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Nathan Price

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Special Immigrant Juvenile Status: Special Here, Special There, But Not Special Everywhere

NATHAN PRICE[†]

INTRODUCTION

Ana Herrera was only four months old when she was abandoned by both her mother and her father.¹ Ana was left in the care of her maternal grandmother and did not have any further contact with her parents.² Ana's grandmother, try though she might, could not get a job and, as a result, Ana often did not have enough food.³ For almost two decades, Ana lived without guarantee of a daily meal, attempting to help when she could by working here and there, and unable to attend

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[†] Nathan Price is an Evening Student at the University of Maryland Francis King Carey School of Law, graduating class of 2018. Nathan thanks all those involved in the editing process of this Comment, including Catherine Lee and Sidonie Beckton, who spent many hours reviewing the many drafts of this Comment. He also thanks his fellow Evening Class members, who have been a constant source of support throughout his law school career. He would also like to thank his government high school teacher, Mr. Charles Hontz, for making government, and the law, interesting at such a critical phase of his development. He thanks Scott Rose, for providing him with an opportunity to do pro bono work assisting immigrant juveniles seeking Special Immigrant Juvenile Status. He thanks his friends and girlfriend, Lauren Shevitz, for their company, love, and support in not only the writing and editing process, but also his formation as a law student. Lastly, Nathan thanks his parents, whose unconditional love, support, and (at times) firm reminders, have made him the man he is today.

1. Elizabeth Doerr, *Young People Traveling Across the Border Alone Are Making it to Maryland – and Fighting to Stay*, CITY PAPER (May 25, 2016), <http://www.citypaper.com/news/features/bcp-062516-feature-ana-profile-20160525-story.html>.

2. *Id.*

3. *Id.*

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school because of her poverty and the incessant local gang violence.⁴

One day, Ana was in her neighborhood and witnessed the murder of her cousin.⁵ To make matters worse, the murderers knew she saw them.⁶ Fearing for her life, Ana left her home country of El Salvador alone and headed towards the United States, where her aunt lived.⁷ Four dangerous weeks and 2,000 miles later, traveling on foot and by bus, Ana made it to the Texas border and crossed into the Land of the Free.⁸ Ana was apprehended by Immigration Services and was sent to a detention center.⁹ After weeks of incarceration, Ana was sent to her aunt's house in Maryland.¹⁰ Being over the age of eighteen, Ana was on a deadline if she was to benefit from Special Immigrant Juvenile Status (SIJS),¹¹ which is meant to help foreign children who have been abused, neglected, or abandoned find a better life in the United States.¹² Ana's aunt petitioned the local Circuit Court for guardianship of her niece, as well as for specialized findings of fact¹³ required for SIJS: that Ana had been abandoned, abused, or neglected by one or both of her parents.¹⁴ The Circuit Court made the desired findings of fact and Ana was ultimately granted SIJS and became a legal resident of the United States.¹⁵

Ana was one of the lucky ones. While Maryland allowed Ana to become dependent on a juvenile court through guardianship at nineteen years of age, there are many juveniles that are not so fortunate.¹⁶ SIJS is made available by a federal statute¹⁷ that allows

4. *Id.*

5. *Id.*

6. *Id.*

7. Doerr, *supra* note 1.

8. *Id.*

9. *Id.*

10. *Id.*

11. *See* Immigration Reform and Control Act of 1986, 8 U.S.C. § 1101(a) (2006) (requiring that the juvenile be declared dependent on a juvenile court and that reunification with one or both parents not be viable due to “abuse, neglect, [or] abandonment” in order to qualify for SIJS); *see also* Md. Code Ann., Fam. Law § 1-201(a) (defining “child” as “an unmarried individual under the age of 21 years”).

12. *Special Immigrant Juvenile Status*, U.S. CITIZENSHIP AND IMMIGRATION SERV., <https://www.uscis.gov/green-card/special-immigrant-juveniles/special-immigrant-juveniles-sij-status> (last visited Apr. 23, 2017).

13. Doerr, *supra* note 1.

14. *See* 8 U.S.C. § 1101.

15. Doerr, *supra* note 1.

16. *Id.*

17. Immigration Reform and Control Act of 1986, 8 U.S.C. § 1101(a) (2006); *see also* 8 U.S.C. § 1232 (2008).

immigrant juveniles who have been abused, abandoned, or neglected by one or both parents to petition a state juvenile court for special factual findings that will put the juvenile on an accelerated path to citizenship.¹⁸ The juvenile must also be declared dependent on that state juvenile court by that court, and must demonstrate that it is not in his or her best interest to return to the country of origin.¹⁹ Some children “age out” of SIJS eligibility while their SIJS applications are pending,²⁰ and still others are prohibited from becoming dependent on a juvenile court once they are over the age of seventeen, depending on the state law.²¹ This Comment discusses several states’²² different approaches to applying SIJS, analyzes various problems found in those approaches, as well as the lack of uniformity across the states, and proposes several solutions to bridge the differences amongst the states and transform SIJS into the universal safeguard it was meant to be by ensuring a uniform, humanitarian application of SIJS.²³

SIJS seekers begin in state court, where certain factual findings must be made in order for them to proceed along the path of obtaining SIJS.²⁴ These factual findings must be made as part of a proceeding that results in the SIJS seeker being adjudicated to be dependent on the court.²⁵ This presents a unique federalism issue, as noted by some courts when addressing SIJS petitions.²⁶ The issue of immigration regulation, in which state courts are required to play a part under the SIJS framework, has been unequivocally left to the federal government for over a century.²⁷ By requiring state courts to make findings of fact that the Department of Homeland Security depends on when making immigration determinations, the SIJS statute effectively delegates certain aspects of immigration determination to state courts.²⁸ As a

18. See 8 U.S.C. § 1101; see also Jessica R. Pulitzer, Note, *Fear and Failing in Family Court: Special Immigrant Juvenile Status and the State Court Problem*, 21 CARDOZO J.L. & GENDER 201, 213-14 (2014).

19. See 8 U.S.C. § 1101; see also Pulitzer, *supra* note 18.

20. See *Perez-Olano v. Gonzales*, 248 F.R.D. 248, 268-69 (C.D. Cal. 2008); see also 8 C.F.R. § 204.11 (setting the age restriction for application as “under twenty-one years of age”).

21. FLA. STAT. ANN. § 39.01 (West 2016) (defining a minor under Florida law as “any unmarried person under the age of 18 years” for purposes of child-related adjudications).

22. Maryland, Florida, and California.

23. See Pulitzer, *supra* note 18.

24. Immigration Reform and Control Act of 1986, 8 U.S.C. § 1101(a) (2006).

25. *Id.*

26. See *infra* Part II.B.

27. *Chae Chan Ping v. U.S.*, 130 U.S. 581, 609 (1889) (“The power of exclusion of foreigners being an incident of sovereignty belong[s] to the government of the United States”).

28. 8 U.S.C. § 1101.

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relatively new process, this has created challenges in the state courts, some of which grapple with the propriety of their new-found responsibility.²⁹

The importance of uniformity in SIJS adjudications across the fifty states, as well as safeguards against the rise of obstacles to SIJS seekers created by state law, cannot be understated. The success of otherwise identical SIJS petitions varies wildly from state to state. Because of the undeniable injustices this lack of uniformity produces, something must be done to ensure that petitions are treated equally, regardless of which state they are brought in. Furthermore, the lack of adequate safeguards in place to prevent procedural and substantive obstacles from arising further obviates the fact that something must be done to ensure that those that fall within the ambit and intent of the SIJS statute are able to take advantage of its protections.

Part I of this Comment walks through the history of SIJS, from its inception in 1990³⁰ to present day. Part II discusses how SIJS has been applied in Maryland, Florida, and California through the discussion of select cases. These states were chosen because they represent three distinct ways in which state courts have addressed the SIJS issue.³¹ Part III identifies problems state courts have faced dealing with SIJS petitions and proposes solutions to those issues. Part III also proposes ways to ensure uniformity across the nation regarding SIJS petition adjudications and discusses nationwide solutions that could revolutionize the way SIJS is applied and enable thousands more immigrant children to profit from its protections. Lastly, Part III presents a realistic, comprehensive solution that would solve or curtail the issues discussed throughout the Comment.

PART I. THE HISTORY OF SPECIAL IMMIGRANT JUVENILE STATUS 1990 TO 1997

Prior to 1990, there was no meaningful distinction in United States immigration law between immigrant adults and immigrant children.³² This was despite steps taken across the world during the late twentieth century toward implementing a “best interest of the child”

29. See *infra* Part II.B.

30. Heryka Knoespele, Note, *Special Immigrant Juvenile Status: a “Juvenile” Here is Not a “Juvenile” There*, 19 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 505, 507 (2013); see also 8 U.S.C. § 1101.

31. See *infra* Part II.

32. See Pulitzer, *supra* note 18, at 204.

philosophy when making decisions regarding a child's rights.³³ The Convention on the Rights of the Child (CRC), in 1990, mandated that: "[i]n all actions concerning children; whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration."³⁴ However, the United States is one of three signatory states to the CRC that has not ratified it.³⁵ This means that, while the United States cannot pass laws that conflict with this maxim or any of the CRC's provisions, the United States does not have to positively pass or enforce legislation that will bring about the CRC's humanitarian goals.³⁶

Instead of ratifying the CRC, the United States took its own steps towards considering the best interests of the child in 1990 by signing into law the Immigration and Nationality Act (INA).³⁷ The INA created a new form of relief for immigrant children who fit certain criteria: Special Immigrant Juvenile Status (SIJS).³⁸ Under the INA, a child seeking SIJS would have to obtain from a state court: (1) an order declaring the child dependent on the court, (2) a finding that the child was eligible for long-term foster care, and (3) a finding that it was not in the child's best interest to return to the child's home country.³⁹ In 1993, federal regulations were promulgated that defined eligibility for long-term foster care as a situation where reunification with the child's parents was no longer possible.⁴⁰ Specifically, the regulation defined a child eligible for long-term foster care as one that would "normally be expected to remain in foster care until reaching the age of majority, unless the child is adopted or placed in a guardianship situation."⁴¹ The regulations were silent on what constituted dependency on a state

33. *Id.* at 208-09 (discussing the passage by the United Nations of the Declaration of the Rights of the Child in 1959 and the subsequent Convention on the Rights of the Child passed in 1989); *Convention of the Rights of the Child*, 44 U.N. GAOR Supp. No. 49, at 167, U.N. Doc. A/44/49 (1989) [hereinafter *CRC*].

34. *CRC*, *supra* note 33; *see also* Pulitzer, *supra* note 18, at 209.

35. Pulitzer, *supra* note 18, at 209 n.54 (stating that the three countries that had not ratified the CRC were: Somalia, South Sudan, and the United States).

36. *Id.*

37. *Id.* at 211; *see also* Immigration Reform and Control Act of 1986, 8 U.S.C. § 1101(a) (2006).

38. 8 U.S.C. § 1101; Pulitzer, *supra* note 18, at 211.

39. *See* 8 U.S.C. § 1101; *see also* Theo Liebmann, *Family Court and the Unique Needs of Children and Families Who Lack Immigration Status*, 40 SOLUM. J.L. & SOC. PROBS. 583, 589 (2007).

40. Pulitzer, *supra* note 18, at 211 n.73; *see also* 8 C.F.R. § 204.11 (2006).

41. Pulitzer, *supra* note 18, at 211 n.73

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court, as well as any indication as to the proper best interest factors, making such determinations purely a matter of state law.⁴²

Armed with the three factual determinations of the state court, the SIJS applicant would then send the court documents and proper legal forms to the local Immigration and Naturalization Service (INS) District Office.⁴³ The final step in the application was an interview with INS, which reviewed and rendered a decision on the immigration aspect of the application.⁴⁴

A. 1997 to 2008

In 1997, Congress amended the requirements of SIJS, primarily out of concern for fraud by juveniles using student visas.⁴⁵ Congress became concerned that these juveniles sought to become dependents on a state court in order to gain legal status rather than to actually escape abuse, abandonment, or neglect.⁴⁶ For example, in 2003, the Court of Appeals for the Third Circuit remarked that a large loophole existed for any visiting student where the student could file a petition with the appropriate state court requesting SIJS on the basis that he or she qualified for foster care, with a substantial chance that the petition would succeed based on the students' separation from any potential caregiver.⁴⁷

The statute was amended to require not only that the child be eligible for long-term foster care, but that the child be eligible for long-term foster care *because* of abuse, abandonment, or neglect.⁴⁸ The statute, as amended, also required any child already in custody of the immigration authorities to seek the consent of the United States Attorney General before beginning any kind of state court dependency proceeding.⁴⁹ This change was controversial because, prior to the

42. 8 C.F.R. § 204.11(c) (requiring that dependency determinations be made “in accordance with state law governing such declarations of dependence”); Pulitzer, *supra* note 18, at 211 n.73.

43. Pulitzer, *supra* note 18, at 211 n.74.

44. *Id.* at 211-12. For purposes of this Comment, this will be the final mention of the latter portion of the application process because the procedure has remained substantially the same since the inception of SIJS. In addition, the process is applied relatively uniformly across the country and is not subject to the same problems discussed herein.

45. Pulitzer, *supra* note 18, at 212.

46. *Id.*

47. *Yeboah v. U.S. Dep’t of Justice*, 345 F.3d 216, 221 (3d Cir. 2003); *see also* Knoespel, *supra* note 30, at 507.

48. Pulitzer, *supra* note 18, at 212.

49. *Id.*

amendment, state courts had full jurisdiction over all immigrant juveniles, regardless of the their detainment status.⁵⁰ The change limited the number of juveniles able to seek SIJS, prohibiting the many juveniles who were already in the custody of the Department of Homeland Security or Immigration and Customs Enforcement from beginning the SIJS process.⁵¹

B. 2008 to Present

In 2008, Congress took dramatic steps toward rearming the SIJS statute with the power it needed to protect the vulnerable, underage immigrants for whom it was created. Congress passed the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA),⁵² which clarified the requirements a child needed to meet to be eligible for SIJS, and greatly expanded the number of immigrant children that were eligible.⁵³ The TVPRA amended the SIJS eligibility requirements so that, in order to qualify, a child needed to: (1) be declared dependent on a juvenile court located in the United States or be declared dependent on an individual or entity appointed by a State or juvenile court, (2) obtain a finding from a juvenile court that the minor is unable to reunify with one or both parents due to abuse, neglect, or abandonment by the parent(s), and (3) obtain a finding from a juvenile court that it would not be in the child's best interest to return to the child's country of nationality or previous habitual residence.⁵⁴ This was a substantial step towards achieving the goals set forth by the CRC: that all adjudications regarding immigrant children have the child's best interest as the primary objective.⁵⁵ With this amendment, the child no longer needed to be eligible for long-term foster care and now required a finding that at least one parent had abused, abandoned, or neglected the child.⁵⁶ The amendment also explicitly required that the state court consider the best interest of the child when determining the child's eligibility for SIJS.⁵⁷

50. *Id.*

51. *Id.*

52. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 8 U.S.C. § 1232 (2008) [hereinafter TVPRA].

53. Pulitzer, *supra* note 18, at 213; *see also* Knoespel, *supra* note 30, at 509.

54. TVPRA, 8 U.S.C. § 1232 (2008); Immigration Reform and Control Act of 1986, 8 U.S.C. § 1101(a) (2006); *see also* Pulitzer, *supra* note 18, at 213; *see also* Knoespel, *supra* note 30, at 510.

55. CRC, *supra* note 33; Pulitzer, *supra* note 18, at 209.

56. *See* TVPRA, 8 U.S.C. § 1232 (2008); 8 U.S.C. § 1101; 8 C.F.R. § 204.11.

57. *See* TVPRA, 8 U.S.C. § 1232 (2008); 8 U.S.C. § 1101; 8 C.F.R. § 204.11.

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The TVPRA also instituted limited “age-out” protections at the federal level for children eligible for SIJS by requiring United States Citizenship and Immigration Services (USCIS) to consider the age of the child at the time the child filed his or her petition for SIJS.⁵⁸ This prevented a common occurrence where otherwise eligible children would pass the cut-off age of twenty-one while their applications were passed from desk to desk or were lost, sometimes multiple times.⁵⁹ The amendment also required that the USCIS process a petition within 180 days of its receipt, dramatically decreasing the amount of time it would take these petitions to receive a final adjudication.⁶⁰

PART II. APPLICATION OF SIJS

This section describes and analyzes current SIJS case law in three states: Maryland, Florida, and California. These states were chosen because each one demonstrates some of the larger trends that have emerged across the nation within state courts faced with SIJS petitions. Maryland courts have at times failed to reach the SIJS issues because of procedural and substantive obstacles that have arisen through Maryland’s application of its Family Law Article and Maryland common law precedent.⁶¹ Florida courts have taken issue with the role they are now asked to play in immigration, a field they contend is a purely federal concern.⁶² The California courts, in contrast, have consistently addressed the SIJS issue, making SIJS findings of fact in cases of juvenile delinquency and thereby demonstrating their commitment to making said findings when presented.⁶³ The analysis focuses on the factors and definitions used by each state in the adjudication of SIJS petitions. Multiple cases will be discussed and analyzed to obtain a picture of the legal landscape surrounding SIJS across the three chosen States.

A. Maryland

The Maryland court system has four levels.⁶⁴ There are two trial

58. Knoespel, *supra* note 30, at 510; *see also* TVPRA, 8 U.S.C. § 1232 (2008).

59. Knoespel, *supra* note 30, at 510; Emily Rose Gonzalez, *Battered Immigrant Youth Take the Beat: Special Immigrant Juveniles Permitted to Age-Out of Status*, 8 SEATTLE J. SOC. JUST. 409, 410 (2009).

60. Knoespel, *supra* note 30, at 510.

61. *See infra* Part II.A.

62. *See infra* Part II.B.

63. *See infra* Part II.C.

64. *About the Maryland Court System*, MD. CTS.,

court levels: the District Court, with limited jurisdiction over small claims valued at or below fifteen thousand dollars, and the Circuit Court, with general jurisdiction.⁶⁵ The Court of Special Appeals serves as the intermediate appellate tribunal, and the Court of Appeals serves as the state's highest appellate court.⁶⁶

The Maryland state courts, as discussed below, demonstrate a willingness to make the findings of fact when presented; however, they have encountered obstacles arising out of Maryland state family law. These obstacles have prevented the Circuit Courts from reaching the merits of the case, instead disposing of the petitions through various procedural or substantive technicalities.⁶⁷

i. *In re Dany G.*

The Court of Special Appeals in *In re Dany G.*⁶⁸ clarified what factors must be considered by Maryland courts when determining (1) whether a child had been neglected by his or her parents and (2) whether it was in that child's best interest to return to his or her country of origin.⁶⁹ The Court also discussed how the Maryland appellate courts viewed the role Maryland courts were to play within the unique federalism framework created by the SIJS statute.⁷⁰ Because the guardianship in this case had already been granted, and thus a finding of dependency already effectuated, the Court was not confronted with the various substantive and procedural issues that have prevented Circuit Courts from reaching the SIJS factors.⁷¹

In re Dany G. arose out of the Circuit Court's denial of the motion for SIJS findings made by the petitioning guardian.⁷² Specifically, the

<http://www.courts.state.md.us/courts/about.html> (last visited May 13, 2017).

65. *Id.*

66. *Id.*

67. *See In re Guardianship of Zealand W. and Sophia W.*, 220 Md. App. 66, 82 (2014) (holding that, because the biological mother's parental rights had not been terminated, the court could not grant guardianship of the juvenile to a third party, thereby preventing a finding of dependency); *see Jose B. v. Maria B.*, No. 2179, 2016 WL 4261814, at *4 (Md. App. Aug. 8, 2016) (requiring a prospective guardian to overcome the presumption of custody in favor of the biological parent despite that parent's consent to the guardianship). *But see Simbaina v. Bunay*, 221 Md. App. 440, 452 (2015) (citing *Marcelina M.-G. v. Israel S.*, 112 A.D.3d 100, 109 (N.Y. App. Div. 2013)) (internal quotations omitted) (discussing the respective roles of the state courts and the federal government in the SIJS process).

68. *In re Dany G.*, 223 Md. App. 707 (2015).

69. *Id.* at 720-22.

70. *Id.* at 712-18.

71. *See infra* Part II.A.ii-iv.

72. *In re Dany G.*, 223 Md. App. at 710.

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Circuit Court held that the minor, over whom the petitioner had already been granted guardianship by the same court, had not been abused, abandoned, or neglected by his mother or father.⁷³ The Circuit Court did not reach the issue of whether or not it was in the juvenile's best interest to return to his native country of Guatemala.⁷⁴ The Court of Special Appeals vacated and remanded the case back to the Circuit Court.⁷⁵ It held that the Circuit Court had applied the wrong legal standard in considering whether the minor had been neglected by his parents⁷⁶ and that the Circuit Court's failure to determine whether it was in the minor's best interest to return to Guatemala was, at least in part, based on an improper application of Maryland law.⁷⁷

In making its decision, the Court of Special Appeals interpreted the SIJS statute to require the application of state law, regardless of where the abuse, abandonment, or neglect occurred.⁷⁸ This deviated from the intermediate appellate courts of New Jersey,⁷⁹ which have required that their trial courts apply the "New Jersey state law definitions but as applied in the context of the child's home country."⁸⁰ The Maryland Court of Special Appeals made its decision on the grounds that the "federal law directs the states to apply state law, not a hybrid of the law of a single American state superimposed on the living conditions of another country."⁸¹ According to the court, this was because the state judges have expertise in applying their state's family law concepts⁸² and this approach was "more consistent with the humanitarian purpose of the federal law."⁸³

73. *Id.* at 710-12.

74. *Id.* at 712.

75. *Id.* at 722.

76. *Id.* (stating that the Circuit Court had failed to consider whether the child's welfare had been harmed or placed at substantial risk of harm).

77. *Id.* at 720-722.

78. *In re Dany G.* 223 Md. App. at 717 ("We hold that the trial court must apply state law definitions of 'abuse,' 'neglect,' 'abandonment,' 'similar basis under state law,' and 'best interest of the child' as we would in Maryland, without taking into account where the child lived at the time the abuse, neglect, or abandonment occurred.").

79. *H.S.P. v. J.K.*, 435 N.J. Super. 147 (App. Div. 2014); *D.C. v. A.B.C.*, 417 N.J. Super. 41 (Ch. Div. 2010).

80. *In re Dany G.* 223 Md. App. at 717 (discussing cases cited *supra*, note 79).

81. *In re Dany G.* 223 Md. App. at 717-18 (discussing Immigration Reform and Control Act of 1986, 8 U.S.C. § 1101(a) (2006); 8 C.F.R. § 204.11 [amended by TVPRA, 8 U.S.C. § 1232 (2008)]).

82. *In re Dany G.* 223 Md. App. at 718 (quoting *In re Y.M.*, 207 Cal. App. 4th 892, 908 (2012)).

83. *In re Dany G.* 223 Md. App. at 718 (citing *In re Y.M.*, 207 Cal. App. 4th at 909).

The Maryland Court of Special Appeals applied the standard of “neglect” as it is defined by the Maryland Family Law Article⁸⁴ and the Courts and Judicial Proceedings Article.⁸⁵ Under both articles, “neglect” is defined in Maryland as “the leaving of a child unattended or other failure to give proper care and attention to a child by any parent . . . under circumstances that indicate that the child’s health or welfare is harmed or placed at substantial risk of harm.”⁸⁶ The Court found that the Circuit Court had only applied the first half of the correct standard; namely, the Circuit Court had found that the minor was not neglected because his parents had not physically left him to fend for himself.⁸⁷ The Court went on to say that several different facts in the case would meet the standard of neglect in Maryland.⁸⁸ Moving on to the best interest determination, the Court of Special Appeals defined a child’s best interest as the evaluation of “the child’s life chances . . . and [a] predict[ion] with whom the child will be better off in the future.”⁸⁹

This case sheds light on the role the Maryland appellate courts believe the circuit courts should play in the SIJS process. This case proposes that the circuit courts are not “granting SIJ status [but] [r]ather [are] making factual findings that the child meets certain eligibility requirements.”⁹⁰ Furthermore, the Maryland Court of Special Appeals stated, “[i]f the underlying juvenile court filing is properly before the court, state courts are required to make [the SIJS] factual findings.”⁹¹ In this case, the guardianship had already been granted and the motion for the SIJS factual findings was filed after the minor had already been deemed a dependent on the court by establishing guardianship, meaning the court had already adjudicated

84. MD. CODE ANN., FAM. LAW § 5-701(s) (West).

85. MD. CODE ANN., CTS. & JUD. PROC. § 3-801(s) (West); *In re Dany G.* 223 Md. App. at 720.

86. *In re Dany G.* 223 Md. App. at 720 (citing MD. CODE ANN., Cts. & Jud. Proceedings § 3-801; MD. CODE ANN., FAM. LAW § 5-701) (alterations in original).

87. *In re Dany G.* 223 Md. App. at 720-21.

88. *Id.* at 721 (“We are also mindful that is parents in Maryland allow or force their child to leave school at the age of 12, this factor would lead to a finding that the child was neglected.”).

89. *Id.* (quoting *Montgomery Cty. Dep’t of Soc. Servs. v. Sanders*, 38 Md. App. 406, 419 (1977)). In a footnote, the Court of Special Appeals stated that it was not itself deciding what the term “similar basis” included as used in the SIJS statute, but acknowledged that the words “similar basis” were “added by the TVPRA to allow for the expansion of the protected grounds beyond those of abuse, neglect, and abandonment.” *In re Dany G.* 223 Md. App. at 722 n.6 (quoting Pulitzer, *supra* note 18, at 225).

90. *In re Dany G.* 223 Md. App. at 714.

91. *Id.* at 715 (citing *Simbaina v. Bunay*, 221 Md. App. 440, 455-56 (2015)).

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the juvenile matter and had a duty to rule on the SIJS determinations.⁹²

ii. *Jose B. v. Maria B.*

*Jose B. v. Maria B.*⁹³ demonstrates one of the obstacles Maryland courts have encountered arising out of Maryland family law. The Court of Special Appeals held that the Circuit Court had correctly refused to make the SIJS findings because the underlying petition, that of guardianship, was denied.⁹⁴

In an unreported opinion, the Maryland Court of Special Appeals affirmed the Circuit Court's denial of a petition for custody and the accompanying petition for judicial finding of SIJS facts in regard to petitioner's niece, Heidy.⁹⁵ The crux of the petition was that the petitioner, as Heidy's uncle, wanted custody of Heidy because Heidy's mother was the subject of deportation proceedings and could be deported "at any time," and neither party wanted Heidy to also be deported.⁹⁶ The Court of Special Appeals held that "[i]f the court finds no unfitness on the part of the biological parent or extraordinary circumstances that make it detrimental for the child to remain in the parent's care, the presumption [in favor of custody of the biological parent] remains, and custody must be awarded to the biological parent."⁹⁷ The Court affirmed the Circuit Court's denial of the petition because there was no error or abuse of discretion in finding no unfitness (nor was any alleged) of Heidy's mother nor exceptional circumstances in the "entirely speculative and unlikely"⁹⁸ deportation proceedings related to Heidy.⁹⁹ The Court also held that, "in the absence of the grant of custody to [petitioner], the court was not required to make the required findings in relation to Heidy's eligibility for SIJ status."¹⁰⁰

This case demonstrates some of the procedural and substantive

92. *In re Dany G.* 223 Md. App. at 711 ("Charlene M. ('Charlene') was appointed guardian of her cousin, Dany G. ('Dany'), a native of Guatemala, on November 20, 2013, by the Circuit Court for Montgomery County.>").

93. *Jose B. v. Maria B.*, No. 2179, 2016 WL 4261814, at *4 (Md. App. Aug. 8, 2016)

94. *Id.* at *4.

95. *Id.* at *1.

96. *Id.* at *2 ("[Jose]'s attorney explained that [Maria] [was] attempting to make arrangements for her unmarried daughter should [Maria] be deported. Even though [Maria] has a family, she could be deported at any time").

97. *Id.* at *4 (discussing *McDermott v. Dougherty*, 385 Md. 320, 325 (2005)).

98. *Jose B.*, 2016 WL 4261814, at *2.

99. *Id.*

100. *Id.* at *4.

obstacles SIJS seekers face that are unique to Maryland law. Heidi was not given the requisite finding of facts, despite the consent of her mother to the change in custody, solely because of the presumption in favor of custody of the biological parent that exists in Maryland.¹⁰¹ Additionally, the Court of Special Appeals supported the Circuit Court's statement that "the parties cannot sidestep the requirements of the law simply by indicating consent has been reached"¹⁰² and that "[a] biological parent cannot be permitted to consent to a change in custody to a third party solely in an attempt to obtain a 'green card' for his or her child, when no other legal factual factors support the change."¹⁰³

iii. *In re Guardianship of Zealand W.*

*In re Guardianship of Zealand W.*¹⁰⁴ set several important precedents in Maryland appellate advocacy, as well as family law.¹⁰⁵ The Court of Special Appeals held that a circuit court could not appoint a third-party guardian of a minor where at least one of the minor's parents was still alive whose parental rights had not been terminated.¹⁰⁶

In this case, Zealand's father was deceased,¹⁰⁷ which made Zealand's mother the sole natural guardian.¹⁰⁸ Because Zealand's mother's parental rights had never been terminated, the Court held that the Circuit Court had no authority to grant a third party guardianship over Zealand, either temporary or permanent.¹⁰⁹ The Court of Special Appeals relied heavily on the Maryland Court of Appeals' decision in *In re Adoption/Guardianship of Tracy K.*,¹¹⁰ where the Court of Appeals held that "[u]ntil [a determination on the termination of parental rights has been made], '[t]he parents [are] the natural guardians of their minor child' and are 'responsible for the child's

101. *Id.* at *3 ("In deciding a custody case between a third party and the biological parent of a child, the presumption is in favor of custody in the biological parent.") (citing *Karen P. v. Christopher J.B.*, 163 Md. App. 250, 265 (2005)).

102. *Jose B.*, 2016 WL 4261814, at *4 (internal quotations omitted).

103. *Id.* at *4.

104. *In re Guardianship of Zealand W. and Sophia W.*, 220 Md. App. 66, 82 (2014)

105. *In re Jason Daniel M.-A.*, No. 0128, 2016 WL 769860, at *3-*6 (Md. Ct. Spec. App. Feb. 29, 2016) (discussing the ramifications of the *In re Zealand* decision).

106. *In re Guardianship of Zealand W.*, 220 Md. App. at 85-86.

107. *Id.* at 71.

108. MD. CODE ANN., FAM. LAW § 5-203(a) (West); *In re Guardianship of Zealand W.*, 220 Md. App. at 80.

109. *In re Guardianship of Zealand W.*, 220 Md. App. at 82.

110. *In re Adoption/Guardianship of Tracy K.*, 434 Md. 198 (2013); see *In re Zealand W.*, 220 Md. App. at 82 (discussing *In re Tracy K.* and the similarities between the cases).

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support, care, nurture, welfare, and education.”¹¹¹ The Court of Appeals arrived at that conclusion because of the inquiries Title 5 of the Family Law Article requires courts to make into the best interests of the child before ruling on the termination of parental rights.¹¹² The Court of Special Appeals concluded that:

[w]hat was said in *Tracy K.* is here applicable. Section 13-702(a) of the Estates & Trusts Article does not allow a circuit court judge to appoint a guardian of the person of a minor child where, as here: (1) the mother of the child is still living; and (2) the mother’s rights have never been terminated in this state pursuant to Title 5 of the Family Law Article; and (3) parental rights have not been terminated by any other court.¹¹³

The Court of Special Appeals remanded the case back to the Circuit Court with directions to reconsider the mother’s motion to dismiss the case.¹¹⁴

In re Guardianship of Zealand W. had the practical effect of adding a procedural obstacle in the path of a juvenile seeking SIJS findings in Maryland: that the seeker’s parent(s)’s parental rights must be terminated prior to any guardianship being granted.¹¹⁵ This is another example of procedural and substantive barriers unique to Maryland’s state law that contribute to the lack of uniformity in how SIJS petitions are dealt with across the nation.

iv. *Simbaina v. Bunay*

In *Simbaina v. Bunay*,¹¹⁶ the Court of Special Appeals considered the refusal of the Circuit Court to make the SIJS factual findings during an absolute divorce hearing that addressed the custody of Nathaly, the minor.¹¹⁷ The Court determined that the Circuit Court “should have heard testimony and evidence relating to Nathaly’s SIJ status” and “[u]pon remand ... should evaluate Nathaly’s request under SIJ

111. *In re Tracy K.*, 434 Md. at 208 (quoting MD. CODE ANN., FAM. LAW § 5-203(a, b)).

112. *In re Tracy K.*, 434 Md. at 208.

113. *In re Guardianship of Zealand W.*, 220 Md. App. at 82.

114. *Id.* at 88-89. The Court of Special Appeals confirmed its stance on the matter in a previous case, holding that, absent the termination of parental rights of living parents, a guardianship could not be granted. *Id.*

115. *Id.* at 85-86.

116. *Simbaina v. Bunay*, 221 Md. App. 440 (2015).

117. *Id.* at 445-46.

standards.”¹¹⁸ The Court also discussed the SIJS framework in detail, providing insight into the Maryland appellate court’s interpretation of the procedural constructs of SIJS.¹¹⁹

The Appellant, Maria Simbaina (hereinafter, Simbaina), responded to her then husband’s Complaint for Custody by filing a Counter-Complaint for Divorce and Custody.¹²⁰ During the litigation, Simbaina requested that the court “enter an Order finding that it is not in Nathaly’s best interest to return to her home country and reunification with [Bunay] is not viable due to abuse[,] neglect[,] or abandonment.”¹²¹ The Circuit Court refused to make the requisite SIJS findings, suggesting that Simbaina needed a “petition for some type of guardianship” that must “be filed with the court concerning any immigration issues,” and that no immigration issues would be discussed because “they were not properly pled.”¹²² The resulting order granted the absolute divorce between the parties and addressed Nathaly’s custody, but did not include any factual findings on Nathaly’s SIJS eligibility.¹²³ The Circuit Court denied Simbaina’s Motion to Alter or Amend and her Motion for a New Trial.¹²⁴ On appeal, the Court of Special Appeals considered whether “the circuit court err[ed] when it failed to make Special Immigrant Juvenile factual findings during the divorce and custody proceedings.”¹²⁵ The Court answered in the affirmative and remanded the case to the Circuit Court to make the requisite factual findings.¹²⁶

The Court of Special Appeals discussed several key aspects of SIJS determination, namely: (1) separation of state and federal powers and concerns regarding state regulation of immigration,¹²⁷ (2) circuit court jurisdiction over SIJS,¹²⁸ and (3) pleading requirements for SIJS determinations.¹²⁹ Addressing the separation of powers, the court drew a distinction between the federal government’s interests in the immigration status of the juveniles and the circuit court’s power, which

118. *Id.* at 458.

119. *Id.* at 450-59.

120. *Id.* at 446.

121. *Id.* (internal quotations omitted).

122. *Simbaina*, 221 Md. App. at 447 (internal quotations omitted).

123. *Id.*

124. *Id.*

125. *Id.* at 448.

126. *Id.* at 459.

127. *Simbaina*, 221 Md. App. at 450-52.

128. *Id.* at 453-57.

129. *Id.* 457-58.

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included making “determinations helpful to determining the immigration status of certain individuals.”¹³⁰ The Court of Special Appeals recognized that “[t]he federal government delegated [the power to make these determinations] to State juvenile courts because these courts are the appropriate forum for child welfare determinations regarding abuse, neglect, or abandonment, and a child’s best interests.”¹³¹ The Court of Special Appeals remarked that “it is important to note that the State court is not rendering an immigration determination, because the ultimate decisions regarding the child’s immigration status rests with the federal government,”¹³² but that state courts are ultimately responsible for making the underlying findings.¹³³

The Court held that the jurisdiction to make the SIJS findings “extends to any court that has jurisdiction under state law to make judicial determinations about the custody and care of juveniles” and confirmed the circuit courts’ ability to make SIJS findings outside of a separate guardianship hearing.¹³⁴ Because the circuit court was empowered to make determinations regarding the custody of the minor during the divorce hearing, it was also empowered to make the requisite SIJS findings as a court having “jurisdiction under state law to make judicial determinations about the custody and care of juveniles,” and should therefore have considered evidence regarding Nathaly’s SIJS eligibility.¹³⁵ The Court of Special Appeals noted that there were no restrictions in the federal statute limiting the appropriate proceedings or procedures through which the SIJS factual findings were to be made.¹³⁶ Rather, the sole limitation was that the findings be made by a “juvenile court,” as defined in the federal regulations.¹³⁷

The Court of Special Appeals quickly dispatched the pleading requirement issue by citing Maryland Rule 2-303(b), which requires only that “pleadings be simple, concise, and direct.”¹³⁸ The court held that Simbaina’s amended complaint made clear that “she sought [the SIJS] additional findings from the court.”¹³⁹ The court went on to note

130. *Id.* at 452.

131. *Id.* at 451 (internal quotations omitted).

132. *Id.* at 452 (citing *Marcelina M.-G. v. Israel S.*, 112 A.D.3d 100, 109 (N.Y. App. Div. 2013)) (internal quotations omitted).

133. *Simbaina*, 221 Md. App at 452.

134. *Id.* at 454 (internal quotations omitted).

135. *Id.*

136. *Simbaina*, 221 Md. App. at 455.

137. *Id.*

138. *Id.* at 457 (citing Md. Rule 2-303(b)).

139. *Simbaina*, 221 Md. App. at 457.

that, “[w]hile a separate motion can be filed [...] it is not required by the federal statute,” but that, “[w]hen pleading [the SIJS] issue before the circuit court, a moving party should ensure that the court is on notice of the request for these factual findings.”¹⁴⁰ In the instant case, the Court of Special Appeals held that the pleading was sufficient.¹⁴¹

B. Florida

Similar to the Maryland court system, the Florida court system consists of four levels: two trial court levels and two appellate court levels.¹⁴² At the trial level, County Courts hear cases involving fifteen thousand dollars or less and the Circuit Courts hear all other matters.¹⁴³ The District Courts of Appeal serve as the state’s intermediate appellate court, with the Florida Supreme Court sitting as the state’s highest appellate court.¹⁴⁴

The Florida appellate courts have expressed concerns with both their role in the immigration process and the possibility for abuse of the SIJS process.¹⁴⁵ These concerns have manifested themselves in the definitions and requirements the appellate courts have used and implemented when considering SIJS petitions.

i. In re S.A.R.D.

*In re S.A.R.D.*¹⁴⁶ demonstrates the Florida appellate court’s apprehension and concern regarding the state courts’ roles in the SIJS process. In its opinion, the District Court of Appeals discusses the SIJS process in detail and describes its issue with inputting best interest concerns into immigration determinations.¹⁴⁷ The Court, discussing the SIJS factors, found that any abandonment, neglect, or abuse cannot be too far removed from the time the petition is filed if the petition is to succeed, a requirement that is not based on, or found in, the federal statute.¹⁴⁸

In re S.A.R.D. came before the District Court of Appeal of Florida

140. *Id.* at 458 (internal citations omitted).

141. *Id.*

142. *Florida State’s Court System*, FLORIDA SUPREME COURT, http://www.floridasupremecourt.org/pub_info/system2.shtml (last visited May 13, 2017).

143. *Id.*

144. *Id.*

145. *See infra* Part II.B.i-iii.

146. *In re S.A.R.D.*, 182 So. 3d 897 (Fla. Dist. Ct. App. 2016).

147. *Id.* at 897-901.

148. *See, e.g.*, Immigration Reform and Control Act of 1986, 8 U.S.C. § 1101(a) (2006).

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on appeal because of the Circuit Court's denial of S.A.R.D.'s petition, nine days before his eighteenth birthday, for the required SIJS finding of dependency under the relevant Florida statute.¹⁴⁹ In his petition, S.A.R.D. alleged that he was abandoned by his father at the age of seven, over ten years before the filing of his petition, and that he was neglected by his mother leading up to his departure from his native country of Honduras in 2014, approximately two years before his petition.¹⁵⁰ The District Court of Appeal began its analysis by reviewing the history of the SIJS provision of the Immigration and Nationality Act (INA) and its intended purpose.¹⁵¹ The court discussed the "bifurcated procedure" for obtaining SIJS, stating that:

Although it is clear that under our federal system the policies pertaining to the entry of aliens and their rights to remain here are ... entrusted exclusively to Congress, we are being asked to provide an initial stamp of approval to a child's request for SIJ status and permanent residency as if we are federal customs agents.¹⁵²

The Court took issue with the fact that, "because the matter is before the dependency court, the dependency court must base its decision, in part, on what is in the best interest of the child, as opposed to what is in the best interest of the country."¹⁵³ The Court discussed the possible repercussions of using its role to expand SIJS to cover "children who leave their families and homes in other countries [...] and illegally enter the United States without their parent(s) in search of a better life."¹⁵⁴ In further support of its contentions, the Court described the great difficulty of investigating the claims of abuse, abandonment, and neglect regarding parents living in other countries.¹⁵⁵

The Court first discussed the alleged abandonment by S.A.R.D.'s father.¹⁵⁶ Once again bemoaning the unverifiable nature of the allegations and the lack of an adversarial proceeding,¹⁵⁷ the Court

149. *In re S.A.R.D.*, 182 So. 3d at 899.

150. *Id.*

151. *Id.* at 899-901.

152. *Id.* at 900 (citing *In re K.B.K.V.*, 176 So. 3d 297 (Fla. Dist. Ct. App. 2015)).

153. *Id.* at 900-01.

154. *Id.* at 901.

155. *In re S.A.R.D.*, 182 So. 3d at 901.

156. *Id.* at 902.

157. *Id.* ("As already noted above, however, S.A.R.D.'s petition was not subjected to an

discussed five factors¹⁵⁸ proposed by the Fourth District Court of Appeal for consideration in private dependency petitions.¹⁵⁹ The District Court of Appeal affirmed the trial court's conclusion that the father's abandonment over ten years prior to the filing of the petition was too far removed to merit a dependency finding.¹⁶⁰ The District Court of Appeal stated that it was clear that "S.A.R.D., for the [remaining] nine-day period of his minority status, was not in substantial risk of abuse, neglect, or abandonment."¹⁶¹ In discussing the alleged neglect by S.A.R.D.'s mother, the court noted that, under Florida statutory law, a guardian of a child cannot be found to have neglected the child if the neglect was caused "primarily by financial inability [to care for the child] unless actual services for relief have been offered to and rejected by such person."¹⁶² The Court found there was no evidence that S.A.R.D.'s mother was financially able to meet S.A.R.D.'s needs and that "the family's poverty, without more, does not constitute neglect as contemplated by our dependency statutes."¹⁶³ In this case, the Court read into the SIJS statute a proximity requirement to the determination of whether or not a juvenile had been abused, neglected, or abandoned.¹⁶⁴

ii. *In re F.J.G.M.*

*In re F.J.G.M.*¹⁶⁵ confirmed the Florida appellate courts' position regarding the temporal proximity of the abandonment, abuse, or neglect and an SIJS petition. The Court held that the abandonment alleged by the petitioner was too far removed in time to provide a basis for an SIJS finding.¹⁶⁶ This holding instituted a new obstacle to achieving SIJS: that the abandonment, neglect, or abuse be either sufficiently close in time to the relevant petition or that it be imminent.

adversarial proceeding.").

158. (1) The nature, severity and frequency of the abuse, neglect, or abandonment; (2) the time that has elapsed between the abuse, neglect or abandonment and the filing of the petition; (3) whether the child is presently at a continued, but not necessarily imminent, risk of harm before turning eighteen years old; (4) the availability of a caregiver capable of providing both supervision and care; and (5) any other relevant factors unique to the particular case. *Id.*

159. *Id.* at 902 (citing *O.I.C.L. v. Dep't of Children and Families*, 169 So. 3d 1244, 1249 (Fla. Dist. Ct. App. 2015)).

160. *In re S.A.R.D.*, 182 So. 3d at 903.

161. *Id.*

162. *Id.* at 903-04 (citing FLA. STAT. § 39.01(30) (defining "harm" as it relates to neglect of the child) and FLA. STAT. § 39.01(44) (defining "neglect")).

163. *In re S.A.R.D.*, 182 So. 3d at 905.

164. *Id.* at 903.

165. *In re F.J.G.M.*, 196 So. 3d 534 (Fla. Dist. Ct. App. 2016).

166. *Id.* at 539

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This opinion also brought to light several of the primary issues that the Florida bench saw in its role in the SIJS process, including its own policy considerations and views on immigration.¹⁶⁷

In re F.J.G.M. arose out of F.J.G.M.'s mother's petition for F.J.G.M. to be declared dependent on the Florida Court in order to become eligible for SIJS.¹⁶⁸ The petition alleged that F.J.G.M. had been abandoned at birth by his father,¹⁶⁹ which qualified him as a dependent under Florida law.¹⁷⁰

The Third District Court of Appeals characterized the mother's petition as "an attempt to expand the stated purpose of the [SIJS statute],"¹⁷¹ as well as encouraging illegal immigration and placing a "very difficult burden upon the state courts tasked with reviewing these private dependency petitions and making dependency determinations."¹⁷² The District Court of Appeals discussed the alleged abandonment by F.J.G.M.'s father at birth as it related to the Florida Statutes¹⁷³ and found: (1) the abandonment, over thirteen years before the dependency proceeding, was too far removed to support a finding of dependency and (2) F.J.G.M. was "not at a substantial risk of imminent abuse, abandonment or neglect when his mother filed the petition [since he was] living with and being cared for by his mother in Miami."¹⁷⁴ Based on those findings, the District Court of Appeals affirmed the lower court's denial of the petition on the basis that the abandonment by the minor's father was too far removed to be considered in an SIJS adjudication.¹⁷⁵

The Court focused on the alleged purpose of the SIJS in avoiding the deportation of the minor with or to the abusive, neglectful, or abandoning parent(s).¹⁷⁶ This approach ignored the discussion of the best interests of the child, instead focusing on procedure and a narrow,

167. *Id.* at 538.

168. *Id.* at 536.

169. While no father was listed on the birth certificate or during several other proceedings, including the mother's application for public assistance, Alexis Escobar, the suspected father, acknowledged paternity during the dependency proceedings. *Id.* at 536-37.

170. *Id.* at 538-39 (defining dependent child under FLA. STAT § 39.01(15) as "one who has been abandoned, abused, or neglected by the child's parent or parents or legal guardians").

171. *In re F.J.G.M.*, 196 So. 3d at 538.

172. *Id.* at 538 (citing *In re S.A.R.D.*, 182 So. 3d 897, 901 (Fla. Dist. Ct. App. 2016)).

173. *In re F.J.G.M.*, 196 So. 3d at 538-539.

174. *Id.* at 539.

175. *Id.* at 540.

176. *Id.* at 538.

relatively unsupported reading of the SIJS statute's intent. This opinion also alluded to the fact that Florida courts are faced with a large number of petitions for dependency aimed at qualifying the minor beneficiary for SIJS.¹⁷⁷ There was concern from the Court that extending dependency findings to juveniles who were not in danger of being neglected, abused, or abandoned would "encourage illegal immigration."¹⁷⁸

iii. *O.I.C.L. v. Department of Children and Families*

Florida courts, as discussed above, have demonstrated a dislike for the burden placed on them by the SIJS procedure. This dislike has manifested in decisions based on narrow or novel readings of the requirements of SIJS.¹⁷⁹ The Florida courts have justified their positions by citing policy concerns regarding the nation's immigration policies and have attempted to curtail the number of successful SIJS petitions, acting more as a gatekeeper than as a fact finder determining what is in the juvenile's best interest.¹⁸⁰ *O.I.C.L. v. Department of Children and Families*¹⁸¹ was another case requiring a close proximity in time between the alleged abuse, abandonment, or neglect and the petition for SIJS findings. The Court in *O.I.C.L.* held that, in order for abuse, abandonment, or neglect to provide the basis for SIJS finding of facts, it must have occurred close in time to the petition or be imminent.¹⁸²

O.I.C.L. v. Department of Children and Families was before the District Court of Appeal on appeal by *O.I.C.L.* because of the denial of his petition for dependency, in which he argued he had been abandoned by his parents and had no parent or legal custodians capable of providing supervision and care.¹⁸³ In his petition, *O.I.C.L.* alleged that he had been abandoned by his father and neglected by his mother since the age of twelve, over six years prior to the filing of the petition

177. *Id.* at 538 ("[these many petitions place] a very difficult burden upon the state courts tasked with reviewing these private dependency petitions.").

178. *In re F.J.G.M.*, 196 So. 3d at 538.

179. *Id.* at 540 (holding that the abandonment of petitioner by his father 13 years prior to the petition was too far removed to be considered).

180. *Id.* at 538 ("The purpose of the [SIJS] Act is not to provide exemption from deportation to children who forgo legal immigration migration to the United States and illegally enter the United States in search of a better life or to be reunited with a family member who came to the United States legally or illegally.").

181. *O.I.C.L. v. Dep't of Children and Families*, 169 So. 3d 1244 (Fla. Dist. Ct. App. 2015).

182. *Id.* at 1248.

183. *Id.* at 1246.

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at issue.¹⁸⁴ The allegations of neglect centered on O.I.C.L.’s mother’s inability to provide sufficient food, water, and clothing for O.I.C.L.¹⁸⁵ The trial court denied the petition, finding that O.I.C.L. was living with an uncle who fit the definition of “caregiver” under the Florida Statutes¹⁸⁶ and who had, therefore, become a “relative caregiver” legally responsible for O.I.C.L.’s welfare.¹⁸⁷ In affirming the trial court’s ruling, the appellate court considered: (1) “whether a dependency adjudication can be based on alleged abuse or neglect occurring at any time, even if remote to the petition’s filing,”¹⁸⁸ and (2) whether a child living in conditions of poverty was on its own sufficient to sustain a finding of abandonment or neglect.¹⁸⁹

The District Court of Appeals held that not considering the length of time between the adjudication and the alleged abuse or neglect would lead to the absurd result of permitting “the adjudication of a seventeen-year-old based upon an isolated incident of ‘abuse’ inflicted at the age of two by a long since deceased parent.”¹⁹⁰ The court held that finding a child dependent under those circumstances would permit the irrational result of allowing “the adjudication of any child ever subjected to abuse, abandonment, or neglect by a parent at any point during their minority.”¹⁹¹

The District Court of Appeals also engaged in an analysis of the statutory definitions of “abandoning a child,”¹⁹² “neglect,”¹⁹³ and “neglecting a child,”¹⁹⁴ and found that, absent a willful refusal of available resources, the inability to provide for a child as a result of poverty did not constitute neglect or abandonment.¹⁹⁵ The Court observed that:

Judicial resources too often are being misused to obtain dependency orders for minors who are neither abused, neglected or abandoned, and who seek a dependency

184. *Id.*

185. *Id.*

186. FLA. STAT. § 39.01(10).; FLA. STAT. § 39.01(47).

187. *O.I.C.L.*, 169 So. 3d at 1247.

188. *Id.* at 1248.

189. *Id.*

190. *Id.* (citing *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984)).

191. *O.I.C.L.*, 169 So. 3d at 1248.

192. FLA. STAT. § 39.01(1).

193. FLA. STAT. § 39.01(44).

194. FLA. STAT. § 39.01(30).

195. *O.I.C.L.*, 169 So. 3d at 1249.

adjudication and best-interest order not because they are endangered and need protection but because they want preferential immigration treatment without having to comply with the requirements of the customary legal immigration process.¹⁹⁶

The Court noted, however, that the motivations behind a child's petition for dependency should not factor into the court's decision, although the motivations seem to have indeed been a factor the Court considered in determining the relevance of the difference in time between the alleged abuse or neglect and the petition in this case.¹⁹⁷

C. California

California has organized its court in three levels: two appellate levels and one trial level.¹⁹⁸ There is one trial court, a Superior Court, in each county.¹⁹⁹ The District Courts of Appeal serve as the intermediate appellate courts, with the Supreme Court sitting as the state's highest court.²⁰⁰

The California Courts have embraced their roles as initial fact finders and have set, as their purpose, determining what is in the best interest of the child, provided that certain baseline criteria are met. California courts have consistently made SIJS findings when requested, making the granting of SIJS petitions the rule rather than the exception.²⁰¹

i. Leslie H. v. Superior Court

*Leslie H. v. Superior Court*²⁰² arose out of the Superior Court's refusal to make SIJS findings during a delinquency adjudication for Leslie H.²⁰³ Leslie had been arrested for, and had plead guilty to, stealing alcoholic beverages and cigars from a liquor store, as well as assaulting the clerk when he confronted her and her friends.²⁰⁴ During

196. *Id.* at 1250.

197. *Id.* at 1249.

198. *Courts*, California Courts, <http://www.courts.ca.gov/courts.htm> (last visited May 13, 2017).

199. *Id.*

200. *Id.*

201. *E.g.*, *In re Israel. O.*, 233 Cal. App. 4th 279 (2015); *see also Eddie E. v. Superior Court*, 234 Cal. App. 4th 319 (2015).

202. *Leslie H. v. Superior Court*, 224 Cal. App. 4th 340 (2014).

203. *Id.* at 343-44.

204. *Id.* at 345.

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the delinquency proceedings, Leslie moved for the court to make the SIJS findings on the grounds that she had been abandoned by her father and abused by her mother.²⁰⁵ The trial court expressed concern that, if it were to grant SIJS findings to juveniles who had been arrested and convicted and/or plead guilty to a crime, it would incentivize illegal immigrants to break the law to become dependent on a juvenile court.²⁰⁶

The Court of Appeal looked at the plain language of the SIJS statute as it had been amended in 2008²⁰⁷ and held that, although the Superior Court had considered the proper criteria,²⁰⁸ it had declined to make the appropriate SIJS findings out of “misplaced policy considerations . . . despite ample, uncontroverted evidence supporting the [SIJS] findings.”²⁰⁹ The Court of Appeal defined the juvenile court’s role in the SIJS process as “not to determine worthy candidates for citizenship, but simply to identify abused, neglected, or abandoned alien children under its jurisdiction who cannot reunify with a parent or be safely returned in their best interests to their home country.”²¹⁰ The California appellate courts have unwaveringly stood behind this principle and, as such, have routinely found that the Superior courts should reach the merits of SIJS petitions, the overwhelming majority of which are granted.²¹¹ California courts have been consistent in their application of SIJS requirements and procedures and, thus need not be discussed further.

PART III. PROBLEMS AND PROPOSED SOLUTIONS

As evidenced by the cases discussed above, there is a vast array of policies, procedures, and proceedings state courts across the country

205. *Id.*

206. *Id.* at 346.

207. *Leslie H.*, 224 Cal. App. 4th at 349-50.

208. The court considered (1) whether Leslie H. was in fact dependent upon the court within the meaning of the SIJS statute, (2) whether returning to her parents was a viable option, and (3) whether repatriation was in Leslie H.’s best interest. *Id.* at 344. The court found that Leslie H.’s delinquency was controlling as to factors two and three and did not make any findings of fact in their regard. *Id.*

209. *Id.* at 350.

210. *Id.* at 351.

211. *E.g., B.F. v. Superior Court*, 207 Cal. App. 4th 621 (2012) (holding that the probate court was authorized to make the SIJS findings); *see also In re Israel O.*, 233 Cal. App. 4th 279 (2015) (holding that, despite suitable parental home, a minor may establish reunification with other parent as not viable so as to satisfy SIJS requirements); *Eddie E. v. Superior Court*, 234 Cal. App. 4th 319 (2015) (holding that the petitioner’s mother’s death did not cause reunification with the mother to cease being not viable due to abandonment).

have implemented to deal with their fact-finding duties under the SIJS provision. Several states have developed serious problems in their adjudication of SIJS petitions through erroneous interpretation of the proper role of the state court in the SIJS process or misinterpretation of the federal statute or the regulations governing its application.²¹² These problems result in new hurdles that SIJS seekers are forced to overcome before they are able to submit their application to the USCIS. While it is true that this “delegation of duties” between the state and federal systems alleviates the burden on the federal courts and immigration agencies, it has resulted, and will continue to result, in inconsistent outcomes based on the various state approaches.

The lack of uniformity in how the various states treat and adjudicate SIJS petitions is a significant problem. Currently, two juveniles could have the exact same set of circumstances surrounding their petitions, but the outcome could be different based solely on the state in which their petition is brought, where one juvenile’s application for citizenship could be denied while the other is granted. Uniformity across the states is important because it promotes equity, as well as the “best interest of the child” approach endorsed by the CRC.²¹³

The unique mixture of state and federal power in SIJS procedures is one of the primary problems that have caused the lack of uniformity. As demonstrated in Florida, some state courts have struggled with their perceived role in what they perceive as a decision regarding immigration.²¹⁴ This creates a lack of uniformity when, absent the requisite findings of fact at the state level, a petitioner for SIJS is precluded from submitting the petition to INS for consideration.²¹⁵ Thus, a petitioner submitting his or her petition in Florida is less likely to get the requisite findings of fact, or at the very least have his or her petition subjected to heightened scrutiny in the name of public policy, than would a petitioner in Maryland submitting an identical petition.²¹⁶

212. See *supra* Part II.A-B.

213. Pulitzer, *supra* note 18, at 208-09.

214. E.g., *In re F.J.G.M.*, 196 So.3d 534 (Fla. Dist. Ct. App. 2016); see also *In re S.A.R.D.*, 182 So. 3d 897, 900-01 (Fla. Dist. Ct. App. 2016).

215. Pulitzer, *supra* note 18, at 214 (discussing procedure for submitting petition to INS once the requisite finding of facts are made).

216. Compare *In re S.A.R.D.*, 182 So. 3d 897, 900 (Fla. Dist. Ct. App. 2016) (stating that “although it is clear that under our federal system the policies pertaining to the entry of aliens and their rights to remain here are . . . entrusted exclusively to Congress, we are being asked to provide an initial stamp of approval to a child’s request for SIJ status and permanent residency as if we are federal customs agents”) with *Simbaina v. Bunay*, 221 Md. App. 440, 451 (2015)

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What follows are proposed solutions to identified problems, and suggestions that could help curb the development of additional problems in the future.

A. Problems

i. Varying Requirements Under State Statutory Law

In re Guardianship of Zealand W. had the practical effect of adding a procedural obstacle in the path of a juvenile seeking SIJS findings in Maryland that is not found in other states.²¹⁷ As a result of the Court's ruling in *Zealand*, in order for a third party to be given guardianship over a minor, thereby enabling the court to make the requisite SIJS findings, the parental rights of all surviving parents must have been previously severed or severed during the guardianship proceedings.²¹⁸ This represented a shift in Maryland family law adjudication that could have disastrous effects on SIJS seekers. While this case did not deal with SIJS factors directly, it dealt with one of the primary methods by which SIJS seekers are able to get into juvenile or family courts: guardianship petitions. Under this ruling, petitioners seeking SIJS findings through a petition for guardianship by a relative or other qualified individual would be required to first seek, obtain, or otherwise demonstrate the termination of the petitioner's parents' parental rights.²¹⁹

This decision seemed to hinge on a technicality. There was substantial evidence that it was not in Zealand's best interest to be placed with his mother, since custody had been awarded to his father during the divorce and his mother had only been allowed supervised visits.²²⁰ The Court failed to address the substantive issues and instead focused its attention on whether or not the Maryland Estates and Trusts Article allowed a circuit court to grant a third party guardianship of a minor when that minor's parent was still alive, his or her parental rights

(stating that "[t]he federal government delegated [the power to make these determinations] to State juvenile courts because these courts are the appropriate forum for child welfare determinations regarding abuse, neglect, or abandonment, and a child's best interests").

217. Compare *In re Guardianship of Zealand W.*, 220 Md. App. at 86 (requiring a SIJS seeker's parent(s)'s rights be terminated prior to a guardianship being established under Maryland law) with *In re F.G.J.M.*, 196 So. 3d 534, 536 (Fla. Dist. Ct. App. 2016) (deciding on a case where the minor's mother petitioned the Florida court for a finding of dependency based on abandonment by the minor's father).

218. *In re Guardianship of Zealand W.*, 220 Md. App. at 86.

219. *Id.*

220. *Id.* at 71-72 (discussing the marriage between Zealand's parents, the divorce, and the mother's "history of serious alcohol abuse").

had not been terminated, and no testamentary appointment had been made.²²¹ Of notable concern is that the Maryland Estates and Trusts Article does incorporate the best interests of the child in its adjudication, which is inapposite to the intent behind SIJS findings being made by state juvenile courts.²²² This put a new requirement on those seeking SIJS in Maryland: that the court terminate the parental rights of the SIJS seeker before awarding guardianship. This could dissuade youth from seeking SIJS, since many are fleeing poverty and danger-ridden homelands where their parents were unable to provide for them, not out of a lack of affection or devotion, but simply out of a lack of financial means. This would have the practical effect of denying SIJS to many deserving youth.

Another source of variance amongst the states is the different cutoff ages for juvenile determinations. Under Florida law, a child, for purposes of dependency proceedings, is “any unmarried individual under the age of 18 years.”²²³ Under Maryland law, a child is “an unmarried individual under the age of 21 years.”²²⁴ This is one of the starkest differences between the states and is a clear example of why change is necessary. A nineteen-year-old youth in Florida would be precluded from even filing a request for SIJS findings since he or she could not be found dependent on a Florida court because of his or her age.²²⁵ This irreconcilable difference requires some sort of solution to provide consistency.

ii. State Court Interpretation of Federal Law

In *O.I.C.L. v. Department of Children and Families*,²²⁶ Florida began requiring that the abuse, neglect, or abandonment not only have transpired,²²⁷ but that it is not “too far removed” from the petition such

221. *Id.* at 85-86.

222. See MD. CODE ANN., EST. & TRUSTS § 13-702; see also *Simbaina v. Bunay*, 221 Md. App. 440, 451 (2015) (stating that “[t]he federal government delegated [the power to make these determinations] to State juvenile courts because these courts are the appropriate forum for child welfare determinations regarding abuse, neglect, or abandonment, and a child’s best interests”).

223. FLA. STAT. § 39.01(12).

224. MD. CODE ANN., FAM. LAW § 1-201(a).

225. See Immigration Reform and Control Act of 1986, 8 U.S.C. § 1101(a) (2006) (requiring that the juvenile be declared dependent on a juvenile court); see also FLA. STAT. § 39.01(12) (defining child or youth as “any unmarried individual under the age of 18 years”).

226. *O.I.C.L. v. Dep’t of Children and Families*, 169 So. 3d 1244 (Fla. Dist. Ct. App. 2015).

227. The Florida courts have expressed a need for trial courts to “use the most caution to avoid being nothing more than a ““rubber-stamp,”” and to carefully consider all evidence and

that the minor is not in continued danger of harm.²²⁸ This case was one of many in Florida to demonstrate the courts' frustration with the frequency and quantity of dependency petitions based on a desire for SIJS findings.²²⁹ The Court was more interested in ferreting out the meritless or contrived requests for SIJS findings than determining the best interests of the child. The Court acted as a gatekeeper charged with granting or denying entry to the SIJS seeker, rather than a fact finder whose statutory duty was to make a specific factual finding regarding the history and characteristics of the SIJS seeker. The Florida court reached its conclusion out of misplaced policy concerns regarding federal immigration policy and congressional intent regarding the SIJS statute, as well as an admitted confusion as to the nature of its role in the SIJS framework.²³⁰ Florida is not the only state to face this dilemma, as many states, including Maryland, Minnesota, and New York, have grappled with the complex federalism framework that enshrouds the SIJS provision.²³¹ The complexity has given several courts pause and has caused a reluctance to reach the merits in favor of extension of state law or interpretation of federal law that disposes of the case.²³²

B. Solutions

i. Promulgating Federal Regulations

One solution to procedural blocks and lack of uniformity amongst the states is the promulgation of federal regulations detailing appropriate proceedings and procedures for making the SIJS findings consistent across jurisdictions. Detailing appropriate procedures and definitions would help state courts that have struggled with the question of their ability to reach the SIJS findings during state court

not decide these dependency case “for sake of expediency or sympathy.” *Id.* at 1250.

228. *Id.* at 1249.

229. *Id.* at 1251 (Forst, J., dissenting); *see also In re F.J.G.M.*, 196 So. 3d 534, 538 (Fla. Dist. Ct. App. 2016); *In re S.A.R.D.*, 182 So. 3d 897, 901 (Fla. Dist. Ct. App. 2016).

230. *In re S.A.R.D.*, 182 So. 3d at 900-01.

231. *See Simbaina v. Bunay*, 221 Md. App. 440, 445-48 (2015) (discussing where the trial court had refused to make the SIJS findings because the petition was made during a proceeding for absolute divorce and custody); *see also In re Welfare of A.S.*, 882 N.W.2d 633, 639 (Minn. Ct. App. 2016) (holding that placement of the juvenile on probation for a traffic offense did not constitute “dependency” on a state court or custody of a state agency as required for SIJS); *In re Jose H.*, 40 N.Y.S.3d 710, 716 (2016) (holding that the petitioner had not been declared dependent on a juvenile court, but rather had been committed to state prison for committing a crime for which he was charged as an adult).

232. *See supra*, note 231 and accompanying text.

proceedings.²³³ Additionally, because of the SIJS' unique joinder of both state and federal authority, uniformity on the state level, once achieved, would match uniformity on the federal level, where a single body, INS, is charged with rendering a decision regardless of the state in which the factual findings are made.²³⁴

Federal regulations defining key statutory terms would also promote uniformity. For instance, defining what constitutes neglect, abuse, or abandonment for purposes of SIJS, instead of relying on law that varies by state, could help state courts reach uniform decisions regarding a child's appropriate designation. This would help avoid the institution of obstacles such as those that arose in Florida over the requirement that the abuse, neglect, or abandonment not be "too far removed" from the petition,²³⁵ in addition to the different standards of neglect across the states.²³⁶ The promulgation of federal regulations would help ensure uniformity across the states without drastically changing the way SIJS petitions are brought or the manner in which they are adjudicated.

ii. Creating a New SIJS Proceeding in State Courts

Another solution is to create a stand-alone SIJS proceeding that would make the juvenile dependent on the state court for the findings of fact without requiring an underlying cause of action that would put SIJS seekers before a state juvenile court. In such a case, an SIJS seeker would file a stand-alone petition for SIJS findings of fact in an appropriate court. This would eliminate the issue that has arisen in Maryland where, in order to place a child under the guardianship of a third party, thereby rendering the child dependent on the court, courts are now mandating the termination of the surviving parent(s)' paternal rights.²³⁷ This would also put the court on notice of the request for the

233. *Simbaina*, 221 Md. App. at 445-46 (discussing where the Circuit Court had refused to reach the merits of the SIJS petition when made during a divorce proceeding).

234. Jessica R. Pulitzer, Note, *Fear and Failing in Family Court: Special Immigrant Juvenile Status and the State Court Problem*, 21 *CARDOZO J.L. & GENDER* 201, 214 (2014).

235. *In re F.J.G.M.*, 196 So. 3d 534, 540 (Fla. Dist. Ct. App. 2016) (holding that abandonment of the minor by his father over 13 years prior to the petition was "too far removed" to permit a finding of abandonment); *see also In re S.A.R.D.*, 182 So. 3d 897, 904-05 (Fla. Dist. Ct. App. 2016) (holding that mere failure to provide for the child's needs is insufficient to constitute neglect).

236. *Compare In re S.A.R.D.*, 182 So. 3d at 904-05 (holding that mere failure to provide for the child's needs is insufficient to constitute neglect) *with In re Dany G.* 223 Md. App. 707, 721 (2015) (stating that in Maryland allowing a minor to drop out of school constitutes negligence).

237. *In re Guardianship of Zealand W.*, 220 Md. App. 66, 85-86 (2014).

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SIJS findings, since it would be its own separate proceeding, thereby avoiding the problems posed in *Simbaina v. Bunay*, where the circuit court failed to address the SIJS request because it believed SIJS findings required the filing of particular pleadings.²³⁸ This would also make these adjudications more procedurally consistent, eliminating the disparity between states that do not grant dependency beyond the age of eighteen²³⁹ and those that allow individuals under the age of twenty-one²⁴⁰ to become dependent on the court.

Creating a separate state level cause of action would enable courts in more cases to reach the truly important issue, and the reason they are part of the process, of the best interests of the child. By removing the procedural requirement of a valid underlying state law cause of action, otherwise meritorious petitions would cease to be dismissed or denied based solely on the lack of dependency on the court, and would be able to proceed on the merits.

This result could also be reached by amending the SIJS statute to no longer require a finding of dependency. Such an amendment would allow SIJS seekers to request the SIJS findings as declaratory relief separate from any underlying state law causes of action under the state court's general jurisdiction as a court of equity. This amendment would help reduce frequency of the unfortunate occurrence where the approval or denial of a petition hinges on the state of the law regarding custody determinations of the state in which it is brought, rather than on the facts or merits of the case.²⁴¹

iii. Creating a Federal Court Division to Handle SIJS Petitions

A more drastic and unprecedented approach would be to create an SIJS division in the federal district courts and grant them jurisdiction over SIJS petitions. This would assist with creating a uniform procedural framework, with federal district courts applying federal procedural law, although it would not tackle the inconsistencies inherent in state law when considering whether or not a minor has been abused, abandoned, or neglected, since the district courts would

238. *Simbaina*, 221 Md. App. at 458.

239. FLA. STAT. § 39.01(12) (defining a child as “any unmarried person under the age of 18 years”).

240. MD. CODE ANN., FAM. LAW § 1-201(a) (defining child as “an unmarried individual under the age of 21 years”).

241. *Compare In re Dany G.*, 223 Md. App. 707 (2015) with *O.I.C.L. v. Dep’t of Children and Families*, 169 So. 3d 1244 (Fla. Dist. Ct. App. 2015).

continue applying state substantive law.

This solution would be most effective if coupled with the proposed promulgation of federal regulations defining the key statutory terms, such as “neglect,” “abandonment,” and “abuse.” In this scenario, Congress could continue to benefit from family and juvenile court judges’ expertise, since those who are nominated would ostensibly be nominated from those very courts. The judges assigned to this division could be required to have experience adjudicating juvenile matters at the state level.²⁴² While this would initially constitute a tremendous shift from allowing all juvenile and family matters to remain at the state level, it could be done under the auspices of retaining all things related to immigration at the federal level.

iv. The Best Solution: Federal Question in Federal Court

Ultimately, the most effective solution would be the creation of a SIJS division in the federal district courts, as well as a statutory amendment creating a federal cause of action for SIJS seekers. First, it guarantees the uniformity of procedure, since federal courts are bound to follow the Federal Rules of Civil Procedure, regardless of the nature of their jurisdiction.²⁴³ Second, the amendment of the SIJS statute giving the power to make SIJS determinations to a federal court would necessarily confer subject matter jurisdiction upon the federal district courts under the doctrine of federal question jurisdiction, since any proceeding requesting the SIJS findings would stem from the INA. Since the inception of SIJS, Congress has amended its requirements twice, making a third amendment conceivable. Therefore, this solution becomes easily obtainable.

Third, the creation of such a division could carry with it the requirement that judges assigned or nominated to the courts be approved by the state court and/or division tasked with hearing juvenile matters. Such a requirement would preserve the benefit of the expertise of the state bench dealing with juvenile concerns. Lastly, and potentially most importantly, this would remove the federalism issue

242. This should be a requirement, as the primary reason for the delegation of the fact finding to the state courts was to benefit from the state judiciaries’ experience regarding juvenile determinations. See *Simbaina v. Bunay*, 221 Md. App. 440, 451 (2015) (stating that “[t]he federal government delegated [the power to make these determinations] to State juvenile courts because these courts are the appropriate forum for child welfare determinations regarding abuse, neglect, or abandonment, and a child’s best interests”).

243. See FED. R. CIV. PROC. 1 (stating that the Federal Rules of Civil Procedure “govern the procedure in all civil actions and proceedings in the United States district courts”).

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currently posed by SIJS and the corresponding dilemmas with which state courts have struggled.²⁴⁴ The assignment of SIJS proceedings to the federal courts would keep all immigration matters at the federal level, relieving the difficult balancing act from the state courts. The amendment would also solve the issue surrounding the lack of uniformity regarding what constitutes a declaration of the juvenile as dependent on a juvenile court. Such a requirement would have been foregone to create the stand-alone federal cause of action, as the petitioner would necessarily be dependent on the federal court for the adjudication of his or her petition.

The financial costs involved in creating such a department would be minimal. The department would be part of the federal district court system and could be limited to one judge per state, although more could be nominated as needed for states or districts with heavier SIJS caseloads. Additionally, for those states and/or districts with a limited caseload, a separate department would not be necessary. Instead, these new federal SIJS petitions would be added to the federal docket of the appropriate district court. Alternatively, those states and/or districts with limited caseloads could be consolidated into one SIJS division. This would maintain the ability of the division to select a judge with juvenile experience.

Politically, this solution should be very uncontroversial, in part due to the noncontroversial nature of statutory amendments, a frequent occurrence at all levels of government. In larger part, however, such an amendment would remove the hazardous question of federalism from the state judiciaries, thereby removing the need for state judges to ponder their role in the immigration system. Given the dislike some state courts have expressed at their current role in the SIJS process, it is likely that many state judiciaries would greet news of such an amendment with relief. At the very least, such an amendment would be a welcome sight in the Florida courts.

CONCLUSION

The creation of SIJS was a step in the right direction for the

244. *In re S.A.R.D.*, 182 So. 3d 897, 900 (Fla. Dist. Ct. App. 2016) (discussing at length, and noting its disapproval of, the complexity of the federalism dynamic posed by SIJS, and stating that “although it is clear that under our federal system the policies pertaining to the entry of aliens and their rights to remain here are ... entrusted exclusively to Congress, we are being asked to provide an initial stamp of approval to a child’s request for SIJ status and permanent residency as if we are federal customs agents”).

United States towards protecting an incredibly vulnerable segment of the population, but much work needs to be done for it to truly achieve such an objective. Although SIJS relief is obtainable, inconsistencies between states/jurisdictions and the novel and complex nature of the relationship between state and federal law SIJS creates have become obstacles to those seeking the relief to which they are entitled. This has resulted in the denial of petitions and requests for SIJS findings in one jurisdiction that would likely have been granted in another, making the determination of SIJS more dependent on the jurisdiction the juvenile lives in than on the juvenile's past or future. Drastic measures are needed to give the SIJS provision of the INA the "teeth" it needs to accomplish its lofty and inspirational goal of assisting those in most need of protection, the world's youth, regardless of which state they call home.