UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

R.F.M., T.D., S.W., and D.A.F.A., on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

KIRSTJEN NIELSEN, et al.,

Defendants.

No. 18-cv-5068

Hon. John G. Koeltl

BRIEF FOR AMICUS CURIAE THE STATE OF NEW YORK IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

BARBARA D. UNDERWOOD
Attorney General
State of New York
28 Liberty Street
New York, NY 10005
(212) 416-8019

STEVEN C. WU
Deputy Solicitor General
SCOTT A. EISMAN
Assistant Solicitor General
of Counsel

Dated: August 7, 2018

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases **Page(s)**

Constitution

Laws

Federal

State

Laws **Page(s)**

State (cont'd)

Legislative Materials

Miscellaneous Authorities

Miscellaneous Authorities **Page(s)**

INTEREST OF AMICUS CURIAE

When Congress established special immigrant juvenile status (SIJS) as a pathway to lawful permanent residence for neglected, abused, and abandoned children, *see* 8 U.S.C. § 1101(a)(27)(J), it expressly conditioned that status on certain threshold determinations by state courts in the exercise of their traditional supervision of family matters. Specifically, Congress directed that SIJS applicants obtain a declaration from a state "juvenile court" that reunification with one or both parents is not viable because of abuse, neglect, or abandonment, and that return to the country of the applicant or her parent would not be in the applicant's best interests. Congress's reliance on state courts reflected those courts' extensive experience and established expertise over matters affecting child welfare—an area of traditional state rather than federal concern. Consistent with that congressional intent, federal immigration authorities have for decades deferred to the States' determination of which of their courts qualifies as a "juvenile court" with jurisdiction to make the findings necessary for SIJS. In New York, that court has long been Family Court.

This case challenges the federal government's recent, abrupt, and unwarranted reversal of its longstanding deference to the States in this regard. Plaintiffs allege that the United States Citizenship and Immigration Services (USCIS) has recently begun rejecting New York Family Court orders and factual findings as insufficient to support SIJS applications for juveniles between the ages of eighteen and twenty-one. As plaintiffs correctly argue, USCIS's new policy conflicts

with federal law. It also rests on profound misunderstandings of New York law. In particular, USCIS incorrectly concluded that, for juveniles between ages eighteen and twenty-one, Family Court lacks the power to make custody determinations and to order parental reunification.

The State of New York submits this brief amicus curiae to explain the errors in USCIS's interpretations of state law. The State has a strong interest in correcting the misapplication of its laws and in defending the central role that Congress intended to give state courts in the SIJS program. Indeed, deference to state courts is vital to the proper functioning of the SIJS statute because state courts, not federal immigration officials, have the expertise and experience to make the determinations required by Congress in that statute—whether a juvenile has suffered from abuse, neglect, or abandonment, and what custodial or residential arrangements would best serve the interests of such juveniles.

The State also has an interest in preventing wrongful denials of SIJS to qualified New York residents. Such denials harm not only those residents, but also the State's broader interests. As plaintiffs have alleged—and as empirical studies confirm—"SIJS and legal permanent residency are associated with an increase in wages and participation in the workforce, leading to increased consumption, resulting in job creation and economic growth." Compl. ¶ 73; *see also id.*, Ex. 10 (Decl. of Judith Meltzer) ¶¶ 5–18. Wrongful denials of SIJS to qualified applicants residing in New York thus injure statewide interests beyond the undisputed harm to the individual.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

Congress created SIJS in 1990 to help immigrant children who have been abused, neglected, or abandoned, and who lack parental support. As commentators have observed, the SIJS statute reflects Congress's recognition "that children who have experienced mistreatment in their families deserve special protection and are extremely vulnerable as children, immigrants, and survivors of family abuse, neglect, or abandonment." Gregory Zhong Tian Chen, *Elian or Alien? The Contradictions of Protecting Undocumented Children Under the Special Immigrant Juvenile Statute*, 27 Hastings Const. L.Q. 597, 604 (2000). A grant of SIJS affords that special protection by allowing eligible juveniles to remain in the United States as lawful permanent residents, typically under the custody or care of a state court, rather than sending them back to their or their parents' country of origin. *See* 8 U.S.C. § 1255(a), (h); *see also id.* § 1153(b)(4) (allotting visas for SIJS recipients).

To qualify for SIJS, a person must file a petition with USCIS, a division of the Department of Homeland Security (DHS), and show that she meets certain statutory criteria. *See* 8 C.F.R. § 204.11(b). Specifically, the petition must establish that:

(1) the applicant "has been declared dependent on a juvenile court located in the United States" or that such a court "has legally committed [her] to, or placed [her] 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," 8 U.S.C. § 1101(a)(27)(J)(i);

(2) "it has been determined in [state] administrative or judicial proceedings that it would not be in [her] best interest to be returned to [her] or [her] parent's previous country of nationality or country of last habitual residence, *id.* § 1101(a)(27)(J)(ii);

(3) "reunification with 1 or both of [her] parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law," *id.* § 1101(a)(27)(J)(i); and

(4) she was under twenty-one years of age when she petitioned for SIJS and is unmarried, *see* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(d)(6), 122 Stat. 5080 (2008); 8 U.S.C. § 1101(b)(1).

A DHS regulation provides that an applicant can satisfy the eligibility criteria only by obtaining a "juvenile court order, issued by a court of competent jurisdiction located in the United States," making the required eligibility findings.[1] 8 C.F.R. § 204.11(d)(2). The regulation defines "juvenile court" to mean "a court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles." *Id.* § 204.11(a).

Aside from limiting SIJS to petitioners who are "under twenty-one years of age," *id.* § 204.11(c)(1), the regulation does not otherwise define who qualifies as a "juvenile" or which courts qualify as "juvenile court[s]." In issuing the regulation, DHS's predecessor, the Immigration and Naturalization Service, acknowledged that "definitions of the terms 'juvenile,' 'minor,' and 'child' vary from state to state." Special Immigrant Status, 58 Fed. Reg. 42,843, 42,846 (Aug. 12, 1993) (codified at 8 C.F.R. § 204.11). Despite the "inequities caused by [such] variations in state law," DHS

---

[1] The regulation also requires an immigrant to show that she "[h]as been deemed eligible by the juvenile court for long-term foster care," 8 C.F.R. § 204.11(c)(4), but that requirement is satisfied so long as a juvenile court has determined "that family reunification is no longer a viable option," *id.* § 204.11(a).

defers to each State's "juvenile court system's ability to make determinations regarding its own jurisdictional issues." *Id.* at 42,846, 42,848; *see* 6 USCIS, *Policy Manual* pt. J, ch. 3, § A(2) (2018) ("Juvenile courts should follow their state laws on issues such as when to exercise their authority."). Thus, whether a particular court qualifies as a "juvenile court" turns on whether state law authorizes that court to exercise jurisdiction over "juveniles," "minors," "children," or the like.

In looking to state law, the SIJS statute and its implementing regulation "strike[] a balance that relies upon existing state systems to handle child welfare matters while at the same time requiring [DHS] to perform its function of regulating immigration." Chen, *supra*, at 613; *see Matter of Hei Ting C.*, 109 A.D.3d 100, 104 (2d Dep't 2013) (SIJS statute "employs a unique hybrid procedure that directs the collaboration of state and federal systems"). Deferring to state courts' child-welfare determinations makes sense, given that the "whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states," and not to the federal government. *Ex parte Burrus*, 136 U.S. 586, 593–94 (1890).[2]

---

[2] *See also, e.g.*, *Stephens v. Hayes*, 374 F. App'x 620, 623 (6th Cir. 2010) (declining jurisdiction over collateral attack on termination of parental rights out of "deference to state expertise in the field of domestic relations"); *Vaughan v. Smithson*, 883 F.2d 63, 65 (10th Cir. 1989) (per curiam) ("[T]he states have a strong interest in domestic relations matters and have developed an expertise in settling family disputes."); *Mac Donald v. Mac Donald (In re Mac Donald)*, 755 F.2d 715, 717 (9th

As to the SIJS program in particular, both courts and scholars have recognized that the program's reliance on state-court child-welfare determinations properly reflects that state "'juvenile courts have particularized training and expertise in the area of child welfare and abuse.'" *Matter of Hei Ting C.*, 109 A.D.3d at 104 (quoting David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 Ohio St. L.J. 979, 1005 (2002)). Indeed, because "[a]ll fifty states have created administrative and judicial systems to protect the health, safety, and welfare of children, administrative and judicial expertise in child welfare matters resides primarily with the states and local governments," rather than with the federal government. Chen, *supra*, at 609–10. That expertise "places [state courts] in the best position" to make the requisite SIJS findings. *Matter of Hei Ting C.*, 109 A.D.3d at 104. DHS has observed, in an administrative determination overturning a denial of SIJS, that "USCIS is neither the fact finder nor an expert in regards to these issues of child welfare under various state laws," and so "the statute explicitly defers such findings to the expertise and judgment of the juvenile court." *In re Anonymous*, 2012 WL 8597755, at *4 (DHS Nov. 2, 2012).

Cir. 1985) (federal courts should "avoid incursions into family law matters out of . . . deference to [federal judges'] state court brethren and their established expertise in such matters" (quotation marks omitted)).

The federal government has traditionally declined to second-guess child-welfare determinations by state courts when evaluating SIJS applications, except in one narrow circumstance: when the state-court order "was sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect."[3] H.R. Rep. No. 105-405, at 130 (1997) (Conf. Rep.). Otherwise, "[o]rders that have the necessary findings or rulings and include, or are supplemented by, the factual basis for the court's findings (for example, the judicial findings of fact) are usually sufficient to establish eligibility" for SIJS. 6 USCIS, *Policy Manual*, *supra*, pt. J, ch. 3, § A(3). DHS has thus viewed its own role in the SIJS process as confined to ensuring that applicants sought juvenile-court relief primarily for a non-immigration-related purpose, and has otherwise deferred to state courts to make the child-welfare determinations that are a traditional area of state concern. *See id.* pt. J., ch. 2, § A.

[3] Though the House Report refers to actions by the Attorney General, those actions are now the responsibility of the Secretary of Homeland Security. *See Clark v. Martinez*, 543 U.S. 371, 374 n.1 (2005).

B. New York's Involvement in Determining Special Immigrant Juvenile Status (SIJS)

In New York, the state court with the principal responsibility to make child-welfare determinations—and thus the main juvenile court qualified to issue SIJS eligibility findings—is Family Court. Family Court has broad jurisdiction over all matters that may affect children, including "abuse and neglect proceedings," "proceedings concerning adoption and custody of children," and "proceedings concerning guardianship and custody of children by reason of the death of, or abandonment or surrender by, the parent or parents." Family Court Act § 115(a)(i), (c); *accord* N.Y. Const. art. VI, § 13. In all such proceedings, Family Court must act in the best interests of the child. *See* Family Court Act §§ 661(b) (guardianship), 1011 (child-protective proceedings); *Matter of O'Rourke v. Kirby*, 54 N.Y.2d 8, 13 (1981) (adoption).

The New York Legislature has directed Family Court to "help protect children from injury or mistreatment" and to "safeguard their physical, mental, and emotional well-being." Family Court Act § 1011. The Legislature also made explicit findings that, once Family Court has jurisdiction over a matter, "the court is given a wide range of powers for dealing with the complexities of family life so that its action may fit the particular needs of those before it." *Id.* § 141. Those powers include the power to order state agencies and employees "to further the objects" of the Family Court Act. *Id.* § 255. In other words, Family Court may "cut through the bureaucracy, fragmentation and lack of co-ordination which so inhibits the provision of services for families and children before the court." *Matter of Nicole JJ.*, 265 A.D.2d 29, 32 (3d

Dep't 2000) (quotation marks omitted). Family Court has accordingly come to be recognized as "a special agency for the care and protection of the young and the preservation of the family," *Matter of Jesmer v. Dundon*, 29 N.Y.2d 5, 9 (1971) (quotation marks omitted), and is vested with "wide discretion" to discharge its "grave responsibilities" to identify and then promote the best interests of the children under its jurisdiction, Family Court Act § 141.

Given Family Court's expertise in child-welfare matters, USCIS has long accepted its authority to make the requisite SIJS findings, which "concern matters within Family Court's traditional purview—whether family reunification is a viable option and where it is in a child's best interest to reside." Theo Liebmann, *Family Court and the Unique Needs of Children and Families Who Lack Immigration Status*, 40 Colum. J.L. & Soc. Probs. 583, 588 (2007); *see also, e.g.*, *Matter of Marvin E.M. de P. (Milagro C.C.–Mario Enrique M.G.)*, 121 A.D.3d 892, 893 (2d Dep't 2014). Family Court typically issues its SIJS findings during proceedings to appoint a guardian over a juvenile, and New York courts have consistently recognized that Family Court orders appointing a guardian over a juvenile makes that juvenile "dependent" on Family Court within the meaning of the SIJS statute, 8 U.S.C. § 1101(a)(27)(J)(i). *See, e.g.*, *Matter of Trudy-Ann W. v. Joan W.*, 73 A.D.3d 793, 795 (2d Dep't 2010); *Matter of Antowa McD.*, 50 A.D.3d 507, 507 (1st Dep't 2008).

Although Family Court's jurisdiction over children is typically exercised for individuals under the age of eighteen, its jurisdiction extends to children up to the age of twenty-one for a number of purposes. In particular, as relevant here, a 2008

amendment to the Family Court Act's guardianship provisions authorized Family Court to appoint a guardian for any "person who is less than twenty-one years old who consents to the appointment or continuation of a guardian after the age of eighteen," and expressly deems such a person to be an "infant or minor" subject to the jurisdiction of Family Court. Family Court Act § 661(a). Supporters of the amendment stressed that some juveniles between eighteen and twenty-one still need guardians because they "are unable to assume the full responsibilities of living independently." Letter from Karen Walker Bryce, Deputy Comm'r and Gen. Counsel, N.Y. State Off. of Children & Family Servs., to Hon. Terryl Brown Clemons, Acting Counsel to the Gov. at 1 (Aug. 1, 2008), *reprinted in* Bill Jacket for ch. 404 (2008), at 14.

The additional guardianship-appointment powers that the 2008 amendment gave to Family Court thus helped ensure that such juveniles could continue receiving the protection and support that they needed. Guardians appointed over such juveniles have not only the right but also the "responsibility to make decisions, including issuing any necessary consents, regarding the child's protection, education, care and control, health and medical needs, and the physical custody of the person of the child." Family Court Act § 657(c).

C. This Proceeding

Plaintiffs are four New York residents who applied for SIJS after they turned eighteen but before they turned twenty-one and whose petitions USCIS has denied. They sue on behalf of a class of similarly situated individuals. Although each named plaintiff presented USCIS with an order from New York Family Court stating that

he or she was dependent on Family Court by virtue of the appointment of a legal guardian, USCIS denied the applications because, in its view, Family Court did not qualify as a "juvenile court" for purposes of making SIJS eligibility findings for these individuals.

USCIS has given two reasons for denying plaintiffs' and other putative class members' SIJS applications. *First*, USCIS reasoned that DHS's SIJS regulation requires the requisite findings to be made by a court that has the power to decide *both* "the custody *and* care of juveniles," 8 C.F.R. § 204.11(a) (emphasis added). USCIS determined that Family Court's power to appoint a guardian for individuals between eighteen and twenty-one concerned only such individuals' care, not their custody—that is, the appointment, while protecting plaintiffs' well-being, did not affect where and with whom plaintiffs would physically reside. *See, e.g.*, Compl., Ex. 1 App. G at 2–3.

Second, USCIS reasoned that only a court with the authority to compel parental reunification for individuals between eighteen and twenty-one could make the requisite statutory finding that such reunification is "not viable." 8 U.S.C. § 1101(a)(27)(J)(i). USCIS then found that Family Court "lacks the authority to reunify petitioners between their 18th and 21st birthdays with a parent." Compl. ¶ 4.

Plaintiffs now seek a preliminary injunction barring USCIS from denying SIJS applications on the ground that Family Court lacks jurisdiction over juveniles between ages eighteen and twenty-one.

The State of New York files this amicus brief to demonstrate that both prongs of USCIS's reasoning reflect a misunderstanding of New York law.

ARGUMENT

UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES MISCONSTRUED NEW YORK LAW IN DENYING PLAINTIFFS' SIJS APPLICATIONS

USCIS's conclusion that New York Family Court is not a "juvenile court" for purposes of the SIJS program relies on a fundamental misunderstanding of New York law. In denying plaintiffs' SIJS applications, USCIS asserted that Family Court lacks jurisdiction to make custody determinations for juveniles between ages eighteen and twenty-one, and that Family Court lacks jurisdiction to order that such juveniles be reunified with their parents. USCIS is wrong on both counts.

First, New York law authorizes Family Court to make custody determinations for juveniles between eighteen and twenty-one by allowing that court to appoint guardians who may make decisions concerning "the physical custody of the person" of such juveniles. Family Court Act § 657(c). *Second*, contrary to USCIS's assertion, Family Court does have authority to order parental reunification for a juvenile between eighteen and twenty-one because it may (and on occasion does) appoint the parent of such a juvenile to be that juvenile's guardian. And in considering whether to make such an appointment, Family Court routinely makes the findings about the viability of parental reunification that Congress directed federal immigration authorities to rely on in deciding SIJS applications. There was thus no basis in state law for USCIS to reject Family Court's orders here.

A. Family Court Has Authority to Determine the Custody of Juveniles Between Eighteen and Twenty-One.

Plaintiffs and the putative class members are juveniles between eighteen and twenty-one who applied for SIJS status in reliance on New York Family Court orders that appointed guardians over them. *See* Compl. ¶¶ 87–88, 96–99, 110–112, 125–129. In denying plaintiffs' and other class members' SIJS applications, USCIS determined that (1) DHS's SIJS regulation required an order from a state court that had authority to make determinations affecting *both* the care *and* custody of the specific applicant, and (2) that, as to juveniles between eighteen and twenty-one such as plaintiffs, Family Court's guardianship powers are limited to the juvenile's care, not custody. *See id.* ¶¶ 9–12.

As plaintiffs have correctly explained, USCIS's reasoning conflicts with the plain language of the SIJS statute and DHS's implementing regulation. The statute and regulation require only that the relevant state court *generally* have the power to make "'determinations about the custody and care of juveniles'"—not that it have the full scope of such power for each particular SIJS applicant. Pls.' Mem. of Law in Supp. of Mot. for Prelim. Inj. (Pls.' Mem.) at 21 (quoting 8 C.F.R. § 204.11(a)).

In any event, even under USCIS's crabbed interpretation of the SIJS statute and DHS's regulation, its denials of plaintiffs' SIJS applications were improper because USCIS relied on a misinterpretation of New York law. Contrary to USCIS's reasoning, Family Court *does* have authority to determine the custody (as well as the care) of juveniles between eighteen and twenty-one. New York law expressly vests Family Court with jurisdiction over such juveniles by authorizing the court to appoint

a guardian if the juvenile consents. Family Court Act § 661(a).[4] And Family Court regularly exercises that jurisdiction to appoint guardians over juveniles between the ages of eighteen and twenty-one. *See, e.g.*, *Matter of Mohamed B.*, 83 A.D.3d 829, 830–32 (2d Dep't 2011) (appointment of guardian for nineteen-year-old); *Matter of Trudy-Ann W.*, 73 A.D.3d at 795 (appointment of guardian for twenty-year-old). Such guardians have the authority to make a broad range of decisions concerning juveniles, including determinations affecting "the physical custody of the person of the child." Family Court Act § 657(c).

The history and purpose of these provisions confirm that Family Court's appointment of guardians for juveniles between eighteen and twenty-one affects the custody of such juveniles within the meaning of the SIJS regulation, 8 C.F.R. § 204.11(a). Since at least the mid-nineteenth century, New York law has recognized that "guardianship of the person of an infant implies the custody and control of the person of an infant." *Matter of Yardum*, 228 A.D. 854, 855 (2d Dep't 1930) (citing, e.g., *Wilcox v. Wilcox*, 14 N.Y. 575 (1856)); *see Matter of Thoemmes*, 238 A.D. 541, 542 (2d Dep't 1933) (child's guardian "would be entitled to her custody and control, unless he

---

[4] A separate provision of the Family Court Act provides that Family Court's jurisdiction over a child typically expires once the child reaches eighteen, but contemplates that there may be exceptions to this general rule in "specific context[s]." Family Court Act § 119(c). Family Court's guardianship-appointment authority is one such express exception.

has forfeited such right"). Family-law experts have likewise remarked on guardians' broad custodial powers, observing that guardians are vested with "wide-ranging" authority over their charges—authority that "generally includes physical custody of a child" and "other types of decision-making power." Philip C. Segal & Mimi Ginott Kaough, *Weighing Guardianship of a Child Versus Custody*, N.Y.L.J., Feb. 25, 2002, at 22. As a result, "there is little practical difference, in the context of minors, between guardianship over the person and custody of them." Sandra B. Edlitz, *Guardianship and Custody: Is There a Distinction?*, N.Y.L.J., Mar. 31, 2000, at 35.[5]

Given this "seeming overlap between the meaning and effect of an application to be appointed a custodian and guardian of a child," the Legislature in 2008 amended the Family Court Act, the Domestic Relations Law, and the Surrogate's Court Procedure Act to codify the "consistent legal rights and responsibilities for custody and guardianship of a minor" that courts and scholars had long observed. N.Y. State Assembly Mem. in Supp. of Legislation, *reprinted in* Bill Jacket for ch. 404, *supra*, at 7. In the same enactment that extended Family Court's guardianship-appointment powers to juveniles between eighteen and twenty-one, *see* Ch. 404, § 1, 2008 N.Y.

---

[5] Philip C. Segal and Sandra B. Edlitz are former Family Court judges, each of whom devoted decades to family law. *See* Segal & Greenberg LLP, *Partners*, http://www.segal-greenberg.com/partners.html (last visited July 30, 2018); N.Y. Courts, *2006 Voter Guide: Sandra B. Edlitz*, https://www.nycourts.gov/vote/2006/bios/Sandra_Edlitz.shtml (last visited July 30, 2018).

Laws 3510, 3511 (codified at Family Court Act § 661(a)), the Legislature confirmed that guardians are authorized to make a number of decisions on behalf of juveniles, including enrolling them in public school in the school district in which the guardian lives, *id.* §§ 2–3, at 3511 (codified at Family Court Act § 657(a)–(b); Domestic Relations Law § 74(1)–(2)).

Two years later, in 2010, the Legislature further clarified guardians' custodial powers by enacting Family Court Act § 657(c), *see* Ch. 58, pt. F, § 5, 2010 N.Y. Laws 407, 478, which provides that guardians have "the right and responsibility" to make decisions about "the physical custody of the person of the child." Family Court Act § 657(c). Supporters of these amendments stressed that juveniles between eighteen and twenty-one often need such custodial aid because they "are unable to assume the full responsibilities of living independently." Letter from Karen Walker Bryce to Hon. Terryl Brown Clemons, *reprinted in* Bill Jacket for ch. 404, *supra*, at 14.

Since these amendments, New York courts have consistently recognized that "[t]he distinctions between guardianship and custody are elusive, as both forms of legal responsibility to a child have very similar attributes." *Matter of Marisol N.H.*, 115 A.D.3d 185, 190 (2d Dep't 2014). Thus, "[c]ustody decrees and those appointing a legal guardian of the person create the same sort of relationship between the child . . . and the person to whose care he [or she] is awarded." *Matter of Allen v. Fiedler*, 96 A.D.3d 1682, 1684 (4th Dep't 2012) (alterations & ellipsis in original; quotation marks omitted).

Family Court's power to appoint guardians to make custody determinations for juveniles between eighteen and twenty-one is dispositive here because plaintiffs all rely on such guardianship orders to support their SIJS applications. *See* Compl. ¶ 1. But guardianship is only one example of Family Court's authority to determine the custody of juveniles between eighteen and twenty-one. In addition, for example, Family Court Act § 1091 allows juveniles under the age of twenty-one who were previously in foster care to request that Family Court return them to foster care—a classic form of custody determination. Section 1091 reflects the New York Legislature's judgment that "[c]onfronting the world alone at age eighteen is neither easy nor wise." Merril Sobie, Practice Commentaries to Family Court Act § 1091, 29A McKinney's Cons. Laws of N.Y. at 162 (Supp. 2018). As the legislative history reveals, the Legislature passed that statute because many juveniles between eighteen and twenty-one are not "equipped to live on their own." Letter from Sen. Velmanette Montgomery to Gov. David Paterson (Aug. 6, 2010), *reprinted in* Bill Jacket for ch. 342 (2010), at 6.

Indeed, the Legislature cited "a vast array of literature" showing "that all too often adolescents age out of foster care upon reaching age 18 or shortly thereafter wholly unprepared to function in society." N.Y. State Assembly Mem. in Supp. of Legislation, *reprinted in* Bill Jacket for ch. 342, *supra*, at 8. That literature included a report explaining that, "[f]or most young people, the transition to adulthood is a gradual process," as evidenced by the fact that "55 percent of young men and 46 percent of young women between 18 and 24 years old were living at home with one

or both parents in 2003." Mark E. Courtney et al., *When Should the State Cease Parenting? Evidence from the Midwest Study* 1, Chapin Hall Ctr. for Children: Issue Brief No. 115 (2007). The report studied foster care in three States and noted that in the one State where children could stay in foster care until age twenty-one, two-thirds of the study population "were still in care after their twentieth birthday, and more than half did not leave care until age 21." *Id.* at 3. On balance, the study suggested, "foster youth would benefit from extending care until age 21." *Id.* at 8.

Thus, for both guardianship and foster-care purposes, the Legislature has explicitly furnished Family Court with jurisdiction over the "custody" of juveniles between eighteen and twenty-one. *See* 8 C.F.R. § 204.11(a). USCIS therefore erred in interpreting Family Court's jurisdiction over such juveniles to be limited to their care alone.

B. Family Court Has the Authority to Reunify Juveniles Between Eighteen and Twenty-One with Their Parents in the Context of Guardianship Determinations.

USCIS has denied some putative class members' SIJS applications on the additional ground that Family Court cannot order the reunification of parents with juveniles between eighteen and twenty-one, and that as a result its findings about the viability of such reunification may be ignored. *See* Compl. ¶ 4. In other words, USCIS has concluded that "a factual determination that reunification was not practical" merits no weight at all if "there is no evidence that the state court had jurisdiction under New York state law to make a legal conclusion about returning [a SIJS applicant] to [her parent's] custody." *Id.*, Ex. 6 (Decl. of Beth Krause) ¶ 20 (quotation marks omitted).

As plaintiffs correctly argue, nothing in the SIJS statute or in DHS's regulation requires that a juvenile court have the power to order reunification over the SIJS applicant. *See* Pls.' Mem. at 24–26. Indeed, inquiring into whether Family Court has the power to order reunification for a particular SIJS applicant misunderstands the reason that Congress decided to condition SIJS on state juvenile-court findings. The deference that the SIJS statute accords to state-court reunification findings flows not from state courts' *power* to order reunification, but rather from state courts' *expertise* in making determinations about the best interests of the child. See *supra* at 5–7.

Moreover, DHS's conclusion, like the related conclusion discussed above, is based on a fundamental mistake about New York law. Contrary to USCIS's assertion, Family Court *does* have the authority to order the reunification of a parent with a juvenile between eighteen and twenty-one, and thus routinely makes findings about the viability of parental reunification for such juveniles. Specifically, when Family Court exercises its authority to appoint a guardian for a juvenile, including a juvenile between the ages of eighteen and twenty-one, it may, but need not, appoint the juvenile's parent to be her guardian. New York law authorizes such an appointment: because the guardianship provisions of the Surrogate's Court Procedure Act (which apply in Family Court guardianship proceedings) allow the court to appoint "any person" as the guardian of a child, "they must include even the appointment of a natural parent as guardian," including for juveniles between eighteen and twenty-one. *Matter of Marisol N.H.*, 115 A.D.3d at 189–90 (quotation marks omitted) (mother could be appointed guardian of nineteen-year-old son); *see also Matter of Karen C.*,

111 A.D.3d 622, 622 (2d Dep't 2013) (mother appointed co-guardian of twenty-year-old daughter). Such an appointment has the practical and legal effect of committing the juvenile to his or her parent's custody. See *supra* at 14–16.

Thus, Family Court has jurisdiction under New York law to make a legal conclusion about whether to reunify juveniles between eighteen and twenty-one with their parents. And because parental reunification (by guardianship appointment) is one of the available custody options for such juveniles, Family Court routinely makes findings about the viability of reunification in determining which option would be in a juvenile's best interests. Family Court therefore has ample legal authority, and ample practical experience and expertise, to make the findings necessary to support a SIJS application, including the determination that "reunification with 1 or both of the [applicant'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)(i). *See* Pls.' Mem. at 26–27.

For example, Family Court necessarily evaluates the viability of parental reunification when it appoints one natural parent instead of another as a child's guardian. In *Matter of Karen C.*, Family Court appointed a twenty-year-old juvenile's mother and stepfather as her co-guardians, rather than her father, because "reunification with her father [was] not a viable option" due to his abandonment of the juvenile. 111 A.D.3d at 623. Family Court also regularly makes findings about parental reunification when considering whether to appoint somebody other than a natural parent as a guardian. In *Matter of Trudy-Ann W.*, for instance, the Appellate

Division appointed a juvenile's aunt as her guardian based on evidence adduced before Family Court that the juvenile's father had "abandoned her at birth," that her mother had "neglected and abused her by inflicting excessive corporal punishment and failing to supply her with adequate food and supervision," and that her aunt, in contrast, had provided her "a loving home, financial and emotional support, and the ability to pursue educational goals." 73 A.D.3d at 794, 795. Similarly, in *Matter of Beth M. v. Susan T.*, the Appellate Division held that Family Court properly appointed a child's stepmother as her guardian, given evidence that the child's mother had sexually abused her. 81 A.D.3d 1396, 1397 (4th Dep't 2011). Although Family Court did not appoint the natural parent as a guardian in these cases, its findings about the viability of parental reunification were critical to support its determination that the child's best interests would be served by appointing a nonparent as guardian. *See* Family Court Act § 661(b) (guardianship decisions guided by child's best interests).

Congress directed federal immigration authorities to rely on such findings to determine whether a juvenile immigrant is entitled to SIJS. These judicial findings are entitled to respect and deference in SIJS proceedings because Family Court has the general authority to order parental reunification, and because in exercising that authority it has developed the expertise that is the basis for such deference. Thus, there is no basis under either federal or state law for USCIS to withhold the deference that federal and state law require.

CONCLUSION

For the above reasons, the Court should reject USCIS's finding that New York's Family Court does not qualify as a juvenile court for purposes of the SIJS program, and grant plaintiffs' motion for a preliminary injunction.

Dated: New York, New York
August 7, 2018

Respectfully submitted,

BARBARA D. UNDERWOOD
Attorney General
State of New York

By: */s/ Scott A. Eisman*
SCOTT A. EISMAN
Assistant Solicitor General

28 Liberty Street
New York, NY 10005
(212) 416-8019

STEVEN C. WU
Deputy Solicitor General
SCOTT A. EISMAN
Assistant Solicitor General
of Counsel

CERTIFICATE OF COMPLIANCE

Scott A. Eisman, an employee in the Office of the Attorney General of the State of New York and counsel to amicus curiae State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 5,536 words (exclusive of the cover page, certificate of service, certificate of compliance, table of contents, and table of authorities), and complies with Local Civil Rule 11.1 of the Southern District of New York, as well as with Individual Practice Rule 2.D of Judge John G. Koeltl.

/s/ Scott A. Eisman

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the accompanying brief for amicus curiae State of New York by using the CM/ECF system on August 7, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: August 7, 2018
New York, NY

/s/ Scott A. Eisman