NO PARENTS ALLOWED: THE PROBLEM WITH SPECIAL IMMIGRANT JUVENILE STATUS

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INTRODUCTION

"[I]f any freedom not specifically mentioned in the Bill of Rights enjoys a 'preferred position' in the law it is most certainly the family."[1]

Family is and has always been a quintessential American value. This value is reflected in the nation's laws and policies. U.S. immigration law is an area where the government has claimed to

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1 *Moore v. City of East Cleveland*, 431 U.S. 494, 511 (1977) (Brennan, J., concurring).

advocate family values, and in particular, family reunification.[2] Since early in the nation's history, the U.S. has had a family-centered approach to immigration, and family reunification continues to be the most common legal basis for immigration to the United States.[3] Examples of this family-centered approach include family-based sponsorship petitions made by citizens or legal permanent residents, and family derivative options for asylees, refugees, employment-based immigrants, and T and U-Visa recipients. However, there is one area in particular where this family centered approach falls to the wayside: Special Immigrant Juvenile Status (SIJS).

SIJS, enacted in 1990, is a provision of the Immigration and Nationality Act meant to be a unique form of immigration relief for children.[4] In order to qualify for SIJS, a child must be under twenty-one years of age, unmarried, dependent on a state juvenile or family court, and unable to reunify with a biological parent because of parental abuse, abandonment, neglect, or some similar reason under state law. It must also be in the child's best interest not to return to his or her home country.[5] The SIJS statute differs from other forms of U.S. immigration relief for two reasons. First, the SJIS statute incorporates a best interest of the child standard into its eligibility requirements.[6]Second, while it provides a path to citizenship for an immigrant child, the SIJS provision has also been interpreted to prohibit a child from ever sponsoring his mother or father.[7]

The statute states that "no natural parent or prior adoptive parent of any alien provided [Special Immigrant Juvenile Status] shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this Act."[8] This language was originally included when SIJS was introduced in the Immigration Act of 1990.[9] At that time, SIJS required a child to have been abused, neglected, or abandoned by both parents and thus be eligible for long-term foster care.[10] This language has been interpreted by United Citizenship and Immigration Services (USCIS) to terminate indefinitely the relationship between natural parents and a

2 *See* Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 89, 79 Stat. 911, 922 (1965).

3 U.S. Department of State – Bureau of Consular Affairs, *Immigrant and Nonimmigrant Visas Issued at Foreign Service Posts Fiscal Years 2012 – 2016*, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2016AnnualReport/FY16AnnualReport-TableI.pdf.

4 I.N.A. § 101(a)(27)(J)(i).

5 *Id.*

6 I.N.A. § 101(a)(27)(J)(ii).

7 *See* note 4.

8 I.N.A. § 101(a)(27)(J)(iii)(II).

9 Act of 1990, Sec. 153, 101st Congress Nov. 29, 1990 104 STAT. 4978.

10 I.N.A. § 153(a)(3).

SIJS recipient child for immigration purposes.[11] Such an interpretation made sense in 1990; at that time, in order to qualify for SIJS, a child had to have severed ties with both natural parents, and be eligible for foster care.[12] And indeed, if the child was coming to the U.S. to flee a bad parental situation involving both parents, those parents should not then be able to benefit from the newly found legal immigration status of their mistreated child.

In 2008, the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA)[13] amended the Immigration Act of 1990 by requiring reunification with one or both natural parents to be unviable due to abuse, neglect or abandonment, or a similar basis.[14] Following this amendment, a child can potentially have a stable, healthy relationship with one parent, and still be SIJS eligible. This greatly expanded the number of children who would qualify for SIJS. However, while the scope of SIJS eligible children has widened greatly, the restrictions on SIJS have remained the same. Because the language denying a natural parent "any right, privilege, or status" has remained part of the SIJS provision, a child in such a situation who has legalized through SIJS, and then gone on to naturalize, cannot then sponsor his parent. This is problematic because a child and his non-abusive, non-neglectful, non-abandoning parent must either choose to separate so that the child can find a safe haven in the United States, or such a parent must make the decision to live in the United States without legal status to care for her child. Many times, that parent is ineligible for immigration relief on an independent basis and thus has no choice but to remain undocumented while she provides for and takes care of her SIJS recipient child. This reality is neither family centered, nor in the best interest of the child, and therefore contradicts the underlying principles of both U.S. immigration law, and of the SIJS provision in particular. While SIJS certainly has a humanitarian basis, it must take a more holistic approach in providing immigration relief to children.

This Note will propose that the SIJS statute, at INA §101(a)(27)(J)(iii)(II), should be interpreted to deny an abusive, neglectful, abandoning parent of any parental status for immigration purposes, but should not deny parental status to parents who do not

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[11] *Id.*

[12] *Id.*

[13] First Focus, *Legal Protections for Unaccompanied Minors in the Trafficking Victims Protection Act of 2008*, https://firstfocus.org/wp-content/uploads/2014/08/Legal-Protections-for-Unaccompanied-Minors-in-the-Trafficking-Victims-Protection-Act-of-2008.pdf (Jul. 2014) (The TVPRA is legislation that strengthens federal trafficking laws and adds provisions that govern the rights of unaccompanied immigrant children who enter the United States).

[14] ENHANCING EFFORTS TO COMBAT THE TRAFFICKING OF CHILDREN, PUB. L. No. 110–457, §235(1)(B)(i) (2008).

meet these specifications. It also argues that, if the SIJS provision cannot be interpreted in that way, the Immigration Act of 1990 should be amended to effectuate the goals of the TVPRA[15] by accounting for the vast number of children with one present, non-abusive parent—whom the TVPRA made eligible for SIJS—and specify that the language denying "right[s], privilege[s], or status" only applies to the abusive, neglectful, or abandoning natural parent or parents of a SIJS recipient.[16]

Part I of this Note provides a brief historical background of U.S. immigration jurisprudence to demonstrate how family unity has permeated the law's development over the years. Part II takes a close look at the text of the SIJ provision to consider why specific language was adopted, and what Congress intended to achieve. Part III will look at problems with the current interpretation of the SIJS provision, and assess the effects of this interpretation on children and families. Part IV will propose possible solutions, suggesting that courts interpret the SIJS provisions differently, or that the language itself be amended, to allow SIJS grantees the right to petition for their non-abusive parent.

PART I: A BRIEF HISTORY OF FAMILY-CENTERED U.S. IMMIGRATION POLICY

Early in U.S. history, immigration was not heavily regulated.[17] The U.S., being a young nation, needed people to settle the vast lands and serve as labor to build the country's infrastructure. Often times, entire families immigrated together. "[M]any U.S. citizens thought of their new nation as an experiment in freedom—to be shared by all people, regardless of former nationality, who wish to be free."[18] In 1864, Congress passed the Act to Encourage Immigration, in an attempt to recruit foreign labor during the Civil War.[19] The Supreme Court went so far as to declare state laws regulating immigration unconstitutional during this time.[20] It was not until the late nineteenth century, when

15 Julia Halloran McLaughlin, *Do the Right Thing: A Call upon Congress to Enhance the Rights of Unaccompanied and Undocumented Mexican Children under the TVPRA*, 17 FLA. COASTAL L. REV. 1, 42 (2015) (The goals of the TVPRA, passed with broad bi-partisan support in 2008, were to provide special protections to children who enter the U.S. without documents).

16 *See supra* note 12.

17 Monique Lee Hawthorne, *Family Unity in Immigration Law: Broadening the Scope of "Family"*, LEWIS AND CLARK L. REV. 809, 812 (Sept. 15, 2007); THOMAS ALEXANDER ALIENIKOFF, DAVID A. MARTIN, AND HIROSHI MOTOMURA, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 149 (5th ed., 2003) (hereinafter IMMIGRATION AND CITIZENSHIP).

18 IMMIGRATION AND CITIZENSHIP at 148.

19 Act to Encourage Immigration (1864).

20 *Smith v. Turner*, 48 U.S. 283 (1849).

demographics of incoming immigrants began to move away from the demographics that already existed.[21] That xenophobia began to make an appearance, and greater limitations on immigration were put in place.

Even in periods of migration restriction, such as the Chinese Exclusion Act in 1882, family unification remained a motivator in immigration policy. In *In re Chung*, a federal court held that a merchant who was entitled to come to the United States to work and live was also entitled to bring with him, and have with him, his wife and children. "The company of the one, and the care and custody of the other, are his by natural right; and he ought not to be deprived of either."[22]

Ultimately, these anti-immigrant sentiments led to the establishment of a country based quota system in 1924, with the passage of the National Origin Quota Act.[23] This Act restricted immigration by establishing quotas based on national origin, and established a ceiling of 150,000 admissions per year.[24] However, this was also one of the first immigration policies to privilege certain family members over other immigrants.[25] These family members included husbands, wives, parents, brothers, sisters, children, and fiancés.[26] Within these family categories, the National Origin Quota Act established a hierarchy of importance. Wives and children of citizens under the age of eighteen were treated as non-quota immigrants, but other family members were "preference" immigrants only, subject to quotas but potentially able to gain admission before other, nonfamily members.[27]

In establishing these family preference categories, Congressional House Records show a discussion of the importance of family togetherness.

> What better material to build citizenship out of do you want than people of whom the President could say: Although this movement of people originated [abroad], in its essence and its meaning it is peculiarly American. It has nothing about it of class or caste. It has no tinge of aristocracy . . . It has about it the strength of the home and the fireside, the family ties of the father and the mother, the children and the kindred. It has all been carried on very close to the soil; it has all been

[21] *See supra* note 10, at 185.

[22] *In re Chung Toy Ho*, 42 F. 398, 400 (D. Or. 1890); This statement encompasses exactly why family togetherness in the context of migration is so important: no one should be forced because of immigration restrictions to be without the support and company of their loved ones. If the care and custody of one's child is the natural right of the parent, then it would follow that the child has a reciprocal natural right to be cared for by and in the custody of their parent.

[23] *See supra* note 9, at 158.

[24] *See* IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK (15th Ed. 2016) at 4.

[25] Kerry Abrams, *What Makes the Family Special?* http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=5587&context=uclrev.

[26] National Origins Quota Act, 68 Pub. L. 139, 43 Stat. 153, 68 Cong. Ch. 190, §6 (1924).

[27] Naturalization Act of 1855, Chapter 71, §2; 10 Stat. 604, 604 (1855).

extremely human.[28]

With the Immigration and Nationality Act of 1965 (INA), the quota system was abolished, but the family preference system was continued. The chart below demonstrates that of the total immigrant visas issued in 2016, about 86% were family-based.

Immigrant Categories[29]	Visas Issued in 2016
1. Immediate Relatives	315,352
2. Special Immigrants	16,176
3. Vietnam Amerasian Immigrants	6
4. Family Sponsored Preference	215,498
5. Employment-Based Preference	25,056
6. Diversity Immigrants	45,664
Total	617,752

The 1990 Act, amending the INA, contains many instances of legislative concern for family. Referring to the legislative history of a specific INA provision granting a special preference status, the US Supreme Court noted that it establishes that Congressional concern was directed "at the problem of keeping families of United States citizens and immigrants united."[30] Other judicial references to the INA have further demonstrated this congressional concern by noting that the INA has a "humane purpose . . . to reunite families," and also have declared family reunification as "'the foremost policy underlying the granting of preference visas under our immigration laws.'" Since 1965, family reunification has remained a cornerstone of the INA. [31]

PART II: AN IN DEPTH LOOK AT THE LANGUAGE AND PURPOSE OF SIJS

This section first describes the statutory history of the SIJS provision. It then looks at the language codified today to understand the purpose of SIJS and its current interpretation, which purports to deny

[28] Congressional Record – House 5629

[29] *See supra* note 3; John Guendelsberger, *The Right to Family Unification in French and United States Immigration Law*, http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1183&context=cilj; 8 U.S.C. §1153(a) (1982).

[30] *Fiallo v. Bell* 430 U.S. 787, 795, n.6 (1977) quoting from H.R. Rep. No. 1199, 85th Cong., 1st Sess., 7 (1957), U.S. Code. Cong. & Admin. News, 1957, 2016, 2020.

[31] *See supra* note 23.

both parents of an SIJS recipient any "rights, privileges, or benefits."

A. Statutory History of SIJS

In 1990, the Immigration Act of 1990 established Special Immigrant Juvenile Status, which created a path to legalization for immigrant children in certain situations. The language of the Act stated

> "An immigrant 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 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, except that no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this Act."[32]

Essentially, this Act created three requirements: first, that the child be declared dependent on a juvenile court in the United States, second that the child be eligible for long-term foster care, implying that no natural parent is available or otherwise appropriate to care for the child, and third that it not be in the child's best interest to be returned to his or her country of nationality. If these requirements were met and the child is granted Special Immigrant Juvenile Status, then no natural parent or prior adoptive parent could be given any right, privilege, or status.

In 1997, a second amendment created some procedural changes regarding the SIJS application process, but kept the basic eligibility requirements the same.

In 2008, the William Wilberforce Trafficking Victims Protection Reauthorization Act amended the SIJS language once more, this time making a substantive change.

> "Section 101(a)(27)(J) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(27)(J)) is amended-
>
> (A) in clause (i), by striking ''State and who has been deemed eligible by that court for long-term foster care due to abuse, neglect, or abandonment;'' and inserting ''State, or an individual or entity appointed by a State or juvenile court located in the United States, and whose reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under

32 Immigration Act of 1990, PUB. L. 101-649 sec. 153 (a)(3).

State law."[33]

With this amendment, the requirements for SIJS eligibility changed significantly. Language regarding foster-care eligibility was removed, and replaced with a requirement of nonviable reunification with at least one parent due to abuse, neglect, abandonment, or a similar basis. After the 2008 amendment, a child can have a relationship with or be under the care of one parent, and still be SIJS eligible, as long as there are allegations of abuse, neglect, or abandonment against the other parent.[34] In this situation, there are no adoptive or foster parents, only one natural parent. This amendment opened the doors for children who have broken relationships with one but not both parents to qualify for SIJS. However, the "No natural parent . . . shall thereafter . . . be accorded any right, privilege, or status . . . " language remains attached, though the SIJS requirements have changed in such a way that has an important impact on immigrant children and their natural parent.

B. "RIGHT, PRIVILEGE, OR STATUS"

"Right, privilege, or status" was first added to the INA in 1957 in a provision which allowed adopted children to derive family immigration benefits from their adoptive parents, while also stating that "no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this Act."[35] The phrase has not since been defined in the INA, nor is there any court decision or any other published guidance on its meaning in the SIJS context.[36] Further, Congress has not suggested an intended interpretation in legislative history for statutes where the language is used. However, it has been interpreted by the United States Citizenship and Immigration Services (USCIS) as making it impermissible for SIJS recipients to ever sponsor their natural parent.[37] In assessing the validity of that interpretation, it is important to determine what exactly "right, privilege, or status," means.

The phrase has appeared in the INA in only one other context: international child adoption. In these situations, the Board of

33 *See supra* note 12.

34 *See supra* note 28; Immigrant Legal Resource Center, *Special Immigrant Juvenile Status: A Primer for One Parent Cases*, https://www.ilrc.org/sites/default/files/resources/one-parent_sijs_primer_final.pdf.

35 PUB. L. 85-316, §2, 71 Stat. 639 (1957), at INA §101(b)(1)(E)

36 *See Matter of B-*, 9 I&N Dec. 46, 48 (BIA 1960)

37 USCIS POLICY MANUAL, SPECIAL IMMIGRANT JUVENILES: ELIGIBILITY REQUIREMENTS (March 28, 2018) https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartJ-Chapter2.html#S-G ("[A] petitioner who adjusts status as a result of an SIJ classification may not confer an immigration benefit to his or her natural or prior adoptive parents.")

Immigration Appeals (BIA) has strongly implied that the "right, privilege, or status" language severs the parent-child relationship for all immigration purposes.[38]

> Thus, for purposes of any 'right, privilege, or status' under the Act, a child may be recognized as the child of his or her natural parents or of his or her adoptive parent or parents, but not of both . . . Thus, natural parents no longer have the 'status' of parents under the Act once "such" an adoption has occurred . . .[39]

INA §101(b)(2) provides a standardized definition of the word "parent", and BIA has held that the "right, privilege, or status" in the INA international adoption provisions terminated the parent-child relationship.[40]

The BIA has identified policy concerns supporting a reading of the "right, privilege, or status" language to fully terminate a parent-child relationship in the international adoption context:[41]

> [The language] serves to prevent the possible manipulation—whether innocent or contrived—of the eligible orphan provision whereby, e.g., an alien parent may be motivated to release his child for immigration to the United States in the hope that he might further his own prospects of obtaining entry into the United States at a future time. A parent who abandons his child or irrevocably releases a child for adoption by another in the United States can have no legitimate expectation of preserving a legal bond by which to lay claim to subsequent immigration benefits himself.

The BIA explained that a permanent severing of relations between the child and natural parent is a prerequisite for relief for children whose parents are dead, have abandoned them, or cannot properly care for them, and as a result of this, no immigration benefits will be transferable between the child and natural parent.[42] This is to "prevent the possible manipulation . . . of the eligible orphan provision, whereby an alien parent may be motivated to release his child for immigration to the United States in the hope that he might further his own prospects of obtaining entry into the United States at a future time."[43] Further, the BIA has held that the "right, privilege, or status" language terminates parent-child relationships so completely that adopted children can no longer file petitions for their natural siblings, since for immigration

38 *See infra* notes 45-47.
39 *Matter of Li*, 20 I&N Dec. 700 (BIA 1993).
40 *Matter of S*, 9 I&N Dec. 567, 569 (BIA 1962).
41 *Matter of Greenwood*, 18 I&N Dec. 417-19 (BIA 1983).
42 *Id.*
43 *Id.* at 417.

purposes they no longer have a parent in common.[44]

Based on its repeated usage in legislation, and its interpretation by courts, it appears that by granting no "right, privilege, or status", the SIJS statute[45] severs the ties between a child and his natural parent for immigration purposes.

This severing is logical in the case of international adoptions because in that situation a natural parent is permanently relinquishing all parental duties and responsibilities to her child, and in theory there is no question of family reunification.[46] SIJS is different, because a relationship with one parent remains viable in some cases. The 2008 Amendment expanded the category of SIJS eligible immigrants to those who had only one abusive or neglectful parent, but the language denying any "right, privilege, or status" to both natural parents remains in the statute. Thus as the law stands currently, and as per USCIS's current interpretation, a child who receives SIJS and obtains permanent legal status in the U.S., has severed ties with both of his natural parents, and can never petition for a green card for either of them.

C. Best Interest of the Child

A prerequisite of SIJS eligibility is that a family court finds returning to the country of origin not be in the "best interest of the child."[47] Protecting the interest of a child arises from the concept of *parens patriae*.[48] *Parens patriae* is Latin for "parent of the nation" and refers to "the state in its capacity as provider of protection to those unable to care for themselves."[49] In the United States, family law courts consider the best interests of the child in divorce or adoption custody proceedings and in parental termination hearings where the child has been abused or neglected.[50] To determine the best interests of the child, courts consider the following factors: (1) the parent's interest for family integrity, (absent a finding of abuse or neglect); (2) the state's interest to protect the minor; and (3) the child's interest in safety and a stable family environment.[51] Some state family law statutes consider the best interests of the child only after a showing of parental unfitness; others

44 *Matter of Li*, 20 I&N Dec. 3207 (BIA 1993) and *Matter of Ma*, 22 I&N Dec. 67 (BIA 1998). The Ninth Circuit has upheld the rule in *Li* and *Ma*, as has the Third Circuit.

45 I.N.A. §101(a)(27)(J)(iii)(II).

46 *See supra* note 35. The BIA suggests in *Matter of Li* that when an adoption is legally terminated, a child's relationship with his natural parent is not irreparable.

47 I.N.A. §101(a)(27)(J)(ii).

48 3 J. Race Gender & Poverty 81, 2012.

49 *Id.* (citing Black's Law Dictionary 1144 (9th ed. 2009)).

50 *See* Koo, *infra* note 53, at 131.

51 *Id.*

consider the best interests of the child concurrently with parental rights.[52] In a family court setting, the court's tendency "is to apply intuition in deciding that a child would be 'better' with one set of parents than with another and then express this intuitive feeling in terms of the legal standard of being in the 'best interests of the child."[53]

However, the notions of *parens patriae* and serving the best interest of a child are considerations that are not statutorily taken into account in almost any avenue of U.S. immigration law.[54] For example, asylum law makes no distinction between unaccompanied children and adults as it treats both under the same set of law.[55] In most situations, the best interest of the child, the center of the juvenile legal system, is not normally taken into account when the child is an immigrant.[56]

SIJS purports to be different.[57] Before USCIS can adjudicate a SIJS application, a state juvenile or family court must find that it would not be in the child's best interest to be returned to his previous country of nationality.[58] By requiring this judicial finding, SIJS forces immigration law to consider whether returning an immigrant child to his home country would be detrimental to that child. SIJS status thus has the potential to provide legal relief and hope to many undocumented and oppressed children by addressing the lack of a voice children ordinarily have in the U.S. immigration system.[59]

The 1997 House Conference Report explains the intent of Congress in considering the best interest of children when drafting the

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52 *See* Koo, *infra* note 53, at 131; Elizabeth P. Miller, Note, DeBoer v. Schmidt *and* Twigg v. Mays: *Does the "Best Interests of the Child" Standard Protect the Best Interests of the Child?,* 20 J. OF CONTEMP. L. 497, 508-09 (1994).

53 Joyce Koo Dalrymple, *Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied Minors*, 26 B.C. Third World L.J. 131, 167-168 (2006).

54 3 J. Race Gender & Poverty 81, 2012, citing: OLGA BYRNE, UNACCOMPANIED CHILDREN IN THE UNITED STATES: A LITERATURE REVIEW 13 (2008). (citing David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children's Rights Underlying Immigration Law*,"63 OMO ST. L .J. 979 (2002)); 11 Tex. Hisp. J.L. & Pol'y 45 2005; 71; JACQUELINE BHABHA AND SUSAN SCHMIDT, SEEKING ASYLUM ALONE: UNACCOMPANIED AND SEPARATED CHILDREN AND REFUGE PROTECTION IN THE U.S. 7 (2006) ("Children are thrust into a system that was designed for adults, often without legal counsel or the emotional support of families to help them manage. In the words of a former immigration judge, children are the biggest void in all of immigration law."). BHABHA AND SCHMIDT at 35 ("U.S. immigration law does not consider the best interests of the child in decision making. The INA only mentions the concept of the child's best interests once: when setting out the eligibility requirements for [SIU status] . . . "); Singh, *supra* note 25, at 539 ("The 'best interests' principle is not substantively applied in U.S. refugee or immigration law, with the exception of one provision that describes eligibility requirements for [SIJ status].")

55 3 J. RACE GENDER & POVERTY 81, 2012.

56 *Id*. at 82.

57 80 BROOK. L. REV. 1087 2014-2015; SIJS represents the first and to date only "child-centered" immigration remedy incorporating the traditional "best interest" standard applied in proceedings related to children.

58 I.N.A. §101(a)(27)(J)(ii), 8 U.S.C. §1101(a)(27)(J)(ii) (2012).

59 16 Scholar 659 2013-2014

SIJS provisions:

> The language has been modified in order to limit the beneficiaries of this provision to those juveniles for whom it was created, namely abandoned, neglected, or abused children, by requiring the Attorney General to determine that neither the dependency order nor the administrative or judicial determination of the alien's best interest was sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect."[60] Congress stresses that eligibility is based on best interest and not merely on the desire for legal status.

The TVPRA amendment to SIJS in 2008 reaffirmed the need to consider the best interest of a child, especially in the case of an unaccompanied immigrant child.[61]

PART III: PROBLEMS WITH THE CURRENT INTERPRETATION OF SIJS

A. *Equal Protection Violation*

The Equal Protection Clause prohibits statutes from creating classifications affording different treatment to people who are similarly situated.[62] In this case, we are looking at two groups of U.S. citizens over the age of twenty-one. The first group consists of U.S. citizens who were either born in the U.S., or who naturalized after receiving legal status through family based immigration, employment based immigration, or immigration relief including but not limited to asylum, cancellation of removal, T visas, and U visas. The second group consists of U.S. citizens who have naturalized after receiving permanent residency through SIJS. Individuals in the first category have naturalized with no limitations, and stand on the same footing as a U.S. citizen by birth. They are free to petition for their parents when they turn twenty-one. The second category, who have naturalized after

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[60] Pub. L. No. 105-119, §113, 111 Stat. 2440, 2460 (1997) (current version at 8 U.S.C. §1101(a)(27)(J) (2012)).

[61] 3 J. Race Gender & Poverty 81 2012 (91); "if an immigrant child only seeks a dependency order and does not seek to have the state court determine or alter his or her custody status or placement, the immigrant child is not required to seek any consent from [Health and Human Services." Thus a child who is living with one of their parents would not need to be placed by HHS.

[62] *See Plyler*, 457 U.S. at 216; *See generally*, *Tigner v. Texas*, 310 U.S. 141-147 (1940); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). *See also* Tussman & Tenbroek, *The Equal Protection of the Laws*, 37 CALIF L. REV. 341, 344 (1949) (discussing classification under the Equal Protection Clause).

receiving SIJS, are in a worse position than any other U.S. citizen because they cannot petition to sponsor their parent.[63] This second category are disadvantaged in a way that affects almost all aspects of their lives, and this is a violation of the Equal Protection Clause of the 14th amendment.

The right at stake here is more than the ability of a child to sponsor his parent; it is the right for that child to live with and be raised by his parent. More than anything at issue here, is the sanctity of family. And on that sanctity, the Court has held "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."[64] By denying a U.S. citizen child the right to petition for their parent, they are being deprived the choice to live among family. In *Moore v. East Cleveland*, the Court used intermediate review to strike down a zoning ordinance that would affect living arrangements of families.[65] Ordinarily, rational basis review would apply to zoning ordinances, but the Court found a history of tradition of protecting family unity, and this justified the heightened scrutiny that ultimately struck down the ordinance. Similarly, though executive and congressional decisions with respect to immigration are typically given great deference, a situation where the right of a U.S. citizen child to live with her parent could pose a great enough threat to family unity that the Supreme Court should apply a higher level of scrutiny to an interpretation of SIJS.

Additionally, by prohibiting a SIJS grantee child from ever sponsoring their natural parent, the government is creating a subclass of U.S. citizens who must choose between living without their natural parent, or forcing that parent to live in the U.S. without status. The Supreme Court has previously discouraged creating subclasses amongst the citizenry. In *Plyler v. Doe*, the Court has applied intermediate review to an issue involving undocumented children and education because state law was purporting to create a subclass of illiterate children who would soon be permanent residents.[66] In the case of SIJS recipients, they are already permanent residents or U.S. citizens. The United States Supreme Court held in *Plyler v. Doe* that the state of Texas could not deny undocumented children access to a public education solely because of their immigration status.[67] The Court in

63 *See supra* note 37.
64 *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).
65 *Id.*
66 457 U.S. at 202.
67 *Id.*

Plyer, although not going as far as deeming alienage classification as inherently suspect, did consider it important for undocumented children to have access to a basic education. The Court was especially persuaded by the positive impact that access to public education could have in the future lives of children and how it could enable them to become productive members of American society. [68] The Court should similarly consider the positive impact of sponsoring non-abusive parents will have on SIJS recipient children. It means providing the monetary, physical, and emotional support a parent offers, all of which can directly reflect a child's future productivity. Additionally, it means potentially keeping thousands of children out of foster care,[69] which is both a difficult adjustment for a child already coming from a traumatic family experience, and a drain on U.S. taxpayer and government resources.

Thus, children who have received SIJS are at an unconstitutional disadvantage compared to other immigrant children who have been legalized because legalized children can petition for their parents. As in Plyer, where the Supreme Court held that undocumented children could not be denied a public education by the state of Texas solely because of their status, denying a certain group of children the right to petition for a natural parent status would impose "a lifetime of hardship on a discrete class of children not accountable for their disabling status."[70]

The Court has also applied an intermediate scrutiny review to classifications that disadvantage innocent children of undocumented noncitizens. [71] The government must show an exceedingly persuasive justification for passing any legislation when intermediate scrutiny is applied.[72] The government will usually argue that the "no right, privilege, or status" language from which this classification scheme stems serves an important purpose. By denying natural parents any right, privilege, or status through their SIJS grantee child, the government hopes to protect against abuse of this pathway to U.S. citizenship. Under this theory, a child could come to the U.S., receive

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68 *Id.*

69 USCIS, NUMBER OF I-360 PETITIONS FOR SPECIAL IMMIGRANT WITH A CLASSIFICATION OF SPECIAL IMMIGRANT JUVENILE (SIJ) BY FISCAL YEAR AND CASE STATUS 2010-2016, (Sept. 30, 2016). In 2016, 15,101 SIJS applications were approved. No study has been done to show how many of those children were placed in foster care; however, it is likely the case that most of those children are either eligible for foster care, or are being raised by an undocumented parent. There really is no other option.

70 *See Plyer v. Doe*, 457 U.S. 202, 210 (1982). 223; 19 CHILD. LEGAL RTS. J. 11, 1999.

71 The *Plyer* Court did not apply the traditional "toothless scrutiny" associated with its review of economic and social welfare legislation. Instead, it applied the more recently contrived "intermediate level" of scrutiny. *Plyer*, 457 U.S. at 224. *See infra* notes 76-86 and accompanying text.

72 *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Mississippi v. Hogan*, 458 U.S. 718, 1982.

SIJS, eventually naturalize, and then sponsor the same parents who they had previously claimed to seek refuge from. This seems like a completely valid governmental interest, and when considering the pre-2008 requirements for SIJS (two abusive, neglectful, or abandoning parents), it would certainly have passed muster.

However, applying the "no right, privilege, or status" restriction to the non-abusive natural parent does not serve this same purpose. When a child is fleeing the abuse or neglect of one natural parent, allowing that child to eventually petition for the sponsorship of the non-abusive parent does not undermine these objectives because at no point in time is either the child or the parent intending to take advantage of the SIJS program. If a child is eligible for SIJS, that means she has at least one parent who has abandoned her, neglected her, or abused her. It is due to this parent that the child leaves her home country and seeks shelter in the U.S., and it is this parent with whom SIJS finds reunification nonviable. By accepting SIJS, the child will never be able to invite this parent to join her in the U.S., and thus a parent cannot send his child to the U.S. with hopes of exploiting the system to benefit himself.

Additionally, not only is there no legitimate governmental interest, there is also a substantial government disinterest in prohibiting a SIJS grantee to ever petition their parent. Deporting an undocumented live-in parent of a SIJS grantee is very costly. To arrest, detain, and deport one undocumented person, it costs about 12,500 taxpayer dollars.[73] Furthermore, this figure is just the initial cost, the additional expense of placing a child of a deportee in the foster care system, or placing him/her with a guardian who may rely on government assistance can bring the cost of deporting a single parent closer to $102,000—and this does not even factor into account the lost tax revenue from the working deportee .[74] This is unfortunate when, if only the parent was able to legalize through her child, she would pay taxes, contribute to the economy, not be drain on government resources, and have a normal family life. As it stands currently, 150,000 U.S. citizens lose a parent to deportation each year.[75]

The traditional equal protection analysis is admittedly less persuasive as applied to a federal statute. However, the federal government is not free to violate equal protection standards. In Bolling v Sharpe, the Court found segregation in the public schools of Washington, D.C. violated the Constitution. Chief Justice Warren wrote:

73 *Immigrant America: The High Cost of Deporting Parents*, (VICE News March 19, 2014) https://www.youtube.com/watch?v=JOEn0iBWWx0.

74 *Id.*

75 *Id.*

> The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violate of due process.[76]

A U.S. citizen who legalized through SIJS is denied rights that are granted to U.S. citizens who have naturalized in any other way. Mainly, the right to petition for sponsorship of a parent is granted to almost all other citizens.[77] Stated alternatively, the SIJS citizen deprived of this right. The Supreme Court has held that once citizenship is granted, it is not to be diluted by the federal government. There cannot be subclasses within the citizenry.[78] As stated by the Court:

> [The naturalized citizen] becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national Legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual.[79]

Denying the natural parent of any "right, privilege, or status" is in effect denying the child of the right to petition for their parent. There can be no petition if the request is statutorily per se denied by without any other consideration denying a natural parent any "right, privilege, or status." This is an attempt by Congress to abridge a right granted a native citizen. Further, the tie of a parent to their child is a special one, which in other circumstances has warranted special constitutional protection.[80]

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[76] *See Bolling v. Sharpe*, 347 U.S. 497 (1954); *see also United States v. Windsor*, 133 S. Ct. 2675 (U.S. 2013) (Additionally, the Court found a government statute to be invalid in *United States v. Windsor*. The Court found the Defense of Marriage Act to be unconstitutional as "a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution," that it violates "basic due process" principles; and that it inflicts an "injury and indignity" of a kind that denies "an essential part of the liberty protected by the Fifth Amendment)

[77] USCIS, Instructions for Form I-130, "Who May Not File Form I-130", https://www.uscis.gov/i-130.

[78] *See generally*, *Afroyim v. Rusk*, 387 U.S. 253, (1967).

[79] *Afroyim*, 387 U.S.. at 261.

[80] *Miller v. Albright*, 523 U.S. 420 (1998). *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *see also Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535

The Ninth Circuit recently applied rational basis review to uphold a statute which abridged a citizen's right to petition for family-sponsored visas.[81] In *Solorio v. Lynch*, petitioner challenged the Adam Walsh Child Safety and Protection Act (AWA), as a violation of the Equal Protection Clause of the 14th Amendment.[82] AWA amended sections of the INA to preclude any U.S. citizen convicted of "a specified offense against a minor" from petitioning for a family-sponsored visa, "unless the Secretary of Homeland Security, in the Secretary's sole and unreviewable discretion, determines that the citizen poses no risk to the alien with respect to whom a petition . . . is filed." 8 U.S.C. § 1154(a)(1)(A)(viii)(I)."[83] The petitioner alleged that 8 U.S.C. § 1154(a)(1)(A)(viii)(I) violates the Equal Protection Clause of the Fourteenth Amendment because the statute irrationally treats adult beneficiaries differently based on whether their U.S.-citizen sponsors have been convicted of "a specified offense against a minor."[84] The challenged statute distinguishes between U.S.-citizen or lawful permanent resident petitioners for family-sponsored immigration visas who are barred from petitioning under §1154(a)(1)(A)(viii)(I), and those who are not.

The Court felt there were several conceivable bases for such a legislative distinction. Firstly, AWA is intended to protect the public from those convicted of sex offenses and other offenses against children.[85] Through the AWA, Congress conceivably intended to treat convicted sex offenders differently by denying them the right to petition for sponsorship of a family member.[86] The exception in the statute suggests Congress may have wanted convicted sex offenders to make an affirmative showing that they no longer pose a risk to intended beneficiaries before regaining the right to petition for a family-sponsored visa, because those individuals are more likely to pose a risk of harm to the public generally, including family members. Additionally, Congress may have wanted to provide incentives for those convicted to engage in the rehabilitative process. Alternatively, the potential denial of a right to petition for family-based immigration may have been intended to deter future criminal conduct. Because several plausible rational justifications exist for the challenged classification, the Ninth Circuit dismissed the plaintiff's equal protection claim.[87]

(1942).

81 *Solorio v. Lynch*, 194 F. Supp. 3d 1038 (E.D. Cal. 2016).

82 4 U.S.C.A. §20901.

83 *Solorio*, 194 F. Supp. 3d at 1041.

84 *Id.*

85 *Id.*

86 *Id.*

87 *Solorio*, 194 F. Supp. 3d at 1045.

Denying a citizen the right to petition for family members under the SIJS statute is fundamentally different from the situation in Solorio. The limitation on the right to petition created by AWA applies to sex offenders. Those who have been convicted of wrong-doing. And even then, those individuals have the opportunity to make an affirmative showing that they are no longer a danger to others. The right to petition for family members is not merely limited by SIJS, but is completely and irrevocably restricted.[88] Further, this restriction applies to innocent children who have fled to the U.S. to seek shelter and security from abuse and neglect. Again, the government presents no rational basis for withholding "right, privilege, or status" from a natural parent of a SIJS recipient who is not abusive. The rational basis Congressional reports provide apply to abusive parents. They are the category Congress does not want to permit into the U.S. Applying this rationale to non-abusive parents does not fit, because non-abusive parents do not implicate any of the factors Congress was concerned about: Congress wanted to avoid giving two sets of parents rights, but when a child has on non-abusive natural parent, there are no foster parents involved; nor are the these are not the parents SIJS recipients are fleeing from. As discussed above, the cost of deporting such a parent, or forcing them to live here with no status, hurts Congress and taxpayers. Additionally, with AWA, denying the right to petition is not absolute. The petitioner has the opportunity to show that he poses no risk to the noncitizen in respect to whom a petition is filed. However, with SIJS, there is no such opportunity making it substantially unfair. This harsh effect that parental ties can never be reinstated would be unfair and contrary to the humanitarian purpose of the act.[89]

B. The Current Interpretation Does Not Effectuate the Best Interest of the Child

This section analyzes the real life effects of SIJS' current interpretation through two lenses - first, the of the story of a SIJS grantee, and second, a recent psychological study – in an effort to show that the current interpretation of SIJS does not fully effectuate the best interest of the child. Although society may see the separation of a child from abusing or seriously neglectful parents as an act of protection, in the eyes of the child, separation from his home country and parents can be a truly traumatic experience.[90] If the child is able to make the

88 *See supra* note 37.

89 *Matter of Li*, 20 I&N Dec. 700 (BIA 1993).

90 *The Needs of Abused and Neglected Children*, Child Welfare Info. Gateway,

transition accompanied by a non-abusive parent, and is able to resettle in the U.S. with that parent, the experience can be less traumatic. The way the SIJS statute currently is written, this is not an option for many SIJS eligible children. If Congress was truly considering best interest as it is interpreted by family courts, it should realize severing the relationship between a child and their natural parent when that parent is non-abusive or neglectful, does not serve the values of family integrity, does not protect the minor, and certainly does not further the interest of safety and familial stability.

The two options SIJS leaves for children who qualify are separating from his or her non-abusive parent indefinitely, or being raised by an undocumented parent; neither of these options is a holistic approach to protecting best interest of the child, and to the contrary can actually be severely detrimental to the child's wellbeing.

i. A Mother and Daughter's Story

Emily, a sixteen-year-old SIJS grantee and legal permanent resident, chose the latter option. Emily and her mother, Josefina, crossed the Mexican border into the U.S. in 2005, when Emily was four years old. Emily's father was both verbally and physically abusive, and Josefina revealed that Emily was conceived through rape. The decision to leave was a difficult one, as abusive husbands are not a rare occurrence among Josefina's family, and few supported her. Josefina remembers thinking only at that time that she needed to protect herself and her infant daughter. She recalls asking for a cousin's help in arranging a coyote to smuggle her and Emily into the U.S. They left their home in the middle of the night, and made the trip to Tijuana, a Mexican border city which many coyotes use as a send-off point. Once in the U.S., Emily and Josefina made their way to New York City, where they had some distant relatives. By this time, Josefina was almost out of money and began to find under-the-table jobs to support herself and her daughter.

When Josefina learned that SIJS was an option for Emily, she rushed to begin the application process. That meant finding pro-bono counsel, and going to family court in order to establish that Emily was an unmarried minor whose reunification with her father was impossible due to neglect and abuse, that she was a dependent of the family court, and returning to Mexico was not in Emily's best interest. Josefina additionally had to file for legal guardianship of Emily. In granting

https://www.childwelfare.gov/pubs/usermanuals/subscare/subscareb.cfm (last visited Feb. 15, 2014). 16 Scholar 659 2013-2014.

guardianship to Josefina, the family court found her to be a suitable caretaker for her daughter and bestowed upon her all responsibilities of a parent to their child, including shelter, nutrition, education, and healthcare.

In the process of the SIJS application, Josefina's attorney determined that Josefina was not eligible for any affirmative relief of her own, including asylum, immigrant visas for battered spouses and parents through the Violence Against Women Act (VAWA), or other existing humanitarian visas. The attorney also informed her that though Emily was eligible for SIJS, which would grant her legal permanent resident status, and eventually citizenship, Emily would never be able to petition for sponsorship of Josefina. Upon learning this, Josefina did not bat an eyelash. She calmly said, "My only concern is for my daughter. If she will be able to live here legally and without worry about returning to Mexico, then I am happy."

Though Emily is the only one of the two for whom U.S. immigration law provides relief, it is obvious that it is not Emily alone who has suffered. Emily has one abusive, neglectful parent, but she also has one brave, loving, and devoted parent. Family court relies on these characteristics when granting Josefina guardianship, and in doing so affirms the strong natural parent – child relationship which exists between Emily and her mother. Yet the same legal system which acknowledges Josefina's exceptional caretaking of her daughter, also purports to sever the parental relationship for immigration purposes. In effect, Josefina carries all of the responsibility of being a single parent, but is denied any of the legal benefit. Josefina's selfless attitude is shared by many other parents in her situation. It is very often the case that a child who is eligible for SIJS because of the abuse of one parent, has come to the U.S. in the company of the non-abusive parent. And, very unfortunately, that parent is often herself a victim and fleeing her own abuse.

Now, Josefina must provide for Emily with no legal status. This makes Josefina's responsibilities as a single mother significantly more difficult. She struggles to find a reliable source of income, keep a roof over their heads, and is unable to access many government benefits which help support low-income families. Additionally, there is a psychological burden on both Emily and Josefina which comes with the looming possibility of deportation. Being undocumented puts Josefina at constant threat of deportation, which creates a massive amount of instability for her and her daughter. Colombian-American Diane Guerro describes a similar experience in her autobiography, *In the Country We Love: My Family Divided*:

> Deported. Long before I fully understood what that word meant, I'd

> learned to dread it. With every ring of my family's doorbell, with every police car passing on the street, a horrifying possibility hung in the air. My parents might one day be sent back to Colombia. That fear permeated every part of my childhood. Day after day, year after year, my mom and dad tried desperately to become American citizens and keep our family together. They pleaded. They planned. They prayed. They turned to others for help. And in the end, none of their efforts were enough to keep them here in the country we love. My story is heartbreakingly common. There are more than eleven million undocumented immigrants in America, and every day an average of seventeen children are placed in state care after their parents are detained and deported, according to US Immigration and Customs Enforcement (ICE).[91]

In a few years, Emily will be a U.S. citizen and turn twenty-one years old, yet unlike other U.S. citizen children with noncitizen parents, she will not be able to petition for sponsorship of her mother; if her mother were to be put in deportation proceedings, Emily would not be able to help her.

ii. Psychological Effects

The effects of immigration, especially when the migration was made in less than positive circumstances, can often be traumatic. Complex cultural, economic, and social issues arise when people choose or are forced to leave their home country, and the children of illegal immigrants are often the most overlooked when considering what effects a lack of legal status can have.[92] A SIJS recipient child may have found sanctuary from an abusive or neglectful parent, but as Emily's story shows, living with an undocumented parent comes with its own kind of struggle, and if that parent were to be detained or deported, a vulnerable child is put through a second traumatic experience.

The "Pyramid of Immigration Enforcement Effects," developed by sociologist Joanna Dreby, explains many of the effects of parental deportation on children. At the base is a broad group of almost 10 million legal immigrant children living in immigrant families. There is evidence that children in these families may experience stress and other negative effects even if their immediate family members all have legal status, partially because they often live in communities where

91 DIANE GUERRO, IN THE COUNTRY WE LOVE: MY FAMILY DIVIDED (Henry Holt and Co. May 3, 2016).

92 Robert Muller, *The Traumatic Effects of Forced Deportation on Families*, (May 18, 2013), https://www.psychologytoday.com/blog/talking-about-trauma/201305/the-traumatic-effects-forced-deportation-families.

significant numbers of families have experienced parental arrest, detention, and deportation.[93]

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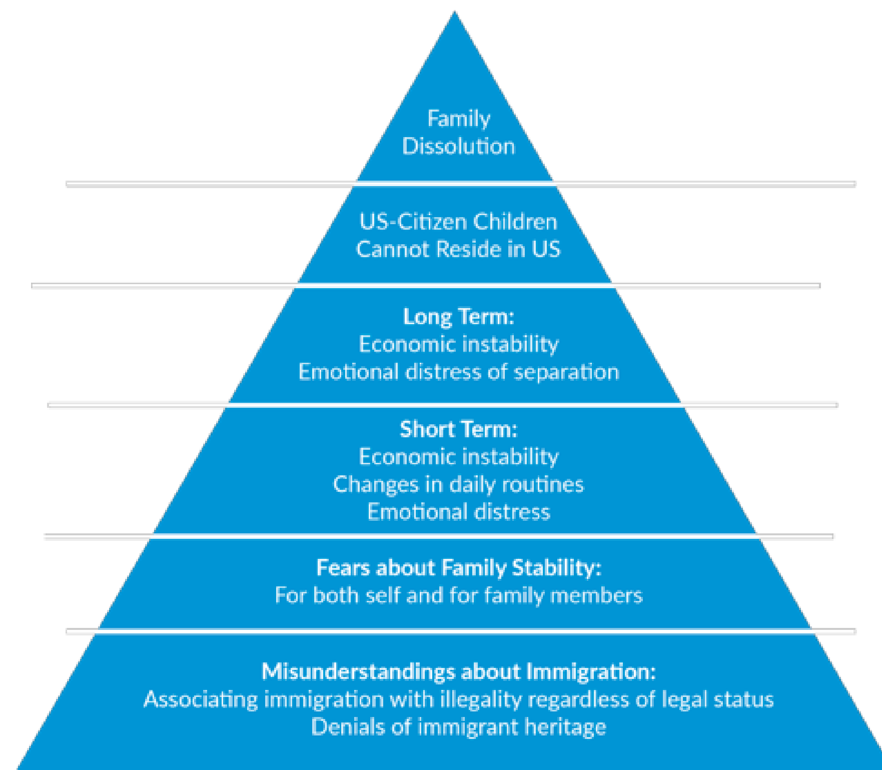
Next up the pyramid are the 5.3 million children of unauthorized immigrants who live with the persistent threat of their parents' deportation alongside the economic and social instability that generally accompany the unauthorized status of their family members.[95] Among



the difficulties families in these groups experience is low pay, unstable employment, unpredictable work hours, lack of autonomy at work, and lack of quality and stable child care. These factors have been associated with poor health and low cognitive development among children with unauthorized immigrant parents.[96] The psychosocial effects of

93 *See generally* Urban Institute & Migration Policy Institute, *Implications of Immigration Enforcement Activities for the Well- Being of Children in Immigrant Families* (Sept. 2015).

94 *Deportation of a Parent Can Have Significant and Long-Lasting Harmful Effects on Child Well-Being, As a Pair of Reports from MPI and the Urban Institute Detail*, (Sept. 21, 2015), http://www.migrationpolicy.org/news/deportation-parent-can-have-significant-and-long-lasting-harmful-effects-child-well-being-pair.

95 *See supra* note 91.

96 *Deportation of a Parent Can Have Significant and Long-Lasting Harmful Effects on Child

unauthorized status and the risk of parental deportation can also lower parents' emotional well-being and creating friction between family relationships.[97] Migration and integration are stressful enough without the added burden constant fear of deportation creates.[98]

The effects of parental detention and deportation are similar to those seen in children with incarcerated parents; they include psychological trauma, material hardship, residential instability, family dissolution, increased use of public benefits, and aggression.[99] Psychological trauma can come from witnessing a parent arrested at home, not knowing what happened to a detained parent, long periods of separation from a parent, unstable caregiving arrangements, and parental depression.[100] Initiation of deportation proceedings often result in economic hardship that is prolonged while the case moves through the immigration court system; in June 2015, it took an average of 600 days for immigration judges to complete deportation cases in which the defendant was not detained.[101].

Further up the pyramid, the study looks at those deported parents who choose to take their children along with them when they return to their home countries.[102] While there is no hard data on the frequency of this occurrence, an estimated half a million US-born children lived in Mexico in 2010, most of whom likely left the United States with their parents.[103] The transition to life in a foreign country can be difficult for children born and raised in the United States, as the language and culture are unfamiliar.[104] The standard of living can be lower than what a U.S. citizen child may be used to, particularly in the four countries which receive the most deportees: Mexico, El Salvador, Guatemala, and Honduras.[105] U.S. citizen children have the right to return to the United States, but may return with limited English skills, interrupted formal education, and other disadvantages.[106]

Well-Being, As a Pair of Reports from MPI and the Urban Institute Detail, (Sept. 21, 2015), http://www.migrationpolicy.org/news/deportation-parent-can-have-significant-and-long-lasting-harmful-effects-child-well-being-pair.

97 *Id.*

98 *Id.*

99 *Id.*

100 *Id.*

101 *Id.*

102 *Deportation of a Parent Can Have Significant and Long-Lasting Harmful Effects on Child Well-Being, As a Pair of Reports from MPI and the Urban Institute Detail*, (Sept. 21, 2015), http://www.migrationpolicy.org/news/deportation-parent-can-have-significant-and-long-lasting-harmful-effects-child-well-being-pair.

103 *Id.*

104 *Id.*

105 *Id.*

106 Randy Capps, Heather Koball, Andrea Campetella, Krista Perreira, Sarah Hooker & Juan

At the top of the pyramid are families that become permanently separated when parents are deported and lose custody of or contact with their children.[107] Marriages sometimes end following deportation, and inability to provide financially may discourage fathers from remaining in their children's lives.[108] According to one estimate, about 5,000 children in foster care in 2011 had a detained or deported immigrant parent.[109] Once in foster care, the child's reunification with the immigrant parent may become very difficult because parents in prolonged immigration detention often cannot attend child custody hearings, and those who are deported cannot easily return to the United States to attend these hearings.[110] Parents' rights may be terminated when they cannot comply with court requirements such as regularly visiting with their children, taking parenting classes, or gaining employment.[111]

Across the board, raising a family while undocumented often creates severe economic hardship. Unauthorized immigrant parents generally earn lower incomes than their legal immigrant and citizen counterparts.[112] Low pay, unstable employment, unpredictable work hours, lack of autonomy at work, and lack of quality and stable child care are associated with poorer health outcomes and lower cognitive development among children with unauthorized immigrant parents, compared with children of legal immigrant or US-citizen parents.[113]

Recent research attempts to measure the psychosocial effects of unauthorized status and the risk of parental deportation on immigrant families.[114] A survey of Hispanic immigrants in cities cross the Northeast found that parents' without legal immigration status were associated with lower levels of overall family well-being, which was measured by parents' emotional well-being, ability to provide financially, and relationships with their children.[115] The well-being of their children was also lower, measured by parents' perceptions of

Manuel Pedroza, *Implications of Immigration Enforcement Activities for the Well- Being of Children in Immigrant Families*, Urban Institute (September 2015) https://www.urban.org/sites/default/files/alfresco/publication-exhibits/2000405/2000405-Implications-of-Immigration-Enforcement-Activities-for-the-Well-Being-of-Children-in-Immigrant-Families.pdf.

107 *Id.*

108 *Id.*

109 *Id.*

110 *Id.*

111 *Id.*

112 *Id.*

113 H. YOSHIKAWA, IMMIGRANTS RAISING CITIZENS: UNDOCUMENTED PARENTS AND THEIR YOUNG CHILDREN (New York: Russel Sage, 2011).

114 *Id.*

115 K.M. Brabeck and Q. Xu, *The Impact of Detention and Deportation on Latino Immigrant Children and Families: A Quantitative Exploration*, HISP. J. OF BEHAV. SCI., 32, 341-361 (2010).

children's emotional well-being and their academic performance.[116]

Fear associated with the threat of deportation can be exacerbated by Immigration and Customs Enforcement (ICE) enforcement practices, such as home and workplace raids.[117] News of such occurrences can spread through families and communities, terrorizing adults and children alike. The effects are especially traumatic for children. A report of children who have experienced an ICE raid describes cases of long-term separation anxiety among children who were separated from their caregivers for even a day.[118] Some parents claim that their children cry uncontrollably when dropped off at school or day-care because of this fear.[119] Psychologists have noted signs of depression, anxiety, and even post-traumatic stress in some of these children.[120]

Children with undocumented parents also experience ostracization among their communities, especially as a result of ICE raids.[121] The report describes one mother's experience, "Nobody talks to us anymore. They treat us like criminals."[122] Families are described to "turn in on themselves."[123] This social exclusion and isolation can induce depression and accentuate psychological distress among parents and children.[124] Psychologists have noted that some children appear to have absorbed the feeling of being labelled an outcast and are living isolated from their peers.[125] These children are often stigmatized and harassed for having parents who have are "illegal" or who have been arrested.[126] This stigmatization causes some children to live in the constant fear of friends and peers finding out the status parents.[127] They are sometimes warned to keep this a secret, which can further contribute to feelings of isolation and shame.[128]

Additionally, the threat of deportation can lead to higher levels of acculturative stress, which is defined as the psychosocial strain that immigrants and their descendants experience in response to

116 *Id.*

__117_Robert T Muller, *The Traumatic Effects of Deportation on Families*, PSYCHOLOGY TODAY, (May 18, 2013) https://www.psychologytoday.com/blog/talking-about-trauma/201305/the-traumatic-effects-forced-deportation-families.

118 *Id.*

119 *Id.*

120 *Id.*

121 *Id.*

122 *Id.*

123 Robert T Muller, *The Traumatic Effects of Deportation on Families*, PSYCHOLOGY TODAY, (May 18, 2013) https://www.psychologytoday.com/blog/talking-about-trauma/201305/the-traumatic-effects-forced-deportation-families.

124 *Id.*

125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.*

immigration-related challenges, such as linguistic barriers or separation from friends and family.[129] One survey of Hispanic immigrants in a mid-western city showed many reported greater fear of deportation when going to a social or government agency also experienced more acculturative stress, more emotional distress, and lower self-reported health status.[130] In a second study, many Hispanic immigrants in two Texas cities expressed concern about walking in the streets, waiting on a street corner to get work, applying for a driver's license, and interacting with the police.[131] The study showed that those with such fears also experienced higher levels of acculturative stress.[132]. Furthermore, fear of deportation may exacerbate the negative impacts of illegal immigrant parents' difficulties in finding and maintaining employment.[133] The association between fear of deportation and poor physical and emotional health is related to stress resulting from low earnings and poor employment prospects, which researchers have termed "extrafamilial acculturative stress."[134]

Many immigrant children, (all immigrant children eligible for SIJS), already experience separation from at least one parent during migration to the United States. [135] Indeed, separation from a parent can be stressful even if the relationship with that parent was a difficult one. Parental deportation, or even the threat of deportation, can intensify the psychological effects of prior separations and make children vulnerable to fears that these could occur again.[136] These fears might be worse for older children who are themselves unauthorized immigrants.[137]

All of these effects are unfortunate, and in the context of a SIJS grantee child who has a non-abusive parent, avoidable. Were such a child able to petition for status for their parent as an LPR or citizen, this would create greater likelihood of familiar stability and security, two things integral to the wellbeing of children who have already faced traumatic experiences in their young lives.

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129 Richard Cervantes, Amado M. Padilla, Nelly Salgado de Snyder, *The Hispanic Stress Inventory: A Culturally Relevant Approach to Psychosocial Assessment,* Psychol. Assessment: A J. of Consulting and Clinical Psych. (1991).

130 PA Cavasos-Regh, LH Zayas, EL Spitznagel, *Legal Status, Emotional Wellbeing and Subjective Health Status of Latino Immigrants*, J. NATL. MED. ASSOC. (2007).

131 *Id.*

132 Consuelo Arbona, Norma Olvera, Nestor Rodriguez, Jacqueline Hagan, Adriana Linares, Margit Wiesner, *Acculturative Stress Among Documented and Undocumented Latino Immigrants in the United States*. HISPANIC J. OF BEHAVIORAL SCI. 2010, at 32.

133 *Id.*

134 *See* Cavasos-Regh, Zayas, and Spitznagel *supra* at 1130.

135 Suárez-Orozco, Todorova, and Louie, *Making up for lost time: the experience of separation and reunification among immigrant families*. FAM. PROCESS, Winter 2002, at 625.

136 *Id.*

137 Dreby, J. *The Burden of Deportation on Children in Mexican Immigrant Families*. J. OF MARRIAGE AND FAMILY, 2012, at 829.

PART IV: SOLUTIONS

A. SIJS Should Not Be Interpreted to Deny a Non-Abusive Parent "Right, Privilege, or Status"

In order to treat SIJS recipients equally with other legal permanent residents and citizens, and to ensure they are able to find true refuge in the United States, the "no right privilege, or status" language needs to be read differently. As sponsorship is not a "right, privilege, or status" of the parent, but is a right that belongs to the person who legalizes (here, the child), this provision can be interpreted by USCIS as to not bar a SIJS recipient from sponsoring their non-abusive natural parent.

For the reasons discussed above, in an adoption context, and a pre-2008 SIJS context, severing the natural parent – child relationship so as to deny immigration benefits was acceptable. However, the scenario changed completely after the 2008 amendment to SIJS. Now, a child need not be parentless in the U.S; he or she can have a relationship with one parent and still be eligible for SIJS. In this situation, when it is not necessary for both parents to be dead, absent, or unfit for parenting, it is much less logical to deny the non-abusive, neglectful, or absent parent any immigration benefit.

Courts have picked up on this illogicality in analogous situations regarding adopted immigrant children. In *Matter of Li*, the BIA discussed the intent of Congress in terminating parental rights. The BIA found that there were situations where the status of natural parents may be terminated, by adoption for instance, and the intent of Congress in these situations was to ensure that a child only had one parental relationship, either with her natural parents, or her adoptive parents, but not both. However, the BIA also found that to say natural relationships "could never again be recognized under any circumstances for immigration purposes following the legal termination of an adoption could lead to patently unjust results, which [they were] confident would not have been intended by Congress." *Matter of Li*, 21 I&N Dec. 13 (BIA 1995).

In *Li*, the court gave the example of a child who had been separated from her natural parents and adopted under a mistaken belief that she had been orphaned. Should she later be reunited with her natural parents, and the adoption be terminated, the natural parent relationship could be reestablished granted there is no fraud or attempted manipulation of immigration laws. "In such a situation, to conclude that the natural parental relationship had been severed irrevocably and could not be recognized for immigration purposes under any circumstances would distort rather than further the purposes of the

Act." Despite the language prohibiting transfer of any "right, privilege, or status" to a natural parent of an adopted child, if a beneficial relationship can be reinstated with a previously adopted child and his natural parent, then the Act did not intend to sever all ties forever and deny all benefit to parents if the relationship is later resumed. Similarly, despite the existence of the "right, privilege, or status" language in the SIJS provisions, if the natural parent-child relationship is not severed due to abuse, neglect, or abandonment, and is on the contrary a healthy and beneficial relationship, the statute should not be read to deny all immigration benefits to such a parent.

Like international adoption laws, the SIJS subsection of the INA also serves a humanitarian purpose: it is meant to assist children in situations where their natural parents are absent or unfit to parent, and provide those children with the option of finding a better support system in the U.S. However, should the child find that support system in an existing non-abusive, natural parent, it seems completely illogical to either force that child to separate from such a parent, or to force that parent to live without status as they care for their child. For SIJS to sever natural parent – child relations for immigration purposes with the "no right, privilege, or status" language as applied to a parent who is not abusive or neglectful, would similarly distort, rather than further, the purposes of SIJS.

For these reasons, SIJS should be interpreted to deny all "right, privilege, and status" to an abusive, neglectful natural parent, but not to a natural parent who does not fall under that criteria.

This would not be contrary to the spirit of SIJS. The House Report accompanying the 1997 amendment to the SIJS language expressed that SIJS is supported if "neither the dependency order nor the administrative or judicial determination of the alien's best interest was sought primarily for the purpose of obtaining status of an alien lawfully admitted for permanent residence, rather than the purpose of obtaining relief from abuse or neglect." H.R Rep. 105-405, at 130 (1997). Congress here expresses that objective intent of a child is relevant when determining the appropriateness of SIJS relief. It is not meant to be a channel for immigrant youth to unequivocally find lawful status in the U.S. Rather, it is meant to be provide immigrant children with a safe haven if they are in fact escaping abuse or neglect. If a child is forced to sever a beneficial relationship with an existing natural parent in order to receive relief through SIJS, then that seems to be an absurd result which puts the nature of the "relief" being provided is put into question. Thus, allowing a child granted SIJS to petition for their natural parent would not be misaligned with the Congressional intent expressed here. A child with one non-abusive parent can legitimately

seek to escape abuse or neglect at the hands of his other parent.

The canons of statutory interpretation make clear that not only should the SIJS provisions be interpreted to permit non-abusive, present parents of SIJS children to obtain rights, privileges, and status, they can be. Three substantive canons come to mind when examining the SIJS provisions. First, is the absurd results doctrine. Courts have traditionally used this doctrine to justify an interpretation that departs from the literal reading of a statute that would produce absurdity.[138] When this is the case, legislative intent, rather than the literal text, controls, as the "legislature will not intend an absurd or manifestly unjust result."[139] Barring a natural parent who has not surrendered his or her child from ever immigrating legally with that child seems to be an absurd and manifestly unjust result when considering the purpose of SIJS is to provide relief to abandoned, neglected, and abused children, not to put them through the further struggle of jeopardizing their only remaining familial relationships.

Second, it is encouraged to interpret statutes in light of fundamental values.[140] The purpose of SIJS furthers the societal value in providing relief for children escaping parental abuse or neglect. In situations where both parents are abusive, neglectful, or absent, SIJS allows for a child to legalize and find alternate care in the U.S., through adoption or foster care. The 2008 amendment allows for a child to be SIJS eligible if he has only one abusive, neglectful, or absent parent. This implies that the other parent is not abusive, neglectful, or absent. Forcing a child to leave such a parent behind - essentially separating a family - or indirectly asking that parent to raise that child in the U.S. without legal documentation clearly would be interpretations of the SIJS statute which go against fundamental societal values.

The third canon to consider is the canon of constitutional avoidance. This canon states that if a statute is susceptible to more than one reasonable construction, courts should choose an interpretation that avoids raising doubts about the statute's constitutionality. Interpreting the SIJS provisions as prohibiting SIJS recipient children from ever sponsoring a natural parent, even once they have become U.S. citizens, raises 14th Amendment equal protection concerns. All U.S. citizens are endowed with certain rights, and prohibiting a citizen who naturalized after receiving SIJS to sponsor their natural parent would create a subcategory of citizens who's right to sponsor direct relatives are significantly limited.

[138] D. Wiley Barker, *The Absurd Results Doctrine, Chevron, and Climate Change*, 26 BYU J. PUB. L. 73 (2012); citing United States v. Ron Pair Enters., 489 U.S. 235, 242 (1989).

[139] *Id.* at 242; *Sutherland*, §58:2, at 90 (7th ed. 2008).

[140] *See generally Church of the Holy Trinity v. United States*, 143 U.S. 457.

An example of a way that the current interpretation is at odds with these canons is the implications it has on cancellation of removal. Cancellation of removal is an avenue of immigration relief available to individuals who have been ordered deported. To qualify, one must meet the following criteria: [141]

1. Must have been continuously physically present in the U.S. for at least ten years.
2. Removal from the U.S. would cause "exceptional and extremely unusual hardship" to your qualifying relative, who is a U.S. citizen or LPR
3. Must show "good moral character"; and
4. Must not have been convicted of certain crimes

Qualifying relatives consist of: the noncitizen's the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.[142] A child is defined as an unmarried person under twenty-one years of age.[143]

The second requirement is often the most difficult to meet, as "to establish "exceptional and extremely unusual hardship," an applicant for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. §1229b(b), must demonstrate that his or her spouse, parent, or child would suffer hardship that is substantially beyond that which would ordinarily be expected to result from the alien's deportation, but need not show that such hardship would be "unconscionable."[144]

Partap v. Holder[145] states that cancellation of removal is appropriate if the detailed statutory definition of child is met. A U.S. citizen or LPR child who received SIJS is a prime candidate for a qualifying relative who would experience extreme hardship because receiving SIJS in itself requires the child to secure a court order which outlines the hardship the child had experienced in their home country, and the reasons why returning to said country is not in the child's best interests. SIJS recipient children fall exactly into the category of relatives cancellation of removal is trying to protect, and prohibiting a parent from listing such a child as a qualifying relative would be completely counterintuitive. After all, to qualify for SIJS in the first place a child must have experienced abuse or neglect- extreme and unusual hardship by any definition.

If a child is severing their parental relationship in order to receive

[141] I.N.A. 240(A).
[142] I.N.A. §240(A)(b)(1)(d).
[143] §101(b)(1) of 8 U.S.C. §1101.
[144] 240A(b) of the Immigration and Nationality Act 8 U.S.C. §1229b(b).
[145] 603 F.3d 1173 (2010).

legal status through SIJ, as the current interpretation seems to require, then that child would no longer be a "qualifying relative" for cancellation of removal purposes. However, this is problematic because deportation of a SIJS grantee's non-abusive parent is a severe hardship on that child, more so than deportation of parents of any other U.S. citizen or LPR child. A SIJS grantee may not have the option to return to his home country with his deported parent, because of safety concerns such as an abusive parent. He may not have the support of other relatives in the U.S. Most importantly, after experiencing the trauma of abuse, neglect, or abandonment, migrating to escape that abuse or neglect, and then facing the difficulties of resettlement in such a circumstance, deportation of his non-abusive parent and only caretaker would seem to qualify as extreme and unusual hardship.

Allowing a SIJS grantee to sponsor their natural parent, or expanding pathways to legal status to any degree, does not seem to be the most politically viable course of action at this time. This assessment suggests how far out of sync U.S. immigration law has become with other values related to the treatment of children. As discussed supra, outside the realm of immigration law, the importance of children's interests in legal decisions regarding family is well established.[146] Yet in immigration, despite claiming to consider "best interest" in SIJS, there seems to be a movement away from the children's rights over the last two decades. For example, originally to avoid deportation through cancellation of the removal, "exceptional and extreme hardship" to children had to be shown, which is a lower standard than the existing standard of "extremely unusual hardship."[147] As David Thronson put it in his essay, *Entering the Mainstream: Making Children Matter in Immigration Law*:

> U.S. immigration law has strayed so far from other areas of law in its treatment of children, that we are left expecting from immigration law no more than the mere avoidance of exceptional and extremely unusual hardship to children . . . a major step toward a more child-centered immigration law would be accomplished by allowing consideration of the hardship to children that is common when families face separation due to deportation, rather than declaring it irrelevant simply because it is not extremely unusual.[148]

Deportation of a parent will always be a very heavy burden on a child, but even more so when that child is a SIJS grantee. And yet, fighting for cancellation of removal is doubly impossible for the parent

[146] *See supra* notes 46-56.
[147] H.R. Conf. Rep. No. 104-828.
[148] David B. Thronson, *Entering the Mainstream: Making Children Matter in Immigration Law*, 38 FORDHAM URB. L.J. 393 at 410 (2010-2011).

of a SIJS grantee because of both the "extremely unusual hardship" requirement and the fact that her child may not qualify as a qualifying relative.Allowing parents of SIJS grantees to obtain legal immigration status through their children further advances the goals and policies that generally advance and promote child welfare, which is certainly a fundamental and constitutionally protected value.[149] Parents with lawful immigration status are better able to provide economically and integrate socially for the benefit of the child and the family as a whole.[150] This also reduces the possible need for state intervention or support for the child.[151]

B. Alternatively, the SIJS Provision Should Be Amended

As explained above, the SIJS statute, as currently interpreted, conflicts with Congress's intent when it amended the statute and in frustrating the best interests of SIJS recipients. Accordingly, if the statute cannot be interpreted to effectuate those purposes, it should be amended.

SIJS could be amended to deny any "right, privilege, or status" to the abusive, neglecting, or abandoning parent to whom the family court has already found reunification is not viable. If each SIJ grantee's sponsorship petition is looked at on a case by case basis, a parent will have the opportunity to show that they are the non-abusive, non-neglectful, non-abandoning parent by obtaining an order of guardianship or custody from a state family.

Additionally, Congress can take a similar approach as the one it took with the Adam Walsh Child Protection and Safety Act (AWA). "Among other aspects, the AWA amended sections of the INA to preclude any U.S. citizen convicted of "a specified offense against a minor" from petitioning for a family-sponsored visa, "unless the Secretary of Homeland Security, in the Secretary's sole and unreviewable discretion, determines that the citizen poses no risk to the alien with respect to whom a petition . . . is filed.""[152] A natural parent who is the would-be beneficiary of a SIJS U.S. citizen child's sponsorship petition could be required to show that he or she is not abusive, neglecting, or abandoning parent with whom reunification is not viable. This would alleviate any concerns that granting such a petition would not be in the best interest of the child or that there is a

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149 *Id*. at 412.
150 *Id*. at 412.
151 *Id*. at 412.
152 8 U.S.C. §1154(a)(1)(A)(viii)(I); *See Solorio v. Lynch*, 194 F.Supp.3d 1038 (2016).

risk of allowing an abusive, neglectful, or abandoning parent into the country.

CONCLUSION

Mainstream U.S. legal and societal theory rejects the notion of penalizing children for the actions of their parents.[153] Limiting the rights of a child because of circumstances out of their control is "contrary to the basic concept of our system that legal burdens should bear some relationship to the individual responsibility of wrongdoing."[154] An immigrant child is not responsible for the abuse, neglect, or abandonment of his parent, and many times did not himself make the decision to come to the U.S. Once in the U.S., hopes of a safer, more stable life are often overshadowed by the realization that though the child himself may eventually naturalize, he will never be able to share the sanctuary of legal status with his remaining parent. Thus, as SIJS exists today, it is an incomplete and troubling option for children escaping abhorrent circumstances in their home country.

In conclusion, before the 2008 amendment, the "no right, privilege, or status" language made sense. A child eligible for foster care because he has no natural parent to take care of him, should not be able to sponsor his abusive, neglectful, or absent natural parents after obtaining SIJS because this invites immigration fraud, and would defeat the purpose of SIJS. However, after the 2008 amendments to the SIJS provisions allowing for a child with only one abusive, neglectful, or absent parent to qualify, restricting immigration benefits to both parents is unnecessary and also is counterintuitive to the purpose of SIJS. Congress has not shown clear intent to restrict immigration benefits to parents of SIJS recipients unconditionally, and the BIA has found the "no right, privilege, or status" language can be applied on a somewhat discretionary basis. Therefore, there should not be an absolute ban on parents of SIJS recipients obtaining any immigration relief. An alternate interpretation of the SIJS provisions, or a statutory amendment, allowing a SIJS grantee to petition for sponsorship of their non-abusive, non-neglectful, non-abandoning parent would alleviate the burdens SIJS creates and make it the humanitarian avenue of relief it was intended to be.

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[153] David B. Thronson, *Entering the Mainstream: Making Children Matter in Immigration Law*, 38 FORDHAM URB. L.J. 393 at 412 (2010-2011).

[154] *Id.* at 412.