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Abandoning the Status Quo: Towards Uniform Application of Special Immigrant Juvenile Status

GREGORY E. CATANGAY*

* Copyright © 2016 Gregory E. Catangay. J.D. Candidate, University of San Diego School of Law, 2016; B.A., Political Science, University of San Diego, 2012. I would like to thank Professor Robert C. Fellmeth for all of his guidance and mentorship in the realm of children's rights, and Yana Ridge, my Comments Editor, for her encouragement and advice throughout the writing process. I also wish to express my gratitude to Lesley Sedano and the Journal of Juvenile Law & Policy Journal Staff for all of their hard work and input. Finally, I am grateful to my family for their unconditional and wholehearted support.

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Introduction

“I knew my daughter would have no future if I stayed.”¹ Gang-sponsored killings and demands for protection money plagued eighteen year-old Maria Aracely’s town in Honduras.² Maria fled Honduras with her infant daughter Linze in March 2014 after Maria’s mother removed them from her home.³ Smugglers, also known as “coyotes,” guided Maria and Linze through Guatemala and Mexico.⁴ Once in Texas, border patrol agents detained them for five days.⁵ Maria and Linze eventually moved in with Maria’s older sisters outside of Austin.⁶ With the support of her sisters and attorneys, Maria sought lawful residency through the Special Immigrant Juvenile Status Program (SIJS).⁷ Although SIJS is a federal law, Maria’s eligibility for the program—and possibly her legal status in the United States—rested in the hands of a Texas state judge.⁸

The Bureau of Customs and Border Protection apprehended over sixty-six thousand unaccompanied alien children (UACs) attempting to cross the United States-Mexico border in Fiscal Year 2014.⁹ Many UACs with similar stories to Maria and Linze fled to the United States to escape organized crime and violence in their country of origin.¹⁰ While the total

¹ Jazmine Ulloa, *Little-Known Legal Move Could Aid Thousands of Young Refugees*, AUSTIN AMERICAN-STATESMAN (Aug. 10, 2014, 5:51 PM), <http://www.mystatesman.com/news/news/crime-law/little-known-legal-move-could-aid-thousands-of-you/ngyyZ/>.

² Jazmine Ulloa kept Maria’s last name anonymous due to her uncertain legal status in the United States. *See id.*

³ *Id.*

⁴ *Id.*; see Guillermo Alonso Meneses, *Human Rights and Undocumented Migration Along the Mexican-U.S. Border*, 51 UCLA L. REV. 267, 269 (2003).

⁵ Ulloa, *supra* note 1.

⁶ Ulloa, *supra* note 1.

⁷ Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(J) (2008).

⁸ *Id.*; see Ulloa, *supra* note 1.

⁹ An “unaccompanied alien child” is a child under the age of eighteen who lacks both lawful legal status in the United States and a parent or legal guardian able to provide care and physical custody. *See* Homeland Security Act of 2002, P.L. 107–296, § 462(g)(2), 116 Stat. 2135, 2205 (2002); *Southwest Border Unaccompanied Alien Children*, DEP’T OF HOMELAND SEC., BUREAU OF CUSTOMS AND BORDER PROTECTION, <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children> (last visited September 3, 2014). Interestingly, more UACs originated from Latin American countries such as Honduras and Guatemala, and the number of UACs from Mexico decreased. The number of UACs arriving from Honduras markedly increased in Fiscal Year 2014. *See id.* The number of UACs originating from Mexico in Fiscal Year 2014 actually decreased. *See id.*

¹⁰ *Children on the Run*, U.N. HIGH COMM’R FOR REFUGEES REG’L OFFICE FOR THE

number of UACs apprehended decreased in July 2014, the legal status of many UACs currently in the United States remains uncertain.¹¹ Access to the courts presents a challenge to minors, especially in regards to UACs, and undocumented children who lack adult assistance in their proceedings.¹² The Obama administration asserted that the William Wilberforce Trafficking Victims Protection and Reauthorization Act of 2008 (TVPRA) grants UACs an opportunity to appear at an immigration hearing.¹³ Assuming that the UACs are eligible for an immigration hearing, the recent wave of UACs, coupled with the estimated one million undocumented children already residing in the United States, would pose a considerable challenge to the bloated immigration courts.¹⁴

UNITED STATES AND THE CARIBBEAN 6 (March 2014),

http://www.unhcrwashington.org/sites/default/files/1_UAC_Children%20on%20the%20Run_Full%20Report.pdf; see also William Stock, *Responding to the Increase in Child Migrants: We've Managed These Crises Before*, AM. IMMIGR. LAW. ASS'N LEADERSHIP BLOG (June 19, 2014), <http://ailaleadershipblog.org>. According to a report by the United Nations High Commissioner for Refugees, fifty-eight percent of the 404 children interviewed reported that they personally experienced violence brought about by organized criminal groups, and around twenty-seven percent of the children specifically identified gangs as the source of violence or threats of violence. U.N. HIGH COMM'R FOR REFUGEES REG'L OFFICE FOR THE UNITED STATES AND THE CARIBBEAN, *supra* note 10, at 26. Sixty-three percent of the Salvadoran children identified gang-related violence, and thirty-four percent of the Honduran children identified violence or the threat of violence from organized criminal actors as the reason why they left the country.

¹¹ Phil Helsel, *Flow of Immigrant Children Across Border Slows*, NBC NEWS (Aug. 8, 2014, 12:18 AM), <http://www.nbcnews.com/storyline/immigration-border-crisis/flow-immigrant-children-across-border-slows-n175606>; Melvin Félix & Mike Clary, *The Uncertain Future of Undocumented Children*, SUN SENTINEL (March 25, 2016), <http://www.sun-sentinel.com/news/interactive/sfl-the-uncertain-future-of-undocumented-children-htmlstory.html>.

¹² ROBERT C. FELLMETH, *CHILD RIGHTS AND REMEDIES* 42 (3rd ed. 2011) (identifying the requirement of a *guardian ad litem*, lack of self-representation options, and lack of financial resources as barriers to the court system). See generally Melissa Aryah Somers et al., *Constructions of Childhood and Unaccompanied Children in the Immigration System in the United States*, 14 U.C. DAVIS J. JUV. L. & POL'Y 311 (2010) (discussing the difficulties unaccompanied children face in removal proceedings without guardians).

¹³ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 110 P.L. 457, 122 Stat. 5044, 5079–80; see Carl Hulse, *Immigrant Surge Rooted in Law to Curb Child Trafficking*, N.Y. TIMES, (July 7, 2014), <http://www.nytimes.com/2014/07/08/us/immigrant-surge-rooted-in-law-to-curb-child-trafficking.html>. However, others dispute the application of TVPRA to recent UACs. See Jon Feere, *Trafficking Law Largely Inapplicable to Border Crisis*, THE HILL (July 24, 2014, 6:30 AM), <http://thehill.com/blogs/pundits-blog/immigration/213167-trafficking-law-largely-inapplicable-to-border-crisis>.

¹⁴ In 2010, an estimated one million unauthorized children resided in the United States. See Jeffrey S. Passel & D'Vera Cohn, *Unauthorized Immigrant Population: National and*

In light of the barriers to court access, can UACs follow Maria's example and seek SIJS eligibility?¹⁵ SIJS provides an option for unmarried, undocumented minors under the age of twenty-one to become legal permanent residents of the United States.¹⁶ To be eligible for SIJS, a minor must be declared a dependent of a juvenile court or placed in the custody of a State, an individual, or entity.¹⁷ The juvenile court must find that one or both of the minor's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law (special finding).¹⁸ TVPRA amended SIJS by requiring the juvenile court to find that reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis found under state law.¹⁹

The current interplay between state and federal jurisdiction and laws fails Congress' goal of providing "the adjustment of status to that of lawful permanent resident for aliens classified as special immigrants."²⁰ Since SIJS eligibility depends on state court findings grounded in state law, SIJS eligibility varies among the states. This variance is due to differences in the structure of state juvenile court systems and the different state standards for child abuse, neglect, or abandonment. Conflicting state interpretation of the "one or both parents" provision of SIJS further threatens to base SIJS eligibility on the applicant's location. A minor who would qualify under one state's law may be ineligible under the laws of another.²¹ States

State Trends, 2010, PEW HISPANIC CTR. 13 (2011),

<http://www.pewhispanic.org/files/reports/133.pdf>; Eleanor Acer & Tara Magner, *Restoring America's Commitment to Refugees and Humanitarian Protection*, 27 GEO. IMMIGR. L.J. 445, 476 (2013) ("The overall backlog in the immigration courts. . . is more than 340,000 cases.").

¹⁵ Vera's DUCS Legal Access Project found that twenty-two percent of the clients they served were eligible for SIJS. See Olga Byrne & Elise Miller, *The Flow of Unaccompanied Children Through the Immigration System*, VERA INST. OF JUSTICE 25 fig.10 (2012), <http://www.vera.org/sites/default/files/resources/downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf>.

¹⁶ Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(J) (2008).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 110 Pub. L. 457, 122 Stat. 5044, 5079–80; 8 U.S.C. § 1101(a)(27)(J) (2008).

²⁰ Angela Lloyd, *Regulating Consent: Protecting Undocumented Immigrant Children from Their (Evil) Step-Uncle Sam, or How to Ameliorate the Impact of the 1997 Amendments to the SIJ Law*, 15 B.U. PUB. INT. L.J. 237, 246 n.58 (2006); see Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court, 58 Fed. Reg. 42,843 (Aug. 12, 1993).

²¹ See generally Heryka Knoespe, *Special Immigrant Juvenile Status: A "Juvenile" Here is not a "Juvenile" There*, 19 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 505 (2013)

effectively have the final say on SIJS eligibility, a decision that ultimately rests with the federal immigration courts. As a result of state influence, SIJS lacks the force and effect Congress intended the program to have as a federal remedy for eligible minors.

To ensure uniform application of SIJS, Congress should exercise its wide authority over immigration, and place all UACs entering the country into federal custody. Because UACs must attend federal immigration proceedings anyway, Congress should amend the Immigration and Nationality Act (INA) to determine SIJS eligibility during normal immigration proceedings. In addition, Congress should amend the INA to include a definition of child abandonment for the purposes of SIJS, based on the Texas Family Code section 161.001. Section 161.001 allows a state juvenile court to find child abandonment through a wide range of scenarios: voluntary abandonment, constructive abandonment, convictions, abandonment of a pregnant mother, and abandonment of the child without means of identification.²² Finally, Congress should amend

SIJS to explicitly grant eligibility after a finding of unviable reunification with only one parent.

Part I of this comment will briefly describe the SIJS process before and after the TVPRA. Part II will discuss SIJS, and TVPRA provisions that may affect the eligibility of recent UACs.²³ Part III will analyze the definition of child abandonment and the application of SIJS under California, Texas, New York, and New Jersey law to demonstrate state law differences that may implicate SIJS eligibility. Part IV will highlight and analyze how state law variations lead to unequal SIJS application. Part V will argue for a federal takeover of the SIJS program based on pre-emption, and examples of federal programs for UACs and immigrants. Part V also argues that Congress should both require federal courts to apply a federal definition of child abandonment based on Texas Family Code section 161.001, and amend the language of SIJS to explicitly allow one-parent SIJS adjudication.

(highlighting SIJS Program developments and application differences in Florida, Texas, New York, and California); Randi Mandelbaum & Elissa Steglich, *Disparate Outcomes: The Quest for Uniform Treatment of Immigrant Children*, 50 FAM. CT. REV. 606 (2012) (discussing inconsistent application of SIJS by the states).

²² TEX. FAM. CODE § 161.001 (2011).

²³ See generally 8 U.S.C. § 1101(a)(27)(J)(i); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 235.

I. The Limited Applicability of SIJS Pre-TVPRA

Intended to “alleviate hardships experienced by some dependents of United States juvenile courts,” Congress amended the Immigration Act of 1990 to include the Special Immigrant Juvenile Status Program on November 29, 1990.²⁴ The 1990 amendment granted special immigrant status to:

An immigrant (i) who has been declared dependent on a juvenile court located in the United States and has been deemed eligible by that court for long term foster care, and (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.²⁵

The dependency and foster care requirements of the original SIJS statute restricted the reach of 8 U.S.C. § 1101(a)(27)(J), and presented an issue that has continued to affect the program’s application. SIJS eligibility hinges on a special finding—that is, the state court finding that one or both parents have abused, neglected, or abandoned the minor. This special finding requires courts to apply the particular legal definitions and requirements of the state.²⁶

Instead of addressing the narrow reach of SIJS, Congress further restricted access to SIJS through a 1997 amendment. First, mere eligibility for long-term foster care no longer sufficed: SIJS under the 1997 amendment required that the court legally committed the applicant to long-term foster care, or placed the applicant under the custody of such care “due to abuse, neglect, or abandonment.”²⁷ Although intended to prevent child

²⁴ Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court, 58 Fed. Reg. 42,843 (Aug. 12, 1993); Immigration Act of 1990, sec. 153, 8 U.S.C. § 1101, 101 Pub. L. No. 649, 104 Stat. 4978 (1990); see also Lloyd, *supra* note 20; Gregory Zhong Tian Chen, *Eliau or Alien? The Contradictions of Protecting Undocumented Children under the Special Immigrant Juvenile Statute*, 27 HASTINGS CONST. L.Q. 597, 600 n.13 (2000).

²⁵ 8 U.S.C. 1101(a)(27)(J) (1990).

²⁶ “A state’s refusal to have an alien child declared dependent on the state and eligible for long-term foster care renders that child ineligible for lawful permanent residency through special immigrant juvenile status. This contravenes the scheme of state and federal cooperation set forth in this statute and makes this federal provision of law meaningless.” Carolyn S. Salisbury, *The Legality of Denying State Foster Care to Illegal Alien Children: Are Abused and Abandoned Children the First Casualties in America’s War on Immigration?* 59 U. MIAMI L. REV. 633, 652 (1996).

²⁷ Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies

abuse and tend to the needs of vulnerable minors, the restrictive nature of the 1997 amendment attributed little weight to the minors' interests.

Second, the 1997 amendment specified that “[n]o juvenile court has jurisdiction to determine the custody status or placement of an alien in the actual or constructive custody of the Attorney General unless the Attorney General specifically consents to such jurisdiction.”²⁸ This provision produced confusion over the nature of the consent required for cases in which the Immigration and Naturalization Service (INS) exercised actual or constructive custody of SIJS applicants.²⁹ Because proceedings cannot occur without such consent, some courts interpreted the 1997 amendment to read that the Attorney General and INS effectively exercised jurisdiction over a domain traditionally reserved to state juvenile courts.³⁰ However, the Attorney General suggested that the grant or denial of the SIJS petition should reflect the Attorney General’s consent to the dependency order.³¹ Regardless of the nature of the consent required by the 1997 amendment, the interaction between federal entities and state courts lead to delays in SIJS proceedings and created the risk that children facing deportation may “age out” of eligibility.³² The 1997 amendment imposed additional obstacles for protective services to SIJS applicants under the custody of INS.³³

Appropriations Act, sec. 113, 8 U.S.C. § 1101, Pub. L. 105–119, 111 Stat. 2440, 2460 (1997).

²⁸ Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, § 113, 111 Stat. at 2460.

²⁹ The Immigration and Naturalization Service was a former agency under the Department of Justice, but The Homeland Security Act of 2002 disbanded the agency in 2003 and distributed the INS’s responsibilities to other agencies. Homeland Security Act of 2002, Pub. L. No.107–296, § 462(a), 116 Stat. 2135, 2202 (2002) (transferring UAC-related responsibilities to the Director of the Office of Refugee Resettlement of the Department of Health and Human Services).

³⁰ *In re Welfare of Y.W.*, 1996 WL 665937, at *2 (Minn. Ct. App. Nov. 19, 1996) (“Congress granted the United States Attorney General exclusive custody over illegal immigrants.”); see Areti Georgopoulos, *Beyond the Reach of Juvenile Justice: The Crisis of Unaccompanied Immigrant Children Detained by the United States*, 23 LAW & INEQ. 117, 145, 151 (2005); Porter, *supra* note 28, at 453 (“The plain meaning of the statute appears to suggest. . . ‘[N]o juvenile court has jurisdiction to determine the custody status or placement of an alien in the actual or constructive custody of the Attorney General unless the Attorney General specifically consents to such jurisdiction.’”).

³¹ See Porter, *supra* note 28, at 448–449.

³² *Id.* at 452, 462 (providing an example of a SIJS applicant “aging out” of the program due to INS regulations); Emily Rose Gonzalez, *Battered Immigrant Youth Take the Beat: Special Immigrant Juveniles Permitted to Age-Out of Status*, 8 SEATTLE J. FOR SOC. JUST. 409, 414, 436 (2009). SIJS applicants must be under the age of twenty-one.

³³ Chen, *supra* note 24, at 641 (arguing that the 1997 amendment made Immigration and

II. The TVPRA's Impact on SIJS and Implications for Recent UACs

Congress enacted the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 on December 23, 2008.³⁴ The TVPRA's amendments to SIJS relaxed eligibility restrictions presented in the 1997 amendment.³⁵ Intended to combat human trafficking, TVPRA also modified SIJS eligibility for special immigrant status in three ways.³⁶

First, TVPRA amended 8 U.S.C. § 1101(a)(27)(J)(i) to extend beyond those eligible for foster care by including individuals "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."³⁷ This provision not only granted access to SIJS to minors outside the foster care system, but the phrase "or an individual or entity" included undocumented minors placed in the care of individuals outside of federal or state entities such as family members.³⁸

Second, TVPRA transferred authority over SIJS applicants from the United States Attorney General to the Secretary of Homeland Security, and established a deadline for the Secretary of Homeland Security to adjudicate all SIJS applications.³⁹ As a result, TVPRA removed the language regarding the Attorney General's consent requirement that caused confusion for SIJS applicants under the custody of the INS.⁴⁰ The hearing

Naturalization Services the "effective gatekeeper to state court protective services.").

³⁴ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 235.

³⁵ *See id.* For a case where SIJS applicants were placed under the care of a relative, *see* B.F. v. Superior Court, 143 Cal. Rptr. 3d 730, 732, 734–35 (Cal. Ct. App. 2012).

³⁶ 154 CONG. REC. H10888–01 (Dec. 10, 2008) (statement of Rep. Berman) ("To enhance measures to combat trafficking in persons, and for other purposes.").

³⁷ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 235 at 5079. *But see* Wendi J. Adelson, *The Case of Eroding Special Immigrant Juvenile Status*, 18 J. TRANSNAT'L L. & POL'Y 65, 80 (2008) (noting that administrative officers lack the family law experience necessary to expertly make the required finding).

³⁸ William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 235 at 5079.

³⁹ All applications for special immigrant status under 8 U.S.C. § 1101(a)(27)(J) shall be adjudicated by the Secretary of Homeland Security not later than 180 days after the date on which the application is filed. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 235 at 5080.

⁴⁰ *In re* Welfare of Y.W., 1996 WL 665937, at *2 (Minn. Ct. App. Nov. 19, 1996) ("Congress granted the United States Attorney General exclusive custody over illegal immigrants."); *see* Georgopoulos, *supra* note 32, at 145, 151; Porter, *supra* note 28, at 453 ("The plain meaning of the statute appears to suggest...[N]o juvenile court has jurisdiction to determine the custody status or placement of an alien in the actual or constructive custody of the Attorney General unless the Attorney General specifically consents to such jurisdiction.").

requirement had the effect of preventing applicants from “aging out” of eligibility.⁴¹

Last and most important, TVPRA required the state juvenile court to find the applicant’s reunification with one or both parents to be “not viable due to abuse, neglect, abandonment, or a similar basis found under State law.”⁴² This provision both broadened and narrowed SIJS eligibility. TVPRA kept the 1997 amendment’s special finding requirement. TVPRA also maintained the required trial court finding that it is not in the best interest of the child to be returned to the minor’s or parent’s previous country of nationality or country of last habitual residence.⁴³ However, the addition of the “similar basis” language extended the reach of the statute by allowing minors to apply for SIJS through legal definitions unique to each state.⁴⁴ Under the TVPRA abuse, neglect, or abandonment now act as basis for a juvenile court finding that reunification with one, or both parents is unviable.

III. An Overview of State Laws of Abandonment and SIJS Cases

In 2007, 772 children qualified for SIJS proceedings and subsequently attained legal status in the United States.⁴⁵ In 2009, the number of children receiving legal residency status through SIJS was 1,144.⁴⁶ In 2013, the total number of children receiving legal residency through SIJS was 2,735.⁴⁷ While TVPRA opened new opportunities for

⁴¹ See Jared Ryan Anderson, *Yearning to Be Free: Advancing the Rights of Undocumented Children Through the Improvement of the Special Immigrant Juvenile (SIJ) Status Procedure*, 16 ST. MARY’S L. REV. & SOC. JUST. 659, 687 (2014). However, state law may prevent juvenile courts from asserting jurisdiction over SIJS applicants.

⁴² The final act retained the language used in draft bills. See H.R. 7311, 110th Cong. § 235(d)(1)(A) (2008).

⁴³ See Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(J)(i) (2012).

⁴⁴ California law provides for child abandonment, acts that lead to a presumption of an intent to abandon, and transfer of Native American children to a Native American custodian. CAL. FAM. CODE § 7822 (2008).

⁴⁵ OFFICE OF IMMIGR. STAT., DEP’T OF HOMELAND SEC., 2007 YEARBOOK OF IMMIGRATION STATISTICS 22 tbl. 7 (2007), http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2007/ois_2007_yearbook.pdf.

⁴⁶ OFFICE OF IMMIGR. STAT., DEP’T OF HOMELAND SEC., 2009 YEARBOOK OF IMMIGRATION STATISTICS 22 tbl. 7 (2009), http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf. In 2012, 2250 SIJS applicants received legal residency. OFFICE OF IMMIGR. STAT., DEP’T OF HOMELAND SEC., 2012 YEARBOOK OF IMMIGRATION STATISTICS 22 tbl. 7 (2012), http://www.dhs.gov/sites/default/files/publications/ois_yb_2012.pdf.

⁴⁷ OFFICE OF IMMIGR. STAT., DEP’T OF HOMELAND SEC., PERSONS OBTAINING LAWFUL

minors seeking SIJS status, two areas of contention threaten equal and effective application of the program. First, differences in state juvenile law, such as the definition of child abandonment, hinder the goals behind SIJS. Second, controversy exists as to whether a minor is eligible for SIJS where the minor is abused, neglected, or abandoned by only one parent, not both. In *In re Erick M.*, the Supreme Court of Nebraska held that SIJS eligibility required a finding that reunification with both parents is unviable due to abuse, neglect or abandonment.⁴⁸ States that require a showing of nonviable reunification with both parents place an additional hurdle on minors seeking SIJS eligibility.⁴⁹ This Comment will now discuss state abandonment laws—as well as state court interpretations of the unviable reunification component of SIJS—to demonstrate how vulnerable SIJS is to state law variations.⁵⁰

A. *California and Abandonment: A Matter of Time and Intent*

California Family Code section 7822 provides for termination of parental rights due to abandonment of the child.⁵¹ Abandonment occurs under section 7822(a)(1) if “the child has been left without provision for the

PERMANENT RESIDENT STATUS BY TYPE AND DETAILED CLASS OF ADMISSION: FISCAL YEAR 2013 tbl. 7 (2013), <http://www.dhs.gov/yearbook-immigration-statistics-2013-lawful-permanent-residents>.

⁴⁸ *In re Erick M.*, 820 N.W.2d 639, 647 (Neb. 2012).

⁴⁹ New Jersey also requires a finding that reunification with both parents is unviable due to abuse, neglect, or abandonment. See *H.S.P. v. J.K.*, 87 A.3d 255, 267–68 (N.J. 2014), *overruled by* *H.S.P. v. J.K.*, 121 A.3d 849, 852 (N.J. 2015). For a discussion of how different interpretations of the “one or both parents” provision of SIJS have led to unequal access to SIJS, see “Variations in state case law affecting SIJS Access: *Erick M.* and One-Parent SIJS petitions,” *infra* pp. 26–36.

⁵⁰ For SIJS purposes, the juvenile state court must find 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. 8 U.S.C. § 1101(a)(27)(J)(i) (2012).

⁵¹ CAL. FAM. CODE § 7822 (2008). Section 7822 of the California Family Code falls under California Family Code Division 12, Part 4. See CAL. FAM. CODE § 7800 (1992) (“The purpose of this part is to serve the welfare and best interest of a child by providing the stability and security of an adoptive home. . .”). However, application of Section 7822 can extend beyond adoption proceedings, and adoption is not required. The California Court of Appeals held that former section 232 of the California Civil Code (the predecessor to division 12, part 4 of the California Family Code) did not prohibit other uses besides adoption. *In re Marcel N.*, 1 Cal. Rptr. 2d 240, 243 (Cal. Ct. App. 1991). Section 7841 of the California Family Code allows “interested persons” to bring an action to “[declare] a child free from the custody and control of either or both parents,” and “includes, but is not limited to” individuals filing adoption petitions. CAL. FAM. CODE § 7841 (2008). Therefore, adoption is not necessary for this part of the California Family Code. See *T.P. v. T.W.*, 120 Cal. Rptr. 3d 477, 485 (Cal. Ct. App. 2011).

child's identification by the child's parent or parents."⁵² Sections 7822(a)(2) and 7822(a)(3) apply to a parent or parents who intend to abandon the child and to leave the child without provision for support or contact.⁵³

California case law extends the definition of abandonment beyond section 7822. Termination of parental rights does not require a permanent intent to abandon the child, but rather an intent to abandon for the one year statutory period.⁵⁴ Abandonment can also be established by evidence of a

⁵² CAL. FAM. CODE § 7822(a)(1) (2008). Identification relates to the parents demonstrating the relationship status between one or both parents and the child. *In re Grazzini's Estate*, 87 P.2d 713, 714 (Cal. Ct. App. 1939) (defining provision for identification as making "provision so that they may be identified as the parents of the minor and that the minor may be identified as their child."). Section 7822 also provides for parental absence within a statutory period and distinguishes between one or both parents leaving the child with another person and one parent leaving the child with the other parent. *Compare* CAL. FAM. CODE § 7822(a)(2) (2008) ("child has been left by both parents or the sole parent in the care and custody of another person for a period of six months."), *with* CAL. FAM. CODE § 7822(a)(3) (2008) ("one parent has left the child in the care and custody of the other parent for a period of one year.").

⁵³ CAL. FAM. CODE § 7822(a)(2)–(3) (2008).

⁵⁴ *In re Adoption of Allison C.*, 79 Cal. Rptr. 3d 743, 749–50 (Cal. Ct. App. 2008) (citing *In re Daniel M.*, 20 Cal. Rptr. 2d 291, 295 (Cal. Ct. App. 1993)). In *In re Adoption of Allison C.*, Allison's biological father was incarcerated in 2003 and released sometime in July 2005. *In re Adoption of Allison C.*, 79 Cal. Rptr. 3d at 745 (Cal. Ct. App. 2008). Father's parole officer denied Allison's father visitation but allowed phone or email contact with prior approval. *Id.* at 745. Allison's father never sought this permission. *Id.* at 745. Allison's stepfather involved himself in her life since 2003 and was found to be a fit and proper person to adopt her. *Id.* at 745. Allison's stepfather had no criminal record and no substance abuse or domestic violence concerns, was in good health, made a good income, and provided Allison with "suitable living accommodations." *Id.* at 745. The minor's mother and stepfather brought an action under section 7822 of the California Family Code to terminate the father's parental rights. *Id.* at 746. Allison's father argued that he never intended to abandon Allison, and his failure to support Allison when he was not asked to did not constitute abandonment. *Id.* at 748–50. The appellate court held that substantial evidence supported the trial court's finding of father's abandonment for one year. *Id.* Father failed to communicate and bond with Allison for three years, failed to seek permission to begin phone and mail contact, and failed to support Allison. *Id.* at 748–50. The trial court correctly applied *In re Daniel M.* and section 7822 in finding that father abandoned Allison for the statutory period and that abandonment under section 7822(a)(3) did not require an intent to permanently abandon. *See id.* at 749–50 (citing *In re Daniel M.*, 20 Cal. Rptr. 2d 291, 295 (Cal. Ct. App. 1993)). The court in *Daniel M.* held that abandonment for the statutory period was sufficient, because allowing parents to retain parental rights after abandoning the child would run contrary to the intent of the legislature and prevent adoption of the child into stable homes. *In re Daniel M.*, 20 Cal. Rptr. 2d at 294–95. The court in *Allison C.* supported the trial court's finding that preventing adoption due to father's incarceration and failure to support or communicate would be against Allison's

parent's voluntary inaction after the other parent gains custody.⁵⁵

B. California's Attempts to Widen Access to SIJS

Recent developments in California illustrate a move towards broadening court access to possible SIJS applicants despite the ongoing debate over illegal immigration.⁵⁶ SIJS eligibility in California extended to

best interests. *See In re Adoption of Allison C.*, 79 Cal. Rptr. 3d at 750.

⁵⁵ *In re Marriage of Jill & Victor D.*, 110 Cal. Rptr. 3d 369, 380–81 (Cal. Ct. App. 2010). In *In re Marriage of Jill & Victor D.*, the father failed to appear at a July 20, 2000 family court hearing. *In re Marriage of Jill*, 110 Cal. Rptr. 3d at 372. The trial court denied visitation to the father, directed him to pay child support, issued a permanent restraining order against him, and awarded legal and physical custody to the mother. *Id.* at 372. The father last visited and made contact with his children in February 2001 and did not make any child support payments until his wages were garnished in December 2002; rather, the father hid his money to avoid paying taxes and child support. *Id.* at 372–76. Father failed to comply with the court orders and demonstrate progress treating his issues. *Id.* at 373, 381. He also moved to Florida without alerting the court and missed one court proceeding. *Id.* at 373. From 2004 to 2006, the trial court denied the father's multiple requests to modify the custody orders because he failed to provide evidence that he completed the required counseling and random drug testing results. *See id.* at 374. The mother filed a petition under Section 7822 to terminate the father's parental rights on the grounds that he failed to contact his children since March 2001. *Id.* at 374. The father argued that he did not voluntarily abandon the children because a court order deprived him of custody. *Id.* at 379. The appellate court held that the father abandoned his children under section 7822. *See id.* at 381, 383. Even though a custody order denied custody and visitation to the father, his failure to provide for and maintain communication with the children was brought about by his own actions. *See id.* at 381 (“[Father] did not provide for his children's care in any way, did not seek any type of parental relationship with them, and did not pay child support until it was extracted from him through garnishment of his wages.”); *see also In re Amy A.*, 33 Cal. Rptr. 3d 298, 302 (Cal. Ct. App. 2005) (“Case law consistently focuses on the voluntary nature of a parent's abandonment of the parental role rather than on physical desertion by the parent.”).

⁵⁶ The city of Murrieta, California became the center of debate during the 2014 immigration crisis. On July 1, 2014, protestors prevented buses carrying 140 detained undocumented immigrants from entering a border patrol station downtown. Matt Hansen & Mark Boster, *Protesters in Murrieta Block Detainees' Buses in Tense Standoff*, L.A. TIMES (July 2, 8:07AM), <http://www.latimes.com/local/lanow/la-me-ln-immigrants-murrieta-20140701-story.html#page=1>. The detainees were primarily children accompanied by their parents. *Id.*; *see also* Matt Hansen, *Immigration Protesters Gather in Murrieta but Buses Go Elsewhere*, L.A. TIMES (July 7, 6:27PM), <http://www.latimes.com/local/lanow/la-me-ln-protesters-no-buses-murrieta-20140707-story.html> (“The majority of immigrants who have been scheduled to arrive in Murrieta are women and children who have traveled from Central America.”). Murrieta's mayor, Alan Long, urged protestors to protest the placement of the detainees in Murrieta and argued that federal government should deport illegal immigrants and “not disperse them into our local communities.” *See* Matt Hansen & Mark Boster, *Protesters in Murrieta Block Detainees' Buses in Tense Standoff*, L.A. TIMES (July 2, 2014, 8:07AM),

minors in probate courts, in *B.F. v. Superior Court*, because restricting the SIJS finding authority to juvenile courts would adversely affect minors who would otherwise be SIJS eligible.⁵⁷ California courts may make SIJS finding for minors in dependency proceedings under *Eddie E. v. Superior Court*.⁵⁸ *Leslie H. v. Superior Court* reaffirmed the holding in *Eddie E.* in

<http://www.latimes.com/local/lanow/la-me-ln-immigrants-murrieta-20140701-story.html#page=1>. The buses eventually traveled to another border patrol facility in San Ysidro. Matt Hansen, *Immigration Protesters Gather in Murrieta but Buses Go Elsewhere*, L.A. TIMES (July 7, 2014, 6:27PM), <http://www.latimes.com/local/lanow/la-me-ln-protesters-no-buses-murrieta-20140707-story.html>. The Murrieta protests demonstrate the need for immigration debate and reform in California, where a quarter of the estimated 11.5 million undocumented immigrants in the United States reside. See Chiamaka Nwosu et al., *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POL'Y INST. (April 28, 2014), <http://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states-2>.

⁵⁷ *B.F. v. Superior Court*, 143 Cal. Rptr. 3d 730, 736 (Cal. Ct. App. 2012). In *B.F.*, three siblings petitioned the trial court to make the necessary finding needed for SIJS eligibility. *B.F.*, 143 Cal. Rptr. 3d at 732. Both of the sibling's parents were deceased before the minors commenced their action, and the probate court appointed the minors' paternal aunt and her husband as their legal guardians. *Id.* Probate courts are a juvenile courts under the Code of Federal Regulations, because probate courts have jurisdiction to make determinations about the custody and care of juveniles. *Id.* at 734–735; see also 8 C.F.R. § 204.11(a) (2009) (“Juvenile court means a court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles.”). Furthermore, the California Probate Code authorizes probate courts to exercise jurisdiction over guardianship and conservatorship proceedings. *B.F.* 143 Cal. Rptr. 3d at 735. Under the California Probate Code, the superior court has jurisdiction of guardianship and conservatorship proceedings. CAL. PROB. CODE § 2200 (1990); see also PROB. § 2351(a) (2013) (“The guardian or conservator . . . has the care, custody, and control of, and has charge of the education of, the ward or conservatee.”). As a result, probate courts have jurisdiction to make custody and care determinations under California state law. *B.F.* 143 Cal. Rptr. 3d at 735. Jurisdiction is supported by the fact that the California Constitution vests subject matter jurisdiction to the trial court as a whole despite the division of the trial courts into departments. CAL. CONST. amend. VI, § 4 (1998) (“In each county there is a superior court of one or more judges.”); *Estate of Bowles*, 87 Cal. Rptr. 3d 122, 129–30 (Cal. Ct. App. 2008) (“[t]he superior court is divided into departments, including the probate department, as a matter of convenience; but the subject matter jurisdiction of the superior court is vested as a whole.”). In addition, local court rules recognize the authority of the trial court to make SIJS finding. 143 Cal. Rptr. 3d at 735–36; Super. Ct. L.A. County, Local Rules, rule 6.15(a) (2011).

⁵⁸ *Eddie E. v. Superior Court*, 167 Cal. Rptr. 3d 435, 439–440 (Cal. Ct. App. 2013). In *Eddie E. v. Superior Court*, the petitioner, Eddie, was a minor declared a ward of the court. *Eddie E.*, 167 Cal. Rptr. 3d at 438. The trial court declared Eddie a ward after making a true finding on allegations he had unlawfully taken a vehicle, resisted or obstructed a public officer, and was guilty of hit and run with property damage. *Id.* During delinquency proceedings, the probation department placed Eddie in juvenile hall before transferring him

February 2014.⁵⁹ California established a statutory basis for SIJS jurisdiction when Governor Jerry Brown approved Senate Bill 873 (SB-873) on September 27, 2014.⁶⁰ SB 873 explicitly allows juvenile, probate, and family courts to make necessary SIJS finding, and potentially allows other trial courts to make SIJS finding.⁶¹

to a foster home and finally an Office of Refugee Resettlement shelter. *Id.* Eddie petitioned the trial court to make the finding necessary for SIJS, but the court denied his petition on the grounds that Eddie was a ward of the state instead of a dependent of a juvenile court. *Id.* at 439. The appellate court interpreted 8 U.S.C. § 1101(a)(27)(J)(i) as disjunctive: to be eligible for SIJS, the minor must either be a dependent of the state juvenile court or “legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States.” *Id.*; Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(J)(i) (2012). Although Eddie was not a dependent of the juvenile court, the trial court failed to consider his status as a ward of the state in denying his petition for the SIJS finding. *Id.* at 439–40.

⁵⁹ See *Leslie H. v. Superior Court*, 168 Cal. Rptr. 3d 729, 737 (Cal. Ct. App. 2014). In *Leslie H. v. Superior Court*, the trial court denied appellant Leslie’s petition to make the required SIJS finding on the grounds that she was a ward of the state instead of a dependent of the court. *Leslie H.*, 168 Cal. Rptr. 3d at 734. Despite the fact that uncontroverted evidence existed that would allow the trial court to make the necessary finding for SIJS, the trial court denied her petition on the basis of her juvenile delinquency. *Id.* at 737. In addition, the court found that remaining in the United States would not be in her best interests on the grounds that her path in the United States would lead to incarceration. See *id.* at 734 (“Frankly, at this point I think going back to Mexico would be in her best interest because the path that she is on right now is one that is going to lead to self-destruction.”). Reunification with one or both of Leslie’s parents was problematic: Leslie’s mother abused drugs and alcohol, physically abused and failed to feed Leslie, and stopped contacting Leslie after leaving her with her grandmother in 2007. *Id.* at 733. Leslie never lived with her father and only met him once; he neither attempted to contact Leslie nor financially supported her. *Id.* The appellate court held that a minor does not need to be a dependent of a juvenile court to be eligible for SIJS if the minor is “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 located in the United States.” *Id.* at 736–37 (citing *Eddie E. v. Superior Court*, 167 Cal. Rptr. 3d 435, 438–39 (Cal. Ct. App. 2013)) (“The first part of [8 U.S.C. § 1101(a)(27)(J)(i)] is disjunctive. . . thus, a court must find either that an immigrant has been a) a declared dependent. . . or legally committed.”); 8 U.S.C. § 1101(a)(27)(J)(i). SIJS requires state juvenile courts only to decide whether or not to make the specific finding, not to make immigration policy considerations and “pre-screen” applicants to prevent SIJS abuse. *Leslie H.* 168 Cal. Rptr. 3d at 737 (citing *In re Mario S.*, 954 N.Y.S.2d 843, 852–53 (N.Y. Fam. Ct. 2012)). Finally, there was ample evidence for the trial court to establish that Leslie’s reunification with one or both her parents was not viable due to abuse, neglect, and abandonment. *Id.* at 738.

⁶⁰ S.B. 873, 2013–2014 Reg. Sess., ch. 685 (Cal. 2014), available at

http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB873.

⁶¹ *Id.*

C. New York and Abandonment: A Two-Statute Approach

Under the New York Family Court Act, child abandonment falls under the umbrella of the term “neglected child.”⁶² The pertinent provision in Section 1012(f) (ii) reads that a neglected child is one who has been abandoned “in accordance with the definition and other criteria set forth in [section 384-b of the New York Social Services Law], by his parents or other person legally responsible for his care.”⁶³ Under section 384-b, a parent abandons a child upon evincing an intent to forego parental rights and obligations.⁶⁴ Failure to visit the child, and to communicate with the social services agency despite possessing the capability to take such actions manifests an intent to forego parental rights and obligations.⁶⁵ Section 384-b goes even further by presuming parental capability to visit and communicate, unless rebutted by evidence.⁶⁶ Finally, section 384b does not consider the parent’s subjective intent where there is no evidence that the parent manifested an intent not to abandon the child.⁶⁷

D. New York and SIJS: Leading the Way for One-Parent Proceedings

New York is one of the most successful states in terms of making the necessary SIJS findings, and the number of minors receiving permanent residence in New York through SIJS has doubled over the last three years.⁶⁸ Despite some concerns that abuse of SIJS exists, the state continues to hear undocumented minors’ SIJS petitions.⁶⁹ New York trial court judges have gained considerable experience with SIJS proceedings, including “one-parent” SIJS cases where the minor lives with one parent but cannot reunify with the other parent due to abuse, neglect, or abandonment.⁷⁰ In *In re E.G.*,

⁶² N.Y. FAM. CT. ACT, Art. X, § 1012(f)(ii) (2009).

⁶³ *Id.* (citing N.Y. SOC. SERV. LAW § 384-b (2013)). Article X gives the family court exclusive original jurisdiction over proceedings under Article X involving child abuse or neglect. N.Y. FAM. CT. § 1013(a) (2013).

⁶⁴ N.Y. SOC. SERV. LAW, Art. 6, § 384-b(5)(a) (2013).

⁶⁵ *Id.* This provision applies when the social services agency has not prevented discouraged child visitation or communication with the agency. *See id.*

⁶⁶ *Id.*

⁶⁷ *See id.*

⁶⁸ Mirela Iverac, *Border Kids Fill Courts*, WNYC (July 2, 2014),

<http://www.wnyc.org/story/border-kids-fill-courts/>.

⁶⁹ *See id.* One New York courthouse currently has 4500 pending cases for undocumented minors. *Id.*

⁷⁰ *See Iverac, supra note 70; The Intersection of Immigration Status and the New York Family Courts*, THE FUND FOR MODERN COURTS 2 (Feb. 2015),

<http://moderncourts.org/files/2014/03/Modern-Courts-Statewide-Report-The-Intersection-of-Immigration-Status-and-the-New-York-Family-Courts.pdf>.

the New York appellate courts first considered the possibility of granting a SIJS finding petition despite the fact that there is one non-abusive parent.⁷¹ *In re Mario S.* was the first published New York decision upholding one-parent SIJS petitions.⁷²

New York courts reaffirmed approval of one-parent SIJS applications and considered the plain meaning, and legislative intent behind SIJS in *In re Marcelina M.-G. v. Israel S.*⁷³ The fact that a non-offending

⁷¹ *In re E.G.*, 899 N.Y.S.2d 59, 59 (N.Y. Fam. Ct. 2009). In an unpublished opinion, the court stated that “in light of the recent amendment to 8 U.S.C. § 1101(a)(27)(J), a child may petition for SIJS even if there is a fit parent living abroad, so long as the minor has been abused, neglected or abandoned by one parent.” *In re E.G.*, 899 N.Y.S.2d at 59. However, the appellate court did not apply this reasoning to the case because the minor’s mother submitted a sworn affidavit stating her intentions to end her responsibilities. *See id.*

⁷² *In re Mario S.*, 954 N.Y.S.2d 843, 845 (N.Y. Fam. Ct. 2012). In *Mario S.*, the named minor, a juvenile delinquent, violated his probation and was removed from his mother’s residence and placed in the custody of the New York State Office of Family Services (OCFS). *In re Mario S.*, 954 N.Y.S.2d at 846. After his release, Mario would be returned to his mother’s care and receive additional services from OCFS. *Id.* at 847. Mario’s father neither contacted nor financially supported his son after he was deported in 2011. *Id.* at 846, 849–50. The appellate court found Mario eligible for SIJS status. *Id.* at 845. Even though Mario lived with his mother during his delinquency proceedings, reunification with his father was not viable due to his father’s abandonment and deportation. *Id.* at 851. In addition, Mario’s mother’s undocumented status made reunification with her tenuous. *See id.* at 851–52 (“[Mario’s] mother is also present in the United States illegally and she is therefore at risk of deportation, which would make her unavailable to continue to care for Mario and his siblings.”). The court explicitly rejected the holding in *In re Erick M.* requiring that a court must find reunification with both parents is not viable. *Id.* at 852. *Contra In re Erick M.*, 820 N.W.2d 639, 647 (Neb. 2012). Consideration of federal agency policies and other factors goes beyond the scope of state court authority under SIJS, and the statute only authorizes state courts to make a determination on the necessary finding. *See In re Mario S.* 954 N.Y.S.2d at 852–53 (The juvenile court need not determine any other issues, such as . . . whether the USCIS . . . may or may not grant a particular application for adjustment of status as a SIJ.”). In contrast, the Nebraska Supreme Court turned to USCIS documentation stating that SIJS applicant “must normally show that reunification with the other parent is also not feasible.” *In re Erick M.*, 820 N.W.2d 639 at 647.

⁷³ *See generally In re Marcelina M.-G v. Israel S.*, 973 N.Y.S.2d 714 (N.Y. App. Div. 2013). In *Marcelina*, mother Marcelina brought a petition seeking sole legal custody of her daughter Susy. *In re Marcelina*, 973 N.Y.S.2d at 718. In her SIJS petition for Susy, Marcelina argued that Susy’s father, Israel, abandoned her. *See id.* at 721. Marcelina also argued that Susy’s father left her without financial support, was not involved in Susy’s life, and was a substance abuser. *Id.* The trial court granted Marcelina legal custody of Susy, but denied making the SIJS finding on the grounds that Susy lived with her biological mother. *Id.* The trial court judge stated that “I think that it is a bending over more than backwards to create an artificial citizenship, frankly, and I will not make a special finding.” *See id.* at 718. The appellate court looked at plain disjunctive meaning of the “one or both parents” language under SIJS. *Id.* at 722. *Contra In re Erick M.*, 820 N.W.2d at 647.

parent existed was inconsequential to the minor's SIJS eligibility because SIJS only requires one offending parent.⁷⁴ The legislative history of SIJS supported a literal interpretation of the statute.⁷⁵ The court also reaffirmed New York's rejection of the holding in *Erick M.*⁷⁶ Lastly, the final decision regarding immigration status rests with the federal government; the state courts' role is just to make the necessary SIJS finding.⁷⁷ New York courts continue to apply the reasoning in *Mario*, and *Marcelina* in granting one-parent SIJS petitions.⁷⁸ However, New York courts have also emphasized the need for the minor SIJS applicant to be a dependent of the juvenile court.⁷⁹

E. New Jersey and Abandonment: Substantive Law, Narrow Application

New Jersey's robust definition of child abandonment under New Jersey Statute section

⁷⁴ *In re Marcelina*, 973 N.Y.S.2d at 722.

⁷⁵ *Id.* By replacing the "long-term foster care" language with the "one or both parents" reunification requirement, Congress intended to expand SIJS eligibility. *Id.* at 722-723; William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, H.R. 7311, 110th Cong. No. 457, 122 Stat. 5044, § 235, 5079-80. Prior to TVPRA SIJS status required a finding that the minor is eligible for long-term foster care, a determination that meant that reunification with both parents was not viable. *In re Marcelina*, 973 N.Y.S.2d at 722.

⁷⁶ *Id.* at 723; *In re Erick M.*, 820 N.W.2d at 647. *Erick M.*'s ruling would go against the purpose and intent of SIJS, namely to "protect the applicant from further abuse or maltreatment by preventing him or her from being returned to a place where he or she is likely to suffer further abuse or neglect." See *In re Marcelina*, 973 N.Y.S.2d at 723-24 (citing *In re W.C.*, 920 N.Y.S.2d 135 (N.Y. App. Div. 2011)).

⁷⁷ See *id.* at 721, 724-25.

⁷⁸ See generally *P.E.A. v. A.G.G.*, 975 N.Y.S.2d 85 (N.Y. App. Div. 2013); *In re Karen C.*, 973 N.Y.S.2d 810 (N.Y. App. Div. 2013); *In re Miguel C.-N.*, 989 N.Y.S.2d 126 (N.Y. App. Div. 2014); *In re Gabriel H.M.*, 984 N.Y.S.2d 96 (N.Y. App. Div. 2014).

⁷⁹ Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(J) (2012). For instance, a minor was a dependent of the juvenile court once the court appointed the minor's half-sibling as his guardian. See *In re Miguel C.-N.*, 989 N.Y.S.2d 126, 127 (N.Y. App. Div. 2014). Inversely, a filed child support application is not enough to declare a SIJS applicant a juvenile court dependent. See *Tung W.C. v. Sau Y.C.*, 940 N.Y.S.2d 791, 791 (N.Y. App. Div. 2011). The court in *Tung W.C.* went on to hold that the Family Court "permitted a SIJS application only where dependency upon the court has been established by way of a guardianship or adoption." See *Tung W.C.*, 940 N.Y.S.2d at 794. A later appellate court decision recognized that the Family Courts only made the SIJS special finding where dependency upon the court was established by guardianship, adoption, or custody. "No appellate decisions in this state have addressed the question of whether an order issued by the Family Court that does not award or affect the custody of a child satisfies the dependency prong." *In re Hei Ting C.*, 969 N.Y.S.2d 150, 151, 154 (N.Y. App. Div. 2013).

9:6-1 consists of any of the following acts:

(a) Willfully forsaking a child; (b) failing to care for and keep the control and custody of a child so that the child shall be exposed to physical or moral risk without proper and sufficient protection; (c) failing to care for and keep the control and custody of a child so that the child shall be liable to be supported and maintained at the expense of the public, or by child caring societies or private persons not legally chargeable with its or their care, custody and control.⁸⁰

Two other abandonment provisions exist outside of New Jersey Statute section 9:6-1. A child may also be deemed abused or neglected under section 9:6-8.21, if willfully abandoned by a parent or guardian.⁸¹ The New Jersey Division of Youth and Family Services may move to terminate parental rights if a parent abandoned the child in one of the three scenarios.⁸² The final provision concerns voluntary placement of the child by the parent.⁸³

While New Jersey Statute section 9:6-1 adopts many acts within the umbrella of abandonment, this section applies only to individuals who have custody or control of the child.⁸⁴ A recent New Jersey appellate court decision further limited the applicability of section 9:6-1 to SIJS applicants who are eligible for reunification with one parent but not the other.

⁸⁰ N.J. STAT. § 9:6-1 (1987).

⁸¹ N.J. STAT. § 9:6-8.21 (2012).

⁸² N.J. STAT. § 30:4C-15.1(b)(1)–(3). The division may petition to terminate parental rights if a parent fails to contact the child or other parties for six or more months and, the parent's whereabouts are unknown despite reasonable efforts to locate that parent. N.J. STAT. § 30:4C-15.1(b)(1). The inability to identify parents following completion of a law enforcement investigation is grounds for termination after the division has exhausted all identifications efforts. *See* N.J. STAT. § 30:4C-15.1(b)(2).

⁸³ Where the parent voluntarily delivered the child to and left the child at, or voluntarily arranged for another person to deliver the child to and leave the child at a State, county or municipal police station or at an emergency department of a licensed general hospital in this State when the child is or appears to be no more than 30 days old, without expressing an intent to return for the child. . .the division shall file for termination of parental rights no later than 21 days after the day the division assumed care, custody and control of the child. N.J. STAT. § 30:4C-15.1(b)(3).

⁸⁴ N.J. STAT. § 9:6-1 (1987).

F. *New Jersey and SIJS: Challenges to One-Parent SIJS Petitions*

The New Jersey courts' treatment of one-parent SIJS petitions has varied in recent years.⁸⁵ Until August 2015, New Jersey courts required SIJS applicants to demonstrate that reunification with both parents is not viable.⁸⁶ In *H.S.P. v. J.K.*, H.S.P., a United States citizen, petitioned for custody of his nephew M.S., an Indian citizen who entered the country

⁸⁵ In 2013, New Jersey recognized one-parent SIJS petitions. *In re Minor Children of J.E.*, 74 A.3d 1013, 1015 (N.J. Super. Ct. Ch. Div. 2013), *overruled by* *H.S.P. v. J.K.*, 87 A.3d 255 (N.J. 2014).

<https://a.next.westlaw.com/Document/Ie1766bdb4c3511e590d4edf60ce7d742/View/FullText.html?listSource=RelatedInfo&list=NegativeCitingReferences&rank=0&originationContext=docHeader&transitionType=NegativeTreatment&contextData=%28sc.DocLink%29>. In *In re Minor Children of J.E.*, the petitioner J.E. sought custody of her two sons and for the court to make the necessary SIJS finding. *In re Minor Children of J.E.*, 74 A.3d 1013 at 1015. J.E. fled Honduras without her two sons. *Id.* The father attempted to shoot J.S. when she refused to give the children to him. *Id.* at 1015. The children testified that their father did not protect them from physical abuse and openly conducted drug trafficking in their presence. *See id.* ("Both boys routinely witnessed their father and his associates with large arsenals of guns, and witnessed a large container with a white substance being stored in their father's house."). The minor's stepmother left the children after the children's father died in a shootout involving the police and other drug traffickers. *Id.* The children eventually reunited with J.E. despite her temporary lawful status in the United States. *Id.* at 1016. J.E.'s lawful status is based on Temporary Protected Status subject to expiration. *See id.* The trial court granted the custody order and made way for the necessary SIJS finding, and noted the intent behind SIJS was to "assist a limited group of abused children to remain safely in the country with a means to apply for [lawful permanent resident] status." *Id.* at 1017, 1023 (citing *Garcia v. Holder*, 659 F.3d 1261, 1271 (9th Cir. 2011)). Recent amendments to SIJS demonstrated congressional intent to expand SIJS eligibility. *See id.* at 1018 (noting that the recent amendments allow state courts to "make SIJS finding whenever jurisdiction can be exercised under state law to make care and custody determinations, and [state courts] are no longer confined to child protection proceedings alone."); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 235. Based on the intent and language of the provision, 8 U.S.C. § 1101(a)(27)(J)(i) only requires a trial court to find that unviable reunification with one parent was sufficient: "If reunification with one parent is not viable, even when reunification with the other parent is, the applicant nevertheless qualifies for eligibility for SIJS." *In re Minor Children of J.E.*, 74 A.3d at 1020; 8 U.S.C. § 1101(a)(27)(J)(i) (2008). Abandonment occurred under New Jersey law when the minors' father was killed as a result of his criminal conduct and their stepmother left them behind. *See In re Minor Children of J.E.*, 74 A.3d at 1021; *see also* N.J. STAT. § 9:6-1(b) (1987) ("failing to care for and keep the control and custody of a child so that the child shall be exposed to physical or moral risk without proper and sufficient protection."); STAT. § 9:6-1(a) ("willfully forsaking a child."). Thus, reunification was not viable with the father due to abandonment. *See In re Minor Children of J.E.*, 74 A.3d at 1021.

⁸⁶ *H.S.P. v. J.K.*, 87 A.3d 255, 266 (N.J. Super. Ct. App. Div. 2014), *overruled by* *H.S.P. v. J.K.*, 121 A.3d 849, 852 (N.J. 2015).

illegally.⁸⁷ To provide her child with a better life, M.S.'s mother paid for him to be brought in to the United States through Mexico.⁸⁸ As part of his custody petition for M.S., H.S.P. also petitioned that the trial court make the necessary finding, granting M.S. SIJS eligibility.⁸⁹ To support H.S.P.'s petition, the mother sought a default judgment against her, and a determination that she abandoned M.S.⁹⁰

The appellate court found that the father abandoned M.S., but affirmed the trial court's denial of the SIJS petition.⁹¹ The fact that H.S.P.'s custody petition was non-adversarial, included the mother's request for default judgment against her, and was adjudicated while H.S.P. had physical custody of M.S., caused the court to question whether or not Congress had the intent that SIJS be used primarily as a means to gain legal immigration benefits.⁹² Previous New Jersey case law established that the basis for SIJS jurisdiction does not exist where the petitioner seeks guardianship without a basis for unviable reunification with either parent.⁹³ Despite these concerns, the father willfully abandoned M.S. because his absence during M.S.'s life "demonstrates his settled purpose to forego his parental duties."⁹⁴

The appellate court then turned towards the issue of whether a finding of unviable reunification with one parent satisfied the requirements

⁸⁷ *H.S.P.*, 87 A.3d at 258.

⁸⁸ M.S. lived in the slums with his ill mother and ill grandmother, and M.S.'s father was never involved with his life. *H.S.P.*, 87 A.3d at 258. M.S. entered the United States without documentation. *H.S.P.*, 87 A.3d at 258. H.S.P. already brought M.S. into his family before he filed the petition. *H.S.P.*, 87 A.3d at 258.

⁸⁹ *Id.*

⁹⁰ However, M.S. maintained weekly phone contact with his mother in India. *H.S.P.*, 87 A.3d at 258. The trial court granted the custody petition but denied the SIJS petition on the grounds that there was insufficient evidence for a finding of unviable reunification with both parents. *H.S.P.*, 87 A.3d at 259.

⁹¹ *Id.* at 269.

⁹² See 87 A.3d at 261 ("We question whether Congress intended [8 U.S.C. § 1101(a)(27)(J)] to apply to juveniles who are placed in the custody of an individual not because necessity was shown under State law, but because custody was requested for immigration purposes."). In addition, M.S.'s father was neither named as a party nor served with the complaint. 87 A.3d at 261. *But see* 8 U.S.C. § 1357(h) (2006) (stating that minors under SIJS status "shall not be compelled to contact the alleged abuser (or family member of the alleged abuser).").

⁹³ See *D.C. v. A.B.C.*, 8 A.3d 260, 266 (N.J. Super. Ct. Ch. Div. 2010).

⁹⁴ *H.S.P.*, 87 A.3d at 264–65; N.J. STAT. § 30:4C-15.1(b)(1)(a)–(b) (2004) (permitting the termination of parental rights for abandonment if the parent has had no contact with the child for six months or more and the parent's whereabouts are unknown).

of 8 U.S.C. § 1101(a)(27)(J)(i). Although several courts—including a New Jersey appellate court—held that unviable reunification with one parent sufficed, the court in this case adopted the holding of *In re Erick M.* requiring that reunification with both parents be unviable.⁹⁵ The “one or both” provision excluded SIJS eligibility where reunification with one or both parents is viable.⁹⁶ Congress enacted a 1997 amendment to 8 U.S.C. § 1101(a)(27)(J)(i) “to limit the beneficiaries of this provision to those juveniles for whom it was created, namely abandoned, neglected, or abused children.”⁹⁷ In doing so, Congress intended to prevent the abuse of the SIJS program.⁹⁸ TVPRA added the “one or both” provision and reaffirmed Congress’ goals of providing benefits to eligible minors, while preventing abuse.⁹⁹ The court held requiring a finding that reunification with neither parent is viable furthers both of Congress’ goals. In the court’s view, the “neither parent” requirement protects eligible minors from unsafe parents and excludes minors who have access to a safe and suitable parent; inversely, granting SIJS eligibility through single parent unviable reunification renders SIJS vulnerable to abuse.¹⁰⁰ Although the Supreme Court of New Jersey overturned *H.S.P.* in 2015, the case illustrates how a state’s interpretation of SIJS provisions could deny eligible children from the program.¹⁰¹

⁹⁵ *H.S.P.*, 87 A.3d at 265–66 (“We hold that it is insufficient that reunification with one parent is not viable due to abuse, neglect, or abandonment, if the juvenile has another “safe” parent who has not abused, neglected or abandoned the juvenile.”); see *In re Minor Children of J.E.*, 74 A.3d 1013, 1015 (N.J. Super. Ct. Ch. Div. 2013), *overruled by H.S.P.*, 87 A.3d at 265–66; *In re Marisol N.H.*, 979 N.Y.S.2d 643, 647 (N.Y. App. Div. 2014); *In re Marcelina M.-G. v. Israel S.*, 973 N.Y.S.2d 714, 721–23 (N.Y. App. Div. 2013); *In re Mario S.*, 954 N.Y.S.2d 843, 851 (N.Y. Fam. Ct. 2012). *Contra In re Erick M.*, 820 N.W.2d 639, 647 (Neb. 2012). The court in *H.S.P.* went on to overrule *J.E.* 87 A.3d at 266.

⁹⁶ *H.S.P.*, 87 A.3d at 266.

⁹⁷ *Id.* at 266; Pub. L. No. 105–119, § 113, 111 Stat. 2440, 2460 (1997).

⁹⁸ See *id.* at 266; see also *Yeboah v. U.S. Dept. of Justice*, 345 F.3d 216, 224 (3d Cir.2003) (finding that the 1997 amendment deters minors from “attempting to manipulate the system to obtain permanent residence” for juveniles in the United States.”); *M.B. v. Quarantillo*, 301 F.3d 109, 114 (3d Cir. 2002) (“The legislative history confirms that the revision in the statute was intended to curtail the granting of special immigrant juvenile status.”).

⁹⁹ See *H.S.P.*, 87 A.3d at 267–68 (“Where such protection is unnecessary, however, Congress wanted to prevent misuse of the SIJ statute for immigration advantage.”); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 235.

¹⁰⁰ See *H.S.P.*, 87 A.3d at 266, 268 (“would permit SIJ status even if that safe parent had raised the juvenile from birth, in love, comfort, and security, and even if reunification with the safe parent would not result in any further contact with the unsafe parent.”).

¹⁰¹ *H.S.P. v. J.K.*, 121 A.3d 849, 852 (N.J. 2015).

G. Texas's Multi-Faceted Approach to Abandonment

Texas Family Code section 161.001 includes substantive provisions for involuntary termination of the parent-child relationship through abandonment and similar actions.¹⁰² First, the trial court may terminate the relationship upon finding that the parent abandoned the child without providing for identification and reasonable efforts to identify the child.¹⁰³ Second, section 161.001 recognizes constructive abandonment where the parent fails to engage in regular visitation, or significant contact with a child in the care of a state agency for at least six months.¹⁰⁴ Third, termination of the parent-child relationship may occur as a result of conviction or prosecution for child abandonment, or child endangerment that caused death or serious bodily injury to the child.¹⁰⁵ Fourth, voluntarily abandoning a pregnant mother and failing to support the mother, both before pregnancy and after the child's birth is sufficient to terminate the parent-child relationship under section 161.001.¹⁰⁶ Finally, termination of the relationship may occur due to one of the following acts by either parent:

- A) [The parent] voluntarily left the child alone or in the possession of another not the parent and expressed an intent not to return; (B) voluntarily left the child alone or in the possession of another not the parent without expressing an intent to return, without providing for the adequate support of the child, and remained away for a period of at least three months; (C) voluntarily left the child alone or in the possession of another without providing adequate support of the child and remained away. . .¹⁰⁷

¹⁰² TEX. FAM. CODE § 161.001 (2011). All of the provisions under this statute require a finding by clear and convincing evidence. .

¹⁰³ *Id.* § 161.001(1)(G).

¹⁰⁴ *See id.* § 161.001(1)(N). The state agency must also make reasonable efforts to return the child to the parent, and the parent must demonstrate an inability to provide the child with a safe environment before termination of parental rights occurs.

¹⁰⁵ *See id.* § 161.001(1)(L)(x); TEX. PEN. CODE § 22.041 (defining abandonment as leaving a child "without providing reasonable and necessary care for the child, under circumstances under which no reasonable, similarly situated adult would leave a child of that age and ability.").

¹⁰⁶ The parent must also possess knowledge of the pregnancy and abandon the mother at some point during her pregnancy. *See* FAM. § 161.001(1)(H).

¹⁰⁷ FAM. § 161.001(b)(1)(A)–(D). Other grounds for termination include conduct that endangers the physical and emotional well-being of the child. *See* FAM. § 161.001(b)(1)(D)–(E), (P).

IV. Variations in State Law Prevent the Uniform Application of SIJS

The current SIJS scheme is unnecessarily confusing and unworkable. SIJS relief involves a murky interplay between state family law and federal immigration law.¹⁰⁸ Petitioners must continue to appear in ongoing immigration proceedings separate from their SIJS requests, and the federal backdrop of SIJS causes state judges to question their authority in the subject.¹⁰⁹ Furthermore, requiring state courts to make the necessary finding based on that particular state's laws threatens to exclude qualified minors, and threatens the goals of SIJS. State law provides the certification that an SIJS applicant requires to actually file an SIJS application to United States Citizenship and Immigration Services (USCIS).¹¹⁰ However, a state court's refusal to make the special finding prevents UACs from submitting an SIJS application to USCIS.¹¹¹ As a result, state law judges effectively have the pivotal say on SIJS eligibility, even if USCIS would have granted SIJS status. While some states such as California provide UACs with more opportunities to fall under SIJS protection, other states such as New Jersey offer limited eligibility.¹¹² Therefore, state law judges are effectively regulating SIJS because eligibility hinges not on the merits of the claim under federal law, but whether the petition falls under the state's definition of abandonment, abuse, and neglect. "Significant discrepancies among state courts have created a situation in which state courts are sometimes serving as gatekeepers for immigration relief."¹¹³ The following examples demonstrate how state law differences endanger uniform application of

¹⁰⁸ Annie Chen, *An Urgent Need: Unaccompanied Children and Access to Counsel in Immigration Proceedings*, A.B.A. (July 14, 2014), <http://apps.americanbar.org/litigation/committees/childrights/content/articles/summer2014-0714-urgent-need-unaccompanied-children-access-counsel-immigration-proceedings.html>.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ After receiving a court order with the necessary SIJS finding, an applicant must then submit Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant while the order is in effect. *Eligibility for SIJS*, UNITED STATES CITIZENSHIP AND IMMIGR. SERV., <http://www.uscis.gov/green-card/special-immigrant-juveniles/eligibility-sij-status/eligibility-status-sij> (last visited Jan. 19, 2015).

¹¹² For a discussion on California's recent efforts to expand SIJS eligibility, see *supra* notes and accompanying texts 57–62. For a discussion on New Jersey's limit on one-parent SIJS petitions, see *supra* notes and accompanying texts 86–102.

¹¹³ Meghan Johnson & Kele Stewart, *Unequal Access to Special Immigrant Juvenile Status: State Court Adjudication of One-Parent Cases*, A.B.A. (July 14, 2014), <http://apps.americanbar.org/litigation/committees/childrights/content/articles/summer2014-0714-unequal-access-special-immigrant-juvenile-status-state-court-adjudication-one-parent-cases.html>.

SIJS.

A. *Legislative Barriers: Proposition 187 and SAPCR*

As an example of how state law developments can effectively nullify access to SIJS, California voters passed Proposition 187 in 1994.¹¹⁴ Codified as California Welfare and Institutions Code section 10001.5(a), Proposition 187 prohibited undocumented immigrants from accessing public social services, including foster care.¹¹⁵ The law prevented undocumented immigrant children from using SIJS as a legal remedy by prohibiting California courts from finding undocumented immigrants eligible for the foster care system, as required by the 1997 amendment.¹¹⁶ Although a United States district court eventually overturned California Welfare and Institutions Code section 10001.5(a), Proposition 187 demonstrates how voter-approved laws can jeopardize access to SIJS relief for applicants.¹¹⁷

Despite the broad definition of abandonment under Texas state law, procedural laws act as a barrier to those seeking SIJS protections. An SIJS applicant seeking approval under Texas' definitions of abandonment must comply with the requirements of a Suit Affecting the Parent-Child

¹¹⁴ Proposition 187 passed with a 59% majority vote. *California Opinion Index: Voting in the 1994 General Election*, FIELD POLL 1 (Jan. 1, 1995), available at www.field.com/fieldpollonline/subscribers/COI-94-95-Jan-Election.pdf; see also

Salisbury, *supra* accompanying text and note 26.

¹¹⁵ CAL. WEL. & INST. CODE § 10001.5(a) (1995). Upon a determination or reasonable suspicion that the recipient of public social services resided in the United States illegally, a public entity must terminate services and notify the State Director of Social Services of California, the Attorney General of California, and the United States Immigration and Naturalization Service about the potential illegal immigrant. *Id.* at § 10001.5(b); see Salisbury, *supra* note 26; *Id.* § 10051 (“Public social services’ means those activities and functions of state and local government administered or supervised by the department or the State Department of Health Services and involved in providing aid or services or both.”).

¹¹⁶ Salisbury, *supra* note 26.

¹¹⁷ Multiple aspects of section 10001.5(a) of the California Welfare and Institutions Code were held preempted by federal law. See *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 780–82 (C.D. Cal. 1995) (referring to California Welfare and Institutions Code section 10001.5 as “section 5.”). For an additional example of state law and judicial organization impeding SIJS application, see Angela M. Elsparger, *Florida’s Battle with the Federal Government Over Immigration Policy Holds Children Hostage: They Are Not Our Children!*, 13 LAW & INEQ. 141, 149, 154 (1994) (“by denying undocumented children the jurisdiction of juvenile court for dependency proceedings, Florida has denied Jean and Carlos access to “special immigrant status” which would permit them to apply for lawful, permanent residence in the United States.”).

Relationship (SAPCR).¹¹⁸ The applicant's guardian, or caregiver may be required to exercise custody or control of the child for a statutory period.¹¹⁹ If a UAC does not have a guardian to file the petition, the UAC must file a self-petition in juvenile or family court.¹²⁰

UACs who file self-petitions are at a greater risk of having their petitions denied.¹²¹ UACs often lack an attorney who can understand immigration law and the "differing and perplexing standards" granting state courts jurisdiction over SIJS. Without an attorney, UACs may have trouble explaining SIJS to state judges who are unfamiliar with immigration law.¹²² Most importantly, the family court's jurisdiction over an applicant under these sections ends once the applicant turns eighteen.¹²³ As a result, an SIJS applicant who turns eighteen may age out of the program, because the family court cannot make the special finding for an individual it does not have jurisdiction over.¹²⁴

¹¹⁸ TEX. FAM. CODE § 101.032(a) (1995) ("Suit affecting the parent-child relationship" means a suit filed as provided by this title in which the appointment of a managing conservator or a possessory conservator, access to or support of a child, or establishment or termination of the parent-child relationship is requested."). Section 161.001 of the Texas Family Code is under Title 5: The Parent-Child Relationship and the Suit Affecting the Parent-Child Relationship. *See id.* § 161.001.

¹¹⁹ *See id.* § 102.003(a)(9) ("a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition."); *Id.* § 162.009(a) ("The court may not grant an adoption until the child has resided with the petitioner for not less than six months.").

¹²⁰ John A. Nechman, *Protecting Immigrant Children from Deportation: The Role of Texas Probate Courts in Determining Special Immigrant Juvenile Status*, THE HOUS. LAWYER, Nov./Dec. 2013, at 20, 22.

¹²¹ *Id.*

¹²² *Id.* (identifying "procedural snafus, failure to comply with critical deadlines and legal confusion, often from judges unclear on SIJS law and their authority to consider self-petitions filed by minors" as reasons for why SIJS self-petitions are denied.).

¹²³ TEX. FAM. CODE § 101.003 (West 2015) (defining "child" as a person under eighteen years of age). The statutory definition of child appears with the definitions of "child custody determination" and "child custody proceeding", and "physical custody" of a child. *See id.* § 101.003(2)-(4), (14) (1999).

¹²⁴ *See In re J.L.E.O.*, WL 664642 (Tex. Ct. App. 2011). In *In re J.L.E.O.*, The Children's Center filed a petition to name the Center as minor J.L.E.O.'s conservator, declare J.L.E.O. a dependent of the court, and make the necessary finding for SIJS. *Id.* at *1 (Tex. Ct. App. 2011). Both of J.L.E.O.'s parents were deceased. *Id.* The Center filed a request for declaratory judgment after the trial court denied the request for the SIJS finding; however, by this point J.L.E.O. was eighteen years old. *Id.* The appellate court held that an individual has to be under the age of eighteen to be a dependent of the juvenile court under section 102.003(a)(9). *Id.* at *2. Because J.L.E.O. was no longer a child under section 102.003(a)(9) when the Center filed the request for declaratory relief, the juvenile court no longer had jurisdiction. *Id.* The juvenile court did not retain continuing, exclusive

B. Judicial Barriers: Erick M. and One-Parent SIJS petitions

8 U.S.C. § 1101(a)(27)(J)(i) requires a finding that reunification with one *or* both of the applicant's parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law.¹²⁵ This provision affects UACs who traveled to the United States to reunite with one, or both parents.¹²⁶ However, state differences in interpreting 8 U.S.C. § 1101(a)(27)(J)(i), jeopardize robust and uniform application of SIJS. The Supreme Court of Nebraska's decision in *In re Erick M.* requires a court to find that reunification with both parents is not viable.¹²⁷ In contrast, the plain meaning of 8 U.S.C. § 1101(a)(27)(J)(i) states that unviable reunification with only one parent due to abuse, neglect, or abandonment suffices for SIJS eligibility.¹²⁸ States that adopt the holding in *Erick M.*—that courts must separately determine whether reunification with both parents is viable—effectively exclude children who have been abandoned by only one parent and would otherwise qualify for SIJS eligibility.¹²⁹ The rule in *Erick M.* is an incorrect interpretation of 8 U.S.C. § 1101(a)(27)(J)(i), it fails to account for the best interests of minors, does not effectively prevent abuse of the program, and conflicts with the SIJS statute.

Nebraska was the first state to require a finding that reunification with *both* parents is not viable to qualify for SIJS. The juvenile court adjudicated *Erick M.* in December 2010 and committed him to the Office of Juvenile Services because he had two charges of being a minor in

jurisdiction because the court made no final orders. *Id.*; *See also* § 155.001(a).

¹²⁵ Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(J)(i) (2008); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235, 122 Stat. 5044, 5079–80.

¹²⁶ *See* David Agren, *CRS Looks at Central American Programs to Help Fight Migration Crisis*, CATHOLIC NEWS NETWORK, Sept. 8, 2014, <http://www.catholicnews.com/services/englishnews/2014/crs-looks-at-central-american-programs-to-help-fight-push-factors.cfm> (“Many also try to reunite with parents, who have spent years working in the United States to support households back home.”).

¹²⁷ *In re Erick M.*, 820 N.W.2d 639, 647 (Neb. 2012); *see* Anderson, *supra* note 43, at 683; Samantha Casey Wong, Note, *Perpetually Turning Our Backs to the Most Vulnerable: A Call for the Appointment of Counsel for Unaccompanied Minors in Deportation Proceedings*, 46 CONN. L. REV. 853, 863 (2013).

¹²⁸ Meghan Johnson & Yasmin Yavar, *Uneven Access to Special Immigrant Juvenile Status: How the Nebraska Supreme Court Became an Immigration Gatekeeper*, 33 CHILD. LEGAL RTS. J. 64, 84 (2013), *available at* http://www.childrenslegalrightsjournal.com/childrenslegalrightsjournal/2013spring_2?pg=84#pg70.

¹²⁹ *Id.*

possession of alcohol.¹³⁰ Erick lived with his mother while participating in dependency proceedings, and expressed an interest in pursuing a home-based rehabilitation plan.¹³¹ Erick petitioned the court to make the necessary SIJS finding, testified that he was unaware of his father's contact information or whereabouts, and demonstrated that his father failed to establish biological paternity.¹³²

The juvenile court denied Erick's motion for SIJS eligibility, because Erick failed to demonstrate that reunification with his mother was not viable due to abuse, neglect, or abandonment.¹³³ Erick's removal from his mother's house was brought about from his alcohol charges as opposed to any acts by his mother.¹³⁴ Erick's mother cared for him before juvenile court proceedings began and wished to place Erick back in her care upon his release. Because Erick had a non-offending parent that could care for him the court held that it did not need to consider the father's abandonment for the purposes of SIJS eligibility.¹³⁵

On appeal to the Supreme Court of Nebraska, Erick argued that SIJS only required unviable reunification with one parent according to 8 U.S.C. § 1101(a)(27)(J)(i). Thus, despite his mother's care, his father abandoned him.¹³⁶ The State interpreted the statute to require unviable reunification

¹³⁰ *In re Erick M.*, 820 N.W.2d at 642.

¹³¹ Nebraska Department of Health and Human Services Office responsible for assisting minors who have committed a delinquent or criminal act and their families. *Office of Juvenile Services*, NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES (March 4, 2014 2:35 PM), http://dhhs.ne.gov/children_family_services/pages/jus_ojsindex.aspx; see 820 N.W.2d at 643, 648. Erick demonstrated opposition and desertion towards state-based rehabilitation. *In re Erick M.*, 820 N.W.2d at 643.

¹³² *In re Erick M.*, 820 N.W.2d at 643.

¹³³ *Id.*; see Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(J)(2008).

¹³⁴ *In re Erick M.*, 820 N.W.2d at 643; see Anderson, *supra* note 43, at 691. (Furthermore, no evidence showed permanent removal from his mother). *Id.*

¹³⁵ *In re Erick M.*, 820 N.W.2d at 643; Johnson & Yavar, *supra* note 130, at 80. There was no evidence of abuse or neglect committed against Erick by his father. *In re Erick M.*, 820 N.W.2d at 643.

¹³⁶ Erick argued that Congress intended to give a disjunctive meaning to the provision. *In re Erick M.*, 820 N.W.2d at 643–44; see also Johnson & Yavar, *supra* note 130, at 70. Additionally, Erick focused on his placement in the Office of Juvenile Services and the absence of his father. *In re Erick M.*, 820 N.W.2d at 643–44. The State argued that Congress intended courts to consider the possibility of reunification with the other parent, and that the possibility of reunification with one parent precluded an analysis of reunification with the other parent. *Id.* But see Johnson & Stewart, *supra* note 115 (arguing that such an interpretation of 8 U.S.C. § 1101(a)(27)(J)(i) runs counter to and nullifies the TVPRA amendment).

with both parents.¹³⁷

Finding that both arguments presented a reasonable interpretation of SIJS, the Supreme Court of Nebraska turned to the legislative history of SIJS.¹³⁸ The 1997 amendment required a juvenile court to determine whether the applicant is eligible for long-term foster care “due to abuse, neglect or abandonment.”¹³⁹ Congress intended the 1997 amendment to “prevent youths from using this remedy for the purpose of obtaining legal permanent resident status, rather than for the purpose of obtaining relief from abuse or neglect.”¹⁴⁰

The practices of immigration officials and the USCIS also demonstrated the intent to focus on particularly vulnerable applicants.¹⁴¹ Immigration authorities interpreted earlier versions of SIJS as requiring a juvenile court finding that family reunification is no longer viable.¹⁴² In accordance with the 1997 amendment, the USCIS required abuse, neglect or abandonment as a basis for SIJS applications.¹⁴³ Furthermore, “when reunification with an absent parent is not feasible because the juvenile has

¹³⁷ We could also reasonably interpret the phrase “one or both” parents to mean that a juvenile court must find, depending on the circumstances, that *either* reunification with one parent is not feasible *or* reunification with both parents is not feasible. *In re Erick M.*, 820 N.W.2d at 644.

¹³⁸ Absent any statutory or regulatory guidance, we conclude that the statute is ambiguous because the parties have both presented reasonable, but conflicting, interpretations of its language. *Id.* at 646. We can examine an act’s legislative history when a statute is ambiguous. *Id.* at 645 (citing *State v. Halverstadt*, 809 N.W.2d 480 (2011)); Johnson & Yavar, *supra* note 130, at 79.

¹³⁹ Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, §113, 8 U.S.C. § 1101, Pub. L. No. 105–119, 111 Stat. 2440, 2460 (1997).

¹⁴⁰ See *In re Erick M.*, 820 N.W.2d at 646; Charles Gordon et al., *Immigration Law and Procedure* § 35.09 [1] at 35–36 (rev. ed.2011), citing H.R. Rep. No. 105–405 (1997) (Conf. Rep.). Although TVPRA broadened SIJS eligibility, the earlier 1997 amendment still requires juveniles to seek relief from parental abuse, neglect, or abandonment. *In re Erick M.*, 820 N.W.2d at 645.

¹⁴¹ The USCIS, under the Department of Homeland Security, is responsible for maintaining border security and granting immigration and citizenship benefits. *About Us*, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES (Apr. 30, 2009), <http://www.uscis.gov/aboutus>.

¹⁴² *In re Erick M.*, 820 N.W.2d at 645–46, citing 8 C.F.R. § 204.11(a) (2009) (“Eligible for long-term foster care means that a determination has been made by the juvenile court that family reunification is no longer a viable option.”).

¹⁴³ § 113, 111 Stat. at 2460. USCIS will not consent to a petition for SIJ status if it 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 or abandonment.” *In re Erick M.*, 820 N.W.2d at 646 fn.25.

never known the parent or the parent has abandoned the child, USCIS and juvenile courts generally still consider whether reunification with the known parent is an option.”¹⁴⁴ Therefore, USCIS required SIJS applicants to show unviable reunification with both parents, and found one-parent unviability insufficient.¹⁴⁵

The Supreme Court of Nebraska applied the State’s interpretation of the reunification component, and affirmed the trial court.¹⁴⁶ “If a juvenile lives with only one parent when a juvenile court enters a guardianship or dependency order, the reunification component for obtaining [SIJS]. . . is not satisfied if a petitioner fails to show that it is not feasible to return the juvenile to the parent who had custody.”¹⁴⁷ Therefore, a juvenile court does not need to determine viability of reunification with the absent parent if a non-offending parent is present.¹⁴⁸

Erick sought to support his argument with *In re E.G.*, an unpublished New York decision.¹⁴⁹ The appellate court factored in Erick’s disposition during removal proceedings in order to distinguish *In re E.G.*, and deny his SIJS application.¹⁵⁰ First, unlike the minor abandoned by, and deprived of contact with, his father following the father’s alcohol abuse,

¹⁴⁴ *In re Erick M.*, 820 N.W.2d at 646, citing *Trudy-Ann W. v. Joan W.*, 901 N.Y.S.2d 296, 299 (N.Y.S. App. Div. 2010) (determining the viability of reunification with one parent after making a determination for the other parent). *But see* Johnson & Yavar, *supra* note 130 (noting that none of the juvenile court or USCIS cases cited by the Supreme Court of Nebraska required making a determination for both parents).

¹⁴⁵ *In re Erick M.*, 820 N.W.2d at 643.

¹⁴⁶ The court found that the interpretation practiced by USCIS and the courts was the better interpretation of the reunification provision. *See Id.* at 648.

¹⁴⁷ *Id.* at 647.

¹⁴⁸ The court did recognize the potential reunification issues brought about by a minor’s removal from both of his or her parents due to abuse, neglect, or abandonment. *See Id.* at 647.

¹⁴⁹ *In re E.G.*, 899 N.Y.S.2d 59 (N.Y. Fam. Ct. 2009). *In re E.G.*, a minor left his mother and siblings in Guatemala to live with his father. *Id.* at 59. The father gradually spent all his money on alcohol instead of rent and food. *Id.* The Department of Social Services removed the minor from his father and filed a neglect petition. *Id.* The Department based its petition on the father’s alleged act of leaving the minor with money or care. *Id.* Minor’s counsel moved for SIJS eligibility, and father neither maintained contact with the minor nor responded to service. *Id.* The trial court made the SIJS finding without considering reunification with the mother. *Id.* The only reference to mother was her concerns about gang retaliation in the court’s finding that return to Guatemala to be against the minor’s best interests. *Id.* Because there was no consideration over the viability of reunification with mother, the court in this case interpreted SIJS literally. *See Id.*

¹⁵⁰ When ruling on a petitioner’s motion for an eligibility order for SIJS, a court should generally consider whether reunification with either parent is feasible. *In re Erick M.*, 820 N.W.2d at 648. But this case presents the exception. *Id.*

Erick lived with his mother during proceedings.¹⁵¹ Second, the father in *In re E.G.* failed to respond to the proceedings, but Erick's mother attended her son's hearings and evinced a desire to receive Erick upon his release.¹⁵² Third, the father abandoned the minor and triggered the neglect petition in *In re E.G.*, whereas Erick did not become a dependent of the court due to abuse, neglect, or abandonment by his mother. Instead, Erick caused himself to become a dependent of the court through his juvenile alcohol use.¹⁵³ Because Erick's removal was not pursuant to the reunification provision's policy of providing applicants relief from parental abuse, neglect, or abandonment, the trial court correctly denied Erick's request to make the required finding for SIJS eligibility.¹⁵⁴

Nebraska's interpretation of the "one or both parents" provision fails to conform to the literal text of the statute.¹⁵⁵ Congress, according to the court in *H.S.P.*, is capable of amending SIJS to include one-parent SIJS cases.¹⁵⁶ However, other courts held Congress applied SIJS to minors where reunification with only one parent is not viable.¹⁵⁷ The New York appellate court in *In re Marcelina* correctly applied the plain meaning of SIJS.¹⁵⁸ The court in *In re Marcelina* also noted that Congress replaced the "long-term foster care" requirement with the "one or both parents" requirement in 2008.¹⁵⁹ The 1997 amendment required unviable reunification with both parents, because long term foster care presumes that

¹⁵¹ *In re E.G.*, 899 N.Y.S.2d at 59.

¹⁵² *Id.*; see *In re Erick M.*, 820 N.W.2d at 643, 647–48.

¹⁵³ *In re E.G.*, 899 N.Y.S.2d at 59. Erick's family permanency specialist testified that Erick's mother was not investigated for abuse or neglect. *In re Erick M.*, 820 N.W.2d at 642–43.

¹⁵⁴ See *In re Erick M.*, 820 N.W.2d at 646, 648; Charles Gordon et al., Immigration Law and Procedure § 35.09 [1] at 35–36 (rev. ed.2011), citing H.R. Rep. No. 105–405 (1997) (Conf. Rep.). Although TVPRA broadened SIJS eligibility, the earlier 1997 amendment still requires juveniles must still be seeking relief from parental abuse, neglect, or abandonment. *In re Erick M.*, 820 N.W.2d at 645.

¹⁵⁵ New Jersey adopted the Supreme Court of Nebraska's "both parents" requirement. See *H.S.P. v. J.K.*, 87 A.3d 255 (N.J. 2014) (citing *In re Erick M.*, 820 N.W.2d 639, 647 (Neb. 2012)), overruled by *H.S.P. v. J.K.*, 121 A.3d 849, 852 (N.J. 2015).

¹⁵⁶ See *H.S.P.*, 87 A.3d at 268 ("If Congress wished to create a "gateway" for all abused or impoverished foreign juveniles. . . it could have done so. It did not do so by enacting the 2008 amendments.").

¹⁵⁷ *In re Marisol N.H.*, 979 N.Y.S.2d 643, 647 (N.Y. App. Div. 2014); *In re Marcelina M.-G. v. Israel S.*, 973 N.Y.S.2d 714, 721–23 (N.Y. App. Div. 2013); *In re Mario S.*, 954 N.Y.S.2d 843, 851 (N.Y. Fam. Ct. 2012).

¹⁵⁸ *In re Marcelina*, 973 N.Y.S.2d at 722.

¹⁵⁹ *Id.*

reunification with both parents is not viable.¹⁶⁰ In contrast, the word “or” in its ordinary use is a disjunctive. Therefore, Congress intended to expand eligibility to minors who cannot reunify with *either* one parent, *or* both parents.¹⁶¹ Applying the *Erick* reasoning, Congress could have amended SIJS to explicitly require unviable reunification with “*both* parents,” but it did not do so.¹⁶²

8 U.S.C. § 1101(a)(27)(J)(i) contains other provisions with disjunctive language, and state court decisions demonstrate that courts have experience interpreting the plain language of such provisions.¹⁶³ In *Leslie H. v. Superior Court*, the appellate court interpreted 8 U.S.C. § 1101(a)(27)(J)(i) to include wards of the state in delinquency proceedings.¹⁶⁴ The relevant text of 8 U.S.C. § 1101(a)(27)(J)(i) does not require a minor immigrant to be deemed a dependent of the juvenile court if such court commits or places the minor in the State’s custody, an individual or entity.¹⁶⁵ The court in *Leslie H.* did not look to the legislative history of SIJS, and also noted that courts should not make policy determinations in SIJS petitions; rather, the scope of the court’s authority under SIJS is merely to make necessary eligibility findings.¹⁶⁶

The “both parent” rule contradicts the legislative history and intent behind SIJS. New Jersey found that the “both parents” requirement furthered Congress’ goals to provide relief to eligible children and prevent abuse of the program.¹⁶⁷ However, the “both parents” requirement limits SIJS eligibility and runs counter to this goal of “alleviate hardships experienced by some dependents of United States juvenile courts.”¹⁶⁸ Additionally, Congress intended TVPRA to provide “refugee assistance for children in such status,” and focused on the trauma and challenges faced by

¹⁶⁰ See 8 C.F.R. § 204.11(a) (2009) (“Eligible for long-term foster care means that a determination has been made by the juvenile court that family reunification is no longer a viable option.”); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 110 Pub. L. No. 457, § 235, 122 Stat. 5044, 5079–80.

¹⁶¹ *In re Marcelina*, 973 N.Y.S.2d at 722.

¹⁶² Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(J)(i) (2008).

¹⁶³ *See id.*

¹⁶⁴ *See Leslie H. v. Superior Court*, 168 Cal. Rptr. 3d 729, 737 (Ct. App. 2014).

¹⁶⁵ See 8 U.S.C. § 1101(a)(27)(J)(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.”) (emphasis added).

¹⁶⁶ *See Leslie H.*, 168 Cal. Rptr. 3d at 738.

¹⁶⁷ *See H.S.P.*, 87 A.3d at 267-68.

¹⁶⁸ Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court, 58 Fed. Reg. 42,843 (Aug. 12, 1993).

UACs instead of their family situations.¹⁶⁹ Statements from Senator Richard Durbin further elaborate on the intent behind the TVPRA:

Today Congress took an important step to protecting unaccompanied alien children. . .to ensure that unaccompanied minors in temporary Federal custody are treated as children and not as criminals. . .This bill seeks to protect children. who have escaped traumatic situations such as armed conflict, sweatshop labor, human trafficking, forced prostitution, and other life-threatening circumstances.¹⁷⁰

The “both parents” requirement runs contrary to Congress’s goal of protecting children. Vulnerable children who are otherwise eligible for SIJS protections are excluded because States are satisfied with the one-parent viability.

In addition to opposing Congress’ intent behind SIJS, New Jersey’s adoption of the *In re Erick M.* rule interferes with uniform application of the program.¹⁷¹ Although not binding precedent in New Jersey, several courts have held that SIJS only requires unviable reunification with one parent.¹⁷² The rule originally adopted in *In re Erick M.* excludes children in Nebraska who would otherwise qualify for SIJS, and have had one parent abuse, neglect, or abandon them. Requiring a finding of unviable reunification with both parents further conditions SIJS eligibility on the state that the applicant filed their case.¹⁷³ For example, in *H.S.P.* the New Jersey appellate court found that M.S.’s father abandoned him, but M.S. was not SIJS eligible because M.S. failed to show that reunification with his mother was not viable.¹⁷⁴ The outcome of M.S.’s case would have been different if he resided in the neighboring state of New York, because New York courts make SIJS findings for applicants where reunification with one

¹⁶⁹ See H.R. REP. NO. 110–430(I), at 58 (2007).

¹⁷⁰ 154 Cong. Rec. S10,886–901 (daily ed. Dec. 10, 2008) (statement of Sen. Durbin).

¹⁷¹ Compare *H.S.P. v. J.K.*, 87 A.3d 255, 267–68 (N.J. 2014), overruled by *H.S.P. v. J.K.*, 121 A.3d 849, 852 (N.J. 2015), with *In re Marcelina M.-G. v. Israel S.*, 973 N.Y.S.2d 714, 721–23 (App. Div. 2014) and *In re Mario S.*, 954 N.Y.S.2d 843, 851 (Fam. Ct. 2012).

¹⁷² *In re Marisol N.H.*, 979 N.Y.S.2d 643, 647 (App. Div. 2014); *In re Marcelina M.-G.*, 973 N.Y.S.2d at 721–23; *In re Mario S.*, 954 N.Y.S.2d at 851; *In re Minor Children of J.E.*, A.3d 1013 (N.J. Ch. Div. 2013). *Contra In re Erick M.*, 820 N.W.2d 639 (Neb. 2012). The court in *H.S.P.* went on to overrule *J.E.* 87 A.3d at 266.

¹⁷³ Wong, *supra* note 129; see Johnson & Stewart, *supra* note 115 (“The effect of state court overreaching is to cut off immigration relief to one class of immigrants that might get relief in a different state court.”).

¹⁷⁴ *H.S.P.*, 87 A.3d at 269.

parent is viable.¹⁷⁵ Under this scheme, the children who Congress intended to protect are unfairly discriminated against as a result of their residency, despite any trauma and abandonment the children have already experienced.¹⁷⁶

Although the court in *Erick M.* considered Congress' concerns over individuals abusing SIJS in amending the program, requiring unviable reunification with both parents fails to prevent such abuse. First, SIJS eligibility is a difficult program to abuse because it involves a long legal process requiring multiple findings and procedures.¹⁷⁷ Even if a state court makes the prerequisite finding for SIJS eligibility, the visa determination and final disposition on lawful permanent residence rests with the USCIS.¹⁷⁸ Second, the total number of individuals receiving legal residency status through SIJS makes up only a fraction of annual visa grants.¹⁷⁹ A total of 2,250 children obtained legal permanent resident status through SIJS in 2012.¹⁸⁰ In contrast, over nine-thousand spouses, six-thousand investors, and nearly eighty-five thousand parents of United States citizens obtained legal permanent residency through other means in the same period.¹⁸¹ SIJS currently affects a small number of minors, so expressly authorizing one-parent SIJS petitioned would expand the reach of the program. Third, inconsistent application of the "one or both parents" provision in fact incentivizes abuse by encouraging forum shopping.¹⁸² Legal advocates may encourage minors preparing to enter the United States to seek out relief in states recognizing one-parent petitions.¹⁸³ Children and

¹⁷⁵ See *In re Marcelina M.-G.*, 973 N.Y.S.2d at 721–23; *In re Mario S.*, 954 N.Y.S.2d at 851.

¹⁷⁶ See Anderson, *supra* note 43, at 684.

¹⁷⁷ For discussion of SIJS as a three-step process, see Johnson & Yavar, *supra* note 130, at 73.

¹⁷⁸ Johnson & Yavar, *supra* note 130, at 74, 75.

¹⁷⁹ Only 772 children qualified for SIJS proceedings and subsequently attained legal status. 2007 Yearbook of Immigrant Statistics, OFFICE OF IMMIGR. STAT., DEP'T OF HOMELAND SEC. 22 tbl. 7 (2007), available at

http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2007/ois_2007_yearbook.pdf.

¹⁸⁰ 2012 Yearbook of Immigration Statistics, OFFICE OF IMMIGR. STAT., DEP'T OF HOMELAND SEC. 22 tbl. 7 (2012), available at

http://www.dhs.gov/sites/default/files/publications/ois_yb_2012.pdf

¹⁸¹ *Id.*

¹⁸² See Knoespel, *supra* note 21, at 521. One New York courthouse currently had 4,500 pending cases for undocumented minors. See also Mirela Iverac, *Border Kids Fill Courts*, WNYC (July 2, 2014), <http://www.wnyc.org/story/border-kids-fill-courts/>.

¹⁸³ See Johnson & Yavar, *supra* note 130, at 89–90 (“Advocates must continue to act quickly to try to discern where a child may ultimately be headed in the United States and to strategize about the child’s options for legal relief on that basis.”).

their caretakers may be more likely to file petitions in states with the “one-parent” rule, leading to a backlog of cases in those states.¹⁸⁴

Finally, requiring unviable reunification with both parents assumes that reunification with the parent who did not abuse, neglect, or abandon the child is in the child’s best interest.¹⁸⁵ In enacting SIJS, Congress separated the “one or both parents” provision from the “best interest” provision.¹⁸⁶ However, it is possible that these provisions may conflict with one another if unviable reunification with both parents is the standard. Even if there is a non-offending parent in the home country, factors may indicate that it would not be in the child’s best interests to be placed with the “viable” parent. For example, California Family Code Section 3020(a) states that the “health, safety, and welfare of children shall be the court’s primary concern in determining the best interest of children.”¹⁸⁷ Texas Family Code Section 263.307’s list of best interests factors includes the frequency and circumstances of harm to a child, and whether the child is fearful of living in, or returning to the home.¹⁸⁸ As previously discussed, many UACs experienced gang violence in their home countries, and fled to escape continuing gang violence.¹⁸⁹ Reunification with a parent in the home country may neither necessarily guarantee that the child is in a safe environment, nor alleviate the child’s fears that led to the initial attempt to enter the United States. Requiring unviable reunification with both parents conflicts with the clause regarding a child’s best interests.

These issues illustrate how the current mechanics of SIJS, which involves both state and federal actions, and jurisdictions, threaten to leave deserving children without a remedy for their immigration and protective placement issues.

V. Solution: A Federal Takeover of SIJS

Because state law differences undermine the uniform application of SIJS, a federal immigration law, Congress should remove the state court

¹⁸⁴ See Knoespel, *supra* note 21, at 521.

¹⁸⁵ See Johnson & Yavar, *supra* note 130, at 85.

¹⁸⁶ *In re Erick M.*, 820 N.W.2d 639, 647 (Neb. 2012).

¹⁸⁷ Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(J)(i)–(ii) (West 2008) (“for whom it has been determined in administrative or judicial proceedings 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.”).

¹⁸⁸ CAL. FAM. CODE § 3020(a) (West 2000).

¹⁸⁹ TEX. FAM. CODE § 263.307(b) (West 1995).

¹⁸⁹ U.N. HIGH COMM’R FOR REFUGEES REG’L OFFICE FOR THE UNITED STATES AND THE CARIBBEAN, *supra* note 10, at 26.

requirements and keep the program within the purview of the federal system.¹⁹⁰ An amended SIJS program should place all UACs directly into the custody of the federal government. SIJS should apply to UACs aged twenty-one or younger who were not in custody of either parent at the time they entered the United States and lack a permanent residence therein. Rather than rely on state court finding before filing a proper SIJS petition, Congress should act by incorporating an SIJS hearing into immigration proceedings if UACs petition for eligibility. Such a system would ensure SIJS uniformity, and would prevent an influx of UACs targeting specific states for SIJS petitions. Federal jurisdiction over immigration law, federal programs concerning the placement of UACs, and federal law regulations of juvenile and family law justify a federal takeover of the SIJS process.

A. Federal Preemption of Immigration Law

Under the Supremacy Clause of the United States Constitution, Congress possesses the power to preempt—to supersede—conflicting state law.¹⁹¹ Courts recognize three types of preemption. First, federal law preempts state law when the language of the federal law explicitly says that state law is preempted.¹⁹² Second, field preemption occurs where the federal statutory scheme is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.”¹⁹³ The third, conflict preemption, where “compliance with both federal and state regulations is a physical impossibility.”¹⁹⁴

The federal government maintains broad power over immigration law, including laws that affect the rights of non-citizens.¹⁹⁵ The United States Supreme Court has previously recognized that there is “no conceivable subject [over which] the legislative power of Congress is more complete than it is over the admission of aliens.”¹⁹⁶ In this capacity,

¹⁹⁰ Lauren Heidbrink, *Unintended Consequences: Reverberations of Special Immigrant Juvenile Status*, 5 J. OF APPLIED RES. ON CHILDREN AT RISK 19 (2014). I would like to thank Professor Robert Fellmeth for his input and advice on this section.

¹⁹¹ U.S. CONST. art. VI, cl. 2. See also Jordan Jodré, *Preemptive Strike: The Battle for Control Over Immigration Policy*, 25 GEO. IMMIGR. L.J. 551, 554 (2011).

¹⁹² *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ See *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (“In the exercise of its broad power over immigration and naturalization, Congress regularly makes rules that would be unacceptable if applied to citizens.”).

¹⁹⁶ *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972); See also *Fiallo*, 430 U.S. at 794; *Mathews v. Diaz*, 426 U.S. 67, 81 (1976); Jesse Lorenz et al., *Family Unity v. Removal*, 15

Congress maintains the power to allow undocumented immigrants to remain in the United States, or remove them.¹⁹⁷ Immigration regulation rests in the legislative and executive branches, while the role of the courts is limited.¹⁹⁸ The federal government exercises power over immigration through the INA and the Immigration Reform and Control Act.¹⁹⁹

The United States Supreme Court in *De Canas v. Bica* reaffirmed that the “power to regulate immigration is exclusively a federal power.”²⁰⁰ However, the Supreme Court also held that not every state law affecting undocumented immigrants impermissibly interferes with Congressional immigration power.²⁰¹ Lower courts have applied *De Canas*, and prescribed three tests for federal preemption based on all three types of preemption.²⁰² The first test is whether a state statute regulates immigration, a field of law that falls exclusively under the federal government.²⁰³ The second concerns field preemption: state law is preempted if it was the “clear and manifest purpose of Congress to effect a complete ouster of state power.”²⁰⁴ Finally, federal law preempts state law

IMMIGR. LITIG. BULL. 3–4 (2011),

http://www.justice.gov/sites/default/files/civil/legacy/2014/10/17/November_2011.pdf.

¹⁹⁷ See *Fiallo*, 430 U.S. at 792.

¹⁹⁸ *Landon v. Plasencia*, 459 U.S. 21, 34–35 (1982) (“The role of the judiciary is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy.”).

¹⁹⁹ Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(J) (West 2008); Immigration Reform and Control Act, P.L. No. 99–603, §100 Stat. 3445 (1986); Jodré, *supra* note 193, at 554.

²⁰⁰ *De Canas v. Bica*, 424 U.S. 351, 354 (1976).

²⁰¹ See *id.* at 355–56 (“But the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power, whether latent or exercised.”).

²⁰² See *id.* (“The question. . . is whether [California Labor Code] Section 2805(a) is unconstitutional either because it is an attempt to regulate immigration and naturalization or because it is pre-empted under the Supremacy Clause”); See also *Villas at Parkside Partners v. City of Farmers Branch*, 496 F. Supp. 2d 757, 764–65 (N.D. Tex. 2007); *LULAC v. Wilson*, 908 F. Supp. 755, 768 (C.D. Cal. 1995); *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043, 1055 (S.D. Cal. 2006); *Equal Access Education v. Merten*, 305 F. Supp. 2d 585, 601–602 (E.D. Va. 2004); Monica Guizar, *How to Analyze Whether State and Local Initiatives Are an Unlawful Attempt to Enforce Federal Immigration Law or Regulate Immigration*, NAT’L IMMGR. L. CTR. (2007),

http://www.nilc.org/federalpreemptionfacts_2007-06-28.html#note7.

²⁰³ *Villas at Parkside Partners*, 496 F. Supp. 2d at 765; *Garrett*, 465 F. Supp. 2d at 1055; *Merten*, 305 F. Supp. 2d at 601–02.

²⁰⁴ “In other words, a statute is preempted where Congress intended to occupy the field which the statute attempts to regulate.” *Villas at Parkside partners*, 496 F. Supp. 2d at 765;

under the third test if the state law is an obstacle to the accomplishment and execution of Congress's purposes and objectives²⁰⁵ State law variations in interpreting SIJS—particularly the holdings in *In re Erick M.* and *H.S.P. v. J.K.* that require nonviable reunification with both parents for SIJS eligibility—fall under this category insofar as they stand as obstacles to the full purposes and objectives of 8 U.S.C. § 1101(a)(27)(J).²⁰⁶

B. Federal Programs Affecting UACs

The federal government exercises power over the custody and eventual placement of UACs. Under 8 U.S.C. § 1232, UACs in federal custody must be transferred to the Secretary of the Department of Health and Human Services (DHHS) no later than seventy-two hours after the child was identified as a UAC.²⁰⁷ UACs must then be placed “in the least restrictive setting that is in the best interest of the child.”²⁰⁸ Factors DHHS may consider for placements include: the danger the UAC presents to himself, to the community, and the flight risk they pose.²⁰⁹ Placement determinations may still occur even if the UAC turns eighteen before the transfer to DHS.²¹⁰ UACs who pose a danger to themselves or others, or face criminal charges are placed in a secure facility. However, DHHS must review secure facility placement on a monthly basis to determine if secure placement should continue.²¹¹ Under certain conditions, DHHS may return a UAC from a country contiguous to the United States.²¹²

Garrett 465 F. Supp. 2d at 1055; *Merten*, 305 F. Supp. 2d 585 at 601–602.

²⁰⁵ “Stated differently, a statute is preempted under the third test if it conflicts with federal law making compliance with both state and federal law impossible.” *Villas at Parkside partners*, 496 F. Supp. 2d at 765; *Garrett*, 465 F. Supp. 2d at 1055; *Merten*, 305 F. Supp. 2d 585 at 601–02.

²⁰⁶ *In re Erick M.*, 284 Neb. 340, 350 (2012); *H.S.P. v. J.K.*, 87 A.3d 255, 267–278, *overruled by H.S.P. v. J.K.*, 121 A.3d 849, 852 (N.J. 2015). For a discussion on how requiring unviable reunification with both parents runs contrary to Congress' intent behind 8 U.S.C. § 1101(a)(27)(J), see *supra* notes and accompanying text 167–175.

²⁰⁷ 8 U.S.C. § 1232 (2013).

²⁰⁸ *Id.* § 1232(c)(2)(A) (2013).

²⁰⁹ *Id.*

²¹⁰ *Id.* § 1232(c)(2)(B).

²¹¹ *Id.* § 1232(c)(2)(A). Note that Congress intended 8 U.S.C. § 1232 to combat human trafficking.

²¹² See *id.* § 1232(a)(2)(A)–(B) (allowing return if the UAC is neither a victim of a severe form of trafficking, nor

at the risk of becoming a victim, lacks a fear of returning to the home country backed by “credible fear of persecution,” and the UAC is competent enough to withdraw the admission application).

Similarly, the Department of Homeland Security (DHS) must transfer UACs apprehended by DHS agents to the Office of Refugee Resettlement (ORR).²¹³ Prior to immigration proceedings, ORR must feed, house, and provide medical care for UACs until they can be released to a safe environment with sponsors.²¹⁴ ORR must consider the interests of the UAC before creating and implementing placement determinations for all UACs in federal custody.²¹⁵ Pursuant to this authority, ORR conducts limited home studies under TVPRA to determine the potential sponsor's ability to ensure the child's safety and well-being.²¹⁶ Congress granted ORR with policymaking powers regarding the care and placement of UACs, and required ORR to submit a plan to help UACs attain counsel.²¹⁷ ORR must also identify a "sufficient number" of qualified individuals, entities, and facilities to house UACs, ensure the quality of facilities and individuals taking care of UACs in federal custody, and reunite UACs with parents outside the United States when appropriate.²¹⁸ Congress mandated ORR to consider the safety needs of UACs in federal custody. While making UAC placement determinations, ORR must consult juvenile justice professionals, the USCIS Director, and the Assistant Secretary of the Bureau of Border Security to ensure that UACs:

- (i) Are likely to appear for all hearings or proceedings in which they are involved;
- (ii) are protected from smugglers, traffickers, or other who might seek to victimize or otherwise engage them in criminal, harmful, or exploitive activity; and
- (iii) are placed in a setting. . .not likely to pose a danger to themselves or others.²¹⁹

²¹³ Homeland Security Act of 2002, Pub. L. No. 107–296, § 462(a), 116 Stat. 2135, 2202 (2002). The care and placement of UACs originally fell under the Commissioner of the Immigration and Naturalization Service. *Id.*

²¹⁴ *Unaccompanied Children Released to Sponsors By State*, OFFICE OF REFUGEE RESETTLEMENT, available at <http://www.acf.hhs.gov/programs/orr/programs/ucs/state-by-state-uc-placed-sponsors> (last visited Jan. 18, 2015).

²¹⁵ See Homeland Security Act of 2002, Pub. L. No. 107–296, § 462(b)(1)(A), (B), (D), 116 Stat. 2135, 2202-2203 (2002).

²¹⁶ See OFFICE OF REFUGEE RESETTLEMENT, *supra* note 216; *Children Entering the United States Unaccompanied: Guide to Terms*, OFFICE OF REFUGEE RESETTLEMENT, available at <http://www.acf.hhs.gov/programs/orr/resource/children-entering-the-united-states-unaccompanied-guide-to-terms#Home%20Study> (last visited Oct. 31, 2015).

²¹⁷ Homeland Security Act of 2002, Pub. L. No. 107–296, § 462(b)(1)(A), 116 Stat. 2135, 2202-03 (2002).

²¹⁸ *Id.* § 462(b)(1)(F), (G), (H)

²¹⁹ *Id.* § 462(b)(2)(A)(i)–(iii). ORR "shall consult with appropriate juvenile justice professionals, the Director of the Bureau of Citizenship and Immigration Services, and the

8 U.S.C. § 1522 empowers ORR to provide child welfare services to refugee children detained by ORR for thirty-six months.²²⁰ Under 8 U.S.C. § 1522, ORR is authorized to provide child welfare services through direct federal action, state reimbursements, and contracts with public and private nonprofit agencies.²²¹ UACs detained by ORR may receive child welfare services until one month after they turn eighteen, unless state law continues services.²²² Furthermore, ORR assumes legal responsibility of unaccompanied refugee children admitted into the United States until their placement is arranged.²²³

However, these ORR requirements apply to fewer undocumented immigrants than SIJS. ORR applies to children under eighteen who do not have a parent or legal guardian in the United States, or lack a parent or legal guardian able to provide care and physical custody in the United States.²²⁴ In addition, ORR does not fall under USCIS but rather DHHS.²²⁵

Federal authority over immigration includes the power to defer deportation. In 2012, the Deferred Action for Childhood Arrivals program (DACA) granted the Department of Homeland Security (DHS), and immigration agencies prosecutorial discretion over removal decisions for individuals who “know only [the United States] as their home.”²²⁶ Immigration officials can exercise prosecutorial discretion regardless of whether or not the qualifying individual is already in removal proceedings.²²⁷ DACA defers removal action, but does not grant permanent legal status.²²⁸ The recent wave of UACs cannot fall under the current

Assistant Secretary of the Bureau of Border Security.” *Id.* § 462(b)(2)(A).

²²⁰ 8 U.S.C. § 1552(d)(2)(A) (2011).

²²¹ *Id.*

²²² *Id.* § 1552(d)(2)(B)(i).

²²³ *See id.* § 1552(d)(2)(B)(ii).

²²⁴ Homeland Security Act of 2002, Pub. L. No. 107–296, § 462(g)(2), 116 Stat. 2135, 2205 (2002).

²²⁵ Jessica G. Taverna, *Did the Government Finally Get It Right? An Analysis of the Former INS, Office of Refugee Resettlement and Unaccompanied Minor Aliens’ Due Process Rights*, 12 WM. & MARY BILL RTS. J. 939, 968 (2004).

²²⁶ *See* Memorandum from Janet Napolitano to David V. Aguilar, Acting Commissioner U.S. Customs and Border Prot., Alejandro Mayorkas, Director U.S. Citizenship and Immigration Servs., & John Morton, Director U.S. Immigration and Customs Enforcement (June 15, 2012), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> (Establishing the requirements for how DHS should exercise prosecutorial discretion for qualifying minors who “lacked the intent to violate the law.”).

²²⁷ *Id.*

²²⁸ *See Deferred Action for Childhood Arrivals*, DEP’T OF HOMELAND SEC.,

DACA residence and presence requirements. To qualify for DACA prosecutorial discretion, the applicant must 1) have entered the United States under the age of sixteen; 2) have continuously resided in the United States at least five years before June 15, 2012 and prove presence in the United States on June 15, 2012; and 3) be under the age of thirty before June 15, 2012.²²⁹ However, the Obama administration recently removed the age limit, and lowered the continuous residency requirement from five years (prior to June 15, 2012) to three years.²³⁰ The Obama administration plans to grant deferred action to parents of citizens or lawful permanent residents through the Deferred Action for Parents of Americans program that has similar requirements to DACA.²³¹

C. Federal Laws Regulating Juvenile and Family Law

Although juvenile and family law are traditionally state law matters, United States Supreme Court decisions and congressional legislation have imposed requirements on state juvenile law and family law cases.²³² Numerous United States Supreme Court decisions established mandatory standards and procedures for state court juvenile and family law proceedings.²³³ In addition, Congress has enacted child welfare institutions

<http://www.dhs.gov/deferred-action-childhood-arrivals> (last visited Dec. 26, 2014) (“Deferred action does not confer lawful status upon an individual.”); Knoespel, *supra* note 21, at 516.

²²⁹ Memorandum from Janet Napolitano, *supra* note 228. However, individuals in removal proceedings face additional requirements, and all individuals must pass a background check before qualifying. *Id.*

²³⁰ Memorandum from Jeh Charles Johnson to Leon Rodriguez, Director U.S. Citizenship and Immigration Services, Thomas S. Winkowski, Acting Director U.S. Immigration and Customs Enforcement, R. Gil Kerlikov Commissioner U.S. Customs and Border Prot (November 20, 2014), *available at*

http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.

²³¹ *Id.*

²³² Linda Elrod, *The Federalization of Family Law*, 36 A.B.A. HUMAN RIGHTS MAG. 6, 6 (2009), *available at*

http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol36_2009/summer2009/the_federalization_of_family_law.html.

²³³ See *Santosky v. Kramer*, 455 U.S. 745, 747–48 (2007) (requiring States to support its allegations of child abuse or neglect by clear and convincing evidence before terminating parental rights); *In re Winship*, 397 U.S. 358, 364 (1970) (holding that the standard of proof in juvenile delinquency cases is beyond a reasonable doubt); *In re Gault*, 387 U.S. 1, 34–59 (1967) (holding that a juvenile in delinquency proceedings must be afforded protections such as the right to counsel, the privilege against self-incrimination, and the right to appellate review); see also *Stanley v. Il.*, 405 U.S. 645, 657–659 (1972) (holding that depriving an unwed father of his children without a hearing violates the Fourteenth Amendment of the Constitution of the United States).

affecting state law. For example, the Child Abuse Prevention and Treatment Act (CAPTA) grants states federal funds to address child abuse and neglect, but only if the state adopts legal definitions of child abuse and neglect.²³⁴ The Adoption and Safe Families Act of 1997 (ASFA) requires states to file to terminate parental rights for children who have been in foster care for fifteen out of the most recent twenty-two months.²³⁵ ASFA also mandates a permanency hearing no later than twelve months after the child's initial removal from the home.²³⁶ States are normally required to make reasonable efforts to reunify foster children with their parents, but ASFA provides for situations where the state does not need to make such reasonable efforts.²³⁷

Congress created legislation affecting state court jurisdiction over children when it enacted the Indian Child Welfare Act of 1978 (ICWA).²³⁸ ICWA ensures that the removal of Native American children and their placement in foster care or adoptive homes protects the best interest of the children and "promote[s] the stability and security of Indian tribes and families."²³⁹ ICWA grants Native American tribes exclusive jurisdiction "as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law."²⁴⁰ State courts must transfer proceedings concerning foster care placements or termination of parental rights to the Native American tribe's jurisdiction, even if the child is not domiciled or residing within the tribe's reservation.²⁴¹ The child's Native American custodian or the child's tribe has the right to intervene at any point in foster care placement, or termination of parental rights proceeding.²⁴² Notice requirements ensure that Native American tribes are put on notice of the child's proceedings and

²³⁴ Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, §§ 101–209, 88 Stat. 4; See *infra* text accompanying notes 242–44.

²³⁵ Adoption and Safe Families Act of 1997, Pub. L. No. 105–89, § 103(a)(3), 111 Stat. 2115, 2118; Elrod, *supra* note 234, at 7.

²³⁶ *Id.* § 302, 111 Stat. at 2128–29.

²³⁷ These situations include aggravated circumstances under state law, if a parent has committed murder or voluntary manslaughter which would be an offense under federal law, and if a parent's rights to the foster child's sibling has been terminated involuntarily. *Id.* § 101, 111 Stat. at 2116–17.

²³⁸ Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1963.

²³⁹ *Id.* § 1902.

²⁴⁰ *Id.* § 1911.

²⁴¹ See *id.* A parent, Native American custodian, or the tribe must petition for the transfer of jurisdiction, and such transfer must occur absent good cause or objection by either parent.

²⁴² *Id.*

have an opportunity to respond.²⁴³ ICWA demonstrates Congress' power to remove family and juvenile law jurisdiction from state courts, and their ability to recognize a specialized version of the best interests of the child standard.²⁴⁴ Congress should similarly use this power with regards to SIJS state findings.

D. Federalizing Texas Family Code section 161.001

State variations in child abandonment law challenge uniform SIJS eligibility. A SIJS applicant may be considered "abandoned" in one state but not another. As a result, a minor who would normally qualify for SIJS would fall through the cracks due the state's definition of abandonment. Therefore, Congress needs to adopt a federal definition of child abandonment. Additionally, Congress should amend the language of 8 U.S.C. § 1101(a)(27)(J) to explicitly allow SIJS petitions where only one parent has abused, neglected, or abandoned the child. Clarifying the validity of one-parent SIJS petitions would end the unequal application of SIJS based on this provision.²⁴⁵ Recent legislative efforts demonstrate Congress's recognition of this issue. On January 7, 2015, Representative Robert Anderholt introduced a bill to amend the language of 8 U.S.C. § 1101(a)(27)(J)(i) from "one or both" parents to "*either* of the immigrant's parents."²⁴⁶ Congress should pass this provision of this amendment to assist UACs that would be excluded from SIJS under *In re Erick M.* and *H.S.P. v. J.K.* This amendment correctly puts the focus on whether the child suffered abuse, abandonment, or neglect instead of whether there is a non-offending parent.²⁴⁷

It is within Congress' power to establish a federal definition of child abandonment. Existing law demonstrates congressional experience and readiness in establishing federal floors for harmful acts against children.

²⁴³ *See id.* § 1912.

²⁴⁴ The best interest standard of a Native American child should consider the political nature of the child's heritage and the benefits of tribal national citizenship. *See* Hon. Peter J. Herne, *Best Interests of an Indian Child*, 86-APR N.Y. St. B.J. 22, 22-23 (2014). Furthermore, under ICWA the best interest standard is paired with the policy goal of promoting "the stability and security of Indian tribes and families." 25 U.S.C. § 1902.

²⁴⁵ *See* Herne, *Supra* note 246 at 21-29.

²⁴⁶ Repeal Executive Amnesty Act of 2015, H.R. 191, 114th Cong. § 302 (2015) (referred to the Subcommittee on Immigration and Border Security on February 2, 2015).

²⁴⁷ *LIRS Analysis of Rep. Aderholt, H.R. 191 Repeal Executive Amnesty Act of 2015 & Unaccompanied Children Provisions and Rep. Carter, H.R. 5143 Protection of Children Act*, LUTHERAN IMMIGRATION AND REFUGEE SERVICE, <http://lirs.org/wp-content/uploads/2015/02/HR-191-and-HR-5143-UAC-provisions-FINAL.pdf>.

CAPTA covers both child sexual abuse, and withholding of medically indicated treatment.²⁴⁸ To receive grants under CAPTA, states must have provisions and procedures requiring the appointment of a guardian ad litem for “every case involving a victim of child abuse or neglect which results in a judicial proceeding.”²⁴⁹ The CAPTA Reauthorization Act of 2010 establishes a federal floor for child abuse and neglect: “‘Child abuse and neglect’ means, at a minimum, failure to act. . .which results in death, serious physical or emotional harm, sexual abuse or exploitation, or an act or failure to act which presents an imminent risk of serious harm.”²⁵⁰ Proposed legislation demonstrates Congress’s recognition of CAPTA’s definitions, as well as a willingness to adopt CAPTA’s definitions into future child abuse legislation.”²⁵¹

Other examples illustrate how Congress establishes federal definitions in child protection legislation. Child neglect under the Indian Child Protection and Family Violence Prevention Act includes “negligent treatment or maltreatment of a child by a person, including a person responsible for the child’s welfare, under circumstances which indicate that the child’s health or welfare is harmed or threatened thereby.”²⁵² 42 U.S.C. § 13925 defines child abuse, and neglect as a parent’s act or omission combined with the “intent to cause death, serious physical or emotional harm, sexual abuse, or exploitation,” and includes acts or omissions that present an “imminent risk of serious harm” to a minor.²⁵³ 18 U.S.C. § 2256 defines child pornography as any visual depiction of sexually explicit conduct that involves:

²⁴⁸ Child Abuse and Prevention Treatment Act (CAPTA), 42 U.S.C. § 5106g(4)–(5) (1996). (CAPTA provides federal funding to assist child abuse and neglect investigations). *Id.* § 5106a.

²⁴⁹ *Id.* § 5106(b)(2)(B)(xiii). The guardian ad litem may be an attorney or a court appointed special advocate.

²⁵⁰ Child Abuse and Prevention Treatment Act Reauthorization Act of 2010, Pub. L. No. 111–320, 124 Stat. 3459. These definitions must cover children through their eighteenth birthday. Elrod, *supra* note 234, at 7.

²⁵¹ See Stop Child Abuse in Residential Programs for Teens Act of 2014, S. 2054, 113th Cong. § 2 (2014) (“The term ‘child abuse and neglect’ has the meaning given such term in [CAPTA.]”); Strengthening Child Welfare Response to Trafficking Act of 2014, H.R. 5081, 113th Cong. § 3 (2014) (“Address the needs of such trafficked children without altering the definition of child abuse and neglect under [CAPTA.]”).

²⁵² See Indian Child Protection and Family Violence Prevention Act, 25 U.S.C. § 3202(4) (1990).

²⁵³ 42 U.S.C. § 13925(a)(3) (2013). This statute also defines child maltreatment as “the physical or psychological abuse or neglect of a child or youth, including sexual assault and abuse.” *Id.* § 13925(a)(5).

(A) The production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.²⁵⁴

The Abandoned Infants Assistance Act of 1998 defines abandoned infants and young children as, “young children who are medically cleared for discharge from acute care hospital setting, but who remain hospitalized because of a lack of appropriate out-of-hospital placement alternatives.”²⁵⁵ Finally, the Individuals with Disabilities Education Act defines the term “child with a disability” in regards to special education and related services.²⁵⁶

A definition of child abandonment exists under the Code of Federal Regulations.²⁵⁷ In regards to the status of alien orphans, child abandonment under 8 Code of Federal Regulations § 204.3(b) occurs when a parent has “willfully forsaken all parental rights, obligations, and claims to the child, as well as all control over and possession of the child, without intending to transfer, or without transferring, these rights to any specific person(s).”²⁵⁸ Note that this section applies to orphans, and requires abandonment by both parents.²⁵⁹

Although one solution is for Congress to pass a federal child abandonment law with language similar to either 8 Code of Federal Regulations section 204.3(b), or adopting a federal child abandonment standard based upon Texas Family Code section 161.001, best serves SIJS enforcement and uniformity. Texas law provides a variety of opportunities for SIJS applicants to be deemed abandoned by either parent.²⁶⁰ Section

²⁵⁴ See 18 U.S.C. § 2256(8) (2008). For a definition of “sexually explicit conduct” under this section, see *id.* § 2256(2)(B).

²⁵⁵ Abandoned Infants Assistance Act of 1998, Pub. L. No. 100–505, § 103, 102 Stat. 2533, 2536.

²⁵⁶ See Individuals with Disabilities Education Act, 8 U.S.C. § 1401(3)(A) (2010) (listing the conditions allowing a child to come under the statute).

²⁵⁷ 8 C.F.R. § 204.3(b) (2011) (addressing the immigration classification of alien orphans).

²⁵⁸ *Id.*

²⁵⁹ *Id.* Under this section each parent must both intend to surrender all parental rights and actually surrender such rights. *Id.* Unconditionally surrendering the child to an orphanage without exhibiting ongoing parental interest in the child is grounds for abandonment. *Id.*

²⁶⁰ Dan Tilly, *Confidentiality of Adoption Records in Texas: A Good Case for Defining*

161.001 covers children who grew up without the presence of at least one parent.²⁶¹ In particular, section 161.001(1)(H) would allow a finding of abandonment even if the mother is providing for the minor applicant.²⁶² Because many UACs migrate in the United States to escape violence in their home countries, sections 161.001(1)(D) and 161.001(1)(E) apply if one of their parents participated in such violent, dangerous conduct.²⁶³ For instance, sections 161.001(1)(D) and 161.001(1)(E) apply to the father and in *In re Minor Children of J.E.* because the minor's father conducted drug trafficking, attempted to shoot the mother, and died in a drug-related shooting.²⁶⁴

Conclusion

Maria attained SIJS eligibility when a New York court found that her mother abandoned her.²⁶⁵ However, other states are denying SIJS access to similarly situated minors. The current SIJS scheme grants the states too much power over immigration law and fails to further the best interests of UACs. The federal government must take sole control over SIJS to ensure robust and equal access to it. For some of these UACs, SIJS is the only viable form of relief available to them. If Congress fails to counteract the limits created by state law, UACs who should qualify for SIJS are in danger of falling through the cracks.²⁶⁶ Many of these minors are victims of parental abandonment who have fled the violence and turmoil of their homeland. Congress cannot fail these minors. They have already been wronged once; they must not be abandoned again.

Good Cause, 57 BAYLOR L. REV. 531, 534 n.15 (2005) (section 161.001 specifies every manner in which the court may order involuntary termination).

²⁶¹ See TEX. FAM. CODE § 161.001(1)(H), (P) (2011).

²⁶² *Id.* § 161.001(1)(H) (finding abandonment where parent voluntarily abandoned mother knowing she was pregnant and failing to stay in contact and support the child).

²⁶³ See *id.* § 161.001(1)(D)–(E) (parents engaging in conduct or associating with people engaging in conduct that places children in physical or emotional danger).

²⁶⁴ *In re Minor Children of J.E.*, 74 A.3d at 1015. The stepmother also abandoned the children under section 161.001(1)(D) when she fled following the father's death. *Id.*

²⁶⁵ Ulloa, *supra* note 1.

²⁶⁶ Johnson & Stewart, *supra* note 115; Wong, *supra* note 129.