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

GREGORY E. CATANGAY*

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

Introduction .................................................................................................................41

I. The Limited Applicability of SIJS Pre-TVPRA ..................................................45

II. The TVPRA’s Impact on SIJS and Implications for Recent UACs .........................47

III. An Overview of State Laws of Abandonment and SIJS Cases .........................48

   A. California and Abandonment: A Matter of Time and Intent ..................49
   B. California’s Attempts to Widen Access to SIJS ........................................51
   C. New York and Abandonment: A Two-Statute Approach .......................54
   D. New York and SIJS: Leading the Way for One-Parent Proceedings ............54
   E. New Jersey and Abandonment: Substantive Law, Narrow Application ........56
   F. New Jersey and SIJS: Challenges to One-Parent SIJS Petitions .................58
   G. Texas’s Multi-Faceted Approach to Abandonment ....................................61

IV. Variations in State Law Prevent the Uniform Application of SIJS .......................62

   A. Legislative Barriers: Proposition 187 and SAPCR .....................................63
   B. Judicial Barriers: Erick M. and One-Parent SIJS petitions ..........................65

V. Solution: A Federal Takeover of SIJS .................................................................73

   A. Federal Preemption of Immigration Law ....................................................74
   B. Federal Programs Affecting UACs ..............................................................76
   C. Federal Laws Regulating Juvenile and Family Law ....................................79
   D. Federalizing Texas Family Code section 161.001 .....................................81

Conclusion ..................................................................................................................84
**Introduction**

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

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

---

² Jazmine Ulloa kept Maria’s last name anonymous due to her uncertain legal status in the United States. See id.
³ Id.
⁵ Ulloa, supra note 1.
⁶ Ulloa, supra note 1.
⁸ Id.; see Ulloa, supra note 1.
⁹ An “unaccompanied alien child” is a child under the age of eighteen who lacks both lawful legal status in the United States and a parent or legal guardian able to provide care and physical custody. See Homeland Security Act of 2002, P.L. 107–296, § 462(g)(2), 116 Stat. 2135, 2205 (2002); *Southwest Border Unaccompanied Alien Children*, DEP’T OF HOMELAND SEC., BUREAU OF CUSTOMS AND BORDER PROTECTION, http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children(last visited September 3, 2014). Interestingly, more UACs originated from Latin American countries such as Honduras and Guatemala, and the number of UACs from Mexico decreased. The number of UACs arriving from Honduras markedly increased in Fiscal Year 2014. See id. The number of UACs originating from Mexico in Fiscal Year 2014 actually decreased. See id.
¹⁰ *Children on the Run*, U.N. HIGH COMM’R FOR REFUGEES REG’L OFFICE FOR THE
number of UACs apprehended decreased in July 2014, the legal status of many UACs currently in the United States remains uncertain.\textsuperscript{11} Access to the courts presents a challenge to minors, especially in regards to UACs, and undocumented children who lack adult assistance in their proceedings.\textsuperscript{12} The Obama administration asserted that the William Wilberforce Trafficking Victims Protection and Reauthorization Act of 2008 (TVPRA) grants UACs an opportunity to appear at an immigration hearing.\textsuperscript{13} Assuming that the UACs are eligible for an immigration hearing, the recent wave of UACs, coupled with the estimated one million undocumented children already residing in the United States, would pose a considerable challenge to the bloated immigration courts.\textsuperscript{14}

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

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


Id.

Id.


See generally Heryka Knoespel, Special Immigrant Juvenile Status: A “Juvenile” Here is not a “Juvenile” There, 19 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 505 (2013)
effectively have the final say on SIJS eligibility, a decision that ultimately rests with the federal immigration courts. As a result of state influence, SIJS lacks the force and effect Congress intended the program to have as a federal remedy for eligible minors.

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

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

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

I. The Limited Applicability of SIJS Pre-TVPRA

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

An immigrant (i) who has been declared dependent on a juvenile court located in the United States and has been deemed eligible by that court for long term foster care, and (ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien’s best interest to be returned to the alien’s or parent’s previous country of nationality or country of last habitual residence.25

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

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

---

26 “A state’s refusal to have an alien child declared dependent on the state and eligible for long-term foster care renders that child ineligible for lawful permanent residency through special immigrant juvenile status. This contravenes the scheme of state and federal cooperation set forth in this statute and makes this federal provision of law meaningless.” Carolyn S. Salisbury, The Legality of Denying State Foster Care to Illegal Alien Children: Are Abused and Abandoned Children the First Casualties in America’s War on Immigration? 59 U. MIAMI L. REV. 633, 652 (1996).
27 Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies
abuse and tend to the needs of vulnerable minors, the restrictive nature of the 1997 amendment attributed little weight to the minors’ interests.

Second, the 1997 amendment specified that “[n]o juvenile court has jurisdiction to determine the custody status or placement of an alien in the actual or constructive custody of the Attorney General unless the Attorney General specifically consents to such jurisdiction.”

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

---

30 In re Welfare of Y.W., 1996 WL 665937, at *2 (Minn. Ct. App. Nov. 19, 1996) (“Congress granted the United States Attorney General exclusive custody over illegal immigrants.”); see Areti Georgopoulos, Beyond the Reach of Juvenile Justice: The Crisis of Unaccompanied Immigrant Children Detained by the United States, 23 LAW & INEQ. 117, 145, 151 (2005); Porter, supra note 28, at 453 (“The plain meaning of the statute appears to suggest . . . ‘[N]o juvenile court has jurisdiction to determine the custody status or placement of an alien in the actual or constructive custody of the Attorney General unless the Attorney General specifically consents to such jurisdiction.’”).
31 See Porter, supra note 28, at 448–449.
32 Id. at 452, 462 (providing an example of a SIJS applicant “aging out” of the program due to INS regulations); Emily Rose Gonzalez, Battered Immigrant Youth Take the Beat: Special Immigrant Juveniles Permitted to Age-Out of Status, 8 SEATTLE J. FOR SOC. JUST. 409, 414, 436 (2009). SIJS applicants must be under the age of twenty-one.
33 Chen, supra note 24, at 641 (arguing that the 1997 amendment made Immigration and
II. The TVPRA’s Impact on SIJS and Implications for Recent UACs

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

First, TVPRA amended 8 U.S.C. § 1101(a)(27)(J)(i) to extend beyond those eligible for foster care by including individuals “legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States.” This provision not only granted access to SIJS to minors outside the foster care system, but the phrase “or an individual or entity” included undocumented minors placed in the care of individuals outside of federal or state entities such as family members.

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

Naturalization Services the “effective gatekeeper to state court protective services.”


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


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

40 In re Welfare of Y.W., 1996 WL 665937, at *2 (Minn. Ct. App. Nov. 19, 1996) (“Congress granted the United States Attorney General exclusive custody over illegal immigrants.”); see Georgopoulos, supra note 32, at 145, 151; Porter, supra note 28, at 453 (“The plain meaning of the statute appears to suggest…’[N]o juvenile court has jurisdiction to determine the custody status or placement of an alien in the actual or constructive custody of the Attorney General unless the Attorney General specifically consents to such jurisdiction.’”).
requirement had the effect of preventing applicants from “aging out” of eligibility.41

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

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

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

41 See Jared Ryan Anderson, Yearning to Be Free: Advancing the Rights of Undocumented Children Through the Improvement of the Special Immigrant Juvenile (SIJ) Status Procedure, 16 ST. MARY’S L. REV. & SOC. JUST. 659, 687 (2014). However, state law may prevent juvenile courts from asserting jurisdiction over SIJS applicants.
42 The final act retained the language used in draft bills. See H.R. 7311, 110th Cong. § 235(d)(1)(A) (2008).
44 California law provides for child abandonment, acts that lead to a presumption of an intent to abandon, and transfer of Native American children to a Native American custodian. CAL. FAM. CODE § 7822 (2008).
47 OFFICE OF IMMIGR. STAT., DEP’T OF HOMELAND SEC., PERSONS OBTAINING LAWFUL
minors seeking SIJS status, two areas of contention threaten equal and effective application of the program. First, differences in state juvenile law, such as the definition of child abandonment, hinder the goals behind SIJS. Second, controversy exists as to whether a minor is eligible for SIJS where the minor is abused, neglected, or abandoned by only one parent, not both. In *In re Erick M.*, the Supreme Court of Nebraska held that SIJS eligibility required a finding that reunification with both parents is unviable due to abuse, neglect or abandonment. 48 States that require a showing of nonviable reunification with both parents place an additional hurdle on minors seeking SIJS eligibility. 49 This Comment will now discuss state abandonment laws—as well as state court interpretations of the unviable reunification component of SIJS—to demonstrate how vulnerable SIJS is to state law variations. 50

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

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


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

50 For SIJS purposes, the juvenile state court must find reunification with one or both of the immigrant’s parents is not viable due to abuse, neglect, abandonment, or a similar basis found under state law. 8 U.S.C. § 1101(a)(27)(J)(i) (2012).

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

Sections 7822(a)(2) and 7822(a)(3) apply to a parent or parents who intend to abandon the child and to leave the child without provision for support or contact.

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

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


54 In re Adoption of Allison C., 79 Cal. Rptr. 3d 743, 749–50 (Cal. Ct. App. 2008) (citing In re Daniel M., 20 Cal. Rptr. 2d 291, 295 (Cal. Ct. App. 1993)). In In re Adoption of Allison C., Allison’s biological father was incarcerated in 2003 and released sometime in July 2005. In re Adoption of Allison C., 79 Cal. Rptr. 3d at 745 (Cal. Ct. App. 2008). Father’s parole officer denied Allison’s father visitation but allowed phone or email contact with prior approval. Id. at 745. Allison’s father never sought this permission. Id. at 745. Allison’s stepfather involved himself in her life since 2003 and was found to be a fit and proper person to adopt her. Id. at 745. Allison’s stepfather had no criminal record and no substance abuse or domestic violence concerns, was in good health, made a good income, and provided Allison with “suitable living accommodations.” Id. at 745. The minor’s mother and stepfather brought an action under section 7822 of the California Family Code to terminate the father’s parental rights. Id. at 746. Allison’s father argued that he never intended to abandon Allison, and his failure to support Allison when he was not asked to did not constitute abandonment. Id. at 748–50. The appellate court held that substantial evidence supported the trial court’s finding of father’s abandonment for one year. Id. Father failed to communicate and bond with Allison for three years, failed to seek permission to begin phone and mail contact, and failed to support Allison. Id. at 748–50. The trial court correctly applied In re Daniel M. and section 7822 in finding that father abandoned Allison for the statutory period and that abandonment under section 7822(a)(3) did not require an intent to permanently abandon. See id. at 749–50 (citing In re Daniel M., 20 Cal. Rptr. 2d 291, 295 (Cal. Ct. App. 1993)). The court in Daniel M. held that abandonment for the statutory period was sufficient, because allowing parents to retain parental rights after abandoning the child would run contrary to the intent of the legislature and prevent adoption of the child into stable homes. In re Daniel M., 20 Cal. Rptr. 2d at 294–95. The court in Allison C. supported the trial court’s finding that preventing adoption due to father’s incarceration and failure to support or communicate would be against Allison’s
parent’s voluntary inaction after the other parent gains custody.55

B. California’s Attempts to Widen Access to SIJS

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

---

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

56 The city of Murrieta, California became the center of debate during the 2014 immigration crisis. On July 1, 2014, protestors prevented buses carrying 140 detained undocumented immigrants from entering a border patrol station downtown. Matt Hansen & Mark Boster, Protesters in Murrieta Block Detainees’ Buses in Tense Standoff, L.A. TIMES (July 2, 2014, 8:07AM), http://www.latimes.com/local/lanow/la-me-ln-immigrants-murrieta-20140701-story.html#page=1. The detainees were primarily children accompanied by their parents. Id.; see also Matt Hansen, Immigration Protesters Gather in Murrieta but Buses Go Elsewhere, L.A. TIMES (July 7, 6:27PM), http://www.latimes.com/local/lanow/la-me-ln-protesters-no-buses-murrieta-20140707-story.html (“The majority of immigrants who have been scheduled to arrive in Murrieta are women and children who have traveled from Central America.”). Murrietta’s mayor, Alan Long, urged protestors to protest the placement of the detainees in Murrieta and argued that federal government should deport illegal immigrants and “not disperse them into our local communities.” See Matt Hansen & Mark Boster, Protesters in Murrieta Block Detainees’ Buses in Tense Standoff, L.A. TIMES (July 2, 2014, 8:07AM),
minors in probate courts, in *B.F. v. Superior Court*, because restricting the SIJS finding authority to juvenile courts would adversely affect minors who would otherwise be SIJS eligible. California courts may make SIJS finding for minors in dependency proceedings under *Eddie E. v. Superior Court*. Leslie H. v. Superior Court reaffirmed the holding in *Eddie E.* in


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

58 *Eddie E. v. Superior Court*, 167 Cal. Rptr. 3d 435, 439–440 (Cal. Ct. App. 2013). In *Eddie E.* v. Superior Court, the petitioner, Eddie, was a minor declared a ward of the court. *Eddie E.*, 167 Cal. Rptr. 3d at 438. The trial court declared Eddie a ward after making a true finding on allegations he had unlawfully taken a vehicle, resisted or obstructed a public officer, and was guilty of hit and run with property damage. *Id.* During delinquency proceedings, the probation department placed Eddie in juvenile hall before transferring him
February 2014. California established a statutory basis for SIJS jurisdiction when Governor Jerry Brown approved Senate Bill 873 (SB-873) on September 27, 2014. SB 873 explicitly allows juvenile, probate, and family courts to make necessary SIJS finding, and potentially allows other trial courts to make SIJS finding.

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

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


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

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

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

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

63 Id. (citing N.Y. SOC. SERV. LAW § 384-b (2013)). Article X gives the family court exclusive original jurisdiction over proceedings under Article X involving child abuse or neglect. N.Y. FAM. CT. § 1013(a) (2013).
64 N.Y. SOC. SERV. LAW, Art. 6, § 384-b(5)(a) (2013).
65 Id. This provision applies when the social services agency has not prevented discouraged child visitation or communication with the agency. See id.
66 Id.
67 See id.
69 See id. One New York courthouse currently has 4500 pending cases for undocumented minors. Id.
the New York appellate courts first considered the possibility of granting a SIJS finding petition despite the fact that there is one non-abusive parent.\footnote{In re E.G., 899 N.Y.S.2d 59, 59 (N.Y. Fam. Ct. 2009). In an unpublished opinion, the court stated that “in light of the recent amendment to 8 U.S.C. § 1101(a)(27)(J), a child may petition for SIJS even if there is a fit parent living abroad, so long as the minor has been abused, neglected or abandoned by one parent.” In re E.G., 899 N.Y.S.2d at 59.} In re Mario S. was the first published New York decision upholding one-parent SIJS petitions.\footnote{In re Mario S., 954 N.Y.S.2d 843, 845 (N.Y. Fam. Ct. 2012). In Mario S., the named minor, a juvenile delinquent, violated his probation and was removed from his mother’s residence and placed in the custody of the New York State Office of Family Services (OCFS). In re Mario S., 954 N.Y.S.2d at 846. After his release, Mario would be returned to his mother’s care and receive additional services from OCFS. Id. at 847. Mario’s father neither contacted nor financially supported his son after he was deported in 2011. Id. at 846, 849–50. The appellate court found Mario eligible for SIJS status. Id. at 845. Even though Mario lived with his mother during his delinquency proceedings, reunification with his father was not viable due to his father’s abandonment and deportation. Id. at 851. In addition, Mario’s mother’s undocumented status made reunification with her tenuous. See id. at 851–52 (“[Mario’s] mother is also present in the United States illegally and she is therefore at risk of deportation, which would make her unavailable to continue to care for Mario and his siblings.”). The court explicitly rejected the holding in In re Erick M. requiring that a court must find reunification with both parents is not viable. Id. at 852. Contra In re Erick M., 820 N.W.2d 639, 647 (Neb. 2012). Consideration of federal agency policies and other factors goes beyond the scope of state court authority under SIJS, and the statute only authorizes state courts to make a determination on the necessary finding. See In re Mario S. 954 N.Y.S.2d at 852–53 (The juvenile court need not determine any other issues, such as . . . whether the USCIS . . . may or may not grant a particular application for adjustment of status as a SIJ.”). In contrast, the Nebraska Supreme Court turned to USCIS documentation stating that SIJS applicant ”must normally show that reunification with the other parent is also not feasible.” In re Erick M., 820 N.W.2d 639 at 647.}

New York courts reaffirmed approval of one-parent SIJS applications and considered the plain meaning, and legislative intent behind SIJS in In re Marcelina M.-G. v. Israel S.\footnote{See generally In re Marcelina M.-G v. Israel S., 973 N.Y.S.2d 714 (N.Y. App. Div. 2013). In Marcelina, mother Marcelina brought a petition seeking sole legal custody of her daughter Susy. In re Marcelina, 973 N.Y.S.2d at 718. In her SIJS petition for Susy, Marcelina argued that Susy’s father, Israel, abandoned her. See id. at 721. Marcelina also argued that Susy’s father left her without financial support, was not involved in Susy’s life, and was a substance abuser. Id. The trial court granted Marcelina legal custody of Susy, but denied making the SIJS finding on the grounds that Susy lived with her biological mother. Id. The trial court judge stated that “I think that it is a bending over more than backwards to create an artificial citizenship, frankly, and I will not make a special finding.” See id. at 718. The appellate court looked at plain disjunctive meaning of the “one or both parents” language under SIJS. Id. at 722. Contra In re Erick M., 820 N.W.2d at 647.} The fact that a non-offending
parent existed was inconsequential to the minor’s SIJS eligibility because SIJS only requires one offending parent. The legislative history of SIJS supported a literal interpretation of the statute. The court also reaffirmed New York’s rejection of the holding in Erick M. Lastly, the final decision regarding immigration status rests with the federal government; the state courts’ role is just to make the necessary SIJS finding. New York courts continue to apply the reasoning in Mario, and Marcelina in granting one-parent SIJS petitions. However, New York courts have also emphasized the need for the minor SIJS applicant to be a dependent of the juvenile court.

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

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

---

74 In re Marcelina, 973 N.Y.S.2d at 722.
75 Id. By replacing the “long-term foster care” language with the “one or both parents” reunification requirement, Congress intended to expand SIJS eligibility. Id. at 722-723; William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, H.R. 7311, 110th Cong. No. 457, 122 Stat. 5044, § 235, 5079–80. Prior to TVPRA SIJS status required a finding that the minor is eligible for long-term foster care, a determination that meant that reunification with both parents was not viable. In re Marcelina, 973 N.Y.S.2d at 722.
76 Id. at 723; In re Erick M., 820 N.W.2d at 647. Erick M.’s ruling would go against the purpose and intent of SIJS, namely to “protect the applicant from further abuse or maltreatment by preventing him or her from being returned to a place where he or she is likely to suffer further abuse or neglect.” See In re Marcelina, 973 N.Y.S.2d at 723-24 (citing In re W.C., 920 N.Y.S.2d 135 (N.Y. App. Div. 2011)).
77 See id. at 721, 724–25.
79 Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(J) (2012). For instance, a minor was a dependent of the juvenile court once the court appointed the minor’s half-sibling as his guardian. See In re Miguel C.-N., 989 N.Y.S.2d 126, 127 (N.Y. App. Div. 2014). Inversely, a filed child support application is not enough to declare a SIJS applicant a juvenile court dependent. See Tung W.C. v. Sau Y.C., 940 N.Y.S.2d 791, 791 (N.Y. App. Div. 2011). The court in Tung W.C. went on to hold that the Family Court “permitted a SIJS application only where dependency upon the court has been established by way of a guardianship or adoption.” See Tung W.C., 940 N.Y.S.2d at 794. A later appellate court decision recognized that the Family Courts only made the SIJS special finding where dependency upon the court was established by guardianship, adoption, or custody. “No appellate decisions in this state have addressed the question of whether an order issued by the Family Court that does not award or affect the custody of a child satisfies the dependency prong.” In re Hei Ting C., 969 N.Y.S.2d 150, 151, 154 (N.Y. App. Div. 2013).
9:6-1 consists of any of the following acts:

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

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

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

82 N.J. STAT. § 30:4C-15.1(b)(1)–(3). The division may petition to terminate parental rights if a parent fails to contact the child or other parties for six or more months and, the parent’s whereabouts are unknown despite reasonable efforts to locate that parent. N.J. STAT. § 30:4C-15.1(b)(1). The inability to identify parents following completion of a law enforcement investigation is grounds for termination after the division has exhausted all identifications efforts. See N.J. STAT. § 30:4C-15.1(b)(2).
83 Where the parent voluntarily delivered the child to and left the child at, or voluntarily arranged for another person to deliver the child to and leave the child at a State, county or municipal police station or at an emergency department of a licensed general hospital in this State when the child is or appears to be no more than 30 days old, without expressing an intent to return for the child. . . the division shall file for termination of parental rights no later than 21 days after the day the division assumed care, custody and control of the child. N.J. STAT. § 30:4C-15.1(b)(3).
F. New Jersey and SIJS: Challenges to One-Parent SIJS Petitions

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

---

85 In 2013, New Jersey recognized one-parent SIJS petitions. *In re Minor Children of J.E.*, 74 A.3d 1013, 1015 (N.J. Super. Ct. Ch. Div. 2013), *overruled by* H.S.P. v. J.K., 87 A.3d 255 (N.J. 2014). https://a.next.westlaw.com/Document/1e1766db4c3511e590d4edf60ce7d742/View/FullText.html?listSource=RelatedInfo&list=NegativeCitingReferences&rank=0&originContext=docHeader&transitionType=NegativeTreatment&contextData=%28sc.DocLink%29. In *In re Minor Children of J.E.*, the petitioner J.E. sought custody of her two sons and for the court to make the necessary SIJS finding. *In re Minor Children of J.E.*, 74 A.3d 1013 at 1015. J.E. fled Honduras without her two sons. *Id.* The father attempted to shoot J.S. when she refused to give the children to him. *Id.* at 1015. The children testified that their father did not protect them from physical abuse and openly conducted drug trafficking in their presence. *See id.* (“Both boys routinely witnessed their father and his associates with large arsenals of guns, and witnessed a large container with a white substance being stored in their father’s house.”). The minor’s stepmother left the children after the children’s father died in a shootout involving the police and other drug traffickers. *Id.* The children eventually reunited with J.E. despite her temporary lawful status in the United States. *Id.* at 1016. J.E.’s lawful status is based on Temporary Protected Status subject to expiration. *See id.* The trial court granted the custody order and made way for the necessary SIJS finding, and noted the intent behind SIJS was to “assist a limited group of abused children to remain safely in the country with a means to apply for [lawful permanent resident] status.” *Id.* at 1017, 1023 (citing *Garcia v. Holder*, 659 F.3d 1261, 1271 (9th Cir. 2011)). Recent amendments to SIJS demonstrated congressional intent to expand SIJS eligibility. *See id.* at 1018 (noting that the recent amendments allow state courts to “make SIJS finding whenever jurisdiction can be exercised under state law to make care and custody determinations, and [state courts] are no longer confined to child protection proceedings alone.”). *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 235.* Based on the intent and language of the provision, 8 U.S.C. § 1101(a)(27)(J)(i) only requires a trial court to find that unviable reunification with one parent was sufficient: “If reunification with one parent is not viable, even when reunification with the other parent is, the applicant nevertheless qualifies for eligibility for SIJS.” *In re Minor Children of J.E.*, 74 A.3d at 1020; 8 U.S.C. § 1101(a)(27)(J)(i) (2008). Abandonment occurred under New Jersey law when the minors’ father was killed as a result of his criminal conduct and their stepmother left them behind. *See In re Minor Children of J.E.*, 74 A.3d at 1021; *see also* N.J. STAT. § 9:6-1(b) (1987) (“failing to care for and keep the control and custody of a child so that the child shall be exposed to physical or moral risk without proper and sufficient protection.”); STAT. § 9:6-1(a) (“willfully forsaking a child.”). Thus, reunification was not viable with the father due to abandonment. *See In re Minor Children of J.E.*, 74 A.3d at 1021.

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

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

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

---

87 H.S.P., 87 A.3d at 258.
88 M.S. lived in the slums with his ill mother and ill grandmother, and M.S.’s father was never involved with his life. H.S.P., 87 A.3d at 258. M.S. entered the United States without documentation. H.S.P., 87 A.3d at 258. H.S.P. already brought M.S. into his family before he filed the petition. H.S.P., 87 A.3d at 258.
89 Id.
90 However, M.S. maintained weekly phone contact with his mother in India. H.S.P., 87 A.3d at 258. The trial court granted the custody petition but denied the SIJS petition on the grounds that there was insufficient evidence for a finding of unviable reunification with both parents. H.S.P., 87 A.3d at 259.
91 Id. at 269.
92 See 87 A.3d at 261 (“We question whether Congress intended [8 U.S.C. § 1101(a)(27)(J)] to apply to juveniles who are placed in the custody of an individual not because necessity was shown under State law, but because custody was requested for immigration purposes.”). In addition, M.S.’s father was neither named as a party nor served with the complaint. 87 A.3d at 261. But see 8 U.S.C. § 1357(h) (2006) (stating that minors under SIJS status “shall not be compelled to contact the alleged abuser (or family member of the alleged abuser).”).
94 H.S.P., 87 A.3d at 264–65; N.J. STAT. § 30:4C-15.1(b)(1)(a)–(b) (2004) (permitting the termination of parental rights for abandonment if the parent has had no contact with the child for six months or more and the parent’s whereabouts are unknown).
of 8 U.S.C. § 1101(a)(27)(J)(i). Although several courts—including a New Jersey appellate court—held that unavailable reunification with one parent sufficed, the court in this case adopted the holding of In re Erick M. requiring that reunification with both parents be unavailable. The “one or both” provision excluded SIJS eligibility where reunification with one or both parents is viable. Congress enacted a 1997 amendment to 8 U.S.C. § 1101(a)(27)(J)(i) “to limit the beneficiaries of this provision to those juveniles for whom it was created, namely abandoned, neglected, or abused children.” In doing so, Congress intended to prevent the abuse of the SIJS program. TVPRA added the “one or both” provision and reaffirmed Congress’ goals of providing benefits to eligible minors, while preventing abuse. The court held requiring a finding that reunification with neither parent is viable furthers both of Congress’ goals. In the court’s view, the “neither parent” requirement protects eligible minors from unsafe parents and excludes minors who have access to a safe and suitable parent; inversely, granting SIJS eligibility through single parent unavailable reunification renders SIJS vulnerable to abuse. Although the Supreme Court of New Jersey overturned H.S.P. in 2015, the case illustrates how a state’s interpretation of SIJS provisions could deny eligible children from the program.


96 H.S.P., 87 A.3d at 266.


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

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

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

G. Texas’s Multi-Faceted Approach to Abandonment

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

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

---

102 TEX. FAM. CODE § 161.001 (2011). All of the provisions under this statute require a finding by clear and convincing evidence.
103 Id. § 161.001(1)(G).
104 See id. § 161.001(1)(N). The state agency must also make reasonable efforts to return the child to the parent, and the parent must demonstrate an inability to provide the child with a safe environment before termination of parental rights occurs.
105 See id. § 161.001(1)(L)(x); TEX. PEN. CODE § 22.041 (defining abandonment as leaving a child “without providing reasonable and necessary care for the child, under circumstances under which no reasonable, similarly situated adult would leave a child of that age and ability.”).
106 The parent must also possess knowledge of the pregnancy and abandon the mother at some point during her pregnancy. See FAM. § 161.001(1)(H).
107 FAM. § 161.001(b)(1)(A)–(D). Other grounds for termination include conduct that endangers the physical and emotional well-being of the child. See FAM. § 161.001(b)(1)(D)–(E), (P).
IV. Variations in State Law Prevent the Uniform Application of SIJS

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

109 Id.
110 Id.
111 After receiving a court order with the necessary SIJS finding, an applicant must then submit Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant while the order is in effect. Eligibility for SIJS, UNITED STATES CITIZENSHIP AND IMMIGR. SERV., http://www.uscis.gov/green-card/special-immigrant-juveniles/eligibility-sij-status/eligibility-status-sij (last visited Jan. 19, 2015).
112 For a discussion on California’s recent efforts to expand SIJS eligibility, see supra notes and accompanying texts 57–62. For a discussion on New Jersey’s limit on one-parent SIJS petitions, see supra notes and accompanying texts 86–102.
Abandoning the Status Quo

SIJS.

A. Legislative Barriers: Proposition 187 and SAPCR

As an example of how state law developments can effectively nullify access to SIJS, California voters passed Proposition 187 in 1994.\textsuperscript{114} Codified as California Welfare and Institutions Code section 10001.5(a), Proposition 187 prohibited undocumented immigrants from accessing public social services, including foster care.\textsuperscript{115} The law prevented undocumented immigrant children from using SIJS as a legal remedy by prohibiting California courts from finding undocumented immigrants eligible for the foster care system, as required by the 1997 amendment.\textsuperscript{116} Although a United States district court eventually overturned California Welfare and Institutions Code section 10001.5(a), Proposition 187 demonstrates how voter-approved laws can jeopardize access to SIJS relief for applicants.\textsuperscript{117}

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


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

\textsuperscript{116} Salisbury, supra note 26.

\textsuperscript{117} Multiple aspects of section 10001.5(a) of the California Welfare and Institutions Code were held preempted by federal law. See League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 780–82 (C.D. Cal. 1995) (referring to California Welfare and Institutions Code section 10001.5 as “section 5.”). For an additional example of state law and judicial organization impeding SIJS application, see Angela M. Elsperger, Florida’s Battle with the Federal Government Over Immigration Policy Holds Children Hostage: They Are Not Our Children!, 13 LAW & INEQ. 141, 149, 154 (1994) (“by denying undocumented children the jurisdiction of juvenile court for dependency proceedings, Florida has denied Jean and Carlos access to “special immigrant status” which would permit them to apply for lawful, permanent residence in the United States.”).
Relationship (SAPCR). The applicant’s guardian, or caregiver may be required to exercise custody or control of the child for a statutory period. If a UAC does not have a guardian to file the petition, the UAC must file a self-petition in juvenile or family court.

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

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

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


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

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

Nebraska was the first state to require a finding that reunification with both parents is not viable to qualify for SIJS. The juvenile court adjudicated Erick M. in December 2010 and committed him to the Office of Juvenile Services because he had two charges of being a minor in jurisdiction because the court made no final orders. Id.; See also § 155.001(a).


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

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

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

---

130 In re Erick M., 820 N.W.2d at 642.
132 In re Erick M., 820 N.W.2d at 643.
134 In re Erick M., 820 N.W.2d at 643; see Anderson, supra note 43, at 691. (Furthermore, no evidence showed permanent removal from his mother). Id.
135 In re Erick M., 820 N.W.2d at 643; Johnson & Yavar, supra note 130, at 80. There was no evidence of abuse or neglect committed against Erick by his father. In re Erick M., 820 N.W.2d at 643.
136 Erick argued that Congress intended to give a disjunctive meaning to the provision. In re Erick M., 820 N.W.2d at 643–44; see also Johnson & Yavar, supra note 130, at 70. Additionally, Erick focused on his placement in the Office of Juvenile Services and the absence of his father. In re Erick M., 820 N.W.2d at 643–44. The State argued that Congress intended courts to consider the possibility of reunification with the other parent, and that the possibility of reunification with one parent precluded an analysis of reunification with the other parent. Id. But see Johnson & Stewart, supra note 115 (arguing that such an interpretation of 8 U.S.C. § 1101(a)(27)(J)(i) runs counter to and nullifies the TVPRA amendment).
Finding that both arguments presented a reasonable interpretation of SIJS, the Supreme Court of Nebraska turned to the legislative history of SIJS. The 1997 amendment required a juvenile court to determine whether the applicant is eligible for long-term foster care “due to abuse, neglect or abandonment.” Congress intended the 1997 amendment to “prevent youths from using this remedy for the purpose of obtaining legal permanent resident status, rather than for the purpose of obtaining relief from abuse or neglect.”

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

---

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

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


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

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

143 § 113, 111 Stat. at 2460. USCIS will not consent to a petition for SIJ status if it was “sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect or abandonment.” In re Erick M., 820 N.W.2d at 646 fn.25.
never known the parent or the parent has abandoned the child, USCIS and juvenile courts generally still consider whether reunification with the known parent is an option.” Therefore, USCIS required SIJS applicants to show unviable reunification with both parents, and found one-parent unviability insufficient.

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

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

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

Nebraska’s interpretation of the “one or both parents” provision fails to conform to the literal text of the statute. 155 Congress, according to the court in H.S.P., is capable of amending SIJS to include one-parent SIJS cases. 156 However, other courts held Congress applied SIJS to minors where reunification with only one parent is not viable. 157 The New York appellate court in In re Marcelina correctly applied the plain meaning of SIJS. 158 The court in In re Marcelina also noted that Congress replaced the “long-term foster care” requirement with the “one or both parents” requirement in 2008. 159 The 1997 amendment required unviable reunification with both parents, because long term foster care presumes that

151 In re E.G., 899 N.Y.S.2d at 59.
152 Id.; see In re Erick M., 820 N.W.2d at 643, 647–48.
153 In re E.G., 899 N.Y.S.2d at 59. Erick’s family permanency specialist testified that Erick’s mother was not investigated for abuse or neglect. In re Erick M., 820 N.W.2d at 642–43.
156 See H.S.P., 87 A.3d at 268 (“If Congress wished to create a ‘‘gateway’’ for all abused or impoverished foreign juveniles. . .it could have done so. It did not do so by enacting the 2008 amendments.”).
158 In re Marcelina, 973 N.Y.S.2d at 722.
159 Id.
reunification with both parents is not viable.\textsuperscript{160} In contrast, the word “or” in its ordinary use is a disjunctive. Therefore, Congress intended to expand eligibility to minors who cannot reunify with either one parent, or both parents.\textsuperscript{161} Applying the \textit{Erick} reasoning, Congress could have amended SIJS to explicitly require unviable reunification with “both parents,” but it did not do so.\textsuperscript{162}

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

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

---


\textsuperscript{161} In re Marcelina, 973 N.Y.S.2d at 722.


\textsuperscript{163} See \textit{id.}

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

\textsuperscript{165} See 8 U.S.C. § 1101(a)(27)(J)(i) (“who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States.”) (emphasis added).

\textsuperscript{166} See Leslie H., 168 Cal. Rptr. 3d at 738.

\textsuperscript{167} See H.S.P., 87 A.3d at 267-68.

\textsuperscript{168} Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court, 58 Fed. Reg. 42,843 (Aug. 12, 1993).
UACs instead of their family situations.\textsuperscript{169} Statements from Senator Richard Durbin further elaborate on the intent behind the TVPRA:

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

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

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

\textsuperscript{173} Wong, supra note 129; see Johnson & Stewart, supra note 115 (“The effect of state court overreaching is to cut off immigration relief to one class of immigrants that might get relief in a different state court.”).
\textsuperscript{174} \textit{H.S.P.}, 87 A.3d at 269.
parent is viable. Under this scheme, the children who Congress intended to protect are unfairly discriminated against as a result of their residency, despite any trauma and abandonment the children have already experienced.

Although the court in *Erick M.* considered Congress’ concerns over individuals abusing SIJS in amending the program, requiring unviable reunification with both parents fails to prevent such abuse. First, SIJS eligibility is a difficult program to abuse because it involves a long legal process requiring multiple findings and procedures. Even if a state court makes the prerequisite finding for SIJS eligibility, the visa determination and final disposition on lawful permanent residence rests with the USCIS. Second, the total number of individuals receiving legal residency status through SIJS makes up only a fraction of annual visa grants. A total of 2,250 children obtained legal permanent resident status through SIJS in 2012. In contrast, over nine-thousand spouses, six-thousand investors, and nearly eighty-five thousand parents of United States citizens obtained legal permanent residency through other means in the same period. SIJS currently affects a small number of minors, so expressly authorizing one-parent SIJS petitioned would expand the reach of the program. Third, inconsistent application of the “one or both parents” provision in fact incentivizes abuse by encouraging forum shopping. Legal advocates may encourage minors preparing to enter the United States to seek out relief in states recognizing one-parent petitions.

---

176 See Anderson, supra note 43, at 684.
177 For discussion of SIJS as a three-step process, see Johnson & Yavar, supra note 130, at 73.
178 Johnson & Yavar, supra note 130, at 74, 75.
181 Id.
183 See Johnson & Yavar, supra note 130, at 89–90 (“Advocates must continue to act quickly to try to discern where a child may ultimately be headed in the United States and to strategize about the child’s options for legal relief on that basis.”).
their caretakers may be more likely to file petitions in states with the “one-parent” rule, leading to a backlog of cases in those states.\textsuperscript{184}

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

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

V. Solution: A Federal Takeover of SIJS

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

\textsuperscript{184} See Knoespel, supra note 21, at 521.
\textsuperscript{185} See Johnson & Yavar, supra note 130, at 85.
\textsuperscript{186} In re Erick M., 820 N.W.2d 639, 647 (Neb. 2012).
\textsuperscript{187} Immigration and Nationality Act, 8 U.S.C. § 1101(a)(27)(J)(i)–(ii) (West 2008) (“for whom it has been determined in administrative or judicial proceedings it would not be in the alien’s best interest to be returned to the alien’s or parent’s previous country of nationality or country of last habitual residence.”).
\textsuperscript{188} CAL. FAM. CODE § 3020(a) (West 2000).
\textsuperscript{189} TEX. FAM. CODE § 263.307(b) (West 1995).
requirements and keep the program within the purview of the federal system. An amended SIJS program should place all UACs directly into the custody of the federal government. SIJS should apply to UACs aged twenty-one or younger who were not in custody of either parent at the time they entered the United States and lack a permanent residence therein. Rather than rely on state court finding before filing a proper SIJS petition, Congress should act by incorporating an SIJS hearing into immigration proceedings if UACs petition for eligibility. Such a system would ensure SIJS uniformity, and would prevent an influx of UACs targeting specific states for SIJS petitions. Federal jurisdiction over immigration law, federal programs concerning the placement of UACs, and federal law regulations of juvenile and family law justify a federal takeover of the SIJS process.

A. Federal Preemption of Immigration Law

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

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

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


193 Id.

194 Id.

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

196 Kleindienst v. Mandel, 408 U.S. 753, 766 (1972); See also Fiallo, 430 U.S. at 794; Mathews v. Diaz, 426 U.S. 67, 81 (1976); Jesse Lorenz et al., Family Unity v. Removal, 15
Congress maintains the power to allow undocumented immigrants to remain in the United States, or remove them.\textsuperscript{197} Immigration regulation rests in the legislative and executive branches, while the role of the courts is limited.\textsuperscript{198} The federal government exercises power over immigration through the INA and the Immigration Reform and Control Act.\textsuperscript{199}

The United States Supreme Court in \textit{De Canas v. Bica} reaffirmed that the “power to regulate immigration is exclusively a federal power.”\textsuperscript{200} However, the Supreme Court also held that not every state law affecting undocumented immigrants impermissibly interferes with Congressional immigration power.\textsuperscript{201} Lower courts have applied \textit{De Canas}, and prescribed three tests for federal preemption based on all three types of preemption.\textsuperscript{202} The first test is whether a state statute regulates immigration, a field of law that falls exclusively under the federal government.\textsuperscript{203} The second concerns field preemption: state law is preempted if it was the “clear and manifest purpose of Congress to effect a complete ouster of state power.”\textsuperscript{204} Finally, federal law preempts state law...
under the third test if the state law is an obstacle to the accomplishment and execution of Congress’s purposes and objectives.\(^{205}\) State law variations in interpreting SIJS—particularly the holdings in \textit{In re Erick M.} and \textit{H.S.P. v. J.K.} that require nonviable reunification with both parents for SIJS eligibility—fall under this category insofar as they stand as obstacles to the full purposes and objectives of \textit{8 U.S.C. § 1101(a)(27)(J)}.\(^{206}\)

\textbf{B. Federal Programs Affecting UACs}

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


\(^{205}\) “Stated differently, a statute is preempted under the third test if it conflicts with federal law making compliance with both state and federal law impossible.” \textit{Villas at Parkside partners}, 496 F. Supp. 2d at 765; \textit{Garrett}, 465 F. Supp. 2d at 1055; \textit{Merten}, 305 F. Supp. 2d 585 at 601–602.


\(^{208}\) \textit{Id.} § 1232(c)(2)(A) (2013).

\(^{209}\) \textit{Id.}

\(^{210}\) \textit{Id.} § 1232(c)(2)(B).

\(^{211}\) \textit{Id.} § 1232(c)(2)(A). Note that Congress intended \textit{8 U.S.C. § 1232} to combat human trafficking.

\(^{212}\) \textit{See id.} § 1232(a)(2)(A)–(B) (allowing return if the UAC is neither a victim of a severe form of trafficking, nor at the risk of becoming a victim, lacks a fear of returning to the home country backed by “credible fear of persecution,” and the UAC is competent enough to withdraw the admission application).
Similarly, the Department of Homeland Security (DHS) must transfer UACs apprehended by DHS agents to the Office of Refugee Resettlement (ORR).\textsuperscript{213} Prior to immigration proceedings, ORR must feed, house, and provide medical care for UACs until they can be released to a safe environment with sponsors.\textsuperscript{214} ORR must consider the interests of the UAC before creating and implementing placement determinations for all UACs in federal custody.\textsuperscript{215} Pursuant to this authority, ORR conducts limited home studies under TVPRA to determine the potential sponsor’s ability to ensure the child’s safety and well-being.\textsuperscript{216} Congress granted ORR with policymaking powers regarding the care and placement of UACs, and required ORR to submit a plan to help UACs attain counsel.\textsuperscript{217} ORR must also identify a “sufficient number” of qualified individuals, entities, and facilities to house UACs, ensure the quality of facilities and individuals taking care of UACs in federal custody, and reunite UACs with parents outside the United States when appropriate.\textsuperscript{218} Congress mandated ORR to consider the safety needs of UACs in federal custody. While making UAC placement determinations, ORR must consult juvenile justice professionals, the USCIS Director, and the Assistant Secretary of the Bureau of Border Security to ensure that UACs:

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


\textsuperscript{218} \textit{Id.}, § 462(b)(1)(F), (G), (H)

\textsuperscript{219} \textit{Id.}, § 462(b)(2)(A)(i)–(iii). ORR “shall consult with appropriate juvenile justice professionals, the Director of the Bureau of Citizenship and Immigration Services, and the
8 U.S.C. § 1522 empowers ORR to provide child welfare services to refugee children detained by ORR for thirty-six months. Under 8 U.S.C. § 1522, ORR is authorized to provide child welfare services through direct federal action, state reimbursements, and contracts with public and private nonprofit agencies. UACs detained by ORR may receive child welfare services until one month after they turn eighteen, unless state law continues services. Furthermore, ORR assumes legal responsibility of unaccompanied refugee children admitted into the United States until their placement is arranged.

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

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

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


Id.

Id. § 1552(d)(2)(B)(i).

See id. § 1552(d)(2)(B)(ii).


Id.

See Deferred Action for Childhood Arrivals, DEP’T OF HOMELAND SEC.,
Abandoning the Status Quo

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

C. Federal Laws Regulating Juvenile and Family Law

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


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


231 Id.


233 See Santosky v. Kramer, 455 U.S. 745, 747–48 (2007) (requiring States to support its allegations of child abuse or neglect by clear and convincing evidence before terminating parental rights); In re Winship, 397 U.S. 358, 364 (1970) (holding that the standard of proof in juvenile delinquency cases in beyond a reasonable doubt); In re Gault, 387 U.S. 1, 34–59 (1967) (holding that a juvenile in delinquency proceedings must be afforded protections such as the right to counsel, the privilege against self-incrimination, and the right to appellate review); see also Stanley v. Il., 405 U.S. 645, 657–659 (1972) (holding that depriving an unwed father of his children without a hearing violates the Fourteenth Amendment of the Constitution of the United States).
affecting state law. For example, the Child Abuse Prevention and Treatment Act (CAPTA) grants states federal funds to address child abuse and neglect, but only if the state adopts legal definitions of child abuse and neglect. 234 The Adoption and Safe Families Act of 1997 (ASFA) requires states to file to terminate parental rights for children who have been in foster care for fifteen out of the most recent twenty-two months. 235 ASFA also mandates a permanency hearing no later than twelve months after the child’s initial removal from the home. 236 States are normally required to make reasonable efforts to reunify foster children with their parents, but ASFA provides for situations where the state does not need to make such reasonable efforts. 237

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

---


236 Id. § 302, 111 Stat. at 2128–29.

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


239 Id. § 1902.

240 Id. § 1911.

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

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

\textit{D. Federalizing Texas Family Code section 161.001}

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

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

\textsuperscript{243} \textit{See id.} § 1912.

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

\textsuperscript{245} \textit{See} Herne, \textit{Supra} note 246 at 21–29.


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

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


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


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


\(^{253}\) 42 U.S.C. § 13925(a)(3) (2013). This statute also defines child maltreatment as “the physical or psychological abuse or neglect of a child or youth, including sexual assault and abuse.” Id. § 13925(a)(5).
(A) The production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.\(^{254}\)

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

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

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


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

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

\(^{258}\) Id.

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

\(^{260}\) Dan Tilly, Confidentiality of Adoption Records in Texas: A Good Case for Defining
161.001 covers children who grew up without the presence of at least one parent. In particular, section 161.001(1)(H) would allow a finding of abandonment even if the mother is providing for the minor applicant. Because many UACs migrate in the United States to escape violence in their home countries, sections 161.001(1)(D) and 161.001(1)(E) apply if one of their parents participated in such violent, dangerous conduct. For instance, sections 161.001(1)(D) and 161.001(1)(E) apply to the father and in In re Minor Children of J.E. because the minor’s father conducted drug trafficking, attempted to shoot the mother, and died in a drug-related shooting.

**Conclusion**

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

---

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


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

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

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


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