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## REFORMING AND CLARIFYING SPECIAL IMMIGRANT JUVENILE STATUS

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### INTRODUCTION

Special Immigrant Juvenile Status (“SIJS” or “SIJ status”) is a form of immigration relief for undocumented minor children who have been abused, abandoned, and/or neglected by one or both parents. Most applicants for SIJ status hail from the “Northern Triangle” countries of El Salvador, Honduras, and Guatemala, and have travelled thousands of miles, often alone and in dangerous conditions, to seek protection in the United States that one or both of their parents are unable or unwilling to provide them in their country of origin, typically from gangs.<sup>1</sup> To ensure that the best interests of these children are protected, the process of obtaining SIJ status must be reformed and clarified.

To receive SIJS, first, a state juvenile court must determine that the return of the child to his or her country of origin would put him or her at risk for future abuse, neglect or abandonment.<sup>2</sup> Second, the United States Citizenship and Immigration

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<sup>1</sup> Amelia Cheatham, *Central America’s Turbulent Northern Triangle*, COUNCIL ON FOREIGN RELS. (Oct. 1, 2019), <https://www.cfr.org/background/central-americas-turbulent-northern-triangle>.

<sup>2</sup> 8 U.S.C. § 1101(a)(27)(J). The statute reads as follows:

(J) an immigrant who is present in the United States—

(i) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States, and whose reunification with 1 [sic] or both of the immigrant’s parents is not viable due to abuse, neglect, abandonment, or a similar basis found State law;

(ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien’s best interest to be returned to the alien’s or parent’s previous country of nationality or country of last habitual residence; and

Services (“USCIS”) must review the child’s petition to confirm that the child meets SIJS requirements. If a child is approved for SIJS, the child immediately becomes eligible to apply for legal permanent resident status (in recognition of which a “Green Card” is issued)<sup>3</sup> and to apply for citizenship after being a permanent resident for at least five years.<sup>4</sup> Since 2014, when over 57,000 “unaccompanied alien children”<sup>5</sup> attempted to enter the United States without proper documentation (compared to 25,000 the year before),<sup>6</sup> the number of children coming to the United States without proper documentation has remained high. In fiscal year 2018, there were more than 50,000 unaccompanied minors apprehended at the border;<sup>7</sup> just one year later, in fiscal year 2019, the number of unaccompanied, undocumented children entering the United States saw a more than a fifty percent year-over-year increase, with more than 76,000 unaccompanied children crossing the border.<sup>8</sup> More than 90% of unaccompanied children were from Guatemala (54%), Honduras (26%), and El Salvador (12%);<sup>9</sup> 73% of all unaccompanied children were over fourteen years of

(iii) in whose case the Secretary of Homeland Security consents to the grant of special immigrant juvenile status, except that—

(I) no juvenile court has jurisdiction to determine the custody status or placement of an alien in the custody of the Secretary of Health and Human Services unless the Secretary of Health and Human Services specifically consents to such jurisdiction; and

(II) no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter[.]

*Id.*

<sup>3</sup> *Special Immigrant Juveniles*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/working-united-states/sij> (last visited Jan. 25, 2020) [hereinafter *Special Immigrant Juveniles*].

<sup>4</sup> *Path to U.S. Citizenship*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/us-citizenship/citizenship-through-naturalization/path-us-citizenship> (last visited Jan. 25, 2020).

<sup>5</sup> An “unaccompanied alien child” is a child who (1) has no lawful immigration status in the United States; (2) has not attained eighteen years of age; and (3) either has no parent or legal guardian in the United States or has no parent or legal guardian in the United States who can provide care and physical custody for the child. 6 U.S.C. § 279(g)(2). However, in most cases, unaccompanied children cross the border with an adult, typically a close family relative, such as an aunt or uncle, grandparent, or adult sibling. See John Burnett, *What ‘Unaccompanied Alien Children’ Means*, NPR (Dec. 23, 2018, 8:01 AM), <https://www.npr.org/2018/12/23/679592522/what-unaccompanied-alien-children-means>. Although children apprehended at the border may have a parent or legal guardian who resides in the United States, such children are classified as “unaccompanied” if the parent or legal guardian cannot provide immediate care. See CONG. RESEARCH SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 1 (2019), <https://fas.org/sgp/crs/homesec/R43599.pdf> [hereinafter UNACCOMPANIED ALIEN CHILDREN].

<sup>6</sup> *Fiscal Year 2020: Justification of Estimates for Appropriations Committees*, DEP’T OF HEALTH & HUM. SERVS. 1, 38 (2020), [https://www.acf.hhs.gov/sites/default/files/olab/acf\\_congressional\\_budget\\_justification\\_2020.pdf](https://www.acf.hhs.gov/sites/default/files/olab/acf_congressional_budget_justification_2020.pdf).

<sup>7</sup> *Southwest Border Migration FY2018*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2018> (last visited Jan. 25, 2020).

<sup>8</sup> *Southwest Border Migration FY2019*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2019> (last visited Jan. 25, 2020) [hereinafter *Southwest Border Migration FY2019*].

<sup>9</sup> *Unaccompanied Alien Children (UAC) Program Fact Sheet*, ACF PRESS OFFICE, <https://www.hhs.gov/sites/default/files/Unaccompanied-Alien-Children-Program-Fact-Sheet.pdf> (last visited Jan. 25, 2020).

age;<sup>10</sup> and 71% percent were boys.<sup>11</sup> These children largely come to the United States to escape the gang violence that has led El Salvador to have the highest intentional homicide rate in the world, with Honduras and Guatemala not far behind, ranking fourth and sixteenth, respectively.<sup>12</sup>

Although the number of unaccompanied children entering the United States has increased threefold since 2013, applications for SIJS have increased more than five times over. USCIS received fewer than 4,000 applications in fiscal year 2013, compared to nearly 21,000 in fiscal year 2019.<sup>13</sup> Due to this increase, the number of SIJS applications pending has surged almost fifteen times over, from under 2,000 in 2013 to nearly 30,000 in 2019.<sup>14</sup> Despite USCIS's statutorily mandated goal of adjudicating applications within 180 days of receipt of a child's initial application,<sup>15</sup> USCIS has struggled to keep pace and routinely misses this target.<sup>16</sup> Even for children approved for SIJ status, their journey through the immigration system is not done—SIJ status merely “paroles”<sup>17</sup> the child into the United States for the purposes of adjusting his or her status to that of a legal permanent resident.<sup>18</sup> USCIS does not have a legally mandated targeted processing time for administering these adjustments of status.<sup>19</sup> Children holding SIJ status may wait years before officially receiving their

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Intentional Homicide Victims*, U.N. OFFICE ON DRUGS & CRIME, <https://dataunodc.un.org/crime/intentional-homicide-victims> (last visited Aug. 30, 2020); *see also* Amber Pariona, *Murder Rate by Country*, WORLDATLAS (Jan. 9, 2020), <https://www.worldatlas.com/articles/murder-rates-by-country.html>.

<sup>13</sup> *Number of I-360 Petitions for Special Immigrant with a Classification of Special Immigrant Juvenile (SIJ) by Fiscal Year, Quarter and Case Status, Fiscal Year 2010–2019*, U.S. CITIZENSHIP & IMMIGR. SERVS., [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Adjustment%20of%20Status/I360\\_sij\\_performancedata\\_fy2019\\_qtr4.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Adjustment%20of%20Status/I360_sij_performancedata_fy2019_qtr4.pdf) (last visited Jan. 25, 2020) [hereinafter *Number of SIJS Petitions FY2019*]. The percentage of unaccompanied children applying for SIJS nearly doubled from 16% in fiscal year 2013 to 29% percent in fiscal year 2018. DEP'T OF HEALTH & HUM. SERVS., *supra* note 6, at 38.

<sup>14</sup> *Number of SIJS Petitions FY2019*, *supra* note 13.

<sup>15</sup> 8 U.S.C. § 1232(d)(2).

<sup>16</sup> Suzanne Monyak, *USCIS Sued Over Special Immigrant Juvenile Policy*, LAW360 (Mar. 6, 2019), <https://www.law360.com/articles/1135701/uscis-sued-over-special-immigrant-juvenile-policy>. *See also* *Number of SIJS Petitions FY2019*, *supra* note 13.

<sup>17</sup> Being “paroled” into the United States is not the same as being “admitted” into the United States. When a person is “paroled” into the United States, the Secretary of Homeland Security uses discretion in allowing certain noncitizens to physically enter and remain in the United States temporarily without a legal basis for being admitted to the United States. An “admission” occurs when an immigration officer allows a noncitizen to enter the United States pursuant to a visa or another entry document, without the limitation of parole. *The Use of Parole Under Immigration Law*, AM. IMMIGR. COUNCIL (Jan. 24, 2018), <https://www.americanimmigrationcouncil.org/research/use-parole-under-immigration-law>.

<sup>18</sup> U.S. CITIZENSHIP & IMMIGR. SERVS., *Chapter 7 – Special Immigrant Juveniles*, <https://www.uscis.gov/policy-manual/volume-7-part-f-chapter-7> (last visited Jan. 25, 2020) [hereinafter *Chapter 7 – Special Immigrant Juveniles*]. *See also* 8 U.S.C. § 1255(a) (2018).

<sup>19</sup> Memorandum from Lori Scialabba, Deputy Director, U.S. Citizenship & Immigr. Servs., to January Contreras, Ombudsman, U.S. Citizenship & Immigr. Servs. 4 (Jul. 13, 2011), [https://www.courts.ca.gov/documents/BTB\\_23\\_3K\\_11.pdf](https://www.courts.ca.gov/documents/BTB_23_3K_11.pdf).

Green Card, along with the knowledge that they will not be returned to their country of origin.<sup>20</sup>

Although, with respect to setting immigration laws, there is “no conceivable subject [in relation to which] the legislative power of Congress [is] more complete,”<sup>21</sup> SIJS requires the input of both the state and the federal governments.<sup>22</sup> The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA 2008”) amended previously passed legislation regarding SIJS to allow children who may not be reunited with “1 or both parents” to be eligible for the status.<sup>23</sup> Before submitting an application to USCIS, the child must receive “judicial determinations” from the state juvenile court that the child has been abused, neglected, abandoned, or similarly mistreated under state law by one or both parents, and that reunification with one or both parents is not viable.<sup>24</sup> While receiving an SIJ predicate order is required before a child may petition the federal government to obtain SIJ status, approximately 90% to 95% of those who have received an SIJS predicate order have ultimately had their SIJ status approved.<sup>25</sup> While the federal government’s approval rate of SIJS applications lowered to 75% in fiscal year 2018, the following year the approval rate returned to 90%.<sup>26</sup> Moreover, even with only 75% of SIJS applications being approved in fiscal year 2018, the SIJS approval rate overall remains significantly

<sup>20</sup> Austin Rose, *For Vulnerable Immigrant Children, a Longstanding Path to Protection Narrows*, MIGRATION POL’Y INST., <https://www.migrationpolicy.org/article/vulnerable-immigrant-children-longstanding-path-protection-narrows> (last visited Jan. 25, 2020).

<sup>21</sup> *Reno v. Flores*, 507 U.S. 292, 305 (1993) (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)).

<sup>22</sup> While visa options, such as the U-Visa, exist—which may rely on a state court making predicate findings, unlike SIJS—the input of state courts is not explicitly required. See Bernard P. Perlmutter, *Judges Behaving Badly . . . Clinics Fighting Back: The Struggle for Special Immigrant Juveniles in State Dependency Courts in the Age of Trump*, 82 ALB. L. REV. 1553, 1581 (2018). For information on the U-Visa, see generally *Victims of Criminal Activity: U Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status> (last visited Jan. 25, 2020).

<sup>23</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110–457, 122 Stat. 5079. The statute reads in part as follows:

(1) IN GENERAL—Section 101(a)(27)(J) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(27)(J)) is amended—

(A) in clause (i), by striking “State and who has been deemed eligible by that court for long-term foster care due to abuse, neglect, or abandonment;” and inserting “State, or an individual or entity appointed by a State or juvenile court located in the United States, and whose reunification with one or both of the immigrant’s parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law.

*Id.*

<sup>24</sup> *Special Immigrant Juveniles*, *supra* note 3.

<sup>25</sup> *Number of SIJS Petitions FY2019*, *supra* note 13 (comparing the number of approved applications to the number of denied applications).

<sup>26</sup> *Id.*

higher when compared to alternative immigration petitions, such as defensive asylum,<sup>27</sup> which has an approval rate of less than 10%.<sup>28</sup>

With the high likelihood of receiving SIJ status following receipt of a state family court or juvenile court's order, the main challenge to receiving SIJS has been obtaining the initial order that the child has been abused, neglected, and/or abandoned and that reunification with one or both parents is not viable. However, states differ dramatically in their interpretation of the SIJS statute on when to grant SIJS findings. Some states, like New York, interpret the plain meaning of the statute, holding that a child must not be able to reunify with at least one parent.<sup>29</sup> Other states, such as Nebraska, look to the legislative history behind Special Immigrant Juvenile Status and hold that for a child to be eligible for SIJS, the child must be unable to reunify with both parents.<sup>30</sup> This split among the states creates a situation where similarly situated children may receive different immigration outcomes based on the state in which they reside and to which they immigrate.<sup>31</sup>

In addition to the uncertainty surrounding the "1 or both" language, there remains some uncertainty about what Congress intended when it sought to protect children from abuse, neglect, and abandonment. The determination of abuse, neglect, or abandonment is left entirely to the states. The federal statute provides no guidelines on what counts as abuse, neglect, or abandonment; it sets no limitation on how far removed the abuse or neglect may have occurred; and it does not specify how to treat the death of an abusive, neglecting, or abandoning parent for SIJS purposes. Additionally, neither the SIJ statute nor the TVPRA 2008 specifically require the state juvenile court to make a determination that the child is making a bona fide request for SIJ status to escape abuse, neglect, or abandonment for the child's wellbeing rather than as an alternative pathway toward permanent legal status and eventually citizenship.<sup>32</sup>

Part I of this Note will present hypotheticals that demonstrate SIJS's problems, complexity, and variability among several states. Part II will examine the history and legislative intent surrounding SIJS, as well as the federal immigration law

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<sup>27</sup> An asylum applicant is said to have pursued asylum "defensively" when he or she began his or her asylum application after deportation proceedings have already begun. In contrast, applicants who apply for asylum before being placed in deportation proceedings are considered to have pursued asylum "affirmatively." *Defensive Asylum*, U.N. HIGH COMM'R FOR REFUGEES, <https://www.unhcr.org/en-us/defensive-asylum.html> (last visited Jan. 25, 2020). Approval rates for defensive asylees were 7% in 2018, compared to affirmative asylees' 22% approval rate. *Q2 Immigration Court Statistics for Fiscal Year 2018 (FY18)*, U.S. DEP'T OF JUST., <https://www.justice.gov/opa/press-release/file/1060936/download> (last visited Jan. 25, 2020) [hereinafter *Defensive Asylum Statistics 2018*].

<sup>28</sup> *Defensive Asylum Statistics 2018*, *supra* note 27.

<sup>29</sup> See generally *In re Marcelina M.-G.*, 973 N.Y.S.2d 714 (N.Y. App. Div. 2013).

<sup>30</sup> See generally *In re Erick M.*, 820 N.W.2d 639 (Neb. 2012).

<sup>31</sup> Compare *In re Marcelina M.-G.*, 973 N.Y.S.2d, and *In re Mario S.*, 954 N.Y.S.2d 843 (N.Y. Fam. Ct. 2012) (holding that the state family court must grant SIJS predicate orders to children who have suffered abuse, abandonment or neglect from only one parent), with *In re Erick M.*, 820 N.W.2d (holding that the state family court has discretion to not grant SIJS predicate orders to children who have suffered abuse, abandonment or neglect from only one parent).

<sup>32</sup> H. R. REP. NO. 105-405 § 113, at 130 (1997) (Conf. Rep.) (addressing the intent of the 1997 revision to the SIJS statute).

as a whole, considering alternative paths to obtaining legal status other than SIJS. Parts III–V track a typical chronology of a child who seeks SIJ status. Part III will address the federal government’s initial role in apprehending an unaccompanied, undocumented child. Part IV will discuss the states’ role in making “special findings,” including a comparison of New York’s plain meaning approach to Nebraska’s consideration of legislative intent. Part V will examine the federal government’s role in the SIJS process after a child has received an SIJS predicate order. Part VI will include a proposal to reform and clarify Special Immigrant Juvenile Status by establishing more concrete standards that: (1) follow the legislative intent behind SIJS; (2) create more uniform outcomes for similarly situated children, regardless of the state in which they reside; and (3) better protect the interests of all children.

#### I. CURRENT PROBLEMS WITH SIJS

State laws vary dramatically in what they consider to be abuse, neglect, and abandonment of children. For example, consider corporal punishment, the use of physical force upon another’s body to punish that person for an infraction. Although corporal punishment is banned in military training centers and many federally funded programs such as Head Start and most juvenile detention facilities,<sup>33</sup> the Supreme Court of the United States ruled in 1977 that corporal punishments in state-run schools do not violate the Eighth Amendment.<sup>34</sup> Moreover, although corporal punishment, such as spanking and paddling, is lawful in the home in all fifty states,<sup>35</sup> states vary regarding the legality of corporal punishments in schools: nineteen states allow corporal punishment in both public and private schools;<sup>36</sup> twenty-nine states allow corporal punishments in private schools but not public schools; and only two states—Iowa and New Jersey—have banned corporal punishment from use in both public and private schools alike.<sup>37</sup> Because the SIJS statute directs state judges to follow state law as to what constitutes abuse, neglect, or abandonment—regardless of whether the abuse, neglect, or abandonment occurred within the state or not<sup>38</sup>—a given state may declare certain treatment in certain situations to be abusive and/or neglectful, while a different state may hold the same treatment of minors to be non-abusive and/or non-neglectful. Consider how the following hypotheticals regarding minor differences in state laws could have a substantial effect on federal immigration eligibility.

Imagine a Guatemalan boy lives with his father in Guatemala, while his mother lives undocumented in the United States. In all Guatemalan schools, public

<sup>33</sup> Christina Caron, *In 19 States, It’s Still Legal to Spank Children in Public Schools*, N.Y. TIMES (Dec. 13, 2018), <https://www.nytimes.com/2018/12/13/us/corporal-punishment-school-tennessee.html>.

<sup>34</sup> *Ingraham v. Wright*, 430 U.S. 651 (1977).

<sup>35</sup> GLOB. INITIATIVE TO END ALL CORPORAL PUNISHMENT OF CHILD., CORPORAL PUNISHMENT OF CHILDREN IN THE USA (2020), <http://www.endcorporalpunishment.org/wp-content/uploads/country-reports/USA.pdf> [hereinafter CORPORAL PUNISHMENT OF CHILDREN IN THE USA].

<sup>36</sup> Caron, *supra* note 33.

<sup>37</sup> CORPORAL PUNISHMENT OF CHILDREN IN THE USA, *supra* note 35, at 3.

<sup>38</sup> 8 U.S.C. § 1101(a)(27)(J).

and private alike, corporal punishment is legal.<sup>39</sup> As such, the boy attends a school in which his teacher is allowed to punish students by spanking them with a paddle. The father knows that his son has, on several occasions, been paddled by his teacher, but the father, having no remedy to contest the corporal punishment due to its legality in Guatemala, does nothing to stop the paddling.<sup>40</sup>

Scenario 1: Imagine that the boy comes to the United States with his uncle to live with his mother for a better life in general, but not necessarily to escape the corporal punishment in his Guatemalan school. Furthermore, imagine that the judge is unwilling to find that one or both parents neglected or abused the child by having the child make the perilous journey to the United States through dangerous, gang-controlled territory.<sup>41</sup> Currently, the SIJS statute does not require state courts to find that SIJS petitions be made on the basis of bona fide claims of abuse, abandonment, or neglect rather than to gain legal permanent residency. If his mother lived in Nebraska, a Nebraska court, following Nebraska precedent, would decline to make any special findings needed for SIJS because the request is not bona fide.<sup>42</sup> Unless the boy could find alternative grounds for halting his removal, the boy would likely be deported. However, if the boy went to live with his mother in New York, the court would not inquire about his reasons for coming to the United States and would not make a determination as to whether the application is bona fide.<sup>43</sup> In considering his request to make SIJS findings, the New York family court may grant those requested findings of abuse and/or neglect. Subsequently, the boy will, more likely than not, receive SIJ status and eventually receive legal permanent resident status and citizenship.

Scenario 2: Imagine that the child came to the United States specifically to escape the legal scholastic corporal punishment which his father did nothing to prevent. If the boy were to reside with his mother in New Jersey, which has banned corporal punishment in all schools, public and private alike,<sup>44</sup> a New Jersey family

<sup>39</sup> GLOB. INITIATIVE TO END ALL CORPORAL PUNISHMENT OF CHILD., COUNTRY REPORT FOR GUATEMALA (2018), <https://endcorporalpunishment.org/reports-on-every-state-and-territory/guatemala/>.

<sup>40</sup> Most SIJS cases are based on more “direct” cases of parental abuse, neglect, and abandonment, such as the parent committing physical abuse, committing sexual abuse, completely abandoning the child, or neglecting to provide for the child’s basic needs, such as the needs for food and shelter. This Note uses scholastic corporal punishment as an example of a hypothetical child’s claim for SIJS to highlight the problems of using state law in a federal matter, as the differences between state law as to what constitutes more “direct” abuse, such as physical abuse, are comparatively minor and more complex to explain.

<sup>41</sup> Some judges may find that a parent has neglected or abandoned a child by allowing him or her to make the dangerous journey from the Northern Triangle to the United States. See, e.g., *In re Guardianship of Luis*, 134 N.E.3d 1070 (Ind. Ct. App. 2019). But some family court judges may refuse to do so in the absence of more “traditional” abuse, abandonment or neglect, feeling such a decision should be made by federal officials. See generally *In re Avila Luis*, 114 N.E.3d 855, 856–857 (Ind. Ct. App. 2018) (referencing a family court judge who stated that he had a “real problem” with the federal government “[t]hrowing it on me to make factual findings for them” because “[the findings] should be made by federal officials, [as] [t]hey are the one[s] that make the decision of who comes in the United States [and] who leave[s] the United States, not me”).

<sup>42</sup> See, e.g., *In re Erick M.*, 820 N.W.2d 639 (Neb. 2012).

<sup>43</sup> For SIJS purposes, the abuse, neglect, or abandonment need not have occurred in the United States or the state in which the child seeks SIJS findings. See, e.g., *In re Marcelina M.-G.*, 973 N.Y.S.2d 714 (N.Y. Sup. Ct. 2013).

<sup>44</sup> N.J. STAT. ANN. § 18A:6-1 (West 2020).

court would likely find that, under New Jersey law, the boy's father neglected him by sending him to a school in which he experienced corporal punishment. This finding would allow the boy to apply for SIJ status and eventually obtain legal permanent residency.

Consider that, instead of New Jersey, the boy went to live with his mother in Texas. In Texas, corporal punishment is permitted in both public and private schools.<sup>45</sup> If the boy were to petition a Texas family court for the same SIJS findings as he would in New Jersey, the Texas court, applying Texas law regarding corporal punishment in schools, would be unlikely to find that the child had been abused or neglected. With no basis to find abuse or neglect, the court would not grant the required special findings predicate order, preventing the child from applying for SIJS, and precluding this path toward legal permanent residency. Here, the sole difference in the boy's ability to apply for and receive a federal immigration status is the difference between the two states' laws.

Scenario 3: Let us now consider the same fact pattern, but imagine that the boy reunites with his mother in California after attending a public school in Guatemala. In California, corporal punishment is expressly prohibited in public schools, but it is permitted in private schools.<sup>46</sup> The fact that the boy was paddled in a public school and the father did nothing would likely constitute a violation of California's child abuse and neglect laws. A California juvenile court could then make specific findings that the father neglected his son by sending the boy to a school in which the boy might experience corporal punishment, making the boy eligible for SIJS.

However, if the boy attended a private school rather than a public school, the outcome in California is very different. If the same corporal punishment occurred in a Guatemalan private school, the California court would likely find that, since corporal punishment in private schools in California is allowed,<sup>47</sup> the father did not neglect his son, and the court would not make specific findings of abuse and/or neglect against the father. The boy would not be eligible for SIJS based solely on the fact that he attended private school rather than public school. When Congress created SIJS, it clearly could not have intended for a child's attendance of a public school versus a private school to be a decisive factor in obtaining the protection of SIJS. A revision to the Special Immigrant Juvenile Status process that produces more uniform outcomes is needed to better protect children.

In addition to SIJS's problems regarding inconsistent treatment of similarly situated children in different states, unlike other immigration statuses, the SIJS statute provides no exceptions to exclude applicants who have willfully<sup>48</sup> joined and

<sup>45</sup> TEX. EDUC. CODE ANN. § 37.0011 (West 2019).

<sup>46</sup> CAL. EDUC. CODE § 49001 (West 2020).

<sup>47</sup> *Id.*

<sup>48</sup> Many gangs attempt to recruit minors. Gangs generally present the children and their families with two options: (1) the minor can join the gang; or (2) the family can pay a recurring extortion fee to have the gang leave them alone. If the family elects neither, the gang will threaten to kill the child and/or the family. While gangs generally recruit teenagers, children as young as six years old have been recruited. Victoria Rossi, *Honduran Maras Recruit Children in Kindergarten*, INSIGHT CRIME (Sept. 10, 2012),



remained in a gang, have engaged in heinous criminal activities, or whose presence in the United States generally represents a threat to others. The number of children with potential gang ties may not be insignificant. According to Honduras's National Directorate of Criminal Investigation, one in ten Honduran students could be active gang members, and up to 40% of Honduran students may sympathize with the gangs.<sup>49</sup> Past attempts to amend SIJS to exclude willful gang members and other dangerous minors from receiving the benefits of SIJ status have failed.<sup>50</sup> Although over 98% of all people crossing the border without authorization do not have a criminal conviction in the United States or abroad, and only about one in one thousand has a proven gang affiliation,<sup>51</sup> SIJ should not be a backdoor for gangs wishing to establish chapters within the United States.

Additionally, SIJS and the ability to adjust it to legal permanent residency is not conditioned on the child's graduation, attendance, or even enrollment in school.<sup>52</sup> Although thousands of Central American children drop out of schools in their home countries due to the threat of gang violence,<sup>53</sup> past threats from individuals outside the United States should not prevent abused, neglected, or abandoned children from attending school in the United States.<sup>54</sup> Abused, neglected, and abandoned children must receive an education while in the United States so they do not remain vulnerable. Especially for legislation that is founded on protecting the best interests of children who have been victimized, a scholastic requirement before receipt of legal permanent resident status should not be considered unreasonable, as it will help ensure children's long-term success in the United States.

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<https://www.insightcrime.org/news/brief/honduran-maras-recruit-children-in-kindergarten-report/>. This Note does not consider children who have been so threatened so as to be considered to have "willfully" joined a gang.

<sup>49</sup> *Id.*

<sup>50</sup> *See, e.g.*, 163 CONG. REC. H7387 (daily ed. Sept. 14, 2017).

<sup>51</sup> *CBP Enforcement Statistics Fiscal Year 2021*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics> (last visited Jan. 1, 2021). For a discussion regarding issues and problems surrounding identifying (and misidentifying) undocumented immigrants as gang members, see generally PAIGE AUSTIN ET AL., STUCK WITH SUSPICION: HOW VAGUE GANG ALLEGATIONS IMPACT RELIEF & BOND FOR IMMIGRANT NEW YORKERS (2019), [https://www.nyclu.org/sites/default/files/field\\_documents/020819-nyclu-nyic-report\\_0.pdf](https://www.nyclu.org/sites/default/files/field_documents/020819-nyclu-nyic-report_0.pdf).

<sup>52</sup> All children in the United States are entitled to a public education regardless of their citizenship or immigration status. States may not prevent undocumented children from attending public schools. *See Plyler v. Doe*, 457 U.S. 202 (1982). Despite this holding, some school officials still impose obstacles to discourage and prevent undocumented students from enrolling in school due to fear that they will negatively impact test scores or will require the school to spend disproportionate amounts of resources on the students. *See* Tim Walker, *How Undocumented Students Are Turned Away from Public Schools*, NEA TODAY (Apr. 22, 2016, 7:54 AM), <http://neatoday.org/2016/04/22/undocumented-students-public-schools/>.

<sup>53</sup> Tristan Clavel, *540 Children Were Murdered Last Year in El Salvador: Report*, INSIGHT CRIME (Jan. 31, 2017), <https://www.insightcrime.org/news/brief/540-children-murdered-last-year-el-salvador-report/>.

<sup>54</sup> For example, the homicide rate in El Salvador of children aged twelve to seventeen was 67.4 per 100,000. *Id.* However, the rate in the United States is nearly fifteen times less, with 4.7 child homicides per 100,000. Sally Curtin et al., *Recent Increases in Injury Mortality Among Children and Adolescents Aged 10–19 Years in the United States: 1999–2016*, NAT'L VITAL STAT. REPS., June 1, 2018, at 1, [https://www.cdc.gov/nchs/data/nvsr/nvsr67/nvsr67\\_04.pdf](https://www.cdc.gov/nchs/data/nvsr/nvsr67/nvsr67_04.pdf).

## II. HISTORY OF SIJS AND IMMIGRATION LAW

The United States has not always addressed the particular immigration needs of undocumented children. Before the creation of SIJS in 1990, asylum was the primary remedy for children who feared future persecution.<sup>55</sup> However, asylum relief requires an applicant to have been persecuted, or show that he or she is likely to be persecuted, on account of race, religion, nationality, political opinion, or membership in a particular social group, and that the asylum seeker's home country is unable or unwilling to protect the individual from this persecution.<sup>56</sup> Asylum applications are not approved on the grounds of fleeing general violence in one's home country.<sup>57</sup> Children who have been abused, neglected, or abandoned by one or both of their parents do not fit neatly into any of the aforementioned categories, and immigration officials have been notoriously reluctant to grant asylum to people from Latin America, fearing that granting asylum to migrants from nearby countries will encourage more migrants to come to the United States.<sup>58</sup>

Congress recognized the specialized needs of unaccompanied, undocumented children by establishing Special Immigrant Juvenile Status in Section 153 of the Immigration Act of 1990.<sup>59</sup> In 1990, children who applied for SIJS were required to show that they had a state court dependency order, that they had been deemed eligible for long-term foster care, and that it was in their best interests not to be returned to their country of origin.<sup>60</sup> Following the submission of a state court order containing these findings, Immigration and Naturalization Services ("INS," USCIS's predecessor)<sup>61</sup> had the exclusive right to approve or deny the application.<sup>62</sup>

Despite the good intentions behind Section 153, it was riddled with uncertainty and loopholes. The bifurcated roles between the states and the federal government were not clear, resulting in oversights such as omitting a provision allowing SIJS recipients to adjust their SIJ status to legal permanent resident status.<sup>63</sup> Without such an adjustment, SIJS recipients remained in an immigration "gray area," being allowed to stay in the United States, but also unable to obtain a legal status, which specifically allowed them to freely live and work in the United States.

<sup>55</sup> Establishing Asylum Eligibility, 8 C.F.R. § 208.13 (2019).

<sup>56</sup> *Id.*

<sup>57</sup> Miriam Jordan & Simon Romero, *What it Takes to Get Asylum in the U.S.*, N.Y. TIMES (May 2, 2018), <https://www.nytimes.com/2018/05/02/us/what-it-takes-to-get-asylum-us.html>.

<sup>58</sup> *Id.*

<sup>59</sup> Immigration Act of 1990, Pub. L. No. 101-649, § 153, 104 Stat. 4978, 5005–06 (1990) (codified at 8 U.S.C. § 1101(a)(27)(J) (West 2012)).

<sup>60</sup> *Id.*

<sup>61</sup> INS was part of the Department of Justice ("DOJ") from 1940 to 2003, at which point most of its functions were transferred to USCIS, U.S. Immigration and Customs Enforcement ("ICE"), and U.S. Customs and Border Patrol ("CBP"), departments within the newly created Department of Homeland Security ("DHS"). USCIS HIST. OFF. & LIBR., U.S. CITIZENSHIP & IMMIGR. SERVS., OVERVIEW OF INS HISTORY (2012), <https://www.uscis.gov/sites/default/files/USCIS/History%20and%20Genealogy/Our%20History/INS%20History/INSHistory.pdf>.

<sup>62</sup> Immigration Act of 1990, Pub. L. No. 101-649, § 153, 104 Stat. 5005, 5006.

<sup>63</sup> Laura Ploeg, *Special Immigrant Juveniles: All the Special Rules*, IMMIGR. L. ADVISOR, Jan. 2014, at 1, <https://www.justice.gov/sites/default/files/eoir/legacy/2014/08/27/vol8no1.pdf>.

Congress addressed these issues, stating that it intended for state juvenile courts to determine the best interests of the child.<sup>64</sup> However, the statutory language was still ambiguous, and the ambiguity resulted in SIJS petitions being granted to children and young adults outside Congress's intention.<sup>65</sup> For example, visiting international college students would petition for SIJS to receive legal permanent residency and a pathway to citizenship, a status and pathway that their student visa did not provide.<sup>66</sup>

In response to the vague language of the statute and misuse by some applicants, Congress passed Section 113 of the Immigration and Nationality Act of 1997 (INA 1997). Section 113 required that SIJS approval be conditioned on petitioners being eligible for long-term foster care due to abuse, neglect, or abandonment.<sup>67</sup> In addition, the express or specific consent of the Attorney General of the United States (then the head of the INS) was required.<sup>68</sup> A congressional report issued shortly after INA 1997's passage clarified that SIJS was amended:

[I]n order to limit the beneficiaries of this provision to those juveniles for whom it was created, namely abandoned, neglected, or abused children, by requiring the Attorney General to determine that neither the dependency order nor the administrative or judicial determination of the alien's best interest was sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect.<sup>69</sup>

Despite the issuance of this congressional report, the *bona fide* element never was formally incorporated as an SIJS requirement.<sup>70</sup> As a result, state juvenile courts are not required by federal law to consider that element when evaluating SIJ cases and ordering special findings.

### III. THE FEDERAL GOVERNMENT'S INITIAL INVOLVEMENT IN PRACTICE

In practice, the federal government's role in most undocumented children's SIJ cases begins at the border where the child is apprehended by Customs and Border Patrol ("CBP").<sup>71</sup> Once apprehended, the child is in the physical care and legal

<sup>64</sup> *Id.*

<sup>65</sup> *Yeboah v. U.S. Dep't of Just.*, 345 F.3d 216, 221 (3d Cir. 2003).

<sup>66</sup> *Id.*

<sup>67</sup> Immigration Act of 1997, Pub. L. No. 105-119, § 113, 111 Stat. 2440, 2460.

<sup>68</sup> Memorandum from William R. Yates, Assoc. Dir. for Operations, U.S. Citizenship & Immigr. Servs., to Reg'l & Dist. Dirs., U.S. Citizenship & Immigr. Servs. (May 27, 2004), [https://www.uscis.gov/sites/default/files/document/memos/sij\\_memo\\_052704.pdf](https://www.uscis.gov/sites/default/files/document/memos/sij_memo_052704.pdf) [hereinafter Yates Memorandum]. Express consent was used typically when the child was not in the custody of the Attorney General and where the juvenile court had issued a dependency order, whereas specific consent typically was issued in cases where the child was "in the actual or constructive custody of the federal government." *Id.*

<sup>69</sup> H.R. REP. NO. 105-405, at 130 (1997).

<sup>70</sup> Yates Memorandum, *supra* note 68. However, in 2004, relying on the 1997 report, William Yates, the Associate Director for Operations of USCIS, stated that "express consent is an acknowledgement that the request for SIJ classification is *bona fide*." *Id.*

<sup>71</sup> The alternative would be that an undocumented child presents himself or herself to immigration officials after having resided in the United States for some period of time.

custody of CBP, an agency within the federal Department of Homeland Security (“DHS”). Prior to the Homeland Security Act of 2002, the physical care and legal custody of apprehended children was to be “quickly” transferred to a family member or to a state-operated, long-term foster care facility.<sup>72</sup> However, “quickly” was not defined.

Revisions to the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (“TVPPRA 2008”) included a provision that, within seventy-two hours of the minor’s apprehension by CBP,<sup>73</sup> the custody of a child must be transferred to a family member or a state-run, licensed care facility meeting standards set by the Office of Refugee Resettlement (“ORR”), a subdivision of the Department of Health and Human Services (“HHS”).<sup>74</sup> As a child’s family in the United States may live hundreds, if not thousands, of miles from the site of apprehension, more than 98% of undocumented, unaccompanied children apprehended at the border spend at least some time in an ORR-funded care facility.<sup>75</sup> While most ORR facilities are in states along the United States-Mexico border,<sup>76</sup> where a child is sent for ORR foster care often depends on where there is capacity to house the child. For example, a child apprehended in Texas may be transferred to New York or Florida depending on where there is a bed available for the child.<sup>77</sup> As such, even if the child intentionally crossed the southern border in an area close to where family members reside, there may be a delay in the child’s release from an ORR facility to his or her family as the family attempts to obtain physical custody of the child by making a cross-country journey or while the family attempts to gather funds to pay for a plane ticket for the child.<sup>78</sup>

#### IV. THE ROLE OF THE STATES

Although the U.S. Constitution expressly delineates naturalization policy as within the powers of Congress,<sup>79</sup> the Constitution does not explicitly prevent the federal government from delegating certain parts of the process to the states. Congress involved state juvenile courts in the SIJS process because Congress

<sup>72</sup> ACF PRESS OFFICE, *supra* note 9.

<sup>73</sup> 8 U.S.C. § 1232(b)(3). This excludes countries that share a land border with the United States, i.e., Canada and Mexico.

<sup>74</sup> *About the Program*, OFFICE OF REFUGEE RESETTLEMENT (May 18, 2019), <https://www.acf.hhs.gov/orr/programs/ucs/about> [hereinafter *About the ORR Program*].

<sup>75</sup> In 2018, approximately 49,100 (98%) of the 50,036 unaccompanied minors spent at least some time in an ORR-funded shelter. *Latest UAC Data – FY2019*, DEP’T OF HEALTH & HUM. SERVS. (Jan. 30, 2020), <https://www.hhs.gov/programs/social-services/unaccompanied-alien-children/latest-uac-data-fy2019/index.html>.

<sup>76</sup> *About the ORR Program*, *supra* note 74.

<sup>77</sup> See Aura Bogado, *Here’s a Map of Shelters Where Immigrant Children Have Been Housed*, REVEALNEWS.ORG (June 26, 2018), <https://www.revealnews.org/article/heres-a-map-of-shelters-where-immigrant-children-have-been-housed/>.

<sup>78</sup> The average length unaccompanied children spent in an ORR-funded shelter was fifty days in 2019. ACF PRESS OFFICE, *supra* note 9.

<sup>79</sup> U.S. CONST. art. I, § 8, cl. 4 (stating “Congress shall have the power . . . [t]o establish a uniform Rule of Naturalization”).

believed that federal immigration judges “may lack local insight or access to fact witnesses necessary to make the particularized findings SIJS requires[,] . . . [while state juvenile] courts regularly make findings of fact regarding the best interests of children and as such are experts on this standard.”<sup>80</sup>

Before a child is eligible to apply for SIJS, a state family court must make the following six findings<sup>81</sup>:

1. The child is physically present in the United States;
2. The child meets the state’s age requirements for family or juvenile court;<sup>82</sup>
3. The child is not married;
4. The child has been declared dependent on a juvenile court, or legally committed to or placed under the custody of a state agency or department or an individual or entity appointed by a state or juvenile court;<sup>83</sup>
5. The child’s reunification with one or both parents is not viable due to parental abuse, neglect, abandonment, or mistreatment of a similar basis under state law;<sup>84</sup> and
6. It is not in the child’s best interests to return to his or her country of origin.<sup>85</sup>

The first four findings are relatively straightforward and can be determined by testimony, birth certificates, and other standard procedures, with which state family court and juvenile court judges are accustomed.<sup>86</sup> The fifth and sixth findings—the heart of the SIJS-predicate order—are more difficult to prove.

Judges have several concerns when granting an SIJS predicate order. Judges primarily question how they can be expected to investigate and prove that a child was abused, neglected, or abandoned in a foreign country and wonder at what point abuse, neglect, or abandonment becomes too remote to be used for a declaration of

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<sup>80</sup> Christine Poarch, *When Federal Immigration Law Is a State Issue: Special Immigrant Juveniles in Virginia*, 63 VA. LAW. 16, 16 (2014), <https://www.vsb.org/docs/valawyeremagazine/vl1014-immigration-law.pdf>.

<sup>81</sup> States differ in whether they have separate family courts and juvenile courts. In states which do not have separate juvenile courts, jurisdiction of minors is given to the family court. In this Note, the terms “family court” and “juvenile court” will be used interchangeably to refer to a court which has authority over a minor.

<sup>82</sup> Family and juvenile courts vary in whether their age limit for juvenile order is eighteen or twenty-one. *Special Immigrant Juveniles*, *supra* note 3.

<sup>83</sup> IMMIGRANT LEGAL RESEARCH CTR., SPECIAL IMMIGRANT JUVENILE STATUS: A PRIMER FOR ONE-PARENT CASES 2 (n.d.), [https://www.ilrc.org/sites/default/files/resources/one-parent\\_sijs\\_primer\\_final.pdf](https://www.ilrc.org/sites/default/files/resources/one-parent_sijs_primer_final.pdf) (last visited Jan. 25, 2020).

<sup>84</sup> Although the abuse, neglect, or abandonment need not have occurred within the court’s jurisdiction, or even within the United States. *See, e.g., In re Marcelina M.-G.*, 973 N.Y.S.2d 714 (N.Y. App. Div. 2013) (holding that what is considered abuse, neglect, or abandonment is determined under each state’s law); 8 U.S.C. § 1101(a)(27)(J).

<sup>85</sup> 8 U.S.C. § 1101(a)(27)(J); *see also Special Immigrant Juveniles*, *supra* note 3.

<sup>86</sup> Richard F. Storrow, *Unaccompanied Minors at the U.S.-Mexico Border: The Shifting Sands of Special Immigrant Juvenile Status*, 33 GEO. IMMIGR. L.J. 1, 8 (2018).

dependency.<sup>87</sup> Judges also question why an abused, neglected, or abandoned child is seeking a court order stating they have been mistreated yet (typically) are not seeking services from the applicable state agency in charge of child welfare.<sup>88</sup> With such uncertainty, judges fear that their courts are being flooded with cases of questionable, or even illegitimate, merit and that they have no way to properly and fairly adjudicate these claims.<sup>89</sup> Moreover, judges are concerned that children, even those “truly”<sup>90</sup> abused, neglected, or abandoned, seek a state court dependency order to go through an unintended, albeit legal, “back door” to qualify for legal permanent resident status.<sup>91</sup>

Immigration advocates counter judges’ concerns, contending that since parents of U.S. citizen children are not subject to time frames for abuse, neglect, or abandonment, there should be no exception for non-citizen minors.<sup>92</sup> Moreover, such advocates point to a document prepared specifically for state juvenile courts in which USCIS states that “[t]he role of the [state juvenile] court is to make factual findings based on state law about the abuse, neglect, or abandonment; [the possibility of] family reunification; and [the] best interests of the child.”<sup>93</sup> The document also stresses that “juvenile judges should note that providing an order [granting SIJS findings] does not [in and of itself] grant SIJ status or a ‘Green Card’ . . . .”<sup>94</sup> Nevertheless, state juvenile court judges familiar with the SIJS process may remain reluctant to grant SIJS findings knowing that, historically, 90% to 95% of children who receive an SIJS predicate order are granted SIJS,<sup>95</sup> and that most SIJS recipients will eventually receive legal permanent residency or citizenship.

In making a determination of the best interests of the child, the juvenile court judge has wide discretion in interpreting both the state and federal governments’ roles regarding SIJS. State law regarding the abuse, neglect, or abandonment of children varies, as does state case law interpretations of the SIJS requirements. When making

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<sup>87</sup> Florida courts have held in several cases that undocumented minors who are claiming to have been abused, neglected, or abandoned by a parent more than ten years prior may not use such remote maltreatment as a basis for a court dependency order. See, e.g., *In re S.A.R.D.*, 182 So. 3d 897 (Fla. Dist. Ct. App. 2016); see also *In re F.J.G.M.*, 196 So. 3d 534 (Fla. Dist. Ct. App. 2016).

<sup>88</sup> Most undocumented children do not seek state or federal social services despite being eligible. Ashley Cleek, *Florida Judges Are Turning Their Backs on Abused Young Immigrants*, THE NATION (Jan. 22, 2018), <https://www.thenation.com/article/florida-judges-are-turning-their-backs-on-abused-young-immigrants/>.

<sup>89</sup> Perlmutter, *supra* note 22, at 1577.

<sup>90</sup> See, e.g., *In re B.R.C.M.*, 182 So. 3d 749, 751–54 (Fla. Dist. Ct. App. 2015).

<sup>91</sup> Perlmutter, *supra* note 22, at 1555; see also *In re T.J.*, 59 So. 3d 1187, 1194–95 (Fla. Dist. Ct. App. 2011) (Wells, J., concurring in part, dissenting in part) (“[T]hus what T.J. is seeking here is to be declared dependent to secure a ‘back door’ route to naturalization. While I do not believe that Chapter 39 was ever intended to secure a pathway to citizenship for foreign minors, I must agree that the manner in which that Chapter currently is written may be interpreted to provide an avenue for such use.”).

<sup>92</sup> Cleek, *supra* note 88.

<sup>93</sup> U.S. CITIZENSHIP & IMMIGR. SERVS., SPECIAL IMMIGRANT JUVENILE STATUS: INFORMATION FOR JUVENILE COURTS (n.d.), [https://web.archive.org/web/20180212182957/https://www.ncjfcj.org/sites/default/files/Information\\_for\\_Juvenile\\_Courts\\_FINAL%20\(1\).pdf](https://web.archive.org/web/20180212182957/https://www.ncjfcj.org/sites/default/files/Information_for_Juvenile_Courts_FINAL%20(1).pdf) (last visited Jan. 25, 2020).

<sup>94</sup> *Id.*

<sup>95</sup> *Number of SIJS Petitions FY2019*, *supra* note 13 (comparing the number of approved applications to the number of denied applications).

a decision, a juvenile court judge, acting under the federal SIJS law, is not required to determine that the child seeks findings for a bona fide SIJS petition pursuant to the 1997 congressional report.<sup>96</sup> Similarly, the judge is not required to confirm that the child is attending or has graduated from school, and is not required to ask about any criminal history when determining the “best interests” of the child.<sup>97</sup> Without such knowledge, a judge may place a minor in the custody of a parent or guardian who is unwilling or unable to provide for the best interests of the child—the exact issue SIJS was designed to solve.<sup>98</sup> Such discretion also means that undocumented, unaccompanied children with similar histories may receive different findings based on their state of residence.<sup>99</sup>

For example, before granting an SIJS predicate order, Nebraska chooses to evaluate whether a child is seeking such an order bona fide, even though this is not required (and possibly not allowed) under the SIJ statute. In *In re Erick M.*, a boy with a history of drug and alcohol abuse reunited with his mother in Nebraska. The boy subsequently petitioned for specific SIJS findings on the grounds that his father, who abandoned his mother while she was pregnant with the boy, had abandoned him as well.<sup>100</sup> Despite the plain language of “1 or both” in the SIJS statute,<sup>101</sup> the family court denied the boy’s request to make specific findings. On appeal, the Nebraska Supreme Court upheld the family court’s decision that the “1 or both” language gave the juvenile court discretion in ruling whether to require that reunification with both parents be unviable, or that reunification with just one parent was not viable.<sup>102</sup>

In making this determination, the Nebraska Supreme Court studied the 1997 SIJS amendment and accompanying congressional report, stating that “Congress intended that the amendment would prevent youths from using this remedy for the purpose of obtaining legal permanent residence status, rather than for the purpose of obtaining relief from abuse or neglect.”<sup>103</sup> Additionally, the court stated that Erick

<sup>96</sup> Yates Memorandum, *supra* note 68.

<sup>97</sup> See, e.g., *In re Mario S.*, 954 N.Y.S.2d 843, 852 (N.Y. Fam. Ct. 2012).

<sup>98</sup> In the Northern Triangle, completion of secondary (high school) education is less than 40%, with fewer than 20% of Guatemalan adults ages twenty-five to twenty-nine having completed secondary education. MELISSA ADELMAN & MIGUEL SZÉKELY, WORLD BANK GRP., SCHOOL DROPOUT IN CENTRAL AMERICA: AN OVERVIEW OF TRENDS, CAUSES, CONSEQUENCES, AND PROMISING INTERVENTIONS 35 fig.1 (2016), <http://documents1.worldbank.org/curated/en/308171468198232128/pdf/WPS7561.pdf>. Among those children ages twelve to seventeen who have migrated to the United States, 5% to 10% do not attend school. *Id.* at 19. For example, imagine that a fourteen-year-old boy who has been abandoned by his father refuses to go to school, preferring to work instead. His mother agrees the boy should work full-time in the United States to help support the family. Unless a state juvenile court judge specifically asks about school attendance, the child will be considered to have been neglected by the mother as well by not enrolling that child in school. See, e.g., *In re Cunnitrel A.*, 894 N.Y.S.2d 800 (N.Y. App. Div. 2010). For issues regarding difficulties undocumented students have enrolling in public schools, see sources cited *supra* note 52.

<sup>99</sup> Compare *In re Erick M.*, 820 N.W.2d 639 (Neb. 2012), with *In re Marcelina M.-G.*, 973 N.Y.S.2d 714 (N.Y. App. Div. 2013).

<sup>100</sup> See *In re Erick M.*, 820 N.W.2d at 642–43.

<sup>101</sup> 8 U.S.C. § 1101(a)(27)(J)(i).

<sup>102</sup> *In re Erick M.*, 820 N.W.2d at 645.

<sup>103</sup> *Id.*

M. was not abandoned by his father, as the father was never a part of the boy's life.<sup>104</sup> As the court ruled that the father had not abandoned the child and that reunification with the mother was possible, the boy's petition for specific SIJS findings was not bona fide.

In contrast, New York case law regarding SIJS holds that at least one parent must have abused, neglected, or abandoned the child in order for the child to qualify for SIJS findings from the juvenile court. The case *In re Mario S.* dealt with a boy with a history of misdemeanors, including truancy and vandalism, who petitioned a family court for SIJS findings.<sup>105</sup> The boy's family had entered the United States when he was about six months old, and he lived with his mother and father in New York until he was ten years old, when his parents separated. The boy lived with his father for a few months when he was fourteen, but they were separated when the father was deported for domestic violence against his girlfriend, at which time the boy returned to live with his mother. Following the father's deportation, the father had only a minimal relationship with the boy, and he did not provide for the boy financially.<sup>106</sup>

Unlike the Nebraska courts, the New York Family Court accepted that the father had abandoned the boy and that, despite the mother's own risk of deportation due to her own undocumented status in the United States, reunification with the mother was viable. Moreover, the court expressly rejected the Nebraska courts' interpretation of the SIJS statute, holding that:

The function of the juvenile court in deciding an application for special findings which would permit a juvenile to file an application for adjustment of status as a special immigrant juvenile is limited in scope. . . . The juvenile court need not determine any other issues, such as what the motivation of the juvenile in making application for the required findings might be; whether allowing a particular child to remain in the United States might someday pose some unknown threat to public safety; and whether the USCIS . . . may or may not grant a particular application for adjustment of status as a[n] SIJ.<sup>107</sup>

The Supreme Court of New York<sup>108</sup> has upheld the reasoning used by the Family Court in *In re Mario S.* In the case *In re Marcelina M.-G.*, a Honduran girl appealed the New York Family Court's denial of SIJS findings. So that the girl's mother could go to the United States to provide for her children, the mother left her children in Honduras in the care of, unknown to the mother, an abusive relative. The

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<sup>104</sup> *Id.* Compare *In re Erick M.*, 820 N.W.2d 639, with *In re Adoption of David C.*, 790 N.W.2d 205 (Neb. 2010) (holding that a father abandoned his child when the father abandoned the child's mother during her pregnancy with the child).

<sup>105</sup> *In re Mario S.*, 954 N.Y.S.2d 843, 851 (N.Y. Fam. Ct. 2012).

<sup>106</sup> *Id.* at 852.

<sup>107</sup> *Id.* at 852–53 (citations omitted).

<sup>108</sup> Unlike most states, in which a court called “the Supreme Court” is the highest court of the state, New York's Court of Appeals is superior to its Supreme Court. As such, the Supreme Court is an appellate court subject to review by the Court of Appeals. *Structure of the Courts*, NYCOURTS.GOV, <http://courts.state.ny.us/courts/structure.shtml> (last updated Feb. 15, 2013).



girl's father was a violent alcoholic and had never supported, nor lived with, the girl. The girl and her half-brother decided to go to the United States to escape the abuse from the relative, but were subsequently apprehended at the United States-Mexico border. After granting the mother's petition for sole custody, the New York Family Court rejected the girl's request for special findings. Although the Family Court agreed that reunification with the girl's father was not viable, the court held that it was "a strained reading of [the SIJS] statute" to permit the girl to petition for SIJS when she was "with her natural parent," as the girl "d[id] [not] need them both."<sup>109</sup>

Upon appeal, the Supreme Court of New York reversed, relying on the plain meaning "that the '1 or both' language requires only a finding that reunification is not viable with one parent."<sup>110</sup> In making such a determination, the court decided that, by replacing the "long-term foster care" requirement with the "1 or both" language, Congress intended that a child could receive SIJS even if only one parent had abused, neglected, or abandoned the child and reunification with the other parent was viable.<sup>111</sup> Outside of Nebraska and New York, the remaining forty-eight states vary in their requirements for specific SIJS findings. California, for example, has explicitly rejected the Nebraska Supreme Court's interpretation of "1 or both" in favor of New York's plain meaning interpretation.<sup>112</sup> Further, California agreed with the *In re Mario S.* court's opinion that it was outside the scope of the juvenile court to determine a child's motivations for seeking SIJS, whether a child may pose a threat to public safety now or in the future, or predict whether USCIS might approve an application to adjust immigration status.<sup>113</sup> Meanwhile, Florida has adopted an approach more similar to that of Nebraska, as family court judges consider the time frame of the child's abuse, neglect, or abandonment to determine whether an SIJS court order is sought bona fide.<sup>114</sup>

## V. THE FEDERAL GOVERNMENT'S ROLE AFTER THE SIJS PREDICATE ORDER

After a child has received an SIJS predicate order with special findings from the state juvenile court, the child must submit a petition to the Department of Homeland Security ("DHS") asking it to grant the child SIJ status. Regardless of the strength of the findings of the state juvenile court, the federal government makes the final determination on whether the child should receive SIJS.<sup>115</sup> DHS is statutorily required to decide whether or not to grant SIJ status within 180 days of receipt of the

<sup>109</sup> *In re Marcelina M.-G.*, 973 N.Y.S.2d 714, 718 (N.Y. App. Div. 2013).

<sup>110</sup> *Id.* at 715.

<sup>111</sup> *Id.*

<sup>112</sup> *In re Israel O.*, 182 Cal. Rptr. 3d 548 (Cal. Ct. App. 2015).

<sup>113</sup> *Id.*

<sup>114</sup> *In re S.A.R.D.*, 182 So. 3d 897 (Fla. Dist. Ct. App. 2016); *see also In re F.J.G.M.*, 196 So. 3d 534 (Fla. Dist. Ct. App. 2016).

<sup>115</sup> *Boyron v. Lynch*, 604 F. App'x 72, 74 (2d Cir. 2015) (citing 8 U.S.C. § 1101(a)(27)(J)(iii)).

application.<sup>116</sup> If DHS grants SIJS, the juvenile applicant is deemed “paroled”<sup>117</sup> into the United States.<sup>118</sup> With such approval, the applicant may request that the Immigration Court terminate removal proceedings and may subsequently petition DHS to adjust his or her SIJ status to the status of legal permanent resident.<sup>119</sup> If DHS denies the SIJS application, the applicant may appeal to the Board of Immigration Appeals.<sup>120</sup>

Although historically DHS grants approximately 90% of SIJS petitions, DHS expressly retains discretion to deny SIJ status to applicants.<sup>121</sup> When making the final determination whether to grant or deny SIJS, DHS first determines “whether the alien applicant is eligible for such relief” and then “whether such relief should be granted in the discretion of [DHS].”<sup>122</sup> Such discretion may include weighing whether the child currently poses or in the future might pose a threat to others<sup>123</sup> and whether the findings were sought primarily for the purpose of obtaining SIJ status.<sup>124</sup>

In October 2016, USCIS began changing its process for evaluating SIJS applications.<sup>125</sup> As allowed under the SIJS statute, the DHS Secretary may issue a Request For Evidence (“RFE”) to SIJS applicants, which requires applicants to submit additional evidence supporting their case to assist DHS in making a determination.<sup>126</sup> In part due to increased use of RFEs, SIJS approval rates dropped from 92% in fiscal year 2017 to 74% in fiscal year 2018.<sup>127</sup> However, in fiscal year 2019, the SIJS approval rates returned to over 90%.<sup>128</sup> Similarly, in 2018, USCIS issued a policy manual ostensibly expounding the intent of SIJS. While USCIS claims the November 2019 update to the policy manual merely provided “clarification” of the law, such as guiding what may constitute a “similar basis” of abuse, neglect, or abandonment,<sup>129</sup> USCIS also explicitly began to require that the juvenile state court predicate order must contain “a reasonable factual basis for each

<sup>116</sup> 8 U.S.C. § 1232(d)(2).

<sup>117</sup> See *supra* note 17 for an explanation of the difference between being “paroled” and “admitted” into the United States.

<sup>118</sup> *Chapter 7 – Special Immigrant Juveniles*, *supra* note 18; see also 8 U.S.C. § 1255(a).

<sup>119</sup> Storrow, *supra* note 86, at 11.

<sup>120</sup> 8 C.F.R. § 103.3 (2020); see also 8 C.F.R. § 103.5 (2020).

<sup>121</sup> 8 U.S.C. § 1101(a)(27)(J)(iii) (stating that an applicant may only receive SIJS when “the Secretary of Homeland Security consents to the grant of special immigrant juvenile status”).

<sup>122</sup> *Riley v. Ganter*, No. 03 Civ.2835 GEL, 2003 WL 22999487, at \*3 (S.D.N.Y. Dec. 22, 2003).

<sup>123</sup> *Chapter 7 – Special Immigrant Juveniles*, *supra* note 18; see also 8 U.S.C. § 1182.

<sup>124</sup> Scialabba, *supra* note 19.

<sup>125</sup> SHARON HING ET AL., IMMIGRANT LEGAL RESEARCH CTR., RESPONDING TO INAPPROPRIATE RFEs AND NOIDS IN SPECIAL IMMIGRANT JUVENILE STATUS CASES 2 (2018), [https://www.ilrc.org/sites/default/files/resources/sijs\\_respond\\_inapp\\_rfes\\_noids-20190102.pdf](https://www.ilrc.org/sites/default/files/resources/sijs_respond_inapp_rfes_noids-20190102.pdf).

<sup>126</sup> 8 C.F.R. § 103.2(b)(8) (2020).

<sup>127</sup> HING ET AL., *supra* note 125; see also *Number of SIJS Petitions FY2019*, *supra* note 13. However, it is important to note that although fiscal year 2018 saw a record 1,654 applications rejected—more than the total number of rejections in fiscal years 2016 and 2017 combined—the total number of applicants for whom USCIS issued a final decision dropped nearly in half, from 12,404 applicants who received a final decision in fiscal year 2017 to only 6,364 such applicants in fiscal year 2018. *Number of SIJS Petitions FY 2019*, *supra* note 13.

<sup>128</sup> *Number of SIJS Petitions FY2019*, *supra* note 13.

<sup>129</sup> Child. Immigr. L. Acad., *Analysis of SIJS Updates to the USCIS Policy Manual*, AM. BAR ASS’N (Dec. 11, 2019), <http://www.cilacademy.org/2019/12/11/analysis-of-sijs-updates-to-the-uscis-policy-manual/>.

of the judicial determinations” necessary for SIJ classification.<sup>130</sup> Despite the attempt to create a more uniform process, the policy manual left much to be questioned, including failing to provide guidance regarding how “1 or both” should be interpreted.<sup>131</sup>

## VI. REFORMING AND CLARIFYING SIJS

Inconsistent results between similarly situated minor applicants residing in different states will continue so long as state juvenile courts following state juvenile laws regarding childhood abuse, abandonment, or neglect make the special findings upon which SIJS orders are predicated. To resolve these discrepancies, to establish a more uniform national system, and to better protect SIJ applicants, Congress should pass the following five fundamental changes to the SIJS process. Congress should: (1) ensure uniformity among the states by issuing a congressional report clarifying the intention of the TVPRA 2008’s “1 or both” language; (2) legislate that, for SIJS purposes only, abuse, neglect, and abandonment should be defined by federal child welfare laws, rather than by state laws; and (3) transfer the responsibility and duty to make SIJS predicate orders from the determination of state juvenile courts to federal immigration judges. Additionally, to prevent misuse of the SIJ process and to ensure the long-term best interests of children, Congress should: (4) pass legislation explicitly preventing minors who pose a threat to others from receiving SIJS predicate orders and SIJ status; and (5) pass legislation conditioning adjustment of SIJ status to legal permanent residency on graduation from U.S. high school or passing a comparable U.S. high school equivalency assessment, such as the General Educational Development test (also known as the “G.E.D.”).

First, a congressional report elaborating on the intent of “1 or both” is desperately needed. In 1997, the penultimate time the SIJS statute was significantly altered, Congress issued a report explaining what it hoped to accomplish with the revised legislation. However, no such report was issued alongside the TVPRA 2008, the last time SIJS underwent significant reforms. Although more than a decade has passed since TVPRA 2008 was enacted, a joint report from the House and Senate clarifying the intent of the “1 or both” language would summarily resolve the differences in interpretation between states like New York and Nebraska. Without such a clarification, the interpretation of “1 or both” is bound to remain variable among the states.

Given the available evidence, Congress almost certainly intended the “1 or both” language to mean that at least one parent, but not necessarily both parents, must have abused, neglected, or abandoned the child. By replacing the “foster care” language with the “1 or both” language while also maintaining the “best interests”

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<sup>130</sup> *Special Immigrant Juveniles*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/working-in-the-united-states/permanent-workers/employment-based-immigration-fourth-preference-eb-4/special-immigrant-juveniles> (last updated Feb. 10, 2020).

<sup>131</sup> *See generally* 7 U.S. CITIZENSHIP & IMMIGR. SERVS., USCIS POLICY MANUAL pt. A, ch. 2 (n.d.), <https://www.uscis.gov/book/export/html/68600> (last updated Dec. 15, 2020).

requirement, Congress intended to expand the eligibility of those who may seek SIJS, as it would be in the “best interests” of an abused, neglected, or abandoned minor who is able to reunify with one parent to reunify with that parent. Regardless of the interpretation, such a determination should be made by Congress and not the states.

Second, federal child welfare laws, rather than those of the several states, should determine whether a child has been abused, neglected, or abandoned by a parent. While the federal government often defers to state law regarding the welfare of children, providing only minimum guidelines,<sup>132</sup> it does provide its own, more restrictive rules on child abuse and neglect for federally funded programs.<sup>133</sup> With uniform definitions of what constitutes the abuse, neglect, or abandonment of a child, similarly situated children are more likely to receive similar judgments than under the current SIJS law. For example, following the federal rules, all children who have experienced corporal punishment in school will be eligible to apply for SIJS. Similarly, it would make no difference whether the child was punished in a public school or a private school.

Third, with the accompanying change to federal child welfare law, federal immigration judges should issue the predicate order, not state juvenile court judges. The reason that state court judges, following state child welfare laws, were allowed to make SIJS predicate orders was that federal immigration judges would lack insight as to the particular needs of children.<sup>134</sup> This was a reasonable belief when SIJS was newly established, as it was unknown how many children would pass through immigration judges’ courtrooms. However, in recent years, unaccompanied children represent nearly 10% of all people who cross and are apprehended at the border.<sup>135</sup> The percentage of cases that immigration judges see involving children is even higher when considering that “family units” include children who crossed into the United States with a parent or guardian.<sup>136</sup> As such, immigration judges routinely handle the immigration cases of children. As there is “no conceivable subject [in relation to which] the legislative power of Congress [is] more complete” than immigration law,<sup>137</sup> states should play no role whatsoever in determining whether a child is eligible to apply for SIJS.

Fourth, when determining whether or not to grant the SIJ predicate order, immigration judges should inquire about any criminal record the child may have outside of immigration offenses. As of January 2020, a criminal record does not preclude a child from seeking SIJS, but it still may be grounds for inadmissibility when adjusting SIJ status to legal permanent residency. Under the current system, a

<sup>132</sup> See, e.g., Child Abuse Prevention and Treatment Act Reauthorization Act of 2010, Pub. L. No. 111-320, § 310, 124 Stat. 3510, 3511-12 (2010).

<sup>133</sup> See, e.g., 45 C.F.R. § 1302.90 (2020).

<sup>134</sup> Poarch, *supra* note 80, at 16.

<sup>135</sup> *Southwest Border Migration FY2019*, *supra* note 8.

<sup>136</sup> *Unaccompanied Alien Children and Family Units Are Flooding the Border Because of Catch and Release Loopholes*, DEP’T OF HOMELAND SEC. (Feb. 15, 2018), <https://www.dhs.gov/news/2018/02/15/unaccompanied-alien-children-and-family-units-are-flooding-border-because-catch-and>; see also *Southwest Border Migration FY2019*, *supra* note 8.

<sup>137</sup> *Reno v. Flores*, 507 U.S. 292, 305 (1993) (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)).

child with a criminal record may obtain an SIJS predicate order, as state juvenile court judges are not required to make such an inquiry or base their order on such a record. Such a child who receives approval from the state juvenile court may then apply for SIJ status from DHS. It is only if DHS discovers the child's criminal record that the child will be denied SIJ status. In addition to ensuring that willful gang members do not use SIJ to remain in the United States, the SIJS system as a whole would become more efficient if it required children to swear that they do not have serious criminal records that would bar future adjustment of SIJ status to that of legal permanent resident.

Fifth, SIJS recipients should not become eligible to apply for legal permanent residency until they have graduated from a U.S. high school or shown mastery of comparable knowledge through a U.S. high school equivalency assessment such as the G.E.D. test. Such a requirement promotes the best interests of SIJS recipients by increasing the likelihood that undocumented children will attend school and acclimate to the United States, thereby making them less likely to be victimized in the future. To ensure compliance, SIJS should become a status that follows a child until he or she graduates from a U.S. high school or turns twenty-one, allowing time for even seventeen-year-old SIJ recipients to receive a U.S. education. Only when SIJ recipients graduate from high school should they be able to adjust their status from SIJ to legal permanent resident. This revised SIJ status would also be more easily revocable than that of legal permanent residency, and the child's SIJ status should be revoked if the child does not complete high school without a valid reason by age twenty-one. The possibility of revocation of SIJ status will encourage children to obtain an education and to be good members of their community, while also allowing the immigration system more time to assess if the child poses a potential threat to others.

#### CONCLUSION

Special Immigrant Juvenile Status is an important protection for abused, neglected, and abandoned children. However, since Congress's creation of the status in 1990, it has been confusing in both scope and application. Immigration and naturalization should be the exclusive domain of the federal government, and the states should play no role in the process. Moreover, the SIJ process does not adequately ensure that the best interests of children are protected. Clarification of the "1 or both" language is needed to ensure that the best interests of vulnerable children—specifically their interests in reuniting with a non-abusive parent and obtaining an education—are met. Similarly, reforms verifying that SIJS recipients do not pose a threat to others is needed to ensure that dangerous minors do not undermine the SIJ process. Through uniformity, clarification of existing law, and a focus on the best interests of children, these recommended reforms strengthen Special Immigrant Juvenile Status to better protect vulnerable children in need.