has not been joined as a party. (See opn. pp. 18, 21, 28-29.) Its concern arose from the statutory requirement that, to issue an SIJ order, the court must find that "reunification of the child with one or both of the child's parents was determined not to be viable because of abuse, neglect, abandonment, or a similar basis." (Code Civ. Proc., § 155, subd. (b)(1)(B); see 8 U.S.C. §1101(a)(27)(J).) In the Court of Appeal's view, it would be "inappropriate" and "extremely problematic" for a court to make such a finding if the person who allegedly abused, neglected, or abandoned the child is not a party. (Opn. pp. 18, 28-

29.) That view cannot be squared with the framework for SIJ proceedings adopted by the Legislature in Code of Civil Procedure section 155. As discussed above, section 155 requires the issuance of SIJ predicate orders—containing precisely the type of finding described by the Court of Appeal—in proceedings before divisions of the superior court in which it is unlikely or impossible that the parents will be parties. (See *ante*, pp. 24-28.)

From the Court of Appeal's perspective, Bianka's request for an SIJ order required joinder of Jorge because it "placed Jorge's paternity squarely at issue," and could not be issued without "first determining paternity." (Opn. pp. 21, 18.) But the Legislature has given contrary guidance. Code of Civil Procedure section 155 indicates that it is appropriate—indeed, mandatory—for a court to make such a finding without first making a formal parentage determination, if the court has before it evidence supporting that finding. Establishing paternity generally entails one of two things: the signing of voluntary declarations by the mother and father (see Fam. Code, §§ 7570-7577); or a formal judgment or order issued by the family court, after adjudicating a parentage action in which the father is the respondent, that "determin[es] the existence or nonexistence of the parent and child relationship" (*id.*, § 7636; see *Gorham*, *supra*, 186 Cal.App.4th at p. 1227). Section 155 does not require any of these steps as a prerequisite to issuing an SIJ order. Under section 155, a superior court "shall" issue an SIJ order so long as it receives a declaration from the *child* and "there is evidence to support [the] findings" required by the federal SIJ statute. (Code Civ. Proc., § 155, subd. (b)(1).) Indeed, the statute requires the issuance of SIJ orders in proceedings before the probate court—a division of the superior court that does not typically make parentage determinations. Nothing in this statutory framework suggests that an SIJ order must be preceded by an explicit (or implicit) paternity determination.

To the extent the Court of Appeal was worried about the preclusive implications of this proceeding for some future dispute over Jorge's paternity, that concern is misplaced. California courts will "not bar a paternity action on the basis of res judicata unless the record demonstrates without doubt that another court previously intended to and actually did adjudicate the issue of paternity." (*D.P. v. Stewart* (1987) 189 Cal.App.3d 244, 249.)[43] An SIJ order issued under the circumstances presented here would be unlikely to satisfy that demanding standard. More fundamentally, a "prerequisite element[]" for applying the doctrine of res judicata is that "the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding." (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797.) Since Jorge is not a party to Bianka's parentage action, a judgment in that action should not have res judicata effects in a future proceeding to which he was a party.

For similar reasons, the Court of Appeal's predictions about the possible effects of an SIJ order in a future custody proceeding appear to be mistaken. The court focused on Family Code section 3044, subdivision (a), which creates a rebuttable presumption that an award of custody to a person "is detrimental to the best interest of the child" if that person "has perpetrated domestic violence against the other party seeking custody of the child or against the child or the child's siblings within the previous five years." The court suggested that, by issuing an SIJ order based on findings of abuse, a family court could "trigger[] the rebuttable presumption against

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[43] *Stewart* involved the Revised Uniform Reciprocal Enforcement of Support Act of 1968, which has since been replaced by the Uniform Interstate Family Support Act. (See *Lundahl v. Telford* (2004) 116 Cal.App.4th 305, 308.) Nothing in UIFSA, however, undermines *Stewart*'s conclusion that res judicata only applies to prior judgments that "without doubt" involved a paternity determination.

custody" for purposes of future custody disputes. (Opn. pp. 28-29.) But that is not necessarily so. Even if the basis for an SIJ order is an allegation of domestic violence against a child, a parent who was not a party to the proceeding in which the order was issued would presumably have an opportunity to litigate any factual issues regarding that alleged violence in a future custody proceeding to which he is a party. (See, e.g., *Boeken*, *supra*, 48 Cal.4th at p. 797 [a prerequisite element for collateral estoppel is that the party against whom the doctrine is being asserted was a party to the prior proceeding].) In other words, the parent would have an opportunity to dispute the allegations before the court could apply the presumption against him.[44]

Ultimately, the Court of Appeal's main concern was that an alleged abuser should "have notice of and an opportunity to rebut the allegation[s]" underlying the request for an SIJ order. (Opn. p. 29; see also *id.* at p. 21 ["[I]t was within the court's discretion to attempt to give Jorge a meaningful opportunity to refute those allegations before making the orders requested by Bianka in this case"].) That is a sensible concern, and, as of July 1, 2016, it is addressed by the Rules of Court. In all proceedings under the Family Code after that date, a person requesting an SIJ order must serve notice of the hearing on that request, along with "a copy of the request and

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[44] Moreover, if the basis for an SIJ order is instead an allegation of neglect or abandonment, a factual finding ratifying that allegation might not satisfy the "domestic violence" requirement of section 3044. (See Fam. Code, § 3044, subd. (d)(1) [defining "domestic violence," for purposes of section 3044, with reference to sections 6203 and 6211]; *id.*, § 6211 [defining "domestic violence" as "abuse perpetrated against" family members]; *id.*, § 6203 [defining "abuse" to include "sexual assault," placing "a person in reasonable apprehension of imminent serious bodily injury to that person or to another," and "intentionally or recklessly caus[ing] or attempt[ing] to cause bodily injury," among other things].)

all supporting papers," on all "alleged, biological, and presumed parents of the child who is the subject of the request." (Cal. Rules of Court, rule 5.130(c).)[45] Any person entitled to such notice "may file and serve a response." (*Id.*, rule 5.130(d).) It is not necessary to impose an additional joinder requirement in order to ensure notice and an opportunity to be heard on the subject of SIJ allegations.

3. The Uniform Child Custody Jurisdiction and Enforcement Act

Next, the Court of Appeal suggested that adjudicating Bianka's parentage action without joining her alleged father would be in tension with the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), Family Code section 3400 *et seq.* (See opn. p. 24.) There is no tension. The UCCJEA applied to Bianka's family court proceeding. Under that statute, the family court may not make a custody determination without first assuring itself of its jurisdiction. (See Fam. Code, § 3421, subd. (a); Judicial Council Forms, form FL-356.) Typically, that requires a finding that the child in question has lived with a parent in California for at least six consecutive months before the commencement of the proceeding. (See Fam. Code, §§ 3402, subd. (g), 3421, subd. (a)(1).) Here, Bianka had been living with Gladys in California for more than a year when she filed her parentage petition (1 AE 4, 9-10), and the family court recognized that Bianka's request for a custody order was subject to the requirements and protections of the UCCJEA (2 AE 305).

The Court of Appeal nonetheless worried that some provisions of the UCCJEA might not apply to Bianka's alleged father if he were not a party.

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[45] Although this rule was not in effect at the time, Bianka served her alleged father with a copy of her request for an SIJ order, along with the supporting documents, in June 2015. (See 1 AE 105-112, 116, 125; see also PBOM 13; Reply 6, 8-11.)

It noted that, "as a nonparty, Jorge could not contest the court's subject matter jurisdiction in this case," as contemplated by Family Code section 3407. (Opn. p. 24.) It also pointed out that the provision of the UCCJEA allowing a parent to participate in child custody proceedings in this State without submitting to personal jurisdiction in other proceedings applies only to a "party to a child custody proceeding . . . or a petitioner or respondent in a proceeding to enforce or register a child custody determination." (Fam. Code, § 3409, subd. (a); see opn. p. 24.) Those observations provide no basis for a categorical rule requiring joinder of alleged fathers in all cases. Again, if a foreign parent wishes to assert a claim of custody or visitation rights after receiving notice of the proceeding, he may do so. In that event, under rule 5.24(e)(1), the "court must order that [he] be joined as a party to the proceeding," after which any protections that the UCCJEA accords to parties would presumably apply to him. (See *ante*, pp. 33-34.)[46]

4. Analogy to legal guardianship proceedings

The Court of Appeal also relied on an analogy to protections governing legal guardianship proceedings, reasoning that "[n]o less due process should be required in an action brought under the UPA." (Opn. p. 27.) That analogy provides no support for requiring joinder of Jorge here. As the Court of Appeal acknowledged, "parents are not parties in a guardianship proceeding." (*Id.* at p. 26.) Instead, "a proposed ward's parents must receive actual notice of the hearing on a petition for the

[46] The Court of Appeal said that the UCCJEA reinforced its view that courts have an "obligation to ensure" that Jorge and others like him receive "both notice and a meaningful opportunity to be heard." (Opn. p. 24.) Any such obligation is satisfied by enforcing the requirements of existing law, including Family Code section 7635, which already requires "notice . . . and an opportunity to be heard."

appointment of a guardian" as well as "a meaningful opportunity to be heard." (*Id.* at p. 26.) Family Code section 7635, subdivision (b) guarantees the same thing in the context of actions under the UPA.

5. The Hague Convention on the Civil Aspects of International Child Abduction

Finally, the Court of Appeal warned that "the procedure used in this case and the relief requested under the UPA could allow a parent to circumvent and undermine" the Hague Convention on the Civil Aspects of International Child Abduction. (Opn. p. 29.) It reasoned that "a finding of abuse or similar conduct has the potential to defeat a parent's claim for return of a child to the child's country of habitual residence" under that Convention. (*Ibid.*) The court was apparently concerned about the possibility that a parent might abduct a child, bring her to California, obtain an SIJ order using the same procedural approach as Bianka, and then use that order to prevent the return of the child to the custodial parent in the child's country of habitual residence. That does not appear to be a realistic scenario.

For one thing, no SIJ order could issue without first giving the foreign parent notice and an opportunity to be heard in the California family court proceeding. (See Fam. Code, § 7635, subd. (b); Cal. Rules of Court, rule 5.130(c)-(d).) If that parent alerted the family court to the abduction, it is unlikely that the court would issue a custody or SIJ order without further inquiry. If the child abductor submitted a fraudulent proof of service, the court could modify its orders and take any other appropriate remedial steps when the fraud came to light.

Moreover, in the event of such an abduction, the foreign parent may initiate a civil action in California seeking return of the child. (See 22 U.S.C. § 9003.) The Convention allows the respondent to resist return by submitting "clear and convincing evidence that returning the child

would violate the child's or other parent's human rights or fundamental freedoms, or the return would cause grave risk to the child's mental or physical well-being." (*Noergaard v. Noergaard* (2015) 244 Cal.App.4th 76, 84.) The Court of Appeal was apparently concerned that an abductor could defeat an action brought under the Convention by pointing to the findings underlying a previously issued SIJ order as evidence of such a "grave risk." (See opn. p. 29.) If the foreign parent was not a party to the prior family court proceeding, however, those findings should not normally have any preclusive effect on that parent in the second action brought under the Convention. (See *ante*, pp. 43-44; *Boeken*, *supra*, 48 Cal.4th at p. 797.)

In any event, the Convention has no application to this particular case. The nation where Bianka's alleged father resides, Honduras, is not a signatory to the Convention.[47] (Neither are El Salvador or Guatemala—which, along with Honduras, comprise the countries of origin for the majority of unaccompanied children who have entered the United States in recent years.)[48] And there is no evidence in the record suggesting that Bianka was abducted.

* * *

The lower courts correctly recognized that when a child requests an SIJ order in a California family court, there is a need to protect the interests of an absent parent (alleged, presumed, or natural) whose alleged conduct forms the basis of that request. But that need must be considered against the best interests of the child herself, who seeks to protect her health and well-being by pursing a claim of permanent residency in the United States.

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[47] See The Hague Conventions: Signatures, Ratifications, Approvals and Accessions <https://assets.hcch.net/docs/ccf77ba4-af95-4e9c-84a3-e94dc8a3c4ec.pdf?> [as of Apr. 5, 2017].

[48] See *ibid.*; see also Information on Migration of Unaccompanied Children from El Salvador, Guatemala, and Honduras, *supra*, at p. 1.

The existing structure of laws and rules strikes an appropriate balance between those interests. It allows actions like the one brought by Bianka to proceed, while providing absent parents with notice and an opportunity to be heard in those proceedings, should they have any desire to be heard. There is no need to superimpose a new joinder requirement on these proceedings that would make it impossible for many children—children who might otherwise satisfy the SIJ criteria—to pursue an SIJ visa.

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Dated: April 10, 2017

Respectfully submitted,

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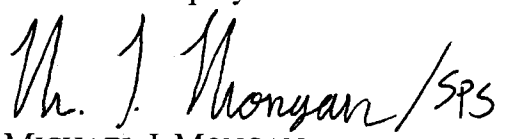

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CERTIFICATE OF COMPLIANCE

I certify that the attached Amicus Brief of Attorney General Xavier Becerra in Support of Petitioner uses a 13 point Times New Roman font and contains 11,930 words.

Dated: April 10, 2017

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Attorney General of California

/s/ M. J. Mongan /SPS

MICHAEL J. MONGAN
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re Bianka M.**
No.: **S233757**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On April 10, 2017, I served the attached **AMICUS BRIEF OF ATTORNEY GENERAL XAVIER BECERRA IN SUPPORT OF PETITIONER** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 10, 2017, at San Francisco, California.

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