

ARTICLES

UNACCOMPANIED MINORS AT THE U.S.-MEXICO BORDER: THE SHIFTING SANDS OF SPECIAL IMMIGRANT JUVENILE STATUS

RICHARD F. STORROW*

The surge of unaccompanied minors crossing the border into the United States bespeaks the conditions that continue to tear at the fabric of families in Central America. Special immigrant juvenile status (SIJS), a classification enacted by Congress in 1990 to provide a pathway to legal permanent residence for undocumented minors abandoned or neglected by their parents, is a source of hope for many of these young migrants. In a political climate in which anti-immigration sentiment is increasing, advocates for unaccompanied minors are detecting new sources of judicial and administrative resistance to SIJS. This article maps this shifting legal terrain and argues that it is at odds with Congress's intent that SIJS be used to remove children from harm's way, no matter their citizenship status.

TABLE OF CONTENTS

I. INTRODUCTION	2
II. THE MECHANICS OF SPECIAL IMMIGRANT JUVENILE STATUS	7
III. TREACHEROUS TERRAIN	13

* Professor of Law, City University of New York School of Law. I thank CUNY Law for the research support that made the completion of this article possible. I also thank Carlos Ball for helpful comments on an earlier draft. I finally wish to acknowledge Alexandra Rizio and Gui Stampur of The Safe Passage Project, a non-profit organization providing *pro bono* representation for unaccompanied children in immigration removal proceedings, for their expert mentoring during my representation of Ernesto. © 2019, Richard F. Storrow.

A.	<i>A Perilous Journey</i>	13
B.	<i>An Unstable Boundary</i>	14
C.	<i>American Dreams, Immigrant Realities</i>	18
IV.	JUDICIAL AND EXECUTIVE ATTEMPTS TO DISMANTLE SIJS	19
A.	<i>State Courts' Resistance</i>	20
B.	<i>DHS's Regulatory Power</i>	30
V.	CONCLUSION	36

I. INTRODUCTION

In the fall of 2016, fifteen-year-old Ernesto¹ and a group of other migrants began a perilous overland journey from Guatemala to the United States. The group traveled through Mexico with the help of paid “coyotes”² as their guides. Crossing the border between Mexico and Arizona and proceeding at night across the Sonoran Desert, the group was nearly apprehended twice when the Border Patrol was operating without canine trackers. Finally, on the morning of December 12, 2015, the Border Patrol surrounded the group, this time with canines. As Ernesto was fifteen at the time and is not from a country contiguous with the United States, he was immediately transferred from the Border Patrol to the Office of Refugee Resettlement (ORR), an agency of the Department of Health and Human Services responsible for processing and resettling unaccompanied minors in accordance with the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008.³ The Act requires children like Ernesto to be placed in removal proceedings under the auspices of the Department of Justice’s Executive Office for Immigration Review.⁴ After several months, Ernesto was transferred to the custody of his brother Javier in Brooklyn, New York, where he remains in deportation proceedings. His next hearing in Immigration Court is in November 2020.

Under the Immigration and Nationality Act, “alien” and “immigrant” mean “any person not a citizen or national of the United States.”⁵ Ernesto figures among the over 200,000 minor immigrants unaccompanied by their

1. The name has been changed in the interest of privacy.

2. 1 UNDOCUMENTED IMMIGRANTS IN THE UNITED STATES: AN ENCYCLOPEDIA OF THEIR EXPERIENCE 124-26 (Anna Ochoa O’Leary ed., 2014).

3. 8 U.S.C. § 1232(b)(1). ORR was originally given responsibility for the care of unaccompanied immigrant children under the Homeland Security Act of 2002. *See* 6 U.S.C. § 279(a).

4. 8 U.S.C. § 1232(a)(5)(D)(i).

5. 8 U.S.C. § 1101(a)(3), (15).

parents who have entered the United States in recent years.⁶ A spike in the number of unaccompanied minors crossing the southwestern border in 2014 followed a report just two years prior that “illegal immigration is on the wane.”⁷ The surge in the number of minors entering the United States along this border bespeaks the conditions that continue to undermine societal stability in the Northern Triangle Countries of Central America—El Salvador, Guatemala and Honduras.⁸ Gangs, poverty, and domestic violence drive minors north in search of safety and opportunity,⁹ but along the way they risk becoming the targets of human traffickers and smugglers. Entering the country overland from the south is becoming increasingly difficult for a variety of reasons. Federal policy raises numerous obstacles, creating disincentives to embarking on an already perilous journey.¹⁰ Efforts are made to funnel migrants into areas where crossing is most treacherous,¹¹ undermine humanitarian aid in the desert,¹² deny entry to asylum seekers,¹³ and prosecute adult border crossers and separate them from their children.¹⁴ Nonetheless, the number of crossings continues to be significant, and the backlog of cases burdening the immigration system approaches 700,000.¹⁵

“Unaccompanied minor” is a legal term of art defined as a child under the age of eighteen with no legal status in the United States at the time of their entry upon United States territory and with no available care from a parent or guardian in the United States.¹⁶ Unaccompanied minors are “entitled to a full hearing before an immigration judge,” and their cases can take some time to

6. Nicole Einbinder, *How the Trump Administration Is Rewriting the Rules for Unaccompanied Minors*, PBS (Feb. 13, 2018), <https://www.pbs.org/wgbh/frontline/article/how-the-trump-administration-is-rewriting-the-rules-for-unaccompanied-minors>.

7. Ananda Rose, *Death in the Desert*, N.Y. TIMES (June 21, 2012), <https://www.nytimes.com/2012/06/22/opinion/migrants-dying-on-the-us-mexico-border.html>.

8. Haeyoun Park, *Children at the Border*, N.Y. TIMES (Oct. 21, 2014), <https://www.nytimes.com/interactive/2014/07/15/us/questions-about-the-border-kids.html>.

9. Cristina Ritchie Cooper, *A Guide for State Court Judges and Lawyers on Special Immigrant Juvenile Status*, 36 CHILD L. PRAC. 29, 29 (2017).

10. Sarah Tory, *Border Patrol Arrests Migrants Seeking Humanitarian Aid*, HIGH COUNTRY NEWS (June 23, 2017), <https://www.hcn.org/articles/border-patrol-arrests-migrants-seeking-humanitarian-aid>.

11. Rose, *supra* note 7.

12. Fernanda Santos, *Border Patrol Raids Humanitarian Aid Group Camp in Arizona*, N.Y. TIMES (June 16, 2017), <https://www.nytimes.com/2017/06/16/us/border-patrol-immigration-no-more-deaths.html>.

13. *Al Otro Lado, Inc. v. Kelly*, No. 2:17-CV-5111, ¶¶ 1-3 (C.D. Cal. July 12, 2017) (complaint for declaratory and injunctive relief); Simon Romero & Miriam Jordan, *On the Border, a Discouraging New Message for Asylum Seekers: Wait*, N.Y. TIMES (June 12, 2018), <https://www.nytimes.com/2018/06/12/us/asylum-seekers-mexico-border.html> (reporting on developments “effectively making it harder for Central Americans to request asylum”).

14. Department of Justice, *Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration* (May 7, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions>.

15. Katie Benner, *Immigration Judges Express Fear that Sessions’s Policies Will Impede Their Work*, N.Y. TIMES (June 12, 2018), <https://www.nytimes.com/2018/06/12/us/politics/immigration-judges-jeff-sessions.html>.

16. 6 U.S.C. § 279(g)(2); Stewart Chang, Amy Woo Lee, et al., *Families Across Borders: When Immigration Law and Family Law Collide – Minors Crossing Borders*, 17 WHITTER J. CHILD & AND FAM. ADVOC. 138, 139 (2018).

be resolved.¹⁷ Within seventy-two hours of entry, the custody of such children from countries other than Mexico and Canada becomes the responsibility of the Department of Health and Human Services,¹⁸ specifically the Office of Refugee Resettlement (ORR). Immigrant juveniles cannot be held in civil detention for more than twenty days and must be placed in the least restrictive setting.¹⁹ Unaccompanied minors with “responsible” family members in the United States are allowed to travel onward to join them while their removal is pending in immigration court.²⁰

As dockets have swelled in recent years to unmanageable numbers, the immigration status of unaccompanied minors can remain unresolved for years.²¹ President Obama initiated fast-track deportation proceedings for unaccompanied minors in the hopes of decreasing unauthorized immigration,²² but the plan did little to lessen the backlog.²³ In the meantime, unaccompanied minors have few pathways to legal status. In addition to asylum—the requirements for which are onerous²⁴—and

17. Miriam Jordan, “I Can’t Go Without My Son,” a Mother Pleaded as She Was Deported to Guatemala, N.Y. TIMES (June 17, 2018), <https://www.nytimes.com/2018/06/17/us/immigration-deported-parents.html>.

18. 8 U.S.C. § 1232(b)(3); see, e.g., Santos v. Smith, 260 F. Supp. 3d 598, 601 (W.D. Va. 2017).

19. 8 U.S.C. § 1232(c)(2)(A); Santos, 260 F. Supp. 3d at 605; *The History of the Flores Agreement and Its Effects on Immigration*, NPR (June 22, 2018), <https://www.npr.org/2018/06/22/622678753/the-history-of-the-flores-settlement-and-its-effects-on-immigration>.

20. Reno v. Flores, 507 U.S. 292, 296 (1993); Office of Refugee Resettlement, *Unaccompanied Alien Children Released to Sponsors by State*, June 30, 2017, <https://www.acf.hhs.gov/orr/resource/unaccompanied-alien-children-released-to-sponsors-by-state>. See, e.g., P.G. v. Dep’t of Children & Family Servs., 867 So. 2d 1248, 1249 (Fla. App. 2004). The vast majority of minors are released to custodians. Santos v. Smith, 260 F. Supp. 3d 598, 615 (W.D. Va. 2017) (noting that roughly 93% were so released in 2014). If a juvenile has no such family member, she remains in federal custody, see, e.g., *In re C.M.K.*, 552 N.W.2d 768, 769 (Minn. Ct. App. 1996). No state juvenile court has jurisdiction over such a minor unless the United States Attorney General consents. 8 U.S.C. § 1101(a)(27)(J)(iii)(I). The Trump Administration has argued that the Flores Settlement necessitates the separation of parents from their children and has asked that the Settlement be modified to permit the indefinite detention of children with their families, to promote “the widely shared interest in keeping families together.” Defendant’s Memorandum of Points and Authorities in Support of *Ex Parte* Application for Relief from the Flores Settlement Agreement at 4, 11, 13-17, Flores v. Sessions, No. CV 85-4544-DMG (C.D. Cal. June 21, 2018).

21. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, *CHILDREN: AMID A GROWING COURT BACKLOG MANY STILL UNREPRESENTED*, (2017), <http://trac.syr.edu/immigration/reports/482> (“Litigation on some UAC cases . . . can stretch on for years.”).

22. Barack Obama, *Letter from the President—Efforts to Address the Humanitarian Situation in the Rio Grande Valley Areas of Our Nation’s Southwest Border*, THE WHITE HOUSE (June 30, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/06/30/letter-president-efforts-address-humanitarian-situation-rio-grande-valle>; Department of Justice, *Department of Justice Actions to Address the Influx of Migrants Crossing the Southwest Border in the United States*, <https://www.justice.gov/iso/opa/resources/214201479112444959.pdf>; Kirk Semple, *Advocates in New York Scramble As Child Deportation Cases Are Accelerated*, N.Y. TIMES (Aug. 4, 2014), <https://www.nytimes.com/2014/08/05/nyregion/advocates-scramble-as-new-york-accelerates-child-deportation-cases.html>.

23. Monica Cordero et al., *Backlog in NY Immigration Court Leaves Most Undocumented Children Without Lawyers*, WNYC (Nov. 27, 2017), <https://www.wnyc.org/story/backlog-ny-immigration-court-leaves-most-undocumented-children-without-lawyers>.

24. Diana Villiers Negroponce, *The Surge in Unaccompanied Children from Central America: A Humanitarian Crisis at Our Border*, UP FRONT (July 2, 2014), <https://www.brookings.edu/blog/up-front/2014/07/02/the-surge-in-unaccompanied-children-from-central-america-a-humanitarian-crisis-at-our-border>.

T- and U-visas,²⁵ special immigrant juvenile status (SIJS) may be a means for many unaccompanied minor migrants to achieve legal immigration status. SIJS is a unique status enacted by Congress in 1990²⁶ and amended through bipartisan legislation in both 1997²⁷ and 2008²⁸ that permits undocumented minors abandoned or neglected by their parents to obtain lawful permanent resident status. Congress enacted SIJS to protect undocumented children against abusive parents and deportation to a situation that would imperil their welfare. SIJS is available to migrant children who arrived with their families and were later removed into foster care²⁹ and also to minors who cross the border by themselves or whose parents are turned away or detained by Border Patrol agents.³⁰

As explained in more detail below in Part II, the path to SIJS begins when a state court takes jurisdiction over a case involving the child's welfare³¹ and makes the six findings required for SIJS. The federal government has expressly delegated these determinations to state courts.³² One of the problems with this avenue to legal status is that the vast majority of unaccompanied minors are unaware of SIJS,³³ have no counsel,³⁴ and may age out of

25. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, *NEW DATA ON UNACCOMPANIED CHILDREN IN IMMIGRATION COURT* (2014), <http://trac.syr.edu/immigration/reports/359/>. For a description of the purposes of and requirements for T and U visas, see Meaghan Fitzpatrick & Leslye E. Orloff, *Abused, Abandoned, or Neglected: Legal Options for Recent Immigrant Women and Girls*, 4 PENN ST. J.L. & INT'L AFF. 614, 621-23 (2016).

26. Immigration Act of 1990, Pub. L. 101-649, § 153(a), 104 Stat. 4978, 5005-06 (1990). The committee and conference records related to this legislation do not discuss this provision. Ruth Ellen Wasem, Cong. Research Serv., R43703, *Special Immigrant Juveniles: In Brief* 2 n.15 (2014).

27. Immigration and Nationality Act, Pub. L. No. 105-119, § 113, 111 Stat. 2440, 2460-61 (1997).

28. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(d)(1)-(6), 122 Stat. 5044, 5079-80 (2008).

29. *Yeboah v. U.S. Dep't of Justice*, 345 F.3d 216, 221 (3d Cir. 2003); THE ANNIE E. CASEY FOUNDATION, *UNDERCOUNTED, UNDERSERVED: IMMIGRANT AND REFUGEE FAMILIES IN THE CHILD WELFARE SYSTEM* 22 (2006); see, e.g., *In re A.M.-C.*, 705 N.W.2d 106 (Iowa Ct. App. 2005); *Riley v. Gantner*, No. 03 Civ.2835 GEL, 2003 WL 22999487, at *1 (S.D.N.Y. Dec. 22, 2003).

30. See, e.g., *Yeboah*, 345 F.3d at 221 ("Rather than being deported along with abusive or neglectful parents, or deported to parents who had abandoned them once in the United States, such children may seek special status to remain in the United States."); see, e.g., *In re Zaim R.*, 822 N.Y.S.2d 368 (Fam. Ct. 2006).

31. See, e.g., CAL. CIV. PROC. CODE § 155(b)(1)(A)(i)-(ii) (Deering 2018).

32. *Gao v. Jenifer*, 185 F.3d 548, 555 (6th Cir. 1999) (citing *Special Immigrant Status; Certain Immigrants Declared Dependent on a Juvenile Court*, 58 Fed. Reg. 42,843, 42,843-47 (Final rule Aug. 12, 1993)); *In re Jose H.*, 40 N.Y.S.3d 710, 715 (Sup. Ct. 2016) (citing *In re Guaman*, 879 N.W.2d 668, 672 (Minn. Ct. App. 2016)); *Special Immigrant Status*, 58 Fed. Reg. 42843-01, 42847 (Aug. 12, 1993) (expressing opinion that determinations of the best interests of the child should be made by a state court and should not be readjudicated in the course of evaluating a petition for SIJS).

33. THE ANNIE E. CASEY FOUNDATION, *supra* note at 22-23 (2006). Immigration courts are not required to inform juveniles in removal proceedings of SIJS unless they show apparent eligibility based on findings made by a state court. *C.J.L.G. v. Sessions*, 880 F.3d 1122, 1149 (9th Cir. 2018).

34. Although immigration judges are not permitted to appoint counsel for juvenile immigrants, they are required to provide them with a list of available pro bono legal services and encourage their use. Memorandum from MaryBeth Keller, Chief Immigration J., to All Immigration Judges et al. (Dec. 20, 2017), <https://www.justice.gov/eoir/file/oppm17-03/download>; see also 8 C.F.R. § 1240.10. Wesley Brockway has made the compelling argument that unaccompanied minors have a constitutional right to counsel in removal proceedings. Wesley C. Brockway, *Rationing Justice: The Need for Appointed Counsel in Removal Proceedings of Unaccompanied Immigrant Children*, 88 U. COLO. L. REV. 179 (2017). Shani King makes a similar argument grounded in public policy and human rights in Shani M.

being able to apply for it.³⁵ Another problem is the procrastination of government officials. Lawsuits have been necessary to compel government officials to resolve pending SIJS petitions in a timely manner.³⁶ Furthermore, the government is not required to grant SIJS even if the appropriate findings are made or if the order made was temporary and subject to a full hearing that never occurred.³⁷ If the government does grant a child SIJS, there is no guarantee they will be granted permanent resident status.³⁸

In a political climate marked by heightened anti-immigration sentiment,³⁹ advocates for unaccompanied minors are confronting new sources of resistance to SIJS. One source lies in state courts, where procedural and substantive inconsistencies in decision making are occurring more frequently. A second source is the federal executive branch's claimed discretionary power to bring about "abrupt policy changes" in immigration law that raise practical roadblocks to obtaining SIJS and that may be difficult to challenge.⁴⁰ This Article canvasses these sources of resistance against the backdrop of our collective ambivalence about our southern land border and argues that attacks on SIJS are at odds with Congress's intent that the protection of immigrant juveniles be implemented fairly, clearly and robustly.

This Article proceeds in four parts. Part II explains the mechanics of obtaining SIJS and an adjustment of status to legal permanent resident. Part III theorizes the southwestern borderlands between the United States and Mexico as a locus of deep ambivalence and indeterminacy both historically and culturally.⁴¹ Part IV tracks the recent efforts of courts and the administration to decrease the availability of SIJS through the familiar mechanisms of statutory interpretation and notice-and-comment rulemaking as well as the less familiar ones of refusing jurisdiction and engaging in surreptitious policy changes.

King, *Alone and Unrepresented: A Call to Congress to Provide Counsel for Unaccompanied Minors*, 50 HARV. J. ON LEGIS. 331 (2013).

35. See, e.g., *Riley v. Gantner*, No. 03 Civ.2835 GEL, 2003 WL 22999487, at *1-2 (S.D.N.Y. Dec. 22, 2003).

36. Darryl L. Hamm, *Special Immigrant Juvenile Status: A Life Jacket for Immigrant Youth*, 38 CLEARINGHOUSE REV. 232, 324-25 (2005).

37. *Reyes v. Cissna*, No. 17-7304, 2018 WL 2937705, at *2 (4th Cir. June 8, 2018); *Perez v. Rodriguez*, 3:16-CV-00748-RJC-DSC, 2018 WL 1187780, at *5 (W.D.N.C. Mar. 7, 2018).

38. *C.J.L.G. v. Sessions*, 880 F.3d 1122, 1148 (9th Cir. 2018); *Gao v. Jenifer*, 185 F.3d 548, 554 (6th Cir. 1999).

39. Julia G. Young, *Making America 1920 Again? Nativism and US Immigration, Past and Present*, 5 J. ON MIGRATION & HUM. SECURITY 217, 227 (2017).

40. Corinne Ramey, *Lawsuit Claims Some Young Immigrants Treated Unfairly under New Policy*, WALL ST. J. (June 7, 2018), <https://www.wsj.com/articles/lawsuit-claims-some-young-immigrants-treated-unfairly-under-new-policy-1528380693>.

41. As the focus herein is SIJS, this Article does not explore applications for refugee status or asylum in any detail. It also does not cover in any detail the Central American Minors Program, established by President Obama in 2014 and cancelled by President Trump in 2017 at a time when more than 2,700 applications were pending. Mica Rosenberg, *U.S. Ends Program for Central American Minors Fleeing Violence*, REUTERS (Aug. 16, 2017), <https://www.reuters.com/article/us-usa-immigration-minors/u-s-ends-program-for-central-american-minors-fleeing-violence-idUSKCN1AW2OZ>.

II. THE MECHANICS OF SPECIAL IMMIGRANT JUVENILE STATUS

There are several forms of special immigrant status outlined in the Immigration and Nationality Act,⁴² each of which is implemented by regulations of the Department of Homeland Security (DHS).⁴³ The original concept of the “special immigrant” in the 1952 version of the Act was to bring to the United States individuals “needed urgently” because of their “high education, technical training, specialized experience, or exceptional ability.”⁴⁴ Attracting such immigrants, it was thought, would be “substantially beneficial prospectively to the national economy”⁴⁵ In 1990, Congress separated the preference categories for immigration into family-based and employment-based, this latter category into three subcategories. A special immigrant must petition the DHS’s Citizenship and Immigration Services (USCIS)⁴⁶ for classification as such in advance of the issuance of any visas, which are numerically limited.

One preference category now includes “juvenile court dependents.”⁴⁷ Special immigrant juvenile status is a type of “special immigrant” status⁴⁸ for a juvenile alien deemed dependent and whose reunification with one or both of his parents cannot occur due to “abuse, neglect, abandonment, or a similar basis”⁴⁹ and against whose best interests it would be to return to his country of nationality or last habitual residence.⁵⁰ Creating the status was a humanitarian gesture inspired by the plight of children of undocumented immigrants within the United States who had been removed from their families, had aged out of foster care, and were at risk of deportation to a country they did not remember.⁵¹ It reflects a Congressional intent to remove children from harm’s way, no matter their citizenship status.⁵² Some of these children “were being adopted out of the system without any kind of legal status.”⁵³ Initially, the visa was not well known and was not often used, perhaps owing to its unique and unfamiliar federal/state court interplay.

42. See 8 U.S.C. § 1101(a)(27).

43. See, e.g., Immigrant Visa Petitions, 8 C.F.R. §§ 204.5-204.11.

44. See UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, *ADJUDICATOR’S FIELD MANUAL* § 22.1 (b), <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-6330/0-0-0-6339.html#0-0-0-415>.

45. See *id.*

46. “USCIS” refers to the United States Citizenship and Immigration Services, the unit within the Department of Homeland Security that decides petitions for SIJS and lawful permanent residence.

47. See UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, *ADJUDICATOR’S FIELD MANUAL* § 22.1(e) (citing 8 U.S.C. § 1101(a)(27)(J)), <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-6330/0-0-0-6339.html#0-0-0-415>.

48. 8 U.S.C. § 1101(a)(27).

49. 8 U.S.C. § 1101(a)(27)(J)(i).

50. 8 U.S.C. § 1101(a)(27)(J)(ii); 8 C.F.R. § 204.11(a).

51. THE ANNIE E. CASEY FOUNDATION, *supra* note at 22 (2006). See, e.g., *In re D.A.M.*, 185 So. 3d 535 (Fla. Dist. Ct. App. 2015); *Artega v. Texas Dep’t of Protective and Regulatory Servs.*, 924 S.W.2d 756, 760 (Tex. Ct. App. 1996); *In re A.C.*, No. H025504, 2003 WL 21246601, at *1 (Cal. Ct. App. May 29, 2003).

52. See Fitzpatrick & Orloff, *supra* note 25, at 639.

53. Chang, *supra* note 16, at 149.

The specific requirements for SIJS as enacted “‘show a congressional intent to assist a limited group of abused children to remain safely in the country with a means to apply for [legal permanent resident] status.’”⁵⁴ These children can proceed through SIJS to lawful permanent residence by fulfilling six elements: presence in the United States; under 21 years of age; unmarried; dependent upon a juvenile court by being placed in the custody of the state or with an individual or entity appointed by the court; at least one parent has abandoned, abused or neglected the child so that the child’s reunification with one or both parents is not viable; and it is not in the best interests of the minor to return to his home country.⁵⁵

Unlike other forms of immigration relief, state courts play an essential role in the determination of SIJS. Indeed, the very foundation of SIJS rests on decisions and findings made by a state court applying the law of that state.⁵⁶ This arrangement is justified by the expertise state courts possess to make the sorts of findings required for SIJS, findings often made in the course of a custody or guardianship proceeding.⁵⁷ In many states, these matters are the province of specialized courts created specifically to hear and resolve family and probate cases.

The path through the state court and the federal agency to SIJS and possibly legal permanent residence is not without complication. State courts are asked to make findings that form the basis of the SIJS determination, given their expertise in addressing similar questions. Findings favorable to the child are embodied in a “SIJS-predicate’ order.”⁵⁸ Some of the requisite findings, such as that the juvenile must be under the age of twenty-one, unmarried, and dependent upon a juvenile court, are relatively straightforward. Testimony,⁵⁹ birth certificates, and whether the court has determined custody or guardianship in the proceeding are usually sufficient to address these elements.⁶⁰ The two more searching factual findings a court must make when requested to make special findings are those regarding the viability of the child’s reunifying with one or both of his parents and whether it is in the child’s best interests to return to his country of origin.

The “reunification” prong, for example, hinges upon findings of parental abandonment, abuse, or neglect by at least one parent. A court may deem a parent to have abandoned a child where the parent’s whereabouts are

54. *Osorio-Martinez v. Att’y Gen. U.S.*, 893 F.3d 153, 168 (3d Cir. 2018) (quoting *Garcia v. Holder*, 659 F.3d 1261, 1271 (9th Cir. 2011)).

55. 8 C.F.R. § 204.11(c).

56. *Gao v. Jenifer*, 185 F.3d 548, 555 (6th Cir. 1999) (“The INA generally relies on state courts, acting in their usual course.”).

57. *See, e.g., In re Srun R.*, 2005 WL 2650254, at *1 (Conn. Super. Ct. Sept. 15, 2005).

58. *Perez-Olano v. Gonzalez*, 248 F.R.D. 248, 253 (C.D. Cal. 2008).

59. *Ramos v. Patriz*, No. 1809 September Term 2017, 2018 WL 2979966, at *2 (Md. Ct. Spec. App. June 13, 2018).

60. *See, e.g., A.M.G. v. Gladis A.G.*, 79 N.Y.S.3d 75, 77 (App. Div. 2018); *In re Denia M.E.C.*, 161 A.D.3d 853, 855 (N.Y. App. Div. 2018).

unknown,⁶¹ the parent has absented himself from the child's life since birth,⁶² or the parent has died.⁶³ Courts may extend SIJS findings related to a parent's failure to exhibit care for a child further still to include instances where "a parent fails to visit a child, does not display love or affection for the child, does not personally interact with the child, and demonstrates no concern for the child's welfare"⁶⁴ Notably, courts have not found abandonment where the case was merely one of "voluntary abandonment," such as abandonment for the purposes of making a child eligible for SIJS.⁶⁵ As explored more fully below in Part IV.A., courts have disagreed whether, if the minor is living with one parent in the United States, a finding of abuse, neglect or abandonment by the other parent would satisfy the requirements of SIJS.⁶⁶

A court may base its finding of abuse or neglect on the harm a parent visits on a child, such as where a parent beats a child, burns the child with cigarettes or uses "excessive corporal punishment."⁶⁷ Courts have also based such findings on the parents' willingness to expose their child to danger and hardship, as exhibited in an instance where a father sent his child to the United States with smugglers who would force the child to work to pay for the journey.⁶⁸ Despite what might be assumed about the effect of geographic distance on a parent's relationship with his child, a parent who somehow remains involved even while living apart from his child may not be deemed neglectful.⁶⁹

Courts have likewise referenced a range of factual findings to support the best interests element of SIJS. These include that the minor would have nowhere to live and would lack the means to support him or herself in the country of origin,⁷⁰ the minor would lack a proper family support system,⁷¹ or that there would be threats to the minor's physical safety⁷² or

61. *In re O.Y.*, No. XX, 2009 WL 5196007, at *2 (N.Y. Fam. Ct. Sept. 22, 2009).

62. *Delmi Y. v. Carmen Y.*, No. G-09792-08, 2009 WL 997518, at *3 (Fam. Ct. April 14, 2009); *H.S.P. v. J.K.*, 87 A.3d 255, 264 (N.J. Super. Ct. 2014), *rev'd on other grounds*, 121 A.3d 849 (N.J. 2015).

63. *In re Denia M.E.C.*, 161 A.D.3d 853, 854-55, at *1, 2 (N.Y. App. Div. 2018). DHS has argued immigration court that a juvenile is not eligible for SIJS based on the death of one of her parents. It was ultimately determined in that case that the juvenile's father had abandoned her while he was still living. *In re Abrego*, A206436307, 2016 WL 4035774 (BIA), at *1 (Bd. Immig. Appeals June 27, 2016).

64. *In re Srun R.*, 2005 WL 2650254, at *7 n.6 (Conn. Super. Ct. Sept. 15, 2005).

65. *See, e.g., Zheng v. Pogash*, 416 F. Supp. 2d 550, 558 (S.D. Tex. 2006).

66. *Compare Gonzalez v. Rodriguez*, No. 17-AP-136, 2018 WL 3084527, at *3 (Ohio Ct. App. June 21, 2018), *with A.M.G. v. Gladis A.G.*, 79 N.Y.S.3d 75, 76 (App. Div. 2018) (in case where child was living with his father, remanding for further findings whether mother abandoned or neglected child); *Ramos v. Patriz*, No. 1809, September Term 2017, 2018 WL 2979966, at *4 (Md. Ct. Spec. App. June 13, 2018) (stating that the reunification prong is satisfied by the non-viability of reunification with one or both parents).

67. *In re G.V.L.*, 417 P.3d 517, 518 (Or. Ct. App. 2018); *In re Christian J.C.U.*, 77 N.Y.S.3d 834, 838 (Fam. Ct. May 17, 2018) (citing N.Y. FAM. CT. ACT. § 1012(f)(i)(B)).

68. *See, e.g., Zheng*, 416 F. Supp. 2d at 559-60.

69. *H.S.P. v. J.K.*, 121 A.3d 849, 861 (N.J. 2015).

70. *See, e.g., In re Trudy-Ann W.*, 901 N.Y.S.2d 296, 299 (App. Div. 2010).

71. *Reyes v. Cissna*, No. 17-7304, 2018 WL 2937705, at *2 (4th Cir. June 8, 2018) (describing findings of the state court); *In re Denia M.E.C.*, 161 A.D.3d 853, 855 (N.Y. App. Div. 2018).

72. *In re O.Y.*, No. XX, 2009 WL 5196007, at *2 (N.Y. Fam. Ct. 2009); *Cruz-Gonzalez v. Kelly*, No. 16-5727, 2017 WL 3990234, at *1 (E.D. Pa. Aug. 4, 2017) ("violence in the region"); *In re Abrego*, No. A206436307, 2016 WL 4035774 (BIA), at *1 (Bd. Immig. Appeals June 27, 2016) ("country conditions"); *Zheng*, 416 F. Supp. 2d at 560 (demands of payment from international smuggling ring).

liberty⁷³ if returned to the country of origin. Best-interest findings can also be made in the affirmative, as where “the respondent’s child support and stability are with her mother in the United States.”⁷⁴

Although a state court’s findings are necessary for SIJS, they are not sufficient. Findings favorable to the child merely render the migrant eligible to apply for the status.⁷⁵ The state court has no jurisdiction to decide whether the child is entitled to it. The juvenile immigrant, armed with a state court-issued order for special findings, must therefore file an I-360 petition with DHS asking it to grant SIJS. No matter the findings the state court makes, the federal government has the ultimate say regarding whether the child will receive it.⁷⁶ DHS explicitly retains discretion to deny SIJS⁷⁷ and is given the power to “establish such regulations . . . as [it] deems necessary for carrying out [its] authority”⁷⁸ DHS exercises its own adjudicatory power at this stage⁷⁹ and will ask two questions: “whether the alien applicant is eligible for such relief . . . [and] whether such relief should be granted in the discretion of the Attorney General.”⁸⁰ The statute itself specifies that immigration authorities may deny SIJS if they determine that the findings were sought primarily for the purpose of obtaining the status.⁸¹ Despite its broad discretionary authority, DHS is required to reach a decision on the petition within 180 days.⁸²

If DHS grants SIJS, the juvenile may then file an I-485 form with the agency asking that her status be adjusted to that of an alien lawfully admitted for permanent residence. But possession of SIJS is no guarantee of receiving legal permanent resident status.⁸³ An application for adjustment of status may be denied for a variety of reasons, including “adverse

73. *Zheng*, 416 F. Supp. 2d at 560 n.12 (governmental retribution for leaving China without authorization).

74. *In re Abrego*, 2016 WL 4035774 (BIA), at *1 (Bd. Immig. Appeals June 27, 2016).

75. *C.J.L.G. v. Sessions*, 880 F.3d 1122, 1148 (9th Cir. 2018); *Gao v. Jenifer*, 185 F.3d 548, 554 (6th Cir. 1999).

76. *Boyron v. Lynch*, 604 F. App’x. 72, 74 (2d Cir. 2015) (citing 8 U.S.C. 1101(a)(27)(J)(iii)); *Cooper*, *supra* note , at 30.

77. 8 U.S.C. § 1101(a)(27)(J)(iii).

78. 8 U.S.C. § 1103(a)(3).

79. *Perez-Olano v. Gonzalez*, 248 F.R.D. 248, 265 n.11 (C.D. Cal. 2008).

80. *Riley v. Gantner*, No. 03 Civ.2835 GEL, 2003 WL 22999487, at *3 (S.D.N.Y. Dec. 22, 2003).

81. *In re Jose H.*, 40 N.Y.S.3d 710, 714 (Sup. Ct. 2016) (citing H.R. REP. No. 105-405, at 130 § 113, 105th Congress, 1st Session (Nov. 13, 1997)); *see also* 8 C.F.R. § 204.11(b) (conditioning SIJS on “an approved petition”); *see, e.g., Zheng v. Pogash*, 416 F. Supp. 2d 550, 557 (S.D. Tex. 2006) (describing Department of Homeland Security’s determination that the applicant “seeks legal immigration status and better educational opportunities rather than protection from abuse”); Donald Neufeld, USDHS, USCIS Office of Policy and Strategy and Domestic Operations, *Memorandum*, March 24, 2009, at 3, at http://courts.ca.gov/documents/BTB_23_5L_8.pdf.

82. United States Citizenship and Immigration Services, at <https://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-29/0-0-0-101/0-0-0-511.html#0-0-0-903> (specifying, in footnote 24, 180 days).

83. *United States v. Santiago-Hernandez*, 113 F. Supp. 3d 966, 967-68 (W.D. Mich. 2015); *In re Jhakomo Hernandez*, No. A088444141, 2015 WL 7074148 (BIA), at *1 (Bd. Immig. Appeals Oct. 8, 2015) (denying adjustment in case where SIJS was approved).

factors” like criminal charges or gang-related activities.⁸⁴ In making such a discretionary determination, the agency may consider youthful offender adjudications, prison infractions, and police reports describing arrests.⁸⁵ Although the decision whether to grant SIJS in the first instance is appealable,⁸⁶ the decision not to adjust status is insulated from judicial review under the specific provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.⁸⁷

Throughout the entire process just described, the minor remains in deportation proceedings. As the process can be lengthy,⁸⁸ it may be possible to obtain an administrative closure of deportation proceedings during the pendency of the petition for SIJS in order to give “appropriate time” to juveniles whose forms I-360 are awaiting adjudication.⁸⁹ In short, removal proceedings may be suspended but are not terminated while the juvenile is awaiting a decision on an I-360.⁹⁰ Once SIJS is acquired, and even before an adjustment of status, removal proceedings can be terminated.⁹¹ If the decision of DHS is to deny SIJS in the first instance, the child is subject to deportation as an undocumented immigrant.

Congress has made adjustments to SIJS since 1990. State courts’ ability to assume jurisdiction over the custody or placement of unaccompanied minors within their borders was absolute until 1997, when an amendment to the Immigration and Nationality Act required the Attorney General to consent to the jurisdiction of the state court in cases where the juvenile is in the custody of the federal government.⁹² The amendment’s purpose was to discourage petitions for SIJS by juveniles present in the United States on student visas

84. See, e.g., *In re Ricardo Antonio Ramires-Pleitez*, No. A205734335, 2017 WL 1045534 (BIA), at *1-2 (Bd. Immig. Appeals Jan. 17, 2017); *In re Jhakomo Hernandez*, 2015 WL 7074148 (BIA), at *2 (Bd. Immig. Appeals Oct. 8, 2015) (criminal activity and “failure to fully accept responsibility for his wrongful actions”).

85. *In re Jhakomo Hernandez*, 2015 WL 7074148 (BIA), at *2 (Bd. Immig. Appeals Oct. 8, 2015).

86. *Zheng v. Pogash*, 416 F. Supp. 2d 550, 557 (S.D. Tex. 2006); ; *Riley v. Gantner*, No. 03 Civ.2835 GEL, 2003 WL 22999487, at *6 (S.D.N.Y. Dec. 22, 2003) (“A holding of ineligibility is subject to judicial review to determine whether or not the appropriate standards have been correctly applied.”) (quoting *Marino v. INS*, 537 F.2d 686, 690 (2d Cir. 1976)).

87. *Riley*, 2003 WL 22999487 at *4-5 (canvassing circuit courts of appeals decisions ruling that IIRIRA “bars review of all determinations regarding adjustment of status”).

88. *In re Avelar-Galdamez*, No. A208142844, 2017 WL 1330125 (BIA), at *1 (Bd. Immig. Appeals March 8, 2017) (citing Memorandum from Brian M. O’Leary, Chief Immigration Judge, to Immigration Judges (March 24 2015)); *In re Navarro*, No. A208376633, 2017 WL 4418384 (BIA), at *1 (Bd. Immig. Appeals July 10, 2017); *In re Renderos-Rodriguez*, No. A208983205, 2017 WL 4736597 (BIA), at *1 (Bd. Immig. Appeals Aug. 21, 2017).

89. *In re Abrego*, A206436307, 2016 WL 4035774(BIA), at *1 (Bd. Immig. Appeals June 27, 2016) (quoting Brian M. O’Leary, Chief Immigration Judge, to Immigration Judges (March 24 2015)); *In re Absalon-Goux*, A206780711, 2015 WL 3932279(BIA), at *2 (Bd. Immig. Appeals May 20, 2015) (citing *Matter of Sanchez-Sosa*, 25 I&N Dec. 807, 815 (BIA 2012)).

90. *In re Gomez-Grave*, No. A208202989, 2016 WL 8471106 (BIA), at *1 (Bd. Immig. Appeals Dec. 29, 2016).

91. *In re Jimenez*, No. A209120084, 2017 WL 2376487 (BIA), at *1 (Bd. Immig. Appeals April 19, 2017); *In re Aguirre-Castillo*, No. A099535633, 2016 WL 6137149 (BIA) (Bd. Immig. Appeals Aug. 25, 2016).

92. Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(J), amended by Pub. L. No. 105-19, 111 Stat. 2440, 2460 (1997); *M.B. v. Quarantillo*, 301 F.3d 109, 114 (3d Cir. 2002). The law prior to the

and to restrict it to children who are abandoned, neglected or abused.⁹³ Some courts interpreted the consent provision of this amendment to establish that any child subject to deportation, even those released to the custody of relatives, was in the “constructive custody”⁹⁴ of the federal government and that the Attorney General’s consent to jurisdiction was required in all such proceedings.⁹⁵ However, this broad interpretation was unpersuasive to other courts, which construed the consent provision to refer only to those children who were in the actual custody of DHS.⁹⁶ In 2008, Congress expanded the availability of SIJS by eliminating the requirement that to be eligible for SIJS the child must also be eligible for long-term foster care.⁹⁷ With this change, state courts may now make SIJS findings whenever they exercise jurisdiction under state law to make care and custody determinations.

SIJS affords an immigrant minor “an array of statutory and regulatory rights and safeguards, such as eligibility for application of adjustment of status to that of a lawful permanent resident,⁹⁸ exemption from various grounds of inadmissibility,⁹⁹ and robust procedural protections to ensure their status is not revoked without good cause.”¹⁰⁰ Lawful permanent residency allows an immigrant eventually to work¹⁰¹ and “to become a naturalized citizen after five years.”¹⁰² SIJS also brings the juvenile within the realm of important constitutional guarantees preventing summary removal: the “substantial connections with this country” that juveniles who have been granted SIJS possess place them in sharp contrast to “aliens seeking initial admission” who have

amendment did not prevent state courts from assuming jurisdiction over immigrant juveniles in the custody of DHS. *F.L. v. Thompson*, 293 F. Supp. 2d 86, 90 (D.D.C. 2003); *M.B.*, 301 F.3d at 114.

93. *Yeboah v. U.S. Dep’t of Justice*, 345 F.3d 216, 222 (3d Cir. 2003). Another court opined that the visiting student rationale was not necessarily behind the specific consent requirement but was instead the rationale for the requirement that the Attorney General expressly consent to the special-findings order serving as a predicate to the grant of SIJS, *see Perez-Olano v. Gonzalez*, 248 F.R.D. 248, 265 n.10 (C.D. Cal. 2008), thus giving acknowledging the *bona fides* of the order, *Zheng v. Pogash*, 416 F. Supp. 2d 550, 554 n.5 (S.D. Tex. 2006).

94. The term “constructive custody” is not defined in the relevant statute or regulations. In *re Perez Quintanilla*, A97 383 010, at 6 (Admin. App. Office June 7, 2007), <https://www.uscis.gov/sites/default/files/USCIS/Laws%20and%20Regulations/Memoranda/July%202007/PerezSIJ073007.pdf>.

95. *See, e.g.*, *P.G. v. Dep’t of Children & Family Servs.*, 867 So. 2d 1248, 1249-50 (Fla. Ct. App. 2004); *see also In re Zaim R.*, 822 N.Y.S.2d 368, 371 (Fam. Ct. 2006) (“The underlying removal proceedings pending against the minor preclude this court from having jurisdiction to proceed at this late date.”).

96. *See, e.g., In re Juvenile 2002-098*, 813 A.2d 1197, 1201 (N.H. 2002); *In re Adoption of Peggy*, 767 N.E.2d 29, 37 (Mass. 2002) (“Federal immigration law specifically recognizes the jurisdiction of State Juvenile Courts over determinations regarding the custody and best interests of children who have been abused or neglected, regardless of their immigration status.”); *In re Srun R.*, 2005 WL 2650254, at *3 (Conn. Super. Ct. Sept. 15, 2005).

97. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 112 Stat. 5044 (eliminating the requirement that the child be eligible for long-term foster care).

98. *See also United States ex rel. K.E.R.G. v. Sec’y of Health & Human Servs.*, 638 F. App’x. 154, 158 (3d Cir. 2016); *M.B. v. Quarantillo*, 301 F.3d 109, 114 (3d Cir. 2002).

99. *See also Tula v. Lynch*, 805 F.3d 185, 188 (5th Cir. 2015) (citing *Garcia v. Holder*, 659 F.3d 1261, 1271 (9th Cir. 2011)).

100. *Osorio-Martinez v. Att’y Gen. U.S.*, 893 F.3d 153, 158 (3d Cir. 2018).

101. *Ramirez v. Dougherty*, 23 F. Supp. 3d 1322, 1325 n.5 (W.D. Wash. 2014).

102. *Zheng v. Pogash*, 416 F. Supp. 2d 550, 554 (S.D. Tex. 2006).

mere presence in the territory and whose connections with the United States are thus comparatively meager.¹⁰³

III. TREACHEROUS TERRAIN

A. *A Perilous Journey*

Ernesto was just 15 when he set out alone from Guatemala, where he lived with his ailing mother, to the United States. His journey involved not only the U.S.-Mexico border, but also the one between Guatemala and Mexico. Like its northern border, the border Mexico shares with Guatemala is marked by rivers, fencing, and customs and immigration checkpoints. As chronicled in the 2006 documentary *Which Way Home?*, after crossing this frontier, many unaccompanied minors board freight trains to wind their way north on an arduous journey fraught with the risk of robbery, sexual exploitation and assault, and death.¹⁰⁴ Some families pay smugglers exorbitant fees to help their children make the journey, giving up their property and taking on debt in order to do so.¹⁰⁵ Public officials often demand bribes from these vulnerable populations,¹⁰⁶ furthering the financial burden borne by those who support the attempted migration.

Twenty-five official crossings lie along the border of the United States and Mexico.¹⁰⁷ If immigrants make it to the northern border of Mexico, crossing over into the United States outside of these official crossings brings new dangers, particularly if attempted via the Sonoran Desert, where temperatures can range from 104 to 118 degrees Fahrenheit during the day and can plunge to freezing at night. Carrying enough water for adequate hydration in these conditions is difficult,¹⁰⁸ and those who succumb to the extreme conditions may be left behind by those who are eager to complete the journey and are desperate to survive.¹⁰⁹ Though immigrants may receive some help in these perilous circumstances, the United States Border Patrol has worked tirelessly to undermine the efforts of volunteers to bring humanitarian aid to crossers

103. *Id.* at 167, 170, 175-76 (internal quotation marks omitted).

104. Nicolas Kulish, *What It Costs to Be Smuggled Across the U.S. Border*, N.Y. TIMES (June 30, 2018), <https://www.nytimes.com/interactive/2018/06/30/world/smuggling-illegal-immigration-costs.html?hp&action=click&pctype=Homepage&clickSource=story-heading&module=photo-spot-region®ion=top-news&WT.nav=top-news>; Manny Fernandez, *A Path to America, Marked by More and More Bodies*, N.Y. TIMES (May 4, 2017), <https://www.nytimes.com/interactive/2017/05/04/us/texas-border-migrants-dead-bodies.html>.

105. Kulish, *supra* note 104.

106. *Id.*

107. Sarah Almukhtar & Josh Williams, *Trump Wants a Border Wall. See What's in Place Already*, N.Y. TIMES (Feb. 5, 2018), <https://www.nytimes.com/interactive/2018/02/05/us/border-wall.html>.

108. Tory, *supra* note 10 (“You can’t really carry enough water with you, so people will get lost and die of dehydration.”).

109. John Difazio, *Immigrant 6-Year-Old Found Abandoned in Desert by Smuggler, Left in 100-Degree Weather Without Food or Water*, NEWSWEEK (June 21, 2018), <http://www.newsweek.com/immigrant-6-year-old-found-abandoned-desert-989888>.

experiencing distress.¹¹⁰

Oral histories cataloguing migrants' experiences of this crossing reveal several common themes, among them the fear that the quest will fail or will result in capture and the uncertainty about what life will be like if the quest is successful.¹¹¹ Such anxieties have their basis in reality. About half of the immigrants attempting an unauthorized crossing elude apprehension, according to a DHS estimate.¹¹² The others are detained to await deportation, with unaccompanied minors from the Northern Triangle released into ORR custody or sent on to family members. Immigration detention conditions vary, with some detainees reporting verbal and physical abuse,¹¹³ lack food, lack of water for hygiene, and deprivation of medical care.¹¹⁴ Once out of federal custody or if they have eluded capture altogether, juvenile migrants may face even greater perils, as will be discussed in Part III.C, below. To these migrants, the crossing can seem in retrospect like a journey that has taken them from one precarious situation to another.

B. *An Unstable Boundary*

Most children who eventually apply for SIJS attempt to enter the United States through its border with Mexico. This border, established by the Treaty of Guadalupe Hidalgo in 1848 and altered by the Gadsden Purchase in 1853,¹¹⁵ runs nearly 2,000 miles from the Pacific Ocean in the west to the Gulf of Mexico in the east. It traces a line on the land for 725 miles until it joins with the Rio Grande river at El Paso, whereupon the boundary follows the course of the river. The border separates four of the United States (California, Arizona, New Mexico and Texas) from six Mexican states (Tamaulipas, Nuevo León, Coahuila, Chihuahua, Sonora, and Baja California), and bisects the ancestral lands of the Tohono O'odham Indians, disrupting their migratory movements and other traditions.¹¹⁶ Terrain along it

110. La Coalición de Derechos Humanos & No More Deaths, *Interference with Humanitarian Aid: Death and Disappearance on the US-Mexico Border*, http://www.thedisappearedreport.org/uploads/8/3/5/1/83515082/disappeared_report_part_2.pdf.

111. SONIA NAZARIO, ENRIQUE'S JOURNEY: THE STORY OF A BOY'S DANGEROUS ODYSSEY TO REUNITE WITH HIS MOTHER (2014); CROSSING OVER: STORIES OF IMMIGRATION AND IDENTITY (Tertulia Pictures 2014) (profiling transgender Mexicans who are seeking asylum in the United States).

112. *Barely Half of Illegal Border Crossers Caught, According to Homeland Security Report*, CHICAGO TRIB. (Oct 7, 2016), <http://www.chicagotribune.com/news/nationworld/ct-us-mexico-border-crossing-captures-20161006-story.html>.

113. Kate Morrissey, *Report Finds More than 800 Complaints of Hate-Related Abuse in Immigration Detention*, SAN DIEGO UNION-TRIB. (July 15, 2018), <http://www.sandiegouniontribune.com/news/immigration/sd-me-immigration-discrimination-20180716-story.html>; Blake Ellis, Melanie Hicken & Bob Ortega, *Handcuffs, Assaults, and Drugs Called "Vitamins": Children Allege Grave Abuse at Migrant Detention Facilities*, CNN (June 21, 2018), <https://www.cnn.com/2018/06/21/us/undocumented-migrant-children-detention-facilities-abuse-invs/index.html>.

114. Allison Lee, *Border Volunteers Allege Mistreatment of Detainees*, HOUS. PUB. MEDIA (July 17, 2018), <https://www.houstonpublicmedia.org/articles/news/in-depth/2018/07/17/295174/in-depth-border-volunteers-allege-mistreatment-of-detainees/>.

115. FRANCISCO CANTÚ, *THE LINE BECOMES A RIVER: DISPATCHES FROM THE BORDER* 41-44 (2018).

116. *History & Culture*, TOHONO O'ODHAM NATION (2016), <http://www.tonation-nsn.gov/history-culture/>.

varies from inhospitable desert to densely populated city centers, including areas where sister cities literally hug the border. The westernmost border crossing is San Ysidro, California, and the easternmost Brownsville, Texas. Most of the United States borderlands east of El Paso are held privately; west of El Paso, the land is primarily federal.¹¹⁷ The major portion of the existing border wall stands on this federal land.¹¹⁸ If Congress approves the necessary funding, the U.S. government's plan to extend the wall across private land will require it to exercise eminent domain.¹¹⁹

It would be easy to assume that, once established in the 19th Century, the land boundary between the United States and Mexico was relatively stable. But the border, though sporadically marked, was initially so hotly contested by those living near it that the United States and Mexican governments had to cooperate in a program of remapping.¹²⁰ Further accords, in 1968 and 1970, were necessary to resolve land disputes stemming from the shifting of the Rio Grande from its nineteenth-century course.¹²¹ Construction in the 1960s to reorient the river's channel has rendered the location of this section of the southwestern border more stable for the time being.¹²²

More recent international agreements have affected the character of the border. In 1983, the United States and Mexico signed the La Paz Agreement, a treaty establishing a border region reaching 100 kilometers on either side of the international boundary and announcing a framework for addressing environmental issues within it.¹²³ The North American Free Trade Agreement (NAFTA),¹²⁴ signed into law by President Clinton in 1993, aimed to loosen trade barriers between the United States and its immediate neighbors. Observers predicted that NAFTA would benefit the Mexican economy in ways that would stem the cross-border migration of Mexicans. The treaty, however, had the opposite result: it caused harm to the Mexican farming economy, spurring many Mexicans to seek economic opportunity in the United States through unauthorized immigration.¹²⁵

117. Almkhtar & Williams, *supra* note 107.

118. *Id.*

119. Kiah Collier, *Amid Immigration Debate, Feds Moving Ahead with Land Seizure for South Texas Border Wall*, THE TEXAS TRIB. (June 21, 2018), <https://www.texastribune.org/2018/06/21/feds-moving-forward-land-seizures-border-wall/>.

120. CANTÚ, *supra* note , at 47-49.

121. JOSEPH RICHARD WERNE, *THE IMAGINARY LINE: A HISTORY OF THE UNITED STATES AND MEXICAN BOUNDARY SURVEY, 1848-1857* (2007).

122. Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and Colorado River as the International Boundary, Mex.-U.S., Nov. 23, 1970, T.I.A.S. 7313. <https://www.state.gov/documents/organization/125390.pdf>; *50 Years ago, a Fluid Border Made the U.S. 1 Square Mile Smaller*, NPR (Sept. 25, 2014), <https://www.npr.org/2014/09/25/350885341/50-years-ago-a-fluid-border-made-the-u-s-1-square-mile-smaller>.

123. La Paz Agreement, Mex.-U.S., Aug. 14, 1983, 35 U.S.T. 2916, <https://www.epa.gov/sites/production/files/2015-09/documents/lapazagreement.pdf>.

124. North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289, <https://www.nafta-sec-alena.org/Home/Texts-of-the-Agreement/North-American-Free-Trade-Agreement?mvid=1&secid=5a1b5f25-8904-4553-bf16-fef94186749e>.

125. *Wave of Illegal Immigrants Gains Speed after NAFTA*, NPR (Dec. 26, 2013), <https://www.npr.org/2013/12/26/257255787/wave-of-illegal-immigrants-gains-speed-after-nafta>. The provisions of

The increase in unauthorized immigration across the U.S.-Mexico border has triggered “massive militarization,”¹²⁶ as depicted in this recent dramatic description:

Doughy blimps equipped with cameras provide video surveillance, with thermal imaging for nighttime. Migrants unknowingly trip advanced seismic sensors with their first steps on American soil. The number of Border Patrol agents has grown to about 20,000 from roughly 9,000 in 2001, while budgets have quadrupled, spent on everything from all-terrain vehicles and horse patrols to helicopters and advanced reconnaissance drones.¹²⁷

Today, the Border Patrol possesses broad enforcement authority extending to 100 air miles inside of any border. It can conduct warrantless searches of vehicles and other conveyances, during which it can request proof of the immigration status of any occupants.¹²⁸ At Falfurrias, Texas, fully seventy miles north of the border, more undocumented immigrants are apprehended by U.S. authorities than at any other checkpoint.¹²⁹

The border is a hotly contested space of “insecurity and instability”¹³⁰ wherein the legal and the illegal collide and rights and status remain indeterminate and ill-defined. It is, to use the words of Mary Dudziak and Leti Volpp, the quintessential “interstitial zone[] of hybridization.”¹³¹ It is not only unruly and chaotic¹³² but “legally vague,”¹³³ as viscerally captured by the recent acquittal of a United States Border Patrol agent who shot and killed a Mexican citizen across the border.¹³⁴ This legal indeterminacy stokes the terror that serves as the justification for over-enforcement and keeps Americans in a perpetual state of alarm that the the turbulence of the border will eventually threaten their very way of life.

NAFTA that allow companies to transfer employees back and forth across the border (TN visas) and facilitate investment (E visas) are beyond the scope of this article.

126. *Id.*

127. Kulish, *supra* note 104.

128. 8 U.S.C. § 1357(a)(3).

129. Kulish, *supra* note 104.

130. *Mexico-United States Border*, WIKIPEDIA, https://en.wikipedia.org/wiki/Mexico-United_States_border (describing 2010 appropriations bill signed by Obama).

131. Mary L. Dudziak & Leti Volpp, Introduction, *Legal Borderlands: Law and the Construction of American Borders*, 57 AM. Q. 593, 595 (2005).

132. Kate Morrissey, *Last of Iconic Illegal Immigration Crossing Signs Has Vanished in California*, L.A. TIMES (Feb. 10, 2018), <http://www.latimes.com/local/lanow/la-me-immigration-sign-20180210-story.html>.

133. John Burnett & Merrit Kennedy, *Supreme Court Sends Cross-Border Shooting Case back to Lower Court*, NPR (June 26, 2017), <https://www.npr.org/sections/thetwo-way/2017/06/26/533968647/supreme-court-sends-cross-border-shooting-case-back-to-lower-court>.

134. Kristine Phillips, *U.S. Border Agent Who Repeatedly Shot Mexican Teen Through a Fence Acquitted of Murder*, WASH. POST (April 24, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/04/24/u-s-border-agent-who-repeatedly-shot-mexican-teen-through-a-fence-acquitted-of-murder/?utm_term=.c38f3c82dc0d.

The stance of the Trump administration is that unauthorized immigration presents a “clear and present danger” of harm to Americans,¹³⁵ a description borrowed from a landmark free-speech case, *Schenck v. United States*,¹³⁶ argued while the United States was at war with Germany. The comparison of unauthorized immigration to wartime dangers is often underscored by references to gang activity in heavily immigrant communities.¹³⁷ The Administration aims are to “control” the border with some sort of protective barrier,¹³⁸ detain more aliens at or near the border,¹³⁹ and hire thousands of additional border patrol officers¹⁴⁰ to effectuate a “layering” strategy involving patrolling at multiple sites within the 100-air-mile zone.¹⁴¹

The Trump administration’s efforts build on policies already mentioned above that place migrants in harm’s way.¹⁴² In his executive order of January 2017, President Trump ordered that migrants be returned to the territories they came from pending removal proceedings and that the availability of parole and asylum be curtailed.¹⁴³ Recently, the federal government moved to prosecute unauthorized border crossing more systematically¹⁴⁴ and deployed hundreds of National Guard troops to help patrol the border.¹⁴⁵ The family separation policy, instituted simultaneously with these recent changes, was met with a vociferous public outcry.¹⁴⁶ Judicially enjoined shortly thereafter,¹⁴⁷ the policy was quickly withdrawn.¹⁴⁸ In concert, these aggressive policies convey the message from the federal government that unauthorized immigration is not simply potentially dangerous but will be catastrophic if not immediately and vigorously combated and controlled.¹⁴⁹ In combination with the geographic, cultural and legal indeterminacy of the border, this

135. Exec. Order No. 13767 § 1, 82 Fed. Reg. 8793 (Jan. 25, 2017).

136. 249 U.S. 47, 52 (1919).

137. Julie Hirschfield Davis & Niraj Chokshi, *Trump Defends “Animals” Remark, Saying It Referred to MS-13 Gang Members*, N.Y. TIMES (May 17, 2018), <https://www.nytimes.com/2018/05/17/us/trump-animals-ms-13-gangs.html>.

138. Exec. Order No. 13767 § 4, 82 Fed. Reg. 8793 (Jan. 25, 2017).

139. *Id.* at §§ 5-6.

140. *Id.* at § 8.

141. 8 U.S.C. § 1357(a)(3); Kulish, *supra* note 104.

142. *See supra* notes - and accompanying text.

143. Exec. Order No. 13767 §§ 7, 11, 82 Fed. Reg. 8793 (Jan. 25, 2017).

144. Miriam Jordan & Ron Nixon, *Trump Administration Threatens Jail and Separating Children from Parents for Those Who Illegally Cross Southwest Border*, N.Y. TIMES (May 7, 2018), <https://www.nytimes.com/2018/05/07/us/politics/homeland-security-prosecute-undocumented-immigrants.html>.

145. Manny Fernandez, *New Troops on Border May Watch, with Caveat*, N.Y. TIMES (May 15, 2018), <https://www.nytimes.com/2018/05/15/us/national-guard-texas-mexico.html>.

146. Stephen Collinson & Lauren Fox, *Outrage Grows As Families Are Separated. Will Trump Change His Policy?*, CNN (June 18, 2018), <https://www.cnn.com/2018/06/18/politics/immigration-trump-congress-family-separation/index.html>.

147. Order Granting Plaintiffs’ Motion for Classwide Preliminary Injunction at 22, *Ms. L. v. United States Immigration and Customs Enforcement*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018) (No. 18cv0428 (MDD)).

148. Michael D. Shear, Abby Goodnough & Maggie Haberman, *Trump Retreats on Separating Families, but Thousands May Remain Apart*, N.Y. TIMES (June 20, 2018), <https://www.nytimes.com/2018/06/20/us/politics/trump-immigration-children-executive-order.html>.

149. *Clear and Present Danger*, BUSINESS DICTIONARY, <http://www.businessdictionary.com/definition/clear-and-present-danger.html>.

message forges in the collective American psyche an understanding of the southwestern border as far more than just a line. It has been for so long a zone of confusion and deep ambivalence on so many levels that it has become, in the words of journalist Dennis Wagner, an unfathomable “kaleidoscope of unique places, problems and people.”¹⁵⁰

C. *American Dreams, Immigrant Realities*

The quest to reach the United States represents, for some unaccompanied minors, the opportunity to be “born again . . . to make a better life for myself.”¹⁵¹ Once these unaccompanied minors are released to family members in the United States, they may believe that for all intents and purposes they have attained that goal; nonetheless, the threat of deportation remains real. Since immigration courts are overwhelmed and woefully underfunded,¹⁵² this state of affairs can endure for years.¹⁵³ In the meantime, juvenile migrants enroll in school, sometimes work part-time, and may have access to health care, a lifestyle that may lead some to believe that their perilous journey has ended successfully.

Life in the United States for an undocumented immigrant, though, often mirrors the common themes found in migrants’ oral histories, namely the common feeling of having exchanged one set of perils for another. Finding themselves separated from their families and culture back home, working long hours, and having no social network in their new communities can be psychologically painful and lonely for immigrants.¹⁵⁴ Ernesto reports such feelings of isolation and loneliness. He lives with his brother and cousin in a predominantly Hispanic neighborhood. They work six days a week at jobs only undocumented persons appear willing to perform and do not have the same days off. They spend their days off recovering from the long hours of physical labor. Although Ernesto is in frequent contact with family members back home, he misses being a part of family events and community celebrations.

Undocumented Latino immigrants also must face the persistent and damaging prejudice against Latinos that exists at all levels of American society.¹⁵⁵ Latino day laborers in particular have been subjected to brutal attacks

150. Dennis Wagner, *What Will We Build?*, ARIZ. REPUB. (Sept. 24, 2017), <https://www.pressreader.com/usa/the-arizona-republic/20170924/281479276601542>.

151. WHICH WAY HOME at 56:52 (Mr. Mudd 2009).

152. Negroponete, *supra* note 24.

153. Noah Lanard, *Trump Wants to Make It Easier to Detain and Deport Unaccompanied Central American Children*, MOTHER JONES (Oct. 13, 2017), <https://www.motherjones.com/politics/2017/10/trump-wants-to-make-it-easier-to-detain-and-deport-unaccompanied-central-american-children> (noting that, at the present time, deporting an unaccompanied minor can take well over two years).

154. Lu Xu, *The Loneliness of Being an Immigrant*, THE WALRUS (March 23, 2017), <https://thewalrus.ca/the-loneliness-of-being-an-immigrant>; CANTÚ, *supra* note 115, at 237.

155. *Discrimination in America: Experiences and Views of Latinos*, NPR (Oct. 2017), <https://www.npr.org/documents/2017/oct/discrimination-latinos-final.pdf>.

by white aggressors.¹⁵⁶ Others have reported being exploited by unscrupulous employers.¹⁵⁷ In one infamous case, a processing plant in Ohio supplying close to a billion pounds of chicken every year to the fast food industry made it a policy to recruit indigenous Guatemalan immigrants whom they knew would not complain of low wages and illegal working conditions.¹⁵⁸

In addition to social isolation and discrimination, the threat of deportation permeates every aspect of life as an undocumented immigrant.¹⁵⁹ Deportation can occur years after an immigrant has been gainfully employed and has had a family.¹⁶⁰ For those in immigration detention, especially those forcibly separated from their children, life in the United States exacts a high price, leading some to regret their decision to cross.¹⁶¹ As Ashtyn Tayler, a medical student volunteer assisting immigrants at the border, reported, “There are so many people here who are traumatized. They are emotionally scarred, and these will be the scars of a generation. [A]n entire mass of people will carry this [trauma] with them for years.”¹⁶²

IV. JUDICIAL AND EXECUTIVE ATTEMPTS TO DISMANTLE SIJS

Serious obstacles block many immigrant juveniles’ path to attaining SIJS. One is their lack of awareness that the status even exists. Immigration authorities are not required to inform juvenile immigrants of the existence of SIJS unless they are “apparently eligible” based on pending state court

156. Nalini Junko Negi, Alice Cepeda et al., *Crime Victimization among Immigrant Latino Day Laborers in Post-Katrina New Orleans*, 35 HISP. J. BEHAVIORAL SCIENCES 354 (2013); Charlie LeDuff, *Immigrant Workers Tell of Being Lured and Beaten*, N.Y. TIMES (Sept. 20, 2000), <https://www.nytimes.com/2000/09/20/nyregion/immigrant-workers-tell-of-being-lured-and-beaten.html>.

157. Kirk Semple, *Study Finds Exploitation of Day Laborers*, N.Y. TIMES (Jan. 9, 2011), <https://www.nytimes.com/2011/01/10/nyregion/10laborers.html>; Luna M. Yasui, *Written Statement of the National Employment Law Project on the Subject of Employment and Labor Protections for Day Laborers*, NAT’L EMP. L. PROJECT, <https://www.nelp.org/wp-content/uploads/2015/03/Employment-and-Labor-Protections-for-Day-Laborers.pdf>.

158. Michael Grabell, *Exploitation and Abuse at the Chicken Plant*, THE NEW YORKER (May 8, 2017), <https://www.newyorker.com/magazine/2017/05/08/exploitation-and-abuse-at-the-chicken-plant>.

159. Samantha Schmidt, “Utter Chaos”: ICE Arrests 114 Workers in Immigration Raid at Ohio Gardening Company, WASH. POST (June 6, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2018/06/06/utter-chaos-ice-arrests-114-workers-in-immigration-raid-at-ohio-gardening-company/?utm_term=.8e289c9c0918; Maria Sacchetti, *ICE Raids Meatpacking Plant in Rural Tennessee; 97 Immigrants Arrested*, WASH. POST (Apr. 6, 2018), https://www.washingtonpost.com/local/immigration/ice-raids-meatpacking-plant-in-rural-tennessee-more-than-95-immigrants-arrested/2018/04/06/4955a79a-39a6-11e8-8fd2-49fe3c675a89_story.html?utm_term=.fe40d71ede2e.

160. Liz Robbins, *He Delivered a Pizza to an Army Base in Brooklyn. Now He Faces Deportation*, N.Y. TIMES (June 6, 2018), <https://www.nytimes.com/2018/06/06/nyregion/pizza-delivery-ice-deportation.html>; Jenna Lyons & Hamed Aleaziz, *Longtime Napa Resident Arrested in ICE Sweep; Family in Shock*, S.F. CHRON. (Mar. 1, 2018), <https://www.sfchronicle.com/bayarea/article/Family-of-longtime-Napa-resident-arrested-in-ICE-12721309.php>.

161. Morgan Lee, *Immigrant Mother Separated from Boy: “I Dream of My Son,”* CHICAGO TRIB. (June 30, 2018), <http://www.chicagotribune.com/news/nationworld/sns-bc-us-immigration-separating-families-vignettes-20180626-story.html> (reporting on one immigrant who said, “If I had known, I never would have come.”).

162. Lee, *supra* note 114.

proceedings.¹⁶³ Delays can be fatal, derailing the minor's opportunity to apply to the federal government for SIJS classification.¹⁶⁴

Exacerbating the problem is that most applicants are without legal counsel and may be hard pressed to locate counsel sufficiently versed in how to apply for SIJS classification.¹⁶⁵ The Homeland Security Act of 2002 contains the tepid statement that the Office of Refugee Resettlement should "develop[] a plan to be submitted to Congress on how to ensure that qualified and independent legal counsel is timely appointed to represent the interests of each such child . . ." ¹⁶⁶ ORR claims that all unaccompanied immigrant minors in its care attend a "Know Your Rights" workshop where they are notified of the eligibility guidelines for SIJS and are given a list of pro bono legal services providers.¹⁶⁷ Recently, an American Bar Association resolution addressed the lack of legal counsel for immigrant juveniles and urged the appointment of "counsel for unaccompanied children at government expense at all proceedings necessary to obtain SIJS and other remedies."¹⁶⁸ Currently, however, unaccompanied minors have no right to a government-appointed lawyer when appearing in immigration court.¹⁶⁹ Thus, most are forced into the position of representing themselves, greatly increasing the likelihood that they will be deported. Finally, there is the promise of legal representation under the William Wilberforce Trafficking Victims Protection Reauthorization Act, but no funding.¹⁷⁰

In the current toxic environment of anti-immigrant sentiment, additional hurdles to SIJS are emerging. Some state courts have begun to interpret the statute in ways that contradict its plain language. Others have dodged requests for SIJS findings by claiming no expertise in immigration law. Still others are purporting to deny SIJS in outright usurpations of the prerogative of USCIS. In addition, immigration officials are finding new ways to question the findings made by state courts and are claiming the regulatory power to make SIJS less available. These efforts of the judicial and executive branches of government to dismantle SIJS are reflections of the polarized debate over immigration that continues to rage in this country.

A. *State Courts' Resistance*

The resistance of state courts to making findings that can be used to apply for SIJS takes several forms, some more benign than others. The first

163. C.J.L.G. v. Sessions, 880 F.3d 1122, 1149-50 (9th Cir. 2018) (citing 8 C.F.R. § 1240.11(a)(2)).

164. Cooper, *supra* note , at 32.

165. THE ANNIE E. CASEY FOUNDATION, *supra* note , at 5.

166. 6 U.S.C. § 279(a)(A).

167. *Services Provided*, OFF. REFUGEE RESETTLEMENT, <https://www.acf.hhs.gov/orr/about/ucs/services-provided>.

168. Cooper, *supra* note 9, at 32.

169. C.J.L.G. v. Sessions, 880 F.3d 1122, 1133 (9th Cir. 2018); *United States v. Cabrera-Ochoa*, 2016 WL 4204551, at* 9 (N.D. Cal. Aug. 8, 2016).

170. 22 U.S.C. § 7101.

potential obstacle is the age of majority, which is not the same in every state for all purposes. In some states, juvenile court jurisdiction ends at eighteen, or nineteen under extended jurisdiction provisions.¹⁷¹ The most commonly recognized age of majority is eighteen or as late as twenty-one if the individual is still attending high school or is attending college.¹⁷² Some states guarantee child support until the age of twenty-one.¹⁷³ Although courts “may be unfamiliar with the consequences of the child ‘aging out’ of the court’s jurisdiction without receiving the SIJS predicate order,”¹⁷⁴ they will not accept petitions for SIJS findings after a child reaches the age of majority.¹⁷⁵ Without the order, the opportunity to seek SIJS evaporates. Some legislatures in states receptive to promoting SIJS have made explicit that, for SIJS purposes, juvenile courts have jurisdiction over individuals until the age of twenty-one.¹⁷⁶ One example is California, which amended its guardianship law to allow persons between eighteen and twenty years of age to file a petition for guardianship, whereas previously, a guardian could be appointed only for a child under the age of eighteen.¹⁷⁷ Another is Florida, whose statute addressing SIJS specifically states that if SIJS and an adjustment of status “have not been granted by the time the child reaches 18 years of age, the court may retain jurisdiction” until the child reaches twenty-two years of age.¹⁷⁸

One problem related to the lack of awareness of SIJS among immigrant youth is that state court judges may be unfamiliar with immigration law and may be unwilling to hone their expertise in this area to deal effectively with motions for SIJS findings. After all, the hybrid decision-making approach to obtaining SIJS is unusual, and family court dockets are already crowded with routine family law matters. In Brooklyn Family Court, where I practice, one judge has become an expert in SIJS cases and hears all such matters by default.¹⁷⁹ In Queens Family Court, by contrast, proceedings can be protracted due to the lack of familiarity and expertise family court judges bring

171. See, e.g., *In re C.M.K.*, 552 N.W.2d 768, 769 n.1 (Minn. Ct. App. 1996) (citing MINN. STAT. §§ 250.015(2), 260.181(4)); *In re Jessica M.*, No. H12CP09012802A, 2010 WL 1508472, at *2 (Conn. Super. Ct. March 16, 2010) (citing CONN. GEN. STAT. § 46b-120)).

172. See, e.g., COLO. REV. STAT. § 14-10-115(13); GA. CODE ANN. §§ 39-1-1, 19-6-15(e); MO. ANN. STAT. §452.340; OR. REV. STAT. ANN. §§ 109.510, 107.108.

173. See, e.g., IND. CODE ANN. § 31-16-6-6; MISS. CODE ANN. § 93-11-65(8)(a).

174. Cooper, *supra* note , at 32.

175. *United States v. Cabrera-Ochoa*, No. 5:15-cr-00206-BLF-1, 2016 WL 4204551, at *6 (N.D. Cal. Aug. 8, 2016).

176. Cooper, *supra* note at 31 (citing MD. CODE FAM. LAW § 1-201(a), (b)(10); CAL. PROB. CODE § 1510.1; 18 N.Y. FAM. CT. ACT § 661(a); *Recinos v. Escobar*, 46 N.E.3d 60, 65 (Mass. 2016); *In re Trudy-Ann W.*, 901 N.Y.S.2d 296, 298 (App. Div. 2010) (“Since Trudy-Ann is under 21 years of age, she is an infant for the purposes of this guardianship proceeding.”)).

177. Chang et al., *supra* note , at 151 (stating “legislation was passed in the form of AB900”).

178. FLA. STAT. § 39.013(2).

179. This approach conforms to American Bar Association Resolution 113, recommending “specialized state court calendars to hear and adjudicate SIJS matters, including creating expedited processes for youth aged 16 and older, given the firm age deadline in federal immigration laws.” Cooper, *supra* note 9, at 32.

to SIJS matters. Compounding the problem is that the law of SIJS has undergone revision in recent years. As Cristina Ritchie Cooper notes, “judges and attorneys should avoid following the regulations that reflect pre-[Trafficking Victims Protection Reauthorization Act] requirements” because that act eliminated the original requirement that the child be found “eligible for long-term foster care.”¹⁸⁰

Other forms of state court resistance are less benign. The most common example relates to the required finding that the child’s reunification with one or both parents is not viable.¹⁸¹ By its own terms, the SIJS statute permits “one-parent SIJS,” where the applicant lives in the United States with one of his parents but has been abandoned by the other parent.¹⁸² The 2008 anti-trafficking legislation made clear that abuse, abandonment or neglect by one parent is all that is needed,¹⁸³ changing language from the earlier law that said such findings were required with respect to both parents. The statute refers specifically to “an individual . . . whose reunification with 1 or both of the immigrant’s parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law.”¹⁸⁴

One-parent SIJS has been controversial, however, with some courts preferring the theory that Congress could not have meant to extend SIJS protection to such cases.¹⁸⁵ Such courts are prone to read the requirement as conjunctive rather than disjunctive¹⁸⁶ or to claim it is ambiguous and thus subject to interpretation. Courts in Nebraska, New Jersey and New York, for example, have declared “one or both parents” to be ambiguous, susceptible to more than one reasonable interpretation, depending upon who was involved in the child’s life prior to the petition. *In re Erick M.*, involving a juvenile offender who lived with his mother but whose father’s whereabouts were unknown, the court read the reunification provision in this way. If the minor lived with one of his parents, it reasoned, then the requirement is that reunification with both of his parents is infeasible.¹⁸⁷ This reasoning seems to suggest that if the minor lived with neither of his parents, then it is enough to show that reunification with at least one parent is infeasible. In support of its decision, the court opined that “Congress wanted to give state courts and federal authorities flexibility” to consider individualized circumstances.¹⁸⁸

180. Cooper, *supra* note at 30.

181. 8 C.F.R. § 204.11(a); *In re Estate of Nina L.*, 41 N.E.3d 930, 937 (Ill. Ct. App. 2015).

182. *In re E.G.*, 24 Misc. 3d 1238(A), at *3 (N.Y. Fam. Ct. 2009).

183. *Matter of Karen*, 111 A.D.3d 622, 623 (N.Y. App. Div. 2013).

184. 8 U.S.C. § 1101(a)(27)(J)(i) (codifying Pub. L. 110-457, 122 Stat. 5044 (2008)).

185. *See, e.g.*, *D.A.J. v. S.A.J.*, 2007 WL 4563517, at *1 (N.J. Super. Ct. App. Div. Dec. 31, 2007) (noting lower court’s refusal to make a finding of abandonment in case where 17-year-old juvenile’s father left the family when juvenile was four and did not contact them thereafter).

186. *In re D.T.J.*, 956 F. Supp. 2d 523, 539 (S.D.N.Y. 2013); *In re Erick M.*, 820 N.W.2d 639 (Neb. 2012) (requiring a showing that reunification with *neither* parent is viable, rather than that reunification with at least one parent is not viable).

187. *Erick M.*, 820 N.W.2d at 647.

188. *Id.* at 642.

A court in New Jersey understood the reunification language to refer to a situation where reunification with neither parent is viable.¹⁸⁹ In that case, the minor arrived in the United States without his parents and went to live with his uncle. The uncle obtained an order of custody, but the court in that proceeding determined that the custody petition had been brought for the purpose of seeking an adjustment of the minor's immigration status¹⁹⁰ and, therefore, refused to make SIJS findings. Moreover, even though the minor's father had abandoned him, the court reasoned that his mother was not guilty of neglect simply because she had inadequate financial resources to provide the child with adequate care.¹⁹¹ The court compared the mother with one in another case who had been described as "'a caring mother [living in poverty] who is trying to provide better living conditions for her son.'"¹⁹² The court believed that only where a minor cannot be reunited with both parents would Congress's twin goals of protecting immigrant youth from unsafe parents and of not giving those who have at least one caring parent an immigration advantage be satisfactorily met.¹⁹³

The New Jersey Supreme Court reversed this determination, implying that the lower courts had overstepped their bounds. It went to great pains to describe the essential but limited role a state court should assume when requested to make SIJS findings:

The Family Part plays a critical role in a minor immigrant's attempt to obtain SIJ status but that role is closely circumscribed. The Family Part's sole task is to apply New Jersey law in order to make the child welfare findings required by 8 C.F.R. § 204.11. The Family Part does not have jurisdiction to grant or deny applications for immigrant relief. That responsibility remains squarely in the hands of the federal government. Nor does it have the jurisdiction to interpret federal immigration statutes. The Family Part's role in the SIJ process is solely to apply its expertise in family and child welfare matters to the issues raised in 8 C.F.R. § 204.11, regardless of its view as to the position likely to be taken by the federal agency or whether the minor has met the requirements for SIJ status. To that end, Family Part courts faced with a request for an SIJ predicate order should make factual findings with regard to each of the requirements listed in 8 C.F.R. § 204.11. When analyzing whether reunification with "1 or both" parents is not viable due to abuse, neglect, or abandonment, the Family Part shall make

189. *H.S.P. v. J.K.*, 87 A.3d 255, 266 (N.J. Super. Ct. App. Div. 2014). Similarly, a New York court recently made the determination that "reunification with both parents must be impossible." The Appellate Court reversed the court based on a plain language reading of the statute but declined to remand the matter, opting instead to make its own findings based on the evidence in the record. *Matter of Keilyn GG.*, 74 N.Y.S.3d 378, 382 (N.Y. App. Div. 2018).

190. *H.S.P.*, 87 A.3d at 260.

191. *Id.* at 262.

192. *Id.* (quoting *D.C. v. A.B.C.*, 8 A.3d 260, 265 (N.J. Super. Ct. Ch. Div. 2010)).

193. *Id.* at 268.

separate findings as to each parent, and that determination shall be made by applying the law of this state. This approach will provide USCIS with sufficient information to enable it to determine whether SIJ status should be granted or denied, in accordance with the statutory interpretation of the SIJ provision applied by that agency.¹⁹⁴

Interpreting “1 or both” as requiring both appears to be a minority position. Other courts routinely find the reunification language plain:

If Congress meant that an applicant for SIJ was required to show that reunification with *both* parents was not viable due to abuse, neglect or abandonment, it could easily have so provided. Use of the disjunctive indicates that abuse, neglect or abandonment by one parent is sufficient to support the predicate finding.¹⁹⁵

Commentators have articulated sound policy justifications for the plain-meaning theory. Rodrigo Bacus finds the justification in the recognition that unaccompanied minors are vulnerable and marginalized.¹⁹⁶ He argues that the one-parent SIJS rule promotes minors’ autonomy and agency. Megan Johnson sees the rejection of one-parent SIJS as a violation of the 2008 statutory amendment enacted to expand SIJS eligibility to children who find themselves “involuntarily at the mercy of [their] parents’ relocation decisions”¹⁹⁷ Gregory Catangay traces the one-parent SIJS controversy to the involvement of state courts in the SIJS process. He argues for removing state courts from the equation, leaving the federal government in charge of the entire process.¹⁹⁸

State court resistance to SIJS does not only take the form of denying one-parent SIJS findings. Some courts reject requests to make special findings by either disclaiming competency in immigration matters or citing a lack of jurisdiction. The unusual hybrid decision-making approach to obtaining SIJS may concern state courts about their proper role vis-à-vis federal officials making decisions about immigration policy, and may trigger suspicion that litigants are using state courts to take improper advantage of immigration

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

195. *In re Estate of Nina L.*, 41 N.E.3d 930, 938 (Ill. App. Ct. 2015); *see also* Eddie E. v. Superior Ct., 183 Cal. Rptr. 3d 773, 779 (Cal. Ct. App. 2015) (“plain and ordinary meaning”); *In re Marcelina M.-G.*, 973 N.Y.S.2d 714, 722 (App. Div. 2013).

196. Rodrigo Bacus, *Defending One-Parent SIJS*, 42 *FORDHAM URB. L.J.* 921, 958-59 (2016).

197. Meghan Johnson & Yasmin Yavar, *Uneven Access to Special Immigration Juvenile Status: How the Nebraska Supreme Court Became an Immigration Gatekeeper*, 33 *CHILD. LEGAL RTS. J.* 84, 89 (2013).

198. Gregory E. Catangay, *Abandoning the Status Quo: Towards Uniform Application of Special Immigrant Juvenile Status*, 20 *U.C. DAVIS J. OF JUV. L. & POL’Y* 40, 74 (2016); *see also* Elizabeth Keyes, *Evolving Contours of Immigration Federalism: The Case of Migrant Children*, 19 *HARV. LATINO L. REV.* 33, 39 (2016) (advocating “giving exclusive authority to the federal government through a centralized adjudications unit”).

law.¹⁹⁹ As California Superior Court Judge Craig Arthur put it, “I noticed that there was a lot of pushback from state court judges about making these findings because, in their mind, they were making a determination that these children were now going to be naturalized citizens of the United States.”²⁰⁰ As was noted above in Part II, however,²⁰¹ in hearing motions to make SIJS findings, state courts are not making immigration decisions but only findings that might support them if the appropriate requests are filed with DHS. At the federal level, an applicant for SIJS must satisfy other tests to obtain SIJS and may be denied lawful permanent residence even if she does.²⁰²

In a case involving an immigrant juvenile living with his mother in Virginia, the court granted custody to the mother but refused to make findings related to the father’s abuse and abandonment of his son, claiming a lack of jurisdiction to do so.²⁰³ The court believed that jurisdiction necessary for a state court to make findings that might be used in an immigration matter does not exist when it is not explicitly conferred by the Immigration and Nationality Act. Nothing in the Act, in short, mandated that state courts make SIJS findings upon request “or tailor their orders to increase the likelihood that federal immigration officials will find them acceptable.”²⁰⁴ The court took comfort in the pronouncements in the United States Citizenship and Immigration Services Policy Manual admonishing courts to apply state law when making SIJS findings.²⁰⁵ Since Virginia state law made no provision for the making of SIJS findings, the court believed it had no obligation to make them at all,²⁰⁶ in spite of the court’s clear jurisdiction over the parental-maltreatment and best-interests-of-the-child issues presented in the case. This refusal to entertain the underlying petition and to make special findings has been the response of other courts as well.²⁰⁷

Several other less prominent points of resistance bear mentioning. One arises when a family or probate court determines it has no jurisdiction because it is not a “juvenile” court in the meaning of the SIJS provisions. This occurs despite the fact that the term, as used in the federal legislation, is broadly used to encompass courts that make “determinations about the custody and care of juveniles” and would include family and probate courts in most states.²⁰⁸ Another is the reluctance of state courts to take jurisdiction in

199. *In re Hei Ting C.*, 969 N.Y.S.2d 150, 155 (App. Div. 2013); *Delmi Y. v. Carmen Y.*, No. G-09792-08, 2009 WL 997518, at *6 (N.Y. Fam. Ct. April 14, 2009) (“Otherwise, the Family Court would be improperly used as a last resort forum to defeat Federal Immigration Removal Proceedings.”).

200. *Chang*, *supra* note 16, at 156.

201. *See supra* notes 75–78 and accompanying text.

202. *See supra* notes 79–81, 83–85 and accompanying text.

203. *Canales v. Torres*, 800 S.E.2d 208, 213–15 (Va. Ct. App. 2017).

204. *Id.* at 220.

205. *Id.* at 218, 221.

206. *Id.* at 223.

207. *See, e.g.*, *Castellanos v. Recarte*, 36 N.Y.S. 3d 217, 217 (App. Div. 2016).

208. *See B.F. v. Super. Ct.*, 143 Cal. Rptr. 3d 730, 732, 734 (Ct. App. 2012).

SIJS cases when the minors are in deportation proceedings.²⁰⁹ However, the language employed in the provision in question applies only to juveniles in actual, not constructive, federal custody.²¹⁰ Another court concluded that Congress could not have intended “to confer immigration benefits on juveniles adjudicated delinquent of criminal offenses.”²¹¹ “[T]hat cannot be the law,” remarked one trial court. “If that were the law then every minor who is here illegally would have an incentive to commit a crime so they go into custody and then they can state “I am now a dependent” or “I am now dependent upon the juvenile court.””²¹² A similar statement was made by an Ohio court: “Appellant entered the country illegally, committed a serious offense, and now prays for relief so he may seek legal status. His request appears nonsensical in view of the circumstances.”²¹³

Other courts express discomfort with providing any sort of support for an application for SIJS.²¹⁴ The most egregious form that this resistance takes is the “categorical rejection”²¹⁵ of SIJS petitions. This stance is reflected in the decisions of lower courts in Florida beginning in 2015, until it was ended by the Florida Supreme Court in 2017. A series of cases between 2005 and 2016 established that Florida appellate courts were generally receptive to SIJS-based dependency cases.²¹⁶ One of these courts rejected the state’s argument that SIJS-based dependency petitions were “not a proper use of Florida’s law, courts, and resources . . .”²¹⁷ In 2015, Florida’s Third District Court of Appeal nonetheless on two different occasions upheld dismissals of SIJS-based dependency petitions on the ground that the alleged abandonment had occurred in the too distant past.²¹⁸ In both cases, Judge Frank Shepherd opined that SIJS-based petitions are improper uses of the law.²¹⁹ Emboldened, the circuit courts began churning out summary denials of SIJS-based dependency petitions and were rewarded with *per curiam* affirmances.²²⁰

209. See, e.g., *Delmi Y. v. Carmen Y.*, No. G-09792-08, 2009 WL 997518, at *6 (N.Y. Fam. Ct. Apr. 14, 2009).

210. *In re Srun R.*, 2005 WL 2650254, at *2 (Conn. Super. Ct. Sept. 15, 2005).

211. *In re Estate of Nina L.*, 41 N.E.3d 930, 935 (Ill. App. Ct. 2015) (citing *Leslie H. v. Super. Ct.*, 168 Cal. Rptr. 3d 729, 733-34 (Cal. Ct. App. 2014) (describing the trial court’s ruling).

212. *Leslie H.*, 168 Cal. Rptr. 3d at 734 (quoting the trial court’s ruling).

213. *In re G.M.*, No. CA2009-07-203, 2009 WL 4918516, at *4 (Ohio Ct. App. Dec. 21, 2009).

214. See, e.g., *In re Zaim R.*, 822 N.Y.S.2d 368, 374 (Fam. Ct. 2006) (“The Family Court is not a vehicle by which one defeats deportation or impedes federal immigration laws.”).

215. *In re B.R.C.M.*, 182 So. 3d 749, 764 (Fla. Dist. Ct. 2015) (Salter, J., dissenting), *rev’d*, 215 So. 3d 1219 (Fla. 2017).

216. See *id.* at 756-67 (Fla. Dist. Ct. 2015) (Salter, J., dissenting).

217. *Id.* at 759 (quoting *F.L.M. v. Department of Children and Families*, 912 So. 2d 1264, 1269 (Fla. Ct. App. 2005)).

218. *In re K.B.L.V.*, 176 So. 3d 297, 299 (Fla. Ct. App. 2015); *In re B.Y.G.M.*, 176 So. 3d 290, 293 (Fla. Ct. App. 2015).

219. *K.B.L.V.*, 176 So. 3d at 301 (Fla. Ct. App. 2015) (Shepherd, J., concurring) (“The purpose of the dependency laws of this state is to protect and serve children and families in need, not those with a different agenda.”); *B.Y.G.M.*, 176 So. 3d at 296 (Fla. Ct. App. 2015) (Shepherd, J., concurring) (“There is no reason for this court to succumb to those who would misuse our law.”).

220. *B.R.C.M.*, 182 So. 3d at 762-63 (Salter, J., dissenting) (describing five cases that followed *B.Y.G.M.* and *K.B.L.V.*).

The Florida Supreme Court reversed and remanded the decision in *B.R.C.M.* for particularized findings. The court recognized a disagreement among the courts of appeals in Florida and in particular took issue with the *B.R.C.M.* court's summary dismissal of the petition because *B.R.C.M.* had brought it for the purpose of seeking SIJS.²²¹ The court firmly admonished the lower courts to focus on whether the child meets the statutory definition of dependency and to ignore what the minor might do with a state court's finding of dependency at the federal level.²²² The Florida Supreme Court's directive was, as has been emphasized above, a correct description of the non-overlapping roles of the state courts and the federal government in questions of SIJS eligibility.

In Nebraska, one trial court was so uncomfortable with the thought of providing the petitioner a stepping stone to lawful permanent residence that it revoked its order of special findings after having issued it earlier in the proceedings. The court was clearly torn about what the findings might mean for the future course of immigration in the United States:

“At the time of the hearing, the juveniles described their living conditions in their home country prior to their arrival in the United States. Both [the juveniles' attorney] and [the attorney representing DHHS] argued persuasively it is in the best interests of the juveniles that they remain in this country. The Court is convinced that is true. However, the Court is equally convinced there are, in all probability, tens if not hundreds of thousands of people who are here illegally or who would like to come to the United States because they would be better off in this country. In addition, the record is devoid of any credible evidence that their mother abused, neglected, or abandoned the juveniles. First of all, the mother brought them here illegally presumably for a better life. Secondly, a conscious decision was made by this family to leave the children in the care and custody of [OJS] when the mother was deported. It is incongruous for the guardian ad litem or [DHHS] to argue the mother abused and neglected these children by leaving them here in the United States and at the same time argue that by doing so, they were being afforded a better life with greater opportunity.”²²³

This court's express reservations about being a tool for furthering a migrant's ambition to obtain SIJS status clouded its judgment about the substantial evidence in the record of abuse, neglect, and abandonment fully separate from the “conscious decision” made by this family at the time of the

221. *B.R.C.M.*, 215 So. 3d 1219, 1222 (Fla. 2017); see also *Bianka M. v. Super. Ct.*, 236 Cal. Rptr. 3d 610, 623-24 (2018).

222. *B.R.C.M.*, 215 So. 3d at 1223.

223. *In re Luis G.*, 764 N.W.2d 648, 653 (Neb. Ct. App. 2009) (quoting the lower court's order vacating its special findings).

mother's deportation.²²⁴ Of course, such a decision is not a disqualification from SIJS where there is evidence in the record of such parental maltreatment.²²⁵

The Family Court in Nassau County, New York, has been particularly resistant to granting SIJS predicate orders. In one case, the judge dismissed the guardianship petition, refused to inquire into the best interests of the child, and instead criticized the child for not speaking English more proficiently. Specific comments included: that the child "should be speaking English a lot better" after having been in the United States for two years and should "make some friends who speak English"; that if the child only spoke Spanish, "what are you gonna do, you're gonna be hanging around just where you are"; and that the child "[c]an't speak English, doesn't go to school, it's wonderful. It's a great country America."²²⁶ The appellate court, reversing, deemed these remarks inappropriate and not to be countenanced.²²⁷ A plethora of similar decisions by this court have likewise been reversed on appeal.²²⁸

State courts engaging in these forms of judicial resistance to SIJS actively obscure the bright line that divides their "institutional competence"²²⁹ to make child welfare determinations from whatever role as an immigration gatekeeper they might fervently want to fulfill.²³⁰ One judge even claimed, "It is as if we are customs agents . . ."²³¹ The dividing line becomes especially blurry for some courts in cases that do not involve allegations of severe physical abuse, gang violence, human trafficking, or drug smuggling. On the one hand, these courts have been vocal about wanting to curtail immigration in this context;²³² on the other, they have disclaimed any responsibility for laying the groundwork for an immigration decision to be made by the federal government.²³³ Either stance is an abdication of responsibility to focus squarely on the child's welfare.

The gatekeeper paradigm is misguided. A California appeals court wrote: "A state court's role in the SIJ process is not to determine worthy candidates for citizenship, but simply to identify abused, neglected, or abandoned alien children under its jurisdiction who cannot reunify with a parent or be safely

224. *Id.* at 656 (describing evidence of physical abuse and neglect).

225. *See also In re Estate of Nina L.*, 41 N.E.3d 930, 937 (Ill. Ct. App. 2015) ("But even if we assume that Maria's abandonment was motivated solely by the desire to give her daughter the opportunity to seek SIJ status, the fact is Maria *did* abandon Nina.")

226. *In re A.* (Anonymous), 78 N.Y.S.3d 189, 190 (App. Div. 2018).

227. *Id.*

228. *See, e.g., In re Marisol N.H.*, 979 N.Y.S.2d 643 (App. Div. 2014); *In re Anibal H.*, 30 N.Y.S.3d 196 (App. Div. 2016); *In re Maura A.R.-R.*, 979 N.Y.S.2d 701 (App. Div. 2014); *In re Tommy E.H.*, 22 N.Y.S.3d 213 (App. Div. 2015); *Pineda v. Diaz*, 9 N.Y.S.3d 93 (App. Div. 2015); *In re Gabriela Y.U.M.*, 989 N.Y.S.2d 117 (App. Div. 2014); *In re Marlene G.H.*, 30 N.Y.S.3d 180 (App. Div. 2016); *In re Haide L.G.M.*, 13 N.Y.S.3d 500 (App. Div. 2015); *Diaz v. Munoz*, 989 N.Y.S.2d 52 (App. Div. 2014); *Castellanos v. Recarte*, 36 N.Y.S.3d 217 (App. Div. 2016).

229. *In re Mario S.*, 954 N.Y.S.2d 843, 849 (N.Y. Fam. Ct. 2012).

230. *In re Y.V.*, 160 So. 3d 576, 577 (Fla. Dist. Ct. 2015).

231. *In re Y.V.*, 160 So. 3d at 577 (Shepherd, J., concurring).

232. *See supra* notes 214–223 and accompanying text.

233. *See supra* notes 199–200, 203–207 and accompanying text.

returned in their best interests to their home country.”²³⁴ The *Nina L.* court opined that there is a good reason state courts are not competent to be gatekeepers in these matters: “[t]here is no party opposing petitioner’s motion for SIJ findings and thus the adversary process will not work to ferret out the truth or shed light on the reasons for [the parents’] conduct.”²³⁵ Furthermore, the federal courts have made explicit that state court findings do not dictate to immigration officials what they must do in SIJS cases. Indeed, federal authorities retain full discretionary authority whether to grant the classification.²³⁶

Appellate review has been necessary to reverse some of these wrong-headed state court decisions,²³⁷ labeled by one commentator as “impermissible immigrant adjudication by state courts.”²³⁸ A Maryland appeals court admonished: “Imposing insurmountable evidentiary burdens of production or persuasion is . . . inconsistent with the intent of Congress.”²³⁹ Through this lens, given that a state court is not making immigration decisions, it is not at liberty simply to refuse to make findings on the matters requested.²⁴⁰ Even more alarming than the resistance itself is that access to SIJS is now skewed across states in a manner that Laila Hlass attributes to a lack of state court familiarity with SIJS in some areas of the country and lack of access to counsel.²⁴¹ Hlass quotes Ken Borelli, a former child welfare official in California who helped draft the law that led to the creation of SIJS: Borelli describes the state courts’ response to SIJS a “tragedy” due to the lack of consistency in its implementation across the country.²⁴²

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

235. *In re Estate of Nina L.*, 41 N.E.3d 930, 938 (Ill. Ct. App. 2015); *see also id.* at 938 (“Again, the *bona fides* of and reasons for the abandonment are not our concern and will be addressed, to the extent that they are deemed relevant, in the context of Nina’s application for SIJ status.”); *Ramos v. Patriz*, No. 1809 Sept. Term 2017, 2018 WL 2979966, at *3 (Md. Ct. Spec. App. June 13, 2018) ([T]he state court is not rendering an immigration determination, because the ultimate decision regarding the child’s immigration status rests with the federal government.”).

236. *See, e.g., Gao v. Jenifer*, 185 F.3d 548, 555 (6th Cir. 1999) (noting that the grant of permanent resident status remains within the discretion of the federal government: “It is the operation of INS rules that may prevent Gao’s deportation, not the action of the county court.”).

237. *See, e.g., In re Luis G.*, 764 N.W.2d 648, 656 (Neb. Ct. App. 2009) (“Clearly, there is evidence in the record to substantiate a finding that the boys had been abused, neglected, and/or abandoned for the purposes of their eligibility for special immigrant juvenile status, and we find that the county court erred in vacating the July 23, 2007, order.”); *In re Estate of Nina L.*, 41 N.E.3d 930, 932 (Ill. Ct. App. 2015) (making specific finding that the existence of SIJS did not motivate the juvenile’s mother to abandon her).

238. Meghan Johnson & Kele Stewart, *Unequal Access to Special Immigrant Juvenile Status: State Court Adjudication of One-Parent Cases*, AMERICAN BAR ASSOCIATION (July 14, 2014), https://www.americanbar.org/content/dam/aba/images/probono_public_service/ts/unequal-access-special-immigrant-juvenile-status-state-court-adjudication-one-parent-cases.pdf.

239. *In re Dany G.*, 117 A.3d 650, 656 (Md. Ct. App. 2015).

240. *Ramos v. Patriz*, No. 1809 Sept. Term 2017, 2018 WL 2979966, at *4 (Md. Ct. Spec. App. June 13, 2018).

241. Laila L. Hlass, *States and Status: A Study of Geographical Disparities for Immigrant Youth*, 46 COLUM. HUM. RTS L. REV. 266, 315-28 (2014).

242. *Id.* at 300.

B. *DHS's Regulatory Power*

The SIJS program is the subject of a Congressional enactment, but DHS has broad regulatory power to determine its contours. Immigration policy in particular is largely immune from judicial review.²⁴³ The more general deference administrative agencies are due when carrying out their statutory mandates is governed by the Supreme Court's decision in *Chevron v. Natural Resources Defense Council*.²⁴⁴ The decision speaks of the broad deference generally given to administrative action²⁴⁵ and establishes a standard by which to judge the level of deference due in individual cases. The *Chevron* standard asks first "whether Congress speaks in the statute to the particular issue"²⁴⁶ If so, deference is not appropriate. If the statute does not speak to the issue, the standard asks whether the agency's regulation "'is based on a permissible construction of the statute."²⁴⁷ Permissible regulations are those that are not "'arbitrary, capricious, or manifestly contrary to the statute."²⁴⁸ As a practical matter, then, the executive branch's administrative decision making in the area of immigration policy is considerably insulated from judicial review. Nevertheless, DHS policies in the context of SIJS have been the subject of numerous legal challenges.

One attack that can be leveled at administrative agencies is that their actions are *ultra vires*. One action that was the subject of such a challenge was DHS's interpretation of a provision in the 1997 amendment to SIJS²⁴⁹ to mean that no immigrant juvenile in federal custody could seek an order of special findings in state court absent DHS's specific consent.²⁵⁰ Without this consent, which had to be obtained before any state court proceedings could be commenced²⁵¹ and was often refused,²⁵² any state court determination would be invalid under federal law.²⁵³ The lack of consent was thus an effective bar to obtaining SIJS. For example, in *M.B. v. Quarantillo*, the court determined that the lack of evidence available to establish that the juvenile would ultimately be capable of satisfying the requirements of SIJS and the fact that he was already beyond the age at which he could be the subject of

243. *Trump v. Hawaii*, 585 U.S. ___, 138 S. Ct. 2392, 2418 (2018) (noting that "the admission and exclusion of foreign nationals is a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control") (internal quotation marks omitted).

244. 467 U.S. 837 (1984).

245. *Id.* at 844.

246. *Perez-Olano v. Gonzalez*, 248 F.R.D. 248, 268 (C.D. Cal. 2008) (citing *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984)).

247. *Id.* (quoting *Chevron*, 467 U.S. at 843).

248. *Id.* (quoting *Chevron*, 467 U.S. at 844).

249. 8 U.S.C. § 1101(27)(J)(iii)

250. *Id.*; see, e.g., *F.L. v. Thompson*, 293 F. Supp. 2d 86, 89 (D.D.C. 2003).

251. *Perez-Olano*, 248 F.R.D. at 253 n.4 (C.D. Cal. 2008).

252. *Zheng v. Pogash*, 416 F. Supp. 2d 550, 553 n.4 (S.D. Tex. 2006).

253. *United States ex rel. K.E.R.G. v. Burwell*, Civ. No. 14-1773, 2014 WL 12638877, at *4 (E.D. Pa. December 30, 2014); *In re Perez Quintanilla*, A97 383 010, at 7 (Admin. App. Office June 7, 2007), <https://www.uscis.gov/sites/default/files/USCIS/Laws%20and%20Regulations/Memoranda/July%202007/PerezSIJ073007.pdf>.

the relevant state court's jurisdiction were proper considerations supporting DHS's withholding of consent.²⁵⁴

Complicating this question of consent was that DHS's implementing regulations contained no mention of the consent requirement.²⁵⁵ Instead, DHS embodied its policy regarding the required consent in the Cook Memorandum, which specified that those in DHS custody had to make a written request for consent.²⁵⁶ In *Zheng v. Pogash*, immigrant minors successfully argued that DHS must grant or deny consent within the parameters of the Memorandum, which also specified that said consent should be granted under the following conditions: "(1) if it is in the best interests of the child to go before the state court; and (2) the child may be eligible for SIJ classification."²⁵⁷ The applicant was a 14-year-old boy whose father had him smuggled into the United States where the boy was to be responsible for working off the \$60,000 bill owed to the smuggling ring.²⁵⁸ The court found DHS's denial of consent to be an abuse discretion based on this evidence and based on DHS's determination that the minor lacked credibility, even though the agency had never interviewed him.²⁵⁹ The opinion cited another case wherein an abuse of discretion determination was grounded on a similar failure to conduct an investigation.²⁶⁰ Had the evidence been satisfactory, however, an immigration court would have been well within its power to determine that the juvenile was ineligible for SIJ status and to refuse to continue proceedings to await any outcome in state court.²⁶¹

In yet another case involving review of DHS's actions surrounding the Cook Memorandum, *Yeboah v. United States Department of Justice*, ten-year-old Julian Yeboah arrived in the United States from Ghana by airplane under nebulous circumstances:²⁶² he was either running away from an abusive father, or his father had arranged for him to travel to the U.S. with the hope that he would find a better life.²⁶³ The Immigration and Naturalization Service (INS) took Julian into custody and refused to consent to his filing a

254. *M.B. v. Quarantillo*, 301 F.3d 109, 115-16 (3d Cir. 2002); see also *In re Domingo Riquia-Chic*, A206895700, 2015 WL 8562301 (BIA), at *2 (Bd. Immig. Appeals Nov. 24, 2015) ("[T]he likelihood that the respondent would be granted SIJ status was too attenuated to warrant a continuance of removal proceedings or administrative closure.").

255. *M.B.*, 301 F.3d at 115.

256. *Id.*

257. *Zheng v. Pogash*, 416 F. Supp. 2d 550, 557 (S.D. Tex. 2006) (citing *M.B.*, 301 F.3d at 113); *L. v. Thompson*, 293 F. Supp. 2d 86, 90-91 (D.D.C. 2003).

258. *Id.* at 558.

259. *Id.* at 559.

260. *A.A.-M. v. Alberto Gonzales*, C05-2012C, 2005 WL 3307531, at *3-4 (W.D. Wash. Dec. 6, 2005), cited in *Zheng*, 416 F. Supp. 2d at 558.

261. See, e.g., *In re Maria Georgina Martinez-Mendoza*, A206732194, 2015 WL 3896298 (BIA), at *2 (Bd. Immig. Appeals June 1, 2015); *In re Rene Marcelo Chavez-Mocha*, A201282978, 2013 WL 6529179 (BIA), at *2 (Bd. Immig. Appeals Nov. 8, 2013) (immigration court found absence of prima facie eligibility for SIJS).

262. *Yeboah v. U.S. Dep't of Justice*, 223 F. Supp. 2d 650, 651 (E.D. Pa. 2002), *aff'd* 345 F.3d 216, 219 (3d Cir. 2003).

263. *Id.* at 656; 345 F.3d at 219.

dependency petition with the state court due to the service's belief that Julian was not abused and that he instead wanted to be declared dependent for the purpose of seeking SIJS.²⁶⁴ The court reviewed the refusal under the arbitrary and capricious standard of *Chevron* and upheld INS's refusal to consent. As was remarked in *Zheng*, the statute did not direct under what conditions INS must or must not grant consent. The terms of the Cook Memorandum,²⁶⁵ however, convinced the Court of Appeals for the Third Circuit to affirm, remarking that the lower court had applied the correct standard and emphasizing that upon a motion for summary judgment, an agency decision for which there is no statutory direction limits the reviewing court to considering whether the legislative history indicates that the agency's action was a "clear error of judgment."²⁶⁶ Since it did not, Yeboah's claim that the agency's action was *ultra vires* was of no avail.

In *Perez-Olano v. Gonzalez*, the plaintiff-immigrant argued that the consent provision did not apply to state court proceedings that do not determine custody or placement. The court granted the plaintiffs' motion for summary judgment on this issue, reasoning that the agency's interpretation of the consent requirement overshot the statutory language that limited the need for consent to cases where the state court adjudication would alter the minor's custody status or placement.²⁶⁷ Since special findings orders can be issued without altering the custody of the child or her placement with the federal government (if she is so placed), it was *ultra vires* for the department to require the consent of federal officials for every petition to a state court for special findings.²⁶⁸ The court further reasoned that the agency's interpretation was in conflict with Congress's reservation of child welfare decisions to state courts as long as those decisions do not interfere with the federal government's control of minors in its actual or constructive custody.²⁶⁹ Minors who require the agency's specific consent can now use a form available at the Health and Human Services website.

Regulations governing the age after which a minor's petition for SIJS will not be accepted by the agency has also been the subject of legal challenges. These regulations specify that "a minor will 'age-out' of eligibility if the child turns 21 years old before being granted SIJ status or SIJ-based adjustment, or if the child is no longer dependent on the state court"²⁷⁰ DHS

264. *Yeboah*, 345 F.3d at 219-20.

265. *Yeboah*, 223 F. Supp. at 654 (quoting Immigration and Naturalization Service, Memorandum for Regional Directors, Subject: Special Immigrant Juveniles, July 9, 1999, at 2).

266. *Yeboah*, 345 F.3d at 221 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

267. *Perez-Olano v. Gonzalez*, 248 F.R.D. 248, 254 (C.D. Cal. 2008).

(citing 8 U.S.C. 1101(a)(27)(J)(iii)(I)).

268. *Id.* at 266.

269. *Id.* at 265.

270. *Id.* at 253 (C.D. Cal. 2008) (citing 8 C.F.R. §§ 204.11(c)(1), 204.111(c)(5), 205.1(a)(3)(iv)(A, C, & D)); see e.g., *Riley v. Gantner*, No. 03 Civ.2835 GEL, 2003 WL 22999487, at *2 (S.D.N.Y. Dec. 22, 2003) (applying age-out provision to motion reconsider denial of adjustment of status was abuse of discretion).

has been accused of delaying SIJS adjudications so that the age-out regulations render applicants ineligible for the status.²⁷¹ Some courts have decided that DHS has a duty to investigate and adjudicate petitions for SIJS expeditiously.²⁷² Taking two-and-a-half years to adjudicate a SIJS petition was, in one court's estimation, unreasonable on its face.²⁷³ Moreover, applying the age-out provisions to motions to reconsider denials of petitions to adjust status submitted when the applicant *was* eligible place the applicant in an untenable procedural bind. As one court explained,

It would be peculiar to hold that, if the agency erroneously denied his application, it would be without power to correct its own mistake on reconsideration, simply because it had delayed acting on plaintiff's application until the eve of his 21st birthday.²⁷⁴

On the question of the validity of the age-out regulations themselves, however, the *Perez-Olano* court found them to be consistent with the *Chevron* standard. Not only had Congress refrained from speaking directly to the issue of whether a child could age out of eligibility for SIJS despite having in hand appropriate findings from a state court, but the agency's regulation was a reasonable interpretation of the statute.²⁷⁵ The court agreed with the plaintiffs that satisfying the criteria for SIJS unquestionably established the applicant's eligibility for that status; however, it was equally persuaded of the reasonableness of cancelling an application for SIJS or for SIJS-based adjustment of status if the applicant attained the age of majority during its pendency. After all, the purpose of the status was to "protect immigrant *children* from abuse, neglect, and abandonment."²⁷⁶ The 2008 amendments to the SIJS statute decreased, but did not completely eliminate, the danger of aging out. A 2009 DHS internal memorandum, describing the age-out protection under the 2008 law, specifies that as long as the petitioner was a "child" on the date the petition was filed, DHS may not deny the classification, even if the petition is resolved beyond the applicant's reaching the age of majority.²⁷⁷

More recently, DHS has revived the specter of aging out of SIJS by surreptitiously reworking the definition of who is a child for SIJS purposes. In an "unannounced policy reversal,"²⁷⁸ advocates have discerned a pattern,

271. See, e.g., *Riley*, 2003 WL 22999487, at *3.

272. *Pierre v. McElroy*, 200 F. Supp. 2d 251, 253 (S.D.N.Y. 2001). The responsibility for adjudicating petitions lies with the United States Citizenship and Immigration Services, a division of DHS. 6 U.S.C. §§ 271(b), 291(a).

273. *Yu v. Brown*, 36 F. Supp. 2d 922, 932 (D.N.M. 1999).

274. *Riley*, 2003 WL 22999487, at *3.

275. *Perez-Olano v. Gonzalez*, 248 F.R.D. 248, 268-69 (C.D. Cal. 2008).

276. *Id.*

277. Donald Neufeld, USDHS, USCIS Office of Policy and Strategy and Domestic Operations, *Memorandum*, March 24, 2009, courts.ca.gov/documents/BTB_23_5L_8.pdf.

278. 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>.

ultimately confirmed by the agency, that it has begun to make “adverse adjudications of SIJS petitions, affecting largely those clients who were 18+ years old at the time of filing with USCIS.”²⁷⁹ In other words, even though SIJS is supposed to be available to individuals under the age of twenty-one, it may no longer be available to those who were over eighteen when they petitioned for SIJS. DHS has even applied this new policy to revoke applications that were previously approved.²⁸⁰

USCIS has denied that its policy is new and insists that it simply scrutinizes each application individually. Advocates suspect the administration wants to do whatever it can to curtail the availability of SIJS. According to Beth Krause of the Legal Aid Society, ““And now, U.S.C.I.S. is interpreting [the statute] in a way to cut out a very large portion of kids who, until the past couple of weeks, had gotten these grants under the same facts.”²⁸¹ One rationale may be that juvenile court jurisdiction typically ends at eighteen, even though that is not the law in New York and several other states.²⁸² The new policy appears to contradict in part a 2007 directive of USCIS’s Office of Administrative Appeals to the effect that where a state “extends its jurisdiction over an applicant beyond his or her 18th birthday [in this case Florida] . . . the applicant [can continue] to meet the eligibility criteria for [SIJS].”²⁸³ The Office of Administrative Appeals was unpersuaded by the argument that “non-viability of family reunification would expire on the applicant’s 18th birthday”²⁸⁴ A lawsuit filed in the United States District Court for the Southern District of New York takes aim at the new policy.²⁸⁵

Another issue involving DHS’s regulatory power over the SIJS program is the cap on the number of visas DHS allocates to SIJS petitioners. Being eligible for lawful permanent residence under SIJS is still subject to the visa preference system.²⁸⁶ Children from the Northern Triangle countries of Guatemala, Honduras, and El Salvador will wait for upwards of a year and a half before a visa number will become available to allow them to apply for lawful permanent residence.²⁸⁷ According to attorney Amy Woo Lee, “It is really up to the whim of the State Department that is putting out this visa bulletin every month saying what visas are available. The numbers can go forward, they can also go back, or they can stay where they are, so it is really hard to predict exactly how long the wait is at any given time.”²⁸⁸ The

279. E-mail from Desirée Hernandez, Deputy Executive Director, Safe Passage Project, to author (Apr. 27, 2018, 18:13 EST) (on file with author).

280. Robbins, *supra* note 278.

281. *Id.*

282. *See supra* notes - and accompanying text.

283. *In re Perez Quintanilla*, A97 383 010, at 4 (Admin. App. Office June 7, 2007), at <https://www.uscis.gov/sites/default/files/USCIS/Laws%20and%20Regulations/Memoranda/July%202007/PerezSIJ073007.pdf>.

284. *Id.* at 4.

285. Complaint, *R.F.M. v. Nielsen*, No. 18 Civ. 5068 (S.D.N.Y. June 7, 2018).

286. Chang, *supra* note , at 162.

287. *Id.*

288. *Id.*

Attorney General, though, does retain discretion to adjust status even if the applicant does not have immediate access to a visa.²⁸⁹

One problem with the visa quota system for SIJS is that SIJS is a category meant to provide protection against child maltreatment; in this way it is more akin to asylum than to other visa categories. The notion that immigration quotas should enter into this equation and its implication that immigration efficiencies can thus override the child welfare concerns that lie at the heart of SIJS reflect a misordering of priorities. This point has been recognized by the American Bar Association, which in 2017 issued a resolution urging the federal government to “increase the number of SIJ visas allotted to qualified applicants each year, because existing limits prevent all qualified children and youth from accessing the protections and benefits of a visa.”²⁹⁰ Although the Department of Homeland Security retains discretion to issue a visa in any given case, it cannot abuse its discretion in its decision to deny the visa. An abuse of discretion in this area would be a decision “made without a rational explanation, [that] inexplicably departed from established policies, or [that] rested on an impermissible basis such as invidious discrimination against a particular race or group.”²⁹¹ To deny or delay granting SIJS visas for children who have established that they have been abused, abandoned, or neglected based solely on their country of origin would constitute an abuse of agency discretion.

To make matters worse, DHS has recently “attempted to remove SIJ-classified children back to their countries of origin” on an expedited basis,²⁹² and a lawsuit was required to establish that action’s incongruence with SIJS. The U.S. Court of Appeals for the Third Circuit reasoned that, given that SIJS insulates a juvenile against removal on several grounds, including her lack of valid immigration documentation,²⁹³ it is a meaningful legal benefit that creates a “substantial legal relationship” between the juvenile and the United States.²⁹⁴ Expedited removal would render SIJS, and the benefits it entails, a nullity; thus, any attempt to summarily deport a juvenile who already holds SIJS must be in accordance with due process.²⁹⁵

In tandem with cutting off the ability to apply for SIJS, the Trump administration is currently ratcheting up its scrutiny of state court proceedings and predicate orders.²⁹⁶ This new development suggests that DHS may in more

289. *Riley v. Gantner*, No. 03 Civ.2835 GEL, 2003 WL 22999487, at *3 (S.D.N.Y. Dec. 22, 2003).

290. Cooper, *supra* note , at 32.

291. Gao v. Jenifer, 185 F.3d 548, 556 (6th Cir. 1999) (citing *Gonzalez v. Immigration & Naturalization Serv.*, 996 F.2d 804, 808 (6th Cir. 1993)).

292. *Osorio-Martinez v. Att’y Gen. U.S.*, 893 F.3d 153, 160 (3d Cir. 2018); *see also Cruz-Gonzalez v. Kelly*, No. 16-5727, 2017 WL 3990234, at *5 (E.D. Pa. Aug. 4, 2017) (ruling that a grant of SIJS does not insulate a juvenile from expedited removal).

293. *Osorio-Martinez*, 893 F.3d at 172.

294. *Id.* at 174.

295. *Id.* at 172-74.

296. Mica Rosenberg, *New Trump Immigration Efforts Aim to Stop Child Border Crossers*, REUTERS (Nov. 3, 2017), <https://www.reuters.com/article/us-trump-effect-immigration-children/new-trump-immigration-efforts-aim-to-stop-child-border-crossers-idUSKBN1D309S>.

cases not find the findings of state courts adequately “rigorous” for SIJS purposes.²⁹⁷ In this connection, it has now become commonplace for DHS to send petitions for classification as a special immigrant juvenile back to young immigrants at least once requesting additional evidence.²⁹⁸ These requests invariably take the form of questioning the findings made by the family court in what one juvenile’s counsel styled “an impermissible *sua sponte* re-determination of the legal conclusions of the juvenile court.”²⁹⁹ In reviewing petitions, the agency scours the factual record the state court relied upon for its findings. Its task is not to re-weigh the evidence but rather to “confirm that the juvenile court has made an informed decision.”³⁰⁰ DHS particularly favors predicate orders that “include specific factual findings and not just conclusory statements.”³⁰¹ In *Reyes v. Cissna*, for example, the state court determined that the minor Maria Hernández had been abandoned by her mother in 2008, but DHS could not find in the record the facts the court relied upon to conclude that the mother had, at that time, ceased to provide Maria with safety, shelter, and food.³⁰² It is also believed that, to pass muster with DHS, the court’s findings must not only be specific but must also contain precise references to the state law sources that support them. In response to DHS’s increased scrutiny, the New York State Bar Association has issued a new form for attorneys to use when drafting an order for special findings to present to a judge.³⁰³ As one judge sees it, “[T]he better the facts, the better the finding that I make, the better the chances that the child will get the SIJS application granted.”³⁰⁴ Whatever the chances of approval, however, there is no disputing that the rate at which applications for SIJS are processed by USCIS has slowed to a crawl.³⁰⁵

V. CONCLUSION

As is true in many other countries, the United States currently finds itself entangled in the struggle “to balance its right to protect its borders and

297. *Osorio-Martinez*, 893 F.3d at 168.

298. Robbins, *supra* note 278.

299. *In re Perez Quintanilla*, A97 383 010, at 9 (Admin. App. Office June 7, 2007), <https://www.uscis.gov/sites/default/files/USCIS/Laws%20and%20Regulations/Memoranda/July%202007/PerezSIJ073007.pdf> (citing Brief in Support of Appeal at 18).

300. *Reyes v. Cissna*, No. 17-7304, 2018 WL 2937705, at *3 (4th Cir. June 8, 2018); *In re F-A-F-*, 1096927, 2018 WL 3019658 (DHS), at *3 (Admin. App. Office May 23, 2018).

301. *Martinez v. Sanchez*, 180 A.3d 158, 163 (Md. Ct. Spec. App. 2018); *see also Reyes*, 2018 WL 2937705, at *2 (“Juvenile court orders that include or are supplemented by specific findings of fact will generally be sufficient to establish eligibility for consent . . .”).

302. *Reyes*, 2018 WL 2937705, at *5.

303. Form GF-42 (Special Findings Order), <https://www.nycourts.gov/forms/familycourt/pdfs/gf-42.pdf>.

304. Chang et al., *supra* note , at 154.

305. Austin Rose, *For Vulnerable Immigrant Children, A Longstanding Path to Protection Narrows*, MIGRATION INFORMATION SOURCE (July 25, 2018), <https://www.migrationpolicy.org/article/vulnerable-immigrant-children-longstanding-path-protection-narrows>.

prevent illegal immigration with showing compassion and humanity.”³⁰⁶ The balance is hard to achieve, no more so than at the U.S.-Mexico border, a legal boundary fraught with complexity and controversy. Strong-arm disincentives to cross-border migration, whether they come in the form of walls or family separation policies, have not quelled migration rooted in “civil strife, economic degradation, and fear of death in the migrants’ home countries.”³⁰⁷ Migration stemming from intractable political problems that make the United States appear to be a beacon of safety and opportunity will in all likelihood continue.

Evidence of the humanity in our immigration law remains in SIJS, a form of immigration relief that Congress enacted to recognize that our most vulnerable population—undocumented children—may need protection against abusive parents and against deportation to a situation that would imperil their welfare. SIJS remains the law because no matter the prevailing political winds, Americans understand that a priority of their government should be to remove children from harm’s way, no matter their citizenship status.

Growing anti-immigrant sentiment, however, has begun to tear at the fabric of SIJS’s protections. Some state courts have cast a suspicious eye on children who apply for SIJS predicate orders, interpreting the language of the statute in ways that contort its plain language. These courts have refused to make predicate orders, appearing to shun their roles as finders of facts regarding the welfare of immigrant children subject to their jurisdiction. They have simultaneously embraced an active but unauthorized gatekeeping role in our immigration system by questioning the motives of the minors who appear before them.

The executive branch, too, has played a significant role in undermining SIJS’s protections. Their competence to regulate in this area is broad, owing to *Chevron* deference. Limitations on the number of visas available to immigrant youth from Northern Triangle countries, the power to deny consent to juveniles in federal custody who wish to seek state court orders, and summarily denying SIJS to those who filed their SIJS petitions after they turned eighteen all conspire to limit the availability of SIJS. Stepped-up scrutiny of state court orders by USCIS also shifts the balance in ways that have seen SIJS approval rates plunge and undermines the cooperation among the state and federal systems upon which SIJS was originally conceived.

The most welcome response to these discouraging developments would be clarification from Congress about the proper roles and responsibilities of and

306. Isabel Kershner, *Israel Moves to Expel Africans. Critics say That’s Not Jewish*, N.Y. TIMES (Feb. 3, 2018), <https://www.nytimes.com/2018/02/02/world/middleeast/israel-migrants-african.html>.

307. Miriam Jordan & Manny Fernandez, *Judge Rejects Long Detentions of Migrant Families, Dealing Trump Another Setback*, N.Y. TIMES (Jul. 9, 2018), <https://www.nytimes.com/2018/07/09/us/migrants-family-separation-reunification.html>; see also Mae Ngai, *The Border-Enforcement Myth*, N.Y. TIMES (Jan. 29, 2018), <https://www.nytimes.com/2018/01/28/opinion/immigrations-border-enforcement-myth.html> (listing “irrepressible human desires for family unification, economic improvement and physical safety”).

the proper relationship between state courts and federal immigration authorities in the SIJS context. This is not likely to occur in the current climate, and I predict instead that going forward we will see more surreptitious activity aimed at whittling this form of immigration protection out of existence. The demise of SIJS would be catastrophic for children caught in the cross-hairs of undocumented status and parental abandonment or abuse. It would be a reminder that our efforts to define who belongs in and who must be kept out have served only to stoke fiery debate and harm people living on both sides of a border defined by no more than an achingly dangerous desert and an ever shifting river.³⁰⁸

308. CANTÚ, *supra* note 115, at 61-62.