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# Special Immigrant Juvenile Status

## THE NEED TO EXPAND RELIEF

### INTRODUCTION

The Immigration Nationality Act<sup>1</sup> (INA) has a long history of failing to provide special relief or, at a minimum, special consideration for child immigrants.<sup>2</sup> Criticism of the immigration system reached new levels of concern in the last year as the number of undocumented minors crossing the southern border of the United States significantly increased.<sup>3</sup> Special Immigrant Juvenile Status (SIJS) provides children under the age of 21 with the opportunity to apply for status as a Legal Permanent Resident<sup>4</sup> (LPR).<sup>5</sup> SIJS represents the first and to date only “child-centered” immigration remedy incorporating the traditional “best interest” standard applied in proceedings related to children.<sup>6</sup>

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<sup>1</sup> The INA was the first consolidated immigration legislation enacted in 1952. Prior to the INA, immigration law was not organized into one cohesive code section. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as 8 U.S.C. § 1158).

<sup>2</sup> David B. Thronson, *Entering the Mainstream: Making Children Matter in Immigration Law*, 38 *FORDHAM URB. L.J.* 393, 393 (2010).

<sup>3</sup> Julia Preston, *Rush to Deport Young Migrants Could Trample Asylum Claims*, *N.Y. TIMES* (July 20, 2014), available at [http://www.nytimes.com/2014/07/20/us/rush-to-deport-young-migrants-could-trample-asylum-claims-.html?\\_r=0](http://www.nytimes.com/2014/07/20/us/rush-to-deport-young-migrants-could-trample-asylum-claims-.html?_r=0) (noting that between October of 2013 and July of 2014, 57,000 undocumented minors have crossed the border, marking a 92% increase from prior years); Kirk Semple, *Youths Facing Deportation to Be Given Legal Counsel*, *N.Y. TIMES* (June 6, 2014), available at <http://www.nytimes.com/2014/06/07/us/us-to-provide-lawyers-for-children-facing-deportation.html?emc=eta1>.

<sup>4</sup> Lawful Permanent Residence provides a path to citizenship and is colloquially referred to as a “green card.” *Green Card*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/greencard> (last updated May 13, 2011).

<sup>5</sup> Wendi J. Adelson, *Case of the Eroding Special Immigrant Juvenile Statue*, 18 *J. TRANSNAT'L L. & POL'Y* 65, 76 (2008) (noting that SIJS relief is especially coveted because it allows for instantaneous application for LPR status upon receipt of the SIJS visa, whereas, many immigration relief options require a significant waiting period between obtaining certification and adjusting to status as a LPR).

<sup>6</sup> David B. Thronson, *Kids will be Kids? Reconsidering Conception of Children's Rights Underlying Immigration Law*, 63 *OHIO ST. L. J.* 979, 1008 (2002) [hereinafter Thronson, *Kids*]; David B. Thronson, *You Can't Get Here From Here: Toward a More Child-Centered Immigration Law*, 14 *VA. J. SOC. POL'Y & L.* 58, 68 n.41 (2006) [hereinafter Thronson, *You Can't Get Here From Here*].

Obtaining SIJS relief involves multiple stages of review by both state officials and federal immigration officers. First, a juvenile must secure a *special findings order*<sup>7</sup> from a state juvenile court. The order must state that: 1) the child is dependent upon the juvenile court<sup>8</sup> or “legally committed to, or placed under the custody of, an agency or department of a state, or an individual or entity appointed by a state or juvenile court”; 2) reunification of the child with one or both parents “is not viable due to abuse, neglect, abandonment, or similar basis found under State law”; 3) return of the child to his or her home country would not be in the child’s best interest; and 4) the child is unmarried and under the age of 21 at the time of filing.<sup>9</sup>

Second, the special findings order is sent along with the special immigrant petition (Form I-360<sup>10</sup>) to United States Citizenship and Immigration Services (USCIS),<sup>11</sup> which determines whether to accept or reject the order and thus grant SIJS status.<sup>12</sup> Obtaining a special findings order is the most important hurdle in the application process because USCIS defers to the state court’s determination as to the four factual findings necessary to merit SIJS relief.<sup>13</sup>

Third, once granted SIJS status, an applicant is automatically eligible to adjust to LPR status (Form I-485<sup>14</sup>)

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<sup>7</sup> The orders issued by family courts with the findings necessary for a SIJS application are generally referred to as “special findings orders.” N.Y. STATE, OFFICE OF CHILDREN & FAMILY SERVS., ADMINISTRATIVE DIRECTIVE 4 (Feb. 7, 2011), available at [http://www.ocfs.state.ny.us/main/policies/external/OCFS\\_2011/ADMs/11-OCFS-ADM-01%20Special%20Immigrant%20Juvenile%20Status%20%28SIJS%29.pdf](http://www.ocfs.state.ny.us/main/policies/external/OCFS_2011/ADMs/11-OCFS-ADM-01%20Special%20Immigrant%20Juvenile%20Status%20%28SIJS%29.pdf).

<sup>8</sup> A juvenile court is “a court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles.” 8 C.F.R. § 204.11(a) (2011).

<sup>9</sup> Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(J) (2012); Randi Mandelbaum & Elissa Steglich, *Disparate Outcomes: The Quest for Uniform Treatment of Immigrant Children*, 50 FAM. CT. REV. 606, 606 (2012). The definition for “child” in INA 101(b) requires the status of “unmarried.” 8 U.S.C. 1101(b)(1).

<sup>10</sup> U.S. CITIZENSHIP & IMMIGRATION SERVS., DEPT OF HOMELAND SEC., OMB No. 1615-0020, I-360: PETITION FOR AMERASIAN, WIDOW(ER), OR SPECIAL IMMIGRANT (Mar. 5, 2013), available at <http://www.uscis.gov/sites/default/files/files/form/i-360.pdf>.

<sup>11</sup> 8 U.S.C. § 1101(a)(27)(J); *Eligibility Status for SIJS*, Memorandum from William R. Yates, Assoc. Dir. for Operations, Immigration & Customs Enforcement, to Regional Dirs. & Dist. Dirs. 2 (May 27, 2004), available at [http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/Archives%201998-2008/2004/sij\\_memo\\_052704.pdf](http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2004/sij_memo_052704.pdf); U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/green-card/special-immigrant-juveniles/eligibility-sij-status/eligibility-status-sij> (last updated July 12, 2011).

<sup>12</sup> Thronson, *You Can't Get Here From Here*, *supra* note 6, at 1007-08.

<sup>13</sup> See *id.* at 1006. The USCIS officer is mostly concerned that the findings put forth in the state court special findings order fulfill the statutory requirements, but she does not adjudicate the findings. *Id.*

<sup>14</sup> U.S. CITIZENSHIP & IMMIGRATION SERVS., DEPT OF HOMELAND SEC., OMB No. 1615-0023, FORM I-485: APPLICATION TO REGISTER PERMANENT RESIDENCE OR

which, if granted, would make a child eligible for a work permit, driver's license, subsidized health insurance, and financial aid for higher education.<sup>15</sup> Applicants are advised to apply concurrently for SJIS and LPR status.<sup>16</sup> Generally after five years in LPR status, SJIS beneficiaries qualify for naturalization.<sup>17</sup> A SIJS beneficiary is restricted from sponsoring a parent for immigration status.<sup>18</sup>

This note explores the problems that undocumented children who live in homes where there is domestic violence face when they seek SIJS relief. The increasing popularity of SIJS among immigration advocates gives the impression that SIJS is a comprehensive form of child-specific immigration relief. However, in actuality, SIJS was meant to protect only the most vulnerable undocumented children and to this day is an inadequate statutory and regulatory scheme to recognize which youth are the most vulnerable.

The following true stories illustrate the tension that results from the lack of clear regulatory guidance to ensure that children who live in homes where there is domestic violence have a path to SIJS relief.

*Jane<sup>19</sup> has three brothers and three sisters, who all recently moved from Albania to the United States with their parents. Each member of Jane's family is undocumented. Her father planned for the whole family to gain status as derivatives on his individual asylum application, but his application was denied. Jane's father has physically and emotionally abused each of the children, as well as Jane's mother, for the last 15 years. Jane's mother had no recourse or option for escape in Albania and unsuccessfully sought immigration protection in the United States as a result of the abuse. Jane was hopeful that she and her siblings might qualify for some type of relief. The family was in and out of criminal and civil family courts to enforce multiple orders of protection against the father. During a civil*

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ADJUST STATUS (June 20, 2013), available at <http://www.uscis.gov/sites/default/files/files/form/i-485.pdf>.

<sup>15</sup> Kristen Jackson, *Special Status Seekers*, 34 L.A. LAWYER 20, 23 (2012); 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. 63, 72 (2013).

<sup>16</sup> Maura M. Ooi, Note, *Unaccompanied Should Not Mean Unprotected: The Inadequacies of Relief For Unaccompanied Immigrant Minors*, 25 GEO. IMMIGR. L.J. 883, 890 (2011).

<sup>17</sup> Memorandum from William R. Yates, to Regional Dirs. and Dist. Dirs., *supra* note 11, at 2.

<sup>18</sup> 8 U.S.C. § 1101(a)(27)(J)(iii)(II) (2012); Thronson, *Kids*, *supra* note 6, at 1008.

<sup>19</sup> Jane is a fictional name assigned to the actual child in this litigation.

family court proceeding, Jane followed a legal advocate's suggestion and made a motion for special findings from the family court that, if granted, would enable her to apply for SIJS.<sup>20</sup>

Susy was born in Honduras, where she lived alone with her mother. Susy never lived with her father and grew up with the knowledge that he was a violent alcoholic who had abused his wife. When Susy was 10, her mother left for the United States. Susy and her younger brother Jason were left in the care of their Aunt Estella. Estella physically, emotionally, and verbally abused Susy and Jason until twelve-year-old Susy arranged for "coyotes" to smuggle Jason and her to the United States.

Upon arrival at the United States and Mexico border, their group encountered border patrol authorities and immediately ran back into Mexico. Susy and Jason were both apprehended<sup>21</sup> and spent 80 days at a detention group home until their Uncle Francisco picked them up and took them to live with him in New York.<sup>22</sup>

Susy explained to a state juvenile court in a guardianship proceeding initiated by her Uncle that:

*At first it was hard adjusting to a new place and a new language but I now feel a lot more comfortable in the United States and I have friends. It is the first time I feel safe and taken care of as a child—it is a wonderful feeling to be provided for and be part of a loving family . . . I see my mother who lives close by with her boyfriend and their baby daughter but my caretaker and head of family is Francisco. I am happy living with him and his family.*

Susy also petitioned for special findings with hope she would benefit from SIJS relief.<sup>23</sup>

In the fall of 2013, Susy received the state juvenile special findings order necessary to apply for SIJS, while Jane's only option was to appeal her denial of the same findings.<sup>24</sup>

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<sup>20</sup> Facts adapted from a Family Court Decision by Honorable Ilana Grubel [hereinafter Family Court Decision], *rev'd*, No. O-9277-12, 2015 WL 1447564 (N.Y. App. Div. Apr. 1, 2015) (July 29, 2013) (on file with author).

<sup>21</sup> Susy escaped, but when she realized that Jason was apprehended, she traveled back to the border to ensure that Jason would not be alone.

<sup>22</sup> *Matter of Marcelina M.-G. v. Israel S.*, 973 N.Y.S.2d 714, 714-17 (App. Div. 2013).

<sup>23</sup> *Id.* The procedural posture of the case is much more complicated than the summary of facts indicates. Susy's mother eventually petitioned for custody of Susy in competition with the uncle's guardianship proceeding. Ultimately, the Appellate Division affirmed Susy's mother's competing custody petition for Susy and granted Susy SIJS relief. *Id.* at 721.

<sup>24</sup> *Id.* at 725; Family Court Decision, *supra* note 20. In fact, Jane's appeal resulted in a reversal of the Family Court's order. *See* *Fifo v. Fifo*, No. O-9277-12, 2015 WL 1447564 (N.Y. App. Div. Apr. 1, 2015). The Second Appellate Department found that the order of protection issued on her behalf against her father established the necessary dependency required by SIJS. *Id.* at \*2.

This note focuses on the need to expand relief to children like Jane. Specifically, that in order to provide explicit SIJS eligibility for undocumented children who live in homes where there is domestic violence, USCIS should issue a new federal regulation or an official legal memorandum to explicitly include a child who a juvenile court has intervened to protect from domestic violence in the home as dependent upon a juvenile court so that they qualify for a special findings order.<sup>25</sup> Part I explains that SIJS was initially intended as an immigration relief only for children in long-term state foster care, a story often untold amidst SIJS advocates today. Part II focuses on two 2008 SIJS amendments that clearly indicate Congress intended to expand the pool of children eligible for SIJS relief. Part II also illustrates the imperfect nature of the expansion and how children in homes where there is domestic violence are likely to be prejudiced by the modern SIJS statute. Part III then argues that USCIS should promulgate a rule offering specific guidance to state courts that would help ensure a clear path to SIJS relief for children who live in homes where there is domestic violence.

## I. UNDERSTANDING SIJS

SIJS was introduced to protect undocumented, minor immigrants eligible for long-term foster care in 1990.<sup>26</sup> It has been substantively amended twice, first in 1997 (1997 Amendments)<sup>27</sup> and most recently in 2008 (2008 Amendments).<sup>28</sup> The type of child seeking SIJS relief drastically changed after the 2008 Amendments.<sup>29</sup> Advocates enthusiastically embraced SIJS, hoping it was a step toward more comprehensive, child-specific

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<sup>25</sup> See *infra* Part I.A.

<sup>26</sup> Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exemption to Marriage Fraud Arrangements; Adjustment of Status, 58 Fed. Reg. 42843, 42847 (Aug. 12, 1993). Prior to the enactment of SIJS, immigration relief had been offered to children for a limited period of time under the Immigration Reform and Control Act of 1986, however, those benefits were only extended for a particular group of children who had been in the United States prior to 1982. *Id.*

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

<sup>28</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235, 122 Stat. 5044 (codified as amended in scattered sections of 8, 18, & 22 U.S.C.).

<sup>29</sup> Mandelbaum & Steglich, *supra* note 9, at 608; Memorandum from Donald Neufeld, Acting Assoc. Dir: Domestic Operations, U.S. Dep't of Homeland Sec., to Field Operations (Mar. 24, 2009), available at [http://uscis.gov/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/2009/TVPRASIJ.pdf](http://uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/TVPRASIJ.pdf); see *infra* Part II for more discussion about this change.

immigration relief.<sup>30</sup> Regrettably, state case law indicates there remains significant confusion as to who is eligible for the state special findings order that is essential for SIJS relief.<sup>31</sup>

In many ways, SIJS was initially envisioned as a narrow solution to a pre-existing state child welfare crisis.<sup>32</sup> Several advocates in the state of California noticed that vulnerable children in the foster care system had a particularly difficult path to citizenship.<sup>33</sup> With the encouragement of a local Congressman, Ken Borelli, the then-Deputy Director for Child Welfare in Santa Clara County, California, drafted the beginnings of SIJS legislation.<sup>34</sup> As the bill was passing through Congress, it gained support from child-welfare workers across the state of California who realized that a large number of children who aged out of the state foster care system lacked immigration status.<sup>35</sup> As a result, these children found it difficult to live balanced and stable lives.<sup>36</sup> The product of the California based efforts was SIJS, a relief the advocates intended exclusively to stabilize foster care children.<sup>37</sup> SIJS provided foster care children with the opportunity for a green card and, as a result, federal benefits and legitimate employment.<sup>38</sup> SIJS relief led to an improvement on the quality of life for foster care children because “[e]ligibility for federal benefits correlates directly with improved socioeconomic status and health.”<sup>39</sup> To be sure, SIJS also benefited the state of California because federal benefits “decrease[] reliance on wholly state-funded services provided to undocumented immigrants.”<sup>40</sup>

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<sup>30</sup> Wendy Young & Megan McKenna, *The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the United States*, 45 HARV. C.R.-C.L. L. REV. 247, 252-53 (2010).

<sup>31</sup> Theo S. Liebmann, *Keeping Promises to Immigrant Youth*, 29 PACE L. REV. 511, 512 (2009).

<sup>32</sup> Email from Ken Borelli, Retired Deputy Dir. for Child Welfare in Santa Clara County, Cal., to author (Oct. 25, 2013) (on file with author).

<sup>33</sup> Email from Ken Borelli, Retired Deputy Dir. for Child Welfare in Santa Clara County, Cal., to author (Feb. 16, 2015) (on file with author).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*; Email from Ken Borelli, to author, *supra* note 32.

<sup>36</sup> *Id.* An undocumented immigrant’s inability to access legal employment or health insurance, higher rates of poverty, and constant threat of deportation generally contribute to instability. Theo Liebmann, *Ethical Advocacy For Immigrant Survivors of Family Crisis*, 50 FAM. CT. REV. 650, 655 (2012).

<sup>37</sup> *Id.*

<sup>38</sup> Jennifer Baum et al., *Most in Need But Least Served: Legal and Practical Barriers to Special Immigrant Juvenile Status for Federally Detained Minors*, 50 FAM. CT. REV. 621, 623 (2012).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

Under the original Act, eligibility depended upon whether the child established that: 1) she was declared dependent on a juvenile court; 2) she was eligible for long-term foster care; and 3) it was contrary to her best interest to return to her home country.<sup>41</sup> A child in Jane's or Susy's position would not have qualified because neither were eligible for foster care.

At the time SIJS was enacted, it was not controversial and barely drew attention at floor debate.<sup>42</sup> In fact, only 28 commentators weighed in to question the rather narrow procedural issue of how SIJS beneficiaries would adjust to LPR status.<sup>43</sup> Unfortunately, the lackadaisical attitude toward SIJS quickly changed seven years later.

In 1997, Congress drastically amended SIJS.<sup>44</sup> Senator Pete Domenici from Arizona<sup>45</sup> alleged that undocumented, un-detained immigrant children severely abused SIJS relief.<sup>46</sup> Specifically, he complained, "this is a giant loophole . . . every visiting student from overseas can have a petition filed in a state court . . . declaring that they're a ward and in need of foster care, . . . [and] they're granting them."<sup>47</sup> In an attempt to "define

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<sup>41</sup> 8 U.S.C. § 1101 (a)(27)(J) (2012); Immigration Act of 1990, 1990 Pub. L. No. 101-649, 104 Stat. 4978 § 153 (1990); Angela Lloyd, *Regulating Consent: Protecting Undocumented Immigrant Children From Their (Evil) Step-Uncle Sam, or How To Ameliorate The Impact of The 1997 Amendments to the SIJ Law*, 15 B.U. PUB. INT. L. J. 237, 241 (2006); Mandelbaum & Steglich, *supra* note 9, at 607.

<sup>42</sup> Lloyd, *supra* note 41, at 241. The only recorded discussion at the acceptance of the 1990 SIJS act consisted of 28 commentators who questioned the potential difficulty involved for children granted SIJS visas adjusting to LPR status. Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exemption to Marriage Fraud Arrangements; Adjustment of Status, 58 Fed. Reg. 42843, 42848-49 (Aug. 12, 1993); Adelson, *supra* note 5, at 76; *see also* Carl Hulse, *Immigrant Surge Rooted in Law to Curb Child Trafficking*, N.Y. TIMES (July 8, 2014), available at [http://www.nytimes.com/2014/07/08/us/immigrant-surge-rooted-in-law-to-curb-child-trafficking.html?module=Search&mabReward=relbias%3Ar%2C%7B%222%22%3A%22RI%3A18%22%7D&\\_r=0](http://www.nytimes.com/2014/07/08/us/immigrant-surge-rooted-in-law-to-curb-child-trafficking.html?module=Search&mabReward=relbias%3Ar%2C%7B%222%22%3A%22RI%3A18%22%7D&_r=0) (describing the 2008 William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 as "enacted quietly" continuing the under-the-radar approach to amendments related to SIJS).

<sup>43</sup> Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exemption to Marriage Fraud Arrangements; Adjustment of Status, 58 Fed. Reg. at 42848-49; Adelson, *supra* note 5, at 76.

<sup>44</sup> Only some of the amendments are discussed in this note, although there were additional SIJS amendments which made it more difficult for children in federal custody to pursue SIJS relief. *See* 8 U.S.C. § 1101 (a)(27)(J)(iii)(I) (2012); Lloyd, *supra* note 41, at 240; *see* Ooi, *supra* note 16, at 890 (noting that the consent requirement presented a significant procedural hurdle to many perspective SIJS applicants who previously had unhindered access to juvenile courts).

<sup>45</sup> Lloyd, *supra* note 41, at 239.

<sup>46</sup> *Id.*

<sup>47</sup> *Yeboah v. U.S. Dep't of Justice*, 345 F.3d 216, 221 (3d Cir. 2003) (citation omitted) (internal quotation marks omitted).

more restrictively the minors to whom SIJS status was available,” the 1997 Amendments specified that, in addition to being dependent upon a state juvenile court as eligible for long-term foster care, those eligible for SIJS must also demonstrate that their dependency upon the state was “due to abuse, neglect or abandonment.”<sup>48</sup> A Congressional Report at the time of the 1997 Amendments included a brief explanation as to the intent of the addition of “due to abuse, neglect, or abandonment:”

The language has been modified in order to limit the beneficiaries of this provision to those juveniles for whom it was created, *namely abandoned, neglected, or abused children*, by requiring the Attorney General to determine that neither the dependency order nor the administrative or judicial determination of the alien’s best interest was sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect.<sup>49</sup>

The number of SIJS applicants noticeably decreased after the restrictive 1997 Amendments but then steadily rose for the next 11 years.<sup>50</sup> With a remarkable change of attitude, in 2008, Congress reversed course and drastically amended SIJS, resulting in increased access to relief.

## II. EXPANDING RELIEF: THE WILBERFORCE TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT

The 2008 Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA)<sup>51</sup> significantly expanded SIJS eligibility.<sup>52</sup> The TVPRA passed easily with little debate or attention, even though, since that time, advocates have demanded federal regulations to clarify the 2008 Amendments.<sup>53</sup>

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<sup>48</sup> Lloyd, *supra* note 41, at 239.

<sup>49</sup> 105 CONG. REC. H26615 (daily ed. Nov. 13, 1997) (emphasis added).

<sup>50</sup> Immigration and Nationality Act, Pub. L. No. 105-119, § 113, 111 Stat. 2440, 2460 (1997); *see infra* Table 1. The chart indicates that SIJS beneficiaries decreased by approximately 140 between 1997 and 1998.

<sup>51</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235, 122 Stat. 5044 (codified as amended in scattered sections of 8, 18, & 22 U.S.C.).

<sup>52</sup> Young & McKenna, *supra* note 30, at 252. Many provisions of the TVPRA, even some related to SIJS, are beyond the scope of this note but have been widely discussed elsewhere. For detailed review of all the changes to SIJS, see DEBORAH LEE ET AL., UPDATE ON LEGAL RELIEF OPTIONS FOR UNACCOMPANIED ALIEN CHILDREN FOLLOWING THE ENACTMENT OF THE WILLIAM WILBERFORCE TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT OF 2008, at 3-4 (Feb. 19, 2009) (on file at AILA InfoNet, Doc. No. 09021830).

<sup>53</sup> *See* Specialized Immigrant Juvenile Petitions, 76 Fed. Reg. 54,978, 54979 (proposed Sept. 6, 2011) (to be codified at 8 C.F.R. pts. 204, 205, and 245); Hulse, *supra* note 42 (“Advocates saw it as a breakthrough on sex trafficking after Congress had

In fact, the 2008 Amendments were heralded as the “first major steps toward developing a more effective system to address the needs of unaccompanied children.”<sup>54</sup> In particular, eligibility was expanded so a child only needed to establish that reunification was not viable with “one or both parents”<sup>55</sup> rather than both parents.<sup>56</sup> Similarly, a child no longer needed to establish that she was eligible “for long-term foster care.”<sup>57</sup> Both of these 2008 Amendments broadened the scope of SIJS eligibility beyond foster care children.

Despite the benefits of the 2008 Amendments, immigrant children living in homes where domestic violence is prevalent may face difficulties accessing SIJS relief. Children continue to be arbitrarily precluded from special findings orders where the family court petitioner is a child’s parent or where the child is not in the “correct type” of family court dependency proceeding. The 2008 Amendments and the difficulties of applying the new language to juvenile court proceedings are explored in turn in the remainder of this section.

#### A. “One or Both Parents”

The 2008 Amendments show that Congress intended to “expand eligibility.”<sup>58</sup> Prior to the 2008 Amendments, before a state court could grant a special findings order, a child needed to show that reunification with both parents was impossible, which required establishing that both parents “effectively

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already scuttled an earlier attempt at broad immigration reform despite the strong backing of Mr. Bush. Just two House Republicans—Representative Jeff Flake of Arizona and Representative Paul Broun of Georgia—opposed the measure when it first passed the House in 2007, but it went through Congress without opposition and with little notice in the post-election session of 2008. Aides to Mr. Flake, now a senator, said he did not foresee the current problems but was more concerned about holding the line on federal spending at the time.”). The relationship between the regulations accompanying SIJS remain problematic today as regulations accepted in 2011 still await codification.

<sup>54</sup> Young & McKenna, *supra* note 30, at 252-53.

<sup>55</sup> Mandelbaum & Steglich, *supra* note 9, at 608; Memorandum from Donald Neufeld, to Field Leadership, *supra* note 29.

<sup>56</sup> Mandelbaum & Steglich *supra* note 9, at 608; Memorandum from Donald Neufeld, to Field Operations, *supra* note 29.

<sup>57</sup> Mandelbaum & Steglich *supra* note 9, at 608; Memorandum from Donald Neufeld, to Field Operations, *supra* note 29.

<sup>58</sup> In its commentary to the proposed regulations, USCIS recognizes that the “one or both parents” addition was intended to “expand eligibility” but fails to provide any guidance in the actual regulations which would encourage uniform state interpretation of the change. See *Specialized Immigrant Juvenile Petitions*, 76 Fed. Reg. at 54979; see also Mandelbaum & Steglich, *supra* note 9, at 608; Memorandum from Donald Neufeld, to Field Leadership, *supra* note 29.

relinquished control of the child.”<sup>59</sup> The traditional dual parent reunification requirement was closely linked to the necessity of showing that a child was eligible for long-term foster care. Prior to a child entering long-term foster care, courts must generally find that “family reunification is no longer a viable option” with either parent.<sup>60</sup> The dual parent reunification was initially intended to operate as an indication of the threshold vulnerability Congress thought SIJS beneficiaries should establish to merit the immigration benefit.<sup>61</sup> The elimination of dual parent reunification created opportunities for immigration relief for mostly non-foster care children, thereby lowering the vulnerability threshold necessary to qualify for SIJS.

The Second Appellate Department of the New York Supreme Court and state appellate courts in California and Minnesota recognize that through the 2008 Amendments, Congress intended to expand eligibility and thus extend SIJS eligibility to children who may have the option of reunification with one parent.<sup>62</sup> Despite the clear language of the amended statute, some jurisdictions interpret “one or both parents” to require a showing that reunification is not possible with either parent.<sup>63</sup> The Supreme Court of Nebraska determined in *In re Erick M.* that “one or both parents” required an immigrant child, who was abandoned by his father in Mexico but lived with his mother, to establish that reunification was also not possible with his mother prior to granting his SIJS special findings order.<sup>64</sup> In order to reach that result, the court first found that the Amendment’s language was ambiguous and then counterintuitively reasoned that while “the effect of the 2008 amendment was to expand the pool of children eligible for SIJS . . . juveniles must still be seeking relief from parental abuse, abandonment, or neglect” because the narrowness introduced by

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<sup>59</sup> *In re Menjivar*, Case No. A70117167, 29 Immig. Reptr. B2-37, at 170 (A.A.U. Tex., Dec. 27, 1994).

<sup>60</sup> *Id.* (internal quotation marks omitted).

<sup>61</sup> ANGIE JUNCK ET AL., SPECIAL IMMIGRANT JUVENILE STATUS 4-10 (3rd ed. 2010).

<sup>62</sup> *Leslie H. v. Superior Court*, 168 Cal. Rptr. 3d 729, 736 (4th Dist. Cal. 2014); *In re Welfare of D.A.M.*, No. A12-0427, 2012 WL 6097225, at \*4 (Minn. Ct. App. Dec. 10, 2012); *Marcelina M-G. v. Israel S.*, 973 N.Y.S.2d 714, 723 (App. Div. 2013); *see also In re Miguel C.-N.*, 989 N.Y.S.2d 126, 127 (App. Div. 2014); *In re Jorge A.V.G.*, 987 N.Y.S.2d 909 (App. Div. 2014); *Sanchez v. Bonilla*, 982 N.Y.S. 2d 373 (App. Div. 2014); *Cecilia M.P.S. v. Santos H.B.*, 983 N.Y.S.2d 840 (App. Div. 2014); *Diaz v. Munoz*, 989 N.Y.S.2d 52, 54 (App. Div. 2014); *P.E.A. v. A.G.G.*, 975 N.Y.S.2d 85, 86 (App. Div. 2013).

<sup>63</sup> *See infra* note 65.

<sup>64</sup> *In re Erick M.*, 820 N.W.2d 639, 641, 648 (Neb. 2012). In that case, the immigrant child lived with his mother, and there were no allegations of abuse in that relationship.

the 1997 Amendments illustrated that the prevailing purpose of the legislation as a whole was to restrict eligibility.<sup>65</sup>

Some courts follow the suspicious reasoning of *Erick M.*<sup>66</sup> For example, the New Jersey Superior Court recently reconsidered its prior broad interpretation of the “one or both parents” language in a decision denying a special findings order.<sup>67</sup> The court explained that although there is no specific legislative history as to the meaning of “one or both parents,” “some guidance can be gained from the legislative history of the 2008 legislation as a whole.”<sup>68</sup> The court then reviewed the history of the 2008 Amendments, concluding that only a narrow interpretation was consistent with the legislation’s purpose:

[T]he legislative and administrative history of Subparagraph J shows two competing goals. Congress wanted to permit use of the SIJS procedure when necessary to prevent the return of juveniles to unsafe parents. Where such protection is unnecessary, however, Congress wanted to prevent misuse of the SIJS statute for immigration advantage . . . . The contrary interpretation does not achieve both of Congress’s goals. It would mean that a juvenile could apply for SIJS status, with its immigration advantages, even if that juvenile could be viably reunified with one parent who never abused, neglected, or abandoned the juvenile. Indeed, it would permit SIJS status even if that safe parent had raised the juvenile from birth, in love, comfort, and security, and even if reunification with the safe parent would not result in any further contact with the unsafe parent. Nothing in the legislative history of Subparagraph J supports such a broad interpretation.<sup>69</sup>

Even under the former New Jersey precedent that broadly interpreted the statutory language, the court was hesitant to recognize a rule that a child in a stable home environment with one parent might be eligible for SIJS:<sup>70</sup>

Under normal circumstances, the court would be reluctant to take jurisdiction in a case where, as here, the children are in a safe

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<sup>65</sup> Meghan Johnson & Kele Stewart, *Unequal Access to Special Immigrant Juvenile Status: State Court Adjudication of One-Parent Cases*, AMERICAN BAR ASSOCIATION (July 14, 2014), available at <http://apps.americanbar.org/litigation/committees/childrights/content/articles/summer2014-0714-unequal-access-special-immigrant-juvenile-status-state-court-adjudication-one-parent-cases.html>.

<sup>66</sup> See *M.P.C. v. A.B.C.*, No. FD-13-20-10, 2012 WL 1205805 (N.J. Super. Ct. App. Div. Apr. 12, 2012) (affirming a denial of dependency for special immigrant juvenile status because 8 U.S.C.A. § 1101(a)(27)(J) did not allow SIJS for a child living with a non-neglectful parent in the United States); see also *D.C. v. A.B.C.*, 8 A.3d 260, 266 (N.J. Super. Ct. Ch. Div. 2010).

<sup>67</sup> *H.S.P. v. J.K.*, 87 A.3d 255, 268 (N.J. Super. Ct. App. Div. 2014).

<sup>68</sup> *Id.* at 267.

<sup>69</sup> *Id.* at 268.

<sup>70</sup> *In re Minor Children of J.E. and J.C.*, 74 A.3d 1013, 1019 (N.J. Super. Ct. Ch. Div. 2013).

placement with one of their natural parents. This case is different. The children were placed with petitioner by immigration authorities and that placement triggers the need for the court's supervision of that placement to make certain that the children are safe and well taken care of.<sup>71</sup>

The result of the confusion and conscious disregard for the clear statutory language is that some children are arbitrarily denied special findings orders even though Congress clearly intended to expand SIJS's scope.<sup>72</sup>

### B. *Dependency*

The elimination of the "long-term foster care" requirement explicitly broadened eligibility for SIJS relief beyond the child welfare system. As a substitute, a child "placed under the custody of . . . an individual or entity appointed by a State or juvenile court" was to be deemed dependent.<sup>73</sup> As the statute currently reads, in order to pursue a SIJS special findings order a child must establish that she is dependent upon the juvenile court in one of three ways:<sup>74</sup> 1) she has been committed to a state agency or department, 2) she is *dependent*<sup>75</sup> upon the juvenile court because of a particular proceeding, or 3) she has been committed to an individual entity by a state juvenile court.<sup>76</sup> The first option is a vestige of the initial intent of SIJS to include foster care children. The second option pre-existed the 2008 Amendments but only recognizes dependency on a juvenile court because of a proceeding that relates to the

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<sup>71</sup> *Id.* The facts of the boys' case were particularly compelling. Their mother fled to the United States from Honduras and was granted temporary protected status after the father of the children shot at her three times. The boys remained with the father in Honduras for 10 years and were abused by their stepmother and father, who was eventually killed as a result of his involvement in drug trafficking. The boys were abandoned and fled to the United States out of fear that witnessing their father's death would jeopardize their safety. Once in the United States, they surrendered to immigration authorities and were released as undocumented minors to their mother's care after two months in a juvenile detention facility. *Id.* at 1014-16. This decision was the law of New Jersey prior to the decision this summer that changed the course of New Jersey juvenile jurisprudence.

<sup>72</sup> Johnson & Yavar, *supra* note 15, at 88-89.

<sup>73</sup> Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(J) (2012).

<sup>74</sup> The additional amendment allowing for guardianship proceedings expanded eligibility to non-foster care children but did not go far enough because the dependency prong still continues to hinder some eligible children.

<sup>75</sup> I have italicized this first use of "dependency" to highlight the distinction between this dependency which refers to "dependency on a juvenile court" from the Dependency prong which encompasses each of the three options for establishing dependency. 8 U.S.C. § 1101(a)(27)(J).

<sup>76</sup> *Id.*

“care and custody” of the child.<sup>77</sup> The third option was the 2008 substitution that recognized guardianship proceedings as fulfilling the dependency requirement. The remainder of this sub-section explores the two dependency options most utilized by the post-2008 non-foster care SIJS beneficiaries: the guardianship option and the dependency option.

## 1. Guardianship

In many ways, the addition of guardianship merely drew attention to the pre-existing use of guardianship as bona fide dependency under the SIJS statute.<sup>78</sup> Prior to the 2008 Amendments, some state courts already granted special findings orders based on guardianship proceedings,<sup>79</sup> and the 1994 Administrative Appeals Office *In re Menjivar* decision recognized guardianship as an authorized action establishing court dependency for a SIJS special findings order.<sup>80</sup> The Appeals Office found:

[t]he acceptance of jurisdiction over the custody of a child by a juvenile court, when the child’s parents have effectively relinquished control of the child, makes the child dependent upon the juvenile court, whether the child is placed by the court in foster care or, as here, in a guardianship situation.<sup>81</sup>

After *Menjivar*, some state courts recognized that a guardianship petition sufficiently established the necessary dependency to grant a child a special findings order.<sup>82</sup> Prior to the TVPRA, the New York Supreme Court First Appellate Division recognized that a finding in favor of guardianship fulfilled the necessary dependency to grant a SIJS special

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<sup>77</sup> Federal regulations define a juvenile court as a court that handles proceedings related to a child’s “care and custody.” 8 C.F.R. § 204.11(a) (2009).

<sup>78</sup> See generally *In re Menjivar*, Case No. A70117167, 29 Immig. Rptr. B2-37 (A.A.U. Tex., Dec. 27, 1994).

<sup>79</sup> *Id.*; *In re Antowa McD.*, 856 N.Y.S.2d 576 (App. Div. 2008). Some may argue that guardianship was not accepted as a grounds for dependency prior to 2008 in New York. See *In re Guardianship of Vanessa D.*, 15 Misc. 3d 819 (N.Y. Fam. Ct. 2007); *In re Zaim R.*, 13 Misc. 3d 180 (N.Y. Fam. Ct. 2006). In each case the special findings motions were dismissed on jurisdiction grounds because the petitioner aged out, but included no discussion that the guardianship was an improper basis upon which to grant special findings. In addition, New York later recognized guardianship proceedings as sufficient to establish the necessary dependency to grant a special findings order. *In re Antowa McD.*, 856 N.Y.S.2d at 576.

<sup>80</sup> *In re Menjivar*, 29 Immig. Rptr. B2-37, at B2-39.

<sup>81</sup> *Id.*

<sup>82</sup> *In re Alamgir A.* 917 N.Y.S.2d 309 (App. Div. 2011); *Trudy-Ann W. v. Joan W.* 901 N.Y.S.2d 296, 299 (App. Div. 2010); Liebmann, *supra* note 31, at 518 n.56.

findings order.<sup>83</sup> The explicit codification of the administrative *Menjivar* rule was indicative of Congress's intent to expand relief beyond foster care children. For the first time, the SIJS statute explicitly recognized an affirmative path to relief whereby a child could petition a state court to commence guardianship proceedings. This marked a significant change from SIJS's origins, which only allowed a child to seek a special findings order after she had become completely dependent upon the state as a ward.<sup>84</sup> Specifically, states recognized that the expansion was justified under the original intent of SIJS because child welfare agencies were generally reluctant to file cases against parents outside of the United States<sup>85</sup> due to difficulties gathering data and investigating.<sup>86</sup> Thus, the codification of guardianship as a dependency option made sense as a means for a vulnerable child to affirmatively petition the court when the state was hesitant to initiate protection proceedings.<sup>87</sup> The Amendment was not such a far stretch from the original intent of the legislation, but in fact drastically expanded access to a special findings order.<sup>88</sup>

## 2. Dependency on a Juvenile Court

While the guardianship expansion recognized and affirmed the need for a broader awareness of how children might come before the court, the dependency option was left untouched. This dependency is not established by all juvenile court proceedings, but only includes proceedings that are narrowly considered to relate to the "care and custody" of the child.<sup>89</sup>

In spirit with the 2008 Amendments, which recognized that potential SIJS beneficiaries might come before the court in ways other than as a state ward, immigration advocates in New York City attempted to litigate an expansion of the

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<sup>83</sup> *In re Antowa McD.*, 856 N.Y.S.2d at 576.

<sup>84</sup> *See supra* Part I.

<sup>85</sup> The problem was not likely jurisdictional since the New York Family Court Act Section 1015 explicitly grants the family court jurisdiction over any case where a child resides in the county where the court sits, regardless of where the maltreatment may have occurred. N.Y. FAM. CT. ACT § 1015 (a) (McKinney 1998); Liebmann, *supra* note 31, at 518 n 56.

<sup>86</sup> Liebmann, *supra* note 31, at 518.

<sup>87</sup> *Id.*

<sup>88</sup> Johnson & Yavar, *supra* note 15, at 64-65; *see infra* Table 1.

<sup>89</sup> Federal regulations define a juvenile court as a court that handles proceedings related to a child's "care and custody." 8 C.F.R. § 204.11(a) (2009).

meaning of the narrow interpretation of dependency.<sup>90</sup> New York City advocates who argued that dependency should be interpreted more broadly relied heavily upon a memo issued by the Chief Administrative Judge of New York's Unified Court System, Judge Ann Pfau,<sup>91</sup> noting:

Juveniles may be eligible to apply to federal immigration authorities for SIJS where, *in any category* of court proceeding, a State court has determined that they are abused, neglected or abandoned, that "family reunification is not an option"<sup>[92]</sup> and that it would be contrary to their best interests to return to their home country.<sup>93</sup>

Specifically, advocates argued that a child before the juvenile court because of a child support order or a civil order of protection should fulfill the "dependent on a juvenile court" option and receive a special findings order.<sup>94</sup>

In *In re Hei Ting C.*, the Second Department declined to recognize dependency where a child found himself under the jurisdiction of a family court to enforce a child support order.<sup>95</sup> The court's opinion specifically declined to expand dependency because "no appellate decisions in this State have addressed the question of whether an order issued by the Family Court that does not award or affect the custody of a child satisfies the dependency prong."<sup>96</sup> Similarly, in Jane's case, the Kings County Family Court declined to issue a special findings order based upon the order of protection issued on behalf of a juvenile against her father.<sup>97</sup> Judge Gruebel's order specifically noted that because:

the children still live[d] with their mother, there has been no finding of abuse or neglect against the father in an Article 10 proceeding, and the court in this case has not accepted jurisdiction over the

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<sup>90</sup> *In re Hei Ting C.*, 969 N.Y.S.2d 150, 151 (N.Y. App. Div. 2013); Family Court Decision, *supra* note 20.

<sup>91</sup> Interview with Lauren Burke, Clinical Professor at Brooklyn Law School and counsel in *In re Hei Ting C.*, 969 N.Y.S.2d 150 (App. Div. 2013) (Nov. 29, 2013) (notes on file with author).

<sup>92</sup> This is the definition of "eligible for long-term foster care" in the federal regulations, a broader definition than foster care under New York law. "Long-term foster care" under the regulations means care until the child reaches the age of majority and specifically includes adoption and guardianship. Memorandum from Hon. Ann Pfau, Chief Admin. Judge of N.Y. Unified Court Sys., to Judges of the Family Court 2 n.2 (Oct. 8, 2008) (on file with author) (citation omitted).

<sup>93</sup> *Id.* (emphasis added).

<sup>94</sup> *In re Hei Ting C.*, 969 N.Y.S.2d at 151; Family Court Decision, *supra* note 20.

<sup>95</sup> *In re Hei Ting C.*, 969 N.Y.S.2d at 151.

<sup>96</sup> *Id.*

<sup>97</sup> Family Court Decision, *supra* note 20.

custody of the children . . . the requisites required [by] special immigrant juvenile status are not met.<sup>98</sup>

Thus, family courts in one of the most immigrant friendly states, New York,<sup>99</sup> continued to require a juvenile court action that is related to the “care and custody” of the child,<sup>100</sup> excluding support orders and only recently recognizing certain orders of protection as a basis to request a SIJS special findings order.<sup>101</sup>

The narrowness of the dependency option presents little or no difficulty for foster care children seeking SIJS relief because they have already been committed to a state agency and therefore fulfill the dependency prong.<sup>102</sup> In contrast, a non-foster care child similar to Jane or Susy might not be exposed to a state child welfare system and might have a difficult time establishing dependency.<sup>103</sup>

[D]espite an ongoing obligation to protect and support vulnerable children, especially those who have been harmed by abuse and neglect, it cannot be assumed that a local child protection agency will come to the aid [of children], calling into question one of the underlying premises of the federal statute and regulations establishing the SIJS criteria. At times . . . a youth simply does not come to the attention of the child protection agency. At other times, because a youth already has the support of an adult caregiver, often a relative, the child protection agency will determine that the youth is safe, no longer at risk of harm, and thus does not need the agency’s assistance.<sup>104</sup>

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<sup>98</sup> *Id.* at 4.

<sup>99</sup> See generally Jacqueline Bhabha & Susan Schmidt, *From Kafka to Wilberforce: Is the U.S. Government’s Approach to Child Migrants Improving?*, IMMIGR. BRIEFINGS, Feb. 2011, at tbl. 11 (ranking New York fourth among states granting SIJS petitions); see also U.S. DEPT OF HOMELAND SEC., PERSONS OBTAINING LEGAL PERMANENT RESIDENT STATUS BY TYPE AND DETAILED CLASS OF ADMISSION: FISCAL YEAR 2013 tbl. 4 (2013), available at <http://www.dhs.gov/yearbook-immigration-statistics-2013-lawful-permanent-residents> (click “Table 4”); Ghita Schwarz, *Why New York Is Still the Capital of Immigrant America*, THE NATION, (Jan. 6, 2015) <http://www.thenation.com/article/173957/why-new-york-still-capital-immigrant-america>.

<sup>100</sup> 8 C.F.R. § 204.11(a) (2014).

<sup>101</sup> See *Fifo v. Fifo*, No.O-9277-12, 2015 WL 1447564, \*2 (N.Y. App. Div. Apr. 1, 2015) (finding that “under the proper circumstances, a child involved in a family offense proceeding involving allegations of abuse or neglect may properly be the subject of such a determination as an intended beneficiary of the SIJS provisions”).

<sup>102</sup> Telephone Interview with David B. Thronson, former immigration practitioner at The Door’s Legal Servs. Ctr. (Nov. 6, 2013); Email from David B. Thronson, former immigration practitioner at The Door’s Legal Servs. Ctr., to author (Nov. 1, 2013) (on file with author).

<sup>103</sup> Mandelbaum & Steglich, *supra* note 9, at 610.

<sup>104</sup> *Id.*

Susy was lucky enough to have a guardian who could petition on her behalf, but Jane did not have that option and was left with only the option to fulfill the more demanding dependency prong.<sup>105</sup>

The 2008 expansion of SIJS eligibility created a new dynamic. SIJS had been a solution to a pre-existing state child welfare matter, rather than an immigration remedy.<sup>106</sup> As explained by Wendy Young, president of Kids in Need of Defense and an immigration adviser to Senator Edward M. Kennedy at the time of the TVPRA's passage, "[t]here was a recognition that these kids are incredibly vulnerable . . ." <sup>107</sup> Children who were not in foster care and who had been ineligible for SIJS prior to 2008 now had new immigration opportunities. Immigration advocates recognized that they could initiate proceedings in family court in order to pursue SIJS special findings for non-foster care children.<sup>108</sup>

Prior to the TVPRA, most SIJS applicants initially came "to the attention of state child welfare authorities rather than federal immigration authorities."<sup>109</sup> A review of the current number of foster care children compared to non-foster care children that benefit from SIJS relief since 2008 illustrates that foster care children are not the primary beneficiaries of SIJS relief.<sup>110</sup> In New York City, between January 2011 and May 2013, only 340 children under the custody of Administration for Children Services (ACS)<sup>111</sup> or in foster care were identified as

<sup>105</sup> Arguably, Jane's mother could have petitioned for guardianship on her behalf and perhaps made Jane eligible for SIJS relief in that way. However, her mother's autonomy to pursue the civil remedies she believes most effective for her family should be preserved. The civil order of protection was a less invasive form of civil relief and Jane should not be punished because her mother sought help in that way as opposed to seeking to terminate her father's parental rights.

<sup>106</sup> The history of the enactment of SIJS described *infra* note 33 and accompanying text also clearly illustrate that the driving force behind SIJS was the need to clean up a state welfare problem rather than an immigration problem.

<sup>107</sup> Hulse, *supra* note 42. Wendy Young's statement refers to more than SIJS eligible children since the TVPRA provided increased protection for children in immigration proceedings generally, even beyond those eligible for SIJS.

<sup>108</sup> *In re T.J.*, 59 So. 3d 1187 (Fla. Dist. Ct. App. 2011) (finding a prima facie case of dependency for a child living with her aunt, even though the child did not request services from the Department of Children Families or the State because the child was dependent as a matter of law, in that she was not being cared for by a guardian or parent).

<sup>109</sup> Susan Schmidt & Jacqueline Bhabha, *Kafka's Kids: Children in U.S. Immigration Proceedings Part II: Beyond and Besides Asylum*, IMMIGR. BRIEFINGS, Feb. 2007, at 35.

<sup>110</sup> Only a regional data comparison is possible because of the poor data collection and availability in this area at both the state and federal level.

<sup>111</sup> Administration for Children Services is the New York City agency providing protection for abused and neglected children. *About ACS*, NYC ADMIN. FOR

eligible for SIJS.<sup>112</sup> Of those eligible, 231 (67.9%) were referred to legal services for further review of their eligibility.<sup>113</sup> Only 99 children (29%) were granted SIJS status at the time of the report in June 2013.<sup>114</sup> Some of those referred for further review pursued different immigration relief or were later determined to already hold United States citizenship or LPR status.<sup>115</sup> No official data has been published as to the total number of SIJS beneficiaries from the State of New York during that time period, but for the two years prior to that time period (2009-2010), a reported total of 370 petitions were granted.<sup>116</sup> As a rough estimate, comparing the number of SIJS beneficiaries from New York State between 2009 and 2010 to the number of New York State foster care children reported to have benefited from SIJS relief, between January 2011 and March 2013, approximately 27% of SIJS petitioners were foster-care children.<sup>117</sup> Despite the clear shift in intended beneficiaries, many vulnerable non-foster care children continue to fall through the cracks of SIJS relief.

### 3. Expanded SIJS Relief Does Not Include Consideration of Domestic Violence

The spirit of the 2008 Amendments—to provide more comprehensive relief to vulnerable children—falls short of its goal because special findings orders are granted on arbitrary grounds that are not indicative of a child's vulnerability. The problem lies in the decision by Congress to condition special findings orders on the type of proceeding in which the child approaches the state juvenile court. The problem is both one of

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CHILD. SERVICES, <http://www.nyc.gov/html/acs/html/about/about.shtml> (last visited May 1, 2015).

<sup>112</sup> N.Y.C. ADMIN. FOR CHILDREN'S SERVS., LOCAL LAW 6 OF 2010: ANNUAL REPORT 7-9 (June 2013).

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

<sup>114</sup> Several of those identified submitted SIJS petitions and awaited their interview, or were preparing a SIJS petition. Others had legal status or pursued relief more favorable to their particular case. *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Jacqueline Bhabha & Susan Schmidt, *From Kafka to Wilberforce: Is the U.S. Government's Approach to Child Migrants Improving?*, IMMIGR. BRIEFINGS, Feb. 2001, app. 1, tbl 2.

<sup>117</sup> This number is obviously flawed because it compares data for foster-care beneficiaries from a different time period than total New York State beneficiaries. In addition, it only includes New York City foster care children while the total number of New York beneficiaries likely includes non-NYC foster care children who might have received SIJS status. Given the lack of data in this area, this comparison, flawed as it may be, is likely the most useful to illustrate the low percentage of foster care SIJS beneficiaries compared to non-foster care beneficiaries.

misinterpretation of federal legislation by state courts as seen by the “one or both parents” interpretation, and poor legislative and regulatory drafting at the federal level as seen with the rigid narrowness of dependency. Children living in homes plagued by domestic violence are particularly affected by the arbitrary requirements that juvenile courts use to determine whether to grant special findings.

A child who lives in a home where there is domestic violence is likely to have one functioning parent and is only subject to risk because of the actions of the second parent. The Nebraska Supreme Court’s interpretation of the “one or both parents” language, therefore, can be particularly difficult for children in a home where there is domestic violence.<sup>118</sup> Likewise, the dependency barrier is particularly onerous for children in a home where there is domestic violence because it discounts orders of protection, the very proceeding by which these children are likely to petition the court to fulfill the dependency requirement.

The “one or both parents” prong has been narrowly interpreted to restrict eligibility because courts appear hesitant to recognize that a child in a stable home environment might be eligible for SIJS; whereas, the dependency prong clearly restricts those eligible to a certain type of state court dependency. Courts will likely begin to accept the intended interpretation of the “one or both parents” language because New York and California, influential states when it comes to matters of immigration, have adopted the intended expansive interpretation.<sup>119</sup> In addition, once the approved USCIS regulations are put in place to clarify that the addition of the “one or both parents” language was intended to “expand eligibility,” more uniform state application should follow.<sup>120</sup> Not all advocates believe the “one or both parents” clarification is enough to ensure consistent interpretation across state lines.<sup>121</sup> In fact, some advocates support increased regulatory guidance regarding the “one or both parents” language because, “without

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<sup>118</sup> *In re* Erick M., 820 N.W.2d 639 (Neb. 2012).

<sup>119</sup> *Marcelina M-G. v. Israel S.*, 973 N.Y.S.2d 714 (App. Div. 2013); *see also* *Leslie H. v. Superior Court*, 168 Cal. Rptr. 3d 729 (4th Dist. Cal. 2014); *In re Miguel C.N.*, 989 N.Y.S.2d 126 (App. Div. 2014); *In re Jorge A.V.G.*, 987 N.Y.S.2d 909 (App. Div. 2014); *Sanchez v. Bonilla*, 982 N.Y.S.2d 373 (App. Div. 2014); *Cecilia M.P.S. v. Santos H.*, 983 N.Y.S. 2d 840 (App. Div. 2014); *Diaz v. Munoz*, 989 N.Y.S.2d 52 (App. Div. 2014); *P.E.A. v. A.G.G.*, 975 N.Y.S.2d 85, 85 (App. Div. 2013).

<sup>120</sup> *See* *Specialized Immigrant Juvenile Petitions*, 76 Fed. Reg. 54978, 54979 (proposed Sept. 6, 2011) (to be codified at 8 C.F.R. pts. 204, 205-45).

<sup>121</sup> *Johnson & Stewart*, *supra* note 65.

an explicit recognition of the validity of one-parent SIJS cases, there is the risk that even more state court judges will close the door to eligible children before their petitions can be considered by USCIS.”<sup>122</sup> While their concern is valid, the “one or both parents” problem—one of incorrect state interpretation of fairly clear federal legislation—is less concerning than the dependency problem, which stems from poor federal legislation.

The proceeding by which a child enters the state court is not necessarily indicative of his or her level of vulnerability, and it is certainly not within the state juvenile court judge’s jurisdiction to refuse relief based on concerns for immigration fraud.<sup>123</sup> A child like Jane may appear drastically different from a foster care child or a child seeking SIJS as a result of an approved guardianship petition with a non-biological parent, but in many ways there are few legal distinctions. Consider Jane and Susy: they have each been abused, neglected, or abandoned by a biological parent and need to re-adjust their legal rights with that parent.<sup>124</sup> The limited SIJS relief available to non-foster care children arbitrarily ignores that a child who has secured a final order of protection against a parent is dependent upon the court for her safety.<sup>125</sup> Instead, Susy was granted relief because she established dependency on the court, while Jane’s dependency was not recognized.<sup>126</sup> The inconsistency is glaring and quite concerning from a child welfare perspective. There needs to be an expansion of

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<sup>122</sup> *Id.*

<sup>123</sup> For instance, Jane sorely needed the court’s protection, as indicated by the multiple orders of protection granted on her behalf to keep her safe from her abusive father, while Susy was in no immediate danger. Nonetheless, some state court judges have refused to make findings of dependency on the grounds that a juvenile only seeks the order for immigration purposes. Adelson, *supra* note 5, at 81. For example, in *In re Mohamed B.*, the family court judge denied SIJS findings because he had suspicions as to how the child separated from his hosts while visiting the United States. *In re Mohamed B.*, 921 N.Y.S.2d 145 (App. Div. 2011) (reversing the New York State Second Appellate Department). The most drastic example is *In re Jason K.* where a student was denied SIJS relief because he was still lawfully present on a student visa, and the judge noted that SIJS is exclusively intended for “[a]n unaccompanied child [who] is subject to deportation unless granted permission to stay in the United States.” *In re Jason K.* 972 N.Y.S.2d 481 (Fam. Ct. 2013) (citation omitted) (internal quotation marks omitted). Similar suspicion resulted in a denial of special findings because a child arranged his own transport to the United States and thereby exhibited too much agency to be determined dependent. *Nirmal S. v. Rajinder K.*, 956 N.Y.S.2d 545 (App. Div. 2012). The unfortunate result of this suspicion is that some very vulnerable children are denied relief.

<sup>124</sup> See *supra* INTRODUCTION.

<sup>125</sup> Allie Meiers, *Civil Orders of Protection: A Tool to Keep Children Safe*, 19 J. AM. ACAD. MATRIM. L. 373, 377 (2005).

<sup>126</sup> See *supra* INTRODUCTION.

dependency to include children who are in homes where there is domestic violence.

Further complicating any efforts for reform, there is a lack of demographic data about the children who seek SIJS relief. There is no comprehensive, detailed reporting of the individual characteristics of those children seeking relief either at the state or federal level.<sup>127</sup> New York State Family Courts do not collect records or information about the type of proceedings in which children petition juvenile courts for special findings orders.<sup>128</sup> The lack of reliable data is problematic for meaningful reform efforts; it allows state judges to continually stereotype applicants and provides little guidance for how regulations should change to better accommodate the population seeking SIJS relief. The remainder of the note focuses on solving the dependency problem, since less attention and fewer reform efforts have focused on eliminating the dependency inconsistency.

### III. PROMULGATING A FEDERAL REGULATION

#### A. *Proposal*

The most principled solution to the dependency problem must include a federal solution, since at its root this is a federally created problem. Just as the approved, but still pending, September 2011 regulations<sup>129</sup> attempt to clarify that the “one or both parent” legislation was intended to “expand eligibility,” USCIS should promulgate a regulation, or at least distribute a regulatory guidance memorandum as to the meaning of dependency, to help ensure that state courts grant special findings orders to children like Jane. Specifically, USCIS should pass a regulation explicitly providing that a permanent one year civil order of protection issued by a juvenile court is dispositive evidence that a child is dependent upon the juvenile court for his or her “care and custody.”<sup>130</sup>

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<sup>127</sup> Email from Rosemary Hartmann, Adjudications Officer for the USCIS Office of Policy & Strategy, to author (Nov. 20, 2013) (on file with author); Email from Michael McLoughlin, First Deputy Chief Clerk for N.Y.C. Family Court, to author (Oct. 18, 2013) (on file with author). The author made several unsuccessful attempts to receive data from USCIS regarding the demographics of SIJS beneficiaries as well as unsuccessful attempts to receive data from New York City Family Courts issuing special findings.

<sup>128</sup> Email from Michael McLoughlin, to author, *supra* note 127.

<sup>129</sup> See Specialized Immigrant Juvenile Petitions, 76 Fed. Reg. at 54979.

<sup>130</sup> There is support for this position in the very recent Second Appellate Department decision finding that “under the proper circumstances, a child involved in

A civil order of protection is a court action intended to address domestic violence safety concerns.<sup>131</sup> It is widely recognized that “[c]ivil protection orders are one of the most commonly sought legal remedies available to protect domestic violence victims.”<sup>132</sup> Some form of this relief is available in all 50 states and the District of Columbia.<sup>133</sup> A permanent order of protection<sup>134</sup> cannot be granted without a hearing in which the accused party appears and has “an opportunity to be heard and present evidence.”<sup>135</sup> The duration of a permanent civil order of protection varies from state to state, but in the majority of states, a final order of protection is effective for one to two years.<sup>136</sup> Eligibility to file for a civil order of protection is limited to a victim who can show beyond “a preponderance of the evidence”<sup>137</sup> that she has been subject to certain types of threats or abuse and she has at least one of the enumerated intimate relationships to the perpetrator.<sup>138</sup> The conduct that is generally required to merit an order of protection for a child includes “overt acts of physical harm, threats of imminent harm, harassment, sexual acts with minors, lewd fondling and touching of a minor,” as well as “emotional abuse.”<sup>139</sup> Most states include the parent-child relationship as one of those eligible for a civil order of protection.<sup>140</sup> In some states, an order of protection petition can be commenced in a state juvenile

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a family offense proceeding involving allegations of abuse or neglect may properly be the subject of such a determination as an intended beneficiary of the SIJS provisions.” *Fifo v. Fifo*, No. O-9277-12, 2015 WL 1447564, \*2 (N.Y. App. Div. Apr. 1, 2015).

<sup>131</sup> Lisa Vollendorf Martin, *What's Love Got To Do With It: Securing Access to Justice For Teens*, 61 CATH. U. L. REV. 457, 466 (2012). “Additionally, civil orders of protection (CPO) may be called many different things depending on the jurisdiction. Some states call their civil orders of protection a Permanent Protective Order (PPO), a Permanent Restraining Order (PRO) or some may simply refer to the order as a domestic violence injunction.” Meiers, *supra* note 125, at 375-76.

<sup>132</sup> NAT’L CTR. ON DOMESTIC & SEXUAL VIOLENCE, THE PRACTITIONER’S GUIDE TO LITIGATING FAMILY OFFENSE PROCEEDINGS 1, available at <http://www.ncdsv.org/images/FINAL-ThePractitioner%27sGu.pdf> (last visited May 11, 2015).

<sup>133</sup> Martin, *supra* note 131, at 466.

<sup>134</sup> Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL’Y REV. 93, 101 (2005). The reader should distinguish a final order of protection from an *ex parte* order which can be granted with significantly fewer procedural protections for the accused and generally lasts for a much shorter period of time. *Id.*

<sup>135</sup> Meiers, *supra* note 125, at 379.

<sup>136</sup> Catherine F. Klein & Leslye E. Orloff, *Symposium on Domestic Violence: Article: Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 848, 905 (1993); Meiers, *supra* note 125, at 375-76.

<sup>137</sup> Smith, *supra* note 134, at 101.

<sup>138</sup> Klein & Orloff, *supra* note 136, at 848, 869.

<sup>139</sup> Meiers, *supra* note 125, at 377.

<sup>140</sup> Martin, *supra* note 131, at 469-71.

court on a child's behalf by a parent, the state or a welfare agency, or the child herself.<sup>141</sup>

Frivolous allegations do not merit a permanent order of protection.<sup>142</sup> A permanent order of protection is already considered "convincing" evidence of battery in other immigration contexts.<sup>143</sup> Expanding dependency to include proceedings in which permanent orders of protection are granted for at least one year ensures an avenue to SIJS relief for children in homes where there is domestic violence.

### B. *Benefits of a Narrow Regulatory Amendment*

Various proposals have been put forward to handle the SIJS dependency problem. Some advocate that states should amend their civil codes to "ensure a jurisdictional basis for freestanding SIJS predicate order motions in juvenile or family courts" or to provide a "self-petitioning 'state of want' cause of action" enabling children to "initiate a SIJS predicate order request outside of the context of a dependency action."<sup>144</sup> The problem with a state-by-state campaign is that it does nothing to promote uniform SIJS relief but rather contributes to inconsistent application across state lines. Furthermore, such an expansive broadening of state juvenile court jurisdiction to grant special findings orders seems inconsistent with the history of SIJS.

Others advocate for federal reform, including an expanded definition of dependency. SIJS advocates Randi Mandelbaum and Elissa Steglich propose clarifying or broadening dependency by "either chang[ing] the statutory language from 'declared dependent' to 'the state court having

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<sup>141</sup> "State protection-order statutes fall loosely into three groups with regard to standing for minor petitioners: (1) statutes that expressly grant standing to some or all minors; (2) statutes that expressly deny standing to some or all minors; and (3) statutes that are ambiguous or silent on the issue." *Id.* (citations omitted).

<sup>142</sup> Meiers, *supra* note 125, at 377.

<sup>143</sup> Liebmann, *supra* note 36, at 653 ("'Credible evidence of battery or extreme cruelty' can include the type of restraining orders and civil protection orders that are frequently sought and issued in family offense and child dependence proceedings in family court. In fact, such orders are generally considered among the most convincing types of evidentiary proof that can be offered, and noncitizens who obtain protection orders have established one of the most important elements of the VAWA self-petition. Such orders can serve as critical support for the noncitizen's claim of battery or extreme cruelty and can confirm the credibility of the self-petitioner.").

<sup>144</sup> Baum, *supra* note 38, at 623. These authors argue that states should be incentivized to make changes because once a child becomes eligible for SIJS the child is "federal[ly] eligibl[e] for health care, employment authorization, financial aid, and other benefits denied to unlawfully present immigrants." *Id.*

assumed jurisdiction,’ or [] defin[ing] ‘declared dependent’ in the federal regulations simply as ‘the state court having assumed jurisdiction.’”<sup>145</sup> Supporting this argument, they point to practitioners’ and state court judges’ common understanding that dependency simply means that a juvenile court has taken jurisdiction over a matter related to the child.<sup>146</sup> Mandelbaum and Steglich are most concerned with inconsistent state interpretations of dependency, rather than the exclusion of a particular vulnerable child population.<sup>147</sup> A broad expansion of dependency like that put forth by Mandelbaum and Steglich would likely encourage increased scrutiny by state court judges who already arguably exceed their jurisdiction by questioning a child’s motive for relief, rather than focusing on the domestic petition the child brings before the court.<sup>148</sup> Certainly, Mandelbaum’s and Steglich’s broad proposal includes child support orders as sufficient evidence of dependency.<sup>149</sup> My proposal does not go so far as to include children who appear before a juvenile court under a child support enforcement order.<sup>150</sup> Instead, the focus of this solution is on including a small, vulnerable group of immigrant children, which is both consistent with the purpose of SIJS to protect the most vulnerable children and more politically feasible than broad reform.

Adding orders of protection to the definition of dependency is consistent with the original purpose of SIJS—to protect vulnerable children.

[N]ot all violence or abuse directed towards children evokes the criminal or juvenile justice systems. When a parent or guardian petitions the court for a civil order of protection for [a] child, it might be the first contact the adult or child has had with the judicial system.

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<sup>145</sup> Mandelbaum & Steglich, *supra* note 9, at 616.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* This note does not focus on the variation between states as to the meaning of dependency or the type of proceedings that various states include within that meaning. It does not appear that any states currently consider a civil order of protection to fall within that definition.

<sup>148</sup> For state courts to engage in that type of review usurps the decision-making function of USCIS. State courts involve themselves in these issues that are best left to immigration authorities, who do in fact conduct that analysis on a regular basis. Johnson & Stewart, *supra* note 65.

<sup>149</sup> Note that I do not advocate expanding SIJS relief to include a case like *In re Hei Ting C.* where advocates tried to argue that a child support order should also be sufficient to qualify a child for the dependency prong. See *supra* note 90 and accompanying text.

<sup>150</sup> See *Fifo v. Fifo*, No.0-9277-12, 2015 WL 1447564, \*2 (N.Y. App. Div. Apr. 1, 2015), where the Second Appellate Department distinguished a proceeding involving an order of protection from the issue in *In re Hei Ting C.*, 969 N.Y.S.2d 150, 151 (App. Div. 2013), involving a child support order.

Civil orders of protection statutes were designed to encompass the minor children of domestic abuse victims.<sup>151</sup>

Furthermore, there is precedent for using regulatory guidance to expand the scope of SIJS relief. When SIJS was a relatively new form of relief and advocates of children in foster care became aware of its potential benefit, there was a large group of undocumented children in the foster care system on the verge of emancipation.<sup>152</sup> These children already had dependency orders from a juvenile court as part of their foster care placement.<sup>153</sup> To handle the volume of SIJS applicants, child welfare workers capitalized upon the statutory and regulatory language that supported an administrative agency's ability to determine the "best interest" of immigrant children in the SIJS context.<sup>154</sup> Both the INA Section 101(a)(27)(J)(i) and the federal regulations associated with SIJS relief allowed for "administrative or judicial proceedings" as the basis for determining that it is not in the child's "best interest" to return to their home country or to reunite with one or both parents.<sup>155</sup>

A child advocate involved in early SIJS adjudication in New York City explained the logic behind the hybrid procedure:

To avoid having to get back in court, we coupled the non-[SIJS] court finding placing the child in care with an affidavit from a high level child welfare official made the other factual findings based on a review of the file and our submissions. INA 101(a)(27)(J) requires a juvenile court for dependency, but contemplates "administrative or judicial proceedings" for the rest. Our assertion, which back then legacy INS accepted, was that the affidavit was the result of an administrative process sufficient to satisfy the statute.<sup>156</sup>

The regulatory guidance paved the way for broader interpretation of SIJS. In the same way, future regulation could pave the way for increased recognition of the serious vulnerability of immigrant children in homes where there is domestic violence. This note's proposed expansion, like the amendment to include guardianship as a ground for dependency, does nothing more than ensure that vulnerable youth who are indistinguishable from current SIJS beneficiaries, apart from

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<sup>151</sup> Meiers, *supra* note 125, at 384.

<sup>152</sup> Telephone Interview with David B. Thronson, *supra* note 102; see Email from David B. Thronson, to author, *supra* note 102.

<sup>153</sup> *Id.*

<sup>154</sup> Immigration and Nationality Act, 8 U.S.C. § 1101 (a)(27)(J)(ii) (2012); 8 C.F.R. § 204.11 (c)(6) (2014).

<sup>155</sup> 8 U.S.C. § 1101 (a)(27)(J)(ii).

<sup>156</sup> Telephone Interview with David B. Thronson, *supra* note 102; Email from David B. Thronson, to author, *supra* note 102.

the proceeding by which they approach the state juvenile court, are afforded the same relief.<sup>157</sup>

### C. *Politically Feasible*

In addition, regulatory rulemaking is also a practical, politically feasible solution, which is crucially important in our current political atmosphere. In fact, the TVPRA has recently come under attack:

The Obama administration says the [TVPRA] is partly responsible for tying its hands in dealing with the current influx of children . . . . What many can agree on is that the Wilberforce law was not enacted with the idea of dealing with the current flow of tens of thousands of unaccompanied minors or providing an incentive for children to reach the border. “It is classic unintended consequences,” said Marc R. Rosenblum, deputy director of the U.S. Immigration Policy Program at the Migration Policy Institute. “This was certainly not what was envisioned.”<sup>158</sup>

The Obama administration’s comments are not specifically directed toward the SIJS Amendments included in the TVPRA, but nonetheless show a mounting concern that immigration relief extended to vulnerable children is too generous. “[G]iven the hostile climate toward immigration-related legislation in Congress, regulatory action may be more expedient and appropriate.”<sup>159</sup> A regulatory change would not need to pass through Congress, and to the extent that Congress disagrees with the change, the Congressional Regulatory Review Act provides them with the power to reject the rule within 60 days of its enactment.<sup>160</sup> Of course, any amendment of the dependency prong might face especially stringent criticism because Congressional and federal authorities welcome the dependency requirement as a safeguard against fraud, allegedly legitimizing SIJS proceedings.<sup>161</sup> The Second Appellate Department of New York’s Supreme Court, in denying special findings based upon a lack of sufficient dependency, specifically noted:

The requirement that a child be dependent upon the juvenile court . . . ensures that the process is not employed inappropriately by

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<sup>157</sup> See *infra* Part II.

<sup>158</sup> Hulse, *supra* note 42; see also Preston, *supra* note 3.

<sup>159</sup> Mandelbaum & Steglich, *supra* note 9, at 616 n.82.

<sup>160</sup> Robert Longley, *Federal Regulations*, ABOUT NEWS (Nov. 6, 2014), <http://usgovinfo.about.com/od/uscongress/a/fedregulations.htm>.

<sup>161</sup> *In re Hei Ting C.*, 969 N.Y.S.2d 150, 154-55 (App. Div. 2013).

children who have sufficient family support and stability to pursue permanent residency in the United States through other, albeit more protracted, procedures.<sup>162</sup>

Some juvenile court judges understand expanded SIJS relief as a slippery slope toward immigration fraud and scrutinize immigrant children seeking special findings orders:<sup>163</sup>

[T]he local officials are often wary of the implications of their actions and nervous about what they perceive as making decisions about whether a person will obtain an immigration benefit. Some may not want to participate in what they perceive as a process that condones or further encourages illegal immigration.<sup>164</sup>

A recent Queens Family Court decision granting SIJS relief warned in dicta that:

Current news reports indicate that parents have been encouraged to dispatch their young on perilous journeys to the United States in the company of paid smugglers who are part of organized criminal enterprises. The children arrive in the United States with the hope that they will be not be deported and that they will be granted sanctuary in the form of legal permission to remain permanently.

Although SIJS was enacted to protect children who have been abused, neglected, or abandoned, it may perversely expose those children to maltreatment. The smuggling of children across international borders is inimical to their safety and well-being.<sup>165</sup>

There is little doubt that any proposed expansion of dependency might encounter resistance.<sup>166</sup> However, like the

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<sup>162</sup> *Id.*

<sup>163</sup> Johnson & Yavar, *supra* note 15, at 76.

<sup>164</sup> *Id.*

<sup>165</sup> *In re Amandeep S.*, No. G-1310/14, 2014 WL 2808690, \*13 (N.Y. Fam. Ct. June 19, 2014).

<sup>166</sup> In fact, on March 4, 2015, a local NBC investigative team reported the uncovering of rampant SIJS fraud in the Sikh community in Queens, New York. Melissa Russo et al., *I-Team: Family Court Exploited in Immigration Cases in Queens, Insiders Charge*, NBCNEWYORK.COM (Mar. 4, 2015, 5:16 PM), <http://www.nbcnewyork.com/news/local/family-court-queens-immigration-cases-human-smuggling-green-card-295050931.html>. Their report noted that guardianship petitions in the Queens Family Court jumped 75% over the last year and that “hundreds of young men from the same part of India are all telling similar stories in order to get special access to green cards.” *Id.* Congressman Bob Goodlatte, Chair of the House Judiciary Committee picked up on the report and sent a letter to Department of Homeland Security Secretary Johnson specifically requesting answers to the following questions:

- 1) What immediate steps will you take to ensure that fraudulent SIJ petitions are not approved by U.S. Citizenship and Immigration Services (USCIS) adjudicators?
- 2) What long term changes will you make to the adjudications process and policies to ensure that fraudulent SIJ petitions are not approved by USCIS adjudicators?
- 3) How exactly will you coordinate with state courts to ensure that abuse, abandonment or neglect is not found by

2008 Amendments that codified guardianship proceedings as *per se* establishing dependency, the addition of orders of protection to a regulatory definition merely extends protection to those eligible for SIJS by authorizing a new posture by which children can approach the court. In addition, this proposal arguably expands eligibility to a much smaller group than the 2008 Amendments. At least one experienced state court judge, Judge Pfau of New York, recognizes that dependency must have a broader meaning than the narrow limitations currently imposed on the definition.<sup>167</sup>

Furthermore, the statute is not reaching enough vulnerable children, as evidenced by the small number of children actually obtaining SIJS relief. The 5,000 cap allotted to SIJS beneficiaries<sup>168</sup> has yet to be met in any year since the legislation's enactment.<sup>169</sup> There was considerable surprise and perhaps disappointment when, "rather than a flood anticipated by some SIJS detractors," the groundbreaking 2008 Amendments actually resulted in only "a trickle" of the expected increase.<sup>170</sup> For many years, only 500 SIJS beneficiaries adjusted to LPR status.<sup>171</sup> The number of beneficiaries slowly increased after the 2008 Amendments; however, even in 2013, at its peak, 2,735 reserved positions

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these courts when there is evidence of fraudulent claims? 4) What, if any, statutory changes do you suggest to give you additional tools to ensure that fraudulent SIJ petitions are not approved by USCIS adjudicators?

Letter from Congressman Bob Goodlatte, Chair of the House Judiciary Comm., to Jeh Johnson, Sec'y of Homeland Sec. (Mar. 19, 2015), *available at* [https://goodlatte.house.gov/system/uploads/415/original/RWG\\_to\\_Johnson\\_3.19.15.pdf](https://goodlatte.house.gov/system/uploads/415/original/RWG_to_Johnson_3.19.15.pdf). These developments appear to be the most recent and also direct attack on SIJS as a form of relief since 1997. Various immigration advocacy agencies have come together drafting a letter in response to Congressman Goodlatte explaining the value of SIJS and correcting some exaggerations and misunderstandings of how SIJS operates. Email from Ctr. on Immigration & Child Welfare, to author (Mar. 29, 2015) (on file with author).

<sup>167</sup>

Juveniles may be eligible to apply to federal immigration authorities for SIJS where, *in any category* of court proceeding, a State court has determined that they are abused, neglected or abandoned, that 'family reunification is not an option' and that it would be contrary to their best interests to return to their home country.

Memorandum from Hon. Ann Pfau, to Judges of the Family Court, *supra* note 92.

<sup>168</sup> Beth Morales Singh, *To Rescue, Not Return: An International Human Rights Approach To Protecting Child Economic Migrants Seeking Refuge in the United States*, 41 COLUM. J. L & SOC. PROB. 511, 526 (2008).

<sup>169</sup> See *infra* note 172.

<sup>170</sup> Jackson, *supra* note 15, at 22.

<sup>171</sup> Ooi, *supra* note 16, at 896.

remained unfilled.<sup>172</sup> In 2012, a total of 2,250 immigrant children obtained LPR status as a result of SIJS,<sup>173</sup> leaving 2,740 reserved positions empty. Even with increased eligibility, on average only one quarter of the 5,000 reserved SIJS LPR positions are filled.<sup>174</sup>

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<sup>172</sup> U.S. DEP'T OF HOMELAND SEC., PERSONS OBTAINING LEGAL PERMANENT RESIDENT STATUS BY TYPE AND DETAILED CLASS OF ADMISSION: FISCAL YEAR 2013 tbl. 7 (2013), *available at* <http://www.dhs.gov/yearbook-immigration-statistics-2013-lawful-permanent-residents> (click "Table 7") [hereinafter PERSONS OBTAINING LEGAL PERMANENT RESIDENT STATUS 2013 TABLE].

<sup>173</sup> U.S. DEP'T OF HOMELAND SEC., PERSONS OBTAINING LEGAL PERMANENT RESIDENT STATUS BY TYPE AND DETAILED CLASS OF ADMISSION: FISCAL YEAR 2012 tbl. 7 *available at* <http://www.dhs.gov/yearbook-immigration-statistics-2012-legal-permanent-residents> (click "Table 7") [hereinafter PERSONS OBTAINING LEGAL PERMANENT RESIDENT STATUS 2012 TABLE].

<sup>174</sup> Singh, *supra* note 165, at 526; Ooi, *supra* note 16, at 890, 896; Adelson, *supra* note 5, at 85.

TABLE 1: TOTAL SIJS BENEFICIARIES ADJUSTING STATUS 1997-2013<sup>175</sup>

Fiscal year	Total SIJS Beneficiaries
2013	2,735
2012	2,250
2011	1,609
2010	1,480

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<sup>175</sup> U.S. DEP'T OF JUSTICE, 1997 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 36 (1997), *available at* <https://www.dhs.gov/xlibrary/assets/statistics/yearbook/1997YB.pdf>; U.S. DEP'T OF JUSTICE, 1998 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 32 (1998), *available at* <https://www.dhs.gov/xlibrary/assets/statistics/yearbook/1998/1998yb.pdf>; U.S. DEP'T OF JUSTICE, 1999 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 32 (1999), *available at* <https://www.dhs.gov/xlibrary/assets/statistics/yearbook/1999/FY99Yearbook.pdf>; U.S. DEP'T OF JUSTICE, 2000 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 31 (2000), *available at* <https://www.dhs.gov/xlibrary/assets/statistics/yearbook/2000/Yearbook2000.pdf>; U.S. DEP'T OF JUSTICE, 2001 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 29 (2001), *available at* <http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2001/yearbook2001.pdf>; U.S. DEP'T OF HOMELAND SEC., PERSONS OBTAINING LEGAL PERMANENT RESIDENT STATUS BY TYPE AND DETAILED CLASS OF ADMISSION: FISCAL YEAR 2004 tbl. 5 (2002), *available at* <http://www.dhs.gov/fiscal-year-2002-yearbook-immigration-statistics-0> (click "Table 5"); U.S. DEP'T OF HOMELAND SEC., PERSONS OBTAINING LEGAL PERMANENT RESIDENT STATUS BY TYPE AND DETAILED CLASS OF ADMISSION: FISCAL YEAR 2004 tbl. 5 (2004), *available at* <http://www.dhs.gov/yearbook-immigration-statistics-2003-0> (click "Table 5"); U.S. DEP'T OF HOMELAND SEC., PERSONS OBTAINING LEGAL PERMANENT RESIDENT STATUS BY TYPE AND DETAILED CLASS OF ADMISSION: FISCAL YEAR 2004 tbl. 4 (2004), *available at* <https://www.dhs.gov/yearbook-immigration-statistics-2004-0> (click "Table 4"); U.S. DEP'T OF HOMELAND SEC., PERSONS OBTAINING LEGAL PERMANENT RESIDENT STATUS BY TYPE AND DETAILED CLASS OF ADMISSION: FISCAL YEAR 2005 tbl. 7 (2005), *available at* <https://www.dhs.gov/yearbook-immigration-statistics-2005-3> (click "Table 7"); U.S. DEP'T OF HOMELAND SEC., PERSONS OBTAINING LEGAL PERMANENT RESIDENT STATUS BY TYPE AND DETAILED CLASS OF ADMISSION: FISCAL YEAR 2006 tbl. 7 (2006), *available at* <https://www.dhs.gov/yearbook-immigration-statistics-2006-3> (click "Table 7"); U.S. DEP'T OF HOMELAND SEC., PERSONS OBTAINING LEGAL PERMANENT RESIDENT STATUS 2007 tbl. 7 (2007), *available at* <http://www.dhs.gov/yearbook-immigration-statistics-2007-3> (click "Table 7"); U.S. DEP'T OF HOMELAND SEC., PERSONS OBTAINING LEGAL PERMANENT RESIDENT STATUS 2008 tbl. 7 (2008), *available at* <http://www.dhs.gov/yearbook-immigration-statistics-2008-3>; U.S. DEP'T OF HOMELAND SEC., PERSONS OBTAINING LEGAL PERMANENT RESIDENT STATUS BY TYPE AND DETAILED CLASS OF ADMISSION: FISCAL YEAR 2009 tbl. 7 (2009), *available at* <https://www.dhs.gov/yearbook-immigration-statistics-2009-3> (click "Table 7"); U.S. DEP'T OF HOMELAND SEC., PERSONS OBTAINING LEGAL PERMANENT RESIDENT STATUS BY TYPE AND DETAILED CLASS OF ADMISSION: FISCAL YEAR 2010 tbl. 7 (2010), *available at* <https://www.dhs.gov/yearbook-immigration-statistics-2010-3> (click "Table 7"); U.S. DEP'T OF HOMELAND SEC., PERSONS OBTAINING LEGAL PERMANENT RESIDENT STATUS BY TYPE AND DETAILED CLASS OF ADMISSION: FISCAL YEAR 2011, tbl. 7 (2011), *available at* <https://www.dhs.gov/yearbook-immigration-statistics-2011-legal-permanent-residents> (click "Table 7"); PERSONS OBTAINING LEGAL PERMANENT RESIDENT STATUS 2012 TABLE, *supra* note 173; PERSONS OBTAINING LEGAL PERMANENT RESIDENT STATUS 2013 TABLE, *supra* note 172.

2009	1,144
2008	989
2007	772
2006	894
2005	660
2004	624
2003	445
2002	510
2001	541
2000	658
1999	345
1998	287
1997	430

A less-than-fifty percent fulfillment rate is curiously paltry when compared to the success of other immigration programs for vulnerable, undocumented immigrants; 2014 marked the fifth consecutive year where all 10,000 U-Visas<sup>176</sup> were utilized within the first several months of the fiscal year.<sup>177</sup>

No single, independent explanation has been offered for why SIJS continually remains an underutilized form of relief given the increasingly large number of vulnerable undocumented children in the United States.<sup>178</sup> Advocates suggest that a lack of awareness among child advocates and immigrant children is likely the largest contributor to the consistently low number of beneficiaries.<sup>179</sup> Regardless of the reason that SIJS relief has not reached its cap, Congress clearly left room for more children to qualify for SIJS relief. There is no principled logic to preclude children like Jane when they are clearly in need of protection and there is a continual deficit in SIJS beneficiaries.<sup>180</sup>

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<sup>176</sup> The U-Visa provides relief to victims of domestic violence and is further discussed later in this piece. See *infra* note 181 and accompanying text.

<sup>177</sup> The U-Visa was created in 2008 and predictably fulfills its 10,000 quota within the first several months of the fiscal year. Daniel M. Kowalski, *USCIS Approves 10,000 U Visas for 5th Straight Fiscal Year*, LEXISNEXIS LEGAL NEWSROOM: IMMIGRATION LAW (Dec. 12, 2010 8:24 AM), [http://www.lexisnexis.com/legalnewsroom/immigration/b/insideneews/archive/2013/12/12/uscis-approves-10-000-u-visas-for-5th-straight-fiscal-year.aspx?utm\\_source=Migration+%26+Child+Welfare+National+Network+E-News&utm\\_campaign=58b32dae2c-MCWNN\\_E\\_News\\_061013&utm\\_medium=email&utm\\_term=0\\_4a8508bf17-58b32dae2c-90769025](http://www.lexisnexis.com/legalnewsroom/immigration/b/insideneews/archive/2013/12/12/uscis-approves-10-000-u-visas-for-5th-straight-fiscal-year.aspx?utm_source=Migration+%26+Child+Welfare+National+Network+E-News&utm_campaign=58b32dae2c-MCWNN_E_News_061013&utm_medium=email&utm_term=0_4a8508bf17-58b32dae2c-90769025).

<sup>178</sup> Jackson, *supra* note 15, at 22.

<sup>179</sup> Mandelbaum & Steglich, *supra* note 9, at 612.

<sup>180</sup> Since the recent surge of unaccompanied youth across the border in 2014, there will arguably be a much higher number of SIJS petitioners and as a result a

Others who object to expanding the definition of dependency may argue that the addition of a final order of protection is duplicative of other forms of comparable relief, in particular the U-Visa that was designed for victims of domestic violence and might afford protection to a child like Jane.<sup>181</sup> The U-Visa is a nonimmigrant visa<sup>182</sup> available to undocumented victims of certain enumerated crimes in the United States who cooperate with law enforcement in the prosecution of crimes committed against them, including crimes categorized as domestic violence.<sup>183</sup> An integral part of the U-Visa is the receipt of a certification that the victim has cooperated with law enforcement in the prosecution of the crime.<sup>184</sup> A variety of state-recognized officials have the authority to grant these certificates, including police commissioners, family court judges, head officials of state agencies, and other state officials.<sup>185</sup> U-Visa holders are eligible to adjust to LPR status after three years of U-Visa status.<sup>186</sup>

The U-Visa does not offer relief that obviates the need for additional federal regulatory guidance as to the meaning of SIJS dependency. Children are currently eligible for U-Visa status either as the primary beneficiaries or as derivatives of a

much higher number of SIJS beneficiaries. Hulse, *supra* note 42; Preston, *supra* note 3. It remains to be seen whether SIJS will reach the 5,000 cap for 2014.

<sup>181</sup> Liebmann, *supra* note 36, at 652. Liebmann notes that SIJS, VAWA, and U visas are the most utilized forms of relief for immigrant survivors of family crisis. The Violence Against Women Act (VAWA) is not as applicable here because it requires that the abusing parent be either a United States citizen or a permanent resident in order for a child to seek relief under the statute. VAWA relief was enacted in 1994 and was the first immigration remedy provided explicitly for victims of domestic violence. A VAWA self-petitioner must satisfy seven requirements to establish eligibility: "(1) relationship to the abuser; (2) that the abuser is a U.S. citizen or lawful permanent resident; (3) that the petitioner resides in the United States (though there are exceptions to this); (4) that the petitioner does, or at one time did, reside with the abuser; (5) credible evidence of battery or extreme cruelty; (6) good moral character; and (7) that the petitioner married the abuser in good faith, and not for the purpose of evading immigration laws." *Id.* at 653 (citation omitted). The most difficult criteria for a victim to prove is the "credible evidence of battery" though orders of protection are used and considered to be "convincing" evidence of battery. *Id.*

<sup>182</sup> A nonimmigrant visa is one that is "issued to persons with a permanent residence outside the U.S. but who wishes to be in the U.S. on a temporary basis" as opposed to an immigrant visa which is issued to a person who plans to change his residency to the United States. U.S. DEP'T OF HOMELAND SEC., *Immigrant Visas v. Nonimmigrant Visas*, U.S. CUSTOMS AND BORDER PROTECTION, [https://help.cbp.gov/app/answers/detail/a\\_id/72/-/immigrant-visas-vs.-nonimmigrant-visas](https://help.cbp.gov/app/answers/detail/a_id/72/-/immigrant-visas-vs.-nonimmigrant-visas) (last visited May 1, 2015).

<sup>183</sup> Immigration and Nationality Act, 8 U.S.C. § 1101 (a)(15)(U) (2012).

<sup>184</sup> *Id.*

<sup>185</sup> U.S. DEP'T OF HOMELAND SEC., U VISA LAW ENFORCEMENT CERTIFICATION RES GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL AND TERRITORIAL LAW ENFORCEMENT 2-3, available at [http://www.dhs.gov/xlibrary/assets/dhs\\_u\\_visa\\_certification\\_guide.pdf](http://www.dhs.gov/xlibrary/assets/dhs_u_visa_certification_guide.pdf).

<sup>186</sup> 8 U.S.C. § 1101 (a)(15)(U).

parent's petition, but the enumerated crimes do not include child specific "civil-crimes" like neglect, abuse, or abandonment.<sup>187</sup> In addition, the U-Visa is a nonimmigrant visa, and beneficiaries do not become eligible to petition for LPR status until two years after they have held U-Visa status.<sup>188</sup> For SIJS beneficiaries, timely processing is important because federal and state college financial aid often depend upon one's legal immigration status.<sup>189</sup> Thus, the U-Visa is not a viable solution for children like Jane who might have only suffered civil rather than criminal harms and who rely on expedient processing in order to lead stable lives.

In addition, a parent could petition for a U-Visa and include his or her child as a derivative on the application, but derivative status is not adequate immigration relief for a vulnerable child. Jane's mother may be ineligible for a U-Visa for a variety of fairly common reasons, including "some aspect of [a parent's] background such as a criminal record or immigration violation, or [] simply unsuccessful[ly] steering a course through the minefield of immigration by, for example, not using an attorney but rather trusting a 'notario' who files botched papers."<sup>190</sup> Battered spouses are often deterred from seeking help from the police because of the fear of deportation or arrest.<sup>191</sup> Seth Wessler conducted research about family strife and found "[i]n numerous cases, police arrested victims of domestic violence while investigating a report of abuse."<sup>192</sup> This same deterrence might also prevent a parent from seeking an order of protection on behalf of a child, but a parent's failure to seek an order of protection is not damning to a child's ability to seek a civil protection order. In many states, child protective services may seek an order of protection on behalf of a child or the child herself may petition the court for protection.<sup>193</sup>

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<sup>187</sup> 8 U.S.C. § 101(a)(15)(V).

<sup>188</sup> Liebmann, *supra* note 36, at 655.

<sup>189</sup> Adelson, *supra* note 5, at 83.

<sup>190</sup> David B. Thronson, *Custody and Contradictions: Exploring Immigration Law As Federal Family Law in the Context of Child Custody*, 59 HASTINGS L.J. 453, 480 (2008). These same reasons illustrate why VAWA derivative status described *supra* note 176 also provides inadequate protection to children.

<sup>191</sup> SETH FREED WESSLER, APPLIED RESEARCH CENTER, SHATTERED FAMILIES; THE PERILOUS INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM 33 (2011), available at <http://www.immigrationresearch-info.org/report/other/shattered-families-perilous-intersection-immigration-enforcement-and-child-welfare-syst> (click link for "Report File"); Liebmann, *supra* note 36, at 655; WESSLER, *supra*, at 33.

<sup>192</sup> *Id.*

<sup>193</sup> "State protection-order statutes fall loosely into three groups with regard to standing for minor petitioners: (1) statutes that expressly grant standing to some or all minors; (2) statutes that expressly deny standing to some or all minors; and (3)

It is extremely difficult to secure a U-Visa given the high demand and potential hurdles.<sup>194</sup> As a result, the U-Visa is not a viable option for children like Jane, and regulatory action remains the most feasible, practical solution to protect undocumented children who live in homes where there is domestic violence.

## CONCLUSION

SIJS legislation has had a tumultuous history, beginning as a remedy intended for foster care children and currently utilized as a more comprehensive, child-specific immigration remedy because of the lack of any comparable child-specific immigration relief.<sup>195</sup> Given the recent influx of children across the southern border of the United States, the need for child-specific immigration reforms has become a politically, emotionally, and economically charged conversation in the public sphere.<sup>196</sup> Yet, the disturbing reality is that many undocumented children are vulnerable, not as they cross the border seeking a better life, but after arriving in the United States where they live in the shadows.

If there were a principled reason to justify the distinctions that SIJS legislation makes in determining eligibility for a state special findings order, perhaps the conversation about the problems with SIJS would be troubling but brief. However, there is no reasonable explanation for the distinctions. Advocates who continue to argue for legislative expansion of SIJS risk wasting their efforts in the current political climate. The increased tension at the southern border of the United States and the amplified dialogue around illegal immigrants living in the United States add to the already charged nature of the immigration debate.<sup>197</sup> Rather, advocates should focus their efforts on data collection and regulatory action, which will provide a faster and less politically charged process.

Advocates must make efforts to increase data collection of SIJS seekers in the state courts and those who file with USCIS. Some have recognized this informational gap and

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statutes that are ambiguous or silent on the issue.” Martin, *supra* note 131, at 469-71 (citations omitted).

<sup>194</sup> The 10,000 U-Visa quota is routinely met within the first several months of each fiscal year. Kowalski, *supra* note 177.

<sup>195</sup> See *supra* Part I.

<sup>196</sup> Hulse, *supra* note 42; see also Preston, *supra* note 3.

<sup>197</sup> See *supra* Part III.B.

begun efforts to collect comprehensive data about the landscape of children seeking SIJS. The most notable effort has been put forth by Jacqueline Bhabha and Susan Schmidt who collected SIJS data organized by state in an attempt to determine where SIJS education efforts should be focused.<sup>198</sup> More projects of this kind, or state efforts to collect and compute data related to children who petition juvenile courts for special findings orders, are needed to better understand the population of children seeking SIJS relief.

Regulatory action avoids the politics of the legislative process and remains consistent with the traditional understanding that SIJS was meant for the most vulnerable children. Immigration fraud would not likely increase by extending dependency to include a child who successfully obtained a permanent civil order of protection. In fact, it is consistent with the purpose of SIJS to protect the most vulnerable children. There is a striking difference in vulnerability between a child who never knew a parent and a child who was actively abused by a parent. Susy never knew her father, and the court found that sufficient to determine that he abandoned her.<sup>199</sup> In contrast, Jane witnessed and experienced abuse at the hands of her father but only qualified for the special findings order on appeal.<sup>200</sup> The proposed regulation further aligns the reach of SIJS with its purpose so that SIJS will protect rather than exclude vulnerable children who are just as deserving, if not more, than those currently benefiting from SIJS relief.

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<sup>198</sup> See generally Bhabha & Schmidt, *supra* note 99, at tbl 2.

<sup>199</sup> *In re Marcelina M.-G. v. Israel S.*, 973 N.Y.S.2d 714, 714-17 (App. Div. 2013).

<sup>200</sup> Family Court Decision, *supra* note 20.

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