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ACCOMMODATING PEDESTRIANISM IN THE TWENTY-FIRST
CENTURY: INCREASING ACCESS AND REGULATING URBAN
TRANSPORTATION SAFETY

Defending One-Parent SIJS

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DEFENDING ONE-PARENT SIJS

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INTRODUCTION

The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) changed the substantive provisions that defined Special Immigrant Juvenile Status (SIJS), a type of immigration benefit for children.¹ One of the changes, concerning a court predicate finding that the child's "reunification with one or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law" was generally agreed to mean that reunification was not viable when the child suffered such mistreatment from at least one parent, and not necessarily from both.² In 2012, however, the Nebraska Supreme Court espoused a different interpretation of the provision, supporting its view by consulting interpretative canons, vertical legislative history, and administrative decisions.³ Other high and appellate level courts have declined to follow the Nebraska decision, but this decision is not an outlier.⁴ In 2014, the New Jersey Superior Court agreed with the Nebraska Supreme Court and reinforced support for the interpretation with direct quotations from the TVPRA Congressional records.⁵ The narrow interpretation propounded by Nebraska and New Jersey has the alarming potential to foreclose relief for many children seeking SIJS.⁶

1. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(d)(1), 122 Stat. 5044, 5074 (2008)(codified as amended in scattered sections of 8 U.S.C.)

2. See, e.g., *In re D.A.M.*, 2012 WL 6097225, *3 (Minn. Ct. App. 2012); *In re Mario S.*, 954 N.Y.S.2d 843, 849 (N.Y. Fam. Ct. 2012); Brief for Appellant at 8, *In re Erick M.*, 820 N.W.2d 639, 646 (Neb. 2012) (No. S-11-000919), 2012 WL 10785183; 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 (2009), available at http://www.ilrc.org/files/235_tvpra_practice_advisory.infonet.pdf; Jared Ryan Anderson, Comment, *Yearning to be Free: Advancing the Rights of Undocumented Children Through the Improvement of the Special Immigrant Juvenile (SIJ) Status Procedure*, 16 SCHOLAR 659, 672 (2014) ("In 2011, out of 1,062,040 immigrants obtaining legal permanent residence status, only 1,609 obtained legal status through SIJS."); 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, 622 (2012); Megan Johnson & Kele Stewart, *Unequal Access to Special Immigrant Juvenile Status: State Court Adjudication of One-Parent Cases*, A.B.A. (July 14, 2014), <http://apps.americanbar.org/litigation/committees/childrights/content/articles/summer2014-0714-unequal-access-special-immigrant-juvenile-status-state-court-adjudication-one-parent-cases.html>.

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

4. See, e.g., *In re Marcelina M.-G.*, 973 N.Y.S.2d 714, 723 (N.Y. App. Div. 2013).

5. *H.S.P. v. J.K.*, 87 A.3d 255, 266 (N.J. Super. Ct. App. Div. 2014).

6. Johnson & Stewart, *supra* note 2.

Since 2012, the United States government has anticipated an increasing number of unaccompanied immigrant children arriving in the United States.⁷ The increase in unaccompanied immigrant children also means a corresponding increase in the amount of potentially SIJS-eligible children.⁸ Consequently, state court judges, as well as family and immigration law attorneys, will increasingly confront the question of who is or is not eligible for SIJS. Some states that will receive incoming unaccompanied children have not addressed the questions behind a SIJS petition for predicate findings in the past. Thus, judges and attorneys will likely find themselves with little guidance on the issue from higher courts within their respective states.

This Note argues that the provision in the Immigration and Nationality Act (INA) that requires a court to find that “reunification with 1 or both of the immigrant’s parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law” is satisfied when a child suffered this type of mistreatment from at least one parent.⁹ Part I provides background information on SIJS generally. It also discusses a history of the provisions for SIJS eligibility in the INA from its codification in 1990 and its major revisions in 1997 and 2008. Part II examines the conflict between states in their interpretations of the plain meaning, intent, and legislative history of the provisions. Part II also introduces and analyzes the decisions by three prominent states that have spoken directly to the issue of interpretation—New York, New Jersey, and Nebraska. Part III advocates for the adoption of the New York interpretation of the SIJS provisions in the INA, which states that reunification is not viable when the child suffered mistreatment from at least one parent, and not necessarily from both. Part III demonstrates that the New York interpretation best reflects the plain meaning and the legislative intent of the INA provision. Part III also

7. In fiscal year 2009, the Office of Refugee Resettlement, after referral by the Department of Homeland Security, admitted 6092 children. The number in fiscal year 2010 was 8207. OLGA BYRNE & ELISE MILLER, VERA INST. OF JUSTICE, *THE FLOW OF UNACCOMPANIED CHILDREN THROUGH THE IMMIGRATION SYSTEM: A RESOURCE FOR PRACTITIONERS, POLICY MAKERS, AND RESEARCHERS* 10 (2012), available at <http://www.vera.org/sites/default/files/resources/downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf>. A congressional report showed the increase from fiscal year 2012 to 2014. LISA SEGHETTI ET AL., CONG. RESEARCH SERV., R43599, *UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW* 2 fig.1 (2014).

8. See *intra* Part I.E.

9. 8 U.S.C. § 1101(a)(27)(J)(i) (2012).

discusses why policy considerations favor the adoption of the New York interpretation.

I. THE EVOLVING LANGUAGE OF THE SPECIAL IMMIGRANT JUVENILE STATUS PROVISIONS IN THE IMMIGRATION AND NATIONALITY ACT

Part I of this Note provides background information on the evolution of the SIJS provisions in 1990, 1997, and 2008. It also discusses SIJS generally and recent trends in child migration. Part I.A explains the meaning of SIJS and the criteria required to qualify for SIJS. Parts I.B, I.C, and I.D explain the SIJS provisions in 1990, 1997, and 2008, respectively, as well as the history behind the provisions and amendments. Finally, Part I.E discusses the increase of migration that began since 2011.

A. What Is Special Immigrant Juvenile Status and What Are Its Criteria?

SIJS is a type of special immigrant status that allows a defined set of eligible persons to obtain lawful permanent residence.¹⁰ The INA generally enables the federal government to grant a particular status to a certain amount of “special immigrants.”¹¹ Several other “special immigrant” statuses are detailed under different sections of the INA.¹² SIJS allows a recipient to immediately apply for lawful permanent residence based on a state court’s predicate factual findings,¹³ and provides the successful applicant with the opportunity to obtain United States citizenship after five years of lawful permanent residence.¹⁴ Congress introduced SIJS at the enactment of

10. See N.Y.S. OFFICE OF CHILDREN & FAMILY SERVS., ADMINISTRATIVE DIRECTIVE 11-OCFS-ADM-01, SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) 2–3 (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.

11. 8 U.S.C. § 1153(b)(4) (2012). “Special immigrants” are listed under 8 U.S.C. § 1101(a)(27) and include certain eligible Panamanian nationals under 8 U.S.C. § 1101(a)(27)(E), former citizens who may apply for reacquisition of membership under 8 U.S.C. § 1101(a)(27)(B), and immigrants who serve the Armed Forces of the United States under 8 U.S.C. § 1101(a)(27)(K).

12. See IMMIGRANT LEGAL RES. CTR., *Introduction and Overview to Special Immigrant Juvenile Status*, in SPECIAL IMMIGRANT JUVENILE STATUS FOR CHILDREN AND YOUTH UNDER COURT JURISDICTION 3-1 (2010), available at http://www.ilrc.org/files/2010_sijs-chapter_03-sijs_overview.pdf.

13. See *e.g.*, *In re Marcelina M.-G.*, 973 N.Y.S.2d 714, 719 (N.Y. App. Div. 2013).

14. See N.Y.S. OFFICE OF CHILDREN & FAMILY SERVS., *supra* note 10, at 3. The applicant, however, is unable to confer immigration status on his or her parents. 8

the federal Immigration Act of 1990 in order to address problems that undocumented immigrant children often encountered in the state foster care system.¹⁵ These obstacles included the possibility of deportation, poverty, language barriers, lack of health care or health insurance, and the lack of access to public benefits.¹⁶ Further, unaccompanied immigrant children are generally vulnerable to harm, such as child trafficking, commercial sexual exploitation, drugs, and gangs.¹⁷ Lawful permanent residence in the United States allows the SIJS recipient to work legally, obtain financial aid for college, and be eligible for limited public benefits.¹⁸ Since enacting SIJS in 1990, Congress redefined it in 1997¹⁹ and then further amended it in 2008.²⁰ As of 2008, for a person to be eligible for SIJ status and have a chance to apply for lawful permanent residence, the person must meet the following three criteria.²¹

The first criterion is met based on the person's involvement in some form of juvenile court proceeding, such as a guardianship or delinquency proceeding.²² In other words, a person "who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States" meets the first criterion for SIJS eligibility.²³ For example, a person may become "dependent on a juvenile court" because a court

U.S.C. § 1101(a)(27)(J)(iii)(II) ("[N]o natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter."); *see also* 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).

15. *See* N.Y.S. OFFICE OF CHILDREN & FAMILY SERVS., *supra* note 10, at 2.

16. *Id.*

17. Wendi J. Adelson, *The Case of the Eroding Special Immigrant Juvenile Status*, 18 J. TRANSNAT'L L. & POL'Y 65, 66 (2008).

18. *See* Ooi, *supra* note 14, at 890 (explaining the process by which special status paves the way for citizenship).

19. *See* Appropriations Act, Pub. L. No. 105-119, § 113, 111 Stat. 2440, 2469 (1997).

20. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(d)(1), 122 Stat. 5044, 5074 (2008) (codified as amended in scattered sections of 8 U.S.C.).

21. *See* 8 U.S.C. § 1101(a)(27)(J) (2012).

22. IMMIGRANT LEGAL RES. CTR., *supra* note 12, at 3-4.

23. *See* N.Y.S. OFFICE OF CHILDREN & FAMILY SERVS., *supra* note 10, at 3.

appoints her aunt as her legal guardian or because she was placed in delinquency proceedings and charged with car theft.²⁴

For a person to meet the second criterion (known as the “Non-Reunification Finding”), a court must issue a finding that “reunification with one or both of the parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law.”²⁵ Full termination of parental rights is not required to meet the “non-reunification” criterion.²⁶ The separation from a parent must be significant enough that a court would consider it unlikely that reunification is possible.²⁷ For example, a person may meet the non-reunification requirement if his or her parents relinquished their parental rights.²⁸ Another example is a person who has suffered abuse by a parent and was placed in long-term foster care as a result.²⁹ The SIJS order should clearly indicate that reunification is not viable due to abuse, neglect, or abandonment of the child, as opposed to some other dissimilar reason.³⁰

The third criterion requires the SIJS applicant to prove that it is not in his best interest to return to his country of origin or last habitual residence.³¹ The same court that signs off on the first and second criteria may also include this third criterion.³² The juvenile court judge would need to sign an order certifying that the above findings are true.³³ Alternatively, evidence for this criterion may come from other administrative or judicial proceedings.³⁴ In addition to the three main criteria, there is a consent requirement with a limited purpose.³⁵ Moreover, a person must be a “child” under the

24. IMMIGRANT LEGAL RES. CTR., *supra* note 12, at 3-4.

25. *Id.* at 3-3.

26. *See id.* at 3-4.

27. *See id.*

28. *See id.*

29. *See id.* at 3-5.

30. *See id.* at 3-6.

31. *See* 8 U.S.C. § 1101(a)(27)(J)(ii) (2012).

32. IMMIGRANT LEGAL RES. CTR., *supra* note 12, at 3-7.

33. *See id.*

34. *See id.*

35. As described by the Immigrant Legal Resource Center:

There are two requirements of consent under the SIJS law: (1) consent to the grant of SIJS in any case; and (2) specific consent for a juvenile court determination on a child’s custody or placement status if the child is in federal custody during removal (deportation) proceedings.

The first type of consent requires that the Secretary of Homeland Security, through the CIS District Director, must consent to the grant of Special Immigrant Juvenile Status. This consent is an acknowledgement that SIJS was not “sought primarily for the purpose of obtaining the status

INA, which is defined as someone who is under 21 years old and not married.³⁶

Although the other parts of SIJS merit their own discussion, this Note will focus on the Non-Reunification Finding. To make factual determinations pursuant to the SIJS provisions, state courts must interpret the meaning of the rest of the federal provision that directs them to make such findings.³⁷ States have produced two opposing interpretations of the phrase “reunification with one or both of the [applicant’s] parents is not viable,” and such divergence affects what the state courts consider to be a type of case that satisfies the Non-Reunification Finding.³⁸ The first interpretation, known as the “one-parent SIJS” interpretation, allows a child to qualify for SIJS even when the child remains with or is actively pursuing reunification with one parent but not the other.³⁹ A second interpretation considers the Non-Reunification Finding to mean generally that the child must not viably reunify with both parents.⁴⁰ Under the second interpretation, the court may find that the applicant child cannot viably reunify with one parent only when it would be impossible to make the same determination for both parents.⁴¹

of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect or abandonment.” CIS conflates consent with the act of approving an SIJS petition and, therefore, there is no separate consent application that needs to be made. An approval of an SIJ application itself is evidence of this consent.

The second type of consent is rarer. It applies only to children in federal custody who seek a juvenile court determination of their custody status or placement. Children in federal custody who are deemed “unaccompanied” will be under the jurisdiction of the Department of Health and Human Services (HHS), Office of Refugee Resettlement (ORR), Division of Unaccompanied Children Services (DUCS) (herein after referred to as ORR). As such, children in federal custody seeking a juvenile court determination on their custody or placement status must first obtain “specific consent” from ORR. This is a notable change. Prior to the TVPRA, the specific consent had to be obtained from the Department of Homeland Security (DHS), which had policies and practices toward unaccompanied minors that were confusing, inconsistent, and detrimental for these youth.

Id. at 3-7 to 3-8 (citations omitted).

36. 8 C.F.R. § 204.11(c)(1) (2014).

37. *See id.*

38. *Compare In re Marisol N.H.*, 979 N.Y.S.2d 643, 647 (N.Y. App. Div. 2014), with *In re Erick M.*, 820 N.W.2d 639, 646–47 (Neb. 2012).

39. LEE ET AL., *supra* note 2, at 3–4; *see also* Johnson & Stewart, *supra* note 2.

40. *In re Erick M.*, 820 N.W.2d at 646–47.

41. *Id.*

B. Special Immigrant Juvenile Status in 1990

The 1990 provisions define a SIJS-eligible person as:

[A]n immigrant (i) who has been declared dependent on a juvenile court located in the United States and has been deemed eligible by that court for long-term foster care, and (ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence⁴²

For a person to be eligible for SIJS in 1990, he would need to be involved in some juvenile court proceeding and also show proof that it is not in his best interest to return to the country of origin or previous habitual residence.⁴³ Notably, the language of the Non-Reunification Finding is different from the current 2008 language.⁴⁴ In 1990, a court had to deem a person eligible for long-term foster care.⁴⁵ This meant, at a minimum, that persons currently in long-term foster care were eligible, but also contemplated that persons could be “deemed eligible,” by a court determination.⁴⁶

In 1990, the SIJS statute passed with little controversy, and there was little discussion specific to the provision in the congressional record.⁴⁷ Some sources suggest that, after the expiration of the Immigration Reform and Control Act of 1986, growing complaints that court-dependent juveniles had no avenue to regularize their immigration status motivated the enactment of the 1990 SIJS provision.⁴⁸ Scholars report that social services agencies in California specifically advocated for immigration law to fill gaps that prevented

42. Immigration Act of 1990, Pub. L. No. 101-649, § 153, 104 Stat. 4978, 4978. The incorporation of the “best interests of the child” findings requirement in SIJS was a progressive inclusion, given the absence of such a best interests of the child standard in immigration law. See Bridgette A. Carr, *Incorporating a “Best Interests of the Child” Approach into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120, 124–25 (2009) (explaining that the United States developed the best interests of the child standard in family law proceedings to protect the needs and wishes of the child, but that it did not incorporate the same standard in immigration law).

43. See *supra* Part I.A.

44. See *supra* Part I.A.

45. Immigration Act § 153.

46. LEE ET AL., *supra* note 2, at 3.

47. See Heryka Knoespele, Note, *Special Immigrant Juvenile Status: A “Juvenile” Here is not a “Juvenile” There*, 19 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 505, 507 (2013).

48. See Katherine Porter, Note, *In the Best Interests of the INS: An Analysis of the 1997 Amendment to Special Immigrant Juvenile Law*, 27 J. LEGIS. 441, 443 (2001).

certain children, with whom the social workers worked, from regularizing their status.⁴⁹ The gap-filling function of SIJS was particularly relevant for such children to be able obtain lawful permanent resident status and naturalize.⁵⁰ A regulation by the Immigration and Naturalization Service (INS), under 58 Fed. Reg. 42843, recorded the understanding of the law's gap-filling effect at the time: "This rule alleviates hardships experienced by some dependents of the United States juvenile courts by providing qualified aliens with the opportunity to apply for special immigrant classification and lawful permanent resident status, with the possibility of becoming citizens of the United States."⁵¹

C. Special Immigrant Juvenile Status in 1997

The 1997 version of SIJS defined a SIJS-eligible person as:

[A]n immigrant who is present in the United States (i) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State and who has been deemed eligible by that court for long-term foster care due to abuse, neglect, or abandonment; (ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence; and (iii) in whose case the Attorney General expressly consent to the dependency order serving as a precondition to the grant of special immigrant juvenile status⁵²

Notably, the 1997 amendment added: (1) a requirement that the applicant child, who was dependent on juvenile court, acquire consent from the INS, and (2) the requirement that the applicant be "eligible for long-term foster care" needed to be specifically "due to abuse, neglect, or abandonment."⁵³

Congressional documents suggest that the motivation to clarify the SIJS beneficiaries to limit abuse and clarify jurisdiction concerns influenced such changes.⁵⁴ First, the 1997 House Conference Report

49. See, e.g., Kirsten Jackson, *Special Status Seekers: Through the Underused SIJS Process, Immigrant Juvenile May Obtain Legal Status*, L.A. LAW., Feb. 2012, at 20, 20–22, available at <http://www.lacba.org/Files/LAL/Vol34No11/2893.pdf>.

50. See Adelson, *supra* note 17.

51. 58 Fed. Reg. 42843 (Aug. 12, 1993).

52. Appropriations Act, Pub. L. No. 105-119, § 113, 111 Stat. 2440, 2469 (1997) (emphasis added).

53. See Porter, *supra* note 48, at 442.

54. See *id.* at 448.

explained that Congress changed the requirements in order to “limit the beneficiaries of this [SIJS] provision to those juveniles for whom it was created namely abandoned, neglected, or abused children.”⁵⁵ Senator Pete Domenici spearheaded the 1997 changes because he identified some instances of students who he claimed had fraudulently obtained SIJS status, where the students did not experience abuse, neglect, or abandonment.⁵⁶ In practice, the consent requirement addressed both the concern about determining the role of the federal and state governments in the SIJS process⁵⁷ and the concern over fraudulent claims by SIJS applicants who did not suffer abuse, neglect, or abandonment.⁵⁸ The understanding by 1993 was that SIJS was a form of relief only for the benefit of abused, neglected, or abandoned children. The 1997 amendment clarified this understanding by adding the requirement that eligibility for long-term foster care be specifically due to abuse, neglect, and abandonment.⁵⁹ The amendments to SIJS may have also been a result of litigation challenging juvenile court jurisdiction over children in deportation proceedings.⁶⁰

D. Special Immigrant Juvenile Status in 2008

After 2008, the TVPRA, codified in 8 U.S.C. § 1101(a)(27), provides that:

[A]n immigrant who is present in the United States—(i) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, *or an individual or entity appointed by a State or juvenile court located in the United States, and whose reunification with one or both of the immigrants’ parents is not viable* due to abuse, neglect, abandonment, *or a similar basis found under State law*; (ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien’s best interest to be returned to the alien’s or parent’s previous country of nationality or country of last habitual residence; and (iii) *in whose case the*

55. See David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children’s Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 1006 n.160 (2002).

56. See Porter, *supra* note 48, at 448.

57. See *id.* at 447–49.

58. See Ooi, *supra* note 14, at 907.

59. See Porter, *supra* note 48, at 444 (citing *Reno v. Flores*, 507 U.S. 292 (1993)).

60. See *id.* at 441–42.

*Secretary of Homeland Security consents to the grant of special immigrant juvenile status . . .*⁶¹

The TVPRA made procedural and substantive changes to many forms of immigration legal relief, including changes to SIJS.⁶² Most critically, the TVPRA eliminated the language “the juvenile is eligible for long-term foster care due to abuse, neglect, or abandonment.”⁶³ Federal regulation 8 C.F.R. § 204.11, enacted before the 2008 changes, stated that the meaning of the phrase “eligible for long-term foster care” was that “family reunification is no longer a viable option” for the applicant.⁶⁴ The regulation, however, did not help to alleviate the confusion because “family reunification” was equally undefined. Thus, only children in foster care were surely eligible for SIJS.⁶⁵ Consequently, Congress declined to adopt the exact language of 8 C.F.R. § 204.11 in passing the TVPRA.⁶⁶ Instead, Congress replaced the entire provision with new language that required a factual finding that a SIJS applicant’s “reunification with 1 or both of the immigrant’s parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law.”⁶⁷ The TVPRA also significantly improved the language from “family reunification” in the federal regulation to specifying that it must be either “1 or both of the immigrant’s parents.”⁶⁸ The TVPRA also added the phrase “or a similar basis found under State law,” instead of keeping the three bases originally listed—“due to abuse, neglect, or

61. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(d)(1), 122 Stat. 5044, 5074 (2008) (codified as amended in scattered sections of 8 U.S.C.) (emphasis added).

62. See LEE ET AL., *supra* note 2, at 1.

63. *Id.* at 3.

64. *Id.*

65. *Id.*

66. The language of the federal code of regulations differs from the enacted provisions in TVPRA 2008. Compare 8 C.F.R. § 204.11 (2014), with 8 U.S.C. § 1101(a)(27)(J) (2014[2]).

67. 8 U.S.C. § 1101(a)(27)(J)(i).

68. Compare 8 U.S.C. § 1101(a)(27)(J)(i), with 8 C.F.R. §204.11(a). Moreover, the TVPRA used the phrase “not viable,” which does not imply the same inquiry into the past arrangement of the family as using the phrase “no longer a viable option.” The phrase “no longer” grammatically implies that a state existed in the past that is different from the current state described. For example, one would say, “it was snowing before, but it is no longer snowing now.” The phrase “no longer” would be grammatically incorrect if the state of existence were the same for the past and the present. For example, it would not make sense to say, “it was not snowing before, but it is no longer snowing now.” One would simply say, “it is not snowing.” The use of the phrase “is not viable” in the TVPRA suggests that courts do not need to inquire about the past viability of family reunification.

abandonment.”⁶⁹ The provision did not track the regulation’s language, which suggests that courts may consider a more expansive interpretation of SIJS than what the agency conceived.⁷⁰

The TVPRA also codified part of a system implemented by the INS and its successors in the Stipulated Flores Settlement Agreement (the “Agreement”) in 1997,⁷¹ through the adoption of some provisions of the Unaccompanied Alien Child Protection Act in 2003.⁷² The events surrounding the Stipulated Flores Settlement Agreement occurred almost parallel to the creation of SIJS in 1990.⁷³ In the lead-up to the creation of the Stipulated Flores Settlement Agreement, child advocates sued the INS in 1990, alleging the mistreatment of unaccompanied immigrant children in immigration detention facilities.⁷⁴ The Supreme Court ruled in favor of the INS, but the class of plaintiff children later reached a settlement agreement with the agency that gave unaccompanied immigrant children rights related to detention, transfer, and release.⁷⁵ The Stipulated Flores Settlement Agreement created a three-pronged framework for the treatment of child migrants in immigration detention centers.⁷⁶ First, the Agreement provided for rights and services to children under detention conditions, including services relating to legal assistance; adequate medical, dental, reproductive, and mental health; and rights relating to education, recreation, privacy, adequate interpretation, and the freedoms of religion and expression.⁷⁷ Second, the Agreement provided for the right to prompt family reunification

69. *See* 8 U.S.C. § 1101(a)(27)(J)(i).

70. *See* LEE ET AL., *supra* note 2, at 1.

71. Carla L. Reyes, *Gender, Law, and Detention Policy: Unexpected Effects on the Most Vulnerable Immigrants*, 25 WIS. J.L. GENDER & SOC’Y 301, 309–10 (2010).

72. In 2003, before the TVPRA, the Homeland Security Act took provisions from the proposed Unaccompanied Alien Child Protection Act and transferred the responsibility under the Stipulated Flores Settlement Agreement from INS to the Department of Health and Human Services’ Office of Refugee Resettlement (ORR). ORR extended the “best interests of the child” rationale to considerations of the treatment, transfer, and detention of unaccompanied immigrant children. *See id.* at 310. The rest of the Unaccompanied Alien Child Protection Act reintroduced more provisions later. *See* 153 CONG. REC. S3001-01 (daily ed. Mar. 12, 2007) (statement of Sen. Dianne Feinstein); *see also* 154 CONG. REC. S10886-01 (daily ed. Dec. 10, 2008) (statement of Sen. Dianne Feinstein).

73. *See* Reyes, *supra* note 71, at 309.

74. *Id.*

75. *Id.*

76. *Id.* at 310.

77. *Id.*

whenever possible.⁷⁸ Third, the Agreement provided for the right to detention in the least restrictive detention setting possible.⁷⁹

The TVPRA came with little legislative history that spoke directly to the meaning of the SIJS provisions, but a component of TVPRA may provide some insight.⁸⁰ Senator Dianne Feinstein, author of the Unaccompanied Alien Child Protection Act of 2000, remarked during the passage of TVPRA on its changes that incorporated some aspects of the Stipulated Flores Settlement Agreement, which would give better procedural guarantees for unaccompanied children and prevent bad detention conditions.⁸¹ However, Senator Feinstein did not mention the inclusion of the changed SIJS provisions at that time.⁸²

In 2008, the TVPRA also codified changes to SIJS in response to the adoption of the Unaccompanied Alien Child Protection Act.⁸³ The Unaccompanied Alien Child Protection Act included a section on SIJS,⁸⁴ and Senator Feinstein has been reintroducing the Act since 2000.⁸⁵ In her 2001 introduction, Senator Feinstein emphasized that the bill's intent was to improve procedural protections for unaccompanied immigrant children and also to "improve unaccompanied aliens' access to existing options for permanent protection"⁸⁶ Senator Feinstein emphasized the same intention in 2007 by stating that the Act "provides no new immigration benefit to unaccompanied alien children" by using the available benefits within current immigration law.⁸⁷ These new SIJS provisions aimed to "streamline[] the Special Immigrant Juvenile (SIJ) program."⁸⁸

78. *Id.*

79. *Id.*

80. *See* IMMIGRANT LEGAL RES. CTR., *supra* note 12, at 3-5; *see also* H.S.P. v. J.K., 87 A.3d 255, 265-67 (N.J. Super. Ct. App. Div. 2014).

81. *See* 154 CONG. REC. S10886-01 (daily ed. Dec. 10, 2008) (statement of Sen. Dianne Feinstein).

82. *See id.*

83. *See generally* 8 U.S.C. § 1101 (2012).

84. Section 341 of the Unaccompanied Alien Child Protection Act of 2002 entitled "Special Immigrant Juvenile Visa." *See* 148 CONG. REC. S3844-01 (daily ed. May 2, 2002).

85. *See* 146 CONG. REC. S9381-05 (daily ed. Sept. 27, 2000) (statement of Sen. Dianne Feinstein).

86. 147 CONG. REC. S101-02 (daily ed. Jan. 22, 2001) (statement of Sen. Dianne Feinstein).

87. 153 CONG. REC. S3001-01 (daily ed. Mar. 12, 2007) (statement of Sen. Dianne Feinstein).

88. *See id.*

The legislators struggled to streamline the language of the SIJS statute to improve access for those who suffered abuse, neglect, or abandonment.⁸⁹ Over time, Senator Feinstein made many changes to the Special Immigrant Juvenile Status section of the Unaccompanied Alien Child Protection Act.⁹⁰ First, the 2002 provision for the Non-Reunification Finding expanded abuse, neglect, and abandonment to “[those] deemed eligible by [a] court for long-term foster care due to abuse, neglect, or abandonment, *or a similar basis found under State law.*”⁹¹ Then, in 2004, the proposed Act entirely removed the language on eligibility for foster care.⁹² Eventually, in May of 2007, the Non-Reunification Finding read that the applicant “*should not be reunified with his or her parents* due to abuse, neglect, abandonment or similar basis found under State law.”⁹³ The provision’s language is almost identical to the language as it was passed, except for the “one or both” phrase which was added in 2008: “[W]hose reunification with one or both of the immigrant’s parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law.”⁹⁴ The trend of the changes suggests three things: (1) the goal was to improve access to current immigration benefits, such as SIJS, instead of creating new ones; (2) the authors thought about and changed the language on eligibility for foster care multiple times; and (3) the authors expressly ruled out using language that would limit the inquiry to abuse, neglect, and abandonment by two parents. Moreover, the language of the Non-Reunification Finding saw constant expansion without modification from its first iteration in 2002.⁹⁵ The unchallenged expansion of the Non-Reunification Finding suggests that legislators did not look to these particular

89. See Thronson, *supra* note 55, at 1006 n.160.

90. See 154 CONG. REC. H10888-01 (daily ed. Dec. 10, 2008); 153 CONG. REC. S6408-03 (daily ed. May 21, 2007); 150 CONG. REC. S11251-03 (daily ed. Oct. 11, 2004); 148 CONG. REC. S3844-01 (daily ed. May 2, 2002).

91. 148 CONG. REC. S3844-01 (daily ed. May 2, 2002) (emphasis added).

92. The proposed Act provides:

(i) who by a court order . . . was declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, a department or agency of a State, or an individual or entity appointed by a State or juvenile court located in the United States, *due to abuse neglect, or abandonment, or a similar basis found under State law.*

150 CONG. REC. S11251-03 (daily ed. Oct. 11, 2004) (emphasis added).

93. 153 CONG. REC. S6408-03 (daily ed. May 21, 2007) (emphasis added).

94. 154 CONG. REC. H10888-01 (daily ed. Dec. 10, 2008) (emphasis added).

95. See 148 CONG. REC. S3844-01 (daily ed. May 2, 2002).

provisions to address the concern that it “would encourage illegal immigration and immigration fraud.”⁹⁶

E. Recent Trends in Child Migration

Since 2008, courts have had to confront the question of whether or not a one-parent SIJS applicant can meet the Non-Reunification Finding.⁹⁷ Despite fears that SIJS “would encourage illegal immigration and immigration fraud”⁹⁸ the reality is that, as recently as 2011, the number of SIJS beneficiaries remained low, despite the expansions and clarifications in the law.⁹⁹ In 2010, the Division of Unaccompanied Children’s Services (DUCS) Legal Access Project Providers reported that 22.8% of the children they screened were eligible for SIJS, with the raw number equaling 1604.¹⁰⁰ In comparison, one record of the actual number of SIJS recipients in that year, which would include a total of many more children than the DUCS sample, was 1492.¹⁰¹ In fiscal year 2014, Customs and Border Patrol apprehended 68,541 unaccompanied immigrant children, representing a 77% increase from the figure in fiscal year 2013.¹⁰² If around 20% are eligible based on DUCS data, then, extrapolating from that data, 13,708 children could potentially be eligible for SIJS. Many would potentially receive no relief and be sent back to places where they would be vulnerable and in danger.

96. 153 CONG. REC. H14098-01 (daily ed. Dec. 4, 2007) (statement of Rep. Lamar Smith).

97. *Compare In re Erick M.*, 820 N.W.2d 639, 645–47 (Neb. 2012) and *H.S.P. v. J.K.*, 87 A.3d 255, 267 (N.J. Super. Ct. App. Div. 2014), with *In re Marcelina M.-G.*, 973 N.Y.S.2d 714, 722 (N.Y. App. Div. 2013).

98. 153 CONG. REC. H14098-01 (daily ed. Dec. 4, 2007) (statement of Rep. Lamar Smith); see also H.R. REP. NO. 105-405, at 130 (1997), reprinted in 1997 U.S.C.C.A.N. 2941.

99. See Anderson, *supra* note 2, at 672 (“In 2011, out of 1,062,040 immigrants obtaining legal permanent residence status, only 1,609 obtained legal status through SIJS.”); see also Jackson, *supra* note 49, at 22 (noting that in 2010, 1492 gained lawful permanent residence through SIJS, compared to the 1,042,625 people that acquired lawful permanent residence).

100. Byrne & Miller, *supra* note 7, at 25 fig.10.

101. Jackson, *supra* note 49, at 22.

102. *Southwest Border Unaccompanied Alien Children*, U.S. CUSTOMS & BORDER PROTECTION, <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children> (last viewed May 19, 2015).

II. NEBRASKA, NEW YORK, AND NEW JERSEY COURTS INTERPRETATIONS OF THE “1 OR BOTH” LANGUAGE

The legislative history of the TVPRA does not articulate whether or not it is in favor of allowing one-parent SIJS.¹⁰³ Since 2008, states have differed in their interpretations of the Non-Reunification Finding’s language and the meaning of “1 or both.”¹⁰⁴ Part II of this Note analyzes in particular the two opinions from the New Jersey and Nebraska courts that have diverged from the common understanding of the Non-Reunification Finding in chronological order. Part II begins by analyzing the Nebraska case, which introduced the alternative interpretation of the “1 or both” language and introduced the controversy in the Non-Reunification Finding. Part II then discusses a case in New York that represents the common understanding of the provision. Finally, this Part discusses the New Jersey case, which revived the alternative interpretation promoted in Nebraska and added novel reasoning in support of that provision.

A. *In re* Erick M.—Nebraska

This decision was the first highest-level state court to directly address the interpretation of the “1 or both” language enacted in 2008. In 2012, the Separate Juvenile Court of Lancaster County committed Erick M. to the care and custody of the Nebraska Office of Juvenile Services (OJS) for two charges of a minor in possession of alcohol.¹⁰⁵ Later, Erick requested the juvenile court to issue SIJS findings.¹⁰⁶ The juvenile court heard Erick’s motion for SIJS findings, but denied the motion after finding that Erick did not meet the Non-Reunification Finding,¹⁰⁷ which requires that the court find that “reunification with 1 or both of the immigrants’ parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law.”¹⁰⁸ Erick’s mother testified that she had not been accused of Erick’s abuse, neglect, or abandonment.¹⁰⁹ The family permanency specialist assigned to the case also testified that she had no contact information for Erick’s father and was unsure if the father was in New

103. *See supra* Part I.D.

104. *Compare In re* Erick M., 820 N.W.2d 639, 645 (Neb. 2012), *and* H.S.P. v. J.K., 87 A.3d 255, 267 (N.J. Super. Ct. App. Div. 2014), *with In re* Marcelina M.-G., 973 N.Y.S.2d 714, 722 (N.Y. App. Div. 2013).

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

106. *Id.* at 641.

107. *Id.* at 643.

108. 8 U.S.C. § 1101 (a)(27)(J)(i) (2012).

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

York or Mexico.¹¹⁰ Furthermore, the specialist added that she would continue to work with Erick's mother, with whom Erick had lived before he was committed to OJS custody.¹¹¹ The juvenile court determined that there was no evidence to show that Erick's father abused, neglected, or abandoned him.¹¹² Erick appealed the denial of SIJS findings.¹¹³

The Nebraska Supreme Court identified that Erick M.'s appeal relied on the interpretation of the SIJS provision that requires a finding that "reunification with 1 or both of the immigrant's parents is not feasible because of abuse, neglect, or abandonment."¹¹⁴ In evaluating the this provision's interpretation, the court took a "soft" plain meaning approach¹¹⁵ to the question of statutory interpretation, proposing to look strictly at the legislation's text unless the plain meaning was unambiguous.¹¹⁶ The court defined an "ambiguous statute" as one that is "susceptible of more than one reasonable interpretation."¹¹⁷ The court then concluded that it was reasonable to interpret the provision as disjunctive because of the use of "or."¹¹⁸ The court ultimately held, however, that Erick's construction described one reasonable interpretation, but another reasonable interpretation could be that the "or" separates two different independent instructions for the court to follow based on the circumstances.¹¹⁹ The court did not specify, however, what it meant by a "reasonable interpretation."

After finding that the phrase's meaning was still ambiguous, the court then analyzed the legislative history of SIJS.¹²⁰ The court acknowledged that the 2008 amendments expanded the eligibility requirements for SIJS.¹²¹ In terms of the Non-Reunification Finding, the court articulated that the 1990 SIJS provisions required only that

110. *Id.* at 642.

111. *Id.* at 642–43.

112. *Id.* at 643.

113. *Id.*

114. *Id.*

115. With the soft plain meaning approach, the courts introduce additional considerations to aid them in determining the presumed intent of the legislators, which is evidenced solely by the words of the statute. *See* Ron Beal, *The Art of Statutory Construction: Texas Style*, 64 BAYLOR L. REV. 339, 370–71 (2012).

116. *See In re Erick M.*, 820 N.W.2d at 644.

117. *Id.*

118. The government argued that, under Erick's construction, the phrase "or both" would be superfluous but not unreasonable. *Id.*

119. *Id.*

120. *Id.* at 644.

121. *Id.* at 645.

the child be eligible for long-term foster care.¹²² In 1997, an amendment to the Non-Reunification Finding provision added that eligibility for foster care must also be a result of abuse, neglect, or abandonment.¹²³ The court explained that the intent behind the addition was to prevent applicants from using SIJS for the sole purpose of obtaining immigration status instead of obtaining relief from abuse, neglect, and abandonment.¹²⁴ The court explained that “eligible for long-term foster care” had always meant that family reunification was no longer viable.¹²⁵ Consequently, the addition of the phrase “1 or both” only slightly expanded the required finding, and that a court still has to evaluate the child’s viability of reunification with a “family,” similar to how an immigration agency or immigration court would analyze it.¹²⁶

The Nebraska Supreme Court then reviewed unpublished decisions by the United States Citizenship and Immigration Services (USCIS), particularly Administrative Appeals Office (AAO) decisions, to guide its understanding of the “1 or both” parents rule.¹²⁷ The court found that the AAO presumed that a parent who has never been in contact with the child has abandoned that child.¹²⁸ Even with such a presumption, however, the court noticed that the AAO continued to evaluate the viability of reunification with the other parent.¹²⁹ Thus, the court concluded that the “1 or both” language gives children who have one parent who is unknown or cannot be found the possibility of SIJS relief based on a finding concerning the other parent.¹³⁰ According to the court, the AAO method was in keeping with the intent to expand the pool of eligibility for SIJS.¹³¹ The court concluded that the cases demonstrate that the USCIS does not consider proof of one absent parent to be the end of its inquiry under the reunification component.¹³² Instead, the court expressed that a

122. *Id.*

123. *See id.*

124. *Id.*

125. *Id.*

126. *See id.*

127. *See id.* at 646.

128. *Id.*

129. *Id.*

130. *Id.* at 647.

131. *Id.*

132. *Id.*

petitioner normally has to show that reunification with the other parent is also not feasible.¹³³

The court envisioned two different scenarios: In one SIJS case, the child could potentially reunify with only one parent because the other is unknown.¹³⁴ In another SIJS case, a child could potentially reunify with two parents.¹³⁵ The court then discussed *In re E.G.*, a 2009 New York case, where the child had one “absent” parent and one parent with whom the child lived.¹³⁶ The New York court found that reunification with the known parent was not viable due to the parent’s abuse, neglect, or abandonment.¹³⁷ Based on the court’s evaluation of the *In re E.G.* and AAO decisions, either an “unknown” or “absent” parent could trigger an extra inquiry on the other parent.¹³⁸ The court then distinguished *In re Erick M.* from *In re E.G.*¹³⁹ The court did not clarify, however, how such an inquiry would be different from a two-parent SIJS case where a court finds one parent to have abandoned the child and the other to have abused or neglected the child.¹⁴⁰ The court seemed to insist that the inquiry of their novel interpretation was a one-parent inquiry.¹⁴¹

The *In re Erick M.* court’s light treatment of legislative history and its reliance on administrative appeals decisions as a substitute for a more rigorous plain meaning analysis seems an odd departure from what one would expect from a statutory interpretation analysis. Other courts have generally declined to follow *In re Erick M.* and instead adopt the reasoning and interpretation in the next case.

B. *In re Marcelina M.-G.*—New York

In *In re Marcelina M.-G. v. Israel S.*,¹⁴² the court also considered the interpretation of the “one or both” phrase.¹⁴³ The case concerned

133. *Id.* When revisiting this question, however, the New York court did find that some immigration cases also considered only one parent SIJS and granted status. *See infra* Part II.C.

134. *In re Erick M.*, 820 N.W.2d at 647.

135. *Id.*

136. *Id.* at 648 (citing *In re E.G.*, 899 N.Y.S.2d 59 (N.Y. Fam. Ct. Aug. 14, 2009)).

137. *Id.*

138. *Id.*

139. *Id.*

140. *See id.*

141. *See id.*

142. 973 N.Y.S.2d 714 (N.Y. App. Div. 2013).

143. The New Jersey court would later disagree with the *In re Marcelina M.-G.* decision. *See H.S.P. v. J.K.*, 87 A.3d 255, 266 (N.J. Super. Ct. App. Div. 2014). The New York Court of Appeals has yet to rule on the issue.

Susy M.-G., daughter of Marcelina M.-G. and petitioner for SIJS findings.¹⁴⁴ Susy lived with her mother and the mother's ex-boyfriend, Tony, in Honduras.¹⁴⁵ The boyfriend was "mean and violent," so Marcelina threw him out of the house when Susy was six.¹⁴⁶ When Susy was ten, Marcelina left Honduras to work in the United States and left Susy and her half-brother, Jason, in the care of their aunt Estella.¹⁴⁷ Susy described her aunt as a "physically violent and verbally abusive" woman, who would call her names and use her mother's money only for her own family.¹⁴⁸ Susy's father, Israel, was never a part of her life.¹⁴⁹ Marcelina added that Israel was an alcoholic who was violent towards her.¹⁵⁰

A few years into living with Estella, Susy arranged to leave with her brother and illegally enter the United States.¹⁵¹ At first, Marcelina did not support this plan, but she later changed her mind and asked her boyfriend to help pay for the trip.¹⁵² In the United States, Susy and her brother reunited with their uncle, Francisco, in New York, where they enrolled in school.¹⁵³ Susy lived with Francisco and also reunited with her mother, who lived nearby.¹⁵⁴ Francisco filed for guardianship of Susy and Jason in family court.¹⁵⁵ From the guardianship petition, Susy and her half-brother petitioned for SIJS findings.¹⁵⁶ The guardianship petition alleged that Israel had never been part of the siblings' lives nor provided for them, and that Marcelina had abandoned the family when she left Honduras.¹⁵⁷ Susy filed a separate petition for SIJS findings and alleged the same facts, but added that Marcelina neglected her by failing to provide adequate food, clothing, shelter, and education, as well as by allowing her to take the perilous journey from Honduras to the United States.¹⁵⁸ To

144. *In re Marcelina M.-G.*, 973 N.Y.2d at 716

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 717.

156. *Id.*

157. *Id.*

158. *Id.*

support her petition, Susy also submitted a letter from her caseworker indicating that she suffered from Post-Traumatic Stress Disorder.¹⁵⁹

Although Marcelina initially supported Francisco's guardianship petition, she later argued that it would be in Susy's best interest to live with her, since Susy's father did not have a relationship with her.¹⁶⁰ She also argued that Susy wanted to live with her.¹⁶¹ The family court granted the mother's custody petition but refused SIJS findings because Susy was "with her natural parent" and to rule otherwise would be a "strained reading of the statute."¹⁶²

On appeal, the Second Department of the New York Court of Appeals gave an overview of the legislative history of SIJS.¹⁶³ The court emphasized that SIJS is a process that involves a predicate order from the state court that is not an immigration status determination,¹⁶⁴ because a SIJS applicant could then use the findings to obtain lawful permanent resident status from the USCIS.¹⁶⁵ The court expressed that the 1997 changes to SIJS were motivated by the "concern that juveniles entering the United States as visiting students were abusing the SIJS process."¹⁶⁶ The court further supported such a characterization by quoting the 1997 Conference Report that legislators modified SIJS "in order to limit the beneficiaries of this provision to those juveniles for whom it was created, namely abandoned, neglected, or abused children."¹⁶⁷ The court compared the difference between the 1997 amendments and the 2008 amendments.¹⁶⁸

The Second Department held that the family court erred in denying the motion for SIJS findings.¹⁶⁹ It found that Susy was under twenty-one, unmarried, and placed under her mother's custody in satisfaction of the other SIJS provisions.¹⁷⁰ It also found that Susy established that reunification with her father was not viable due to

159. *Id.* at 718.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 722.

164. The court uses the terms "predicate order" and "predicate findings" throughout the opinion. *See id.* at 719, 723.

165. *Id.* at 719.

166. *Id.* (citing *Yeboah v. U.S. Dep't of Justice*, 345 F.3d 216, 221 (3d Cir. 2003)).

167. *Id.* at 720.

168. *See id.* at 719–20; *see also supra* Parts I.C–D.

169. *In re Marcelina M.-G.*, 973 N.Y.S.2d at 721.

170. *Id.*

abandonment.¹⁷¹ The Second Department additionally implicitly accepted the family court's SIJS rejection and its determination that the mother did not abuse, neglect, or abandon Susy.¹⁷² The Second Department implicitly accepted the family court's conclusion that the mother did not abuse, neglect, or abandon Susy despite Susy's allegations to the contrary.¹⁷³

The court adopted a different standard of statutory interpretation from *In re Erick M.*, stating that the text was the "most compelling evidence of legislative intent."¹⁷⁴ Under this premise, it held that at least one treatise, two cases, and one law review article concluded that the plain meaning of the "1 or both" provision allows for one-parent SIJS.¹⁷⁵ The court held that its interpretation of the provision is the same.¹⁷⁶ The court also looked to the legislative history and found more supporting evidence for its interpretation, despite the plain meaning's clarity.¹⁷⁷ Based on this analysis, the court supported the common understanding of the Non-Reunification Finding that the child meets such a requirement when the child suffers abuse, neglect, or abandonment from at least one parent and cannot viably reunify with that parent as a result.¹⁷⁸

The court's characterization of legislative history in *In re Marcelina M.-G.* conveys the common understanding and characterization of the legislative history,¹⁷⁹ different from *In re Erick M.*¹⁸⁰ In an overview of SIJS legislative history, the court explained that preserving the requirement that the applicant be deemed eligible for long-term foster care clearly indicated that "SIJS was only available when reunification with both parents was not possible."¹⁸¹ It continued that eliminating such language and replacing it with the "1 or both" phrase indicated that only one parent's viability needed to be examined.¹⁸²

171. *Id.*

172. *See id.*

173. *See id.* at 717.

174. *Id.* at 721.

175. *Id.* at 722.

176. *Id.* (citing *In re D.A.M.*, 2012 WL 609722, *3 (Minn. Ct. App. 2012); *In re Mario S.*, 954 N.Y.S.2d 843 (N.Y. Fam. Ct. 2012); Angie Junck, *Special Immigrant Juvenile Status: Relief for Neglected, Abused, and Abandoned Undocumented Children*, 63 JUV. & FAM. CT. J. 48, 56 (2012); CHARLES GORDON ET AL., 3-35 IMMIGRATION LAW AND PROCEDURE § 35.09(3) (2012)).

177. *Id.*

178. *Id.*

179. *See* Johnson & Stewart, *supra* note 2.

180. *In re Marcelina M.-G.*, 973 N.Y.S.2d at 722–24.

181. *Id.* (quoting *In re D.A.M.*, 2012 WL 609722, *3 (Minn. Ct. App. 2012)).

182. *Id.* (quoting *In re D.A.M.*, 2012 WL 609722, *4 (Minn. Ct. App. 2012)).

Such a difference in characterization implies a divergence in how the two courts view what level of meaningful variation is permissible when a statute's language changes from one to another.¹⁸³ The court also explained that such an expansion of SIJS "permits 'more vulnerable and mistreated children to qualify for this form of legal relief.'"¹⁸⁴ Moreover, the court added, despite fears that an expansion of SIJS would lead to a large increase in the granting of SIJS, SIJS was known to be a largely underused form of legal relief.¹⁸⁵ SIJS represented one percent of the total amount of lawful permanent residencies granted to persons under twenty-one, even up to 2012.¹⁸⁶

After an examination of the general characteristics of the evolution of SIJS, the court also addressed the interpretation proposed in *In re Erick M.*¹⁸⁷ The court noted that the Nebraska court declined to adopt the statute's literal meaning in *In re Erick M.*, unlike the literal reading that the New York court used in its own analysis of the statute's plain language.¹⁸⁸ The court argued that a statutory canon resolves that "ambiguities in immigration statutes must be read in favor of the immigrant."¹⁸⁹ The court did not dwell on this point, however, as it held that it would decide in favor of interpreting the provision to allow for one-parent SIJS for the other reasons it discussed.¹⁹⁰ It also articulated a concern that foreclosing the possibility of SIJS for Susy may mean deportation to Honduras, where her father abandoned her and no other fit relatives can take care of her.¹⁹¹ Reflecting on Susy's welfare if she returned to Honduras, the court clarified that the purpose of SIJS was "protect[ing] the applicant from further abuse or maltreatment by preventing him or her from being returned to a place where he or she is likely to suffer further abuse or neglect."¹⁹²

The court again emphasized that the court's role in making SIJS findings is not to make a determination of immigration status. It opined that Nebraska's treatment of SIJS precluded the USCIS from

183. See *infra* Part III (discussing meaningful variation).

184. *In re Marcelina M.-G.*, 973 N.Y.S.2d at 723 (citing LEE ET AL., *supra* note 2).

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* (citing *Yu v. Brown*, 92 F. Supp. 2d 1236, 1248 (D.N.M. 2000)).

190. *Id.*

191. *Id.*

192. *Id.* at 724 (quoting *In re Sing W.C.*, 920 N.Y.S.2d 135, 140 (N.Y. App. Div. 2011)).

applying its own interpretation of the federal law,¹⁹³ when both the state and federal governments were supposed to have a role in SIJS.¹⁹⁴ Furthermore, the court argued that the requirement for the Secretary's consent addressed the concern that the relief granted would not be for abuse, neglect, or abandonment.¹⁹⁵ It also challenged the assertion in *In re Erick M.* that the USCIS had not granted SIJS when looking at only one parent's abuse, neglect, or abandonment, stating that the USCIS did make such grants of special status without looking at the viability of reunification with the other parent.¹⁹⁶

C. *H.S.P. v. J.K.*—New Jersey

In *H.S.P. v. J.K.*, the New Jersey Supreme Court agreed with the Nebraska Supreme Court's *In re Erick M.* interpretation regarding the Non-Reunification Finding.¹⁹⁷ Further, it expanded upon the analysis of the legislative history of SIJS by examining direct quotes from the Congressional Record around the passage of the TVPRA in 2008.¹⁹⁸ The court tried to further uncover the development of SIJS from a statute that had an unclear requirement about eligibility for foster care to one that more narrowly targeted abused, neglected, and abandoned children.¹⁹⁹ It cited *In re Marcelina M.-G.*²⁰⁰ as holding an alternative interpretation without further treatment or rebuttal of the arguments made in the prior case.²⁰¹

In *H.S.P.*, petitioner H.S.P. was the uncle of M.S. H.S.P. sought custody of M.S., and together they applied for SIJS findings with the Chancery Division, Family Part.²⁰² M.S. was born and raised in India.²⁰³ He had no recollection of meeting his father, B.S., but lived in "disease-ridden slums" with his mother J.K., who was the named opposing party in the case, acting cooperatively with the uncle in the

193. *Id.*

194. *Id.*

195. *Id.* (citing Memorandum from Donald Neufeld, Acting Assoc. Dir. Domestic Operations, U.S. Citizenship and Immigr. Servs., Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions 3 (Mar. 24, 2009)).

196. *Id.*

197. *H.S.P. v. J.K.*, 87 A.3d 255, 266 (N.J. Super. Ct. App. Div. 2014)

198. *Id.* at 267–68.

199. *Id.* at 266–67.

200. 973 N.Y.S.2d 714 (N.Y. App. Div. 2013).

201. *H.S.P.*, 87 A.3d at 265.

202. *Id.* at 255.

203. *Id.* at 258.

custody petition.²⁰⁴ Without adequate medical care, M.S.'s siblings died of illnesses, and his mother became terminally ill.²⁰⁵ M.S. then lived with his grandmother, worked a construction job at the age of fifteen, and developed back pain and a skin condition.²⁰⁶ M.S.'s mother and grandmother arranged for M.S. to travel from Turkey to Mexico, and then across the southern border of the United States to live with H.S.P.²⁰⁷ While living in New Jersey with his uncle, M.S. eventually obtained a General Education Development (GED) diploma.²⁰⁸ Included in the SIJS petition, J.K. requested that the court enter a default judgment against her, claiming that she "abandoned" M.S.²⁰⁹ However, the lower court did not find that there was sufficient evidence to show that "either of his parents" neglected or abandoned M.S.²¹⁰ Consequently, petitioners appealed.²¹¹

Initially, M.S. claimed that both of his parents abused, neglected, or abandoned him, rather than presenting a one-parent SIJS case.²¹² The court, however, took the opportunity to use the case to contemplate the meaning of the "1 or both" language in the TVPRA revision of the SIJS provisions.²¹³ Before the court considered this question, it expressed concern that the petitioners brought the case primarily to acquire SIJS status and a green card,²¹⁴ suggesting that there may be an improper purpose for invoking the jurisdiction of the family court.²¹⁵ The court bypassed this concern and held that M.S. did not meet the Non-Reunification Finding.²¹⁶

The court also addressed the petitioner's claim that the father neglected and abandoned M.S. without naming the father in the complaint or attempting to serve him.²¹⁷ The court stated that a parent should have a chance to oppose allegations of abuse or neglect and petitions from non-parents for custody of the child because such a

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 259.

211. *Id.*

212. *Id.* at 258.

213. *Id.* at 261–62.

214. *Id.* at 260–61.

215. *Id.*

216. *Id.* at 269.

217. *Id.* at 261.

case “resembles the termination of parental rights.”²¹⁸ An additional concern was that the parent may not have been reasonably located or that petitioner did not adequately attempt service.²¹⁹ Finally, the court noted that there may be a possible conflict between the INA provision that the child “shall not be compelled to contact the alleged abuser . . . at any stage,” but left both of these concerns unresolved.²²⁰ The concerns above were ultimately dicta because the court did not make a determination on those grounds.²²¹ However, they reflect the way that the court viewed its role: as a gatekeeper of the country’s borders in matters affecting children’s welfare and immigration status, which may be a perspective that influences the persuasiveness of its overall statutory interpretation.²²² Such concerns set the stage for the court’s holding in this case.

The court interpreted relevant New Jersey state law to determine that the Non-Reunification Finding was satisfied with respect to J.K.²²³ It held that a failure to provide due to poverty did not meet the required element of willful, reckless, or grossly negligent behavior to constitute neglect under New Jersey law.²²⁴ Additionally, it held that the standard for “abuse,” under New Jersey law is relative.²²⁵ According to the court, when a parent permits a child to work in particular conditions, it is only considered “abuse” if those conditions were contrary to the labor laws under which the child worked.²²⁶ As a result, it held that J.K.’s actions were not willful abandonment because she kept in contact with M.S. and only wanted the best for him.²²⁷ With respect to M.S.’s father, the court upheld the lower court’s finding that he willfully abandoned M.S. because his continued absence demonstrated his “settled purpose” to abandon his child.²²⁸ The decision regarding the father and mother effectively transformed an allegation of two cases of parental abuse, neglect, and

218. *Id.*

219. *See id.*

220. *Id.* (citing 8 U.S.C. § 1357(h) (2012)).

221. “We do not attempt in this appeal to resolve that apparent conflict. Despite our concerns, we will assume that the judge’s custody determination is sufficient to satisfy the first precondition for SIJ status, and we will examine the judge’s other findings under Subparagraph J.” *Id.*

222. *See infra* Part III.C.

223. *H.S.P.*, 87 A.3d at 262.

224. *Id.*

225. *Id.*

226. *Id.* at 263.

227. *See id.* at 264.

228. *Id.*

abandonment into a one-parent SIJS case.²²⁹ Such an outcome allowed the court to move to considering whether the interpretation of “1 or both” in the INA allowed for one-parent SIJS cases.²³⁰

The court held in favor of the *In re Erick M.* interpretation of the Non-Reunification Finding but omitted the textual analysis of the provision as was done in *In re Erick M.*²³¹ The court then examined the legislative history of SIJS to determine if its interpretation of legislative intent supported or precluded the *In re Erick M.* interpretation.²³² First, it looked at the Senator Domenici’s statement in a congressional hearing regarding the possible abuses in immigration law as well as a conference report discussing the purpose of the 1997 amendments.²³³ Senator Domenici expressed concern over the students’ ability to “manipulate the system to obtain permanent residence.”²³⁴ The conference report did not explicitly reiterate Senator Domenici’s concern, but it stated that the amendments to the SIJS provisions were meant to “limit the beneficiaries of [the Non-Reunification Finding] to those juveniles for whom it was created” and to ensure that the purpose was primarily to obtain relief from abuse and neglect, not to obtain an adjustment of immigration status.²³⁵

In addition, the court studied the legislative history of the 2008 changes.²³⁶ The phrase “1 or both” came with little explanation, but the court relied on two other statements to analyze the TVPRA’s legislative history.²³⁷ First, a statement from one of the senators stressed concerns about illegal immigration and immigration fraud, while Senator Dianne Feinstein, right before the bill’s passage, stated that, “[t]his legislation does not expand the current immigration rights

229. *Id.*

230. *Id.* at 266.

231. *See id.* The *In re Erick M.* holding has two components: the first is that generally the courts must look at whether reunification with both parents is a viable option. *Id.* Since the provision is bifurcated, the second component explains that if one parent is “deceased or unable to protect the child from the unsafe parent” then the court can consider this an unfeasible reunification with “1” parent. *Id.*

232. *See id.* at 266–68.

233. *Id.* at 266 (citing *Yeboah v. U.S. Dep’t of Justice*, 345 F.3d 216, 221 (3d Cir. 2003)); *see also* H.R. REP. NO. 105-405, at 130 (1997), *reprinted in* 1997 U.S.C.C.A.N. 2941.

234. *H.S.P.*, 87 A.3d at 266.

235. *Id.*

236. *Id.* at 267.

237. *Id.*

of any child.”²³⁸ Senator Feinstein continued, “[i]nstead, [the TVPRA] presumes that children will be placed in removal proceedings—unless they qualify for immigration benefits under current law.”²³⁹

The court characterized the legislative intent of SIJS as “prevent[ing] the return of juveniles to unsafe parents,” but also “prevent[ing] misuse of SIJS statute for immigration advantage.”²⁴⁰ It concluded that allowing one-parent SIJS cases in general would be contrary to legislative intent because it would allow a child who can reunify with a “safe parent” to obtain SIJS status even if reunification with that “safe parent” would not lead to further contact with the “unsafe parent.”²⁴¹ The court added that “or both” would be superfluous when interpreted to allow one-parent SIJS because the provision simply would have said reunification is not viable with one parent.²⁴² For the *H.S.P.* court, the particular outcome for M.S. comports well with the legislative intent of the “protection of those abused, neglected, or abandoned juveniles whose compelled repatriation would place them in danger from a parent who abused, neglected, or abandoned them.”²⁴³ Assuming that the rejection of SIJS for M.S. meant his repatriation to India, the court may be satisfied that he had the option to return to his mother, the “safe parent,” whom the court found had not abused, neglected, or abandoned him.²⁴⁴

III. CONSIDERING THE MEANING OF “1 OR BOTH” AND THE INCLUSION OR EXCLUSION OF ONE-PARENT SIJS CASES FROM ITS SCOPE

Although the three views slightly differed in their approaches, there is a noticeable pattern to statutory interpretation that can help to analyze and resolve the dispute between the two different

238. *Id.* (citing 154 CONG. REC. S10886-01 (daily ed. Dec. 10, 2008) (statement of Sen. Dianne Feinstein)).

239. *Id.*

240. *Id.* at 268.

241. *Id.* The “safe parent” language mirrors the language used in *Erick M.* and may have originated from the case. *See In re Erick M.*, 820 N.W.2d 639, 647 (Neb. 2012).

242. *H.S.P.* 87 A.3d at 268. Note, however, that the concern over the rule of superfluity was not dispositive in this case or in the *Erick M.* case. *See In re Erick M.*, 820 N.W.2d at 644.

243. *H.S.P.*, 87 A.3d at 268.

244. *Id.* at 269.

interpretations.²⁴⁵ First, courts look to the words explicitly used in the text.²⁴⁶ The words themselves are the source of interpretation whether or not the rule is to sort out ambiguous text²⁴⁷ or to rule out contradicting interpretations based on legislative intent.²⁴⁸ After interpretation of the text, the next step is to consult the legislative history, either to confirm a particular interpretation²⁴⁹ or to rule out interpretations that are contradictory.²⁵⁰ When faced with a provision that still defies direct interpretation from the text or history, a court may ask which interpretation best responds to the problem at hand.

Part III of this Note argues that the text's plain meaning, the interpretative variations, and the statutory canons strongly point towards the one-parent SIJS interpretation. Although the legislative history does not directly nor definitively favor one interpretation, it strongly implies the one-parent SIJS interpretation. Finally, this Part considers why one-parent SIJS, which takes a small step towards a type of immigration policy that accepts children as persons, is a better answer than narrowing and gatekeeping.

A. The Plain Meaning of the Text and the Legislative History in Support of the One-Parent SIJS Interpretation

The plain meaning of the text of SIJS suggests that the provision allows for a one-parent SIJS interpretation. The Nebraska court's approach to statutory interpretation in *In re Erick M.* placed plain meaning above other forms of determining legislative intent.²⁵¹ The Nebraska court does not consider legislative history or any other tool of statutory interpretation unless the text's meaning is unambiguous on its face.²⁵² By default, it looked to legislative history by proposing a "reasonable interpretation" to "or" in the phrase "reunification with 1 *or* both of the immigrant's parents is not viable" and concluded that a court should evaluate the viability of reunification with both parents unless viability of reunification with one parent is impossible, at which point a court could look to just one parent.²⁵³ However, the

245. See *supra* Part II (showing an analytical pattern between the three cases).

246. See *In re Erick M.*, 820 N.W.2d at 644; *H.S.P.*, 87 A.3d at 266; *In re Marcelina M.-G.*, 973 N.Y.S. 2d 714, 722 (N.Y. App. Div. 2013).

247. See *In re Erick M.*, 820 N.W.2d at 644.

248. See *In re Marcelina M.-G.*, 973 N.Y.S.2d at 722.

249. See *In re Erick M.*, 820 N.W.2d at 647.

250. See *H.S.P.*, 87 A.3d at 268.

251. See *In re Erick M.*, 820 N.W.2d at 644.

252. *Id.*

253. *Id.*

court considered such a reinterpretation as sufficiently ambiguous to warrant consultation of the legislative history.²⁵⁴ Yet, it is difficult to imagine that Congress, despite contemplating a multitude of scenarios that could occur to abused, neglected, and abandoned children, chose to characterize its instructions of these scenarios in only two ways. Though a court can conceivably introduce ambiguity to the text, it does not follow that the text is ambiguous on its face. Given that social context strongly influences a word's meaning, it would be difficult to find a phrase or sentence that was not susceptible to more than one meaning.²⁵⁵

The court in *In re Erick M.* also did not purely rely on the text for its interpretation, but looked at what administrative appeals decisions set forth.²⁵⁶ While evaluating the AAO decisions, however, the *In re Erick M.* court failed to analyze whether the decision looked at both parents' abuse, neglect, or abandonment—instead of one parent's—was necessary to the holding for every case where it was challenged.²⁵⁷ Even the approach used in *In re Erick M.* is not completely persuasive in indicating the phrase's plain meaning because the AAO also heard cases where it evaluated only one of the parent's non-viability for reunification.²⁵⁸

New York's interpretation better captures the plain meaning than does Nebraska's. It is clearer that the use of the word "or" creates a disjunction, and this has always come to plainly mean that there are two requirements that are independently sufficient to satisfy a particular element or provision.²⁵⁹ Moreover, many thought that changing the SIJS provisions in 2008 would clarify the statute's meaning, particularly that the meaning of "one or both" would overwhelmingly convey the idea that one-parent SIJS cases were eligible.²⁶⁰ The proposed USCIS guidelines interpreting the meaning

254. See *supra* Part II.B.

255. See *Plain Meaning*, *Black's Law Dictionary* (10th ed. 2014), available at Westlaw BLACKS.

256. See *In re Erick M.*, 820 N.W.2d at 646.

257. 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. 64, 84 (2013).

258. Johnson & Stewart, *supra* note 2.

259. *Id.*

260. See generally *In re D.A.M.*, 2012 WL 6097225, at *3 (Minn. Ct. App. 2012); *In re Mario S.*, 954 N.Y.S.2d 843, 849 (N.Y. Fam. Ct. 2012); Brief for Appellant at 8, *In re Erick M.*, 820 N.W.2d 639 (Neb. 2012) (No. S-11-000919), 2012 WL 10785183, at *8; LEE ET AL., *supra* note 2, at 3; Anderson, *supra* note 2, at 683; Jennifer Baum et al., *Most in Need but Least Served: Legal and Practical Barriers to Special Immigrant*

of “1 or both” also indicate that one-parent SIJS applications are allowed.²⁶¹ Even the New Jersey court in *H.S.P.* admitted that many commentators and courts interpreted the provision that way, while Nebraska was alone in interpreting otherwise.²⁶² Although none of these are persuasive on their own right, the existence of documents from advocates, government, the ABA,²⁶³ and courts, even before *In re Erick M.*, strongly suggests that the one-parent SIJS interpretation better captures what the words would ordinarily mean.²⁶⁴

The interpretation introduced in *In re Erick M.* may have also impermissibly minimized the meaningful variation derived from the shift in the language. As previously noted, the 2008 provisions varied significantly from the original 1997 language: “eligible for long-term foster care”²⁶⁵ became “reunification with 1 or both of the immigrant’s parents is not available due to abuse, neglect, abandonment, or a similar basis found under State law.”²⁶⁶ The court used the baseline that federal regulation has always interpreted the 1997 provision to mean that “family reunification was no longer viable” and was reluctant to depart from this interpretation unless courts and administrative decisions ruled otherwise.²⁶⁷ However, the court does not offer a reason to be so cautious when the language between the two provisions is so different. The Nebraska argument is that the inclusion of one is to allow applicants who have one parent but not the other.

However, the Nebraska court did not sufficiently distinguish its interpretation from two parent SIJS cases: the court could find that one parent abandoned the child and that the other parent also abused, neglected, or abandoned the child. Effectively, the court’s interpretation that SIJS is unavailable to children who have a “safe parent” with whom they can reunify seems to nullify the 2008 amendment because it ultimately interpreted the “one or both” language as a variation of a two parent SIJS evaluation.²⁶⁸ That would

Juvenile Status for Federally Detained Minors, 50 FAM. CT. REV. 621, 622 (2012); Johnson & Stewart, *supra* note 2.

261. Special Immigrant Juvenile Petitions, 76 Fed. Reg. 54,978, 54,982, 54,985 (proposed Sept. 6, 2011) (to be codified at 8 C.F.R. pts. 204, 205, 245).

262. See *H.S.P. v. J.K.*, 87 A.3d 255, 266 (N.J. Super. Ct. App. Div. 2014).

263. Johnson & Stewart, *supra* note 2.

264. See *Ordinary Meaning*, *Black’s Law Dictionary* (10th ed. 2014), available at Westlaw BLACKS.

265. Appropriations Act, Pub. L. No. 105-119, § 113, 111 Stat. 2440, 2460 (1997).

266. 8 U.S.C. § 1101 (a)(27)(J)(i) (2012).

267. *In re Erick M.*, 820 N.W.2d 639, 645 (Neb. 2012).

268. Johnson & Yavar, *supra* note 257, at 84.

be contrary to the legislative intent identified in *In re Marcelina M.-G.*: that the shift from the 1997 to the 2008 language meant to move the inquiry beyond simply two-parent SIJS evaluations.²⁶⁹

Even the court in *In re Erick M.* did not rely on its textual interpretation to conclusively hold that its decision represented the statute's plain meaning.²⁷⁰ The court merely used this interpretation to consider the phrase ambiguous and open to other tools of interpretation.²⁷¹ For example, one canon of interpretation that the Nebraska court did not consider was that ambiguities in immigration statutes should be resolved in the immigrant's favor.²⁷² Ultimately, all three courts turn to legislative history to help determine the provision's actual meaning.²⁷³

The New Jersey court in *H.S.P.* used a form of interpretation that relied more heavily on legislative history.²⁷⁴ The New Jersey court evaluated competing textual interpretations and then used the legislative history to selectively invalidate statutory interpretations that contradicted what it found to be the legislative intent.²⁷⁵ The New Jersey approach places less emphasis on the text itself, but it runs the risk of mistakenly imputing the legislation's meaning from one legislator's words and comments without providing the proper context. Members of Congress vote for many reasons, and the Congressional record did not provide a direct explanation of most relevant phrase that needed to be interpreted: the "1 or both" language.²⁷⁶

In fact, the Nebraska and New Jersey courts both analyzed the legislative history of the SIJS provisions that, compounded with their interpretation of legislative intent, painted an inaccurate picture of what was actually happening to children at that time.²⁷⁷ From their

269. See *supra* Part II. B.

270. See *In re Erick M.*, 820 N.W.2d at 644.

271. See Johnson & Yavar, *supra* note 257, at 82.

272. See *supra* Part II. B.

273. See *In re Erick M.*, 820 N.W.2d at 645; *H.S.P. v. J.K.*, 87 A.3d 255, 267 (N.J. Super. Ct. App. Div. 2014); *In re Marcelina M.-G.*, 973 N.Y.S.2d 714, 722 (N.Y. App. Div. 2013).

274. The idea behind New Jersey's approach is that out of multiple, or in this case two, interpretations the court relies on legislative history to eliminate the incorrect ones. See *H.S.P.*, 87 A.3d at 268.

275. *Id.*

276. See IMMIGRANT LEGAL RES. CTR., *supra* note 12, at 3-5; see also *H.S.P.*, 87 A.3d at 267.

277. See Anderson, *supra* note 2, at 672 ("In 2011, out of 1,062,040 immigrants obtaining legal permanent residence status, only 1,609 obtained legal status through SIJS."); Jackson, *supra* note 49, at 22 (noting that in 2010, 1492 gained lawful

analysis, the 1990 SIJS provisions were too broad and the 1997 provisions intended to curtail the relevant language, limit the type of beneficiaries, and avoid abuses in the law.²⁷⁸ Both courts also proposed that their interpretation of legislative intent supported their interpretation of the text itself.²⁷⁹ Senator Domenici's concerns²⁸⁰ about the 1990 SIJS provision and the potential for abuse, however, did not significantly reflect reality. The actual pool of successful SIJS beneficiaries remained low in comparison to all immigrants under the age of twenty-one.²⁸¹ Best estimates by immigration attorneys suggest that roughly several hundred acquired SIJS.²⁸² The numbers were generally not significant in a way that some feared they would be.²⁸³

Although Nebraska and New Jersey correctly point out that some members of Congress were concerned about possible fraud and manipulation of the system, it is not clear that the addition of the "abuse, neglect, or abandonment" language quelled these concerns. The language was equally likely intended to clarify the law's true beneficiaries. However, clarifying that the law's beneficiary is a person who suffered abuse, neglect, or abandonment does not categorically rule out one-parent SIJS cases because a court order would still need to find that he or she in fact suffered from abuse, neglect, and abandonment. It is also an unlikely interpretation that the 1997 language of abuse, neglect, or abandonment was a restrictive addition. At the time, the general understanding was that the beneficiaries of SIJS were primarily children who suffered from abuse, neglect, or abandonment and the statute sought to protect children in need.²⁸⁴ The addition of the "abuse, neglect, and abandonment" language more accurately reflects the evolving understanding of advocates, courts, and government regarding

permanent residence through SIJS compared to the 1,042,625 people that acquired lawful permanent residence); *In re Marcelina M.-G.*, 973 N.Y.S.2d at 723.

278. See *In re Erick M.*, 820 N.W.2d 639, 645 (Neb. 2012); *H.S.P.*, 87 A.3d at 266–68.

279. See *In re Erick M.*, 820 N.W.2d at 645 (considering their interpretation a "reasonable interpretation," and holding in favor of the *In re Erick M.* interpretation and its "fully analyzed" interpretation of the statute).

280. See *Yeboah v. U.S. Dep't of Justice*, 345 F.3d 216, 221 (3d Cir. 2003).

281. See *Anderson*, *supra* note 2, at 672 ("In 2011, out of 1,062,040 immigrants obtaining legal permanent residence status, only 1,609 obtained legal status through SIJS."); *Jackson*, *supra* note 49, at 22 (noting that in 2010, 1492 gained lawful permanent residence through SIJS compared to the 1,042,625 people that acquired lawful permanent residence); *In re Marcelina M.-G.*, 973 N.Y.S.2d at 723.

282. *Porter*, *supra* note 48, at 444.

283. *Id.*

284. *Id.* at 448.

immigrant children, their identities, and what that implies for immigrant children's rights, liberties, and needs.²⁸⁵ Instead, the likely and actual candidate for effectuating the intention of avoiding abuse in SIJS, as New York correctly points out, was the addition of the consent provision.²⁸⁶ Furthermore, given the courts' limited role in making predicate orders and the federal government's clearly accepted power over immigration, imputing the role of limiting and identifying fraud and abuse seems more logically located in the federal government's hands.²⁸⁷ Immigration authorities more appropriately employ the type of gatekeeping analysis used in *In re Erick M.* and *H.S.P.* when entertaining concerns over immigration fraud or abuse.²⁸⁸

In *H.S.P.* the court acknowledged that the legislative history analysis was not compelling on its own, and included more direct language from the congressional record during the TVPRA's passage.²⁸⁹ One problem with legislative history is that it may impute meaning from legislators' past statements that may no longer reflect the present legislators' intent.²⁹⁰ Eleven years passed between 1997 and 2008. The more recent statements made in the Congressional record may better reflect the legislators' intent instead.²⁹¹

When evaluating the congressional record for the TVPRA, the gist of the argument in *H.SP.* was: (1) Senator Feinstein claimed that the act did not expand the children's current immigration rights, and (2) other legislators' goal was to modify provisions that otherwise allow for increased illegal immigration and immigration fraud.²⁹² The first issue with the court's analysis of 2008 congressional records is that it takes Senator Feinstein's comment out of context. Right before the

285. See *infra* Part III.C.

286. See Memorandum from Donald Neufeld, Acting Assoc. Dir. Domestic Operations, U.S. Citizenship and Immigr. Servs., Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions 3 (Mar. 24, 2009), available at http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/TVPRA_SIJ.pdf; see also Ooi, *supra* note 14, at 890.

287. Johnson & Stewart, *supra* note 2.

288. *Id.*

289. *H.S.P. v. J.K.*, 87 A.3d 255, 267–68 (N.J. Super. Ct. App. Div. 2014).

290. Compare *Yeboah v. U.S. Dep't of Justice*, 345 F.3d 216, 221 (3d Cir. 2003) (citing Senator Pete Domenici's concerns over immigration fraud), with 147 CONG. REC. S101-02 (daily ed. Jan. 22, 2001) (statement of Sen. Dianne Feinstein) (emphasizing improving access to SIJS and current forms of relief).

291. See 147 CONG. REC. S101-02 (daily ed. Jan. 22, 2001) (statement of Sen. Dianne Feinstein).

292. See *supra* Part II.C.

bill's passage, Senator Feinstein took the time to thank her fellow legislators and highlight a part of the bill that was important to her.²⁹³ During that speech, she specifically highlighted the part of the bill that provided for improvements in the procedural treatment of unaccompanied immigrant children in detention.²⁹⁴ That part of the bill did not in fact expand on any immigration rights of children. If viewed out of context, Senator Feinstein's statement contradicts the actual bill because it "expands on the immigration provisions of [the Traffic Victims Protection Act 2000]."²⁹⁵ The Senator spoke directly to the legislators' intent as to the SIJS provisions when she introduced the bill in 2007.²⁹⁶ One purpose, which the accompanying text of the Unaccompanied Alien Child Protection Act explained, was to streamline SIJS.²⁹⁷ As the New Jersey court correctly pointed out, other legislators made sure to modify provisions that would encourage illegal immigration and immigration fraud.²⁹⁸ Congress was familiar with the language in the Non-Reunification Finding under the Unaccompanied Alien Child Protection Act,²⁹⁹ and it remained unchanged upon passage, suggesting that Congress had acquiesced to such language.

B. Addressing Gatekeeping Concerns Related to the Expansion of Special Immigrant Juvenile Status to Include One-Parent SIJS

Even after reviewing the text and legislative history, external concerns still bothered some courts. These concerns act as a gloss over how the courts interpreted the provisions or their application.³⁰⁰ One concern about the expansion of SIJS is the potential increase of fraudulent or dubious claims in front of the state courts.³⁰¹ However, the final decision on an applicant's immigration status still rests with

293. See 154 CONG. REC. S10886-01 (daily ed. Dec. 10, 2008) (statement of Sen. Dianne Feinstein).

294. *Id.*

295. See 153 CONG. REC. H14098-01 (daily ed. Dec. 4, 2007) (statement of Rep. Lamar Smith). For example, the TVPRA added waivers to grounds of inadmissibility for special immigrant juveniles seeking legal residence. See LEE ET AL., *supra* note 2, at 6.

296. 153 CONG. REC. S3001-01 (daily ed. Mar. 12, 2007) (statement of Sen. Dianne Feinstein).

297. *Id.*

298. *H.S.P. v. J.K.*, 87 A.3d 255, 267 (N.J. Super. Ct. App. Div. 2014).

299. See *supra* Part I.D.

300. See *supra* notes 215–35 and accompanying text; *H.S.P.*, 87 A.3d at 268 (expressing concern over laws becoming a "gateway" to more migration).

301. See *H.S.P.*, 87 A.3d at 267.

the federal government.³⁰² The concern with dubious claims also does not apply uniquely to one-parent SIJS cases.³⁰³ Instead, any case that comes to the state courts could potentially face the same problems of a lack of evidence, difficulty locating or serving particular parties, and a willingness by even opposing parties to default judgment in the custody claim.³⁰⁴ There is little reason for state courts to concern themselves with the following issues unless they view their roles in the process as gatekeepers of the United States borders, instead of as experts in the applicant child's welfare and permanency.³⁰⁵

There are some concerns that such an expansive definition would necessarily result in an increase in migration to the United States.³⁰⁶ The enactment of SIJS provisions in 1990 similarly did not cause an increase in migration.³⁰⁷ Similarly, an increase in forms of relief for Soviet refugees in the United States did not increase migration.³⁰⁸ Specifically for SIJS, it is unlikely that a child would intentionally suffer abuse, neglect, and abandonment just to acquire eligibility for status.³⁰⁹ Even if immigration laws themselves caused an increase in immigration, state courts have not traditionally been the enforcers of the United States borders; their role in SIJS is to focus on implications concerning welfare for the applicant requesting SIJS findings.³¹⁰

A review of the text's plain and ordinary meaning suggests that one-parent SIJS is the more ordinary and plain interpretation of the 2008 SIJS provision. Furthermore, a review of the current legislative history strongly suggests that concerned legislators did not object to the expansion of SIJS provisions. Moreover, interpreting the meaning of "1 or both" to include one-parent SIJS cases expands the substantive law in relation to what was allowed in the past, but it does not confer a "free pass" into the United States, as the singular finding is balanced by other considerations.

302. See Johnson & Stewart, *supra* note 2.

303. See Carr, *supra* note 42, at 157 (speaking generally about immigration law).

304. *Id.* at 150, 157.

305. See Johnson & Stewart, *supra* note 2 (noting that the gateway role belongs to the immigration agencies).

306. Although it is difficult to divine what the future may hold for an expanded definition, a comparative look at Canadian policy suggests that a more open policy on its own does not affect the level of migration into the country. See Carr, *supra* note 42, at 149.

307. See *supra* Part I.E.

308. Ooi, *supra* note 14, at 906.

309. *Id.*

310. The court's role is to make predicate findings. See *In re Marcelina M.-G.*, 973 N.Y.S.2d 714, 719, 723 (N.Y. App. Div. 2013).

C. One-Parent SIJS Is the Best Answer for Unaccompanied Immigrant Children

In determining the best approach to adjudicating cases that necessarily affect children's futures, state courts have taken an important position that a strictly textual reading of the TVPRA would undermine.³¹¹ Even if the text or the legislative history is insufficiently persuasive, the one-parent SIJS reading provides the best interpretation of the provision.

The one-parent SIJS interpretation of the "1 or both" language is consistent with the meaning of TVPRA in light of the circumstances surrounding its passage, regarding the development of the immigration system built around unaccompanied immigrant children.³¹² It is also consistent with the plain meaning of the phrase "1 or both."³¹³ By limiting the interpretation of the TVPRA language, courts undermine the effect of a movement toward a standard of policy, construction of identity, and treatment of children that is currently present in the unaccompanied immigrant children system.

A question for the court necessarily includes what its proper role is in making these interpretations. Principles of statutory interpretation are persuasive because they give deference to the text on which the majority voted through legislative action. Yet, the courts should also consider their important function as a check against the limitations of majoritarian rule.³¹⁴ Unaccompanied immigrant children are unable to participate in the political process and cannot be part of the majority at all.³¹⁵ They are apolitical and citizens with limited rights.³¹⁶ Due to their identity as immigrants and as children. Their

311. *See id.* at 723 (stating concern over children's welfare and not just immigration status determinations, the court noted that "[t]he expansion in the definition of SIJS to allow a juvenile court to consider the non-viability of family reunification with just one parent, rather than both, permits 'more vulnerable and mistreated children to qualify for this form of relief'").

312. *See supra* Part I.D.

313. *See supra* Part I.D.

314. The Supreme Court has considered such a question when considering protections for racial minorities. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

315. *See Joyce Koo Dalrymple, Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied Minors*, 26 B.C. THIRD WORLD L.J. 131, 137 (2006).

316. M. Aryah Somers et al., *Constructions of Childhood and Unaccompanied Children in the Immigration System in the United States*, 14 U.C. DAVIS J. JUV. L. & POL'Y 311, 328 (2010).

marginalization from the political process creates a particular vulnerability that courts should weigh against other concerns.³¹⁷

One way that courts have made effective progress, without overreaching their role in the tripartite governing system, is to consider different underlying constructions that influence legislative and agency action.³¹⁸ Such a consideration is fitting for the judicial branch. Relative to the other branches, the courts tend to focus on analyzing the logic, reasoning, and the underlying principles and paradigms that influence the meaning of legislation.³¹⁹ The evolution of SIJS provisions and the general immigrant child system reflect an evolving construction of children's identities.³²⁰ Under the INS, the framework governing unaccompanied immigrant children's treatment reflects the threatening construction of children's identity.³²¹ One characterization of the INS framework explains that unaccompanied immigrant children are generally dangerous threats to scarce resources and are disposable because their rights and dignity as people can be violated with little recourse.³²²

The Stipulated Flores Settlement Agreement reflected a different paradigm.³²³ In one way, the agreement reflected the dependency construction of the child's identity.³²⁴ Provisions in the agreement suggest that children are persons in need of minimum services and require the establishment of a system solely dedicated to meet such needs.³²⁵ In another way, the Agreement also introduced the

317. See Ooi, *supra* note 14, at 907.

318. See Somers et al., *supra* note 316, at 331.

319. Supreme Court justices have expressed since the beginning of the United States that the task of judges is to say what the law is and interpret them. See, e.g., *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

320. See Somers et al., *supra* note 316, at 326–28; see also Jacqueline Bhabha, *Demography and Rights: Women, Children and Access to Asylum*, 16 INT'L J. REFUGEE L. 227 (2004).

321. "This construction presents childhood as a site that is threatening, burdensome, or disposable." Somers et al., *supra* note 316, at 330.

322. See *id.* at 339; see also Thronson, *supra* note 55, at 1013.

323. See *generally* Stipulated Settlement Agreement, *Flores v. Reno*, No. CV85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997), available at https://www.aclu.org/files/pdfs/immigrants/flores_v_meese_agreement.pdf; see also Elizabeth M. Frankel, *Detention and Deportation with Inadequate Due Process: The Devastating Consequences of Juvenile Involvement with Law Enforcement for Immigrant Youth*, 3 DUKE F. FOR L. & SOC. CHANGE 63, 73 (2011).

324. "The dependency construction presents childhood as a site for having the needs of the child met while also limiting the agency of the child." Somers et al., *supra* note 316, at 326.

325. *Id.* at 339–40.

autonomous and developmental construction.³²⁶ The Agreement provided for acculturation and adaptation services to allow children to develop independently and responsibly.³²⁷ Additionally, it included assessment programs to evaluate the child's personal goals, strengths, and weaknesses, while also recognizing the child's right to privacy and religion.³²⁸ The continued development of the shelter system under the framework of the Stipulated Flores Settlement Agreement has the potential to promote even more possibilities for respecting a child's autonomy and agency.³²⁹ The Stipulated Flores Settlement Agreement introduced a perspective of the child's identity that better balances the concern that children are developing persons, who have a limited ability to assert their rights.³³⁰ SIJS is equally groundbreaking and is characterized by some as "a radical break from the dominant modes of thinking about children in immigration law."³³¹

One perspective that *In re Erick M.* and *H.S.P.* did not consider is the possibility that the adoption of the "1 or both" language could be equally influenced by the paradigm shift from a threatening construction to an autonomous construction of the child's identity. In some ways, the New Jersey and Nebraska courts' focus on the possibility of fraud and abuse³³² in the system attempts a revival of the threatening construction—the two courts construct every new opportunity or chance given to persons as an opportunity for them to undermine the system. Otherwise, concerns over the parents' procedural rights seem to be an important but secondary concern to a system that the legislators sanctioned and built to center on the child.

Through the TVPRA, Congress codified the best interest determination and placed children in the least restrictive setting, which was the framework established by the Stipulated Flores Settlement Agreement.³³³ The question is open as to whether or not it

326. "The developmental construction presents childhood as a progression of cognitive and psychosocial development towards adulthood" while "[t]he autonomous construction presents childhood as a space of autonomy and agency." *Id.* at 325, 328.

327. *Id.* at 340.

328. *Id.*

329. In one of the shelters, the children are able to elect a representative that could convey concerns and grievances to the shelter administrators. *Id.* at 349.

330. See Thronson, *supra* note 55, at 1002.

331. Laura P. Wexler, Note, *Street Children and U.S. Immigration Law: What Should Be Done?*, 41 CORNELL INT'L L.J. 545, 574 (2008).

332. See *supra* Parts II.A, II.C.

333. Somers et al., *supra* note 316, at 356–57; Wendy Young & Megan McKenna, *The Measure of a Society: The Treatment of Unaccompanied Refugee and*

also means that Congress is moving towards accepting the autonomous and developmental construction underlying the Stipulated Flores Settlement Agreement. The Unaccompanied Alien Child Protection Act combines both systems together under one banner.³³⁴ It is an opportunity for courts to consider such a question. By choosing to further the autonomous construction of children, courts simply are choosing to give children greater dignity as human beings. Most courts incorporate this approach in their analysis and treatment of the “1 or both” language, which results in a conclusion that is more consistent with the developing unaccompanied immigrant child system.³³⁵

State courts are also in a unique position as experts in family law and their understanding of the meaning of the SIJS provisions, as is recognized by the SIJS statute.³³⁶ Although SIJS is governed by federal legislation, the law’s provisions clearly indicate a space for the role of state courts based on their expertise in the realm of family

Immigrant Children in the United States, 45 HARV. C.R.-C.L. L. REV. 247, 253 (2010) (“[The] TVPRA states that an unaccompanied child in HHS custody ‘shall be promptly placed in the least restrictive setting’”).

334. Senator Dianne Feinstein’s first introduction of the Act carries many of the ideas that influenced the Stipulated Flores Settlement Agreement and the Special Immigrant Juvenile Status provisions:

Unaccompanied children are among the most vulnerable of the immigrant population; many have entered the country under traumatic circumstances. They are unable to protect themselves adequately from danger. Because of their youth and the fact that they are alone, they are often subject to abuse and exploitation Because of their age and inexperience, unaccompanied alien children are not able to articulate their fears, their views, or testify to their needs as accurately as adults can. Despite these facts, the U.S. immigration laws and policies have been developed and implemented without careful attention to their effect on children, particularly on unaccompanied alien children.

146 CONG. REC. S9381-05 (daily ed. Sept. 27, 2000) (statement of Sen. Dianne Feinstein). The Senator continues:

The Flores agreement requires that the INS treat minors with dignity, respect, and special concern for their particular vulnerability. It also requires the INS to place each detained minor in the least restrictive setting appropriate to the child’s age and special needs. . . . As a nation that holds our democratic ideals and constitutional rights paramount, how then can we continue to avert our attention from repeated violations of some of the most basic human rights against children who have no voice in the immigration system? We should be outraged that children who come to the U.S. alone, many against their will, are subjected to such inhumane, excessive conditions.

Id.

335. See, e.g. *In re Marisol N.H.*, 979 N.Y.S.2d 643, 647 (N.Y. App. Div. 2014); *In re Marcelina M.-G.*, 973 N.Y.S.2d 714, 723 (N.Y. App. Div. 2013).

336. See Thronson, *supra* note 55, at 1004.

law.³³⁷ SIJS is unique in that it is a hybrid scheme, wherein the collaboration between federal government and state government allows both to exercise their expertise.³³⁸ The traditional notion that federalism entails a division of labor has persisted in the characterization of family law and Congressional deference of child welfare to states.³³⁹ Such a division of roles has resulted in the federal system lagging behind state courts in the substantive and procedural developments in family law.³⁴⁰ Particularly, immigration law that has a prominent effect on the child's life and child's relationship with her family tends to lack the consideration of the "best interests of the child."³⁴¹ Immigration courts, in general, are not at all specialized or expert enough to effectively use a child-centric approach.³⁴² The treatment of unaccompanied immigrant children in the immigration system is a notable exception that has been borne from the work of advocates who are in fact familiar with family law.³⁴³

Given Congress's history of deference to states in matters of child welfare,³⁴⁴ courts should consider that Congress's silence in the legislative history of SIJS does not necessarily limit the way that courts may also exercise their expertise relative to family law. The court's expertise in developing the standard of the "best interests of the child" in cases involving children is one of the reasons why courts defer SIJS findings to state courts.³⁴⁵ Child custody laws in all states have a "best interests of the child" standard, and such an approach has been in development since the twentieth century.³⁴⁶ Courts have considered the "best interests of the child" when making determinations in abuse and neglect proceedings, and they assign guardians ad litem to the child to protect the child's best interests.³⁴⁷ No single standard for the "best interests of the child" can be

337. 8 U.S.C. § 1101(a)(27)(J) (2012) clearly indicates that court findings are required for determinations of abuse, neglect, and abandonment, but not for other inquiries such as consent and return to the country of origin. *See also* Porter, *supra* note 48, at 447–49.

338. *See* Thronson, *supra* note 55, at 1004–05.

339. *See id.* at 1004.

340. *See* Porter, *supra* note 48, at 453.

341. *See* Thronson, *supra* note 55, at 1003.

342. *See id.* at 1005.

343. *See supra* Part I.A.

344. Nothing in the Constitution gives the federal government explicit power over matters of child welfare, and it may be a power strongly reserved to the states. *See* Porter, *supra* note 48, at 454.

345. *See* Johnson & Stewart, *supra* note 2.

346. *See* Carr, *supra* note 42, at 124–25; *see also* Dalrymple, *supra* note 315, at 142.

347. *See* Carr, *supra* note 42, at 125–26.

determined among the fifty states, but it is clear that it at least prioritizes the child's safety, permanency, and wellbeing.³⁴⁸

SIJS evaluations do not adequately consider the "best interests of the child." Although the law provides for a "[determination] in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence,"³⁴⁹ the best interest finding required by the SIJS provision does not include all the factors that a court normally considers when evaluating the "best interests of the child."³⁵⁰ The "best interests" finding is limited primarily because it is a negative consideration.³⁵¹ The best interest finding is specifically to determine when it is not in the child's best interest to return to the country of origin.³⁵² Conversely, in custody determinations, courts have more discretion to make decisions about a child based on the "best interests of the child" standard.³⁵³ In the custody context, a best interest consideration encompasses far more variables than what the limited SIJS analysis allows. In considering a child's best interest, a court may look at a variety of factors, and the decision may be more complex than a binary determination of whether a child gets to stay in one place over another.³⁵⁴

A concern for the child's safety and well-being portrays the child as dependent on third party intervention and support, which echoes the dependency construction.³⁵⁵ Considering the safety and well-being of the child in immigration matters would be a modest shift that is already consistent with the court's concerns in non-immigration proceedings that relate to the welfare of children.³⁵⁶ On the other

348. *See id.* at 126–27.

349. 8 U.S.C. § 1101(a)(27)(J)(ii) (2012).

350. Other considerations include the well-being, safety, and permanence of the child while the particular provision in SIJS is limited to such inquiries related to a child's return home. *See Carr, supra* note 42, at 127.

351. *Compare* Comm. on the Rights of the Child, Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, U.N. Doc. CRC/GC/2005/6 (Sept. 1, 2005) [hereinafter U.N. Comm. on the Rights of the Child] (employing the best interests of the child standard as a positive obligation at all stages of interaction with the child), *with* 8 U.S.C. § 1101(a)(27)(J)(ii) (employing the best interests of the child standard only when considering whether the child is to be returned to his or her country of origin).

352. *See* 8 U.S.C. § 1101(a)(27)(J)(ii).

353. *See Carr, supra* note 42, at 125–26.

354. *See* Convention on the Rights of the Child art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3.

355. *See Somers et al., supra* note 316, at 326–27.

356. *See Carr, supra* note 42, at 125–26.

hand, limiting a child, who has suffered abuse, neglect, and abandonment at the hands of one parent from reuniting with another parent, with whom the child may have a chance to develop a permanent and safe relationship, is an arbitrary foreclosure of the child's best interest. It is also an especially harsh line to draw in making determinations affecting a child's life, especially given the apparent reason and context of the child's migration to the United States.

Additionally, the lack of uniformity among the states regarding the definition of "1 or both" unequally grants necessary relief to some children who have experienced abuse, neglect, and abandonment but not to others.³⁵⁷ The number of children that receive the special immigrant status of SIJS has been historically low,³⁵⁸ partly due to the split in state definitions. A notable example is the different age-out and jurisdictional requirements of states for dependency on juvenile courts.³⁵⁹ Another split in state definitions would present further procedural hurdles that deny relief to children exposed to additional exploitation and instability.³⁶⁰ Moreover, such a concern also reflects the intent of Congress to respect federalism in the same way it defers to courts for family law determinations.³⁶¹ Because the federal government is not an expert in the child's permanence and stability, courts must also respect that the federal nature of immigration law requires some uniformity in the outcome for all children, regardless of forum.³⁶²

Most courts correctly exercise their role and function in the immigration system when contemplating and allowing one-parent SIJS cases.³⁶³ It seems only human to consider the consequences of abuse and neglect experienced by SIJS applicants if they were to be denied special immigrant status even when the SIJS applicant cannot viably reunify with at least one parent.³⁶⁴ One of the more recent appellate division cases that affirmed the interpretation favoring one-parent SIJS reasoned that "[a]lone, without either parent or their maternal grandmother, the children would face the prospect of having

357. See Johnson & Stewart, *supra* note 2.

358. See Anderson, *supra* note 2, at 672; see also Jackson, *supra* note 49, at 22.

359. See Johnson & Yavar, *supra* note 257, at 77.

360. See Johnson & Stewart, *supra* note 2.

361. See Johnson & Yavar, *supra* note 257, at 76.

362. See *id.*

363. See *In re Marcelina M.-G.*, 973 N.Y.S.2d 714, 723 (N.Y. App. Div. 2013).

364. See *In re Marisol N.H.*, 979 N.Y.S.2d 643, 647 (N.Y. App. Div. 2014).

to protect themselves from violent gang members.”³⁶⁵ Such a concern reflects the court’s careful consideration of children’s lives, and not just a blanket argument used to open the borders for more immigration. In another case, the court underscored the goal of relief from parental abuse, neglect, or abandonment as the purpose of SIJS, and also cautioned that such a law may expose potential SIJS applicants to other forms of violence while they journey to the United States.³⁶⁶ More importantly, such a concern better reflects the trend in domestic family law to incorporate the “best interests of the child” and to prioritize the safety, well-being, and permanency of children.³⁶⁷

In examining SIJS and the legal framework governing unaccompanied immigrant children as a whole, courts also have the opportunity to consider the humanitarian function that SIJS serves.³⁶⁸ The “best interests of the child” standard was adopted from family law and was expanded upon by international law for largely humanitarian reasons.³⁶⁹ The idea that SIJS encompasses such concerns is also fairly modest. SIJS already waives most other exclusionary provisions that would generally apply in other parts of immigration law “for humanitarian purposes, family unity, or when it is otherwise in the public interest.”³⁷⁰ Furthermore, in the twenty-first century, children are recognized global citizens with explicitly defined rights and protections.³⁷¹ We should increasingly look at the phenomenon of child migration as a global responsibility.

The best interests standard is a general rubric for applying and evaluating a child’s well-being.³⁷² It is not only the overarching doctrine of U.S. family law, but also of international human rights

365. *See id.*; *see also In re Marcelina M.-G.*, 973 N.Y.S.2d at 723 (“The expansion in the definition of SIJS to allow a juvenile court to consider the nonviability of family reunification with just one parent, rather than both, permits ‘more vulnerable and mistreated children to qualify for this form of legal relief.’”) (citation omitted).

366. *See In re Amandeep S.*, No. G-1310/14, 993 N.Y.S.2d 643 (N.Y. Fam. Ct. June 19, 2014). No evidence, however, supports such a causal link between the relaxation of SIJS and the increased risk to unaccompanied immigrant children coming to the United States.

367. *See Carr*, *supra* note 42, at 125–26.

368. *See Adelson*, *supra* note 17, at 83.

369. *See Convention on the Rights of the Child*, *supra* note 354 (“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”).

370. Adelson, *supra* note 17, at 83 (citing 8 U.S.C. § 1255(h) (2006)).

371. *See Report of the Working Group on Lessons of International Law, Norms, and Practice*, 6 NEV. L.J. 656, 657–58 (2006).

372. Porter, *supra* note 48, at 457–58.

norms.³⁷³ The most relevant law relating to the welfare of children is the Convention on the Rights of the Child (CRC).³⁷⁴ The United States has stalled ratification of the CRC, and there are proponents and deterrents of such ratification.³⁷⁵ However, courts are in a unique position as political bodies in carrying out SIJS, which reflects a compromise between ratification and CRC principles,³⁷⁶ as well as representing the welfare of the children that cannot participate in the political process that is required for ratification.³⁷⁷ Although the United States has not ratified the CRC, signing the treaty obligates it to refrain from enacting legislation that would undermine the CRC's objective.³⁷⁸ Particularly, Article 3 of the CRC provides that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."³⁷⁹ The CRC and the CRC Committee directly provide guidance for the treatment of unaccompanied and separated children.³⁸⁰ The guidance heavily reflects the concepts of rights and dignity in the Stipulated Flores Settlement Agreement and the focus on family reunification, which one-parent SIJS embodies.³⁸¹

CONCLUSION

Courts should adopt the one-parent SIJS interpretation. Congress enacted SIJS in 1990 to give relief to child migrants who suffered from abuse, neglect, and abandonment.³⁸² The numbers of children who are migrating to the United States recently have increased unrelated to developments in immigration law.³⁸³ Such a development highlights the importance of increasing access to rights and legal relief, such as SIJS.³⁸⁴ After enactment of the TVPRA in

373. Dalrymple, *supra* note 315, at 142.

374. Convention on the Rights of the Child, *supra* note 354.

375. Wexler, *supra* note 331, at 565.

376. *See id.* at 574.

377. As a result, children are in need of state protection. *See* Dalrymple, *supra* note 315, at 149.

378. *See* Wexler, *supra* note 331, at 565.

379. Convention on the Rights of the Child, *supra* note 354; *see also* Wexler, *supra* note 331, at 566.

380. Convention on the Rights of the Child, *supra* note 354; U.N. Comm. on the Rights of the Child, *supra* note 351.

381. *See* Convention on the Rights of the Child, *supra* note 354; U.N. Comm. on the Rights of the Child, *supra* note 351.

382. *See supra* Part I.A.

383. *See supra* Part I.E.

384. *See supra* Part I.E.

2008, the common understanding of the improved language was that one-parent SIJS cases would qualify.³⁸⁵ However, the introduction of decisions by New Jersey and Nebraska courts complicated this common understanding.³⁸⁶ Yet, the text of the statute clearly supports the idea that children should be able to reunify with one of their parents if they have experienced abuse, neglect, or abandonment in the hands of the other.³⁸⁷

The statute's legislative history supports the idea behind the one-parent SIJS interpretation, and reflects a larger paradigm that gives children more dignity, respect, personhood, and human rights.³⁸⁸ Allowing the one-parent SIJS cases to qualify not only has great implications in terms of giving more children access to rights that they deserve, it also helps highlight the importance and respect that the United States has so far given to the international human rights system.³⁸⁹ Family law and juvenile court judges are not gatekeepers of our country's borders, but are individuals concerned with the child's permanence and welfare.

385. *See supra* Part II.B.

386. *See supra* Part II.A., II.C.

387. *See supra* Part III.A.

388. *See supra* Part III.C.

389. *See supra* Part III.C.