

# The Double Exclusion of Immigrant Youth

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*Congress created Special Immigrant Juvenile Status (SIJS) in 1990 to protect vulnerable children from deportation by providing a pathway to lawful permanent residency and citizenship. Although relatively few immigrant children applied for SIJS in the early years of the program, the number of SIJS petitions grew significantly over the past decade. The growth of SIJS petitions coincides with growing numbers of immigrant youth arriving at the U.S.–Mexico border and with the politicization of immigrant youth who are increasingly represented as national security threats. Despite the high stakes of SIJS cases, remarkably little empirical research examines the bureaucratic implementation, procedural outcomes, and social effects of the SIJS program. Immigrant youth who apply for SIJS may face discrimination based on age, immigration status, race, class, gender, sexual orientation, and language use. SIJS petitioners are often approaching a formative stage of social development, the transition from childhood to adulthood, which exacerbates the consequences of SIJS delays and outcomes. Moreover, SIJS petitioners are subject to disparities in representation, immigration and criminal enforcement, and access to visas based on national quotas determined by Congress. There is, therefore, an urgent need to understand whether the SIJS program accomplishes its stated goal of protecting children or undermines its humanitarian objectives by exacerbating immigrant children’s vulnerability.*

*To address this need, this Article presents a systematic study of children seeking SIJS and SIJS-based lawful permanent resident (LPR) status using anonymized case-by-case SIJS data obtained from U.S. Citizenship and Immigration Services (USCIS) through the Freedom of Information Act. The data in this Article represent 153,374 I-360 petitions for SIJS filed between 2010 and 2021, and 35,651 I-485 LPR applications filed between 2013 and 2021. As a result of this analysis, the Article finds that the SIJS program has failed to meet the growing need for fair and timely*

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*protection for vulnerable immigrant children. Instead, SIJS petitioners encounter avoidable delays, inconsistent denial rates, and a growing backlog of SIJS petitioners who are already approved for SIJS but whose lives are on hold while they wait for visas to become available. In addition to raising significant concerns about USCIS's management of the SIJS program, these findings have broader implications for how legal scholars conceptualize the relationship between immigrant youth, purportedly humanitarian immigration policies, and the administrative state. We argue that, rather than viewing immigrant youth only as vulnerable subjects who appeal to the state for protection, immigrant youth's vulnerability vis-à-vis the state should be theorized as a form of politically induced vulnerability—or what some scholars have referred to as “precarity.” We argue that precarity manifests itself in SIJS petitioners as what we call a crisis of double exclusion, which refers to immigrant children's exile from a protected childhood as well as exclusion from a successful transition to adulthood. These findings illustrate the need for future research on SIJS, ongoing monitoring of the program, and institutional reforms. Ultimately, we call for action to improve the SIJS program and build power for immigrant children.*

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## INTRODUCTION

Ariel<sup>1</sup> is a nonbinary, immigrant youth who escaped escalating gender-based violence in El Salvador at age thirteen and fled to the United States.<sup>2</sup> Ariel came to the United States hoping to reunite with their father and build a new life, but that future proved illusory.<sup>3</sup> As an undocumented young person, Ariel had few resources, no ability to work legally, and no access to financial aid to attend college.<sup>4</sup> As a Latina/o<sup>5</sup> youth, Ariel was at higher risk of over-policing within their neighborhood in New York and in school, which only exacerbated fears of impending deportation.<sup>6</sup>

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1. Ariel is a pseudonym. See Jasmine Aguilera, *A Years-Long Immigration Backlog Puts Thousands of Abused Kids in Limbo*, TIME (Dec. 16, 2021, 11:25 AM), <https://time.com/6128025/abused-immigrant-kids-sijs-backlog/>.

2. See *id.*

3. See *id.*

4. See *id.*

5. The term “Latina/o” includes a diverse collective of persons and communities, which “necessarily oversimplifies and centers identity in the colonial relationship while also lacking in gender inclusivity.” Marc Tizoc Gonzalez, Saru Matambanadzo & Sheila I. Vélez Martínez, *Latina and Latino Critical Legal Theory: LatCrit Theory, Praxis and Community*, 12 REVISTA DIREITO E PRÁXIS 1316, 1318 n.1 (2021). Even knowing these imperfections, the authors use “Latina/o” generally to refer to people with nationalities or ancestries from Latin America. We find this term most helpful, as robust conversation continues regarding how to prioritize inclusivity along the gender spectrum with other evolving terms, such as Latinx or Latine, while also honoring how community members use terms that they are most comfortable with. See, e.g., Antonio Campos, *What’s the Difference Between Hispanic, Latino and Latinx?*, U.C. (Oct. 6, 2021), <https://www.universityofcalifornia.edu/news/choosing-the-right-word-hispanic-latino-and-latinx> [<https://perma.cc/6BJL-CYT4>].

6. See HILARY BURDGE, ADELA C. LICONA & ZAMI T. HYEMINGWAY, GAY-STRAIGHT ALL-NETWORK, LGBTQ YOUTH OF COLOR: DISCIPLINE DISPARITIES, SCHOOL PUSH-OUT, AND THE SCHOOL-TO-PRISON PIPELINE 2, 4 (2014), [https://www.njcn.org/uploads/digital-library/GSA-Network\\_LGBTQ\\_brief\\_FINAL-web\\_Oct-2014.pdf](https://www.njcn.org/uploads/digital-library/GSA-Network_LGBTQ_brief_FINAL-web_Oct-2014.pdf) [<https://perma.cc/D9V5-MH8T>] (“LGBTQ youth of color are bullied

Meanwhile, as Ariel's relationship with their father deteriorated, they moved into a homeless shelter for LGBTQ youth and connected with a youth advocacy organization, The Door.<sup>7</sup> Through The Door, Ariel learned about Special Immigrant Juvenile Status (SIJS), an immigration benefit created to protect young people like them.<sup>8</sup> To be eligible for SIJS, a state court must (1) find that Ariel had been abandoned, abused, or neglected by a parent, (2) find that it is not in Ariel's best interest to return to their country of origin, and (3) place Ariel under the dependency of the court or with a caretaker.<sup>9</sup> Next, with that state court judgment, Ariel could petition the U.S. Citizen and Immigration Services (USCIS) to be recognized as a Special Immigrant Juvenile (SIJ).<sup>10</sup> USCIS is required by law to adjudicate these petitions in 180 days.<sup>11</sup> If USCIS approved Ariel's SIJS petition, Ariel could apply to become a lawful permanent resident (LPR) and apply for a work permit.<sup>12</sup>

After some time on a waitlist, Ariel was provided an attorney to pursue SIJS.<sup>13</sup> Because of the COVID-19 pandemic, the New York family court system was closed to the public.<sup>14</sup> Based on an emergency medical need, Ariel's attorney requested an expedited hearing in family court despite its closure, less than three months before Ariel aged out of eligibility for protection.<sup>15</sup> The New York family court issued findings in November of 2020 that allowed Ariel to submit a SIJS petition to USCIS, which they did, expecting to find a legal resolution that would allow them to move forward into adulthood.<sup>16</sup> Ariel's application arrived at USCIS at a time when the agency's processing times routinely surpassed the

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based on race, sexual orientation, gender identity, or all of the above at once.”); Bianca D.M. Wilson, Sid P. Jordan, Ilan H. Meyer, Andrew R. Flores, Lara Stemple & Jody L. Herman, *Disproportionality and Disparities Among Sexual Minority Youth in Custody*, 46 J. YOUTH & ADOLESCENCE 1547, 1547 (2017) (“Research indicates that sexual minority youth are disproportionately criminalized in the U.S. and subjected to abusive treatment while in correctional facilities.”).

7. See Aguilera, *supra* note 1.

8. See *id.*

9. See *id.*; 8 U.S.C. § 1101(a)(27)(J) (defining eligibility for SIJS). Legal definitions for what constitutes abandonment, abuse, and neglect vary by state. See RAFAELA RODRIGUES & LESLYE E. ORLOFF, CHAPTER III: ABUSE, ABANDONMENT, OR NEGLECT: THE ROLE OF STATE LAW DEFINITIONS IN SPECIAL IMMIGRANT JUVENILE STATUS FINDINGS 3–4 (2017), <https://niwaplibrary.wcl.american.edu/wp-content/uploads/Abuse-Abandonment-or-Neglect-The-Role-of-State-Law-Definitions-in-Special-Immigrant-Juvenile-Status-Findings-1.pdf> [<https://perma.cc/2YWN-KF53>]. And some scholars have described how the family regulations system can be coercive and punitive, hurting and separating families, particularly those that are part of marginalized communities. See generally S. Lisa Washington, *Fammigration Web*, 103 B.U. L. REV. 117 (2023) (describing the carceral nature of the family regulation system and its convergence with the immigration system).

10. See Aguilera, *supra* note 1.

11. See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235, 122 Stat. 5044, 5080 (codified at 8 U.S.C. § 1232(d)(2)).

12. See Aguilera, *supra* note 1.

13. Zoom Interview with Ariel (Jan. 30, 2023).

14. See *id.*

15. See *id.*

16. See *id.*

statutorily required six-month limit—with impunity.<sup>17</sup> Fortunately in Ariel’s case, USCIS adjudicated the SIJS petition within the mandated six months.<sup>18</sup> Unfortunately, Ariel was also one of the thousands of young people from El Salvador who had to wait for years for a visa to become available to apply for LPR status in what is known as the “SIJS backlog.”<sup>19</sup> Therefore, instead of finding a resolution, Ariel entered a period of legal limbo that exacerbated their already precarious social existence, deferred their transition into adulthood, and prevented them from achieving full independence.<sup>20</sup>

The stress of prolonged instability took a heavy toll on Ariel as they awaited a SIJS decision and visa availability in the SIJS backlog.<sup>21</sup> Ariel reports having to take brutal jobs for little pay, including performing janitorial work in a school and using chemicals that burned their skin without being provided safety gear.<sup>22</sup> They sometimes worked eighty-hour weeks during the summer when they did not have school commitments. Ariel was living in a homeless shelter but had to move out because of safety issues. Ariel found a friend’s family to stay with, but their housing situation remains unstable, and Ariel reports struggling with loneliness and deteriorating mental health.<sup>23</sup> Ariel had real cause to worry because the SIJS process has become increasingly politicized, with spikes of higher rates of denials, notices of intent to deny, and requests for more evidence in recent years—all of which prolong processing times and contribute to higher rates of denial.<sup>24</sup>

When Ariel’s SIJS petition was approved, they initially felt relief.<sup>25</sup> That feeling didn’t last, though, as Ariel has been left stagnant for more than two years. Like thousands of other immigrant youth in the SIJS backlog, Ariel is forced to wait until one of a limited number of visas allotted to SIJ youth becomes

17. See *infra* notes 185–93 and accompanying text. Lawyers could file a writ of mandamus to force the agency to act but commonly do not due to capacity and resource shortages. See generally MARY KENNEY & TIFFANY LIEU, NAT’L IMMIGR. LITIG. ALL. & AM. IMMIGR. COUNCIL, MANDAMUS AND APA DELAY CASES: AVOIDING DISMISSAL AND PROVING THE CASE (2021), [https://www.americanimmigrationcouncil.org/sites/default/files/practice\\_advisory/mandamus\\_actions\\_avoiding\\_dismissal.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/mandamus_actions_avoiding_dismissal.pdf) [<https://perma.cc/S83F-QFBU>] (describing, in a practice advisory, how the Mandamus Act can be used to expedite agency decisions in immigration matters).

18. E-mail from Rachel Leya Davidson, Dir., End SIJS Backlog Coal., Nat’l Immigr. Project to Laila L. Hlass, Professor, Tulane Univ. L. Sch. (Mar. 10, 2023) (on file with authors).

19. See Aguilera, *supra* note 1; RACHEL LEYA DAVIDSON & LAILA L. HLASS, DOOR, “ANY DAY THEY COULD DEPORT ME”: OVER 44,000 IMMIGRANT CHILDREN TRAPPED IN SIJS BACKLOG 5–6 (2021), <https://perma.cc/D2UM-N4NH>.

20. See Aguilera, *supra* note 1.

21. This liminality may cause significant harm to immigrant youth more broadly. See Carola Suárez-Orozco, Hirokazu Yoshikawa, Robert T. Teranishi & Marcelo M. Suárez-Orozco, *Growing Up in the Shadows: The Developmental Implications of Unauthorized Status*, 81 HARV. EDUC. REV. 438, 459 (2011) (“The duress of liminality takes a heavy toll on the socio-emotional development of unauthorized children and youth.”).

22. Zoom Interview with Ariel, *supra* note 13.

23. *Id.*

24. See Liz Robbins, *A Rule Is Changed for Young Immigrants, and Green Card Hopes Fade*, N.Y. TIMES (Apr. 18, 2018), <https://www.nytimes.com/2018/04/18/nyregion/special-immigrant-juvenile-status-trump.html>; DAVIDSON & HLASS, *supra* note 19, at 35–36.

25. See Aguilera, *supra* note 1.

available.<sup>26</sup> Under immigration law, SIJS children apply for LPR status by using visas from the employment-based visa system, as part of the “special workers” sub-category.<sup>27</sup> From the start of the SIJS backlog in 2016, children from countries with historically higher migration to the United States (including Ariel’s home country of El Salvador, as well as Guatemala, Honduras, and Mexico) have been forced to wait years, even after being approved for SIJS, before being allowed to apply for LPR status,<sup>28</sup> leaving them vulnerable to various forms of legal, political, and physical harm that come with being undocumented.<sup>29</sup> In addition to the historical role that racial geopolitics play in limiting lawful migration from Latin American countries,<sup>30</sup> children from these countries are also predominantly racialized (and marginalized) within the United States as Black, Brown, and Indigenous, and more broadly as Latina/o.<sup>31</sup> Their exclusion from eligibility to immediately seek LPR status is aligned with restrictionist U.S. immigration policy trends that work to target Latina/o immigrants<sup>32</sup> and has been likened to a racial quota system because of the racialized impact.<sup>33</sup> In March 2023, the Department of State changed how it interpreted the per-country limit on visa availability which addressed disparities based on nationality, but also forced all children into the years-long backlog.<sup>34</sup> With all children from all nationalities

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26. See DAVIDSON & HLISS, *supra* note 19, at 40–41.

27. See *id.* at 5, 11.

28. See *id.* at 6, 11; Aguilera, *supra* note 1.

29. See, e.g., DAVIDSON & HLISS, *supra* note 19, at 6.

30. See Nicholas De Genova, *The Legal Production of Mexican/Migrant “Illegality,”* 2 *LATINO STUD.* 160, 160–61 (2004); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness,* 73 *IND. L.J.* 1111, 1112, 1132 (1998); Umut Erel, Karim Murji & Zaki Nahaboo, *Understanding the Contemporary Race–Migration Nexus,* 39 *ETHNIC & RACIAL STUD.* 1339, 1339 (2016). See generally REECE JONES, *WHITE BORDERS: THE HISTORY OF RACE AND IMMIGRATION IN THE UNITED STATES FROM CHINESE EXCLUSION TO THE BORDER WALL* (2021) (discussing the roots of white supremacy in U.S. immigration history and policy).

31. See generally ED MORALES, *LATINX: THE NEW FORCE IN AMERICAN POLITICS AND CULTURE* (2018) (discussing how Latin identities and culture are tied into the Latin American history of mestizaje, translatable as “mixedness” or “hybridity”); LEO R. CHAVEZ, *THE LATINO THREAT: CONSTRUCTING IMMIGRANTS, CITIZENS, AND THE NATION* (2008) (deconstructing public discourse which has racialized the Latino population as a threat); Patricia L. Price, *Race and Ethnicity: Latino/a Immigrants and Emerging Geographies of Race and Place in the USA,* 36 *PROGRESS HUM. GEOGRAPHY* 800 (2012).

32. See Sarah R. Sherman-Stokes, *Reparations for Central American Refugees,* 96 *DENV. L. REV.* 585, 587–88 (2019). See generally ANNA SAMPAIO, *TERRORIZING LATINA/O IMMIGRANTS: RACE, GENDER, AND IMMIGRATION POLITICS IN THE AGE OF SECURITY* (2015) (describing U.S. immigration policies and the proliferation of security measures on Latin American immigrants).

33. See Dalia Castillo-Granados, Rachel Leya Davidson, Laila L. Hlass & Rebecca Scholtz, *The Racial Justice Imperative to Reimagine Immigrant Children’s Rights: Special Immigrant Juveniles as a Case Study,* 71 *AM. U. L. REV.* 1779, 1817–18 (2022). For further discussion of the broader racist underpinnings of the U.S. immigration system, detailed extensively in scholarship, see generally E. Tendayi Achiume, *Racial Borders,* 110 *GEO. L.J.* 445 (2022); K-Sue Park, *Self-Deportation Nation,* 132 *HARV. L. REV.* 1878 (2019); Sherally Munshi, *Unsettling the Border,* 67 *UCLA L. REV.* 1720 (2021); Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World,* 76 *OHIO ST. L.J.* 599 (2015); and Laila L. Hlass, *Lawyering from a Deportation Abolition Ethic,* 110 *CALIF. L. REV.* 1597 (2022).

34. The Department of State now will look at each country’s portion of visas in all employment and family categories as a whole, instead of setting caps based on each employment and family sub-category.

now similarly situated in the backlog comes a universal five-plus year wait on being able to seek LPR.<sup>35</sup>

Ariel checks the visa bulletin constantly, sometimes twice a week, to see if their priority date is current, allowing them to seek permanent residence.<sup>36</sup> Each time, Ariel feels anxiety<sup>37</sup> because the priority date does not move. Even worse, sometimes the date moves backward, through “retrogression.”<sup>38</sup> The precarity produced by the SIJS process confounds the protective purpose of the SIJS law, preventing a transition to true permanency.<sup>39</sup> After the March 2022 Biden Administration decision to make work authorization available to SIJS youth in the SIJS backlog through deferred action,<sup>40</sup> Ariel was able to legally work. However, even after this win, Ariel still feels heightened fear and stress from being undocumented, which impacts their sleep, their overall sense of well-being, and their ability to be fully present at school.<sup>41</sup> At the time of this writing, Ariel has been waiting for more than two years in the SIJS backlog and will likely remain suspended in uncertain legal status for three more years at this pivotal crossroads in their adolescence.<sup>42</sup>

Ariel’s experience is emblematic of what we have termed the “double exclusion” many immigrant youth face. They are not permitted to simply be children nor allowed to fully transition into an independent adulthood.<sup>43</sup> A judge has determined that it is not in Ariel’s best interest to return to El Salvador, so they remain in the United States; yet USCIS has not yet permitted Ariel to be permanently legally here, either. This has forced them to navigate multiple lines of double exclusions: in between physically present and legally present; in between El

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*Employment-Based Fourth Preference (EB-4) Announcement*, U.S. DEP’T STATE – BUREAU CONSULAR AFFS. (Mar. 28, 2023), <https://travel.state.gov/content/travel/en/News/visas-news/employment-based-fourth-preference-eb4-announcement.html> [<https://perma.cc/A53T-Q74Y>]; *Employment-Based Preference Immigrant Visa Final Action Dates and Dates for Filing for El Salvador, Guatemala, and Honduras*, 88 Fed. Reg. 18252 (Mar. 28, 2023); *see also Practice Alert: April 2023 Visa Bulletin Changes Impacting SIJS Recipients*, END SIJS BACKLOG (Mar. 24, 2023), [https://static1.squarespace.com/static/5fe8d735a897d33f7e7054cd/t/641df0443273dd2fb2ca245a/1679683652530/2023\\_24March-visa-bulletin-changes-alert.pdf](https://static1.squarespace.com/static/5fe8d735a897d33f7e7054cd/t/641df0443273dd2fb2ca245a/1679683652530/2023_24March-visa-bulletin-changes-alert.pdf) [<https://perma.cc/9D4M-N7DQ>].

35. BUREAU OF CONSULAR AFFS., U.S. DEP’T OF STATE, *VISA BULLETIN: IMMIGRANT NUMBERS FOR APRIL 2023* (2023), <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2023/visa-bulletin-for-april-2023.html> [<https://perma.cc/RMA7-EZHM>].

36. Zoom Interview with Ariel, *supra* note 13.

37. *Id.*

38. *Visa Retrogression*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Mar. 8, 2018), <https://www.uscis.gov/green-card/green-card-processes-and-procedures/visa-availability-priority-dates/visa-retrogression> [<https://perma.cc/22F6-SXZD>].

39. Bd. on Child. & Fams., *Immigrant Children and Their Families: Issues for Research and Policy*, 5 CRITICAL ISSUES FOR CHILD. & YOUTHS 72, 81 (1995) (commenting on how arriving in the United States may produce a fleeting sense of relief, “often followed by depression, which can last well into the third year after arrival”).

40. *See infra* note 108.

41. Zoom Interview with Ariel, *supra* note 13.

42. *See* Aguilera, *supra* note 1.

43. *Cf.* Suárez-Orozco et al., *supra* note 21 (“Identity formation, already a complicated task for immigrant youth, will be particularly frustrated under the siege of liminality and in the face of hostile and disparaging social, political, and media representations . . . .” (citation omitted)).

Salvador and the United States; in between childhood and adulthood; and in between application and adjudication. Although many scholars have viewed immigration controls through the lens of exclusion,<sup>44</sup> we view SIJS youth as unique insofar as most navigate these regimes of exclusion at precisely the point in life (that is, the transition from childhood to adulthood) when the potentiality of their lives hangs in the balance. The objective duration of processing times for SIJS petitioners, which can be several months to several years, may not be exceptional when compared to other wait times for various immigrant and nonimmigrant visas. But we argue that the temporality of SIJS delays, a temporality that takes into account the sociopolitical context and effects of simple duration, illuminates the unique harms that SIJS youth experience at this unique point in life. Thus, our claims about double exclusion, illustrated through an analysis of USCIS data on SIJS processing, are grounded in and through the subjective experiences of immigrant youth who know the immigration system not as a set of data points but as a regime of deferrals and impediments to a full life.

In this Article, we theorize these double exclusions as part of a broader landscape of immigrant precarity. Whereas precariousness is a subjective condition of vulnerability, we adopt Judith Butler's description of precarity as a consequence of (bio)political power that ensures "certain populations suffer from failing social and economic networks of support and become differentially exposed to injury, violence, and death."<sup>45</sup> Butler's framework does not preclude the individualized, discretionary agency of actors within powerful institutions, nor does it depend on it. Precarity may be the result of explicit government design to harm populations, as well as more subtle bureaucratic violence through inaction, incompetence, and unwillingness to address inequities.<sup>46</sup> Most importantly for this Article, precarity does not necessarily work in opposition to seemingly humanitarian efforts (such as SIJS). Rather, precarity is often inextricably bound up with humanitarianism, particularly when humanitarianism becomes co-opted by the state and deployed as part of a broader system of neoliberal governance. Viewed in this way, the SIJS program is ripe for critical inquiry precisely because it productively illustrates the tensions internal to the U.S. immigration system: it is a program that aims to protect the most vulnerable immigrant youth and yet, through its routine operations, it also polices the legal and temporal boundaries between inclusion and exclusion in often troubling ways.

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44. See generally RACE, CRIMINAL JUSTICE, AND MIGRATION CONTROL: ENFORCING THE BOUNDARIES OF BELONGING (Mary Bosworth et al. eds., 2018); DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY (2010); Sherali Munshi, *Immigration, Imperialism, and the Legacies of Indian Exclusion*, 28 YALE J.L. & HUMANS. 51 (2016); Eisha Jain, *The Interior Structure of Immigration Enforcement*, 167 U. PA. L. REV. 1463 (2019); Jennifer Lee Koh, *Executive Defiance and the Deportation State*, 130 YALE L.J. 948 (2021); Park, *supra* note 33.

45. Judith Butler, *Performativity, Precarity and Sexual Politics*, 4 REVISTA DE ANTROPOLOGÍA IBEROAMERICANA, Sept.–Dec. 2009, at i, ii.

46. See *id.*



Using an original data set including the 153,374 SIJS petitions filed in fiscal years 2010 to 2021<sup>47</sup> and 35,651 LPR applications based on approved SIJS filed in 2013 to 2021,<sup>48</sup> this study presents the first systemic empirical investigation of children seeking SIJS and SIJS-based LPR status since the backlog began. We examine how the SIJS program may protract children's precarity at a pivotal crossroads in their lives. As an initial matter, SIJS petitioners' youthfulness, immigration status, race, class, gender, sexual orientation, language, and other factors work to ensure that they already have too few resources and are at risk of harm.<sup>49</sup> Yet even after applying for SIJS, children may face harm as they are subjected to temporal processing delays, the SIJS backlog, disparities in access to quality representation, political whims, and aggressive immigration enforcement during a crucial and formative period of their young lives. This Article theorizes this situation that many SIJS youth find themselves in as a crisis of double exclusion—youth who are prevented from fully experiencing a protected childhood, but who are also stunted from successfully transitioning into adulthood due to barriers and delays in obtaining legal status through the SIJS program. By describing this double exclusion, we aim to make visible the often invisible precarity that SIJS youth face as marginalized youth, and typically people of color, whose precarity is, in turn, exacerbated by the government's (mis)management of the SIJS program.

Based upon our experiences as attorneys<sup>50</sup> representing immigrant children and our analysis of USCIS SIJS petition and SIJS-based LPR application data sets, we posit that the law, policy, and practice of SIJS—the administrative governance of immigration agencies and courts, including its lack of transparency with its own data—have become a form of legal violence.<sup>51</sup> Furthermore, we argue this legal violence contributes to the precarity of SIJS children's lives, whereby they are doubly excluded from a protected childhood and also prevented from

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47. When referring to immigration statistics and years throughout the Article, we refer to, but have dropped the term, “fiscal year” (FY) for readability. The fiscal year runs from October 1 to September 30. For example, FY 2022 spans from October 1, 2021 to September 30, 2022. See *Fiscal Year 2022 Employment-Based Adjustment of Status FAQs*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Aug. 26, 2022), <https://www.uscis.gov/archive/fiscal-year-2022-employment-based-adjustment-of-status-faqs> [https://perma.cc/6FW8-5J7M].

48. Authors Laila L. Hlass, on behalf of herself as a researcher, and Rachel Leya Davidson, as a representative of The Door's legal services, obtained these data through Freedom of Information Act (FOIA) litigation with USCIS in December 2021. The initial FOIA request was filed in April 2021.

49. See Castillo-Granados et al., *supra* note 33, at 1794, 1815, 1842, 1853.

50. Two of the three authors, Hlass and Davidson, are practicing attorneys with extensive experience representing immigrant youth.

51. Instances of “legal violence” are “structural and symbolic violence that are codified in the law and produce immediate *social suffering* but also potentially long-term harm with direct repercussions for key aspects of immigrant incorporation.” Cecilia Menjívar & Leisy J. Abrego, *Legal Violence: Immigration Law and the Lives of Central American Immigrants*, 117 AM. J. SOCIO. 1380, 1384–85 (2012); see Angela S. García, Yunuen Rodríguez-Rodríguez & Juan Contreras, *Violence Here and Violence There: How Compound Violence Drives Undocumented Mexicans' Migration to and Settlement in the United States*, 20 J. IMMIGRANT & REFUGEE STUD. 266, 267 (2022) (describing this violence as “the cumulative effects of harsh immigration laws, enforcement actions, and stigma endured by undocumented and racialized immigrants in the US”).

transitioning into adulthood. Legal violence within immigration law has been described as the harmful effects of laws that derail immigrants' pathways to belonging and amplify and produce vulnerability.<sup>52</sup> Legal violence as a lens can reveal contradictions in the formulation and implementation of immigration laws that purport to provide protection but actually result in harm.<sup>53</sup> In the context of SIJS, this violence may take a temporal form, such as state jurisdictional age cut-offs to seek the underlying court order, USCIS delays in adjudicating the SIJS petition, wait times to apply for work authorization and LPR status due to visa caps, and delays in adjudicating LPR applications.<sup>54</sup> It can also take the shape of capricious political agendas, such as intentional policy decisions made in secret that are designed to exclude immigrant youth from the protections created to shield them from harm.<sup>55</sup>

This Article contributes to literature about immigrant children,<sup>56</sup> the temporality of law,<sup>57</sup> and legal violence.<sup>58</sup> It does so by contextualizing individualized data of immigrant youth seeking SIJS and SIJS-based LPR status. We show that the precarity of these children, who may already be living precariously due to systemic oppression, becomes more entrenched as they proceed through the

52. See Menjívar & Abrego, *supra* note 51, at 1383–84; see also Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319, 2319 (2019) (discussing “slow” and “spectacular” violence of family separation in the immigration legal system); Sarah Sherman-Stokes, *Immigration Detention Abolition and the Violence of Digital Cages* 1 (Bos. Univ. Sch. L., Working Paper No. 23-6, 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4192032](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4192032) [<https://perma.cc/J6JL-YQNW>] (describing electronic ankle shackles, termed “digital cages,” as a form of legal violence in the immigration system).

53. See Menjívar & Abrego, *supra* note 51.

54. See generally DAVIDSON & HLASS, *supra* note 19 (discussing the problems of delays and backlog in the SIJS context).

55. See Priscilla Alvarez, *What the 2017 Draft Memo Reveals About the Administration's Family Separations Policy*, CNN (Jan. 18, 2019, 1:47 PM), <https://www.cnn.com/2019/01/18/politics/draft-memo-significance/index.html> [<https://perma.cc/AL6W-TUCP>]; Draft Memorandum from U.S. DOJ, Policy Options to Respond to Border Surge of Illegal Immigration 2–3 (Dec. 2017), [https://immipolicytracking.org/media/documents/Policy\\_Option\\_to\\_Respond\\_to\\_Border\\_Surge\\_of\\_Illegal\\_Immigration\\_NXDPOKN.pdf](https://immipolicytracking.org/media/documents/Policy_Option_to_Respond_to_Border_Surge_of_Illegal_Immigration_NXDPOKN.pdf) [<https://perma.cc/4ZRL-6NCW>].

56. See generally Lenni B. Benson, *Administrative Chaos: Responding to Child Refugees—U.S. Immigration Process in Crisis*, 75 WASH. & LEE L. REV. 1287 (2018); JACQUELINE BHABHA, *CHILD MIGRATION AND HUMAN RIGHTS IN A GLOBAL AGE* (2014); Lilian Chavez & Cecilia Menjívar, *Children Without Borders: A Mapping of the Literature on Unaccompanied Migrant Children to the United States*, 5 MIGRACIONES INTERNACIONALES 71 (2010); Emily Ryo & Reed Humphrey, *Children in Custody: A Study of Detained Migrant Children in the United States*, 68 UCLA L. REV. 136 (2021); CHIARA GALLI, *PRECARIOUS PROTECTIONS: UNACCOMPANIED MINORS SEEKING ASYLUM IN THE UNITED STATES* (2023).

57. See generally TANZIL CHOWDHURY, *TIME, TEMPORALITY AND LEGAL JUDGMENT* (2020); Carol J. Greenhouse, *Just in Time: Temporality and the Cultural Legitimation of Law*, 98 YALE L.J. 1631 (1989); Rebecca R. French, *Time in the Law*, 72 U. COLO. L. REV. 663 (2001); Richard H.S. Tur, *Time and Law*, 22 OXFORD J. LEGAL STUD. 463 (2002); Renisa Mawani, *Law as Temporality: Colonial Politics and Indian Settlers*, 4 U.C. IRVINE L. REV. 65 (2014); LAW AND TIME (Siân M. Beynon-Jones & Emily Grabham eds., 2019); Liaquat Ali Khan, *Temporality of Law*, 40 MCGEORGE L. REV. 55 (2009).

58. See generally Menjívar & Abrego, *supra* note 51; Ian F. Haney López, *Protest, Repression, and Race: Legal Violence and the Chicano Movement*, 150 U. PA. L. REV. 205 (2001); Leisy J. Abrego & Sarah M. Lakhani, *Incomplete Inclusion: Legal Violence and Immigrants in Liminal Legal Statuses*, 37 LAW & POL'Y 265 (2015).

immigration system.<sup>59</sup> This data reveals the historical and ongoing shortfalls of the SIJS program, as well as the lack of meaningful guardrails against the abuse of power by presidential administrations regarding the treatment of immigrant children, which add to immigrant children's vulnerability.

This Article proceeds in three Parts. First, we develop a framework for understanding precarity among immigrant youth and how administrative state action and inaction harm SIJS children, amounting to legal violence. As part of this description, we provide an extensive description of the SIJS process and barriers to seeking SIJS. In Part II, we build upon this theory of precarity, sharing key quantitative data that illustrate the central arguments of the Article. Using the data set, we lay bare how the Trump Administration in particular sought to undermine the SIJS process by instituting official and unofficial policies that dramatically increased delays and denial rates for SIJS petitioners.<sup>60</sup> The unprecedented scale of rejections and delays, as well as the geographic unevenness of denial rates, coupled with the legal limbo of visa caps and the seeming unwillingness of USCIS to meet the statutory 180-day SIJS adjudication period, acutely illustrate the ways in which the U.S. immigration agency's own exclusion of immigrant children can be exacerbated under certain political conditions. In Part III, we conclude with theoretical and policy implications of the key findings. Ultimately, we call for action to improve the SIJS program and build power for immigrant children.

### I. THE PRECARIETY OF SIJS CHILDREN AND LEGAL VIOLENCE WITHIN THE SIJS PROCESS

A growing number of immigrant youth from the Global South have been migrating to parts of Europe and North America in recent years,<sup>61</sup> sparking new concerns about the responsibility of these countries to ensure that they protect the human and civil rights of immigrant children.<sup>62</sup> Growing numbers of children have migrated to the United States in recent years, particularly from El Salvador, Guatemala, Honduras and Mexico.<sup>63</sup> Nearly a decade ago in 2013, the

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59. Despite the real impacts of the mismanagement of the SIJS program on young people's lives, SIJS is often the only means of obtaining permanent immigration status for many of the young people seeking SIJS and undoubtedly, without access to SIJS, their lives as completely undocumented youth would be much more difficult and dangerous. See Laila L. Hlass, *Minor Protections: Best Practices for Representing Child Migrants*, 47 N.M. L. REV. 247, 251 (2017).

60. Children from some countries, such as India, may suffer from disproportionate denials before and during the Trump Administration. See *infra* Section II.B.1.

61. See Cecilia Menjivar & Krista M. Perreira, *Undocumented and Unaccompanied: Children of Migration in the European Union and the United States*, 45 J. ETHNIC & MIGRATION STUD. 197, 197-98 (2019).

62. See, e.g., Ana Beduschi, *Vulnerability on Trial: Protection of Migrant Children's Rights in the Jurisprudence of International Human Rights Courts*, 36 B.U. INT'L L.J. 55, 56 (2018).

63. See *Growing Numbers of Children Try to Enter the U.S.*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE: IMMIGR. (June 28, 2022) [hereinafter *Growing Numbers*], <https://trac.syr.edu/immigration/reports/687/> [<https://perma.cc/5WNS-RZ8W>].

arrival of minor children<sup>64</sup> at the U.S.–Mexico border was a relatively small proportion of encounters by Border Patrol, “typically between 1,000 and 1,500 per month.”<sup>65</sup> In 2013, Border Patrol apprehended just over 47,000 immigrant children under the age of eighteen, with more than 80% (38,833) arriving unaccompanied.<sup>66</sup> By 2021, that number increased to just under 300,000, with nearly half (140,230) arriving unaccompanied.<sup>67</sup>

In addition to those recently arrived children arrested by immigration officials near the border, many immigrant youth are also living in the country without legal status, undetected by immigration enforcement. The total undocumented population in the United States has been estimated at 10.5 million in 2017<sup>68</sup> and 11.4 million in 2018.<sup>69</sup> Meanwhile, the Migration Policy Institute estimates that about 1.4 million of the total undocumented population in the United States were undocumented children under the age of twenty-one as of 2019.<sup>70</sup> When children encounter immigration officials at the border or in the interior of the country, they may end up in removal proceedings and ultimately deported. Significantly, children comprise a large portion of immigrants who are put into the immigration court process each year. In 2022, nearly a third (31%, or 81,080) of all<sup>71</sup> Notices to Appear (NTAs) issued, where age was recorded (265,337), were issued to minor children.<sup>72</sup>

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64. Following definitions in the Immigration and Nationality Act (INA), we refer to people under the age of twenty-one as children, and “minor children” are those children under age eighteen. *See generally* 8 U.S.C. § 1101 (setting forth definitions). Some SIJS youth who apply for SIJS before turning twenty-one may still be eligible to receive protection after age twenty-one, due to age out protections built into the law. *See infra* note 104. We use the term youth more broadly to include children as well as those who may have recently aged out of childhood.

65. *See Growing Numbers*, *supra* note 63.

66. *Id.*

67. *Id.*

68. Mark Hugo Lopez, Jeffrey S. Passel & D’Vera Cohn, *Key Facts About the Changing U.S. Unauthorized Immigrant Population*, PEW RSCH. CTR. (Apr. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/04/13/key-facts-about-the-changing-u-s-unauthorized-immigrant-population/> [https://perma.cc/BJU7-XLZ5].

69. BRYAN BAKER, U.S. DHS, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2015–JANUARY 2018, at 1 (2021), [https://www.dhs.gov/sites/default/files/publications/immigration-statistics/Pop\\_Estimate/UnauthImmigrant/unauthorized\\_immigrant\\_population\\_estimates\\_2015\\_-\\_2018.pdf](https://www.dhs.gov/sites/default/files/publications/immigration-statistics/Pop_Estimate/UnauthImmigrant/unauthorized_immigrant_population_estimates_2015_-_2018.pdf) [https://perma.cc/8SHL-UE7H].

70. E-mail from Jeanne Batalova, Senior Pol’y Analyst, Migration Pol’y Inst., to Laila Hlass and Austin Kocher (Aug. 1, 2022) (on file with authors) (sending 2019 data results from the Migration Policy Institute’s “analysis of U.S. Census Bureau data from the pooled 2015–19 American Community Survey (ACS) and the 2008 Survey of Income and Program Participation (SIPP), weighted to 2019 unauthorized immigrant population estimates provided by Jennifer Van Hook of The Pennsylvania State University”).

71. This refers to the 265,337 NTAs where age was recorded. *One-Third of New Immigration Court Cases Are Children; One in Eight Are 0–4 Years of Age*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE: IMMIGR. (Mar. 17, 2022), <https://trac.syr.edu/immigration/reports/681/> [https://perma.cc/6KMR-H6A2].

72. *See New Deportation Proceedings Filed in Immigration Court: By State, Court, Hearing Location, Year, Charge, Nationality, Language, Age, and More*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE: IMMIGR., <https://trac.syr.edu/phptools/immigration/ntanew/> [https://perma.cc/RU6Y-E7D2] (last visited May 21, 2023).

Given that immigrant youth comprise a significant and growing fraction of overall immigrants in the U.S. immigration system, it is not surprising that scholars have sought to assess the U.S. reception apparatus for children. Researchers have found severe shortcomings in how the United States handles immigration-related cases involving immigrant youth both at the border and within the interior.<sup>73</sup> While sometimes portrayed as innocent and deserving—such as the “dreamers”<sup>74</sup>—immigrant youth are nonetheless forced into a system where they frequently face deportation without legal representation,<sup>75</sup> where family separation policies have resulted in psychological harm for children,<sup>76</sup> and where the asylum process fails to adequately address the unique needs of children seeking asylum.<sup>77</sup> Furthermore, immigrant youth may experience violence and psychological harm as they are held in institutionalized settings as part of the immigrant detention system.<sup>78</sup> Despite this research, immigrant youth occupy an important yet under-examined position within the U.S. immigration system, sometimes cast as legal subjects who passively lack sufficient agency and yet who, as a part of this lack of perceived agency, are afforded forms of protection that are not afforded to adults.<sup>79</sup> In other contexts, children might be “adultified,” whereby

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73. See, e.g., David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 980, 1014 (2002); Castillo-Granados et al., *supra* note 33, at 1789–90. See generally EMILY RUEHS-NAVARRO, UNACCOMPANIED: THE PLIGHT OF IMMIGRANT YOUTH AT THE BORDER (2022) (cataloguing the pervasive issues of border securitization, criminalization of immigrants, a racialized and classed child welfare system, and neoliberal humanitarianism that impact child immigrants); GALLI, *supra* note 56 (detailing the failures of the U.S. asylum system in addressing the needs of unaccompanied minor children).

74. For further commentary on Deferred Action for Childhood Arrivals (DACA) and the dreamers, see generally *What Is DACA and Who Are the DREAMers?*, ANTI-DEFAMATION LEAGUE (Sept. 9, 2022), <https://www.adl.org/resources/tools-and-strategies/what-daca-and-who-are-dreamers> [https://perma.cc/NP3C-XALS].

75. See Andrew Leon Hanna, Note, *A Constitutional Right to Appointed Counsel for the Children of America's Refugee Crisis*, 54 HARV. C.R.-C.L. L. REV. 257, 259 (2019); Claire R. Thomas & Lenni B. Benson, *Caught in the Web: Immigrant Children in Removal Proceedings*, in 2 IMPACT: COLLECTED ESSAYS ON EXPANDING ACCESS TO JUSTICE 31, 32 (2016); NAT'L ASS'N OF IMMIGR. JUDGES, CONCERNS REGARDING UNACCOMPANIED CHILDREN IN IMMIGRATION COURT REMOVAL PROCEEDINGS 2–3 (2016).

76. See Kristina Lovato, Corina Lopez, Leyla Karimli & Laura S. Abrams, *The Impact of Deportation-Related Family Separations on the Well-Being of Latinx Children and Youth: A Review of the Literature*, 95 CHILD. & YOUTH SERVS. REV. 109, 109–10 (2018); Lisseth Rojas-Flores, Mari L. Clements, J. Hwang Koo & Judy London, *Trauma and Psychological Distress in Latino Citizen Children Following Parental Detention and Deportation*, 9 PSYCH. TRAUMA: THEORY, RSCH., PRAC. & POL'Y 352, 352, 358 (2017); Joanna Dreby, *U.S. Immigration Policy and Family Separation: The Consequences for Children's Well-Being*, 132 SOC. SCI. & MED. 245, 248–49 (2015).

77. Karen Elizabeth Smeda, Note, *Truth or Dare: A Framework for Analyzing Credibility in Children Seeking Asylum*, 50 CORNELL INT'L L.J. 307, 309 (2017).

78. Ryo & Humphrey, *supra* note 56, at 176 (“A growing body of research indicates that detained children suffer substantial negative physical and mental health consequences the longer they are institutionalized.”).

79. See Lauren Martin, *The Geopolitics of Vulnerability: Children's Legal Subjectivity, Immigrant Family Detention and US Immigration Law and Enforcement Policy*, 18 GENDER, PLACE & CULTURE 477, 478, 483, 491 (2011).

children of color suffer a wide variety of negative outcomes in systems because they are perceived as more adult-like than their white peers.<sup>80</sup>

We argue that the growing numbers of immigrant youth arriving at U.S. borders, living in the United States without legal status, and facing deportation in the courts should be understood as being marginalized in unique ways that cannot be simply transposed from understandings of immigrant experiences more generally. Instead, we take the category of “children” and “youth” as seriously as the category of “immigrant” by arguing that the precarity that immigrant youth face, and in particular the heightened cost of delays and uncertainty during this period of life, is as consequential as, and compounding of, their experience of being immigrants.

As we will show throughout the Article, this internal tension between the law’s paternalistic relationship with children and the law’s antagonistic relationship with immigrants can be seen through the legislative history of SIJS, the SIJS petition process itself, and the way that SIJS has become politicized in recent years, particularly during the Trump Administration. First, we describe various social factors and identities of immigrant children seeking SIJS that relate to their heightened precarity. Next, we discuss how legislators attempted to address precarity through SIJS, although at times with ambivalent and contradictory stances toward immigrant children, leading to inadequacies and complications within the law’s structure and implementation. Then, we show how the legal practice and process of SIJS adjudication have created barriers to accessing SIJS. Additionally, we illuminate how politicization of the SIJS process, particularly during the Trump Administration, further erodes SIJS protection. Lastly, we demonstrate the lack of transparency of the SIJS program, including with how the authors obtained the records of SIJS and SIJS-based LPR applications discussed in the Article.

#### A. PRECARIETY OF SIJS YOUTH

Like Ariel, immigrant children may experience precarity before seeking SIJS, and then the SIJS process itself may protract or even exacerbate this precarity. Judith Butler’s description of precarity, mentioned above, is worth repeating: Butler describes precarity as a “politically induced condition in which certain populations suffer from failing social and economic networks of support and become differentially exposed to injury, violence, and death.”<sup>81</sup> This injury takes a variety of shapes including a “heightened risk of disease, poverty, starvation, displacement, and of exposure to violence without protection.”<sup>82</sup> Key to this definition is an understanding that a community’s precarity is politically induced, a result of social systems as well as historic and ongoing discrimination.

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80. See generally Laila Hlass, *The Adultification of Immigrant Children*, 34 GEO. IMMIGR. L.J. 199 (2020) (arguing through the lens of “adultification” that the laws, policies, and practices regulating children in the immigration system are disproportionately harsh).

81. Butler, *supra* note 45.

82. *Id.*

Furthermore, individuals may belong to multiple and overlapping communities, based on identities including gender, race, and immigration status, which might heighten precarity.<sup>83</sup> In this Section, we argue that the framework of precarity can be productively applied to children in the SIJS process.

Immigrant children are often characterized by a variety of social categories that exacerbate their precarity. Immigrant youth are defined by their youthfulness, immigration status, race, class, gender, sexual orientation, language, and other characteristics which may heighten the level of precarity they are subject to within society. In particular, the vast majority of those seeking SIJS hail from four countries: El Salvador, Guatemala, Honduras, and Mexico.<sup>84</sup> While the SIJS petition does not request the designation of race, children from these four countries are generally racialized as Latina/o and are predominantly comprised of Black, Brown, and Indigenous children.<sup>85</sup> Spanish or an Indigenous language generally is the first language of children from these four countries, and new arrivals often have limited or no English proficiency.<sup>86</sup> Those seeking SIJS are often undocumented, having entered the United States without inspection, though some also come to the United States initially on nonimmigrant visas.<sup>87</sup> Another common experience for immigrant children seeking and approved for SIJS is that they have, by legal definition, been abandoned, abused, or neglected.<sup>88</sup> Children seeking SIJS, therefore, belong to a number of communities which are subject to precarity within the United States: as children of color, non- and limited-English proficient speakers,<sup>89</sup> youth, and immigrants. Furthermore, many parts of a SIJS seeker's identity may reinforce other social perceptions and the child's resulting precarity. For instance, one's language, particularly being a Spanish speaker in the United States, can serve as a proxy for race and being non-White.<sup>90</sup> Lack of

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83. See Castillo-Granados et al., *supra* note 33, at 1785–86.

84. See *id.* at 1784–85, 1785 n.27.

85. See *id.* at 1785 & n.27.

86. See *Language Access Resources for Working with Unaccompanied Children*, VERA (Nov. 2015), <https://www.vera.org/publications/language-access-resources-for-working-with-unaccompanied-children> [<https://perma.cc/4UFV-DARZ>] (“A significant number of children who enter Office of Refugee Resettlement custody do not speak English.”); VERA INST. OF JUST., *SPANISH RESOURCES FOR WORKING WITH UC: PART 2: SPOTLIGHT ON CENTRAL AMERICAN SPANISH* 3, 8 (2015), <https://www.vera.org/downloads/publications/unaccompanied-children-resource-spanish-glossary-part2.pdf> [<https://perma.cc/U3DP-UVNPJ>].

87. See Hlass, *supra* note 59, at 250, 254 (describing the growth in child migration in the United States as predominantly Central American children who have crossed the border without authorization).

88. This is required under the law. 8 U.S.C. § 1101(a)(27)(J)(i). Reports of child immigrants to the United States have also shown high levels of violence and deprivation that children have experienced. See UNITED NATIONS HIGH COMM’R FOR REFUGEES, *CHILDREN ON THE RUN: UNACCOMPANIED CHILDREN LEAVING CENTRAL AMERICA AND MEXICO AND THE NEED FOR INTERNATIONAL PROTECTION* 5–6 (2014), <https://www.refworld.org/docid/532180c24.html>.

89. See Lilia D. Monzó & Robert Rueda, *Passing for English Fluent: Latino Immigrant Children Masking Language Proficiency*, 40 *ANTHROPOLOGY & EDUC. Q.* 20, 20 (2009).

90. See *id.* at 20, 22.

English proficiency can also be a proxy for being perceived as “foreign” or “un-American.”<sup>91</sup>

Race, and particularly being a person of color, is particularly salient in the United States as a factor for heightened precarity. Black, Brown, and Indigenous children face a myriad of challenges to accessing education, such as barriers to enrollment; excessive disciplinary actions, including suspension; and language access.<sup>92</sup> Black, Brown, and Indigenous children are also vulnerable to over-policing in schools and broader communities.<sup>93</sup> As part of this over-policing, people of color have also been subjected to allegations of gang affiliation, often flimsy or false, which may lead to being excluded from school or contact with immigration enforcement.<sup>94</sup> These trends have led to a trajectory that has been referred to as the “school to deportation pipeline,” whereby Black and Brown children become more vulnerable to deportation and may lose access to education through school suspension, immigration detention, and deportation.<sup>95</sup>

The generalized system of racial inequality in the United States affects racial minorities within the immigration context. Immigration officials have used gang allegations, as well as any involvement with the criminal legal system, as the basis to discretionarily deny immigration benefits to children.<sup>96</sup> Children of color may face racist treatment in consideration of their applications for LPR status, where adjudicators have used discretion to deny applications based on a gang allegation “and where even minor criminal issues might not be ‘forgiven’ by existing waivers.”<sup>97</sup> These allegations have been a basis for U.S. Immigration and Customs Enforcement (ICE) to detain children in secure juvenile facilities, and older teenagers may be detained in adult ICE jails.<sup>98</sup> Lastly, for those children in deportation proceedings, they may be more likely to be deported after being detained, as well as after a denial of immigrant benefits.<sup>99</sup>

The social categories that exacerbate or mitigate against precarity are not immutable, but may shift over time. At times the law affords protections because of

91. Carlo A. Pedrioli, *Respecting Language as Part of Ethnicity: Title VII and Language Discrimination at Work*, 27 HARV. J. ON RACIAL & ETHNIC JUST. 97, 98 (2011); see Monzó & Rueda, *supra* note 89, at 20, 22.

92. See Patricia Maloney, Duke W. Austin & SaunJuhi Verma, *Fear of a School-to-Deportation Pipeline: How Teachers, Administrators, and Immigrant Students Respond to the Threat of Standardized Tests and Deportation*, URB. EDUC., 2021, at 1, 2, 4–5.

93. AMIR WHITAKER, SYLVIA TORRES-GUILLÉN, MICHELLE MORTON, HAROLD JORDAN, STEFANIE COYLE, ANGELA MANN & WEI-LING SUN, ACLU, COPS AND NO COUNSELORS: HOW THE LACK OF SCHOOL MENTAL HEALTH STAFF IS HARMING STUDENTS 4–5 (Emily Greytak et al. eds., 2019), <https://www.aclu.org/report/cops-and-no-counselors> [<https://perma.cc/776X-WSJU>].

94. See Laila Hlass, *The School to Deportation Pipeline*, 34 GA. ST. U. L. REV. 697, 700–02 (2018); LAILA L. HLASS & RACHEL PRANDINI, IMMIGRANT LEGAL RES. CTR., DEPORTATION BY ANY MEANS NECESSARY: HOW IMMIGRATION OFFICIALS ARE LABELING IMMIGRANT YOUTH AS GANG MEMBERS 16 (2018), <https://www.ilrc.org/deportation-by-any-means-necessary> [<https://perma.cc/7EN8-BXQM>].

95. See Hlass, *supra* note 94, at 700.

96. See HLASS & PRANDINI, *supra* note 94, at 2.

97. Castillo-Granados et al., *supra* note 33, at 1790; see *id.* at 1789.

98. See HLASS & PRANDINI, *supra* note 94, at 15.

99. See Hlass, *supra* note 94, at 730.



children's youthfulness, but age may lead to increased precarity. More insidiously, young people's precarity is compounded abruptly on the day they "age out" of their youthfulness and, as a result, are ineligible for protections or face harsher penalties. Time is a critical measure in the law broadly.<sup>100</sup> And, specifically in naturalization and immigration law,<sup>101</sup> benefits and punishments often relate to dates,<sup>102</sup> and thus time can heighten precarity where it is prolonged.<sup>103</sup> This is particularly true for SIJS children, because childhood is time-limited under immigration law, ending at age twenty-one.<sup>104</sup> Furthermore, juvenile detention and enforcement-related protections end at age eighteen,<sup>105</sup> and there are varied age limitations in all fifty states, the territories, and the District of Columbia that children face when requesting the required SIJS findings in state courts.<sup>106</sup>

Children's precarity is further protracted and exacerbated because of the visa caps and resulting SIJS backlog, causing youth to remain essentially undocumented for years as they wait for immigrant visas designated for their countries to become available.<sup>107</sup> Children experience a variety of harms while waiting in the legal limbo of the backlog, including vulnerability to deportation; until May

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100. See Khan, *supra* note 57, at 56 ("Temporality is an integral part of law."); Mawani, *supra* note 57, at 71 ("[L]aw is fundamentally about time."); Greenhouse, *supra* note 57, at 1631.

101. See Elizabeth F. Cohen, *Citizenship and the Law of Time in the United States*, 8 DUKE J. CONST. L. & PUB. POL'Y 53, 54 (2013).

102. Temporary Protected Status (TPS) eligibility relies, in part, on dates of entry. *Temporary Protected Status*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Jan. 12, 2023), <https://www.uscis.gov/humanitarian/temporary-protected-status> [<https://perma.cc/B7ZM-YVLV>]. Similarly, certain programs, such as DACA, have date deadlines for eligibility. See *Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Nov. 3, 2022), <https://www.uscis.gov/DACA> [<https://perma.cc/FPX6-T6AQ>]. Finally, refugee and asylum applications also use time to determine eligibility for benefits. See *Questions and Answers: Affirmative Asylum Eligibility and Applications*, U.S. CITIZENSHIP & IMMIGR. SERVS. (May 31, 2022), <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/affirmative-asylum-frequently-asked-questions/questions-and-answers-affirmative-asylum-eligibility-and-applications> [<https://perma.cc/N55J-MXYS>] (application for asylum allowed "within 1 year" of arriving to the United States); *Refugees*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Oct. 26, 2022), <https://www.uscis.gov/humanitarian/refugees-and-asylum/refugees> [<https://perma.cc/2F7Y-8XVX>] (application for green card allowed "one year after coming to the United States").

103. For example, a noncitizen convicted of a "crime involving moral turpitude" may be deported if the crime (1) was "committed within five years" of admission to the United States and (2) allows a sentence of at least one year to be imposed. 8 U.S.C. § 1227(a)(2)(A)(i).

104. See Hlass, *supra* note 59, at 257. However, there remain certain protections to prevent "aging out" for SIJS as well as other child-related immigrant benefits. See, e.g., *Green Card Based on Special Immigrant Juvenile Classification*, U.S. CITIZENSHIP & IMMIGR. SERVS. (June 10, 2022), <https://www.uscis.gov/green-card/green-card-eligibility/green-card-based-on-special-immigrant-juvenile-classification> [<https://perma.cc/T6RD-JAFP>].

105. See Hlass, *supra* note 80, at 217.

106. See generally Laila L. Hlass, *States and Status: A Study of Geographical Disparities for Immigrant Youth*, 46 COLUM. HUM. RTS. L. REV. 266 (2014) (examining differences in implementation of SIJS across various states).

107. See DAVIDSON & HLASS, *supra* note 19, at 5, 11. As of December 2022, for the first time all children from all countries are impacted by a backlog, although wait times for children from El Salvador, Guatemala, Honduras and Mexico remain the longest by years. See BUREAU OF CONSULAR AFFS., U.S. DEP'T OF STATE, VISA BULLETIN: IMMIGRANT NUMBERS FOR DECEMBER 2022, at 4 (2022) [hereinafter DECEMBER 2022 VISA BULLETIN], <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2023/visa-bulletin-for-december-2022.html> [<https://perma.cc/FQH2-MCM9>].

2022, an inability to work lawfully; and, at times, an inability to access medical care or higher education.<sup>108</sup> In some cases, children are “struggling with hunger and homelessness” and are “forced to make difficult decisions to survive,” such as “dropping out of school” and “working for exploitative employers.”<sup>109</sup> Living in legal limbo, essentially undocumented for years, can have severe mental health impacts on youth in their transition to adulthood, compounding the trauma of migration. Although an undocumented youth’s legal status may have less of an impact on their mental health when they are young children, “it becomes a defining feature in late adolescence and into adulthood as they realize the limitations of their status and are unable to fully participate.”<sup>110</sup> These challenges to mental health may be further exacerbated by a chronic fear of deportation, uncertainty about the long-term future, and the harm of living in a political environment where their identities are regularly and publicly maligned.<sup>111</sup>

Although no formal estimates exist of how many unauthorized immigrant children might be eligible for SIJS, some studies have found that significant percentages of these children have experienced abuse, deprivation in the home, or other harm that might raise *prima facie* eligibility for SIJS.<sup>112</sup> In fact, removal defense attorneys specializing in representing children have reported that SIJS is one of the most common forms of relief for immigrant youth facing deportation in court, likely due to the frequency with which immigrant youth report experiences of abandonment, abuse, and neglect.<sup>113</sup>

In sum, SIJS petitioners experience precarity as they are generally children of color, with a majority hailing from El Salvador, Guatemala, Honduras, and Mexico.<sup>114</sup> These children are racialized as Latina/o, Indigenous and Black, and most speak Spanish and a number of Indigenous languages, such as K’itche and

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108. See DAVIDSON & HLASS, *supra* note 19, at 6. In March 2022, USCIS announced the creation of a Deferred Action program for SIJS petitioners impacted by the employment-based per-country visa caps. See U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DHS, POLICY ALERT: SPECIAL IMMIGRANT JUVENILE CLASSIFICATION AND DEFERRED ACTION 1 (2022), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220307-SIJAndDeferredAction.pdf> [<https://perma.cc/M48X-G6JS>]. Importantly, this new policy allocated work permits to youth in the SIJS backlog who until then were unable to obtain work authorization while awaiting a visa to apply for LPR status. See *id.* at 1–2. In implementing this policy, USCIS recognized that the backlog was undermining Congressional intent and sought to remedy this as best as possible absent an ability to amend the statute. See *id.* at 1. The Deferred Action program was implemented in May 2022, see *id.* at 2, and advocates have “welcome[d]” the policy “as a needed first step in protecting [immigrant] youth.” END SIJS BACKLOG COAL., FREQUENTLY ASKED QUESTIONS ABOUT USCIS’S SIJS DEFERRED ACTION POLICY 1 (2022), [https://static1.squarespace.com/static/5fe8d735a897d33f7e7054cd/t/63346835fa2aee028820f2f8/1664378933960/2022\\_16May\\_CoalitionFAQs-USCIS-SIJS-Deferred-Action-Policy.pdf](https://static1.squarespace.com/static/5fe8d735a897d33f7e7054cd/t/63346835fa2aee028820f2f8/1664378933960/2022_16May_CoalitionFAQs-USCIS-SIJS-Deferred-Action-Policy.pdf) [<https://perma.cc/V7FY-REJS>].

109. DAVIDSON & HLASS, *supra* note 19, at 6.

110. Carola Suárez-Orozco & Guadalupe López Hernández, “Waking Up Every Day with the Worry”: A Mixed-Methods Study of Anxiety in Undocumented Latinx College Students, 11 FRONTIERS PSYCHIATRY, Nov. 2020, at 1, 3.

111. See *id.* at 2–3.

112. See, e.g., UNITED NATIONS HIGH COMM’R FOR REFUGEES, *supra* note 88, at 6.

113. See Hlass, *supra* note 59, at 257.

114. See Castillo-Granados et al., *supra* note 33, at 1785 & n.27.

Ixil, with limited English proficiency upon arrival.<sup>115</sup> They often suffer from poverty and violence.<sup>116</sup> They may experience heightened precarity because of their language ability, race, class, and immigration status, as well as several other sociocultural factors, which the SIJS process can exacerbate.<sup>117</sup>

#### B. THE LEGISLATIVE AMBIVALENCES OF SPECIAL IMMIGRANT JUVENILE STATUS

The SIJS law is more than thirty years old, created by Congress in 1990 to protect vulnerable children by providing a pathway to becoming LPRs, commonly referred to as having a “green card.”<sup>118</sup> Child advocates who decried the crisis of immigrant children aging out of foster systems without the possibility of permanence and real independence because of their lack of legal status spurred the law’s passage.<sup>119</sup> SIJS is the primary means of helping immigrant children build stability in their lives by creating opportunities to work legally and apply to become LPRs, which is a pathway to U.S. citizenship.<sup>120</sup> From 2010 to 2021, 130,731 children were granted SIJS,<sup>121</sup> and in this same period, 53,607 youth were granted LPR status based on SIJS.<sup>122</sup> Legal status can open doors for young

115. See Hansi Lo Wang, *Language Barriers Pose Challenges for Mayan Migrant Children*, NPR: CODE SW!TCH (July 1, 2014, 7:01 PM), <https://www.npr.org/sections/codeswitch/2014/07/01/326426927/language-barriers-pose-challenges-for-mayan-migrant-children> [<https://perma.cc/DZ7W-CG7B>]; Joanne Gottesman, Randi Mandelbaum & Meredith Pindar, *A Pathway to Permanency: Collaborating for the Futures of Children Who Are Immigrants in the Child Welfare System*, 96 CHILD WELFARE (SPECIAL ISSUE) 25, 30 (2019).

116. See UNITED NATIONS HIGH COMM’R FOR REFUGEES, *supra* note 88, at 5–7, 24; Diana E. Santacrose, Maryam Kia-Keating & Daniella Lucio, *A Systematic Review of Socioecological Factors, Community Violence Exposure, and Disparities for Latinx Youth*, 34 J. TRAUMATIC STRESS 1027, 1038 (2021).

117. See Santacrose et al., *supra* note 116, at 1032.

118. DAVIDSON & HLASS, *supra* note 19, at 5; Immigration Act of 1990, Pub. L. No. 101-649, § 153, 104 Stat. 4978, 5005; Immigration and Nationality Act (INA) § 245(h), 8 U.S.C. § 1255(h) (permitting adjustment of status for those classified as SIJs).

119. See Hlass, *supra* note 106, at 300.

120. See *id.* at 269; DAVIDSON & HLASS, *supra* note 19, at 5.

121. These numbers come from the authors’ data set, discussed and analyzed *infra* Part II.

122. This is the sum of all adjustments of status based on approved SIJS (classified as SL6 and SL1) from DHS’ Annual Statistics Reports for FYs 2011–2021. OFF. OF IMMIGR. STAT., U.S. DHS, 2021 YEARBOOK OF IMMIGRATION STATISTICS 22 (2022) [hereinafter DHS 2021 YEARBOOK], [https://www.dhs.gov/sites/default/files/2023-03/2022\\_1114\\_plcy\\_yearbook\\_immigration\\_statistics\\_fy2021\\_v2\\_1.pdf](https://www.dhs.gov/sites/default/files/2023-03/2022_1114_plcy_yearbook_immigration_statistics_fy2021_v2_1.pdf) [<https://perma.cc/SG32-X7HV>] (recording 11,409 SL6); OFF. OF IMMIGR. STAT., U.S. DHS, 2020 YEARBOOK OF IMMIGRATION STATISTICS 22 (2022) [hereinafter DHS 2020 YEARBOOK], [https://www.dhs.gov/sites/default/files/2022-07/2022\\_0308\\_plcy\\_yearbook\\_immigration\\_statistics\\_fy2020\\_v2.pdf](https://www.dhs.gov/sites/default/files/2022-07/2022_0308_plcy_yearbook_immigration_statistics_fy2020_v2.pdf) [<https://perma.cc/C8RF-ZUEZ>] (recording 5,545 SL6); OFF. OF IMMIGR. STAT., U.S. DHS, 2019 YEARBOOK OF IMMIGRATION STATISTICS 22 (2020) [hereinafter DHS 2019 YEARBOOK], [https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/yearbook\\_immigration\\_statistics\\_2019.pdf](https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/yearbook_immigration_statistics_2019.pdf) [<https://perma.cc/8CQS-ETEQ>] (recording 4,988 SL6 and 64 SL1); OFF. OF IMMIGR. STAT., U.S. DHS, 2018 YEARBOOK OF IMMIGRATION STATISTICS 22 (2019) [hereinafter DHS 2018 YEARBOOK], [https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2018/yearbook\\_immigration\\_statistics\\_2018.pdf](https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2018/yearbook_immigration_statistics_2018.pdf) [<https://perma.cc/HU2P-D2NU>] (recording 4,505 SL6 and 42 SL1); OFF. OF IMMIGR. STAT., U.S. DHS, 2017 YEARBOOK OF IMMIGRATION STATISTICS 22 (2019) [hereinafter DHS 2017 YEARBOOK], [https://www.dhs.gov/sites/default/files/publications/yearbook\\_immigration\\_statistics\\_2017\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/yearbook_immigration_statistics_2017_0.pdf) [<https://perma.cc/WM7C-QDK8>] (recording 4,681 SL6 and 45 SL1); OFF. OF IMMIGR. STAT., U.S. DHS, 2016 YEARBOOK OF IMMIGRATION STATISTICS 22 (2017)

people transitioning into adolescence and adulthood by providing better access to health care, financial aid for higher education, and making deportation less likely.<sup>123</sup> Permanency also allows young people to securely root, integrate into friend groups, focus on academics, and dream of a future without fear of being ripped from their homes and lives.<sup>124</sup> Although the large number of youth protected by SIJS is a success, deficiencies with the law's implementation and abuse by a politicized executive branch mean the SIJS program has failed to fully meet its promise.

Although SIJS is described as a form of humanitarian relief for immigrant children, the brief legal history of SIJS below illustrates the ambivalent—and even contradictory—stances that lawmakers have taken toward immigrant children over the years. On the one hand, as children that are determined by state courts and USCIS to have been abandoned, abused, or neglected, SIJS youth are often represented as among the most vulnerable and therefore the most in need of protection.<sup>125</sup> On the other hand, as immigrants and people of color, SIJS youth have been represented as inherently suspicious, untrustworthy, and potentially national security threats.<sup>126</sup> As we show in this Section, the fluctuating legal and policy regime surrounding the United States' perception of immigrant children has contributed to the precarity that SIJS youth face as they navigate the unpredictable experience of life without a reliable system of legal protection.

The guiding principle behind SIJS is as follows: if a judge in state juvenile court finds that a child has experienced abuse, abandonment, or neglect, then it is not in the best interest of the child to be returned to their country of origin and the child should have a legal path to remain in the United States.<sup>127</sup> Initially,

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[hereinafter DHS 2016 YEARBOOK], <https://www.dhs.gov/sites/default/files/publications/2016%20Yearbook%20of%20Immigration%20Statistics.pdf> [<https://perma.cc/UPZ2-BDS7>] (recording 5,465 SL6 and 148 SL1); OFF. OF IMMIGR. STAT., U.S. DHS, 2015 YEARBOOK OF IMMIGRATION STATISTICS 22 (2016), [https://www.dhs.gov/sites/default/files/publications/Yearbook\\_Immigration\\_Statistics\\_2015.pdf](https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2015.pdf) [<https://perma.cc/BD6L-7P2U>] (recording 5,126 SL6 and 68 SL1); OFF. OF IMMIGR. STAT., U.S. DHS, 2014 YEARBOOK OF IMMIGRATION STATISTICS 22 (2016) [hereinafter DHS 2014 YEARBOOK], <https://www.dhs.gov/sites/default/files/publications/DHS%202014%20Yearbook.pdf> [<https://perma.cc/UWT4-8C29>] (recording 3,328 SL6 and 31 SL1); OFF. OF IMMIGR. STAT., U.S. DHS, 2013 YEARBOOK OF IMMIGRATION STATISTICS 22 (2014), [https://www.dhs.gov/sites/default/files/publications/Yearbook\\_Immigration\\_Statistics\\_2013\\_0.pdf](https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2013_0.pdf) [<https://perma.cc/MPA4-47R5>] (recording 2,735 SL6 and 29 SL1); OFF. OF IMMIGR. STAT., U.S. DHS, 2012 YEARBOOK OF IMMIGRATION STATISTICS 22 (2013), [https://www.dhs.gov/sites/default/files/publications/Yearbook\\_Immigration\\_Statistics\\_2012.pdf](https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2012.pdf) [<https://perma.cc/SS3Y-REN3>] (recording 2,250 SL6 and 30 SL1); OFF. OF IMMIGR. STAT., U.S. DHS, 2011 YEARBOOK OF IMMIGRATION STATISTICS 22 (2012), [https://www.dhs.gov/sites/default/files/publications/ois\\_yb\\_2011.pdf](https://www.dhs.gov/sites/default/files/publications/ois_yb_2011.pdf) [<https://perma.cc/VAJ3-D946>] (recording 1,609 SL6 and 17 SL1); OFF. OF IMMIGR. STAT., U.S. DHS, 2010 YEARBOOK OF IMMIGRATION STATISTICS 22 (2011), [https://www.dhs.gov/sites/default/files/publications/ois\\_yb\\_2010.pdf](https://www.dhs.gov/sites/default/files/publications/ois_yb_2010.pdf) [<https://perma.cc/F6XY-5QMN>] (recording 1,480 SL6 and 12 SL1).

123. See DAVIDSON & HLISS, *supra* note 19, at 9.

124. See Suárez-Orozco et al., *supra* note 21; Suárez-Orozco & Hernández, *supra* note 110, at 2–3 (describing the protective factors of integration, supportive institutions, and stability in contrast to stressors such as fear of deportation and feeling different).

125. See, e.g., U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 108, at 1–2; Aguilera, *supra* note 1.

126. See HLISS, *supra* note 80, at 222–28, 233.

127. See 8 U.S.C. § 1101(a)(27)(J); Aguilera, *supra* note 1.

Congress designed SIJS to provide a future other than deportation for the growing number of immigrant youth in long-term foster care,<sup>128</sup> but it soon expanded to include children beyond the foster system.<sup>129</sup>

Although the guiding principle behind SIJS has remained intact, the law, policy, and bureaucratic practices surrounding SIJS have fluctuated considerably over time—often to the detriment of immigrant youth. There have been three major legislative moments: the creation of SIJS in 1990,<sup>130</sup> the constriction of the SIJS definition in 1998,<sup>131</sup> and the expansion of protection in 2008.<sup>132</sup> Rules interpreting the statute have been promulgated in 1991,<sup>133</sup> 1993,<sup>134</sup> and 2022.<sup>135</sup> USCIS has periodically issued policy guidance interpreting the statute and regulations,<sup>136</sup> which are now memorialized in a USCIS Policy Manual.<sup>137</sup> Not as visibly, the agency has engaged in informal policy practices of targeting certain types of SIJS cases, which advocates have discerned through observation as well as through litigation.<sup>138</sup>

The year 2008 marked a broadening of access to SIJS protection, as Congress amended the law to include children who were harmed by one but not both parents, created age-out protections, and eased some provisions for SIJS children

128. See Hlass, *supra* note 106, at 335.

129. See *id.* at 337–38.

130. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

131. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, § 113, 111 Stat. 2440, 2460–61.

132. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457, § 235(d), 122 Stat. 5044, 5079–80.

133. Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Bona Fide Marriage Exemption to Marriage Fraud Amendments, 56 Fed. Reg. 23207 (May 21, 1991) (to be codified at 8 C.F.R. pts. 101, 103).

134. Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exemption to Marriage Fraud Amendments; Adjustment of Status, 58 Fed. Reg. 42843, 42847 (Aug. 12, 1993) (to be codified at 8 C.F.R. pts. 101, 103, 204, 205, 245).

135. Special Immigrant Juvenile Petitions, 87 Fed. Reg. 13066 (Mar. 8, 2022) (to be codified at 8 C.F.R. pts. 204, 205, 245).

136. See, e.g., Interoffice Memorandum from William R. Yates, Assoc. Dir. for Operations, U.S. Citizenship & Immigr. Servs., to Regional Dirs. & Dist. Dirs. 6 (May 27, 2004) (available at [https://www.uscis.gov/sites/default/files/document/memos/sij\\_memo\\_052704.pdf](https://www.uscis.gov/sites/default/files/document/memos/sij_memo_052704.pdf) [<https://perma.cc/94AQ-R58R>]); Memorandum from Donald Neufeld, Acting Assoc. Dir., Domestic Operations, U.S. Citizenship & Immigr. Servs. & Pearl Chang, Acting Chief, Off. of Pol’y & Strategy, U.S. Citizenship & Immigr. Servs., to Field Leadership 2–3 (Mar. 24, 2009) (available at [https://www.uscis.gov/sites/default/files/document/memos/TVPRA\\_SIJ.pdf](https://www.uscis.gov/sites/default/files/document/memos/TVPRA_SIJ.pdf) [<https://perma.cc/M3H8-2YFR>]).

137. *Policy Manual: Part J – Special Immigrant Juveniles*, U.S. CITIZENSHIP & IMMIGR. SERVS. (May 4, 2023), <https://www.uscis.gov/policy-manual/volume-6-part-j> [<https://perma.cc/3ADJ-2633>].

138. See *generally* Amended Judgment, R.F.M. v. Nielson, No. 18-CV-5068 (S.D.N.Y. May 31, 2019) (noting USCIS had an informal policy of denying cases in New York when children were between eighteen and twenty-one years old); RACHEL PRANDINI & ALISON KAMHI, IMMIGRANT LEGAL RES. CTR., RISKS OF APPLYING FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) IN AFFIRMATIVE CASES: EVOLVING USCIS POLICIES INCREASE THE RISK OF PLACEMENT IN REMOVAL PROCEEDINGS (2018), [https://www.ilrc.org/sites/default/files/resources/risks\\_apply\\_sijs\\_affirm\\_cases-20180831.pdf](https://www.ilrc.org/sites/default/files/resources/risks_apply_sijs_affirm_cases-20180831.pdf) [<https://perma.cc/638X-FYWC>] (detailing the types of cases that have been observed to incur NTAs and Notices of Intent to Deny (NOIDs)).

seeking LPR status.<sup>139</sup> Age-out protections are significant; for years, delays at USCIS resulted in de facto denials when children were denied protection because they aged into adulthood by turning twenty-one years old before USCIS had decided their cases.<sup>140</sup> A class action lawsuit, *Perez-Olano v. Holder*, challenged age-out denials due to the agency's delay,<sup>141</sup> in addition to other SIJS practice problems, and this lawsuit prompted the 2008 provision that designated the child's age at filing (rather than age at adjudication) as the controlling age.<sup>142</sup> Additionally, to ensure timely access to protection for children, the 2008 law mandated that USCIS adjudicate SIJS petitions in six months or less.<sup>143</sup> Lastly, the 2008 amendments broadened exemptions from inadmissibility grounds, an acknowledgment of the youthfulness of SIJS petitioners, allowing more children to become LPRs through the SIJS process even though they might have circumstances that would have otherwise precluded their eligibility to adjust their status to LPR.<sup>144</sup>

However, before and after the 2008 legislative highpoint, legislators and the executive have restricted access to SIJS through the so-called "consent" function.<sup>145</sup> In the 1998 amendment, Congress added the consent function, requiring USCIS to consent to the grant of SIJS by assessing whether the juvenile court order contains the required findings.<sup>146</sup> Unsubstantiated concerns that Mexican teenagers arriving on student visas were abusing the SIJS statute spurred the addition of the consent function, but the real consequence for immigrant youth was that cases became increasingly drawn out and possibly denied despite a judge's ruling making all the required findings.<sup>147</sup>

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139. See Amy Joseph, Amy Pont & Cristina Romero, *Consent Is Not Discretion: The Evolution of SIJS and the Consent Function*, 34 GEO. IMMIGR. L.J. 263, 301 (2020); Hlass, *supra* note 106, at 288, 292–93.

140. See Hlass, *supra* note 106, at 292. A 2004 USCIS memorandum acknowledges the problem of "aging out" and simply encourages petitioners to file timely applications and alert USCIS to the risk of aging out and encourages screening of applications to schedule interviews with applicants before they turn twenty-one when needed. See Interoffice Memorandum from William R. Yates, *supra* note 136.

141. Settlement Agreement at 7–8, *Perez-Olano v. Holder*, No. CV 05-3604 (C.D. Cal. Aug. 31, 2010); see also Hlass, *supra* note 106, at 293 & n.122.

142. See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235, 122 Stat. 5044, 5080.

143. See *id.*

144. 8 U.S.C. § 1255(h); see also Memorandum from Donald Neufeld & Pearl Chang, *supra* note 136 (describing the new inadmissibility exemption grounds).

145. By consent function, we refer to what has been called the "general" consent function as opposed to the particular provision called "specific" consent which applies only to cases where children are in the custody of the Office of Refugee and Resettlement (ORR). See Castillo-Granados et al., *supra* note 33, at 1803–17.

146. Compare Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, § 113, 111 Stat. 2440, 2460 (containing a consent requirement), with Immigration Act of 1990, Pub. L. No. 101-649, § 153, 104 Stat. 4978, 5005–06 (amending 8 U.S.C. § 1101(a)(27)) (containing no consent requirement). Under the 2008 Trafficking Victims Protection Reauthorization Act, the Secretary of the Department of Homeland Security (DHS) now exercises consent in the grant of SIJS status. See Castillo-Granados et al., *supra* note 33, at 1808.

147. See Castillo-Granados et al., *supra* note 33, at 1804–05.

The consent function continues to be the primary mechanism for USCIS to restrict access to SIJS to children who otherwise meet eligibility under the statute.<sup>148</sup> In 2019, advocates challenged USCIS consent practices through *Zabaleta v. Nielsen*,<sup>149</sup> resulting in a decision to curb the agency's use of the consent function to overreach into state court findings.<sup>150</sup> Despite this legal victory, USCIS continued its attempts to second-guess state court judgments through a 2019 proposed regulation,<sup>151</sup> policy memo changes, and three adopted Administrative Appeals Office (AAO) decisions later in 2019,<sup>152</sup> which worked to exacerbate USCIS officers' practice of overreaching into juvenile court findings.<sup>153</sup> In the last five years, USCIS has more frequently issued Requests for Evidence (RFEs) requiring proof that an underlying state court finding of parental abuse, abandonment, or neglect was not issued primarily to obtain immigration relief, and then later potentially denying cases on that basis.<sup>154</sup> USCIS ultimately promulgated new regulations in 2022,<sup>155</sup> attempting to codify their practice of using the consent function to require evidence beyond the statutory requirement. The rule requires a petitioner not only to submit the court order as evidence, but also to include the factual basis for the judicial determinations.<sup>156</sup> Responding to numerous public comments criticizing the 2019 draft language of consent, the 2022 rule made two revisions regarding consent from the proposed 2019 rule.<sup>157</sup> First, the

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148. See Joseph et al., *supra* note 139, at 321.

149. 367 F. Supp. 3d 208 (S.D.N.Y. 2019).

150. See *id.* at 217–19.

151. Special Immigrant Juvenile Petitions, 84 Fed. Reg. 55250, 55251 (Oct. 16, 2019) (to be codified at 8 C.F.R. pts. 204, 205, 245) (stating DHS consent requires petitioners to show that the state court order was primarily for purposes of obtaining relief from abuse, neglect, or abandonment and USCIS may seek additional evidence when “evidence presented is not sufficient to establish a reasonable basis for . . . consent”).

152. See generally U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DHS, POLICY MEMORANDUM: *MATTER OF A-O-C-*, ADOPTED DECISION 2019-03 (AAO Oct. 11, 2019) (2019), [https://www.uscis.gov/sites/default/files/document/memos/Matter\\_of\\_A-O-C-\\_Adopted\\_Decision\\_2019-03\\_AAO\\_Oct\\_11\\_2019.pdf](https://www.uscis.gov/sites/default/files/document/memos/Matter_of_A-O-C-_Adopted_Decision_2019-03_AAO_Oct_11_2019.pdf) [<https://perma.cc/J85V-WAJJ>] (engaging in primary purpose analysis); U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DHS, POLICY MEMORANDUM: *MATTER OF E-A-L-O-*, ADOPTED DECISION 2019-04 (AAO Oct. 11, 2019) (2019), [https://www.uscis.gov/sites/default/files/document/memos/Matter\\_of\\_E-A-L-O-\\_Adopted\\_Decision\\_2019-04\\_AAO\\_Oct\\_11\\_2019.pdf](https://www.uscis.gov/sites/default/files/document/memos/Matter_of_E-A-L-O-_Adopted_Decision_2019-04_AAO_Oct_11_2019.pdf) [<https://perma.cc/L62E-UTZF>] (same); U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DHS, POLICY MEMORANDUM: *MATTER OF D-Y-S-C-*, ADOPTED DECISION 2019-02 (AAO Oct. 11, 2019) (2019), [https://www.uscis.gov/sites/default/files/document/memos/Matter\\_of\\_D-Y-S-C-\\_Adopted\\_Decision\\_2019-02\\_AAO\\_Oct\\_11\\_2019.pdf](https://www.uscis.gov/sites/default/files/document/memos/Matter_of_D-Y-S-C-_Adopted_Decision_2019-02_AAO_Oct_11_2019.pdf) [<https://perma.cc/5CZS-WBJL>] (same). For further information on accompanying changes in the USCIS Policy Manual, see generally CATH. LEGAL IMMIGR. NETWORK, INC., COMPARISON CHART—NOVEMBER 2019 USCIS POLICY MANUAL CHANGES TO VOLUME 6, PART J (SPECIAL IMMIGRANT JUVENILE STATUS) (2019), <https://cliniclegal.org/resources/childrens-issues/special-immigrant-juvenile-status/special-immigrant-juvenile-status> [<https://perma.cc/2PVH-L9QD>].

153. See Joseph et al., *supra* note 139, at 317–18.

154. See Castillo-Granados et al., *supra* note 33, at 1809, 1813, 1828.

155. Special Immigrant Juvenile Petitions, 87 Fed. Reg. 13066 (Mar. 8, 2022) (to be codified at 8 C.F.R. pts. 204, 205, 245).

156. See *id.* at 13070.

157. See *id.* (“DHS received numerous comments disagreeing with the interpretation of the consent function in the NPRM, with some commenters expressing concern that it impermissibly allows USCIS adjudicators to look behind the court’s order.”).

proposed 2019 language would have required petitioners to prove the state court order required under SIJS was “sought primarily for *the purpose* of obtaining relief from abuse, neglect, [or] abandonment.”<sup>158</sup> The final 2022 rule softens this slightly by stating the petitioner must prove “*a primary reason*” for seeking such relief, because petitioners may have dual or mixed motivations for seeking juvenile court determinations.<sup>159</sup> At the writing of this Article, about one year after the 2022 rule became final, it is not clear how much this minute change in language will impact USCIS consent practices. Second, the 2022 final rule clarifies that the consent function is not a form of discretion, whereby agents evaluate a totality of worthiness of the petitioner contemplated in the 2019 rule; as instated, the 2022 text requires a narrower analysis that the SIJS request is simply “bona fide.”<sup>160</sup>

Over time, SIJS has been the subject of multiple class action lawsuits attempting to hold USCIS accountable to the language and intent of the SIJS statute as the political whims of presidential administrations shift, enacting their agendas on the lives of SIJS petitioners. We explore the impact of these policies and ensuing litigation in the Sections that follow.

### C. PROCEDURAL BARRIERS TO OBTAINING SIJS

Various factors collide to create a far from coherent and uniform system of determining who is eligible for, and who ultimately receives, SIJS and, subsequently, LPR status. In this Section, we outline the process of obtaining SIJS, including procedural factors that erect barriers to immigrant children, which makes legal representation essential.

The process for children to seek SIJS and lawful permanent residence based on SIJS requires multiple adjudicators, including state court judges, officers at USCIS, and, for those children in deportation proceedings, judges in immigration court. The first step in the SIJS process is for a state court judge to determine whether it is in the child’s best interest to return to their country of origin, as well as to issue a judgment finding the child dependent on the court, or placing them under the custody of a person or entity, because the child cannot be reunified with at least one parent due to abandonment, abuse, or neglect.<sup>161</sup> In different jurisdictions, there may be a variety of courts suited to make these determinations, such as civil courts of general jurisdiction, or there may be specialized courts that handle SIJS cases, such as family, juvenile, or probate courts.<sup>162</sup> Jurisdictions also vary on what they consider a “child,” because the definition of a child, as defined under immigration law (in this context) as someone unmarried and under

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158. Special Immigrant Juvenile Petitions, 84 Fed. Reg. 55250, 55251 (Oct. 16, 2019) (to be codified at 8 C.F.R. pts. 204, 205, 245) (emphasis added).

159. Special Immigrant Juvenile Petitions, 87 Fed. Reg. at 13070.

160. *See id.*

161. *See* Hlass, *supra* note 106, at 280.

162. *See id.* at 321 & n.237 (explaining that state laws can differ in terms of the “types of courts and proceedings where SIJS findings can be obtained”).



twenty-one,<sup>163</sup> may not coincide with state law.<sup>164</sup> Depending on the child's circumstances and local practice, the type of proceedings varies but may include hearings for guardianship, custody, adoption, permanency, dependency, or delinquency.<sup>165</sup>

Once a child has the requisite SIJS state court judgment, they can then file to be recognized as a Special Immigrant Juvenile by USCIS.<sup>166</sup> Because of the complexity of this process, children seeking SIJS need representation by attorneys.<sup>167</sup> To apply, the child's representative must file the SIJS petition with USCIS, including the completed and signed Form I-360<sup>168</sup> along with required evidence, such as a copy of the state court order, as well as proof of age and identity, such as a birth certificate.<sup>169</sup> Petitioners who are not subject to the SIJS backlog and who are not in removal proceedings may submit an LPR application (Form I-485) simultaneously with the SIJS petition.<sup>170</sup> Until recently, USCIS policy dictated that only children seeking LPR status could apply for work authorization.<sup>171</sup> The Biden Administration changed this policy in 2022 by allowing SIJS petitioners impacted by the SIJS backlog to receive a discretionary grant of deferred action, along with their SIJS approval, which in turn allows them to apply for work authorization.<sup>172</sup> There is no fee to apply for SIJS,<sup>173</sup> and fees to apply for work authorization and biometrics can be waived for SIJS petitioners.<sup>174</sup> For young people struggling to survive and those hoping to attend higher education

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163. 8 U.S.C. § 1101(b)(1).

164. See Hlass, *supra* note 106, at 320.

165. See *id.* at 321.

166. 8 U.S.C. § 1101(a)(27)(J).

167. See Hlass, *supra* note 59, at 252.

168. U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DHS, PETITION FOR AMERASIAN, WIDOW(ER), OR SPECIAL IMMIGRANT: FORM I-360 (2022), <https://www.uscis.gov/sites/default/files/document/forms/i-360.pdf> [<https://perma.cc/9MLM-PSVT>].

169. U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DHS, INSTRUCTIONS FOR PETITION FOR AMERASIAN, WIDOW(ER), OR SPECIAL IMMIGRANT 3 (2022), <https://www.uscis.gov/sites/default/files/document/forms/i-360instr.pdf> [<https://perma.cc/YEX7-P56M>].

170. See Castillo-Granados et al., *supra* note 33, at 1818.

171. See USCIS Announces Policies to Better Protect Immigrant Children Who Have Been Abused, Neglected, or Abandoned, U.S. CITIZENSHIP & IMMIGR. SERVS. (Mar. 7, 2022) [hereinafter *USCIS Announces Policies*], <https://www.uscis.gov/newsroom/news-releases/uscis-announces-policies-to-better-protect-immigrant-children-who-have-been-abused-neglected-or> [<https://perma.cc/Z557-UEV8>]; U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 108, at 1–2.

172. See U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 108, at 1–2; U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DHS, APPLICATION FOR EMPLOYMENT AUTHORIZATION: FORM I-765 (2022), <https://www.uscis.gov/sites/default/files/document/forms/i-765.pdf> [<https://perma.cc/N3QN-DW5A>].

173. See *I-360, Petition for Amerasian, Widow(er), or Special Immigrant*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Feb. 8, 2023), <https://www.uscis.gov/i-360> [<https://perma.cc/G6JC-SGM6>] (stating that SIJs are exempt from paying a filing fee).

174. See U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DHS, INSTRUCTIONS FOR REQUEST FOR FEE WAIVER: FORM I-912, at 1–2 (2021), <https://www.uscis.gov/sites/default/files/document/forms/i-912instr.pdf> [<https://perma.cc/9Q7G-5NX7>] (noting SIJs can waive fees for Form I-485 and I-765).

without access to federal financial aid, this ability to work lawfully has been transformative.<sup>175</sup>

It would be practically impossible for a child to file for SIJS without an attorney. In fact, the child often needs two attorneys, one specializing in family law and one in immigration law.<sup>176</sup> In many regions, pro bono services for children have waiting lists, like the one Ariel was on, or they may be at capacity and not taking new clients.<sup>177</sup> In the SIJS context, access to representation may mean the difference between successfully gaining legal status and remaining undocumented.<sup>178</sup> The process of initiating a state court proceeding in a state court requires the filing of motions and affidavits and, often, the child giving testimony in front of a judge.<sup>179</sup> The form to petition for SIJS is also used for other forms of immigration relief, such as Violence Against Women Act self-petitioners and special religious workers. Therefore, the form is lengthy, currently composed of nineteen pages, with sixteen pages of instructions.<sup>180</sup> Immigration forms typically require specific technical expertise, which is, in part, why USCIS rejects many applications outright for errors and omissions.<sup>181</sup> Moreover, attorneys tend to perform a considerable amount of work to narrate the life of the child into a format that the legal system is able to recognize and adjudicate.<sup>182</sup>

Even with an attorney, children may face barriers throughout the SIJS process, including prolonged processing times and requests from the agency for additional information. USCIS may reject petitions in the first instance for a seemingly minor technical error, or an error by the contracted workers who receive applications at USCIS.<sup>183</sup> Once the agency accepts a child's petition as filed, that date is

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175. Young people have expressed their desperation at not being able to work, due to their economic precarity. See DAVIDSON & HLISS, *supra* note 19, at 15, 17–19.

176. See HLISS, *supra* note 59, at 252.

177. See *id.* at 280–82.

178. See *id.* at 270 (“A vast majority of represented children are allowed to stay in the U.S.—about three out of four. The opposite is true for unrepresented children—four out of five are ordered deported.” (footnote omitted)).

179. See ANGIE JUNCK, ALISON KAMHI & RACHEL PRANDINI WITH KRISTEN JACKSON, IMMIGRANT LEGAL RES. CTR., SPECIAL IMMIGRANT JUVENILE STATUS AND OTHER IMMIGRATION OPTIONS FOR CHILDREN AND YOUTH 172–73 (5th ed. 2018).

180. Many pages are inapplicable to SIJS petitioners and only relevant to other immigrants, which is another challenge that youth must navigate.

181. Although the agency is known for also wrongfully rejecting applications, some advocacy groups have even listed out guidance on avoiding having applications rejected. See, e.g., *Tips for Addressing Rejection of Applications and Contacting Lockbox Support*, CATH. LEGAL IMMIGR. NETWORK, INC. (Nov. 13, 2017), <https://cliniclegal.org/resources/uscis-policy-and-procedure/tips-addressing-rejection-applications-and-contacting-lockbox> [<https://perma.cc/3VEW-35DM>].

182. See Sarah Morando Lakhani, *Producing Immigrant Victims’ “Right” to Legal Status and the Management of Legal Uncertainty*, 38 LAW & SOC. INQUIRY 442, 446 (2013); Austin Sarat & William L.F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer’s Office*, 98 YALE L.J. 1663, 1671 (1989); Deborah G. Martin, Alexander W. Scherr & Christopher City, *Making Law, Making Place: Lawyers and the Production of Space*, 34 PROGRESS HUM. GEOGRAPHY 175, 180–81 (2010).

183. See *Policy Manual: Chapter 3 – Filing Instructions*, U.S. CITIZENSHIP & IMMIGR. SERVS. (May 4, 2023), <https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-3> [<https://perma.cc/Y2YL-ZGM5>] (explaining that, if an application is not properly filed, “USCIS rejects and returns the application”).

considered the priority date, and USCIS issues a receipt notice.<sup>184</sup> By law, USCIS is required to make a decision on the SIJS petition within six months.<sup>185</sup> However, USCIS typically takes much longer.<sup>186</sup> If the adjudicator believes the petitioner has not submitted all required evidence, or that evidence is somehow insufficient, the agency may issue an RFE or a Notice of Intent to Deny (NOID).<sup>187</sup> If the child replies with sufficient evidence, USCIS should grant the petition. Otherwise, the agency may issue a subsequent RFE or NOID, or issue a denial.<sup>188</sup> The agency should issue a NOID if it plans to deny a petition based on derogatory information that may be unknown to the petitioner, or if the agency feels that the evidence is insufficient.<sup>189</sup> NOIDs and RFEs cause significant delays because petitioners may have up to twelve weeks to respond to RFEs<sup>190</sup> and thirty days for NOIDs, and then the agency will take more time to review and adjudicate.<sup>191</sup> However, USCIS considers the statutory six-month adjudication clock to be stopped during the period of an RFE or NOID, allowing it to prolong the adjudication period for SIJS children for months and even years beyond the congressionally imposed six-month adjudication deadline.<sup>192</sup> Although under current practice SIJS seekers are usually not interviewed during the adjudication of the I-360, USCIS has required interviews in the past, which can further extend decision timelines.<sup>193</sup>

Children may experience delays both during the SIJS petition process as well as later when they apply for LPR status. Before 2016, all countries had current priority dates in the SIJS visa category, which meant that many children could apply simultaneously for SIJS and LPR status based on SIJS.<sup>194</sup> If successful in their case, USCIS often approved their SIJS and LPR status on the same day.<sup>195</sup> However, for the first time in 2016, there were visa shortages for SIJS children as

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184. JUNCK ET AL., *supra* note 179, at 179.

185. See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235, 122 Stat. 5044, 5080.

186. See JUNCK ET AL., *supra* note 179, at 60 (“[I]n recent years USCIS is regularly failing to comply with this requirement [of adjudicating petitions within 180 days].”).

187. See *id.* at 202, 225; 8 C.F.R. § 103.2(b)(8) (2023); *Policy Manual: Chapter 6 – Evidence*, U.S. CITIZENSHIP & IMMIGR. SERVS. (May 4, 2022), <https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-6> [<https://perma.cc/FN7P-865A>]. RFEs should request all the evidence the officer anticipates needing to determine eligibility, provide examples of evidence that would be sufficient, and clearly indicate the deadline for response. See *id.*

188. U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 187.

189. See *id.*

190. See *id.*

191. See *id.*

192. See U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DHS, QUESTION & ANSWER SESSION: SPECIAL IMMIGRANT JUVENILE (SIJ) POLICY CLARIFICATIONS ENGAGEMENT 2 (2019), [https://www.uscis.gov/sites/default/files/document/questions-and-answers/Question\\_and\\_Answer\\_Session\\_from\\_Special\\_Immigrant\\_Juvenile\\_SIJ\\_Policy\\_Clarifications\\_Engagement.pdf](https://www.uscis.gov/sites/default/files/document/questions-and-answers/Question_and_Answer_Session_from_Special_Immigrant_Juvenile_SIJ_Policy_Clarifications_Engagement.pdf) [<https://perma.cc/CD36-YCKS>].

193. JUNCK ET AL., *supra* note 179, at 207.

194. See Castillo-Granados et al., *supra* note 33, at 1818–19.

195. See *id.* at 1818. If a child was in immigration court for removal proceedings, they were not allowed to apply simultaneously because the court would typically have jurisdiction over their LPR application. ANDREW CRAYCROFT & RACHEL PRANDINI, IMMIGRANT LEGAL RES. CTR., ADJUSTMENT OF

a result of the employment-based per-country limitations ascribed to SIJS, and initially children from India, El Salvador, Guatemala, Honduras, and Mexico were forced to wait months until their priority date was current to apply for LPR status even after being granted SIJS.<sup>196</sup>

While children from India were only briefly subject to visa shortages before the December 2022 worldwide SIJS visa retrogression,<sup>197</sup> children from El Salvador, Guatemala, Honduras, and Mexico faced years-long waits to even apply to become LPRs starting in 2016. This was due to a purported insufficient number of visas in their category and country, which are necessary to seek LPR status.<sup>198</sup> When there are limited visas for a specific country and immigrant category, the government estimates how many applicants it will allow to apply in the coming month by publishing the priority dates in each category that are current in the visa bulletin.<sup>199</sup> If a child's priority date (the receipt date of the I-360) comes before the date in the visa bulletin, they may submit their LPR application; all others are forced to wait in limbo.<sup>200</sup> As of November 2022, El Salvador, Guatemala, Honduras, and Mexico were all oversubscribed, putting children in a backlog, while SIJS seekers from other countries were allowed to apply for LPR status at the same time they file for SIJS.<sup>201</sup> In December 2022, for the first time ever in the history of SIJS, there was a minimum six-month wait for all SIJS seekers to seek LPR status; meanwhile, the wait for children from El Salvador, Guatemala, and Honduras was at least five years and the wait for children from Mexico was more than two years after being granted SIJS to even apply for LPR status and the protections it affords them.<sup>202</sup> Then in April 2023, the Department of State changed their interpretation of the per-country visa caps, which resulted

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STATUS THROUGH SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) 3 n.13, 10 (2022), [https://www.ilrc.org/sites/default/files/resources/adjustment\\_of\\_status\\_through\\_sijs\\_3-22.pdf](https://www.ilrc.org/sites/default/files/resources/adjustment_of_status_through_sijs_3-22.pdf) [<https://perma.cc/GW96-JF94>].

196. See DAVIDSON & HLOSS, *supra* note 19, at 11.

197. See DECEMBER 2022 VISA BULLETIN, *supra* note 107.

198. See DAVIDSON & HLOSS, *supra* note 19, at 11–12. Compare BUREAU OF CONSULAR AFFS., U.S. DEP'T OF STATE, VISA BULLETIN: IMMIGRANT NUMBERS FOR SEPTEMBER 2016, at 4–5 (2016) [hereinafter SEPTEMBER 2016 VISA BULLETIN], [https://travel.state.gov/content/dam/visas/Bulletins/visabulletin\\_September2016.pdf](https://travel.state.gov/content/dam/visas/Bulletins/visabulletin_September2016.pdf) [<https://perma.cc/GWB4-CZV3>] (including India in the list of oversubscribed countries for EB-4 employment-based visas, which apply to SIJS children), with BUREAU OF CONSULAR AFFS., U.S. DEP'T OF STATE, VISA BULLETIN: IMMIGRANT NUMBERS FOR NOVEMBER 2016, at 4–5 (2016), [https://travel.state.gov/content/dam/visas/Bulletins/visabulletin\\_November2016.pdf](https://travel.state.gov/content/dam/visas/Bulletins/visabulletin_November2016.pdf) [<https://perma.cc/7TCH-JHC4>] (listing El Salvador, Guatemala, and Honduras as oversubscribed for EB-4 cases, but not India), and BUREAU OF CONSULAR AFFS., U.S. DEP'T OF STATE, VISA BULLETIN: IMMIGRANT NUMBERS FOR JULY 2022, at 4–5 (2022), [https://travel.state.gov/content/dam/visas/Bulletins/visabulletin\\_July2022.pdf](https://travel.state.gov/content/dam/visas/Bulletins/visabulletin_July2022.pdf) [<https://perma.cc/P73F-39MS>] (same).

199. See, e.g., SEPTEMBER 2016 VISA BULLETIN, *supra* note 198, at 5.

200. See *id.*

201. See DAVIDSON & HLOSS, *supra* note 19, at 6; Hloss, *supra* note 106, at 280; BUREAU OF CONSULAR AFFS., U.S. DEP'T OF STATE, VISA BULLETIN: IMMIGRANT NUMBERS FOR NOVEMBER 2022, at 4 (2022), [https://travel.state.gov/content/dam/visas/Bulletins/visabulletin\\_%20November2022.pdf](https://travel.state.gov/content/dam/visas/Bulletins/visabulletin_%20November2022.pdf) [<https://perma.cc/5VZQ-3RZR>].

202. See DECEMBER 2022 VISA BULLETIN, *supra* note 107.

in children from all nationalities having the same wait time of more than five years to seek LPR status.<sup>203</sup>

To be eligible for LPR status based on SIJS, the youth must have an approved SIJS petition, a current priority date (meaning they are not subject to the SIJS backlog), and must not be ineligible for a visa due to inadmissibility grounds, which are legal bases to deny admission to the United States.<sup>204</sup> Inadmissibility grounds include health issues, criminal history, certain immigration violations, likelihood to become dependent on public welfare systems, as well as so-called national security grounds.<sup>205</sup> The SIJS statute allows children to remain eligible to seek LPR status based on SIJS despite certain circumstances that would make them “inadmissible” and therefore ineligible for LPR status if they were seeking it based on a family or other type of employment immigrant visa.<sup>206</sup> The waiver of these grounds of inadmissibility is a legal nod to the youthfulness of SIJS petitioners and the lack of agency many of them have over the manner in which they entered the country, and the needs they have had to support themselves without adequate legal or parental support and protection.<sup>207</sup> LPR status is a discretionary benefit, so youth could also be denied even when they were otherwise eligible if the officer or judge believed there were negative discretionary factors present, such as arrests that did not result in convictions.<sup>208</sup>

The LPR process has a similarly complex procedure which is nearly impossible for a child to successfully surmount without a lawyer, including filing an eighteen-page long<sup>209</sup> Form I-485,<sup>210</sup> a filing fee over \$1,000<sup>211</sup> or fee waiver application,<sup>212</sup> and required evidence, including two passport-style photographs, a copy of a government-issued identity document, a birth certificate or other proof

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203. See BUREAU OF CONSULAR AFFS., U.S. DEP’T OF STATE, VISA BULLETIN: IMMIGRANT NUMBERS FOR APRIL 2023 (2023), <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2023/visa-bulletin-for-april-2023.html> [<https://perma.cc/RMA7-EZHM>].

204. See Hlass, *supra* note 106, at 280 & n.72; SARAH BRONSTEIN & MICHELLE MENDEZ, CATH. LEGAL IMMIGR. NETWORK, INC., STRATEGIES FOR SIJS CASES IN LIGHT OF ADJUSTMENT BACKLOG 1 (2016), <https://perma.cc/X379-MSGN>.

205. See 8 U.S.C. § 1182(a) (listing grounds for inadmissibility).

206. 8 U.S.C. § 1255(h).

207. Cf. Castillo-Granados et al., *supra* note 33, at 1841 (“While a waiver is available for some of these grounds of inadmissibility ‘for humanitarian purposes, family unity, or when it is otherwise in the public interest,’ this SIJS-specific waiver is limited and, again, relies on the discretion of the adjudicator.” (footnote omitted) (quoting 8 U.S.C. § 1255(h))).

208. Hlass, *supra* note 94, at 701–02.

209. This is the July 2022 version of the form, which USCIS modifies periodically.

210. U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DHS, APPLICATION TO REGISTER PERMANENT RESIDENCE OR ADJUST STATUS: FORM I-485 (2022) [hereinafter FORM I-485], <https://www.uscis.gov/sites/default/files/document/forms/i-485.pdf> [<https://perma.cc/C9C4-YY3A>]; U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DHS, INSTRUCTIONS FOR APPLICATION TO REGISTER PERMANENT RESIDENCE OR ADJUST STATUS 4 (2022) [hereinafter INSTRUCTIONS FOR FORM I-485], <https://www.uscis.gov/sites/default/files/document/forms/i-485instr.pdf> [<https://perma.cc/RF8W-QHH4>].

211. *I-485, Application to Register Permanent Residence or Adjust Status: Filing Fee*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Dec. 27, 2022), <https://www.uscis.gov/i-485> [<https://perma.cc/CMG8-D2Q6>].

212. See U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 174, at 1.

of age, and a medical examination report completed by an immigration agency-approved doctor.<sup>213</sup> The form is highly detailed, requiring certain biographical information, but also asks more than sixty technical and legal questions which relate to inadmissibility and deportability legal categories, utilizing legal terminology such as “admission” and “exclusion.”<sup>214</sup> Lastly, if any “grounds of inadmissibility” apply, which are legal bases to deny LPR applications due to past immigration, criminal, or other histories, then the child must also submit Form I-601, the attached fee, and supporting evidence to excuse the legal inadmissibility ground.<sup>215</sup> The applicant should file the form with either the immigration court or USCIS, depending on the procedural posture of the case.<sup>216</sup>

Children seeking SIJS and SIJS-based LPR status face many procedural challenges including the difficulties of navigating a state legal system and immigration systems, the practical necessity of securing one or more lawyers, the complexity and length of immigration forms, the costs associated with LPR applications, and the temporal delays throughout the system, particularly the SIJS backlog.

#### D. THE TRUMP ADMINISTRATION’S ATTACKS ON THE SIJS PROGRAM

The legislative and procedural landscape described above is far from static. In fact, in recent years, as the SIJS program has become even more politicized, it has undergone significant internal—often discretionary and less formal—changes that impact how immigrant children seeking SIJS are treated. The Trump Administration’s sweeping anti-immigrant policy agenda impacted immigrant children in particular ways.<sup>217</sup> Children were held in custody longer, prevented from reuniting with available family members,<sup>218</sup> and began aging out of Office of Refugee Resettlement (ORR) care because of extended delays in reunification while ICE implemented a policy of taking children into adult custody on their

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213. See INSTRUCTIONS FOR FORM I-485, *supra* note 210, at 10, 14. Historically, because the medical examination is only valid for a certain period of time, attorneys would provide it right before or during an I-485 interview or, where there is no interview, in response to an RFE issued by USCIS when it is ready to adjudicate the LPR application. Cf. USCIS Temporarily Extending Validity Period of Form I-693, U.S. CITIZENSHIP & IMMIGR. SERVS. (Aug. 12, 2021), <https://www.uscis.gov/newsroom/alerts/uscis-temporarily-extending-validity-period-of-form-i-693> [<https://perma.cc/6RSK-WEQ2>] (announcing COVID policy expanding validity period from two to four years).

214. See, e.g., FORM I-485, *supra* note 210, at 10 (asking whether the individual has ever “been issued a final order of exclusion” or “been denied admission to the United States”). See generally *id.* at 10–15 (asking a variety of legal and technical questions).

215. I-601, *Application for Waiver of Grounds of Inadmissibility*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Dec. 23, 2022), <https://www.uscis.gov/i-601> [<https://perma.cc/A6SK-STT9>].

216. If a child granted or seeking SIJS is in removal proceedings in immigration court, they must seek LPR status before an immigration judge, or seek to dismiss or terminate court proceedings to allow USCIS to assume jurisdiction. See CRAYCROFT & PRANDINI, *supra* note 195, at 10. Children who are not actively in removal proceedings should seek LPR status before USCIS. See *id.* at 4. Children who are categorized as arriving aliens just have their LPR application decided by USCIS, regardless of whether they are in removal proceedings. See *id.* at 10.

217. See Sarah Rogerson, *Cruelty Was the Point: Theories of Recovery for Family Separation and Detention Abuses*, 21 NEV. L.J. 583, 586 (2021); Hlass, *supra* note 80, at 204.

218. See Rogerson, *supra* note 217, at 585–86.

eighteenth birthdays.<sup>219</sup> The immigration court administration reissued instructions on handling children's court cases, advising judges to "be vigilant" in deciding cases of "purported" unaccompanied children.<sup>220</sup> Alongside these policies, SIJS practice saw several changes including implementation of centralization,<sup>221</sup> attempts to categorize children as security threats,<sup>222</sup> a restrictive legal interpretation regarding bona fide juvenile court orders,<sup>223</sup> new RFE and NOID policies, and increased SIJS denials.<sup>224</sup>

The move to centralize SIJS adjudications began before Trump took office,<sup>225</sup> although his agency largely implemented this change. Centralization was purportedly implemented to ensure more consistent and fair processing to protect children.<sup>226</sup> From 1990 to 2016, one of the dozens of local district USCIS field offices adjudicated SIJS petitions, much like naturalization applications or non-asylum cases that involve an interview.<sup>227</sup> In November 2016, USCIS began centralization, adjudicating all SIJS petitions and SIJS-based LPR applications at the National Benefits Center (NBC) in Lee's Summit, Missouri, and Overland Park, Kansas.<sup>228</sup> Child advocates are divided on the costs and benefits of centralization. Some child advocates have expressed concern that centralization has increased opaqueness and instability because practitioners "can no longer rely on their years of collective experience with local USCIS offices to understand how adjudications take place,"<sup>229</sup> undermining their tacit knowledge of local USCIS practice. Others have suggested that centralization has perhaps helped those in regions that had more restrictive local offices by providing more consistent practices and an ability to respond to adjudication trends.<sup>230</sup>

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219. See Final Judgment and Permanent Injunction at 1, *Garcia Ramirez v. U.S. Immigr. & Customs Enf't*, No. 18-508 (D.D.C. Sept. 21, 2021).

220. Memorandum from MaryBeth Keller, Chief Immigr. Judge, Exec. Off. for Immigr. Rev., U.S. DOJ, to All Immigr. Judges, All Ct. Adm'rs, All Att'y Advisors and Jud. L. Clerks & All Immigr. Ct. Staff 8 (Dec. 20, 2017), <https://www.justice.gov/eoir/file/oppm17-03/download> [<https://perma.cc/43ST-TKN2>].

221. See *USCIS to Centralize Processing of Special Immigrant Juvenile Cases*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Nov. 1, 2016) [hereinafter *USCIS to Centralize*], <https://www.uscis.gov/archive/uscis-to-centralize-processing-of-special-immigrant-juvenile-cases> [<https://perma.cc/6VQK-BLU2>].

222. See Hlass, *supra* note 80, at 233–34.

223. See SHARON HING, ALISON KAMHI & RACHEL PRANDINI, IMMIGRANT LEGAL RES. CTR., SPECIAL IMMIGRANT JUVENILE STATUS: RESPONDING TO INAPPROPRIATE RFES AND NOIDS IN SPECIAL IMMIGRANT JUVENILE STATUS CASES 2 (2018), [https://www.ilrc.org/sites/default/files/resources/sijs\\_respond\\_inapp\\_rfes\\_noids-20190102.pdf](https://www.ilrc.org/sites/default/files/resources/sijs_respond_inapp_rfes_noids-20190102.pdf) [<https://perma.cc/AXA4-YXEK>].

224. *Id.* at 1–2.

225. See *USCIS to Centralize*, *supra* note 221.

226. See Memorandum from León Rodríguez, Dir., U.S. Citizenship & Immigr. Servs., U.S. DHS, to Maria Odom, CIS Ombudsman, U.S. Citizenship & Immigr. Servs., U.S. DHS 1–2 (Apr. 19, 2016), [https://www.uscis.gov/sites/default/files/document/legal-docs/Response\\_to\\_CISOMB\\_SIJ\\_Recommendations\\_CSPE\\_LCU\\_9.28.16.pdf](https://www.uscis.gov/sites/default/files/document/legal-docs/Response_to_CISOMB_SIJ_Recommendations_CSPE_LCU_9.28.16.pdf) [<https://perma.cc/WB6J-VHD6>].

227. See U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 192, at 2.

228. See *id.*; *USCIS to Centralize*, *supra* note 221.

229. HING ET AL., *supra* note 223.

230. Attachment to E-mail from Dalia Castillo-Granados, Dir., Child.'s Immigr. L. Acad., to Rachel Leya Davidson, Dir., End SIJS Backlog Coal., Nat'l Immigr. Project & Laila L. Hlass, Professor, Tulane Univ. L. Sch. (Oct. 28, 2022) (on file with authors).

Another possible impact of centralized adjudication is having made it easier for the Trump Administration to consistently protract and deny SIJS and SIJS adjustments, often through dubious accusations of gang affiliation. Early into Trump's presidency, the Administration explicitly tried to categorize their efforts in curbing child migration as a strategy to combat gang violence.<sup>231</sup> A leaked internal Department of Homeland Security (DHS) memo reveals their efforts to deny more SIJS cases by more "carefully scrutiniz[ing] the possibility of gang membership/affiliation" and "review[ing] whether USCIS's consent function can be used to deny a case involving gang membership."<sup>232</sup> Around this time, advocates reported trends of clients being denied immigration benefits due to unfounded allegations of gang membership based on flimsy information such as the brand of sneakers they wore in pictures on social media.<sup>233</sup> In 2017, a class of immigrant children sued the government for their practice of using flimsy and false allegations of gang affiliation to illegally detain them in jail-like facilities and denying SIJS and other immigration benefits based on these same flawed claims.<sup>234</sup> This suit, later under the name *Saravia v. Barr*, concluded in settlement and the vast majority of children being released, many after a court-ordered custody hearing.<sup>235</sup> USCIS later codified the *Saravia* settlement in its Policy Manual by making clear USCIS will not refuse consent or revoke SIJS "based in whole or in part on the fact that the state court did not consider or sufficiently consider evidence of the petitioner's gang affiliation"; further, USCIS confirmed they will not use "consent authority to reweigh the evidence that the juvenile court considered when it issued the predicate order."<sup>236</sup>

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231. See Press Release, U.S. DHS, Unaccompanied Alien Children and Family Units Are Flooding the Border Because of Catch and Release Loopholes (Feb. 15, 2018) (available at <https://www.dhs.gov/news/2018/02/15/unaccompanied-alien-children-and-family-units-are-flooding-border-because-catch-and> [<https://perma.cc/RK69-BNLR>]) ("UACs provide fertile recruiting ground for violent gangs, such as MS-13."); Remarks by President Trump at Law Enforcement Roundtable on MS-13, TRUMP WHITE HOUSE ARCHIVES (Feb. 6, 2018, 1:57 PM) [hereinafter *Remarks by President Trump*], <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-law-enforcement-roundtable-ms-13/> [<https://perma.cc/JN5J-W7RA>] (quoting Department of Justice official as saying "[MS-13] recruit[s] children to be their murderers").

232. Draft Memorandum from U.S. DOJ, *supra* note 55; see Alvarez, *supra* note 55.

233. See HLASS & PRANDINI, *supra* note 94, at 11–12; N.Y. IMMIGR. COAL. & CITY UNIV. OF N.Y. SCH. OF L. IMMIGRANT & NON-CITIZEN RTS. CLINIC, SWEEPED UP IN THE SWEEP: THE IMPACT OF GANG ALLEGATIONS ON IMMIGRANT NEW YORKERS 9 (2018), [https://www.law.cuny.edu/wp-content/uploads/page-assets/academics/clinics/immigration/SweptUp\\_Report\\_Final-1.pdf](https://www.law.cuny.edu/wp-content/uploads/page-assets/academics/clinics/immigration/SweptUp_Report_Final-1.pdf) [<https://perma.cc/25SY-P8RW>].

234. See Second Amended Petition for Writ of Habeas Corpus and Class Action Complaint for Injunctive and Declaratory Relief at 2, 21, *Saravia v. Whitaker*, No. 17-cv-03615 (N.D. Cal. Nov. 15, 2018).

235. See Settlement Agreement and Release at 11, *Saravia v. Barr*, No. 17-cv-03615 (N.D. Cal. Sept. 17, 2020); *Court Cases: Saravia v. Barr*, ACLU (Oct. 22, 2020), <https://www.aclu.org/cases/saravia-v-barr> [<https://perma.cc/XH4W-BS8Z>] ("Over 35 children were granted hearings . . . and over 30 of them were released because the government's evidence of gang affiliation was either flimsy or non-existent.").

236. U.S. CITIZENSHIP & IMMIGR. SERVS, U.S. DHS, POLICY ALERT: SPECIAL IMMIGRANT JUVENILE CLASSIFICATION AND SARAVIA V. BARR SETTLEMENT 1 (2021), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210318-SIJ.pdf> [<https://perma.cc/UG7B-4SEN>].



As President Trump publicly railed against the SIJS law,<sup>237</sup> USCIS increased scrutiny of state juvenile court orders, first through internal legal guidance,<sup>238</sup> which it did not release publicly for a year until the policy manual changed. When USCIS first issued legal guidance internally to decisionmakers, government email correspondence reveals USCIS affirmatively decided to not “open this can of worms” by alerting stakeholders of changes to adjudication,<sup>239</sup> but instead suggested waiting until the publication of new policies in the USCIS policy manual, more than a year later.<sup>240</sup> In 2018, USCIS attempted to restrict SIJS access even further through new guidance broadening when it plans to issue RFEs and NOIDs, as well as articulating that USCIS could issue outright denials without having issued an RFE or NOID first.<sup>241</sup> Worse, USCIS indicated it would begin putting children with denied SIJS who were otherwise out of status in removal proceedings.<sup>242</sup>

As a result of these Trump Administration policies, USCIS began to deny more SIJS cases from 2017 through 2019, as well as mount further procedural barriers to accessing SIJS through the use of RFEs and NOIDs; in response, children’s advocates sued the agency in two separate class actions, challenging the legality of these new restrictive practices in New York (*R.F.M. v. Nielsen*)<sup>243</sup> and

237. See *President Trump Sends a Letter on Border Security to Congress*, TRUMP WHITE HOUSE ARCHIVES (Jan. 4, 2019) [hereinafter *President Trump Sends a Letter*], <https://trumpwhitehouse.archives.gov/articles/president-trump-sends-letter-border-security/> [<https://perma.cc/L2DZ-BLNG>]; *Remarks by President Trump*, *supra* note 231.

238. U.S. CITIZENSHIP & IMMIGR. SERVS. OFF. OF THE CHIEF COUNS., U.S. DHS, LEGAL GUIDANCE: CLARIFICATION OF INTERPRETATION OF “REUNIFICATION WITH ONE OR BOTH PARENTS” FOR PURPOSES OF ESTABLISHING ELIGIBILITY FOR SIJ CLASSIFICATION (2018), <https://perma.cc/NR2S-LFPU>. The Catholic Legal Immigration Network, Inc. (CLINIC) obtained this file by FOIA request. See *CLINIC Obtains FOIA Disclosures on Special Immigrant Juvenile Status Policies After Bringing Lawsuit*, *CLINIC v. USCIS*, CATH. LEGAL IMMIGR. NETWORK, INC. (Jan. 22, 2021) [hereinafter *CLINIC Obtains FOIA Disclosures*], <https://cliniclegal.org/resources/freedom-information-act/clinic-obtains-foia-disclosures-special-immigrant-juvenile-status> [<https://perma.cc/W4J6-5YJ5>].

239. E-mail from Sarah A. Lowman, Cmty. Rels. Officer, U.S. Citizenship & Immigr. Servs., to Helen E. Dallam, Maria P. Pastrana-Lujan & Margot S. Dankner (Mar. 14, 2018, 12:12 PM), <https://perma.cc/MS7Y-W9PK> (“[D]o we want to open this can of worms . . . or should we wait until the manual is complete?”); E-mail from Margot S. Dankner, Pol’y Analyst, U.S. Citizenship & Immigr. Servs., to Sarah A. Lowman, Helen E. Dallam & Maria P. Pastrana-Lujan (Mar. 14, 2018, 1:15 PM), <https://perma.cc/MS7Y-W9PK> (“This legal guidance is currently just for adjudicators.”). CLINIC obtained these email threads by FOIA request as well. See *CLINIC Obtains FOIA Disclosures*, *supra* note 238.

240. See HING ET AL., *supra* note 223, at 1.

241. See *id.*

242. See U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DHS, POLICY MEMORANDUM: UPDATED GUIDANCE FOR THE REFERRAL OF CASES AND ISSUANCE OF NOTICES TO APPEAR (NTAS) IN CASES INVOLVING INADMISSIBLE AND DEPORTABLE ALIENS 7 (2018), <https://www.uscis.gov/sites/default/files/document/memos/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf> [<https://perma.cc/CU25-7R7A>] (“USCIS will issue an NTA where, upon issuance of an unfavorable decision on an application, petition, or benefit request, the alien is not lawfully present in the United States.”).

243. Complaint at 1, 14–16, *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350 (S.D.N.Y. 2019) (No. 18-cv-5068).

California (*J.L. v. Cuccinelli*).<sup>244</sup> Both lawsuits challenged USCIS's new policy and practice of denying SIJS to children aged eighteen to twenty-one;<sup>245</sup> USCIS claimed it based the new practice on the lack of authority of the state courts issuing SIJS orders to make such findings.<sup>246</sup> In *R.F.M.*, a federal court found the Over-Eighteen Denial Policy illegal and granted relief to the more than 6,600 class members whose petitions were based on SIJS orders from the New York Family Court between their eighteenth and twenty-first birthdays.<sup>247</sup> Upon settlement in *J.L.*, USCIS agreed that the California Probate Court is qualified as a juvenile court to make SIJS findings, that they would no longer deny cases under the basis of the juvenile court not having authority to reunify the child with the parent, and that otherwise-eligible SIJS children should not be disqualified simply because they are between the ages of eighteen and twenty-one.<sup>248</sup>

The political context described above has far-reaching consequences, beyond case outcomes, on lived realities of SIJS youth. One study regarding the mental health of Latina/o immigrant students describes the “ecological” or “macrosystemic” impact whereby the interrelated and varied experiences youth face “shape opportunities and have important implications for a number of developmental outcomes.”<sup>249</sup> Specifically, xenophobic public messages, the decades-long inability of Congress to pass immigration reform, and the intensification of the deportation apparatus all act as the reality in which these young people attempt to navigate daily life with wide-ranging implications for children's education, health, and well-being, placing them at “heightened psychological risk.”<sup>250</sup> The Trump era, and specifically 2018, was a watershed moment within the SIJS framework and has left indelible markers on the psychosocial well-being of youth who navigated the SIJS process in that climate, heightening their precarity on a systemic as well as socio-emotional level. Although SIJS petitioners experience precarity before they enter the SIJS process, navigating the immigration legal system may extend their precarity. Prior to this study, there has not been an empirical investigation of how children seeking SIJS and SIJS-based LPR status face legal, policy, procedural, and political challenges in accessing protection, protracting their precarity.

#### E. LACK OF TRANSPARENCY REGARDING SIJS PROTECTIONS

Even with detailed legislative, regulatory, policy, and litigation histories of SIJS, larger trends can be obscured without access to USCIS data sets relating to the adjudication of SIJS and SIJS-based LPR applications. Some limited

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244. Settlement Agreement at 1, *J.L. v. Cuccinelli*, No. 18-CV-4914 (N.D. Cal. Oct. 25, 2019).

245. *See id.*; Complaint, *supra* note 243, at 1.

246. *See* Complaint, *supra* note 243, at 2.

247. *See* THE LEGAL AID SOC'Y & LATHAM & WATKINS, LLP, *R.F.M. v. NIELSEN PRACTICE ADVISORY 1* (2019), <https://legallaidnyc.org/wp-content/uploads/2019/06/SIJS-RFMPPracticeAdvisoryJune102019.pdf> [<https://perma.cc/47F7-8SAL>].

248. *See* Settlement Agreement, *supra* note 244, at 1, 6.

249. Suárez-Orozco & Hernández, *supra* note 110, at 2.

250. *Id.*

information about SIJS petitions<sup>251</sup> and LPR-based SIJS admissions<sup>252</sup> is publicly available, namely the number of SIJS petitions received and whether they are approved, denied, or pending, as well as the number of LPRs admitted based on SIJS. USCIS does not publish more detailed and illustrative information such as applicants' country of origin, U.S. state of residence, gender, and age, linked to processing times and outcomes. In March of 2023, USCIS started publishing a little more data on SIJS adjudications, including the number of RFEs and NOIDs issued and processing times, in response to a directive from Congress in the 2023 Consolidated Appropriations Act.<sup>253</sup> However, this data is inadequate, most egregiously failing to include the length of time SIJS cases are pending prior to final adjudication. This lack of transparency makes it difficult to precisely identify adjudication trends and points of precarity in the process and is in itself a form of legal violence.

To shine a light on adjudication trends for young people seeking SIJS and SIJS-based LPR status, the first two authors submitted an expedited Freedom of Information Act (FOIA) request to USCIS in April 2021.<sup>254</sup> The FOIA letter requested SIJS petitions from 2010 through 2021 with detailed information, including case histories, demographics of petitioners, outcomes, processing times, whether petitioners were represented and by whom, whether they were in removal proceedings, and whether children were ever detained by ORR.<sup>255</sup> The FOIA letter also asked for SIJS-based LPR applications from 2014 through 2021 including case histories, service center where processed, state and city of residence, gender, age, and whether they were in removal proceedings.<sup>256</sup>

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251. This is through annual reports as well as quarterly SIJS Case Status Updates. *See, e.g.*, U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DHS, ANNUAL STATISTICAL REPORT: FY 2021, at 18 (2021), <https://www.uscis.gov/sites/default/files/document/reports/2021%20USCIS%20Statistical%20Annual%20Report.pdf> [<https://perma.cc/FL77-XNXE>]; U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DHS, NUMBER OF I-360 PETITIONS FOR SPECIAL IMMIGRANT WITH A CLASSIFICATION OF SPECIAL IMMIGRANT JUVENILE (SIJ) BY FISCAL YEAR, QUARTER, AND CASE STATUS: FISCAL YEARS 2010–2022 (2022) [hereinafter NUMBER OF I-360 PETITIONS], [https://www.uscis.gov/sites/default/files/document/data/I360\\_sij\\_performancedata\\_fy2022\\_qtr4.pdf](https://www.uscis.gov/sites/default/files/document/data/I360_sij_performancedata_fy2022_qtr4.pdf) [<https://perma.cc/QQ6Q-8MW6>].

252. *Lawful Permanent Residents (LPR)*, DHS (Feb. 13, 2023), <https://www.dhs.gov/immigration-statistics/lawful-permanent-residents> [<https://perma.cc/PJ5P-CQEV>].

253. H. COMM. ON APPROPRIATIONS, 117TH CONG., CONSOLIDATED APPROPRIATIONS ACT, 2023: LEGISLATIVE TEXT AND EXPLANATORY STATEMENT 1365 (Comm. Print 2023), <https://www.congress.gov/117/cprt/HPRT50347/CPRT-117HPRT50347.pdf> [<https://perma.cc/7JR5-KBXX>]; *see* U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DHS, I-360, PETITION FOR AMERASIAN, WIDOW(ER), OR SPECIAL IMMIGRANT (2023), [https://www.uscis.gov/sites/default/files/document/data/I360\\_SIJ\\_Congressional\\_FY23Q1.pdf](https://www.uscis.gov/sites/default/files/document/data/I360_SIJ_Congressional_FY23Q1.pdf) [<https://perma.cc/Y4KW-4J5N>].

254. Laila Hlass in her own capacity and Rachel Leya Davidson as a representative of the Door Legal Services Center drafted and filed the FOIA. *See* FOIA Request for Data Regarding Special Immigrant Juveniles from Laila L. Hlass, Professor, Tulane Univ. L. Sch. & Rachel Leya Davidson, Managing Att'y for Pol'y & Special Projects, The Door, to FOIA/PA Headquarters Off., U.S. Citizenship & Immigr. Servs. (Apr. 21, 2021) [hereinafter 2021 FOIA Request] (on file with authors).

255. *See id.* at 2–3.

256. *See id.*

At the time of the request, a coalition of over seventy national organizations<sup>257</sup> was pushing Congress to include reforms to the SIJS statute in the 2021 reconciliation bill.<sup>258</sup> The urgency of these reforms, reflected in the expedited FOIA request, arose from shared experiences among advocates who were scrambling to respond to a growing number of immigrant children seeking relief who were being stymied in the system due to the SIJS backlog.<sup>259</sup> Members of Congress needed more information about SIJS adjudication to quantify the impact of proposed legal reforms, and only USCIS has access to these public records.<sup>260</sup>

Months later,<sup>261</sup> USCIS denied the authors' request for expedited processing despite evidence that demonstrated the urgent need for this data.<sup>262</sup> The denial letter was formulaic, even boilerplate, failing to address the substantive evidence provided by the requesters about the urgency to inform the public about federal government activity.<sup>263</sup> In August 2021, the authors filed a lawsuit against USCIS to obtain these public records, represented by attorneys at Milbank LLP.<sup>264</sup> Within weeks of filing the lawsuit in the D.C. District Court, the government released a partial data set to the authors, which it allegedly pulled from its database in April 2021.<sup>265</sup> The timing of the release of the partial data begs the

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257. See Press Release, End SIJS Backlog, The Door & Milbank, Immigration Advocacy Coalition Files Lawsuit Against USCIS for Special Immigrant Juvenile Status Data 1 (Aug. 18, 2021), <https://static1.squarespace.com/static/5fe8d735a897d33f7e7054cd/t/611cf9eef8f20c2054ea8268/1629288942639/PressRelease-SIJSFOIALawsuit-18Aug2021.pdf> [<https://perma.cc/A8PQ-4XAH>].

258. See Marianna Sotomayor & Maria Sacchetti, *Hispanic Democrats Warn of the Perils of Dropping Immigration Proposals from Biden's Domestic Spending Bill*, WASH. POST. (Nov. 2, 2021, 7:16 PM), [https://www.washingtonpost.com/politics/immigration-democrats-reconciliation/2021/11/02/b40ac03c-3b89-11ec-a67c-d7c2182dac83\\_story.html](https://www.washingtonpost.com/politics/immigration-democrats-reconciliation/2021/11/02/b40ac03c-3b89-11ec-a67c-d7c2182dac83_story.html); Elaine Kamarck, *Can Biden Pass Immigration Reform? History Says It Will Be Tough*, BROOKINGS (June 22, 2021), <https://www.brookings.edu/blog/fixgov/2021/06/22/can-biden-pass-immigration-reform-history-says-it-will-be-tough/> [<https://perma.cc/JSM6-2UWG>].

259. Cf. *Unaccompanied Children Released to Sponsors by State and County, FY 2014–Present*, MIGRATION POL'Y INST., <https://www.migrationpolicy.org/programs/data-hub/charts/unaccompanied-children-released-sponsors-state-and-county> [<https://perma.cc/KXD8-FAB3>] (last visited May 23, 2023) (showing increasing numbers of child immigrants, specifically from 2020 through 2022).

260. See Press Release, End SIJS Backlog et al., *supra* note 257, at 1–2, 5.

261. USCIS's denial letter was dated April 21, 2021, the same date as our request, but electronic notice of the decision was posted on June 3, 2021, and a physical letter did not arrive to Professor Hlass's Tulane mailing address until June 2021.

262. See Letter from Terri White, Acting Dir., FOIA Operations, U.S. Citizenship & Immigr. Servs., to Laila Hlass, Professor, Tulane Univ. L. Sch. 2–3 (Apr. 21, 2021) (on file with authors).

263. See *id.* at 2 (“Based on the information you provided, we have determined expedited processing of your request is not warranted.”).

264. See Complaint at 1, *Hlass v. U.S. Citizenship & Immigr. Servs.*, No. 21-cv-02200 (D.D.C. Aug. 18, 2021); Press Release, End SIJS Backlog et al., *supra* note 257.

265. See E-mail from Laila L. Hlass, Professor, Tulane Univ. L. School, to Stephen Benz, Assoc., Milbank, Aaron Renenger, Partner, Milbank & Rachel Leya Davidson, Dir., End SIJS Backlog Coal., Nat'l Immigr. Project (Sept. 17, 2021) (on file with authors); E-mail from Brenda González Horowitz, Assistant U.S. Att'y, Civ. Div., U.S. Att'y's Off. for D.C., to Aaron Renenger, Partner, Milbank (Sept. 27, 2021) (on file with authors); E-mail from Aaron Renenger, Partner, Milbank, to Brenda González Horowitz, Assistant U.S. Att'y, Civ. Div., U.S. Att'y's Off. for D.C. (Sept. 30, 2021) (on file with authors).

question as to why USCIS refused to release the data initially. The release of that partial data set was the start of what has become an almost two-year-long ongoing negotiation with the government to obtain a fuller, more accurate data set that is responsive to the authors' initial FOIA request.

USCIS denied the authors' requests for certain digital records that mirrored fields on the I-360, such as the number of SIJS petitioners in removal proceedings at the I-360 stage, information on whether individuals were or had been in the custody of the ORR, the basis for the SIJS eligibility (abuse, abandonment, neglect, or a similar basis by one or both parents), and the number of petitioners in foster care.<sup>266</sup> The requests for this information were denied on the basis that USCIS did not track that information.<sup>267</sup>

The battle for data transparency on SIJS, and the impact of the government's refusal to share accurate information with the authors and advocates, is another form of legal violence, increasing the precarity of immigrant children. Every month that the government obscures the data hinders advocates' work to improve the SIJS system. Moreover, the temporal and financial costs to the government, the courts, and the authors' almost two-year-long court-supervised negotiations are a drain on the resources of advocates and the government, where those same resources would be better spent improving the problems with the SIJS protection for children seeking humanitarian relief.

## II. AN EMPIRICAL ANALYSIS OF THE SIJS PROGRAM

This Article posits that although SIJS is designed to provide permanent protection to immigrant children, the everyday operations of the program over time often undermine that goal. This thesis emerged initially from the experiences of immigration attorneys and child advocates who work directly with SIJS youth. Before proceeding to analysis, we describe how the digital records were collected and analyzed.

The records we analyze on the SIJS program reflect the two-part process of seeking SIJS-based LPR status, which begins at the federal level with an I-360 petition for SIJS recognition and, if approved, continues as an I-485 application for LPR status. USCIS provided SIJS data to the first two authors in two

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266. See 2021 FOIA Request, *supra* note 254, at 1–2. During settlement, USCIS provided some information regarding I-360 petitions flagged as being in removal proceedings, but USCIS confirmed the number was not reliable because officers were not consistently flagging this. See E-mail from Aaron Renenger to Brenda González Horowitz, *supra* note 265; E-Mail from Rachel Leya Davidson, Dir., End SIJS Backlog Coal., Nat'l Immigr. Project, to Stephen Benz, Assoc., Milbank, Laila L. Hlass, Professor, Tulane Univ. L. Sch., Aaron Renenger, Partner, Milbank & Becky Heller, Deputy Pro Bono Couns., Milbank (Oct. 15, 2021) (on file with authors) (sending notes from call with assistant U.S. attorney); Letter from Cynthia Munita, Dir., FOIA Operations, to Laila Hlass, Professor, Tulane Univ. L. Sch. (Apr. 19, 2022) (on file with authors) (sending additional data); Attachment to E-mail from Stephen Benz, Assoc., Milbank, to Laila L. Hlass, Professor, Tulane Univ. L. Sch., Beth Baltimore, Pro Bono Managing Att'y, The Door, Aaron Renenger, Partner, Milbank & Becca Olson, Assoc., Milbank (Nov. 29, 2022) (on file with authors).

267. See E-mail from Aaron Renenger to Brenda González Horowitz, *supra* note 265; E-mail from Rachel Leya Davidson to Stephen Benz et al., *supra* note 266.

unconnected sets of digital records on SIJS petitioners and SIJS-based LPR applicants.<sup>268</sup> The first set of digital records included case-by-case records on 153,374 I-360 petitions filed by children seeking SIJS between 2010 and 2021, effectively encompassing 2010 to 2022.<sup>269</sup> The second set of digital records included case-by-case records on 35,651 I-485 applications, filed between 2014 and 2021.<sup>270</sup> The two data sets share no single common identifier that would permit analysis across the two data sets.

Validation is an important part of any quantitative study. Data quality and completeness cannot be assumed just because the U.S. government provided the data through the FOIA process, and the authors, like other FOIA requesters, cannot review and evaluate every step of the agency's methodology for extracting these data. Nevertheless, comparing data received by the agency with previously published summaries of SIJS petitions provides reasonable assurances that the authors and the agency have examined a similar set of underlying data. In this regard, the number of I-360 petitions in the data analyzed in this Part reflects reasonably similar (though not identical) numbers to USCIS's previously published reports and lends credibility to the data.<sup>271</sup> The number of completed I-485 applications also reflects reasonably similar numbers to USCIS's previously published reports for 2018 to 2021, although it appears to dramatically undercount adjudicated applications prior to 2017 and somewhat undercount in 2018.<sup>272</sup> For instance, USCIS's data on I-485 applications adjudicated in 2014 appear incomplete with only six completed applications recorded as filed, even though, according to the USCIS Yearbook of Immigration Statistics, well over 3,000 SIJs adjusted to LPR status that year.<sup>273</sup> Although the data only show that the agency adjudicated seven I-485 applications in 2016 and only sixteen in 2017, the I-485s filed in those fiscal years appear to be more robust.<sup>274</sup> The authors raised this concern with USCIS representatives who eventually admitted that there were many more SIJS-based applications received prior to 2017, but because of how they collected data they do not have more reliable means to extract SIJS-based I-485s from earlier years.<sup>275</sup> To address these inconsistencies, when the analysis in this

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268. The data from these records, obtained via FOIA request and subsequent litigation, are the basis for the analyses in this Part.

269. There were some I-360 petitions decided in October and November 2021, which is the beginning of FY 2022.

270. There were some I-485 applications decided in October and November 2021, which is the beginning of FY 2022.

271. See, e.g., NUMBER OF I-360 PETITIONS, *supra* note 251 (publishing the number of I-360 petitions received, approved, denied, and pending from 2010 through 2021).

272. See DHS 2018 YEARBOOK, *supra* note 122 (recording 4,505 adjustments); DHS 2019 YEARBOOK, *supra* note 122 (recording 4,988 adjustments); DHS 2020 YEARBOOK, *supra* note 122 (recording 5,545 adjustments).

273. See DHS 2014 YEARBOOK, *supra* note 122 (recording 3,328 adjustments).

274. See DHS 2016 YEARBOOK, *supra* note 122 (recording 5,465 adjustments); DHS 2017 YEARBOOK, *supra* note 122 (recording 4,681 adjustments).

275. See Attachment to E-mail from Stephen Benz to Laila L. Hlass et al., *supra* note 266. The attachment provided responses from USCIS to the authors' questions, stating that "USCIS agrees with the requester that there are many more SIJ-based applications received in those and earlier years. Those

Part represents time series data, the analysis excludes I-485 applications adjudicated before 2018.

This Part proceeds as follows. First, we analyze the data set as a whole, examining how the politicization of SIJS vastly impacted adjudications. Next, we look at key identifiers of precarity of SIJS petitioners including how nationality, removal proceedings, gender, legal representation, geography, age, and processing times impact case outcomes. Finally, we examine how the SIJS backlog exacerbates the precarity of children applying for SIJS and protracts a critical developmental period, preventing them from successfully moving into adulthood.

#### A. THE POLITICIZATION OF THE SIJS PROGRAM

There has been a sharp increase in the number of children seeking SIJS over the last decade.<sup>276</sup> This growth has happened alongside a growing number of Central American child immigrants, a proliferation of nonprofits focused solely on child migration or with a child-specific practice and increasing familiarity with SIJS within the broader immigration bar.<sup>277</sup> Despite the size and vulnerability of the population involved, the SIJS program has yet to be empirically studied during this period of growth of the SIJS youth population. In this Section, we use administrative records obtained from USCIS to quantify the increase, while drawing out the politicization of the SIJS process and precarity of SIJS youth through analysis of SIJS petitions and SIJS-based LPR applications over time. Perhaps the most stunning revelation is how clearly the Trump Administration's antagonism toward immigrant children and politicization of SIJS can be empirically observed. Specifically, denial rates of SIJS and SIJS-based LPR applications increased dramatically with the Trump Administration. The records also show how USCIS slowed issuing final decisions to a near halt in 2018, and deployed adjudicators to instead issue thousands more RFEs and NOIDs. USCIS took these actions after Attorney General Sessions, one of the architects of family separation policies, claimed that some immigrant children were "wolves in sheep clothing" in 2017<sup>278</sup> and while President Trump called SIJS a "loophole"<sup>279</sup> and asked Congress to drastically amend the SIJS law to restrict access to the protection.<sup>280</sup> As we demonstrate, this discourse is emblematic of broader and more lasting revisioning of the SIJS program that occurred during the Trump era through

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SIJ based-applications however, in the form used prior to 2017, are co-mingled with many other categories of applications that are based on any approved petition . . . ." *Id.*

276. See *Growing Numbers*, *supra* note 63.

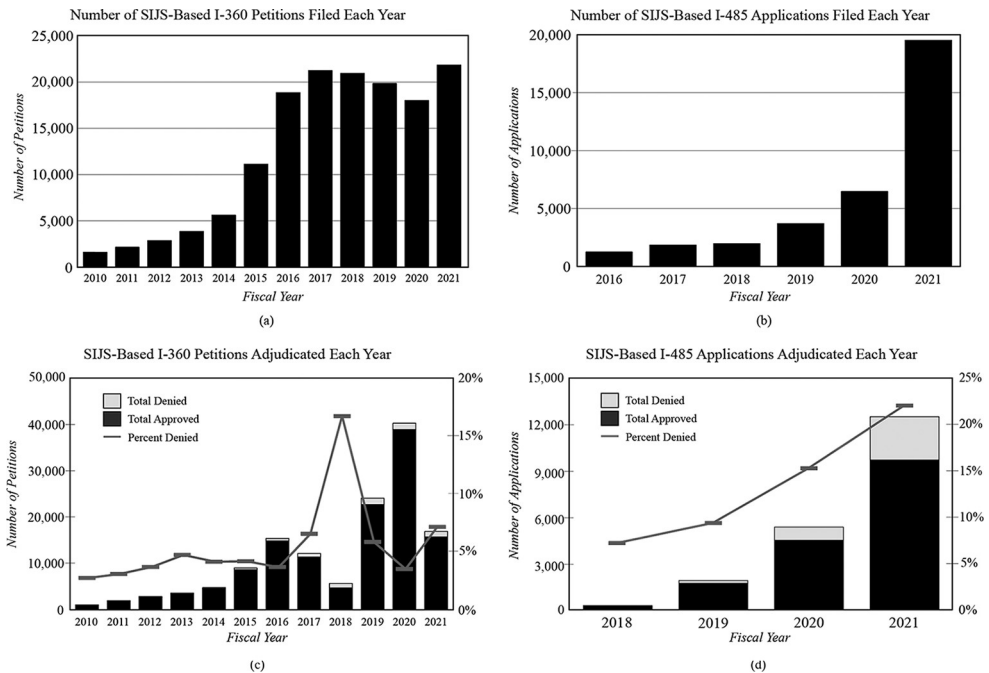
277. See Hlass, *supra* note 106, at 288–89, 289 n.113 (describing a growing number of immigrant youth as well as national nonprofits focused on immigrant children).

278. Josh Delk, *Sessions: Some Undocumented Minors are 'Wolves in Sheep Clothing,'* HILL (Sept. 21, 2017, 10:37 PM), <https://thehill.com/blogs/blog-briefing-room/351852-sessions-some-undocumented-minors-are-wolves-in-sheeps-clothing/> [<https://perma.cc/785M-A2LF>].

279. *President Trump Sends a Letter*, *supra* note 237; see *Remarks by President Trump*, *supra* note 231.

280. *President Trump Sends a Letter*, *supra* note 237.

internal non-publicized policy shifts, whose reverberations are still seen today in the ways the program is administered, despite a rhetorical shift and public valuation of the program by the Biden Administration.



**Figure 1. Overview of I-360 Petitions and I-485 Applications**

Figure 1 provides an overview of the number of forms filed by fiscal year and the outcomes by fiscal year, demonstrating the growth in SIJS petitions and SIJS-based LPR applications, as well as spikes in denial rates for both protections. Figure 1(a) shows the number of applications of I-360s (top left) each fiscal year. The data confirm practitioners’ observations that more children needed, and were applying for, SIJS. This upward trend was strongest from 2010 to 2016 when the number of I-360 petitions grew from 1,610 to 19,300, a nearly twelve-fold increase. But after 2016, the growth of I-360 petitions dissipated and numbers declined slowly but consistently through the end of 2020. In 2021, annual SIJS petitions increased for the first time in five years. Thus, while it is true that the 22,368 I-360 petitions received by USCIS in 2021 are the highest on record, this only barely edges out the 21,761 applications filed in 2017. The coming years will reveal whether this increase represents a new period of growth or whether the number of I-360 petitions will continue to hover around 20,000 per year.

The number of immigrant youth captured by the I-360 data represents a fraction of the total number of immigrant youth who might benefit from SIJS. Even before SIJS petitioners submit an I-360, they have already been through the state court system, a challenging process marred by unequal access to representation, a



patchwork of state laws, geographically uneven infrastructures of child welfare, and other factors beyond the control and experiences of the SIJS-eligible child.<sup>281</sup> Any compositional factors among petitioners, such as stronger child welfare laws in one state or lower rates of representation among certain nationalities, may also affect who can apply for SIJS. Therefore, Figure 1(a) represents a small but growing subset of the total number of immigrant youth who face hardships that would, if given adequate support, qualify them for SIJS.

In contrast to the data on I-360 petitions, the number of I-485 applications has been growing steadily each year from 1,240 in 2016 to more than fifteen times that in 2021 with 19,492 applications (shown in Figure 1(b)). From 2018, the total number of SIJS-based LPR applications nearly doubled from 1,947 to 3,678, nearly doubled again to 6,456, then tripled to 19,492. As this Article discusses in further detail, delays in navigating through the I-360 process, as well as artificially imposed limitations on the number of visas available to SIJS youth, create a backlog that may, in certain years, surge into the I-485 stage of the SIJS process.<sup>282</sup> Even so, unlike I-360s, I-485s do not appear to have leveled off and ongoing research (as well as transparency on behalf of USCIS) is essential to understanding the longer-term trajectory of these cases.

The steep spike in denials of I-360s in a particularly politicized 2018 as well as increased denial rate of I-485 over the last several years can be observed in Figures 1(c) and 1(d), which show the outcomes of I-360 and I-485 applications as either approvals or denials. Of the 138,696 I-360s that have been adjudicated, USCIS approved 94.3% (130,731) and denied 5.2% (7,245). A much smaller number of applications (too small to be viewed in these graphs) were neither approved nor denied: 482 were administratively closed and 238 were revoked. Of the adjudicated I-485 applications, USCIS approved 78.9% (17,592), and denied 18.3% (4,078). In all, USCIS administratively closed 2.7% (609) of all I-485 applications,<sup>283</sup> and revoked just five.<sup>284</sup> A further 14,678 I-360 petitions and

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281. See generally Hlass, *supra* note 106 (examining differences in implementation of SIJS across various states).

282. See *supra* Part I (discussing the SIJS backlog).

283. Cases at the I-485 stage may be administratively closed if for some reason USCIS decided to pause the case, without denying or approving it. See generally Memorandum from David L. Neal, Dir., Exec. Off. for Immigr. Rev., U.S. DOJ (Nov. 22, 2021), <https://www.justice.gov/eoir/book/file/1450351/download> [<https://perma.cc/DT5L-TLGE>] (describing administrative closure). At times, when an applicant has a case before both an immigration court and USCIS, one agency might administratively close the case in that venue while the other agency is taking action on the case. See *id.* at 3 (“For example, it can be appropriate to administratively close a case to allow a respondent to file an application or petition with an agency other than EOIR.”).

284. USCIS might revoke an approval of a SIJS petition or an LPR application if evidence later arises that calls into question the bases for the initial approval, such as if an SIJS petitioner was later found to have married before their petition was approved. See 8 U.S.C. § 1155; CATH. LEGAL IMMIGR. NETWORK, INC., *supra* note 152, at 7, 22–23. A revocation essentially takes away the status, on the premise that the initial approval was wrongful. See 8 U.S.C. § 1155 (“Such revocation shall be effective as of the date of approval of any such petition.”).

13,367 I-485 applications were still pending at the beginning of November 2021 when USCIS released these data to the authors.

The outcomes of both I-360s and I-485s provide evidence of politicized adjudication of SIJS petitions. Prior to 2017, USCIS increased its total SIJS adjudications each year in response to new SIJS petitions while maintaining a relatively consistent denial rate of around 5% or less. For example, in 2015, USCIS received 11,378 I-360s and adjudicated 8,962. Note that even with the congressionally mandated 180-day maximum adjudication deadline, USCIS will not necessarily adjudicate petitions during the same year they are filed due to typical processing times.<sup>285</sup> Between 2010 and 2017, USCIS received 68,789 I-360s and adjudicated 50,514, leaving nearly 20,000 SIJS petitions pending at the start of the 2018 fiscal year. Instead of processing more applications, however, USCIS only adjudicated 5,654 I-360s and denied 16.7% of the ones it did adjudicate in 2018—the highest denial rate on record so far. 2018 stands out in the data as an anomaly which can be understood as a direct result of the politicization of the SIJS process and specific policies that explicitly limited access to SIJS and SIJS-based LPR status.<sup>286</sup> Moreover, even though the denial rates of I-360s returned to around 5% starting in 2019, they rose to 7% in 2021, not fully recovering to the pre-Trump era. Meanwhile, denial rates of I-485s have increased each year from just over 5% to over 20% in 2021.

The lower approval rate of I-485s compared to the I-360s illustrates, in part, a difference in discretion between the two forms. Unlike I-485s, I-360s are not discretionary. As a procedural matter, USCIS should approve petitioners who meet eligibility requirements (that is, who successfully obtain the required state court order).<sup>287</sup> Petitioners who have experienced harm that does not rise to the level of abandonment, abuse, or neglect will fail at the state court level, and therefore would typically not apply to USCIS. Even so, USCIS may use other procedural tools at its disposal to delay adjudication and influence the outcomes of SIJS petitions. As we discuss in further detail, although Congress requires USCIS to adjudicate I-360s in 180 days, the agency took nearly 400 days in 2018 on average to adjudicate I-360s—more than double the statutory requirement.<sup>288</sup> These delays and sudden spikes in denial rates illustrate the ways in which even the routine processing of seemingly non-discretionary applications can be engineered to produce detrimental outcomes for immigrant youth. USCIS may deny I-485s as a matter of discretion even if eligibility criteria are met.<sup>289</sup>

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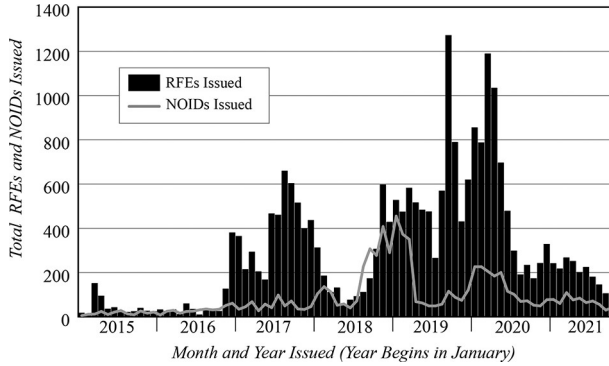
285. See *supra* Section I.C.

286. See *supra* Section I.D.

287. Although formal discretion does not exist, USCIS has used the consent function as way to deny applications they see as unworthy. See Joseph et al., *supra* note 139, at 270 (“At no point has Congress ever empowered USCIS to apply discretion in determining SIJS eligibility, but . . . USCIS has attempted to claim this power for itself through guidance memoranda and proposed regulations.”); Castillo-Granados et al., *supra* note 33, at 1809–11.

288. See *infra* Section II.C.

289. See BRONSTEIN & MENDEZ, *supra* note 204, at 5; 8 U.S.C. § 1255(a).



**Figure 2. Number of RFEs and NOIDs Issued by Year and Month**

Another important trend the data show is a shocking spike in the issuances of RFEs and NOIDs for I-360s starting around December 2016 and January 2017, peaking in 2019 in terms of raw numbers issued. From 2010 until the end of 2016, RFEs and NOIDs were relatively rare. The increase began at the end of the Obama Administration when NOIDs tripled from around 1% of cases receiving a NOID to 3.5% between 2015 to 2016. Then, after Trump took office, the NOID rate climbed to 16.2% in 2017. These numbers drop again in 2018 to 5.4%, which is a marked decrease but still more than double the number of NOIDs issued prior to the Trump Administration. Moreover, the data show a connection between the issuance of an RFE and the likelihood of a denial. Rates of denial for cases where an RFE had been issued nearly tripled from the Obama Administration into the Trump years jumping from 9.4% in 2016 to 17.1% in 2017 and then, at the height of the Trump Administration, shooting up to 54.2% in 2018, 60.9% in 2019, and 50.7% in 2020. The RFE-to-denial rate remained at 54.5% in 2021. That these rates of denial for cases with an RFE issued have yet to revert to pre-Trump rates indicates the possibility that the Biden Administration may still be making decisions to deny SIJS after a politically motivated RFE was issued during the Trump Administration. Importantly, the issuance of RFEs and NOIDs categorically extends the adjudication period of a SIJS petition by stopping the 180-day adjudication clock and allowing USCIS more time to ask for more evidence that attorneys would then have to reply to; the same goes for the NOIDs, thus extending the time youth are awaiting a decision.<sup>290</sup>

#### B. THE PRECARIETY OF SIJS YOUTH

Through an analysis of the data on SIJS petitions and SIJS-based LPR applications, we provide a picture of who applies for, and who receives, SIJS. Most children are identified as male, although without more detailed data on gender and identity, it is not possible to assess nuances of gender identity ignored by USCIS's classification scheme. The rate at which I-360 and I-485 applications

290. See *supra* notes 183–92 and accompanying text.

are approved is shaped by three key variables: the year in which the petition or application was decided, the child's nationality, and their state of residence. Access to quality representation may also play an important role. Gender does not appear to typically shape I-360 approval rates, but in the past two years, I-485 approval rates show increasing gender divergence with USCIS approving female applicants at higher rates than male applicants. Although I-360 denial rates appear to have nearly returned to their pre-2018 rates of about 5%, I-485 denial rates are increasing substantially overall. In this Section, we examine these trends, looking at several factors that connect to our prior analysis about the nature of immigrant-youth precarity as well as procedural barriers, including nationality, removal proceedings, gender, legal representation, geography, processing times, and age.

### 1. Nationality

Nationality and ethnicity may become racialized<sup>291</sup> and may be markers of precarity as described in Part I. Although I-360s and I-485s do not track ethnicity and race, they do track nationality, and therefore it can be studied. Between 2010 and 2021, most immigrant youth seeking SIJS protection were from Guatemala (43,999), El Salvador (42,401), Honduras (32,653), and Mexico (14,765), while a smaller but significant number were from Ecuador (3,168), India (1,772), and Brazil (1,648). This is not unexpected because these nationalities are represented in migration trends to the United States more broadly.<sup>292</sup> Overall, the nationality composition of SIJS youth reflects a broader trend in children fleeing violence in El Salvador, Guatemala, and Honduras over the last decade.<sup>293</sup> There have been some shifts over time in the overall portion of petitioners from certain countries as Guatemalan, Salvadoran, and Honduran petitioners vastly outpaced others, despite an overall increase in numbers across nationalities. However, denial rates of I-360s and I-485s are not evenly distributed across nationalities. Although there have been reports of children from El Salvador, Guatemala, and Honduras being subjected to scrutiny as potential security threats,<sup>294</sup> denial rates of children from India, Bangladesh, China, Nigeria, and Ecuador are even higher. First, we outline the overall distribution by nationality over time of SIJS and LPR applicants, and next, we identify disparities by nationality.

The majority of I-360s were filed by petitioners from four countries: El Salvador, Guatemala, Honduras, and Mexico. Guatemalan and Salvadoran petitioners were the two largest groups at 28.7% and 27.6%, respectively. Honduran petitioners made up a further 21.3% of all applications and Mexican petitioners

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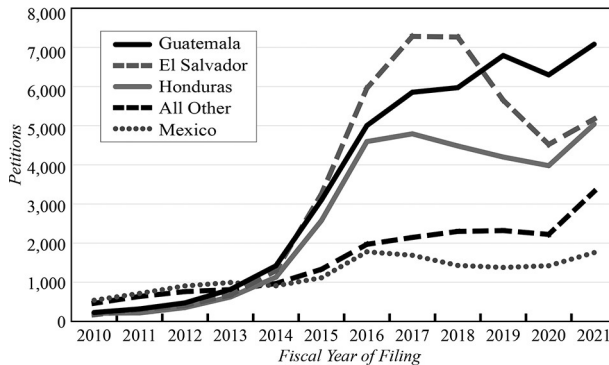
291. See IBRAM X. KENDI, *HOW TO BE AN ANTIRACIST* 71 (2019) (“The fact is, all ethnic groups, once they fall under the gaze and power of race makers, become racialized.”); Achiume, *supra* note 33, at 460–61 (“Through passports, nationality emerged as a ‘privileged axis for state control over mobility,’ specifically as a means for the liberal exclusion of non-Europeans at a time when explicit reliance on race-based justifications became less tenable than they had been before.”).

292. See *Growing Numbers*, *supra* note 63.

293. See *id.*

294. See Hlass, *supra* note 80, at 223–25.

made up 9.6%. Immigrant youth from Mexico stand out as the only group of youth that can officially, under U.S. law, be summarily returned to Mexico at the border, thus limiting the number of potential youth that might enter the United States and apply for SIJS.<sup>295</sup> Taken together, these four nationalities accounted for 87.2% of all I-360s, and thus significantly shape the overall SIJS data. Other nationalities with at least 1% of I-360s were Ecuador (2.1%), India (1.2%), and Brazil (1.1%).



**Figure 3. Number of I-360 Petitions by Nationality**

The percentage of I-360 petitioners from Mexico by the fiscal year of filing has changed dramatically since 2010.<sup>296</sup> In 2010, Mexican petitioners constituted the largest group by far, making up 33.6% of all petitioners. Even though the total number of Mexican petitioners doubled from 541 in 2010 to 1,115 in 2015, the percentage of Mexican petitioners declined to just under 10% (9.8%) over these five years as new petitions from other nationalities outpaced them. Guatemalan, Salvadoran, and Honduran I-360 petitioners have increased in absolute and relative terms. Guatemalan petitioners increased consistently from 14.2% (228) in 2010 to 31.7% (7,081) in 2021. Salvadoran petitioners increased from 10.6% (170) in 2010 to a high of 33.9% (7,265) in 2018, before declining to 23.1% (5,170) in 2021. Honduran petitioners increased from 12.9% (208) in 2010 to 23.8% (4,594) in 2016 and remained at roughly that level (22.5% in 2021). Brazil also saw significant growth, from 0.4% (7) of all petitioners in 2010 to 3.6% (800) in 2021.

295. See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235, 122 Stat. 5044, 5075 (allowing nationals and habitual residents of a “country that is contiguous with the United States” to be returned in certain cases); *Border Screening for Children Has Failed*, YOUNG CTR. (Aug. 5, 2019), <https://www.theyoungcenter.org/stories/2019/8/5/current-border-screening-of-unaccompanied-children-from-mexico-has-failed-and-should-not-be-a-model-for-reform> [<https://perma.cc/M43U-SFJS>].

296. See *Growing Numbers*, *supra* note 63 (“Beginning after FY 2010, children from the Northern Triangle . . . grew quickly while those from Mexico declined.”).

Like the nationality of I-360 petitioners, most I-485 petitioners (76.3%) came from El Salvador, Guatemala, Honduras, and Mexico, although unlike the I-360 petitioners, these four nationalities are uniquely affected by delays in eligibility due to backlogs in available visas for those countries.<sup>297</sup> Salvadoran petitioners were the largest single nationality at 26.7% of all I-485 filings. Notably, Guatemalan petitioners as a percent of the total dropped from nearly 29% of all I-360 petitioners to 20.3% of I-485 applicants. This difference could be explained by the lag in time between cohorts of SIJS beneficiaries in the backlog being able to apply for LPR status. For instance, a Guatemalan who petitioned for SIJS in early March 2019 would have become briefly eligible to apply for LPR status two years later in December 2021 (and because of retrogression these dates ceased being current by December 2022).<sup>298</sup> The number of Guatemalan youth pursuing SIJS steadily increased each fiscal year since 2010, whereas other populations have fluctuated and stagnated over the last several years after an initial period of growth. The portion of Honduran and Mexican applicants in the I-485 data were within a few points of the I-360 data: Hondurans constituted 17.8%, and Mexicans 11.6%.

During the study period, tens of thousands of children approved for SIJS from El Salvador, Guatemala, Honduras, and Mexico were prevented from applying for LPR status because of annual overall visa caps, the manner in which the Department of State applied per-country caps, and the consequent composition of the SIJS backlog. Therefore, the portion of I-485 applicants reflects considerably more countries who comprise 1% or more of applications than the I-360 petitions, simply because so many SIJS petitioners from those leading four countries are restricted from applying for LPR status. The other countries whose children make up 1% or more of LPR applications include Ecuador (3.3%), Brazil (2.3%), and India (1.9%), also noted above, but also China (1.3%), Bangladesh (1.3%), Colombia (1.2%), and Nigeria (1%). All other nationalities combined added up to 11.6%.

From the start of the SIJS backlog in 2016 until 2021, Central American nationalities saw a U-shaped trend, with Salvadoran, Guatemalan, and Honduran applicants making up fully 95.1% of all I-485 applicants in 2016, then decreasing to just 22.1% of all applications by 2018. Due to more limited immigrant visa processing in 2020,<sup>299</sup> more visas were available for these Central American countries, such that they increased again to 80.1% of all applicants in 2021. This 2021 uptick is likely an anomaly, because overseas visa processing has

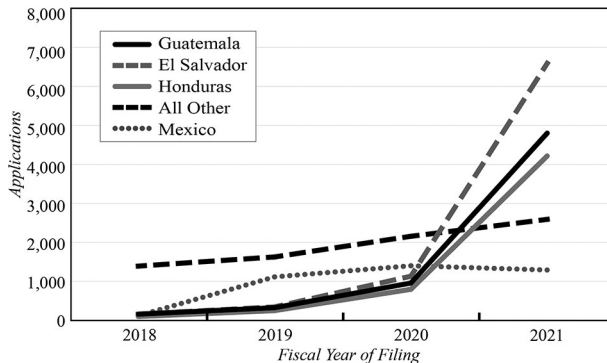
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297. See DAVIDSON & HLASS, *supra* note 19, at 6, 11; Aguilera, *supra* note 1.

298. See *supra* note 38 and accompanying text. Compare BUREAU OF CONSULAR AFFS., U.S. DEP'T OF STATE, VISA BULLETIN: IMMIGRANT NUMBERS FOR DECEMBER 2021, at 4 (2021), [https://travel.state.gov/content/dam/visas/Bulletins/visabulletin\\_december2021.pdf](https://travel.state.gov/content/dam/visas/Bulletins/visabulletin_december2021.pdf) [<https://perma.cc/52UP-2VWE>] (listing March 15, 2019 as the priority date for those in the EB-4 category from Guatemala, Honduras, and El Salvador), with DECEMBER 2022 VISA BULLETIN, *supra* note 107 (listing March 15, 2018 as the priority date for those in the EB-4 category from Guatemala, Honduras, and El Salvador).

299. See Camilo Montoya-Galvez, *Legal Immigration to the U.S. Rebounds from Pandemic Drop in Visa Approvals*, CBS NEWS (Dec. 14, 2022, 9:23 AM), <https://www.cbsnews.com/news/immigration-us-visa-approvals-rebound-covid-19-pandemic/> [<https://perma.cc/RWV3-N6ZL>].

rebounded.<sup>300</sup> In 2022, there was a two-year retrogression for SIJS applicants from El Salvador, Guatemala, and Honduras.<sup>301</sup>



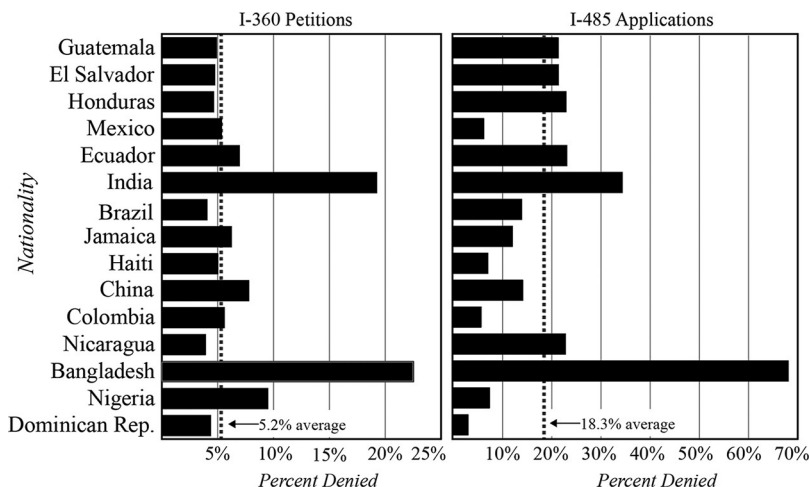
**Figure 4. Number of I-485 Applications by Nationality**

Children from certain countries have much higher rates of being denied SIJS and SIJS-based LPR status. As noted previously, denial rates for I-360 petitions should be low, because the relief is not typically considered discretionary.<sup>302</sup> Yet denial rates of I-360s and I-485s have fluctuated over time and, as we discuss here, by nationality as well. The I-360 denial rate for each of the four backlogged countries (Guatemala, El Salvador, Honduras, and Mexico) can be rounded to a remarkably consistent 5% compared to 5.2% for all countries. Only SIJS petitions from Brazil, Nicaragua, and the Dominican Republic fared better at 4%, 3.9%, and 4.1%, respectively. On the other hand, denial rates for Ecuador (6.9%), China (7.8%), and Nigeria (9.2%) show that petitioners from these countries fared somewhat worse. Even more concerning were the denial rates for SIJS petitioners from South Asia: 19.2% of petitioners from India and 22.5% from Bangladesh have been denied over the past more than a decade. Figure 5 below shows the overall denial rates for the top fifteen nationalities in the I-360 data, then includes those same fifteen nationalities from the I-485 data for continuity.

300. *See id.* (“The preliminary State Department statistics shared with CBS News show that immigrant visa approvals have returned to pre-pandemic levels after plummeting to 240,526 in fiscal year 2020, when the COVID-19 crisis led to a temporary shutdown of visa processing at U.S. consulates and embassies.”).

301. *See* Daniel M. Kowalski, *SIJ Retrogression*, LEXISNEXIS (Feb. 17, 2022), <https://www.lexisnexis.com/LegalNewsRoom/immigration/b/insideneews/posts/sij-retrogression>. As noted above, a change as of April 2023 in how the Department of State is interpreting visa caps has created a universal backlog. While there was a three month jump in the April visa bulletin from SIJS petitioners from El Salvador, Guatemala, and Honduras as a result, it is not possible to predict how the now universal backlog and new interpretation of the application of per-country caps will impact visa availability for those countries moving forward.

302. *See supra* note 287 and accompanying text.



**Figure 5. Denial Rates of I-360 Petitions and I-485 Applications by Nationality**

The overall I-360 denial rates only tell part of the story. First, as we discussed above, 2018 represented a particularly harsh year for SIJS petitions, with denial rates reaching 16%. At a time when Guatemalan petitioners were seeing denial rates elevated to 14%, USCIS denied fully half (50%) of petitioners from Bangladesh and over half (57.1%) of petitioners from India. China was not far behind with a denial rate of 42.9%, and several other countries hovered around 30%, including Colombia (31.3%), Nicaragua (30.8%), Ecuador (30%), and Nigeria (28.6%). The politicization of the SIJS process in 2018 distinctly disadvantaged some petitioners. Second, in 2021, denial rates also spiked for several nationalities, including those that were not targeted in 2018. Among I-360s completed in 2021, Nigeria saw the highest rate of denials at 58.6%, while Bangladesh (36.1%) and India (23%) continued to see high denial rates as well. Denial rates for SIJS petitioners from Jamaica also spiked to 26.3%, its highest rate of any year, including 2018, and Haiti's denial rates increased to 10.4%, second only to its denial rate of 13.6% in 2018 (which was below the national average that year).

These elevated denial rates for particular countries illustrate how, in addition to facing real-world vulnerabilities that lead migrant youth to seek SIJS, migrant youth's paths through the SIJS system can have different outcomes based on their country of origin and the year that they apply. Moreover, the findings from 2018, when the SIJS adjudication process was particularly harsh, should not be interpreted as simply a historical problem that no longer requires attention or concern. Recent variations in SIJS denial rates, including sudden increases for some nationalities, suggest that regardless of whether SIJS is being as explicitly politicized by the Biden Administration as during the Trump Administration, the program may still be undermining its humanitarian objectives and exacerbating



precarity for migrants. Moreover, the shock waves from 2018 continue to echo through the SIJS process, with RFE and NOID rates that have yet to fully revert to pre-Trump levels.

Disparities are also evident at the LPR stage, although the nationalities with higher than average I-360 denials match some but do not exactly mirror those countries with higher I-485 denial rates. Of the four backlogged countries, three—El Salvador, Guatemala, and Honduras—have remarkably similar overall rates of denial at 21.2%, 21.3%, and 22.8%, respectively. USCIS denied each of these three nationalities less than 10% of the time just three years prior in 2019. SIJS youth from Mexico were denied just 6.1% of the time at the adjustment of status stage; this was actually down from 2019 when the denial rate was 9.2%. By contrast, once children from China and Nigeria clear the hurdle of the I-360 stage, they tend to have lower rates of denial at the LPR stage than the national average (18.3%) at 14% and 7.3%, respectively. USCIS denied only 5.5% of Colombians at the I-485 stage. Here again, the most concerning story comes from the data on SIJS youth from South Asia. USCIS denied applicants from Bangladesh 68% overall and as high as 80.2% in 2018, while it denied applicants from India between 25% and 36% for the four years from 2018 to 2021 (inclusively).

Notably, as discussed earlier, SIJS-based LPR applications have higher denial rates overall than SIJS petitions, which makes sense because LPR status is a discretionary form of relief, such that USCIS may even deny those who satisfy all criteria.<sup>303</sup> Furthermore, there are more bars to SIJS-based LPR status than SIJS because LPR applicants are denied based on several inadmissibility grounds such as specific types of criminal convictions or immigration violations, which are not considered at the I-360 stage.<sup>304</sup> Even so, the much higher denial rates among South Asian youth prompted us to dig deeper. After reviewing AAO SIJS decisions mentioning “Bangladesh”<sup>305</sup> and “Indian”<sup>306</sup> and communicating with

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303. See *supra* Figure 1(a)–(d).

304. See *supra* notes 204–16 and accompanying text.

305. Most SIJS denials are not appealed, and not every appeal mentions the nationality of the underlying petitioner. We found 7 AAO decisions regarding Bangladesh youth. Appeal of Form I-360 Petition, No. 20199107 (U.S. DHS Jan. 5, 2023); Appeal of Form I-360 Petition, No. 21103826 (U.S. DHS Dec. 9, 2022); Appeal of Form I-360 Petition, No. 19007586 (U.S. DHS Dec. 1, 2022); Appeal of Form I-360 Petition, No. 15804993 (U.S. DHS Jan. 3, 2022); Appeal of Form I-360 Petition, No. 4021598 (U.S. DHS May 28, 2020); M-S-A-, No. 881480 (U.S. DHS Feb. 22, 2018); M-S-A-, No. 00387835 (U.S. DHS July 18, 2017).

306. We found 43 AAO decisions regarding Indian youth. Appeal of Form I-360 Petition, No. 04814054 (U.S. DHS July 18, 2022); Appeal of Form I-360 Petition, No. 10802298 (U.S. DHS Feb. 22, 2022); Appeal of Form I-360 Petition, No. 18139249 (U.S. DHS Feb. 16, 2022); Appeal of Form I-360 Petition, No. 16402368 (U.S. DHS Sept. 28, 2021); Appeal of Form I-360 Petition, No. 2397496 (U.S. DHS Oct. 23, 2020); Appeal of Form I-360 Petition, No. 5928624 (U.S. DHS June 1, 2020); Appeal of Form I-360 Petition, No. 5656716 (U.S. DHS Apr. 23, 2020); Appeal of Form I-360 Petition, No. 2798787 (U.S. DHS Apr. 1, 2020); Appeal of Form I-360 Petition, No. 4288048 (U.S. DHS Jan. 28, 2020); Appeal of Form I-360 Petition, No. 5445578 (U.S. DHS Jan. 13, 2020); H-S-, No. 948744 (U.S. DHS July 27, 2018); G-S-, No. 821254 (U.S. DHS July 17, 2018); K-S-, No. 228285 (U.S. DHS Apr. 4, 2018); G-S-, No. 230379 (U.S. DHS Mar. 30, 2018); A-S-, No. 00904163 (U.S. DHS Mar. 5, 2018); K-S-, No. 905380 (U.S. DHS Feb. 23, 2018); B-, No. 877606 (U.S. DHS Feb. 21, 2018); G-S-, No. 862761 (U.S. DHS Feb. 7, 2018); H-S-, No. 00818136 (U.S. DHS Feb. 1, 2018); A-S-, No. 755264 (U.S.

several SIJS expert practitioners, we suspect the Bangladeshi and Indian cases' high denial rates are attributable to a combination of bias and heightened scrutiny from USCIS because of purported fraud concerns, as well as potentially less competent legal representation. In New York, one practitioner pointed to an "unfair concern" of fraud by Indian young people in family court settings evidenced by sensational and unsubstantiated news<sup>307</sup> and a USCIS response to that news.<sup>308</sup> Cases from both countries cite as the basis for denials a mix of reasons including discrepancies or lack of sufficient evidence of date of birth, as well as state court orders that failed either because there was concern that orders were primarily for immigration purposes or insufficient evidence of parental harm.<sup>309</sup> Furthermore, one law firm in the data set that mostly represented youth from India had a 31.9% SIJS denial rate, which might be indicative of the quality of representation, or simply a result of taking more cases from India where there might be a higher chance of denial before USCIS.

## 2. Removal Proceedings

Petitioners can file SIJS cases in two postures: affirmatively or defensively. A case is considered "defensive" if the child is in removal proceedings, and "affirmative" if the child is not.<sup>310</sup> Whether a child is in removal proceedings when they file their SIJS petition or LPR application can be an indicator of precarity. Removal proceedings formally demonstrate the child's vulnerability to deportation, and being subjected to removal proceedings for an extended period may harm mental health.<sup>311</sup> Removal proceedings may also implicate the trauma of the mode of entry in the United States and its long-term health impacts, and at times, proceedings may stem from the school to deportation pipeline, and racially disproportionate immigration enforcement.<sup>312</sup> Our analysis reveals that a majority

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DHS Dec. 26, 2017); H-S-, No. 733677 (U.S. DHS Dec. 26, 2017); K-S-, No. 616359 (U.S. DHS Nov. 8, 2017); S-S-, No. 00612188 (U.S. DHS Oct. 24, 2017); R-S-, No. 445904 (U.S. DHS Sept. 26, 2017); G-S-, No. 481468 (U.S. DHS Sept. 14, 2017); G-S-, No. 00427780 (U.S. DHS Aug. 4, 2017); B-S-, No. 338454 (U.S. DHS July 5, 2017); A-P-S-, No. 298799 (U.S. DHS June 2, 2017); H-S-, No. 00257365 (U.S. DHS May 23, 2017); H-S-, No. 00071729 (U.S. DHS Apr. 10, 2017); G-S-, No. 132757 (U.S. DHS Apr. 5, 2017); A-P-S-, No. 8500 (U.S. DHS Oct. 7, 2016); L-S-, No. 8496 (U.S. DHS Oct. 7, 2016); H-S-, No. 69058 (U.S. DHS Oct. 3, 2016); R-S-, No. 09867 (U.S. DHS Sept. 19, 2016); A-S-, No. 17520 (U.S. DHS Aug. 25, 2016); L-S-, No. 17911 (U.S. DHS Aug. 24, 2016); M-S-, No. 17665 (U.S. DHS Aug. 16, 2016); P-S-, No. 17579 (U.S. DHS Aug. 11, 2016); A-S-, No. 17582 (U.S. DHS Aug. 10, 2016); N-S-, No. 17263 (U.S. DHS July 27, 2016); V-S-, No. 17577 (U.S. DHS July 25, 2016); S-S-, No. 17262 (U.S. DHS July 13, 2016).

307. E-mail from Rex Chen, Dir., Legal Servs. N.Y.C., to Laila L. Hlass, Professor, Tulane Univ. L. Sch. (Jan. 18, 2023) (on file with authors). For an example of such news, see Melissa Russo, Evan Stulberger & Fred Mamoun, *I-Team: Family Court Exploited in Immigration Cases in Queens, Insiders Charge*, NBC N.Y. (May 18, 2015, 3:27 PM), <https://www.nbcnewyork.com/news/local/family-court-queens-immigration-cases-human-smuggling-green-card/733817/> [https://perma.cc/LA9D-SG4E].

308. See E-mail from Rex Chen to Laila L. Hlass, *supra* note 307.

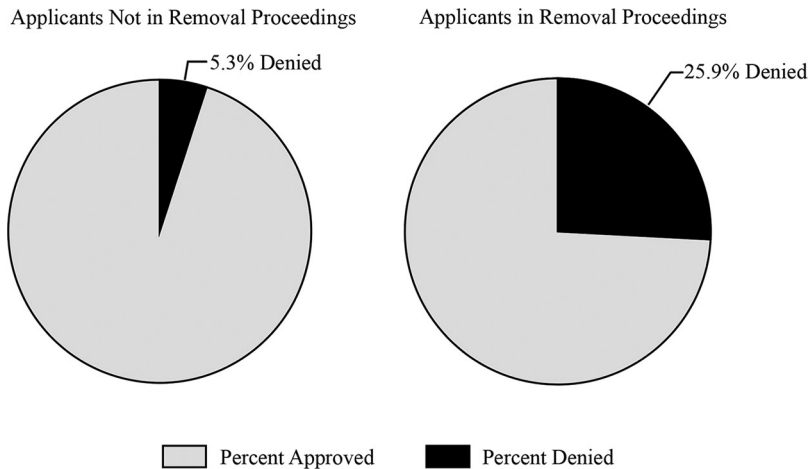
309. See *supra* notes 305–08 and accompanying text.

310. See JUNCK ET AL., *supra* note 179, at 59.

311. See *supra* Section I.A.

312. See *supra* Section I.A.; cf. Charles D.R. Baily, Schuyler W. Henderson, Amber S. Ricks & Amanda R. Taub, *The Psychosocial Context and Mental Health Needs of Unaccompanied Children in United States Immigration Proceedings*, 13 GRADUATE STUDENT J. PSYCH. 4, 9 (2011) ("The research

of SIJS-based LPR applicants were in removal proceedings, and that I-485 denial rates are significantly higher for children who are in removal proceedings. First, we look at the overall portion of SIJS applicants who are in removal proceedings at the I-485 stage, and outcome disparities for those in removal proceedings. Next, we analyze removal data by nationality with a particular focus on the rates of removal proceedings of children impacted by the SIJS backlog. Finally, we contextualize the mental health impacts of removal proceedings on immigrant children.



**Figure 6. Outcome of I-485 Applications Based on Removal Proceedings**

The removal data analyzed stems from the I-485 applications,<sup>313</sup> because USCIS did not provide reliable removal information regarding removal proceedings for petitioners at the I-360 stage.<sup>314</sup> From 2016 to 2021, 63% of LPR applicants were in removal proceedings. In 2021, for SIJS-based I-485 cases in removal, those cases had a 29.9% chance of receiving a denial, whereas cases that were not in removal had a 5.3% denial rate. In other words, a child in removal proceedings had a denial rate for LPR status more than five times that of a child who was not in removal proceedings.

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reviewed in this paper suggests that unaccompanied children in immigration proceedings are likely to have experienced multiple psychosocial stressors during the process of their migration to the United States, and are at high risk for psychological problems.”).

313. Settlement emails with USCIS state that individuals marked by USCIS as being in removal proceedings in the I-485 data were in removal proceedings “currently.” The data therefore does not account for anyone whose case was in removal and then terminated at an earlier date. E-mail from Stephen Benz, Assoc., Milbank, to Laila L. Hlass, Professor, Tulane Univ. L. Sch. (Feb. 22, 2023) (on file with authors) (clarifying that the removal “column indicates if an individual (identified by the A Number) is currently in a removal proceeding”).

314. See *supra* note 266.

The nationality composition of those children in removal proceedings is striking, with children from three of the four historically backlogged countries (El Salvador, Guatemala, and Honduras) among the most likely to be in removal proceedings at the I-485 stage.<sup>315</sup> For all years combined, 92.4% of LPR applicants from Honduras were in removal proceedings, as were 90.9% of those from Guatemala and 86.8% from El Salvador. This reflects trends in overall child migration because most children who are arrested by immigration enforcement are recent arrivals from these countries.<sup>316</sup> Notably, few Mexican applicants—just 28.6%—were in removal proceedings. Among applicants from Latin America, Nicaraguan applicants ranked high with 80.7% of the 194 total completed applicants in removal proceedings. About half (49.3%) of Ecuadorians were in removal proceedings, while Brazil ranked low (28.6%) and Colombia ranked even lower at 6.5% in removal proceedings. Among I-485 applicants' nationalities with at least one hundred cases, only applicants from Bangladesh—with 90.6% of applicants in removal proceedings—ranked as highly as applicants from Central America.

These findings are important because they mean that the majority of children who are left in the legal limbo of the SIJS backlog are subject to removal proceedings for years beyond the approval of their SIJS petitions, heightening their precarity to politically motivated immigration policy changes during that time, as well as subjecting them to the mental health impacts of being in removal proceedings for an extended period during a pivotal time in their transition to adulthood. More concretely, it also means that they are more likely to have their cases ultimately denied when, after waiting in limbo for years for a visa number, they are finally able to apply for LPR status.

The high portion of Salvadoran, Guatemalan, and Honduran children in removal proceedings facing protracted time within deportation proceedings while waiting in the SIJS backlog may have grave consequences.<sup>317</sup> Specifically, 91% of children from Honduras, 89.9% of children from Guatemala, and 84.5% of children from El Salvador who filed an LPR application were in removal proceedings. Research has highlighted relatively high rates of symptoms of anxiety and depression for immigrant youth, which can lead to problems in school and increased self-destructive behavior, such as suicide attempts.<sup>318</sup> In particular, undocumented immigrant children report anxiety relating to being deported.<sup>319</sup>

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315. Initially USCIS did not provide removal data for I-360 because it is not regularly tracked. See *supra* note 266. Then, in April 2022, they re-released the I-360 table with a column where some officers had manually imputed that cases were in removal. Because it was so inconsistently flagged, we did not include analysis.

316. See Amelia Cheatham & Diana Roy, *U.S. Detention of Child Migrants*, COUNCIL ON FOREIGN RELS. (Mar. 27, 2023, 3:11 PM), <https://www.cfr.org/backgrounder/us-detention-child-migrants> [<https://perma.cc/7Q5V-Q5ME>].

317. See DAVIDSON & HLASS, *supra* note 19, at 24.

318. See Pratyusha Tummala-Narra, *Mental Health and Clinical Issues*, in *TRANSITIONS: THE DEVELOPMENT OF CHILDREN OF IMMIGRANTS* 218, 219–20 (Carola Suárez-Orozco et al. eds., 2015).

319. Suárez-Orozco & Hernández, *supra* note 110, at 8.

Removal proceedings in themselves, even for those children who win their cases, may be stressful, because a child must go to immigration court repeatedly, facing not only the judge but often an unfriendly ICE attorney. Each time, a child is confronted with the possibility of removal to a country they have fled, and for SIJS children, a country that a state court has found not in their best interest to return to. One scholar explains how undocumented children may feel “the slow-burn effects of being unauthorized” layered “on top of the post-traumatic stress disorder and other mental health impacts sparked by traumatic experiences suffered in coming to the [United States].”<sup>320</sup> According to one youth seeking SIJS, “[t]he hardest part was not knowing anything about my case. . . . That was the most difficult part. Because I was very worried. I would think: I don’t know anything . . . on any day they . . . could deport me.”<sup>321</sup>

As noted above, children in removal proceedings had a denial rate for their LPR applications five times greater than children who were not in removal proceedings.<sup>322</sup> The cause of the disparity in approval rates based on case posture could be that so many of the I-485 cases flagged as having been in removal are also cases impacted by the SIJS backlog. The time in the SIJS backlog for children from the Northern Triangle (El Salvador, Guatemala, and Honduras) could be nearly five years depending on the visa bulletin.<sup>323</sup> During this time, as described in more detail in Section II.D, children are in legal limbo and precarious situations.<sup>324</sup> Until recently, they were unable to work, putting them at risk of trafficking and labor exploitation, and more vulnerable to immigration impacts of over-policing and the racial harms of the school-to-prison pipeline.<sup>325</sup> I-485 adjudication is discretionary,<sup>326</sup> and the systemic factors that could arise during an extended period of limbo waiting to apply for LPR status may contribute to these denial rates. Being in limbo, under threat of deportation, prevents young people from securely putting down roots, leaning into social relationships, and investing in academics and school. Limbo and fear prevent young people from fully enjoying childhood and adolescence, while also halting their transition into adulthood. According to one study, “[f]or children, keeping their undocumented status a secret and suppressing their native culture produces psychological stress, while the status itself isolates children from social rituals such as getting a driver’s license.”<sup>327</sup> In the words of one young person, “[w]e can’t enjoy life because we might be in trouble and get deported. It’s hard for a 19-year-old to not enjoy life

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320. Patrick D. Murphree, *For the Least of These Brothers and Sisters of Mine: Providing Mental Health Care to Undocumented Immigrant Children*, 15 SEATTLE J. FOR SOC. JUST. 65, 77 (2016) (alteration in original).

321. DAVIDSON & HLASS, *supra* note 19, at 24 (second omission in original).

322. *See supra* Figure 6.

323. *See, e.g.*, DECEMBER 2022 VISA BULLETIN, *supra* note 107.

324. *See* DAVIDSON & HLASS, *supra* note 19, at 18, 20.

325. *See supra* note 108–09 and accompanying text; DAVIDSON & HLASS, *supra* note 19, at 36; Hlass, *supra* note 94, at 697.

326. *See* BRONSTEIN & MENDEZ, *supra* note 204, at 5.

327. Murphree, *supra* note 320, at 76–77.

while I see all my classmates having fun and they can concentrate afterward on schoolwork.”<sup>328</sup> Although more data on removal from the I-360 stage is needed to paint a fuller picture of the factors that contribute to the precarity of SIJS youth, it is clear that being in removal proceedings carries a heightening risk of a denial of LPR status and a worsening of mental health outcomes of SIJS youth.

### 3. Gender<sup>329</sup>

Within the immigration system, gender is broadly understood to be a basis for particular discrimination and harm,<sup>330</sup> but there have been few empirical studies of these gender disparities and reasons for them.<sup>331</sup> One study finds that gender discrimination within the country of origin may be a push factor and concludes gender discrimination over time increases the proportion of women emigrating.<sup>332</sup> Furthermore, a study of women migrating to the United States from the four predominant countries of origin for SIJS seekers (El Salvador, Guatemala, Honduras, and Mexico) reveals that escalating violence in recent years has corresponded with an increased portion of women immigrants over time, although the study also notes that most immigrants are male.<sup>333</sup> Another relevant study finds a significant gender gap in academics, particularly across ethnic groups, with girls outperforming boys in school.<sup>334</sup> This in part may be because boys of color may face more explicit discrimination, in addition to lower expectations and stigmatization, leading to academic disengagement as well as harsher punishments,<sup>335</sup> it also may relate to gendered socialization pushing girls to be “well-behaved” and responsive to others’ opinions.<sup>336</sup>

328. Suárez-Orozco & Hernández, *supra* note 110, at 7.

329. Many studies referenced in this article exclusively use the gender binary when discussing research on gender. In citing these studies, we use the language of the studies and at times the broader terms of “male-identified” or “female-identified.” The authors opt to use the terms “male-identified” and “female-identified” when referring to this study’s dataset, acknowledging that gender is much more expansive than the binary and that immigrants filing applications with USCIS are only given the option of identifying as male or female.

330. See generally KAREN MUSALO, JENNIFER MOORE, RICHARD A. BOSWELL & ANNIE DAHER, *REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH* (5th ed. 2018) (including gender as a basis for harm and discrimination that might qualify for refugee protections).

331. See Saul Lach & Nachum Sicherman, *Gender Discrimination and the Sex Ratio of Immigrants 3* (IZA Inst. Lab. Econ., Discussion Paper No. 15487, 2022), <https://docs.iza.org/dp15487.pdf> [<https://perma.cc/6BZD-JF35>] (“One may speculate as to the factors determining the gender composition of immigrants but, to the best of our knowledge, there is no systematic research into their relevance and importance.”).

332. *Id.* (“Controlling for year and country fixed effects, we find a strong positive effect of gender discrimination in a country of origin on the share of women immigrating to the U.S. from that country.”).

333. UNITED NATIONS HIGH COMM’R FOR REFUGEES, *WOMEN ON THE RUN: FIRST-HAND ACCOUNTS OF REFUGEES FLEEING EL SALVADOR, GUATEMALA, HONDURAS, AND MEXICO* 2, 4 (2015), <https://www.unhcr.org/en-us/publications/operations/5630f24c6/women-run.html> [<https://perma.cc/FCW4-UXRN>].

334. CAROLA SUÁREZ-OROZCO, MARCELO M. SUÁREZ-OROZCO & IRINA TODOROVA, *LEARNING A NEW LAND: IMMIGRANT STUDENTS IN AMERICAN SOCIETY* 38–39 (2008).

335. See *id.* at 39.

336. Núria Rodríguez-Planas, Anna Sanz-de-Galdeano & Anastasia Terskaya, *Gender Norms in High School: Impacts on Risky Behaviors from Adolescence to Adulthood*, 196 J. ECON. BEHAV. & ORG. 429, 431 (2022).

Our analysis of gender among SIJS youth provides three main findings. First, a majority of SIJS seekers and correspondingly those seeking SIJS-based LPR status are identified as male in USCIS's data. Second, outcomes for those identified as male and female at the I-360 stage are closely equivalent, but at the I-485 stage, USCIS is more likely to approve those identified as female than male. Lastly, we found two issues with USCIS's collection of gender data that raise data quality concerns. First, before 2017, USCIS did not electronically track gender for SIJS petitioners, even though it is a mandatory field for petitioners to complete on the paper form.<sup>337</sup> Second, USCIS does not track gender identities outside of the male/female gender binary or offer any other option on the form for a petitioner to identify in any other way. This is significant not only because it does not allow for accuracy in self-identifying or in tracking more expansive gender identities, but also because non-binary gender identity is, itself, a risk factor for immigrant youth both in countries of origin and the United States and is important information for understanding the precarity of immigrant youth.

USCIS's data on the gender of SIJS youth show that they were more often identified as male—about 60% across both I-360 and I-485 applications—than female. This gender breakdown aligns with other population studies that have shown that most undocumented immigrants are male-identified; according to a 2009 study, about 60% of adult undocumented immigrants were male-identified.<sup>338</sup> Furthermore, the gender composition of the unaccompanied immigrant youth in the custody of ORR is majority male-identified, with female-identified youth comprising 36% of children in ORR's custody in 2022.<sup>339</sup> The portion of female-identified youth has increased over the past decade, as female-identified youth comprised only 23% of the unaccompanied minor population in ORR's custody in 2012.<sup>340</sup>

Across the entire I-360 data set, 42.8% of petitioners were male-identified, 26.2% were female-identified, and notably, 31.1% (nearly one third) were either blank or unknown. The lack of thorough data on gender is cause for concern, given the importance of gender<sup>341</sup> as a factor for understanding the precarity of

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337. See U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 168, at 4.

338. JEFFREY S. PASSEL & D'VERA COHN, PEW HISP. CTR., A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES 4 (2009), <http://madranna.org/immref/pew/107Full.pdf> [<https://perma.cc/45GK-284P>] (“There were 6.3 million men, 4.1 million women and 1.5 million children under age 18 living in the United States as unauthorized immigrants in March 2008.”).

339. *Fact Sheets and Data*, ADMIN. FOR CHILD. & FAMS.: OFF. REFUGEE RESETTLEMENT (Feb. 24, 2023), <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data> [<https://perma.cc/YWP5-X8LX>].

340. *Id.*

341. In contrast to USCIS inconsistent data collection regarding gender, the Biden Administration issued a 2022 Executive Order to address gender equality. See *FACT SHEET: President Biden to Sign Historic Executive Order Advancing LGBTQI+ Equality During Pride Month*, WHITE HOUSE (June 15, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/15/fact-sheet-president-biden-to-sign-historic-executive-order-advancing-lgbtqi-equality-during-pride-month/> [<https://perma.cc/F3Q3-5L74>].

immigrant youth.<sup>342</sup> However, missing data on gender are not distributed evenly throughout the data, but rather are heavily concentrated in two main areas. First, missing data are concentrated in petitions filed before 2017 and again in 2021. Only about 1% of I-360 petitions filed from 2017 through 2020 lacks data on gender at the point of submission. Prior to 2016, gender was only rarely entered into USCIS's system at the time of application (less than 3% of applications). In 2016, 35.8% of petitions lacked gender, and then in 2021, at the time of filing, that number was up again to nearly half (48.7%) of all petitions. The years 2017 to 2020 mostly included data with available gender data. Second, missing data were concentrated among petitions that were filed but not adjudicated. When we looked only at completed I-360s, gender was rarely missing. According to USCIS, although the paper forms contain a field for gender, gender is not a required field in the system.<sup>343</sup> However, USCIS also noted that officers should enter gender information at the time of adjudication.<sup>344</sup> The data bear this out. We find that although the gender data at the time of filing is incomplete, by the time petitions are adjudicated (for petitions adjudicated since 2017), gender is nearly always filled out. Thus, the most accurate way to assess the data is by only looking at completed filings. Unlike the data on I-360s, USCIS's data on I-485s did not suffer from missing data. Just 28 out of 35,651 total applications lacked data on gender.

The years for which gender data appear complete at the time of adjudication for I-360 petitions (2017 to 2021) reveal that 62.1% of all I-360 petitioners were male-identified and 37.9% were female-identified. This held remarkably steady over these five years, with the percent of male-identified petitioners fluctuating only between a low of 59.7% in 2019 and a high of 63.7% in 2020. Similarly, the data for I-485s completed between 2018 and 2021 show that 59.3% of all applicants identified as male and 40.7% as female. This also held steady with the percent male-identified going as low as 57.3% in 2020 and as high as 60.9% in 2019. Given the many examples of significant year-over-year variation in other variables throughout this Article, gender is the most stable demographic factor we found. This gender parity may reflect the typically high I-360 approval rate, due to the nature of SIJS as mandatory, not discretionary, relief, and that it would be rare for a petitioner to apply who is not eligible because they should know if their evidence meets the standard before submitting the I-360. For example, if their

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342. See Kalina M. Brabeck, Jodi Berger Cardoso, Tzuan Chen, Arlene Bjugstad, Randy Capps, Elizabeth Capoverde & Allyson Trull, *Discrimination and PTSD Among Latinx Immigrant Youth: The Moderating Effects of Gender*, 14 PSCYH. TRAUMA: THEORY, RSCH., PRAC. & POL'Y 11, 11 (2022); Santacrose et al., *supra* note 116, at 1036.

343. See U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DHS, AUGUST RESPONSE TO QUESTIONS 1 (2022) (on file with authors) ("Each receipt number has a gender character associated with it or alternatively a null value. The gender data is not a required field in the system, the default is 'gender unknown' and the officer is trained to manually enter male or female on when adjudicating. 2016 is when SIJ was first centralized at NBC Div IV in 2016 (before later moving to Div VI). Our best guess is that there was a training issue in 2016 where officers were not instructed to manually enter this data field.")

344. See *id.*



experience is not sufficient to meet standards of abandonment, abuse, or neglect, then the petitioner would know at the state court stage and therefore would generally not file an I-360, knowing they would not qualify. Still, the remarkably close gender parity merits further research to understand if there might be more reasons, particularly USCIS's processes, that contribute to these mostly congruent outcomes.

The gender division of I-360 petitions was not distributed evenly across nationalities, although male-identified petitioners consistently constituted over 50% of petitioners. Some nationalities showed a more even split. Mexican and Brazilian petitioners were the closest to being evenly split between male-identified and female-identified, with 54.7% and 55.8% of petitioners (respectively) identifying as male. Petitioners from Honduras and El Salvador were more heavily weighted toward male-identified petitioners at 58.1% and 59.2%, respectively. Ecuador represented even fewer female-identified petitioners, at 62.5% male-identified. Guatemala was more heavily weighted toward male-identified petitioners at 70%, with just 30% identifying as female. South Asia stood out for including the smallest percentage of female-identified petitioners: just 6.7% of petitioners from India and 4.4% of those from Bangladesh were female-identified, and the rest were male-identified. Like the overall data on gender, the gender division within each nationality typically held steady; only Ecuador showed a meaningful and steady change over time with the percentage of female-identified petitioners increasing from 27.2% in 2017 to 42.5% in 2021.

Completed I-485 applications reflected similar gender composition. Mexican and Brazilian applicants were the closest to being evenly split between male and female-identified, with 52.7% and 52.4% of applicants (respectively) identifying as male. Applicants from Honduras and El Salvador were more heavily weighted toward male-identified applicants at 54.6% and 57.9%, respectively. Ecuador represented even fewer female-identified applicants, at 61.3% male-identified. Guatemala was again more heavily weighted toward male-identified applicants at 70%. South Asia stood out for including the smallest percentage of female-identified applicants: just 8.1% of applicants from India and 4.1% of those from Bangladesh were female-identified, and the rest were male-identified. Like the overall data on gender, the gender division within each nationality typically held steady, with no country seeing a notable change in the gender breakdown since 2018. More research is needed to test various possible reasons for gender disparities in rates of applying by nationality, such as migration patterns or particular barriers female-identified youth may face in seeking immigration protections.

The overall approval rates were pretty close across gender, especially for I-360s. For SIJS petitions completed between 2017 and 2021, 95.3% of female-identified and 94.6% of male-identified applicants were approved—a difference of less than a percent. Even in 2018, when the approval rate dropped, it dropped nearly identically for male- and female-identified petitioners: 86.6% of female-identified petitioners were approved in 2018 alongside 85.6% of male-identified. Only in 2021 did the two see any noticeable separation, when the approval rate for male-identified youth dropped to 91.9% compared to 94.5% for female-

identified. The story is somewhat different for I-485 applications where the overall approval rate for male-identified applicants was lower at 76.3% than for female-identified applicants at 81.3%. As noted above, the overall denial rate for I-485s has been increasing and appears to be affecting applicants identified as male more: the denial rate for male-identified applicants grew from 10.6% in 2019 to 23.7% in 2021, whereas the denial rate for female-identified applicants grew from 7.8% to 19.5% for the same years.

On the whole, USCIS tended to deny SIJS youth identified as male slightly more than female, and this held true for most nationalities with some important exceptions. SIJS youth from El Salvador, Guatemala, and Honduras were denied at nearly the same rate across gender and across both the I-360 and I-485 stages. Male- and female-identified Salvadoran SIJS youth were denied at the overall rate of 4.7% and 3.9%, respectively, at the I-360 stage, and 22.4% and 21.5% at the I-485 stage. Similarly, USCIS denied 4.8% of male-identified Guatemalan petitioners and 4.5% of female-identified petitioners at the I-360 stage, and 22.6% and 21.4% at the I-485 stage. Male-identified Honduran I-360 petitioners were denied 4.4% of the time, on par with female petitioners at 4.2%, but male-identified youth saw a somewhat higher I-485 denial rate (26%) than females (21.4%). Mexican youth saw a more marked divergence based on gender. At the I-360 stage, USCIS was slightly more likely to deny Mexican female-identified petitioners at 5.7% compared to 5.5% for male-identified. But the data on I-485s is much different: USCIS denied 26% of Mexican male-identified applicants compared to just 6.2% for female-identified. India, too, saw significant divergence at both stages: USCIS denied 16.5% of male-identified applicants (compared to 8.8% for female-identified) and 26% of male-identified I-485 applicants were denied (compared to 10.5% for female-identified).<sup>345</sup> Male-identified applicants from Bangladesh were denied 24% of the time at the I-360 level (compared to 4.5% for female-identified) and 72.3% for I-485s (compared to 9.1% for female-identified).<sup>346</sup> The only nationality that bucked the trend was Brazil: 3.6% of male-identified and 3% of female-identified I-360 petitioners were denied, but female-identified I-485 applicants from Brazil were denied 16.6% of the time compared to 12.3% for male-identified.

During the years for which the gender data appear reliable, the differences in I-360 approval rates between male- and female-identified petitioners was consistent, typically within a percentage point from each other except in 2021, when male-identified petitioners were approved slightly less often than female-identified petitioners. The number of records with unknown or blank gender fields show a remarkably lower approval rate in 2017 and 2018. Given the explanation from USCIS above, one plausible explanation is that officers frequently decided not to fill out gender information at time of adjudication in cases where they had

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345. There were small numbers of female Indian applications: sixty-eight females completed I-360s and thirty-eight females completed I-485s.

346. There were small numbers of female Bangladeshi applications: twenty-two females completed I-360s and eleven females completed I-485s.

already decided to deny. In the most recent three full years of data, less than 1% of all adjudicated petitions lacked gender data. Consistent with overall findings, approval rates dropped in 2018 for both male- and female-identified petitioners with surprisingly little difference.

Overall, USCIS approved female-identified LPR applicants at higher rates than male-identified. As described earlier, the overall lower approval rate of I-485s compared to I-360s may be attributable to both inadmissibility bars that do not apply at the I-360 stage and the discretionary, not mandatory, nature of I-485s.<sup>347</sup> For male-identified youth, one explanation for the higher denial rate as compared to female-identified youth is that male-identified are more likely to have contact with the juvenile delinquency<sup>348</sup> or criminal legal systems.<sup>349</sup> In turn, this entanglement in juvenile or criminal legal systems could contribute to a higher frequency of crime-related inadmissibility, as well as discretionary denials.<sup>350</sup> Furthermore, in recent history, there appears to be a trend of immigration officials using false and flimsy information to allege that Central American male-identified youth are gang affiliated, leading to denials of immigration benefits, even without any criminal history;<sup>351</sup> this may have impacted the higher denial rates for male-identified youth.

#### 4. Legal Representation

Immigration attorneys play a decisive role in immigration cases. Previous research has repeatedly shown that immigration attorneys influence the trajectories and outcomes of cases at many pivotal moments in the immigration system, including in removal proceedings,<sup>352</sup> bond hearings,<sup>353</sup> and both affirmative<sup>354</sup>

347. See *supra* notes 204–16 and accompanying text.

348. Girls made up only 29 or 30% of juvenile delinquency arrests from 2017 through 2020. See *Law Enforcement & Juvenile Crime: Juvenile Arrests*, DOJ: OFF. OF JUST. PROGRAMS, <https://www.ojjdp.gov/ojstatbb/crime/qa05104.asp?qaDate=2020&text=yes> [<https://perma.cc/4Z3B-NUWS>] (last visited May 26, 2023).

349. Men are more represented in the criminal legal system. For example, 72% of nationwide arrests are of men. See *Ten-Year Arrest Trends by Sex, 2010–2019*, FBI, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-33> [<https://perma.cc/KUW3-UHJV>] (last visited May 26, 2023) (recording 4,333,749 men arrested and 1,666,578 women arrested in 2019). Men also vastly outnumber women incarcerated in federal prisons. See *Inmate Gender*, FED. BUREAU PRISONS (Mar. 18, 2023), [https://www.bop.gov/about/statistics/statistics\\_inmate\\_gender.jsp](https://www.bop.gov/about/statistics/statistics_inmate_gender.jsp) [<https://perma.cc/KZR3-6U7R>] (recording that 93.1% of inmates are men).

350. SIJS-based LPR adjustment is discretionary, as the statute says the applicant “may” be adjusted at the “discretion” of the agency. 8 U.S.C. § 1255(a). Therefore, the policy manual instructs that officers may use juvenile delinquency as part of a discretionary analysis. See *Policy Manual: Chapter 7 – Special Immigrant Juveniles*, U.S. CITIZENSHIP & IMMIGR. SERVS. (May 4, 2023), <https://www.uscis.gov/policy-manual/volume-7-part-f-chapter-7> [<https://perma.cc/9CG8-H6SA>].

351. See Hlass, *supra* note 94.

352. See Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 2 (2015).

353. See generally Emily Ryo, *Representing Immigrants: The Role of Lawyers in Immigration Bond Hearings*, 52 LAW & SOC’Y REV. 503 (2018) (discussing the positive effect of legal representation in immigration bond hearings).

354. See generally ANDREW I. SCHOENHOLTZ, PHILIP G. SCHRAG & JAYA RAMJI-NOGALES, *LIVES IN THE BALANCE: ASYLUM ADJUDICATION BY THE DEPARTMENT OF HOMELAND SECURITY* (2014)

and defensive asylum hearings.<sup>355</sup> Attorneys are particularly important for immigrants who face additional institutional barriers, such as detained immigrants,<sup>356</sup> as well as immigrants who belong to more vulnerable demographics, such as women with children<sup>357</sup> and immigrant youth.<sup>358</sup>

The influential role of immigration attorneys is often attributed, either directly or indirectly, to the convoluted quality of immigration law, which has been described as “a byzantine network of substantive and procedural rules of law.”<sup>359</sup> Without an immigration attorney, immigrants may not be aware that they are eligible for certain forms of relief, much less file a robust application. Moreover, the benefits of legal representation go beyond formal legal expertise. Like many areas of law, immigration attorneys develop regionalized tacit knowledge, informal professional relationships, and understandings about local adjudicatory practices that are inaccessible even to other attorneys who do not specialize in immigration law. Immigration attorneys also perform important additional functions such as connecting immigrants with other social services,<sup>360</sup> communicating with clients about hearing dates and other procedural deadlines, arranging or ensuring transportation to interviews, and arranging interpreters.<sup>361</sup> However, comparably little empirical research examines the role of legal representation in the SIJS

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(discussing positive correlation between legal representation and grants of asylum); Philip G. Schrag, Jaya Ramji-Nogales & Andrew I. Schoenholtz, *The New Border Asylum Adjudication System: Speed, Fairness, and the Representation Problem*, 66 HOW. L.J. (forthcoming 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4233655](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4233655) [<https://perma.cc/R4HP-RSVH>] (discussing the need for competent legal representation for asylum applicants).

355. See John R. Mills, Kristen M. Echemendia & Stephen Yale-Loehr, “*Death is Different*” and a *Refugee’s Right to Counsel*, 42 CORNELL INT’L L.J. 361, 362 (2009); Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (2007).

356. See Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 FORDHAM L. REV. 541, 542–43 (2009); JENNIFER STAVE, PETER MARKOWITZ, KAREN BERBERICH, TAMMY CHO, DANNY DUBBANEH, LAURA SIMICH, NINA SIULC & NOELLE SMART, VERA INST. OF JUST., *EVALUATION OF THE NEW YORK IMMIGRANT FAMILY UNITY PROJECT: ASSESSING THE IMPACT OF LEGAL REPRESENTATION ON FAMILY AND COMMUNITY UNITY 5* (2017), <https://www.vera.org/downloads/publications/new-york-immigrant-family-unity-project-evaluation.pdf> [<https://perma.cc/YH7V-HUQZ>]; Lindsay M. Harris, *Contemporary Family Detention and Legal Advocacy*, 21 HARV. LATINX L. REV. 135, 160 (2018).

357. See, e.g., *Representation Makes Fourteen-Fold Difference in Outcome: Immigration Court “Women with Children” Cases*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE: IMMIGR. (July 15, 2015), <https://trac.syr.edu/immigration/reports/396/> [<https://perma.cc/94X6-629N>].

358. See Hanna, *supra* note 75.

359. Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1637 (2010).

360. See Baily et al., *supra* note 312, at 6.

361. Cf. VERA INST. OF JUST. & AM. BAR ASS’N, CHILDREN’S IMMIGRATION LAW ACADEMY (CILA) PRO BONO GUIDE: WORKING WITH CHILDREN AND YOUTH IN IMMIGRATION CASES 14–15, 19 (2020), <https://cilacademy.org/wp-content/uploads/2020/11/2020.08.20-CILA-Pro-Bono-Guide.pdf> [<https://perma.cc/94UL-TA5W>] (providing checklists for immigration attorneys and advising them to perform tasks such as arranging interpreters, reminding clients of deadlines, and referring clients to community resources).

context.<sup>362</sup> In addition to the beneficial aspects of representation described above for other immigrant groups, immigrant youth in particular also benefit from access to counsel in unique ways. For instance, attorneys trained in trauma-informed lawyering may act as a protective factor against the stressors of navigating the complex immigration system.<sup>363</sup>

Due to the high institutional barriers to entry for SIJS petitioners, it is not necessarily surprising that an attorney represented 93.4% of I-360 petitioners, as indicated by fields containing information about the attorney, firm, or organization that provided legal services. The remaining 6.4% lacked legal representation as indicated by blank fields—although, for this 6.4% of petitioners, the absence of named counsel may not be proof of absence. It is theoretically possible—though improbable—that some fraction of SIJS petitioners submitted paperwork entirely on their own. Rather, the absence of data on representation may be attributed to other factors, such as record-keeping procedures or issues at USCIS (similar to the documented issues with gender)<sup>364</sup> or the possibility that some portion of individuals assisting in the completion of I-360s did not file the required G-28 Notice of Entry of Appearance as Attorney or Accredited Representative form to indicate their representation.<sup>365</sup> Records provided to the authors on I-485 applications did not include any information on attorney representation.

Several nationally recognized organizations appear in the data as frequently filing SIJS petitions with USCIS. Kids in Need of Defense (KIND), The Refugee and Immigrant Center for Education and Legal Services (RAICES), Catholic Charities, The Door, Safe Passage Project, and many other organizations figured prominently in the data, typically with high approval rates. For example, KIND<sup>366</sup> represented 1,685 I-360 petitioners and received approvals in 98.6% of the 1,583 adjudicated petitions. Attorneys for Catholic Charities affiliates around the country<sup>367</sup> filed a combined 4,064 I-360 petitions and received approvals in 94.9% of the 3,857 adjudicated petitions. The Door, the organization that took

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362. For an exception, see generally Hlass, *supra* note 59, which studies the law firms and individuals who represented SIJS seekers most frequently in 2013.

363. See VERA INST. OF JUST. & AM. BAR. ASS'N, *supra* note 361, at 16–22 (discussing the importance of trauma-informed lawyering); Suárez-Orozco & Hernández, *supra* note 110, at 9 (describing the important role that instructors and institutional support can play in the mental health outcomes of undocumented students).

364. See *supra* note 343 and accompanying text (discussing inconsistent record-keeping with respect to gender). For instance, some attorneys have reported that USCIS has stated they do not have a G-28 attorney representation on file, even when they have filed it. See U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DHS, Q & A: STAKEHOLDER CONFERENCE 9/20/2010, at 1 (2010), <https://asistahelp.org/wp-content/uploads/2019/01/QA-on-U-visas-Fall-2010-AILA-Answers.pdf> [<https://perma.cc/T84Q-69BW>].

365. Lawyers participating in single-day legal assistance clinics might routinely not complete a G-28. Furthermore, foster care case workers might complete forms, but are not authorized to serve as a legal representative.

366. KIND has a headquarters and fourteen field offices. See *Our People*, KIND, <https://supportkind.org/who-we-are/our-people/> [<https://perma.cc/9A53-MHE2>] (last visited May 26, 2023).

367. See *Find Your Local Catholic Charities*, CATH. CHARITIES USA, <https://www.catholiccharitiesusa.org/find-help/> [<https://perma.cc/8SJY-KMG7>] (last visited May 26, 2023).

Ariel's case,<sup>368</sup> filed 1,212 petitions and received approvals for 97.8% of the 1,158 adjudicated petitions. These approval rates are all above the 94.3% average rate of approval across all applications. These high rates of approval may reflect multiple factors including higher attorney competency due to specialization, selectivity of cases among non-profit organizations, and connections to a broader ecosystem of support services.<sup>369</sup>

Outcome disparities across geography might also replicate themselves in representation patterns, particularly if organizations have a single office or regional focus. However, some groups have offices across the country, including KIND and Catholic Charities affiliates.<sup>370</sup> For example, Catholic Charities' generally high rate of approval across thirty-three states where clients were located is somewhat lower for clients living in Texas at 88.9% compared to their approval rate for clients living in New York at 98.7%. RAICES, an organization based in Texas,<sup>371</sup> had an I-360 approval rate lower than other organizations, at 91.9%, or 1,533 of the 1,669 petitions that had been adjudicated so far. Similarly, KIND, which had clients in eighteen states, saw 93.1% of I-360s approved for clients living in Texas compared to 99.6% approved in Maryland.

Not all attorneys have such high rates of I-360 approval. Lower rates of approval for private attorneys may be due to compositional factors such as private attorneys being willing to take on riskier cases for clients who are willing to pay. Lower rates may also be influenced by a high concentration of clients whose nationality receives an overall lower rate of approval. However, lower rates of approval that are unexplained by these other factors may also raise red flags about the quality of representation, which is no trivial concern in SIJS cases. For example, several law firms saw I-360 approval rates of less than 75%, far below the national average. One law firm in the data that had represented 361 petitioners had only been approved in 68% of completed petitions, and another had an approval rate of 73.1% out of 164 completed petitions. Further analysis found that these two firms represented a significant number of SIJS petitioners from India, a country with an overall approval rate of just 72.3%. The larger non-profit organizations above rarely represented Indian nationals; in fact, none of the other organizations mentioned above had represented more than five Indian petitioners over the entire data set. Although this does not necessarily represent bias at the point of client intake, other economic, social, and linguistic factors likely influence which organizations or firms receive referrals for SIJS cases in the first place.

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368. See Aguilera, *supra* note 1.

369. Studies have shown that attorney competence and specialization may improve outcomes in other areas, such as asylum. See *supra* notes 352–63 and accompanying text; Ramji-Nogales et al., *supra* note 355, at 340–41 (discussing higher approval rates for asylum applicants from Georgetown University's clinic and large law firms working together with Human Rights First).

370. See, e.g., *Find Your Local Catholic Charities*, *supra* note 367; *Our People*, *supra* note 366.

371. See *Our Mission*, REFUGEE & IMMIGRANT CTR. FOR EDUC. & LEGAL SERVS., <https://www.raicetexas.org/our-mission/> [<https://perma.cc/E5ES-7WR5>] (last visited May 26, 2023).

The analysis found that another law firm had an approval rate of just 59.5% out of 123 completed I-360 petitions, all from Mexico and Central America where the approval rates well exceed 90%. Despite nearly all of these petitioners living in Texas, a state with a lower-than-average approval rate, this alone does not explain such low rates of approval. Although less egregious, several other firms had approval rates well below the aggregate 94.3% approval rate that could not be explained by the nationality or state of residence of the clients. We note that low approval rates that remain unexplained by this data set may not necessarily be due to attorney quality; more targeted research would likely be required to unpack the range of contextualized factors. Nonetheless, these rates of denial are particularly concerning because if a petitioner has sufficient evidence of eligibility (that is, the required court order and proof of age), USCIS must grant the I-360.<sup>372</sup> Moreover, immigrant youth and their advocates who seek out the services of an attorney typically do not have a mechanism for evaluating the quality of these services (much less have access to USCIS's entire data set of a firm's approval rate), and are therefore at a disadvantage when it comes to evaluating the quality of attorneys.

Although this Article focuses on precarity that the state exacerbates or produces, state institutions are not the only force multipliers of immigrant precarity. Unscrupulous or unqualified attorneys can do damage to immigrant youth by taking advantage of their vulnerable situation. These findings suggest that the immigration bar may benefit from greater awareness and training on the SIJS process. However, we emphasize that even when there are indications of concerning professional behavior by attorneys, the context for these problems arises from within an institutional, legal, and social landscape of immigrant precarity and exclusion manufactured first and foremost by the immigration control apparatus, not individual attorneys. Thus, the critical thrust of this Article is focused on the state, not on individuals operating within the sphere of legal practices created by the state.

## 5. Geography

This Article already discussed how SIJS approval and denial rates fluctuate across time, but SIJS outcomes fluctuate across space, as well. Consistent with our view of precarity as a politically induced condition of vulnerability, political and social systems are, themselves, not uniform across space either. Disparities in application rates may relate to the distribution of SIJS-eligible youth in the United States and youth's access to attorneys, particularly pro bono attorneys, as well as factors such as state laws and state and even local court practices.<sup>373</sup> The

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372. See *supra* note 287 and accompanying text.

373. See Elizabeth Keyes, *Evolving Contours of Immigration Federalism: The Case of Migrant Children*, 19 HARV. LATINO L. REV. 33, 39 (2016) (“[T]he state role [in immigration law] is highly problematic in its unevenness, its complexity, and its distance from the federal immigration adjudication process.”). See generally Hlass, *supra* note 106 (studying disparities in SIJS petition rates, laws, policies, and resources for potential applicants across states).

state of residence of SIJS petitioners may also reflect uneven geographies of social support services and other networks of informal care.<sup>374</sup> Where a child resides, therefore, may impact the ability to apply for SIJS and influence SIJS outcomes.

In this Section, we examine how the youth's state of residence impacts the trajectory of their case. First, we provide an account of the geographic distribution of I-360 petitions and I-485 applications, as well as the geographic distribution of petitioners by nationality. Second, we relate our findings, which show unusually high denial rates for SIJS petitioners primarily in Texas but also in New York and Massachusetts, and we show how these high denial rates contrast with comparably low denial rates in California and Maryland. Although it is beyond the scope of this Article to explain these variations by exploring all possible variables, we conclude this Section by providing initial conclusions and situating these findings within a broader framework of immigrant precarity.

In the first part of this Section, we examine the geography of SIJS petitioners and LPR applications. Most SIJS petitions and SIJS-based LPR applications come from a few key states. Of the 153,374 total I-360 petitions in USCIS's data, New York (33,569), California (20,515), Texas (13,270), Maryland (13,100), and Massachusetts (9,094) combined made up 58.4% of all petitions. Similarly, of the 35,651 total I-485 petitions, New York (9,787), California (4,633), Maryland (3,355), Texas (2,355), and Massachusetts (1,630) combined made up 61% of all petitions. It is not surprising that New York, California, and Texas figure prominently in the total number of SIJS petitions and LPR applications, because these states are well-known as immigrant destinations. Somewhat surprisingly, Maryland and Massachusetts, two much smaller states by population (although also known for large immigrant communities), are on par with Texas, while Florida has only about a third of the number of SIJS petitions as Maryland. A more thorough analysis of state laws, immigrant rights infrastructure, and other demographic factors would be required to understand how state-level factors influence the number of immigrant youth who are eligible for SIJS as well as the number who apply for SIJS. Because smaller annual numbers of petitions from other states affect the analysis, we focus primarily on these five states for much of the analysis in this Section.

While four nationalities dominate the overall data—Guatemala, El Salvador, Honduras, and Mexico—there is some variance of the dominance of these nationalities by state. The main states for Guatemalan SIJS petitions (I-360s) are California, home to 15.6% of all Guatemalan petitions, and New York at 13.9%; the remainder are distributed across many states with less than 8% of all Guatemalan petitions in any single state. Honduran petitioners tend to live in New York (18.9%), Texas (13.9%), and Maryland (8.1%); the remainder, like

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374. See, e.g., Hlass, *supra* note 106, at 304–07.



Guatemalans, are distributed across many states with less than 8% in any single state. Salvadoran SIJS petitioners are more concentrated, with 25.2% of all Salvadoran petitioners living in New York, 16.4% living in Maryland, and 14% in California. Mexican SIJS petitioners are also more concentrated, with 29.9% living in California, 17.2% in Texas, and 10.4% in New York. Unsurprisingly, the geographic patterns of state and nationality for I-485 applicants are relatively consistent with I-360 petitioners. California, home to a large concentration of Mexican I-360 petitioners (29.9%), is also home to a large concentration of Mexican I-485 applicants (30.7%); Maryland, home to a large concentration of I-360 petitioners from El Salvador (16.5%), is also home a large concentration of I-485 applicants from El Salvador (18.9%).

Other nationalities with smaller overall populations show even more geographic clustering. Overall, 73.8% of all Ecuadoran SIJS petitioners, 66.9% of all Indian SIJS petitioners, and 70.8% of all Jamaican SIJS petitioners live in New York. Massachusetts is home to 66.2% of all Brazilian SIJS petitioners. Maryland is home to 25.5% of SIJS petitioners from Nigeria and 21.3% of SIJS petitioners from Peru, and Massachusetts is home to 25.6% of Colombian and 21.4% of Dominican petitioners—although all four of these nationalities are also equally (or more) well-represented in New York. In fact, of the thirty-six nationalities with at least one hundred total SIJS petitions filed, fifteen of them are heavily concentrated in New York, signified by the fact that 50% or more of their petitions were filed while living in the state—including the 63.6% of all Chinese petitioners that lived in New York. California is home to 39.5% of all SIJS petitioners from the Philippines and 24.5% of those from South Korea. Florida is home to 26.6% of all Haitian SIJS petitioners, and Maine is home to 23.5% of all Congolese SIJS petitioners. Other than Mexicans, no group of SIJS petitioners is concentrated in Texas.

To put it slightly differently, New York and Massachusetts have more diverse pools of SIJS petitioners: 73.1% of all I-360 petitioners in New York and 75.2% in Massachusetts are from the four historically backlogged countries (Guatemala, El Salvador, Honduras, and Mexico), while the rest are from other countries. In contrast, over 94% of all I-360 petitioners in California, Maryland, and Texas are from the four backlogged countries with other nationalities making up a relatively small percent of the overall number of petitioners from each state.

The number of I-360 petitions and I-485 applications by state over time show a more nuanced geographic story of where SIJS youth reside. Figure 1(a) shows the trend in total I-360 petitions over time, emphasizing the general decline since 2017 to nearly 18,000 and recent uptick in 2021 to over 22,000. Where these petitions are coming from has also changed. California, Maryland, and Massachusetts mostly saw year-over-year growth between 2010 and 2021. In context, Massachusetts remained relatively steady as a fraction of overall I-360 petitions, hovering between 4.4% and 7.7%. California, however, declined from sending 24.8% of all I-360 petitions to USCIS in 2010 to a low of 8.9% in 2016, then back up to 17.3% in 2021—equal now to New York's 17.3% of all SIJS

petitions during the most recent year of data. Maryland is the breakout story here. From a low of 1.7% of all SIJS petitions in 2010 (just twenty-seven total), the state grew most years to a high in 2021, sending 2,432 I-360s to USCIS, equivalent to 10.9% of all petitions in the country. Texas's trajectory was somewhat different. Texas has a large immigrant population and did see growth in raw numbers of petitions from 178 in 2010 to 2,374 in 2016. But since 2016, the number of petitions coming from Texas declined to 1,199 in 2021. Moreover, as a fraction of national petitions, Texas peaked at 16.1% in 2013 and has been declining ever since, as other states, including California, Maryland, and Massachusetts, have seen far more petitions.

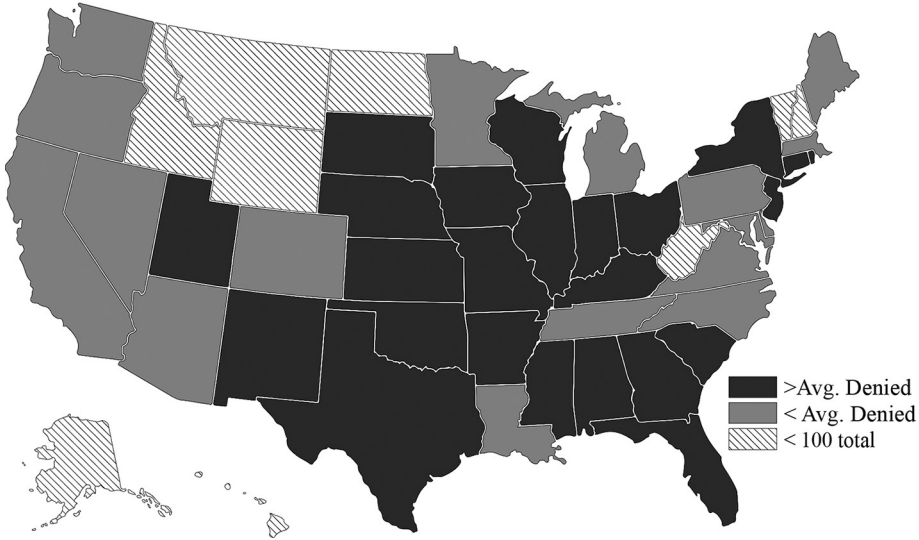
Similar trends can be seen with I-485 applications for SIJS youth, although in this case, all five of the most prominent states in this study (as well as all other states combined) saw consistent year-over-year growth in the number of applications sent to USCIS. New York dominated the number of I-485s, more so than I-360s, by sending as many as 41.6% of all applications in 2018 and sending no less than 25% of all applications for each of the twelve years of data in this study. Although Texas increased in total applications from 141 in 2016 to 1,278 in 2021, it nonetheless remained near the bottom at 6.6% of all applications in 2021, near Massachusetts, which sent 4% (or 787) of all applications that year. Consistent with the I-360 data, Maryland not only increased from ninety-five total I-485s in 2016 to 2,195 in 2021 (nearly 1,000 more than Texas) but also increased as an overall percentage, from 7.7% in 2016 to 11.3% in 2021.

In the second part of this Section, we examine geographic disparities relating to two issues: RFEs and NOIDs by state, and denials of I-360s and I-485s by state. Before December 2016, USCIS rarely issued RFEs, and before January 2018, USCIS rarely issued NOIDs.<sup>375</sup> In 2017, however, 14.1% of all I-360s adjudicated that year had received at least one RFE during the case, up from just 2.2% in 2016. This percent increased dramatically to 52.1% in 2018, then declined to just above 20% for petitions decided in 2019 (22.5%), 2020 (21.8%), and 2021 (21.8%). NOIDs increased, too. Out of all SIJS petitions completed in 2018, 9.1% received at least one NOID, up from 3.6% in 2017. NOID rates remained at elevated levels in 2019 (5.3%), 2020 (7.6%), and 2021 (8.3%).

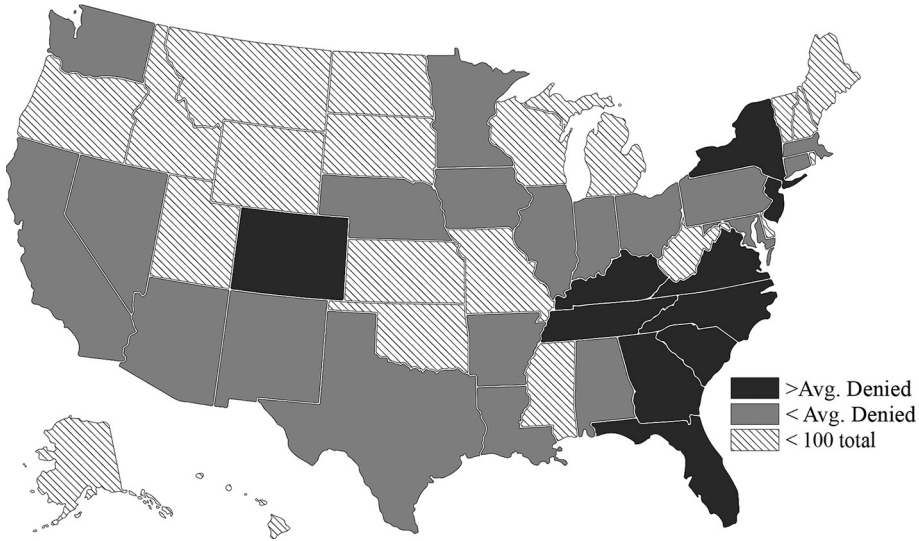
These RFE and NOID rates, along with denial rates, are not distributed evenly geographically. The maps in Figure 7 and Figure 8 below emphasize the states with at least one hundred completed I-360s and I-485s that have denial rates over the national average based on the residence of the applicants. First, we discuss disparities geographically of RFE and NOID rates, alongside overall denial rates of I-360s and I-485s. Next, we focus on Texas, where the rates of RFEs, NOIDs, and denials greatly outpace all other states. Lastly, we conclude with implications for precarity stemming from these geographic disparities.

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375. See *supra* Figure 2.



**Figure 7. Percent of I-360s Denied by State of Applicant Residence**



**Figure 8. Percent of I-485s Denied by State of Applicant Residence**

Although each of the five most prominent states in this study saw an increase in RFEs, they experienced differing intensities. In 2017, when RFE rates were 14.1% for completed petitions nationally, New York, California, Maryland, and Massachusetts each saw RFE rates increase to between 13.5% (California) and 16.1% (both Maryland and Massachusetts). The following year, when RFE rates

increased to 52.1% nationally, these same four states saw RFE rates increase again to between 55.8% (Maryland) and 65.4% (California). Similarly, when NOID rates increased to 9.1% in 2018, these same four states (excluding Texas) saw NOID rates increase to between 6.1% (Maryland) and 11.6% (New York). In fact, Maryland once again stands, this time for receiving comparably low RFE and NOID rates, typically well below the national average and well below its peer states with large volumes of completed SIJS petitions: Maryland had the lowest RFE rate from 2019 to 2021 among the top five states, and the lowest NOID rate from 2018 to 2021 with the only exception in 2019 when California's rate of 0.9% edged out Maryland's relatively lower NOID rate of 1.2%. In fact, California, like Maryland, also typically had relatively lower RFE and NOID rates.

As two states with lower barriers to SIJS processing, California and Maryland fared better than their peers in terms of the percentage of cases denied each year—even with the spike in denials in 2018. In 2018, when the national I-360 denial rate ballooned to 16.7%, USCIS denied 7.6% of petitions from California and 6.3% of petitions from Maryland. This relatively lower denial rate continued through 2021. Both California's and Maryland's denial rates were under 2% for 2019 and 2020 (the national denial rate was 5.8% and 3.4% for each of those years, respectively), and under 4% for 2021 (the national denial rate was 7.1%). New York and Massachusetts did not fare so well. In 2018, New York's denial rate exceeded the national denial rate at 22.8%, then remained high each year through 2021, only falling under the national average (of 3.4%) in 2020 to 2.5%. Massachusetts fared even worse: in 2018, the state's denial rate reached 26.6% and also remained high through the end of 2020, only dropping under the national average (of 7.1%) in 2021 to 6%. In addition, the average number of days to completion has returned to relatively lower levels for California and Maryland. All states saw an increase in the number of days to completion in 2018, but by 2021, cases decided from California (at 178 days on average) and Maryland (169 days) stand out as being quicker than New York (453 days) and Massachusetts (251 days), which remain well over the 180-day statutory threshold.<sup>376</sup>

And then there's Texas. The rate of RFEs, NOIDs, and denials for SIJS cases coming from Texas so greatly exceeds other states that it deserves its own discussion. Even before the spike in RFEs in 2014, when the national RFE rate was 3.2%, USCIS had issued an RFE in 8.4% of completed cases from Texas. This increased to 20% in 2015 and decreased to 7.1% in 2016 (far above the national averages of 4.6% in 2015 and 2.2% in 2016). In 2017 and 2018, Texas's RFE rate was notably below other states (10.8% and 43.2%) but increased to 24.1% again by 2021. Although Texas's RFE rate dropped in 2018, its NOID rate spiked. Already in 2017, 9.2% of all Texas SIJS petitions had been issued a NOID. But in 2018, USCIS issued NOIDs in 29.2% of all petitions decided that year, more than

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376. See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(d)(2), 122 Stat. 5044, 5080.

three times the national rate. Texas' NOID rate remained high in 2019 (17.4%), 2020 (14.1%), and 2021 (14.6%). Only in 2021 did the rate of NOIDs in New York exceed Texas. In addition to high rates of RFEs and NOIDs, the bottom-line outcome for SIJS petitions coming from Texas is unquestionably more dire. In 2016, USCIS denied 4.4% of all petitions from Texas, a number not remarkably higher than other states. But in 2017, the Texas denial rate rose to 16%, a spike that would not be felt nationally until the following year. When the national rate increased to nearly 17% in 2018, Texas's denial rate shot up to 46.6%. USCIS denied nearly half of all SIJS petitions from Texas in 2018. Even after the drop in denial rates, Texas's denial rate remained high: 19.8% in 2019, 10.1% in 2020, and 10.9% in 2021. The time to completion for petitions from Texas has also been exorbitant. In 2018, USCIS took, on average, 491 days to complete adjudication. This increased to 513 days in 2019—the longest average for any state in any year. By 2021, Texas's days to completion declined somewhat to 332, overtaken by New York's now-longest average processing times of 453 days, but still well above the 254-day national average (which well exceeded the 180-day limit).

Although there was a spike in denial rates in all states during 2018, suggesting that national rather than regional policy impacted the spike, Texas was the most stark. One advocate explained that the high rates of denials in Texas after the centralization of adjudication were based on continued adjudication of I-360 petitions filed before October 2016 by local field offices, as well as USCIS's central office's practice of rejecting certain petitions.<sup>377</sup> In fact, according to a government message released through FOIA, the immigration agency decided to further scrutinize SIJS cases involving children over eighteen when they obtained their state court judgment, offering adjudicators particular legal guidance regarding Texas, as well as California and New York.<sup>378</sup> To further understand the purported reasons for denying Texas cases, the authors reviewed thirty-nine AAO appeals of SIJS cases which mention the petitioner is a resident of Texas between 2017 and 2021. All thirty-nine cases were denied because USCIS suggested the state court orders were insufficient.<sup>379</sup> Some of the reasons USCIS put forward were that the order failed to specify the state law basis for the best-interest determination,<sup>380</sup> that the state court did not have jurisdiction over the youth despite

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377. See E-mail from Dalia Castillo-Granados, Dir., Child.'s Immigr. L. Acad., to Rachel Leya Davidson, Dir., End SIJS Backlog Coal., Nat'l Immigr. Project & Laila L. Hlass, Professor, Tulane Univ. L. Sch. (Aug. 15, 2022) (on file with authors) (noting high rates of denials in Texas around 2015 attributable to local practices before centralization, and post-centralization, denials based on declaratory judgments and post-eighteen-year-old cases). According to government documents released through FOIA, adjudicators were told to provide more scrutiny to juvenile court orders in cases when children are over eighteen, as well as specifically state the state law basis for findings. See U.S. CITIZENSHIP & IMMIGR. SERVS. OFF. OF THE CHIEF COUNS., *supra* note 238, at 0711.

378. Message from Valerie Tobias, Field Off. Dir., U.S. Citizenship & Immigr. Servs., U.S. DHS, <https://perma.cc/23H9-62CY>.

379. See, e.g., Appeal of Form I-360 Petition, No. 4906766, at 3 (U.S. DHS Mar. 29, 2021); C-A-F-M-, No. 905227, at 8–9 (U.S. DHS Oct. 31, 2018); A-B-M-, No. 1035378, at 9 (U.S. DHS Dec. 6, 2018).

380. See, e.g., Appeal of Form I-360 Petition, No. 4831445, at 4 (U.S. DHS Feb. 19, 2020).

the order,<sup>381</sup> or that the primary purpose of the proceeding was for an immigration benefit.<sup>382</sup> USCIS appeared to be rejecting the sufficiency of the required SIJS findings that were made as part of declaratory judgments in state courts for children in the custody of the ORR. They also regularly rejected SIJS findings in cases for those aged eighteen to twenty-one in child support proceedings, despite these proceedings being a common judicial proceeding where SIJS findings could be issued in Texas courts.<sup>383</sup> This practice recently came somewhat to an end with the Administrative Appeals Unit of USCIS issuing clarifying decisions and amendments to the USCIS Policy Manual.<sup>384</sup>

We conclude this Section with a discussion of the implications of these findings for immigrant precarity. Congress intended for SIJS to provide a pathway to protection for immigrant youth who cannot be reunified with parents and may not have a permanent home.<sup>385</sup> SIJS should work, and work equally well, for these youth regardless of where they live. Yet as the analysis shows, SIJS youth face geographically uneven procedural hurdles (such as RFEs and NOIDs) as well as geographically uneven case outcomes (in the form of denial rates). For reasons that could only be fully understood through further research, Maryland and California appear to be significantly better places to seek protection as a young person. Although immigrant youth living in these states are not entirely insulated from the politicization of SIJS, immigrants who reached the I-360 petition stage did fare better across several metrics. New York and Massachusetts, on the other hand, two states that have more diverse demographic pools of SIJS petitioners, showed fewer positive outcomes overall, with petitioners in New York facing growing scrutiny and denials in recent years. Immigrant youth in Texas who are seeking protection, however, face an SIJS process that, compared to other states, appears hostile to their success and illustrates the systemic nature of immigrant youth precarity that this Article attempts to articulate.

As young immigrants trying to navigate their way into adulthood, SIJS petitioners cannot be expected to know how their state of residence will affect their ability to seek protection, nor, even if they did have this knowledge, can they be expected to have the resources to relocate. And yet geography can and does influence their access to protection. We interpret these findings as providing support for the argument that precarity, as a politically and systemically induced condition of vulnerability, also manifests as precarious geographies that shape the life and well-being of immigrant youth beyond their control.

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381. See, e.g., Appeal of Form I-360 Petition, No. 12210937, at 3 (U.S. DHS June 25, 2021).

382. D-E-V-H-, No. 1561674, at 5–7 (U.S. DHS Oct. 11, 2018).

383. See E-mail from Dalia Castillo-Granados to Rachel Leya Davidson & Laila L. Hlass, *supra* note 377.

384. See *id.*; *Policy Manual: Chapter 2 – Eligibility Requirements*, U.S. CITIZENSHIP & IMMIGR. SERVS. (May 4, 2023), <https://www.uscis.gov/policy-manual/volume-6-part-j-chapter-2> [<https://perma.cc/5GPG-GQTB>].

385. Aguilera, *supra* note 1.

## C. AGE AND AGING

Age may be an indicator of precarity, because young people have particular developmental abilities and vulnerabilities. Relatedly, aging, or growing up, with adverse childhood experiences, particularly those that might amount to toxic stress, may have long-lasting harmful effects on one's health, behavior, and well-being.<sup>386</sup> In fact, "adverse childhood experiences . . . contribute[] to [seven] of the [ten] leading causes of death in the United States," including heart disease, cancer, stroke, and suicide.<sup>387</sup>

Based upon analysis of the SIJS records, this Article considers how children age through the SIJS process, with an understanding that extended adjudication timelines may protract precarity at a critical developmental age for youth, and that, in turn, may have a long-lasting impact on their health and well-being. Time has amplified value in immigration law, with citizenship and many other qualifying markers for legal status dependent on time. The longer the backlog wait times extend, the longer it takes a child to be allowed to apply for LPR status and, as a result, the longer it takes for the clock to start for the purposes of qualifying for naturalization. Furthermore, in the life of a child, time takes on even greater significance with status as a minor expiring under immigration law at age twenty-one and unaccompanied minor status at age eighteen,<sup>388</sup> and years spent waiting for status represent a large portion of a child's life. The already precarious social situations of children who apply for SIJS may be exacerbated by time, stalled education and career trajectories, and exposure to the harms of exploitation, deportation, and other violence for an extended period.<sup>389</sup>

Analyzing age and case processing timelines, we made several important findings. First, since 2014, USCIS appears to have violated the law in more than 50% of completed cases by taking more than the statutorily mandated 180-day period to decide I-360 cases.<sup>390</sup> Second, during the particularly politicized Trump era, the average processing time for the I-360 petition ballooned to nearly 500 days in 2019. Relatedly, the RFE and NOID policies at that time appeared to extend processing times by adding months on average to the adjudication timeline. Third,

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386. See Melissa T. Merrick, Derek C. Ford, Katie A. Ports & Angie S. Guinn, *Prevalence of Adverse Childhood Experiences from the 2011–2014 Behavioral Risk Factor Surveillance System in 23 States*, 172 JAMA PEDIATRICS 1038, 1039 (2018) ("[C]hildhood adversity can increase morbidity and mortality and have an effect on access to life opportunities."); Johanna Bick & Charles A. Nelson, *Early Adverse Experiences and the Developing Brain*, 41 NEUROPSYCHOPHARMACOLOGY 177, 177 (2016) ("It is well established that early adverse experiences increase risk for maladaptive outcomes, with sequelae spanning a broad number of developmental domains."). See generally Shannon M. Monnat & Raeven Faye Chandler, *Long Term Physical Health Consequences of Adverse Childhood Experiences*, 56 SOCIO. Q. 723 (2015) (examining the connection between experiencing adverse conditions in childhood and negative adult health outcomes).

387. Rebecca Hilgen Bryan, *Getting to Why: Adverse Childhood Experiences' Impact on Adult Health*, 15 J. FOR NURSE PRACS. 153, 153 (2019).

388. 8 U.S.C. 1101(b)(1) (defining child as "an unmarried person under twenty-one years of age"); 8 C.F.R. § 1236.3(a) (2022) (defining juvenile as "an alien under the age of 18 years").

389. See DAVIDSON & HLASS, *supra* note 19, at 6.

390. See *supra* Section I.C. (discussing USCIS delays).

I-485 applications, which do not have a statutorily defined deadline for adjudication like the I-360s,<sup>391</sup> often took years to reach a decision, spiking to an average of more than 800 days for cases that were completed in 2019. Lastly, the most common age of SIJS petitioner at the time of filing is seventeen years old (22.9% of all petitioners), such that these extended adjudication timelines of I-360s and I-485s, particularly for youth who will also be caught in a years-long wait in SIJS backlog, easily extend well into their twenties.<sup>392</sup>

In May 2022, Representative Jamie Raskin sent a letter to USCIS signed by twenty-seven other members of Congress, calling on USCIS to meet the requirement mandated by Congress to adjudicate SIJS petitions in accordance with the law—that is, to adjudicate within 180 days.<sup>393</sup> According to our analysis of USCIS data, USCIS has violated the law in 53.4% of SIJS petitions adjudicated between 2016 and 2021 by taking more than the statutorily mandated 180-day period to decide the cases. Even worse, around 15% of children who applied for SIJS waited more than eighteen months for a decision on their SIJS case, more than triple the amount of time Congress mandated USCIS to take in adjudicating these petitions. The trend of USCIS failing to adjudicate an I-360 petition within the statutory mandate of 180 days has ebbed and flowed over the years with a peak of absolute failure to decide cases on time during the height of the Trump-era policies.<sup>394</sup> From 2010 to 2016, USCIS adjudicated between 77.9% and 94.2% of cases within the statutorily required time. In fact, the average processing time hovered between 92 to 135 days. The average processing time only increased to 186, exceeding the 180-day mandatory time limit, in 2017.

Most stunning is that USCIS seems to have violated the law in 97.2% and 97.5% of SIJS petitions in 2018 and 2019, by taking more than 180 days to adjudicate cases. The average days of adjudication for cases completed in 2018 rose to 393 days and then 480 days in 2019. In 2020, the average days to adjudicate an I-360 petition began to fall, as the portion of adjudications that were compliant started climbing back up, first to 34.8%, and then in 2021, USCIS adjudicated 70.1% of completed cases within 180 days or less. As the administration changed from Trump to Biden, the agency appears to have begun adhering to the non-discretionary adjudication timeline more often, although due to the agency's years of barely adjudicating cases, many cases that had been pending for long times still have had to work their way through the adjudication system. Even as the

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391. See DAVIDSON & HLASS, *supra* note 19, at 15.

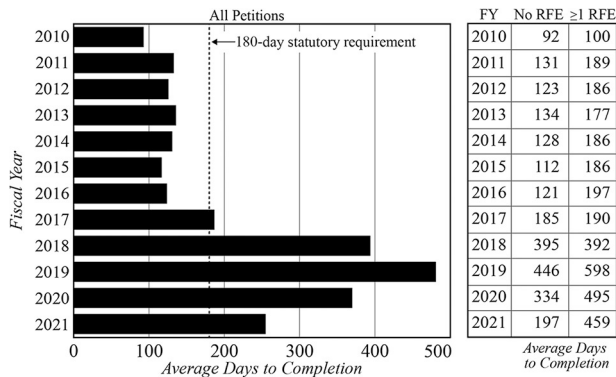
392. The mean age of SIJS petitioners at the time of filing has fluctuated between sixteen and seventeen between 2010 and 2021.

393. Press Release, Jamie Raskin, House of Representatives, Rep. Raskin Sends Letter Calling on USCIS to Process Special Immigrant Juvenile Status Petitions for Vulnerable Youth (May 13, 2022), <https://raskin.house.gov/2022/5/rep-raskin-sends-letter-calling-on-uscis-to-process-special-immigrant-juvenile-status-petitions-for-vulnerable-youth> [<https://perma.cc/7FJK-PFLF>]; see William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(d)(2), 122 Stat. 5044, 5080; 8 C.F.R. § 204.11(g) (2023).

394. See *supra* notes 237–42 and accompanying text.



adjudication times have lessened, timelines have yet to revert to pre-Trump time frames with an average I-360 completion time of 254 days in 2021.



**Figure 9. Average Days to I-360 Adjudication by Year Completed**

USCIS may take years to adjudicate SIJS-based LPR petitions,<sup>395</sup> such that the whole process becomes quite prolonged. There is no correlating legal limit on the time USCIS must adjudicate the SIJS-based LPR application, as there is with SIJS petitions.<sup>396</sup> Nevertheless, the implications of the wait time for the adjudication of LPR status for children with approved SIJS are just as dire. The approval of the underlying SIJS petitions in recent years has not prevented DHS from moving for the removal of SIJS children while they await their LPR status.<sup>397</sup> Moreover, many of the benefits of SIJS are not available to children until they obtain LPR status—including, most significantly for children in the transition to adulthood, access to federal financial aid for college.<sup>398</sup> Federal financial aid is not available to immigrants with approved SIJS until they have become LPRs.<sup>399</sup> As a result, youth caught up in the bureaucratic limbo between obtaining SIJS and the final adjudication of LPR status may find themselves stuck, unable to move forward in life.<sup>400</sup> One immigrant youth described how she was forced to forgo state college and enroll in community college because of financial precarity while waiting to seek and be approved as an LPR.<sup>401</sup> Then due to mounting costs, lack of financial aid, and inability to lawfully work, “she was forced to leave school, putting her dreams on hold.”<sup>402</sup>

395. See DAVIDSON & HLASS, *supra* note 19, at 5.

396. See *id.* at 15.

397. Castillo-Granados et al., *supra* note 33, at 1826.

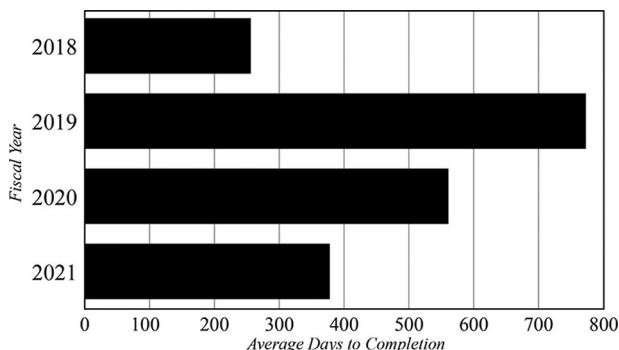
398. See Daisi Diaz-Strong, Christina Gómez, María E. Luna-Duarte & Erica R. Meiners, *Purged: Undocumented Students, Financial Aid Policies, and Access to Higher Education*, 10 J. HISP. HIGHER EDUC. 107, 108 (2011).

399. See DAVIDSON & HLASS, *supra* note 19, at 20.

400. See *id.* at 20–21; Diaz-Strong et al., *supra* note 398, at 117 (“Undocumented students are being systematically purged from the higher education system.”).

401. DAVIDSON & HLASS, *supra* note 19, at 15, 20.

402. *Id.* at 20.



**Figure 10. Average Days to I-485 Adjudication by Year Completed**

For the I-485 applications, the overall average number of days to completion is 447 days. In 2018, the average number of days to adjudicate the I-485 was 255,<sup>403</sup> which grew to 772 days for decisions in 2019.<sup>404</sup> In 2020, the average number of days to completion was 560,<sup>405</sup> which dropped to 377 in 2021.<sup>406</sup> Because of protracted wait times in the I-360 and I-485 adjudication phases, as well as the SIJS backlog, young people may spend a large portion of their teenage years and twenties, aging and waiting, in various parts of the SIJS process. For this analysis, it is not possible to precisely document the life cycle for individual SIJS youth from the filing of an I-360 to the adjudication of an I-485, because the I-360 and I-485 applications are not linked in the records provided to us.<sup>407</sup> Therefore, to illustrate an example case trajectory, the authors picked a filing date and used average petitioner ages and average case processing times. For this case study, the authors projected a lifecycle of a case of a youth from El Salvador in early March 2018. These children are not only impacted by the SIJS backlog, but they constitute the most recent group of Salvadoran youth eligible to seek LPR status as of March 2023,<sup>408</sup> making it possible to map out the length of

403. However, 2018 only had 259 applications according to records provided by USCIS, which seems much lower than it should be. According to the DHS Yearbook of Immigration Statistics, more than 4,000 “juvenile court dependents” adjusted status to that of LPRs. *See* DHS 2018 YEARBOOK, *supra* note 122 (recording 4,505 adjustments).

404. The records included 1,911 SIJS-based LPR applications, although according to the DHS Yearbook of Immigration Statistics in 2019, there were about 5,000 SIJS adjustments. *See* DHS 2019 YEARBOOK, *supra* note 122 (recording 4,988 adjustments).

405. The records included 5,511 SIJS-based LPR applications, which is similar to the approximately 5,500 SIJS adjustments in the DHS Yearbook of Immigration Statistics for 2020. *See* DHS 2020 YEARBOOK, *supra* note 122 (recording 5,545 adjustments).

406. The records included 12,689 SIJS-based LPR applications, which is similar to the 12,000 SIJS adjustments in the DHS Yearbook of Immigration Statistics for 2021. *See* DHS 2021 YEARBOOK, *supra* note 122 (recording 11,409 adjustments).

407. USCIS, on the other hand, has this information because A-Numbers, which are individualized, are part of each data set. *See* Glossary, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/tools/glossary> [<https://perma.cc/6QZZ-9SGN>] (last visited May 26, 2023) (defining A-Number as “[a] unique seven-, eight- or nine-digit number assigned to a noncitizen by the Department of Homeland Security”).

408.

the time waiting in the SIJS backlog, as well as average processing time, and then project estimated I-485 processing times based on recent data.<sup>409</sup>

A Salvadoran child applying for SIJS in 2018 at the hypothetical age of seventeen, the most common age of SIJS petitioners at filing,<sup>410</sup> might spend 514 days,<sup>411</sup> or approximately 1.4 years, in the I-360 stage, five years in the backlog,<sup>412</sup> and then another 447 days,<sup>413</sup> or approximately 1.2 years, in the LPR-adjudication process. They would be about twenty-five years old when finally granted LPR status. This child would have spent the entirety of their transition into adulthood and much of their twenties in the SIJS process. This trajectory illustrates the double exclusion children face: first, from a stable childhood due to the abuse, abandonment, neglect, and various other precarity factors, and then, youth are held in limbo and exiled from transition into independent adulthood. This exclusion from American life acts as a “reminder that they can neither legally be here in the U.S nor become active members of society serv[ing] to foster anxiety, frustration, uncertainty, and a sense of hopelessness.”<sup>414</sup>

#### D. THE SIJS BACKLOG

During the study period, the SIJS backlog had particular intersections with precarity related to age, aging, and national origin. National origin, which has a complex relationship to race,<sup>415</sup> impacts the precarity of immigrant children and youth at various stages of the SIJS process, including in case processing times and outcomes as described above.<sup>416</sup> Before the SIJS backlog developed in 2016, all SIJS-eligible children were able to apply for LPR status and work permits concurrently with their SIJS petitions,<sup>417</sup> and then a child could receive the LPR decision at the same time, or soon after the SIJS decision.<sup>418</sup> The full process could take about six months, because after the 2008 SIJS amendments, USCIS was required to decide petitions within 180 days.<sup>419</sup> When the SIJS backlog first

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408. See BUREAU OF CONSULAR AFFS., U.S. DEP’T OF STATE, VISA BULLETIN: IMMIGRANT NUMBERS FOR MARCH 2023, at 4 (2023) [hereinafter MARCH 2023 VISA BULLETIN], [https://travel.state.gov/content/dam/visas/Bulletins/visabulletin\\_March2023.pdf](https://travel.state.gov/content/dam/visas/Bulletins/visabulletin_March2023.pdf) [<https://perma.cc/8ZD4-4TWD>].

409. Salvadoran, Guatemalan, and Honduran youth who filed for SIJS on March 15, 2018, and later are still waiting in the SIJS backlog, and we cannot estimate when they will be permitted to apply for LPR status. See *id.*

410. This is the average age of the complete SIJS data set, not for 2018, although notably the average age of petitioner has not shifted much over time.

411. The median number of days for adjudication for SIJS petitions filed in 2018 was 514. The average (mean) was 549.13 days.

412. As of March 2023, the visa bulletin states that there are immigrant visa’s available for SIJS petitioners from El Salvador, Guatemala, and Honduras who filed their I-360 on March 15, 2018, or earlier. See MARCH 2023 VISA BULLETIN, *supra* note 408. Therefore, it is a five-year wait.

413. The average time to complete an I-485 from the full I-485 data set from 2016 to 2021 is 447 days, with significant variation over time.

414. Suárez-Orozco & Hernández, *supra* note 110, at 9.

415. See *supra* Section II.B.1.

416. See *supra* Section II.C.

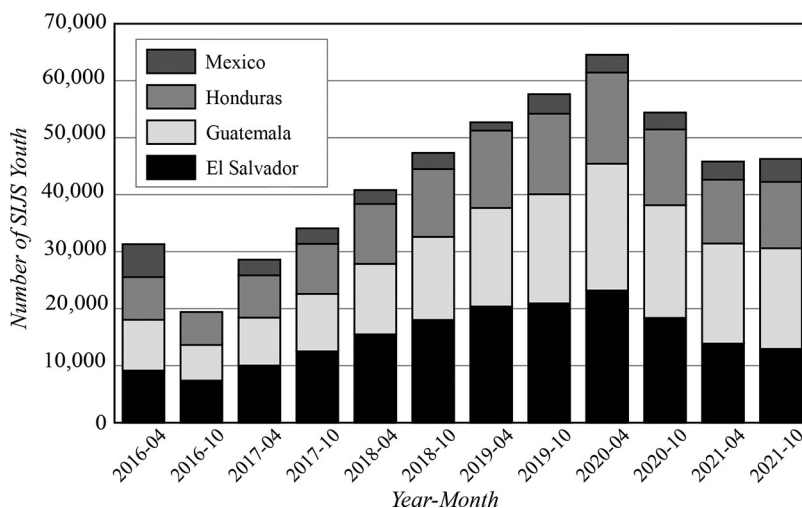
417. See Castillo-Granados et al., *supra* note 33, at 1818.

418. See *id.*

419. See Hlass, *supra* note 106, at 293 (“[I]n 2009 the median processing time [of SIJS petitions] was 121 days. Processing times have dropped to less than three months in 2012.”).

emerged in 2016, children from El Salvador, Guatemala, Honduras, Mexico, and briefly India were forced to wait to apply for LPR status because of the per-country and worldwide visa limitations imposed for the employment-based immigrant visa system, which is how the law categorizes SIJS youth.<sup>420</sup> Because of how the country and regional caps disparately impact Latina/o youth, who might be racialized as Indigenous, Black, or Brown, the phenomenon of the historical SIJS backlog has been likened to a racial quota system.<sup>421</sup> In March 2023, after the study period, vast changes to both the makeup of youth trapped in the backlog and its operation occurred with the Department of State announcing that they have changed how they interpreted the per-country limit on visa availability due to a prior misinterpretation of the law, which resulted in undoing disparities based on nationality within the employment-based fourth preference category, but also forcing all children into the years long backlog.<sup>422</sup>

In this Section, we examine the SIJS backlog, considering how it protracts precarity. First, we catalog the size of the population of youth stuck in the SIJS backlog over time. Then, we describe how the SIJS backlog compounds adjudication wait times and how together, this limbo period may swallow up almost a decade of a young person's life. This analysis is all the more alarming given the fact that as of the date of publication, every single SIJS petitioner is now impacted by the backlog.



**Figure 11. Estimated Size of SIJS Backlog by Nationality Over Time**

420. See *supra* Part I; DAVIDSON & HLAAS, *supra* note 19, at 11.

421. See Castillo-Granados et al., *supra* note 33.

422. See *Practice Alert: April 2023 Visa Bulletin Changes Impacting SIJS Recipients*, *supra* note 34; *Employment-Based Fourth Preference (EB-4) Announcement*, *supra* note 34; *Employment-Based Preference Immigrant Visa Final Action Dates and Dates for Filing for El Salvador, Guatemala, and Honduras*, 88 Fed. Reg. 18252 (Mar. 28, 2023).

In October 2021, there were 46,275 Latina/o youth from El Salvador, Guatemala, Honduras, and Mexico with already filed I-360s, either pending or approved, who were unable to apply for LPR status due the SIJS backlog. This was despite a more than doubling in the number of SIJS-based LPR adjudications in 2021 from 2020 and 2019, stemming from more visa availability in 2021 (and 2022) because of USCIS not using all family and employment-based visas that were available during the pandemic.<sup>423</sup> Although the size of the SIJS backlog in October 2021 had decreased slightly from the height of 64,548 in April 2020, this was temporary. Because all countries have extended visa unavailability as of April 2023, the 2023 SIJS backlog is growing.<sup>424</sup>

In a prior article, two of the authors likened the historical backlog and its long-standing impact on Latina/o youth from the Northern Triangle and Mexico to a “racial quota system” wherein the SIJS backlog both “feeds immigrant children who have already experienced trauma into a broader school to deportation pipeline” as well as extends the time they are in legal limbo, amplifying their precarity.<sup>425</sup> The collision of decades of U.S. foreign policy attempting to restrict migration from these countries, while also participating in regime changes and other political and economic maneuverings that impacted stability in the region which in turn led to large-scale migration, cannot be divorced from the exclusionary impact of interpretation of per-country visa caps on SIJS children from Central America and Mexico.<sup>426</sup>

During this protracted time in liminal legal status, children in the backlog face a variety of challenges, including economically precarious situations due to inability to work lawfully<sup>427</sup> or obtain federal loans for higher education,<sup>428</sup> as well as over-policing in schools and neighborhoods.<sup>429</sup> For many years, children

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423. See *USCIS Announces FY 2021 Accomplishments*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Dec. 16, 2021), <https://www.uscis.gov/newsroom/news-releases/uscis-announces-fy-2021-accomplishments> [<https://perma.cc/37QS-S548>] (“USCIS faced the unprecedented challenge of processing over 237,000 employment-based Green Card applications—not only the agency’s usual 115,000, but an additional 122,000 immigrant visa numbers that the Department of State was unable to process in FY 2020 due to the COVID-19 pandemic.”); Muzaffar Chishti & Julia Gelatt, *After a Slump, Legal Immigration to the United States Is Returning to Pre-Pandemic Levels*, MIGRATION POL’Y INST. (Nov. 30, 2022), <https://www.migrationpolicy.org/article/legal-immigration-us-returns-prepandemic-levels> [<https://perma.cc/S7B6-EBLT>] (“Employment-based visa issuance was higher than normal in FY 2022 because of a quirk of immigration law allowing unused visas from capped family-preference categories . . . in one fiscal year to roll over to employment-based categories in the subsequent fiscal year. Delays in State Department processing resulted in about 262,000 such family-preference visa numbers going unused in FY 2020 and FY 2021 combined, which therefore rolled into employment-based categories. Due to this rollover, the number of employment-based visas available in FY 2022 was double the usual yearly allotment of 140,000.”).

424. See MARCH 2023 VISA BULLETIN, *supra* note 408.

425. Castillo-Granados et al., *supra* note 33, at 1818. Two authors of this Article—Laila Hlass and Rachel Leya Davidson—contributed to this prior article.

426. *Id.* at 1822–25.

427. See DAVIDSON & HLASS, *supra* note 19, at 6.

428. See *id.*

429. Many children from countries impacted by the backlog are apprehended at the border and placed in removal proceedings, while others end up in immigration court when caught up in the

in the SIJS backlog were prevented from seeking work authorization as they waited in the backlog to be able to apply for LPR.<sup>430</sup> Young people were forced to transition into adulthood without legal permission to work, waiting years and graduating from high school with no means of supporting themselves lawfully.<sup>431</sup> This forced many youth into the unregulated labor economy, exposing them to exploitative working conditions including labor trafficking.<sup>432</sup> Ariel reported working eighty-hour weeks in unsafe conditions, using toxic chemicals that burned their hands.<sup>433</sup> These conditions mirror the brutal labor conditions faced by unaccompanied minors and reported recently in the *New York Times* as a “shadow work force [that] extends across industries in every state, flouting child labor laws that have been in place for nearly a century.”<sup>434</sup> This workforce, much like the backlog, is made up of children mostly from Central America and “has exploded since 2021, while the systems meant to protect children have broken down.”<sup>435</sup>

The inability to work, coupled with a lack of access to federal financial aid for college, further pushed SIJS children and youth outside of public life and into the shadows.<sup>436</sup> One study regarding the mental health of undocumented students found that nearly three quarters of all students surveyed worked long hours at menial jobs in order to finance their education because they did not qualify for financial aid.<sup>437</sup> One young person reported:

[I worked] full time and attend school part-time since part-time tuition as [sic] all I was able to afford. . . . money has always been an issue. I attended community college first and then transferred out to a 4-year university, throughout this time I always had to depend on public transportation since I did not own a car. My body was always tired and felt heavy, I was mentally drained and suffered from depression.<sup>438</sup>

Although the Biden Administration introduced a deferred action policy providing work authorization and protections from removal for SIJS youth in the

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crosshairs of over-policing and immigration enforcement via the school to deportation pipeline. *See id.* at 23, 36; Hlass, *supra* note 94, at 697, 700, 702 (explaining the concept of the school to deportation pipeline).

430. *See* DAVIDSON & HLASS, *supra* note 19, at 27.

431. *See id.*

432. *See id.* at 12 (“As the years pass these young people transition into adulthood without legal permission to work, exposing them to trafficking and labor abuse, the exact harms that SIJS was created to protect them from.”).

433. Zoom Interview with Ariel, *supra* note 13.

434. Hannah Dreier, *Alone and Exploited, Migrant Children Work Brutal Jobs Across the U.S.*, N.Y. TIMES (Feb. 28, 2023), <https://www.nytimes.com/2023/02/25/us/unaccompanied-migrant-child-workers-exploitation.html>.

435. *Id.*

436. *See* DAVIDSON & HLASS, *supra* note 19, at 20 (explaining that many SIJS youth abandon goals of attending college or pursuing certain careers).

437. Suárez-Orozco & Hernández, *supra* note 110, at 8.

438. *Id.* (first alteration and omission in original).

backlog in March 2022,<sup>439</sup> children may still face mental health challenges related to their status. DACAmented Latina/o students reported levels of anxiety seven times higher than the norm, according to one study.<sup>440</sup> Although the deferred action program acts as a buffer in many ways to the worst harms of the SIJS backlog, it cannot cure the effects of existing in a perpetual state of liminality for SIJS youth in the backlog.

In addition to the labor exploitation described above, because of the backlog, these children and youth often also deal with protracted court processes after being granted SIJS and before they can adjust to LPR status. Data on SIJS recipients applying for LPR status show that SIJS petitioners from the countries impacted by the visa backlog, El Salvador, Guatemala, Honduras, and Mexico, are likely to be subject to immigration court deportation proceedings.<sup>441</sup> In fact, 88% of children from El Salvador, Guatemala, and Honduras who had approved SIJS petitions and were seeking LPR status were in deportation proceedings. Although this is likely a result of the mode of entry—crossing the southern border and being apprehended and then applying for SIJS—protracted time within removal proceedings may have grave mental health impacts.<sup>442</sup> One attorney reported, “We have seen young people celebrate an approval of their petition for Special Immigrant Juvenile Status only to have to turn around and fight a removal order because a green card was not yet available to them.”<sup>443</sup> Because these children are in limbo for years while awaiting visa availability, they are forced to go to immigration court for an extended period, appear before a judge, battle the attempts by DHS to force a removal order, and have their case scrutinized over and over again by an immigration court,<sup>444</sup> which may lead to

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439. See *supra* notes 172–75 and accompanying text; *USCIS to Offer Deferred Action for Special Immigrant Juveniles*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Mar. 7, 2022), <https://www.uscis.gov/newsroom/alerts/uscis-to-offer-deferred-action-for-special-immigrant-juveniles> [<https://perma.cc/NKN7-7JKP>].

440. See Suárez-Orozco & Hernández, *supra* note 110, at 10.

441. See DAVIDSON & HLASS, *supra* note 19, at 33. Despite our request for data on SIJS petitioners in removal proceedings, see 2021 FOIA Request, *supra* note 254, at 3, USCIS did not share that information with us, stating that it was not a tracked field. See E-mail from Brenda González Horowitz, Assistant U.S. Att’y, Civ. Div., U.S. Att’y’s Off. for D.C., to Stephen Benz, Assoc., Milbank & Aaron Renenger, Partner, Milbank (Oct. 29, 2021) (on file with authors).

442. See, e.g., DAVIDSON & HLASS, *supra* note 19, at 24 (commenting on the mental health impacts of the threat of deportation and the exacerbated stress of immigrants).

443. *Id.* at 23.

444. For further discussion of the challenges of immigration courts, see generally N.Y.C. BAR, REPORT ON THE INDEPENDENCE OF THE IMMIGRATION COURTS (2020), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/independence-of-us-immigration-courts> [<https://perma.cc/4353-8JU3>] and NAT’L ASS’N OF IMMIGR. JUDGES, *supra* note 75. See also DAVIDSON & HLASS, *supra* note 19, at 34 (“In the Boston court, which is the court for Maine, some judges have been pretty unfriendly with granting continuances, and in the past, we’ve had concerns that people who are in the backlog would be ordered deported while waiting for adjustment. At the very least [some judges had wanted] to have some form of relief pending before the court. So we had seen that where someone has an approved I-360 [SIJS petition] and they have a hearing, that they were required to file an

high levels of mental stress.<sup>445</sup>

The SIJS backlog heightens the precarity of children, placing them in extended legal limbo without access to the permanent protection that Congress intended for SIJS children. Furthermore, during this protracted time children may face inability to work lawfully as well as inability to access federal financial aid, pushing them into exploitative economic situations and away from higher education opportunities. While the SIJS backlog's historic high of the study period in April 2020 trapped 64,548 youth, this number is likely on the rise again given the Department of State's April 2023 reinterpretation of per-country visa caps and the consequent inclusion of SIJS petitioners from all countries in the backlog. The far-reaching implications of the mental health, safety, and general well-being of all children within the SIJS process cannot be overstated, particularly in light of the size and scope of youth impacted by the backlog.

### III. THEORETICAL AND POLICY IMPLICATIONS OF KEY FINDINGS

Children who seek SIJS have often been forced to leave their homes, sometimes alone, and travel long distances across international borders in search of safety and security. This Article starts from the premise that these children, who have been abandoned, abused, neglected, and often live as part of communities that have been deprived of economic resources and opportunities, are excluded from a protected childhood. Congress built the SIJS program to help these children build a more secure future. However, SIJS children experience precarity in the United States, often due to discrimination they may face based on age, immigration status, race, class, gender, sexual orientation, and language use. This Article examines how children may face an exclusion after they are taken into the custody of the state or an adult and later petition for SIJS. Stuck for years in the SIJS process, time passes while they live in legal uncertainty. As their peers begin college and obtain more secure jobs, SIJS youth face steep challenges in their transition into independent adulthood. Youth may languish for years in legal limbo, experiencing the violence of the SIJS adjudication process frustrating their ability to work lawfully or obtain financial aid for college, under threat of deportation, and at the whims of the political machinations of the leadership of the moment. This protracted precarity may have a dire impact on youth's mental health.<sup>446</sup>

Our findings reveal a program that, although ultimately providing permanent legal protection to significant numbers of vulnerable immigrant children, undermines its humanitarian purpose throughout the adjudication process in both the

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application for asylum or something [to avoid deportation].” (alterations in original) (quoting Maggie Leoffelholz, Attorney, Immigrant Legal Advocacy Project)).

445. See Cassandra A. Bailey, Amanda Venta, Jorge Varela, Temilola Salami, Chelsea Ratcliff & Jeffrey Gardner, *Risk and Protective Markers for Well-Being in Latinx Immigrants in Removal Proceedings*, 45 LAW & HUM. BEHAV. 179, 180 (“The possibility of deportation contributes to distress among individuals facing immigration proceedings; this distress is exacerbated by the long wait time (i.e. over two years) between the beginning of immigration court proceedings and trial.”).

446. See *supra* notes 110–11 and accompanying text.



ways the law and those implementing it treat these same children. Based on the data, USCIS approved 130,731 I-360s for SIJS petitioners between 2010 and 2021. USCIS approved 15,741 I-485s to SIJS petitioners between 2018 and 2021. SIJS promotes safety and security for so many children, yet at the same time, the law, policy, and practice of SIJS often exacerbate the precarity of immigrant children. Instead of treating immigrant children petitioning for protection with care and consistency, years of delay in accessing protection, the various ways the political agenda of the moment shows up in how USCIS treats children's applications, and the consequent social suffering children experience are seen as the norm by the children applying for SIJS. All of this "deepen[s] existing precarities which may have been imposed on them related to their race, immigration status, and other factors."<sup>447</sup>

In the SIJS context, this precarity is both legally and bureaucratically sanctioned as part and parcel of immigration law. It also exists outside of the law and in violation of it. For example, although the law allows for the existence of a years-long green card backlog through the statutory application of employment-based visa limits on SIJS,<sup>448</sup> it explicitly prohibits the adjudication delays of the SIJS petition that we see in the data by mandating a 180-day adjudication period.<sup>449</sup> The SIJS backlog is therefore a form of legal violence, formally codified into the statute, whereas the consistent violation of the SIJS petition 180-day adjudication limit can be understood as legal violence that is informally perpetuated and permitted through the bureaucratic process. These administrative and legal processes collide, forming a "cumulatively injurious effect[]"<sup>450</sup> or double exclusion of children who are unable to safely transition into adulthood due to the extended legal limbo and violence of the SIJS process.<sup>451</sup> This violence of extended processing times, backlogs, and spikes in notices to require more evidence or indicate a pending denial are normalized as just "part of the SIJS process" in how advocates explain it and, consequently, what immigrant children are conditioned to expect in trade for the hope of eventual LPR status.<sup>452</sup>

Although this violence may not be overtly physical in nature, the surveillance, extended legal limbo, politicized policy and practice changes, and vulnerability to deportation these children face and the resulting exclusion from schooling, access to stable work opportunities and medical care, and exposure to various forms of racial harm have long-term devastating impacts on the mental health and social well-being of immigrant children.<sup>453</sup>

447. Castillo-Granados et al., *supra* note 33, at 1785.

448. 8 U.S.C. § 1153(b)(4).

449. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(d)(2), 122 Stat. 5044, 5080; 8 C.F.R. § 204.11(g) (2023).

450. Menjívar & Abrego, *supra* note 51, at 1380.

451. *Cf. id.* at 1414 ("Legal violence magnifies immigrants' vulnerability in [family, work, and school] and in other facets of life.").

452. *Cf. id.* at 1385 ("An important aspect of the [legal] violence we address is its normalization . . .").

453. See Suárez-Orozco et al., *supra* note 21; Stephen H. Legomsky, *Portraits of the Undocumented Immigrant: A Dialogue*, 44 GA. L. REV. 65, 100 (2009) ("There's mounting evidence that the constant

That SIJS has protected tens of thousands of children in the last decade does not absolve the government of the harms it perpetrates on these children through the adjudication of their SIJS and LPR applications.<sup>454</sup> The SIJS program is not merely aspirational. It is a real program with real impacts and, as such, its deficiencies merit repair. Both congressional and administrative actions must address the precarity SIJS children experience in the program. We include four overarching recommendations to support immigrant youth seeking SIJS stemming from our findings: (1) Congress should defund immigration enforcement, especially the targeting of children, and divert those funds to states and localities to provide competent community-based legal representation; (2) Congress should abolish the SIJS backlog so that children can immediately apply for LPR status when approved for SIJS; (3) USCIS should ensure expeditious processing of SIJS and LPR-based SIJS applications; and (4) USCIS, ICE, and the Executive Office for Immigration Review (EOIR) should be required to publish complete and accurate data on SIJS and children in the immigration system.

A. ENSURING SAFE AND EFFECTIVE LEGAL REPRESENTATION IN THE SIJS PROCESS

The government subjects large numbers of children to removal proceedings, exacerbating their precarity and negatively impacting their mental health. Meanwhile, data on the geographic concentration of SIJS petitioners and success rates by legal representation paint a picture of an SIJS process that privileges children who live in major urban centers with access to effective pro bono representation.<sup>455</sup> Given the complexity of the SIJS process, access to effective and free counsel can be the difference between a child obtaining lawful permanent residence and being deported back to unsafe conditions.<sup>456</sup> Well-trained pro bono legal services providers conduct outreach and screen youth for eligibility; they stay connected to children for years while they navigate the SIJS process; and they often connect them to vital social services while they are in limbo.<sup>457</sup>

Congress as well as the Departments of Justice and of Homeland Security can take action to address the harm large swaths of children face as they are subjected to removal proceedings and their challenges to finding qualified representation. Congress should defund immigration enforcement, particularly its targeting of children, and redirect funds to states and localities for the promotion of access to universal community-based representation. The Department of Justice and Department of Homeland Security should implement policies and practices to

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threat of deportation has induced stress levels that have affected their mental health.”). *See generally* DAVIDSON & HLASS, *supra* note 19 (discussing the many vulnerabilities undocumented youth in the SIJS backlog face).

454. *Cf.* DAVIDSON & HLASS, *supra* note 19, at 11 (explaining that “tens of thousands of children” live in “dangerous limbo, even after being granted SIJS”).

455. *See supra* Sections II.B.4–5.

456. *See* Hlass, *supra* note 59, at 270 (“A vast majority of represented children are allowed to stay in the U.S.—about three out of four. The opposite is true for unrepresented children—four out of five are ordered deported.” (footnote omitted)).

457. *See* Baily et al., *supra* note 312, at 6.

shrink the size of children subject to the deportation regime, through prosecutorial discretion in enforcement, as well as administrative closure and termination of children's cases. These actions together will minimize the harm of children being subjected to removal and left to represent themselves or fall to the predation of unscrupulous or less qualified attorneys. Furthermore, the government will avoid wasting funds prosecuting and detaining children. Local and state funding for the representation of immigrant children is essential, especially in underrepresented areas. It is critical that no restrictions be attached to funding excluding categories of children or precluding organizations that challenge political interference or agency misconduct.<sup>458</sup>

#### B. ABOLISHING THE SIJS BACKLOG

The SIJS backlog is a system that has had significant and disparate harms on children from Central America and Mexico,<sup>459</sup> and as of April 2023 is equally harming children from all countries.<sup>460</sup> Congress should abolish the SIJS backlog by amending the Immigration and Nationality Act to add SIJS to the list of statuses exempt from worldwide annual visa limitations and per-country caps.<sup>461</sup> Along these lines, proposed legislation, the Protect Vulnerable Immigrant Youth Act, was introduced to exempt SIJS youth from the employment-based visa caps and would end the backlog.<sup>462</sup> Furthermore, in the meantime, children in removal proceedings with pending or approved SIJS should have their cases closed or terminated. This was once common practice in immigration courts<sup>463</sup> and should be reinstated because it would protect children from being deported while they are in the backlog.

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458. For instance, immigration advocates who challenged and overturned Trump's unlawful SIJS policies and practices in the class-action cases cited in this Article, such as *R.F.M. v. Nielsen* and *Saravia v. Sessions*, should not be prevented from receiving funds. See *supra* notes 234–48 and accompanying text. For a discussion of the potential harm of restricted federal funding, see generally Angélica Cházaro, *Due Process Deportations*, 98 N.Y.U. L. REV. 407 (2023).

459. See Castillo-Granados et al., *supra* note 33, at 1789–90.

460. See *supra* note 202 and accompanying text.

461. See Deborah S. Gonzalez, *Sky Is the Limit: Protecting Unaccompanied Minors by Not Subjecting Them to Numerical Limitations*, 49 SAINT MARY'S L.J. 555, 580–81 (2018). Indeed, the INA already exempts two categories of “special immigrants” from the worldwide numerical limitations. See 8 U.S.C. § 1151(b)(1)(A) (explaining that those subject to 8 U.S.C. § 1101(a)(27)(A)–(B) “are not subject to the worldwide levels or numerical limitations”); 8 U.S.C. § 1101(a)(27)(A) (“[A]n immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad . . . .”); 8 U.S.C. § 1101(a)(27)(B) (“[A]n immigrant who was a citizen of the United States and may, under section 1435(a) or 1438 of this title, apply for reacquisition of citizenship . . . .”).

462. Protect Vulnerable Immigrant Youth Act, H.R. 7867, 117th Cong. (2022).

463. For a discussion of termination and administrative closure of SIJS cases, see SAFE PASSAGE PROJECT, SPECIAL IMMIGRANT JUVENILE STATUS MANUAL: A STEP-BY-STEP GUIDE FOR SAFE PASSAGE PROJECT PRO BONO ATTORNEYS 52–53 (3d ed. 2017), [https://www.safepassageproject.org/wp-content/uploads/2018/09/SAFE\\_PASSAGE\\_SIJS\\_MANUAL\\_SUMMER\\_2017\\_FINAL.pdf](https://www.safepassageproject.org/wp-content/uploads/2018/09/SAFE_PASSAGE_SIJS_MANUAL_SUMMER_2017_FINAL.pdf) [<https://perma.cc/7TQL-7NJL>].

## C. ENSURING EXPEDITIOUS PROCESSING

Youth are spending years waiting, aging into uncertain futures, due to SIJS processing delays, a politically motivated RFE and NOID issuance practice, the SIJS backlog, and protracted I-485 adjudications. USCIS should ensure expeditious processing at every stage of the SIJS program so that they do not force children into a legal purgatory. First, steps should be taken to ensure USCIS follows its statutory obligation to adjudicate I-360s within 180 days, including timely publication of violations of the law and a change of policy to not incentivize officers to issue unnecessary RFEs and NOIDs. Second, USCIS should set a policy and deploy officers as described above to adjudicate I-485s on a similar timeline to the 180-day SIJS deadline, so that the entire SIJS adjudication (not accounting for the backlog) might span closer to one year, rather than the years-long adjudication children currently face.

First, USCIS must stop violating its statutory obligations to adjudicate SIJS petitions within the 180-day deadline. USCIS should begin tracking and publishing data on SIJS processing times to both expose the frequency with which it adjudicates petitions over 180 days and hopefully aid the agency to meet the six-month deadline. To ensure expeditious filing, immigration attorneys may also have a role to play. Child advocates should consider regularly filing writs of mandamus when cases are pending beyond 180 days.<sup>464</sup>

Relatedly, USCIS policy on the issuance of RFEs and NOIDs to SIJS petitioners has created space for abuse of the adjudication process by allowing the 180-day adjudication clock to stop each time USCIS issues an RFE or NOID.<sup>465</sup> As this Article has demonstrated, the continuous issuances of RFEs and NOIDs during the Trump Administration were the external manifestation of a policy shift designed to delay and deny SIJS to eligible children who applied when they were over the age of eighteen.<sup>466</sup> USCIS should change its policy and practice so that the issuance of an RFE or NOID does not stop the SIJS adjudication clock.

Secondly, USCIS should implement an adjudication deadline for SIJS-based LPR applications. Without setting a correlating time limit for the adjudication of the LPR application,<sup>467</sup> USCIS undermines congressional intent to provide expeditious and permanent protection to immigrant children. According to the data, in 2021, there were over 8,000 LPR applications adjudicated. Of these adjudicated applications, about 75%, or 5,579 of them, were pending for more than six months.<sup>468</sup> Ultimately, the agency must drastically shorten timelines for each

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464. See *supra* notes 185–93 and accompanying text.

465. See 8 C.F.R. § 204.11(g) (2023); 8 C.F.R. § 103.2(b)(10)(i) (2023); U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 192.

466. See *supra* Section II.D.

467. See DAVIDSON & HLASS, *supra* note 19, at 15.

468. Although it is true that USCIS has often failed to uphold the 180-day adjudication timeframe for the underlying SIJS petition, that is not a valid argument for its failure to implement and uphold a timeframe for LPR applications. If this is an issue of resource allocation, it could be remedied by diverting funds from enforcement to SIJS adjudication.

stage of the SIJS process so that youth can more easily and successfully transition into adulthood.

#### D. DATA TRANSPARENCY

To improve transparency and accountability in the SIJS program, USCIS should be required to regularly publish detailed data on SIJS petitions and SIJS-based LPR applications. This will improve data collection, integrity, and transparency, and ultimately, it should enhance the program's administration. It will also allow advocates a means of monitoring the SIJS program's administration to guard against instances of political interference. Because the Secretary of Homeland Security, who is appointed by the President, controls USCIS and DHS, there is not a clear-cut way to shield the program from the kind of political interference observed dramatically in the data during the Trump Administration,<sup>469</sup> but data transparency can at least make political interference apparent in real-time so that impacted youth and other advocates can shine light on and challenge these practices.

To obtain the records necessary to conduct this study, the authors had to secure litigation resources to file a lawsuit and have been in settlement discussions with USCIS for nearly two years at the time of writing this Article. The high cost in both time and resources to obtain public records critical to assess and address children's protection is untenable. This information should be available to the public without the need to expend valuable resources battling the government for it.

Data transparency for SIJS adjudications is not a new request. SIJS-related class action lawsuit *Perez-Olano v. Holder* required USCIS to publish some summary data in the settlement,<sup>470</sup> which continues to be shared regarding raw numbers of pending petitions, approvals, and denials per quarter.<sup>471</sup> Furthermore, in the FY 2023 DHS Consolidated Appropriations Bill, Congress required USCIS to publish quarterly data for the first time about its adjudication timelines.<sup>472</sup> At the time of writing, they had posted the first quarter of this data but failed to meet the directive in important ways, including failing to publish the processing times of SIJS petitions from filing to final adjudication.<sup>473</sup>

Our call for data transparency impacts every single other policy recommendation we propose herein. For example, the disparate denial rates for children based on nationality are troubling. The continued publication of data on approval and

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469. See *supra* Section II.A (discussing data trends during the Trump Administration).

470. Settlement Agreement, *supra* note 141, at 10.

471. E.g., U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DHS, NUMBER OF I-360 PETITIONS FOR SPECIAL IMMIGRANT WITH A CLASSIFICATION OF SPECIAL IMMIGRANT JUVENILE (SIJ) BY FISCAL YEAR, QUARTER, AND CASE STATUS: FISCAL YEARS 2010–2023 (2023), [https://www.uscis.gov/sites/default/files/document/data/I360\\_sij\\_performancedata\\_fy2023\\_qtr1.pdf](https://www.uscis.gov/sites/default/files/document/data/I360_sij_performancedata_fy2023_qtr1.pdf) [<https://perma.cc/WX5A-WBVZ>].

472. H. COMM. ON APPROPRIATIONS, *supra* note 253.

473. See generally U.S. CITIZENSHIP & IMMIGR. SERVS., *supra* note 253 (providing data on the number of pending applications, the length of time the applications have been pending, the number of adjudications, the average processing time, and the number of RFEs and NOIDs).

denial rates will aid child advocates in tracking and addressing trends, whether they are a result of the adjudication policy and practice or stem from challenges with representation. Also, gender is important to track because it may be a marker of precarity where youth who are gender non-conforming and those who identify as female face specific violence and harms that often lead them to migrate.<sup>474</sup> USCIS's tracking of gender has been inconsistent, even though tracking SIJS petitioners' gender is essential for our understanding of the factors contributing to a child's vulnerability and need for protection and is a means to better understand how the program is or is not addressing or exacerbating said precarity.<sup>475</sup>

#### CONCLUSION

Child migration has steadily increased in the last decade, and alongside this increase, more abandoned, abused, and neglected children have sought protection to be classified as SIJs and obtain LPR status based off their approved SIJS petition. By examining 153,374 SIJS petitions filed between 2010 to 2021, and 35,651 SIJS-based LPR applications filed between 2013 to 2021, we have shown the existence of an "underside" of the SIJS program, specifically its "hidden and violent effects"<sup>476</sup> on the lives of the children. Our analysis of SIJS and the underlying data in this Article shift focus from "what the law says about itself"<sup>477</sup> to illuminating what the law actually does and how it operates. Dean Spade draws our attention to the notion that it is in fact in the reality of administrative law that we see how "administrative systems that classify people actually invent and produce meaning for the categories they administer, and that those categories manage both the population and the distribution of security and vulnerability."<sup>478</sup> In other words, our study shows how bureaucratic processes, which often maintain legitimacy through the perception of routinized value-neutral operations, actually function in inconsistent, even calamitous ways that shape the life trajectories of thousands of immigrant youth. Laws and legal reforms that are purportedly neutral or nondiscriminatory can, in fact, enact violence on entire populations.

That the SIJS law was created and amended to protect abused, abandoned, and neglected children should not insulate the law from critique because it does not make the law immune from causing harm. In fact, as we have demonstrated here, the SIJS process amplifies precarity in children's lives in a variety of ways. Moreover, the stated intent of the law does not dissociate the law from the racism of immigration law more broadly and the suffering it causes immigrant children.<sup>479</sup> Stephany, who came to the United States at age fourteen and spent years

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474. See, e.g., Aguilera, *supra* note 1.

475. Lastly, we recommend immigration forms be amended to include a more expansive method of gender self-identification by including "other" as an option for children and youth who identify outside of the male-female gender binary.

476. Menjívar & Abrego, *supra* note 51, at 1382.

477. DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW 7* (rev. ed. 2015).

478. *Id.* at 11.

479. See Castillo-Granados et al., *supra* note 33, at 1785–86.

waiting in the SIJS backlog, implores the government to act to address injustices in the law and to treat immigrant youth with the dignity they deserve: “[B]ecause in the end these are the dreams of human beings and in the end we are all the same . . . .”<sup>480</sup> Removing the visa caps which have caused children to live in years-long legal purgatory is one critical step that Congress could take, but more fundamental changes—changes that fully recognize the embeddedness of problems with the SIJS program within the broader U.S. immigration system—are needed to fully alleviate the barriers to lawful status that immigrant youth face. Ultimately, by revealing the underside of SIJS law and policy, we call for congressional, executive, and agency action to address the harms of the SIJS law and process and promote protection and empowerment for young people.

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480. DAVIDSON & HLASS, *supra* note 19, at 44 & n.72.