

# Settled Law: The Role of State Court Judges in Making Special Immigrant Juvenile Status (SIJS) Judicial Determinations

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## I. Introduction

Special Immigrant Juvenile Status (“SIJS”) is a form of humanitarian immigration relief that provides a pathway to lawful permanent residence for children in the United States who are unable to be reunited with one or both of their parents<sup>1</sup> due to abuse, abandonment, neglect, or a similar basis under state law.<sup>2</sup> Despite the significance of this humanitarian form of relief, there are only a few hundred state family and juvenile court cases involving requests for state court orders containing SIJS judicial determinations that are publicly available. This article was developed to inform state court judges of the settled law surrounding SIJS and the judicial determinations that state court orders must contain as a prerequisite before SIJS-eligible children can file petitions for immigration relief under the SIJS program.

Based on the SIJS case law review, there are a significant number of cases in which the state court’s opinions contained legally incorrect information about SIJS that is not supported by the current SIJS statutes and regulations. Legally incorrect information was applied in state court opinions that both granted and denied SIJS judicial determinations to SIJS-eligible children. Therefore, the difficulties state courts experienced in correctly applying federal SIJS immigration laws was and is understandable in light of the SIJS law’s statutory and regulatory history.

The SIJS statute has been significantly amended several times over the years in 1994, 1998, 2005, and 2008. However, regulations implementing all of these statutory changes were not issued until 2022.<sup>3</sup> As a result, this article’s review of SIJS case law highlighted numerous instances where state courts issued decisions citing SIJS statutes and/or regulations that are incorrect and/or outdated today, and also those that were no longer legally correct at the time the state court orders were issued. Although the U.S. Citizenship and Immigration Services (USCIS) issued policies implementing statutory amendments made between 1994 and 2008 on March 24, 2009,<sup>4</sup> the SIJS regulations were not updated until March 8, 2022.<sup>5</sup> This greatly exacerbated state courts’ difficulty in understanding SIJS federal immigration laws. USCIS inadvertently added to this confusion when it technically “updated” the SIJS regulations in 2009; however, those were technical amendments that failed to actually implement the 1994 – 2008 statutory amendments Congress made to the federal immigration laws governing SIJS.<sup>6</sup> To help alleviate

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<sup>1</sup> In SIJS cases, the term “parent” does not include a stepparent unless the stepparent is recognized as the petitioner’s legal parent under state law, such as when a stepparent has adopted the SIJS applicant child. 6 United States Citizenship and Immigration Services Policy Manual (Hereinafter USCIS-PM) J.2(C)(2), available at <https://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6>.

<sup>2</sup> INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J).

<sup>3</sup> 8 C.F.R. §§ 204.11, 245.1(e)(3); Special Immigrant Juvenile Petitions, 87 Fed. Reg. 13066-13113 (Mar. 8, 2022), available at <https://niwaplibrary.wcl.american.edu/pubs/2022-sijs-regulations>.

<sup>4</sup> See Appendix C – TVPRA-SIJ Neufeld Memo, SIJS Bench Book (last visited Jan. 23, 2024), available at <https://niwaplibrary.wcl.american.edu/pubs/appendix-c-tvpra-sij-neufeld-memo-03-24-2009>.

<sup>5</sup> See Special Immigrant Juvenile Petitions, 87 Fed. Reg. 13066-13113 (Mar. 8, 2022), available at <https://niwaplibrary.wcl.american.edu/pubs/2022-sijs-regulations>.

<sup>6</sup> The 2009 amendments to the SIJS regulations were made for the sole purposes of “Removing References to Filing Locations and Obsolete References to Legacy Immigration and Naturalization Service; Adding a Provision To Facilitate the Expansion of the Use of Approved Electronic Equivalents of Paper Forms.” 74 Fed. Reg. 26933 ( June 5, 2009); see Abigail Whitmore, Antonella Banegas, & Leslye E. Orloff, *Special Immigrant Juvenile Status Regulations: 1993, 2009, 2011 (Proposed Rule), & 2022* at 12 (Oct. 3, 2022), available at <https://niwaplibrary.wcl.american.edu/pubs/sijs-1993-2009-2022-regs-comparison>.

misinformation about SIJS laws, USCIS continues to provide additional clarification about SIJS through its policy manual,<sup>7</sup> brochures,<sup>8</sup> frequently asked questions (FAQs),<sup>9</sup> and other up-to-date materials.<sup>10</sup>

Because of this prolonged confusion amongst the state juvenile courts, the key goals of this article are to:

- Identify the settled law in SIJS cases issued by state courts across the country that is consistent with federal regulations, statutory law, and Department of Homeland Security (DHS) policies and guidance;
- Provide state courts with access to legally correct information about SIJS consistent with federal statutes, regulations, and policies;
- Prevent state courts from issuing decisions in SIJS cases that quote conclusions of law and dicta from prior court decisions that are not consistent with current federal SIJS statutes, regulations, and policies; and
- Promote the issuance of SIJS judicial determinations in all future cases by state courts that are legally correct, consistent with DHS regulations and policies and settled case law, and in furtherance of the Congressional goals of SIJS federal laws to promote the best interests and protection of vulnerable immigrant<sup>11</sup> children.

## II. History of SIJS

SIJS was created in 1990, when Congress amended the Immigration and Nationality Act (“INA”) to include protections for abused, neglected, or abandoned children who, with their families, entered the United States without inspection.<sup>12</sup> Rather than being deported with or to abusive or neglectful parents, or parents who had abandoned them and/or caused them similar harm, children subjected to these forms of maltreatment were granted access to Special Immigrant Juvenile Status (SIJS), which allowed them to remain in the United States.<sup>13</sup> Since 1990, the SIJS statute has undergone numerous procedural and substantive changes.

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<sup>7</sup> USCIS continuously updates their policy manual chapters on SIJS. See 6 USCIS-PM J, available at <https://www.uscis.gov/policy-manual/volume-6-part-j> (last updated Jan. 24, 2024); 7 USCIS F.7, available at <https://www.uscis.gov/policy-manual/volume-7-part-f-chapter-7> (last updated Jan. 24, 2024).

<sup>8</sup> *Immigration Relief for Abused, Abandoned, or Neglected Children: Special Immigrant Juvenile Classification*, USCIS (Jan. 2024), available at <https://niwaplibrary.wcl.american.edu/pubs/uscis-sij-brochure-2024>.

<sup>9</sup> *Special Immigrant Juvenile (SIJ) Frequently Asked Questions*, USCIS (last updated June 15, 2023), available at <https://www.uscis.gov/working-in-the-united-states/permanent-workers/employment-based-immigration-fourth-preference-eb-4/special-immigrant-juveniles/special-immigrant-juvenile-sij-frequently-asked-questions>.

<sup>10</sup> See *Special Immigrant Juveniles*, USCIS (last updated Nov. 8, 2023), available at <https://www.uscis.gov/working-in-US/eb4/SIJ>.

<sup>11</sup> On May 11, 2021, the U.S. Department of Homeland Security (DHS) officially stopped using the term “alien” in federal regulations and replaced it with the term “noncitizen.” A noncitizen is any person who is not a citizen or national of the United States. INA § 101(a)(3); see also *Technical Update – Replacing the Term “Alien”* (May 11, 2021), available at <https://www.uscis.gov/policy-manual/updates>. This article uses the term “noncitizen” and “immigrant” interchangeably.

<sup>12</sup> *Yeboah v. U.S. Dep’t of Justice*, 345 F.3d 216, 221 (3d Cir. 2003); see also 58 Fed. Reg. 42855 (Aug. 12, 1993) (history of 1993 SIJS regulations).

<sup>13</sup> *D.M. v. Armando B.*, No. A159646, 2016 Cal. App. Unpub. LEXIS 7241, at \*8 (Cal. Ct. App. Oct. 4, 2016) (citing *Yeobah v. U.S. Dep’t of Justice*, 345 F.3d 216, 221 (3d Cir. 2003)) (unpublished).

The original statute required the state juvenile court to:

- (1) Declare the child dependent on the state juvenile court;
- (2) Deem the child eligible for long term foster care; and
- (3) Determine that it was not in the child’s best interests to return to their home country.<sup>14</sup>

#### A. 1994 – 2008 SIJS Statutory Amendments

In 1994, Congress amended the SIJS statute to expand SIJS eligibility to immigrant children who are legally committed to or placed by a state court in the custody of a state agency or department.<sup>15</sup> In 1998, further amendments were made to address the SIJS “foster care” requirement, which “effectively limit[ed] the status to juveniles who had no parent to care for them,”<sup>16</sup> and also failed to provide help to children who had a non-abusive parent to care for them, but had been abused, abandoned, or neglected by their other parent.<sup>17</sup> To address this problem, Congress amended the SIJS statute through the 1998 Appropriations Act<sup>18</sup> in order to “more closely connect the ability for immigrant children to receive SIJS [due] to the abuse, abandonment, or neglect the child suffered” at the hands of one parent.<sup>19</sup> Following these 1998 amendments, immigrant children who suffered abuse, abandonment, or neglect by one parent were eligible for SIJS, as were children who had suffered one of these forms of maltreatment perpetrated by both parents.

The next amendments to the SIJS statute were made through the Violence Against Women Act of 2005.<sup>20</sup> These amendments were designed to end a practice in which immigration officials adjudicating SIJS petitions had been contacting or requiring children to contact the child’s parent who had perpetrated the abuse, abandonment, or neglect.<sup>21</sup> This practice both notified the child’s abusive parent that the child was seeking protection under U.S. immigration laws and provided the abusive parent an opportunity to influence or interfere with the adjudication of the child’s SIJS immigration case. The 2005 amendments ended these practices by immigration officials, which had been endangering and harming immigrant children who had been abused, abandoned, or neglected by their parents.

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<sup>14</sup> Immigration and Nationality Act of 1965, Pub. L. No. 101-649, § 153(a)(3), 104 Stat. 4978, 5005-06 (1990).

<sup>15</sup> Immigration and Nationality Technical Corrections Act of 1994, Pub. L. 103-416, 108 Stat. 4319 (Jan. 25, 1994); 6 USCIS-PM J.2(B), available at <https://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6>.

<sup>16</sup> *J.U. v. J.C.P.C.*, 176 A.3d 136, 138 (D.C. 2018).

<sup>17</sup> *J.U. v. J.C.P.C.*, 176 A.3d 136, 138 (D.C. 2018); see also 6 USCIS-PM J.2(B), available at <https://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6>.

<sup>18</sup> The Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998 (CJS 1998 Appropriations Act), Pub. L. 105-119, 111 Stat. 2440 (Nov. 26, 1997); 6 USCIS-PM J.2(B), available at <https://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6>.

<sup>19</sup> Kavel Joseph, et al., *Appendix B: Special Immigrant Juvenile Status Legislative History* at 2 (Dec. 19, 2017), available at <https://niwaplibrary.wcl.american.edu/wp-content/uploads/Appendix-B-SIJS-Legislative-History.pdf>.

<sup>20</sup> See The Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005), Pub. L. 109-162, 119 Stat. 2960 (Jan. 5, 2006).

<sup>21</sup> See *Violence Against Women Act of 2005 in the Department of Justice Appropriations Authorization Act 2006-2009 Legislative History* at 123 (Sept. 22, 2005), available at <https://niwaplibrary.wcl.american.edu/pubs/hr3402legprpt-vawa-2005-leg-history>.

In 2008, Congress enacted the Trafficking Victims Protection and Reauthorization Act (TVPRA), which significantly revised the SIJS statute by further expanding SIJS eligibility.<sup>22</sup> Most notably, the TVPRA eliminated the long-term foster care requirement for dependency on a juvenile court and replaced it with a requirement that reunification with “1 or both” of the child's parents not be viable due to abuse, neglect, or abandonment.<sup>23</sup> In the 2022 regulations, USCIS confirmed that these 2008 amendments established that a court could find that reunification was not viable between the child and the abusive parent and a child could qualify for SIJS without any formal termination of parental rights of the abusive parent(s).<sup>24</sup>

The TVPRA also expanded eligibility to include foreign born children whom a state court has placed into the custody of an individual *person or entity* appointed by a *state or juvenile court*.<sup>25</sup> These TVPRA amendments extended the group of immigrant children eligible for SIJS beyond children in foster care to include many other immigrant children who had suffered parental maltreatment and who had received state court orders regarding their custody, placement, or dependency.<sup>26</sup>

By removing the foster care requirement, the TVPRA expanded the number of state courts authorized under federal immigration laws to issue court orders containing SIJS judicial determinations. Specifically, a state court is now authorized to issue SIJS judicial determinations “whenever jurisdiction can be exercised under state law to make care and custody determinations, and are no longer confined to child protection proceedings alone.”<sup>27</sup> Following this amendment, the dependency requirement for SIJS could be satisfied “by a finding that the child was placed in the custody of an individual or entity appointed by the state or ‘juvenile court.’”<sup>28</sup> This greatly expanded the class of immigrant children eligible for SIJS, this vital form of relief from deportation.

Additionally, the TVPRA’s removal of the foster care requirement for SIJS and addition of the reunification requirement made it possible for children to qualify for SIJS while still continuing to live with their non-abusive parent.<sup>29</sup> Prior to the 2008 TVPRA amendment, to comply with the long-term foster care requirement, parents were put in the untenable position of

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<sup>22</sup> Pub. L. No. 110-457, 122 Stat. 5044 § 235(d) (2008).

<sup>23</sup> Pub. L. No. 110-457, 122 Stat. 5044 § 235(d) (2008); see *Eddie E. v. Superior Court*, 234 Cal. App. 4th 319, 333 (Cal. Ct. App. 2015).

<sup>24</sup> 8 C.F.R. § 204.11(c)(1)(ii) (2023); Special Immigrant Juvenile Petitions, 87 Fed. Reg. 13069 (Mar. 8, 2022).

<sup>25</sup> 6 USCIS-PM J.2(B), available at <https://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6>.

<sup>26</sup> 8 C.F.R. § 204.11(c)(1)(i)(B) (2023); 6 USCIS-PM J.2(C)(1), available at <https://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6>; Special Immigrant Juvenile Petitions, 87 Fed. Reg. 13079 (Mar. 8, 2022) (discussing the wide range of types of court proceedings in which state courts could issue SIJS judicial determinations).

<sup>27</sup> *In re Israel O.*, 233 Cal. App. 4th 279, 284 (Cal. Ct. App. 2015) (citing *Leslie H. v. Superior Court*, 224 Cal. App. 4th 340, 349 (Cal. Ct. App. 2014)); see also 87 Fed. Reg. 13099 (Mar. 8, 2022) (Dependency or Custody in the preamble).

<sup>28</sup> 8 C.F.R. § 204.11(c)(i)(B) (2023); see also *Matter of Marcelina M.-G. v. Israel S.*, 112 A.D.3d 100, 108 (N.Y. App. Div. 2013); *Matter of Hei Ting C.*, 109 A.D.3d 100, 103-04 (N.Y. App. Div. 2013).

<sup>29</sup> Pub. L. No. 110-457, 122 Stat. 5044 § 235(d) (2008).

having to “surrender their immigrant child to long-term foster care” in order for their child to qualify for the humanitarian protections of SIJS.<sup>30</sup> By eliminating the foster care requirement and adding the requirement that reunification not be viable with at least *one*, not both, parents, lawmakers recognized that requiring separation of children from their loving, nurturing, non-abusive parent for SIJS eligibility was “antithetical to the child’s best interests.”<sup>31</sup>

## B. 2022 Regulations

As discussed above, when Congress broadened the eligibility criteria for SIJS in 2008, USCIS did not update the federal regulations implementing the statute, which continued to reference and interpret outdated statutory language until the new, final SIJS regulations were issued in March 2022. This led to significant confusion among state court judges across the nation attempting to reconcile the new statutory language with the now outdated regulations.<sup>32</sup> The “1 or both” reunification language inserted by the TVPRA was particularly troubling for state courts, and for years the requirement was frequently misapplied by state courts, which issued decisions containing legally incorrect information about federal SIJS laws.<sup>33</sup> The final SIJS implementing regulations were published in 2022, putting an end to the years of inconsistent applications of SIJS laws by state courts, and conveying the clear, settled law state court judges are required to apply when issuing SIJS determinations today.

The 2022 regulations included several substantial changes that are particularly relevant to judges issuing state court orders in cases involving immigrant children who will be using the court’s orders in their petitions for SIJS:

- **“Juvenile Court:”** First, the definition of what constitutes a “juvenile court” for purposes of SIJS was updated to be “[a] court located in the United States that has jurisdiction under State law to make judicial determinations about the dependency and/or custody and care of juveniles.”<sup>34</sup> This definition covers any family (e.g., divorce, custody, protection order, and adoptions),<sup>35</sup> juvenile, probate, dependency, guardianship, conservatorship, orphans, youthful offenders, or other state court that

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<sup>30</sup> Kavel Joseph, et al., *Appendix B: Special Immigrant Juvenile Status Legislative History* at 4 (Dec. 19, 2017), available at <https://niwaplibrary.wcl.american.edu/wp-content/uploads/Appendix-B-SIJS-Legislative-History.pdf>.

<sup>31</sup> Kavel Joseph, et al., *Appendix B: Special Immigrant Juvenile Status Legislative History* at 4-5 (Dec. 19, 2017), available at <https://niwaplibrary.wcl.american.edu/wp-content/uploads/Appendix-B-SIJS-Legislative-History.pdf>.

<sup>32</sup> See *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350, 378-79 (S.D.N.Y. 2019) (granting summary judgment to plaintiff class after USCIS erroneously relied on the outdated regulations in contradiction to the 2008 TVPRA amendments when it rejected plaintiffs’ SIJ petitions on the basis that plaintiffs were not properly “dependent” on the New York Family Court when they obtained their SIJS state court orders).

<sup>33</sup> See e.g., *People v. Christian C.*, No. A142082, 2015 Cal. App. Unpub. LEXIS 478, at \*6 (Cal. Dist. Ct. Jan. 22, 2015); *E.P.L. v. J.L.A.*, 190 A.3d 1002, 1006 (D.C. 2017); *In re Estate of Nina L.*, 41 N.E.3d 930, 936 (Ill. App. Ct. 2015); *S.J.D.R. v. J.A.M.*, No. A-5440-13T1, 2015 N.J. Super. Unpub. LEXIS 675, at \*7 (N.J. Super. Ct. App. Div. Mar. 27, 2015) (unpublished); *Matter of Anibal H.*, 138 A.D.3d 841 (N.Y. App. Div. 2016).

<sup>34</sup> 8 C.F.R. § 204.11(a) (2023).

<sup>35</sup> Special Immigrant Juvenile Petitions, 87 Fed. Reg. 13079 (Mar. 8, 2022); see generally *NIWAP SIJS Bench Book* (2018), available at <https://niwaplibrary.wcl.american.edu/pubs/sijs-bench-book-complete> (created to assist state courts issuing SIJS judicial determinations in various types of judicial proceedings).

has jurisdiction to issue orders regarding the custody, placement, or dependency of children.<sup>36</sup>

- **“Judicial Determinations:”** Second, the regulations require that an SIJS eligible child obtain and submit as a required part of their SIJS petition a state court order containing three “judicial determinations.” A “judicial determination” is defined as “a conclusion of law made by a juvenile court.”<sup>37</sup> The term “judicial determination” replaced the previous terms “SIJS finding(s)”<sup>38</sup> and “predicate order” for clarity and consistency. These older terms appear in USCIS regulations and policies and case law issued and decided prior to March 2022. Following the issuance of the final SIJS regulations in 2022, the use of the terms “finding(s)” and “predicate order” in decisions issued by courts prior to 2022, as well as decisions issued by courts which mistakenly use the outdated language in post-March 2022 decisions, as a matter of federal law must be understood by the courts to have the same legal definition that applies to “judicial determination,” as it appears in 8 C.F.R. § 204.11(a).
- **“Abuse By ‘One or Both’ Parents:”** Third, the 2022 regulations clarified the “1 or both” language of the reunification requirement inserted into the SIJS statute by the 2008 TVPRA amendment. “1 or both” means that if a state court makes findings applying state best interests laws and concludes in a judicial determination that reunification with only one of the SIJS applicant child’s parents is not viable due to abuse, abandonment, neglect, or a similar basis under state law, the child has satisfied this SIJS eligibility requirement.<sup>39</sup>

### III. Federal Eligibility Requirements & Role of State Court Judges

There are several criteria that must be met in order for a noncitizen child to be eligible for Special Immigrant Juvenile (SIJ) classification. At a minimum, the child must be under the age of twenty-one, unmarried, and physically present in the United States at the time of filing for SIJ

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<sup>36</sup> See Leslye E. Orloff & Hannah Bridges, *Answers to Questions from State Court Judges on the 2022 Special Immigrant Juvenile Status (SIJS) Regulations* at 1-2 (Apr. 4, 2023), available at <https://niwaplibrary.wcl.american.edu/pubs/sijs-q-and-a>.

<sup>37</sup> 8 C.F.R. § 204.11(a); Special Immigrant Juvenile Petitions, 87 Fed. Reg. 13069 (Mar. 8, 2022).

<sup>38</sup> Special Immigrant Juvenile Petitions, 87 Fed. Reg. 13111 (Mar. 8, 2022) (Section K).

<sup>39</sup> Special Immigrant Juvenile Petitions, 87 Fed. Reg. 13080 (Mar. 8, 2022) (To be codified at 8 C.F.R. pts. 204, 205, 245); 6 USCIS-PM J.2(C)(2) n.17, available at <https://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6> (“The TVPRA 2008 replaced the need for a juvenile court to deem a juvenile eligible for long-term foster care with a requirement that the juvenile court find reunification with one or both parents not viable. USCIS interprets the TVPRA changes as a clarification that petitioners do not need to be eligible for or placed in foster care and that they may be reunified with one parent or other family members. However, USCIS requires that the reunification no longer be a viable option with at least one parent. USCIS maintains that the court’s determination generally should be in place on the date the petitioner files the Form I-360 and continue through the time of adjudication, unless the juvenile court’s jurisdiction over the petitioner terminated solely because a child welfare permanency goal was reached or due to age, provided the petitioner was under 21 at the time of filing the petition. See 8 CFR 204.11(c)(3)(ii)(A) and (B). See Section 235(d)(1)(A) of TVPRA 2008, Pub. L. 110-457 (PDF), 122 Stat. 5044, 5079 (December 23, 2008).”).

classification.<sup>40</sup> However, what makes this form of relief unique is its requirement that the child obtain specific judicial determinations from a qualifying state court with the power to make judicial determinations about dependency and/or the care and custody of children.<sup>41</sup>

The SIJS statute and 2022 federal regulations require the state court to issue judicial determinations that include both findings of fact and the following three conclusions of law that are based upon the included findings of fact:<sup>42</sup>

1. Dependency or Custody: The court has exercised its jurisdiction as authorized by state law to issue orders regarding the dependency, placement, and/or custody and care of an immigrant child;
2. Parental Reunification: Reunification with one or both of the child’s parents is not viable due to abuse, abandonment, neglect, or a similar basis under state law; and
3. Best Interests: It is not in the child’s best interest to return to the home country, or last habitual residence, of the child or the child’s abusive parent.<sup>43</sup>

It would be fair to wonder why the federal government, which has exclusive jurisdiction over immigration law according to the Constitution, would involve state courts in the SIJ process and seemingly blur this distinct, constitutionally mandated separation of powers. However, by directing state courts to enter factual findings and conclusions of law<sup>44</sup> that are “advisory” to a federal agency determination, the SIJS statute does *not* violate the separation of powers doctrine.<sup>45</sup> The federal government has the constitutional power to delegate specific powers to the states “to make determinations helpful to determining the immigration status of certain individuals, including the SIJ status.”<sup>46</sup> Furthermore, because federal law “imposes the duty” to make SIJS judicial determinations on state courts, “any claim of impermissible imposition of

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<sup>40</sup> INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J).

<sup>41</sup> INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J).

<sup>42</sup> The 2022 SIJS regulatory history explains that “DHS works to ensure that all SIJ petitions are properly adjudicated under the requirements of the INA, and as noted previously, will conduct case specific adjudication of each petition to ensure that petitioners have met their burden of proving that USCIS consent is warranted. In the majority of cases, the petitioner can meet the burden of showing that a primary purpose for seeking the order was to provide the petitioner relief from parental abuse, neglect, or abandonment, or a similar basis to these grounds simply based on the juvenile court order itself. Orders that include findings of fact in support of the juvenile court’s determinations, as well as evidence of court-ordered or recognized relief from parental maltreatment, will usually provide the basis for USCIS consent.” Special Immigrant Juvenile Petitions, 87 Fed. Reg. 13088 (Mar. 8, 2022).

<sup>43</sup> INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J); *see also Immigration Relief for Abused, Abandoned, or Neglected Children: Special Immigrant Juvenile Classification*, USCIS at 1 (Jan. 2024), available at <https://niwaplibrary.wcl.american.edu/pubs/uscis-sij-brochure-2024>; Leslye E. Orloff, *Chapter II: Details about Special Immigrant Juvenile Status (SIJS) Findings* at 1-9 (Dec. 19, 2017), available at <https://niwaplibrary.wcl.american.edu/pubs/details-about-special-immigrant-juvenile-status-sijs-findings>; Leslye E. Orloff, *Chapter V Quick Reference Guides* (Mar. 13, 2018), available at <https://niwaplibrary.wcl.american.edu/sijs-manual-table-of-contents> (discussing issuance of SIJS judicial determinations in the following types of proceedings: termination of parental rights and adoption; protection orders; custody and child support; declaratory judgements; delinquency; dependency; guardianship; and paternity and parentage proceedings).

<sup>44</sup> 8 C.F.R. § 204.11(a) (2023).

<sup>45</sup> *Simbaina v. Bunay*, 109 A.3d 191, 197-98 (Md. Ct. Spec. App. 2015).

<sup>46</sup> *Simbaina v. Bunay*, 109 A.3d 191, 198 (Md. Ct. Spec. App. 2015); *see also Perez-Olano*, 248 F.R.D. 248, 265 (C.D. Cal. 2008) (“Congress has plenary power over immigration [and] State courts have general jurisdiction over child welfare matters.”).



nonjudicial duties or of a State separation of powers violation would be trumped by the Supremacy Clause of the U.S. Constitution, Article VI, and similar federal supremacy obligation found in Article 2 of our own Declaration of Rights.”<sup>47</sup>

Rather than offending the separation of powers doctrine, it is actually this doctrine that SIJS laws and regulations seek to honor. To be eligible for SIJS, courts must make judicial determinations that the noncitizen child has been abused, abandoned, or neglected<sup>48</sup> as defined under state law.<sup>49</sup> The court’s judicial determinations must also apply their state law’s best interests factors in determining that it would not be in the child’s best interests to reunify with one or both of their parents.<sup>50</sup> “[F]ederal courts have long recognized that state courts have jurisdiction over child welfare determinations . . . and recognize[] ‘the institutional competence of state courts as the appropriate forum for child welfare determinations regarding abuse, neglect, or abandonment, and a child’s best interests.’”<sup>51</sup> Furthermore, the federal government determined that state juvenile courts have the “the resources and expertise to make findings regarding abuse, neglect and abandonment, and determinations of what is in the best interests of a child, while federal authorities retain ultimate power to regulate immigration.”<sup>52</sup>

Accordingly, the federal government opted to delegate this important fact-finding role to the state courts, as they have specialized expertise in child welfare and children’s best interests.<sup>53</sup> In doing so, the federal government created “a unique hybrid procedure that directs the collaboration of state and federal systems.”<sup>54</sup> Thus, while the federal government does have exclusive jurisdiction with respect to immigration law, “state juvenile courts play an *important and indispensable* role in the SIJ application process.”<sup>55</sup> The federal government envisioned that this state court role would fit neatly within the court’s existing responsibilities, as juvenile courts with the power to make child welfare determinations must already make best interests

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<sup>47</sup> *Simbaina v. Bunay*, 109 A.3d 191, 198 (Md. Ct. Spec. App. 2015).

<sup>48</sup> For brevity and clarity, all references to “abuse, abandonment, and neglect” throughout this paper also include “a similar basis under state law.”

<sup>49</sup> INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11(c)(1)(ii) (2023); *see also* Leslye E. Orloff, *Chapter Application of the Best Interest of the Child Standard*, SIJS Bench Book at 3 (Dec. 15, 2017), available at <https://niwaplibrary.wcl.american.edu/pubs/application-of-the-best-interest-of-the-child-standard-in-sijs-2>; *In re Y.M.*, 207 Cal. App. 4th 892, 908 (Cal. Ct. App. 2012).

<sup>50</sup> INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11(c)(1)(ii) (2023).

<sup>51</sup> *In re Y.M.*, 207 Cal. App. 4th 892, 908 (Cal. Ct. App. 2012).

<sup>52</sup> *Matter of Jose H.*, 40 N.Y.S.3d 710, 716 (N.Y. App. Div. 2016).

<sup>53</sup> *See* Leslye E. Orloff & Hannah Bridges, *Answers to Questions from State Court Judges on the 2022 Special Immigrant Juvenile Status (SIJS) Regulations* at 1 (Apr. 4, 2023), available at <https://niwaplibrary.wcl.american.edu/wp-content/uploads/Q-A-SIJS-Webinar-MJC-4-4-23.pdf>; *see also In re L.F.O.C.*, 901 N.W.2d 906, 912 (Mich. 2017); *In re Mario S.*, 954 N.Y.S.2d 843, 849 (N.Y. Fam. Ct. 2012) (“The SIJ statute affirms the institutional competence of state courts as the appropriate forum for child welfare determinations regarding abuse, neglect, or abandonment, and a child’s best interests.” (internal citations omitted)).

<sup>54</sup> *In re Henry P.B.P.*, 173 A.3d 928, 938 (Conn. 2017); *see also Rivas v. Villegas* 300 A.3d 1036, 1050 (Pa. 2023) (“This hybrid approach of engrafting federal immigration law unto state law rests on a presumption that the state courts have special competence when addressing abandonment, neglect, and abuse and determining a child’s best interests.”).

<sup>55</sup> *Leslie H. v. Superior Court*, 224 Cal. App. 4th 340, 348 (Cal. Ct. App. 2014) (emphasis added); *see also In re Mario S.*, 954 N.Y.S.2d 843, 849 (N.Y. Fam. Ct. 2012).

determinations.<sup>56</sup> Thus, the federal government designed this unique hybrid system with the intent that with state courts issuing the SIJS judicial determinations, USCIS would not have to engage in burdensome additional fact-finding.<sup>57</sup>

#### **IV. The Significance of SIJ Classification**

SIJ classification provides countless benefits to children and their wellbeing, arguably the most important of which is protection from deportation.<sup>58</sup> “[T]he consequences of failing to obtain the [SIJ] status can impose severe hardships” on an SIJS eligible child.<sup>59</sup> Therefore, the importance of the state court issuing SIJS judicial determinations cannot be understated. The Vermont Supreme Court succinctly summarized the significance of the state juvenile court’s role:

In the context of this and similar cases, the question of a possible return to one's country of origin and the implications of such a move on a child's best interests, as well as the viability of reunification with a parent in that country, are not abstract questions. They will be “the reality of [these] children's lives’ absent a successful application for SIJ status.”<sup>60</sup>

##### **A. Benefits to Children with SIJ Classification**

By statute, USCIS, the federal agency responsible for adjudicating SIJ petitions, is required to and generally makes its decisions on SIJ petitions within 180 days of filing.<sup>61</sup> Once a noncitizen child obtains SIJ classification, they receive invaluable protection from removal. In 2021, Immigration and Customs Enforcement (ICE) issued a Victim-Centered Approach directive, a policy which emphasized that certain noncitizen children, including SIJS petitioners, receive some protection from removal and immigration enforcement:

[A]bsent exceptional circumstances, ICE will exercise discretion to defer decisions on civil immigration enforcement action against the applicant or petitioner . . . until USCIS makes a final determination on the pending victim-based immigration

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<sup>56</sup> *In re L.F.O.C.*, 901 N.W.2d 906, 912 (Mich. 2017) (finding that the state juvenile court has authority to issue SIJS judicial determinations as it already hears abuse and neglect issues, evaluates best interest factors, and ensures “safe and appropriate custodial arrangements.”).

<sup>57</sup> 6 USCIS-PM J.2(D), available at <https://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6> (“ USCIS relies on the expertise of the juvenile court in making child welfare decisions and does not reweigh the evidence to determine if the child was subjected to abuse, neglect, abandonment, or a similar basis under state law.”).

<sup>58</sup> *See gen.* INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11(c)(1)(ii).

<sup>59</sup> *Romero v. Perez*, 205 A.3d 903, 909 n.15 (Md. Ct. Spec. App. 2019).

<sup>60</sup> *Kitoko v. Salomao*, 215 A.3d 698, 708 (Vt. 2019).

<sup>61</sup> *See* 6 USCIS-PM J.4(B), available at <https://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6>; Trafficking Victims Protection and Reauthorization Act of 2008, § 235(d)(2), Pub. L. 110-457, 122 Stat. 5044, 5080 (Dec. 23, 2008); 8 C.F.R. § 204.11(g); *see also Galvez v. Jaddou*, 52 F.4th 821, 834 (9th Cir. 2022) (affirming the district court’s decision to grant injunctive relief restricting USCIS’s ability to toll the 180-day statutory deadline because Congress wanted “expeditious adjudication” of SIJ petitions); *Yu v. Brown*, 36 F. Supp. 2d 922, 932 (D.N.M. 1999) (holding that USCIS owes SIJS petitioners a non-discretionary duty to complete processing of their applications in a reasonable time).

benefit application(s) or petition(s), including adjustment of status for noncitizens with approved *Special Immigrant Juvenile status* . . . .<sup>62</sup>

Furthermore, as of May 6, 2022, USCIS considers offering protection from deportation through “deferred action” for a child granted SIJ classification if the child is unable to apply for lawful permanent residence because an immigrant visa is not immediately available.<sup>63</sup> Deferred action is an act of prosecutorial discretion decided on a case-by-case basis, based on the totality of the evidence in the child’s case and a determination by USCIS that the child warrants a favorable exercise of discretion. There is no process to apply for deferred action. Once USCIS approves the SIJS petition for the child, USCIS automatically initiates the process of determining whether it will grant the SIJS recipient child deferred action.<sup>64</sup>

Children with approved SIJS petitions receive deferred action for four years. If after four years with deferred action there still is no visa available for the child, they can submit a deferred action renewal request to USCIS.<sup>65</sup> Generally, those who are granted deferred action are eligible for work authorization if they can “demonstrate economic necessity for employment.”<sup>66</sup> Immigrant children who are granted work authorization by USCIS and meet all other state eligibility requirements are eligible for a federally recognized driver’s license. Additionally, all immigrant children with work authorization are eligible for government-issued identification cards in all 50 states and U.S. jurisdictions.<sup>67</sup>

Once SIJS children receive lawful permanent residence, they become eligible for several federal public benefits, including federal post-secondary educational grants and loans, public and assisted housing, FEMA restricted programs, food stamps, and other benefits. Additionally, in 31 states and the District of Columbia, children with pending SIJS petitions are eligible for state-funded health care subsidies and are able to obtain health insurance through the state healthcare exchanges.<sup>68</sup> However, SIJ status benefits *only* the child. Federal law forbids an SIJS recipient child’s parent from ever obtaining immigration relief based on the child’s status as a lawful permanent resident *or* United States citizen.<sup>69</sup>

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<sup>62</sup> U.S. Immigration & Customs Enforcement (ICE), *ICE Directive 11005.3 – Using a Victim-Centered Approach with Noncitizen Crime Victims* at 2 (Aug. 10, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/ice-victim-centered-directive-11005-3> (emphasis added).

<sup>63</sup> 6 USCIS-PM J.4(G)(1), available at <https://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6>.

<sup>64</sup> 6 USCIS-PM J.4(G)(1), available at <https://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6>.

<sup>65</sup> 6 USCIS-PM J.4(G)(3), available at <https://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6>.

<sup>66</sup> 8 C.F.R. § 274.12(c)(14) (2023).

<sup>67</sup> For details on SIJS children’s eligibility for federally recognized and state issued driver’s licenses and identification cards, see *All State Public Benefits Charts and Interactive Public Benefits Map* (2022), available at <https://niwaplibrary.wcl.american.edu/all-state-public-benefits-charts>.

<sup>68</sup> *All State Public Benefits Charts and Interactive Public Benefits Map* (2022), available at <https://niwaplibrary.wcl.american.edu/all-state-public-benefits-charts>; Leslye Orloff & Axelle Pesme *State-Funded Public Benefits Comparison Chart* (July 7, 2022), available at <https://niwaplibrary.wcl.american.edu/pubs/state-benefits-comparison-chart>.

<sup>69</sup> 8 U.S.C. § 1101(a)(27)(J)(iii)(II).

## V. The Settled SIJS State Case Law

This section reports on areas of settled law arising from nationwide SIJS case law that speaks in a manner that is consistent with and supported by federal laws, regulations, and policies on SIJS and on the application of the best interests of the child laws in SIJS cases. This section seeks to enumerate that case law in a way that makes it clear to state family and juvenile court judges what their role and responsibilities are in regard to issuing SIJS judicial determinations.

### A. Defining “Juvenile Court”

It is clear, settled law that state courts that meet the definition of a “juvenile court” under the SIJS statute and federal regulations have the authority and jurisdiction to issue SIJS judicial determinations.<sup>70</sup> Under the 2022 USCIS SIJS federal regulations, a “juvenile court” is defined as “[a] court located in the United States that has jurisdiction under State law to make judicial determinations about the dependency and/or custody and care of juveniles.”<sup>71</sup> The name of the state court is not what matters for it to constitute a “juvenile court” for SIJS purposes. Rather, the issue is whether the state court has jurisdiction under state law over the child’s custody, care, placement, dependency, and/or child welfare and jurisdiction to make best interest of the child determinations.<sup>72</sup>

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<sup>70</sup> INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11(c)(3)(i) (2023); *see also In re L.F.O.C.*, 901 N.W.2d 906, 911 (Mich. 2017) (“It is therefore clear that a state juvenile court has authority to issue factual findings pertinent to a juvenile’s SIJ status.”); *Chach v. Garcia*, No. 2142, 2017 Md. App. LEXIS 789, at \*12 (Md. Ct. Spec. App. Aug. 2, 2017); *A.J.M.D.P. v. M.T.R.C.*, No. A-244-15T4, 2017 N.J. Super. Unpub. LEXIS 858, at \*8 (N.J. Super. Ct. App. Div. Apr. 5, 2017) (finding that the trial court was empowered to exercise jurisdiction over the SIJS petitioner child because it furthered the child’s best interests).

<sup>71</sup> 8 C.F.R. § 204.11(a) (2023); *see also Immigration Relief for Abused, Abandoned, or Neglected Children: Special Immigrant Juvenile Classification*, USCIS at 1 (Jan. 2024), available at <https://niwaplibrary.wcl.american.edu/pubs/uscis-sij-brochure-2024>.

<sup>72</sup> 8 C.F.R. § 204.11(c)(2)(i) (2023); Special Immigrant Juvenile Petitions, 87 Fed. Reg. 13077 (Mar. 8, 2022) (New 8 C.F.R. 204.11(a)); *see also R.F.M. v. Nielsen*, 365 F. Supp. 3d 350, 377 (S.D.N.Y. 2019) (“The [USCIS] requirement – that to be a juvenile court the state court must have jurisdiction to make custody determinations – legally incorrect because it is inconsistent with the SIJ statute’s plain language, which requires that a juvenile be declared dependent on a juvenile court or placed in a qualifying custody arrangement.”); *J.L. v. Cissna*, 341 F. Supp. 3d 1048, 1059 (N.D. Cal. 2018) (granting plaintiffs’ motion for preliminary injunction against USCIS after USCIS incorrectly found that in order to constitute a juvenile court it must have the power to compel reunification); *A.O. v. Cuccinelli*, 457 F. Supp. 3d 777, 792 (N.D. Cal. 2020) (granting plaintiffs’ motion for preliminary injunction against USCIS based on same improper reunification analysis raised in *J.L. v. Cissna*); *B.F. v. Superior Court*, 207 Cal. App. 4th 621, 629 (2012) (holding that “where the superior court sitting as a probate court made judicial determinations about the care and custody of the Minors . . . it is a juvenile court within the meaning of [8 C.F.R. § 204.11(a) (2023)].”); *Sabino v. Ozuna*, 939 N.W.2d 757, 761 (Neb. 2020) (reversing and remanding to district court to issue findings after district court erroneously believed it did not have authority as a juvenile court to issue SIJS order); *Gonzalez v. State*, 915 N.W.2d 581, 588 (Neb. 2018) (reversing county court’s refusal to issue SIJS order due to belief it did not qualify as a “juvenile court” and holding that it qualifies as a juvenile court because it had authority to grant guardianship to petitioner pursuant to Neb. Rev. Stat. § 43-1238(b)); *Alberto v. State*, 915 N.W.2d 589, 595 (Neb. 2018) (relying on *Gonzalez v. State* to find that the county court erred in determining that it did not constitute a “juvenile court” for purposes of issuing an SIJS order); *Rivas v. Villegas*, 300 A.3d 1036, 1048 (Pa. Super. Ct. 2023) (reversing the lower court’s refusal to issue SIJS determinations based on its erroneous finding that to be a juvenile court for SIJS purposes it must have “administrative power,” contrary to the federal SIJS regulations); *In re*

DHS specifically declined to specify in the 2022 regulations which types of courts have jurisdiction to make SIJS judicial determinations so as not to create a list that may be interpreted as exhaustive. DHS chose to do this so as not to inadvertently limit which state courts and in which types of cases state law authorizes judges to make judicial determinations regarding placement, dependency, custody, and care of children, which will vary from state to state.<sup>73</sup> Therefore, state family and juvenile courts can issue SIJS judicial determinations (findings of fact and conclusions of law) in a variety of types of proceedings, including dependency, delinquency, civil protective order, custody, divorce, guardianship, adoption, and termination of parental rights proceedings.<sup>74</sup> As a note, DHS interprets “custody” as used in the SIJS regulations to encompass “commitment.”<sup>75</sup>

DHS authorizes state courts to issue SIJS judicial determinations in the course of a wide range of state court proceedings. The federal statute “places no restriction on what is an appropriate proceeding” other than that the court entering the determinations meets the federal definition of a “juvenile court.”<sup>76</sup> State courts may issue SIJS judicial determinations in the course of custody and guardianship proceedings even when the individuals seeking custody or guardianship is a natural parent.<sup>77</sup> There are certainly circumstances, in addition to wanting to

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*Custody of A.N.D.M.*, 527 P.3d 111, 120 (Wash. Ct. App. 2023) (reviewing a moot case for the purpose of clarifying that all Washington state superior courts hearing cases to determine the custody and care of children are “juvenile” courts for SIJS purposes and judges sitting in those courts have the power to issue SIJS judicial determinations).

<sup>73</sup> Special Immigrant Juvenile Petitions, 87 Fed. Reg. 13077 (Mar. 8, 2022) (New 8 C.F.R. 204.11(a)).

<sup>74</sup> See Special Immigrant Juvenile Petitions, 87 Fed. Reg. 13099 (Mar. 8, 2022) (part (d) Dependency or Custody in the preamble) see also Leslye E. Orloff & Hannah Bridges, *Answers to Questions from State Court Judges on the 2022 Special Immigrant Juvenile Status (SIJS) Regulations* at 6 (Apr. 4, 2023), available at <https://niwaplibrary.wcl.american.edu/pubs/sijs-q-and-a>; *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350, 379 (S.D.N.Y. 2019) (expressly rejecting Legal Guidance relied on by USCIS providing that the Family Court must have the authority to order reunification with an unfit parent in order to act as a “juvenile court” under the SIJ statute).

<sup>75</sup> Special Immigrant Juvenile Petitions, 87 Fed. Reg. 13069 (Mar. 8, 2022) (New 8 C.F.R. 204.11(c)).

<sup>76</sup> INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J); 6 USCIS-PM J.2(C) and (C)(1), available at <https://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6>; *Simbaina v. Bunay*, 109 A.3d 191, 200 (Md. Ct. Spec. App. 2015); see also *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350, 377 (S.D.N.Y. 2019) (“[T]he plain language of the SIJ statute dictates that the Family Court need not have the authority to make a custody determination in cases where it appoints a guardian.”); but see *Budhathoki v. Dep’t of Homeland Security*, 220 F. Supp. 3d 778, 785-86 (W.D. Tex. 2016) (finding juveniles were not dependent on juvenile court in the course of “Suits Affecting Parent-Child Relationship”); *In re Zavala*, No. CV-2015-852, 2015 Okla. Dist. LEXIS 786, at \*1 (Okla. Dist. June 12, 2015) (issuing SIJS determinations in a declaratory judgment proceeding); *De Guardado v. Menjivar*, 901 N.W.2d 243, 245 (Minn. Ct. App. 2017) (reversing lower court’s denial to issue SIJS determinations upon finding that it had the authority to do so in the course of a dissolution proceeding); *Matter of Fifo v. Fifo*, 127 A.D.3d 748, 750 (N.Y. App. Div. 2015) (issuing SIJS determinations in a “family offense” proceeding for a protection order); *Matter of Hei Ting C.*, 109 A.D.3d 100, 102 (N.Y. App. Div. 2013) (holding that a child support order does not satisfy the dependency requirement of the SIJS statute because there is no need for the Family Court to intervene to further the purpose of SIJS in ensuring that the child is safe); *In the Matter of Tung W.C. v. Sau Y.C.*, 34 Misc. 3d 869, 872-73 (N.Y. Fam. Ct. 2011) (holding that because an application for child support does not address custody issues, the dependency requirement cannot be met in the course of child support proceedings).

<sup>77</sup> *Matter of Linares-Mendez v. Cazanga-Payes*, 183 A.D.3d 738, 739 (N.Y. App. Div. 2020) (custody); *Matter of Mardin A.M.-I.*, 187 A.D.3d 913, 914 (N.Y. App. Div. 2020) (finding that “the mere fact that paternity has not been established for the putative father does not preclude the guardianship petition or the issuance of an order making specific findings enabling the subject child to petition for SIJS”); *Matter of Wilson A.T.Z.*, 147 A.D.3d 962, 962 (N.Y. App. Div. 2017) (guardianship); *Matter of Jimenez v. Perez*, 144 A.D.3d 1036, 1037 (N.Y. App. Div. 2016); *Matter of Maura A.R.-R.*, 114 A.D.3d 687, 689 (N.Y. App. Div. 2014) (mother); *Matter of Karen C.*, 111 A.D.3d 622,

further the child’s best interests by obtaining immigration status for their child,<sup>78</sup> where a natural parent would seek custody or guardianship of their biological child.<sup>79</sup> State courts that refused to issue SIJS judicial determinations and failed to consider the child’s best interests solely because the custody or guardianship seeker was a natural parent were overturned on appeal and ordered to make SIJS judicial determinations.<sup>80</sup>

The USCIS policy manual provides that “commitment to, or placement under the custody of a person may include certain types of guardianship, conservatorship, or adoption.”<sup>81</sup> In *In re C.G.H.*, the D.C. Court of Appeals overturned the Family Court’s finding that in the course of adoption proceedings a minor child was not “dependent” on the court as required under one of the three SIJS judicial determinations.<sup>82</sup> Looking at the plain language of the SIJS statute, the D.C. Court of Appeals concluded that adoption proceedings fall within the meaning of the SIJS statute, and that “an adopted child is ‘legally committed to, or placed under the custody of . . . an individual . . . appointed by a . . . juvenile [or family] court.’”<sup>83</sup> Because federal law is clear that children become dependent on the state juvenile court for SIJS purposes in the course of adoption proceedings, other state courts have similarly issued SIJS judicial determinations in the course of adoption proceedings.<sup>84</sup> The Maryland Court of Special Appeals has also held that when an adoption has already been finalized and SIJS was not addressed in the original adoption order, the adoptive parents can request for SIJS judicial determinations be made after an adoption has been granted.<sup>85</sup> In such a cases, USCIS states that the SIJS judicial determinations can be issued as a separate court order or as an amendment to the original adoption decree.<sup>86</sup>

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623 (N.Y. App. Div. 2013) (mother); *Lopez v. Serbellon Portillo*, 469 P.3d 181, 183 (Nev. 2020); *Amaya v. Rivera*, 444 P.3d 450, 453 (Nev. 2019); *but see Gonzalez v. Rodriguez*, 115 N.E.3d 718, 722 (Ohio Ct. App. 2018) (holding that allocating custody to the juvenile’s natural mother did not satisfy the dependency requirement – \*\*Note this holding is contrary to DHS regulations and policies, *see infra* n.79).

<sup>78</sup> *See Kitoko v. Salomao*, 215 A.3d 698, 707 (Vt. 2019).

<sup>79</sup> *See* 6 USCIS-PM J.2(C)(1), available at <https://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6> (“Custody” states that “When the court places the petitioner under the custody of a specific person, the court order should identify that person by name. A qualifying court-appointed custodial placement could be with one parent, if reunification with the other parent is found to be not viable due to that parent’s abuse, neglect, abandonment, or similar maltreatment of the petitioner.”).

<sup>80</sup> *Matter of Castellanos v. Recarte*, 142 A.D.3d 552, 554 (N.Y. App. Div. 2015) (custody); *Matter of Marisol N.H.*, 115 A.D.3d 185, 190 (N.Y. App. Div. 2013) (guardianship); *Matter of Sanchez Bonilla*, 115 A.D.3d 868, 869 (N.Y. App. Div. 2013) (custody); *but see Gonzalez v. Rodriguez*, 115 N.E.3d 718, 722 (Ohio Ct. App. 2018) (holding that allocating custody to the juvenile’s natural mother did not satisfy the dependency requirement – \*\*Note this holding is contrary to DHS regulations and policies, *see supra* n.79).

<sup>81</sup> 6 USCIS-PM J.2(C)(1), available at <https://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6>.

<sup>82</sup> *In re C.G.H.*, 75 A.3d 166, 170 (D.C. 2013).

<sup>83</sup> *In re C.G.H.*, 75 A.3d 166, 173 (D.C. 2013).

<sup>84</sup> *See Matter of Emma M.*, 74 A.D. 968, 970 (N.Y. App. Div. 2010).

<sup>85</sup> *In re D.C. M.*, No. 689, 2020 Md. App. LEXIS 148, at \*2 (Md. Ct. Spec. App. Feb. 13, 2020) (holding that the lower court erred in refusing to issue SIJS factual findings on the basis that the adoption had already been granted).

<sup>86</sup> 6 USCIS-PM J.3(A)(1), available at <https://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6>; *Simbaina v. Bunay*, 109 A.3d 191, 199 (Md. Ct. Spec. App. 2015); *In re Erick M.*, 820 N.W.2d 639, 642 (Neb. 2012).

## B. Role of the Juvenile Court

State juvenile court judges must issue SIJS judicial determinations upon request when it is in the best interests of the child to do so.

Every time a petitioner requests<sup>87</sup> that the state juvenile court make SIJS judicial determinations, and the state court has the jurisdiction to do so, the court should issue an order containing the three required conclusions of law and the findings of fact upon which these conclusions are based under the SIJS statute.<sup>88</sup> While the federal SIJS statute does not mandate that a state court make these judicial determinations, **a court must still issue the requested orders if it finds that doing so is in the best interests of the child.**<sup>89</sup> SIJS case law from across the country adopts this best interests approach with many state courts requiring the issuance of SIJS judicial determinations upon request.<sup>90</sup> For example, the Maryland Court of

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<sup>87</sup> While it is best practice for the petitioner to be clear and forthcoming about their request for SIJS judicial determinations, when the petition submitted to the court asks for findings regarding abuse, abandonment, or neglect and the child's return to their home country, the issue is properly before the trial court. *A.J.L.B. v. Alvarenga*, No. 23A-JP-1436, 2023 Ind. App. LEXIS 351, at \* 11-12 (Ind. Ct. App. Dec. 13, 2023) (citing *In re Guardianship of Xitumul*, 137 N.E.3d 945, 953 (Ind. Ct. App. 2019)).

<sup>88</sup> INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J).

<sup>89</sup> See *Kitoko v. Salomao*, 215 A.3d 698, 707 (Vt. 2019); compare with *Commonwealth v. N.B.D.*, 577 S.W.3d 73, 76 (Ky. 2019) (relying on *Canales* to support its conclusion that state juvenile courts are not required to issue SIJS judicial determinations *unless it is in the child's best interest to do so*).

<sup>90</sup> *E.C.D. v. P.D.R.D.*, 114 So. 3d 33, 36 (Ala. Civ. App. 2012) (“A juvenile court’s failure to include the findings relevant to SIJ status ‘effectively terminates the application for legal permanent residence, clearly affecting a substantial right’ of the child.”); *Guardianship of Saul H.*, 514 P.3d 871, 877 (Cal. 2022) (“When the facts a petitioner has established by a preponderance of the evidence support SIJ predicate findings, the superior court must issue these findings; it has no discretion to deny the petition”); *In the Interest of J.J.X.C.*, 734 S.E.2d 120, 124 (Ga. Ct. App. 2012) ([C]ourts in other states have held that a juvenile court errs by failing to consider a request for SIJ findings.”); *In the Interest of H.D.G.H.*, No. A23A1659, 2024 Ga. App. LEXIS 114, at \*6 (Ga. Ct. App. Mar. 12, 2024); *In the Interest of R.E.Z.B.*, No. A23A1775, 2023 Ga. App. LEXIS 561, at \*5 (Ga. Ct. App. Dec. 12, 2023); *In re Guardianship of Xitumul*, 137 N.E.3d 945, 953 (Ind. Ct. App. 2019); *In re Avila Luis*, 114 N.E.3d 855, 859 (Ind. Ct. App. 2018); *Montecino v. Ramos*, No. 606, 2023 Md. App. LEXIS 712, at \*8 (Md. 2023); *In re J.M.*, No. 404, 2019 WL 1300509, at \*4 (Md. Ct. Spec. App. Mar. 20, 2019) (unreported); *Hernandez-Lemus v. Arias-Diaz*, 100 N.E.3d 321, 323 (Mass. 2018) (“A judge simply may not decline to make findings; he or she must make the findings – whether favorable or not – concerning those criteria.”); *Guardianship of Penate*, 76 N.E.3d 960, 963 (Mass. 2017); *Sabino v. Ozuna*, 939 N.W.2d 757, 762, (Neb. 2020); *De Mateo v. Mateo-Cristobal*, 938 N.W.2d 372, 377 (Neb. Ct. App. 2020) (reversing the district court for failure to issue SIJS determinations and misapplication of the proper standard where it failed to do so solely because it found that “the minor children were awarded a fit and proper parent . . . and are in no immediate danger”); *Chevez-Gaitan v. Carrillo-Aguilar*, No. 75780, 2019 Nev. App. Unpub. LEXIS 454, at \*2-3 (Nev. Ct. App. May 9, 2019) (holding that “when there is evidence . . . to support [SIJS] findings, the court shall issue an order setting forth such findings”) (unpublished); *H.S.P. v. J.K.*, 121 A.3d 849, 852 (N.J. 2015) (“Family Part courts faced with a request for an SIJ predicate order should make factual findings with regard to each of the requirements listed in 8 C.F.R. 204.11.”); *Orellana v. Mancilla*, No. A-0262-15T4, 2016 N.J. Super. Unpub. LEXIS 2079, at \*4 (N.J. Super. Ct. App. Div. Sept. 13, 2016) (unpublished); *Matter of M.G.M.L.*, 68 Misc. 3d 569, 571 (N.Y. Fam. Ct. 2020) (finding that although the child’s guardianship petition was solely for the purposes of obtaining SIJS determinations given their twenty-first birthday in three days, there was “nothing improper about that motivation” because it was in the child’s best interests to grant the petition); *In re J.A.S.*, 192 N.E.3d 1313, 1319 (Ohio Ct. App. 2022) (“Although the trial court is authorized to conclude appellant failed to present evidence to support the SIJ factors, the court has a duty to consider the SIJ factors and make factual findings with regard to each of the requirements.”); *Orozco v. Tecu*, 284 A.3d 474, 479 (Pa. Super. Ct. 2022) (finding an

Appeals unequivocally held in 2019 that “when a party requests SIJ status findings in his or her pleadings, the circuit court *must* undertake the fact-finding process (hear testimony and receive evidence) and issue ‘independent factual findings regarding’ the minor’s eligibility for SIJ status.”<sup>91</sup>

In addition to the best interests of the child, a state court should always issue SIJS judicial determinations when requested, even when they are unfavorable to the petitioner, because by refusing to issue SIJS determinations, state courts are depriving child litigants of a developed record and the information they need to be able to appeal. As in any other type of judicial proceeding, a litigant is entitled to a full record for appeal purposes. This is consistent with the traditional responsibility of trial court judges, who would otherwise simply write “grant” or “deny” on an order without providing any reasoning for their decision. Such bare orders would leave the appellate court without the ability to meaningfully review the lower court’s judgment, which thus deprives the appellant of their fundamental due process rights.<sup>92</sup> This is not what Congress envisioned when it constructed the judicial system.<sup>93</sup> In essence, failure to issue SIJS determinations is tantamount to a deprivation of access to justice.<sup>94</sup> This is why other state

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abuse of discretion by the trial court in flatly refusing to issue SIJS determinations); *Corrales v. Wilmer*, No. 2023-UP-292, 2023 S.C. App. Unpub. LEXIS 340, at \*2 (S.C. Ct. App. Aug. 9, 2023) (unpublished).

<sup>91</sup> *Romero v. Perez*, 205 A.3d 903, 908 (Md. 2019). It is important to note that state courts issuing the factual findings required by the *Romero* Court are issuing findings of fact as to abuse, abandonment, neglect, or similar maltreatment of the child and applying state law to reach the three conclusions of law that together with the findings constitute an SIJS judicial determination. The state court is not ruling on the child’s SIJS eligibility; only USCIS adjudicates an SIJS petitioner’s immigration eligibility.

<sup>92</sup> See *In re Lopez-Sanchez*, No. 2018 CJ 0318, 2018 La. App. Unpub. LEXIS 157, at \*4-5 (La. Ct. App. June 1, 2018) (dismissing the appeal for lack of jurisdiction, finding that the lower court’s order containing the issuance of inadequate SIJS determinations was defective and did not constitute a final order, but explaining that this did not dismiss the underlying petition for SIJS determinations) (unpublished); *In the Interest of P.-M., D.*, No. 1115, 2018 La. App. Unpub. LEXIS 315, at \*3-4 (La. Ct. App. Nov. 5, 2018) (dismissing the appeal without remand for lack of final, written judgment from the juvenile court even though the lower court appeared from the record to have determined the merits of the petitioner’s request for SIJS determinations); *In re J.A.S.*, 192 N.E.3d 1313, 1319 (Ohio Ct. App. 2022) (“Our review of the trial court’s decision is impaired by the lack of factual findings by the trial court.”).

<sup>93</sup> See Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 Wash. & Lee L. Rev. 483, 504 (2015) (requiring judges to provide reasons for their decisions helps “to secure litigants’ involvement in the judicial process and, on the other hand, to keep the judiciary in check and ensure accurate decisions.”).

<sup>94</sup> As discussed above, SIJS judicial determinations provide valuable, life-saving benefits to children by protecting them from deportation and a pathway to lawful status and a stable, safe living situation with a loving caregiver. See *Kitoko v. Salomao*, 215 A.3d 698, 708 (Vt. 2019) (holding that the consequences of a state court’s issuance of SIJS determinations “will be ‘the reality of [these] children’s lives’ absent a successful application for SIJ status); *Romero v. Perez*, 205 A.3d 903, 909 n.15 (Md. Ct. Spec. App. 2019) (“[T]he consequences of failing to obtain the status can impose severe hardships” on the SIJS petitioner-child); *Corrales v. Wilmer*, No. 2023-UP-292, 2023 S.C. App. Unpub. LEXIS 340, at \*2 (S.C. Ct. App. Aug. 9, 2023) (addressing the merits of the mother’s appeal of the lower court’s failure to issue SIJS judicial determinations despite the fact that the mother had not properly preserved the issue for appellate review because “the duty to protect the rights of minors . . . has precedence over procedural rules otherwise limiting the scope of review . . .”) (unpublished).



courts, such as the California Supreme Court, have held that state court judges with jurisdiction under SIJS laws *must* issue SIJS determinations when requested by the petitioner.<sup>95</sup>

Some state courts have held specifically that when a petitioner has presented evidence sufficient to establish that they meet the requirements for the court to issue SIJS judicial determinations, a court cannot refuse to do so.<sup>96</sup> While this holding is certainly beneficial to SIJS petitioners, it erroneously suggests that when a state court judge determines that a petitioner does not meet one of the requirements for SIJS judicial determinations, the state court does not have to issue such an order containing *any* of the judicial determinations.<sup>97</sup> However, best practice is to issue SIJS judicial determinations every time they are requested, *even if they are unfavorable to the petitioner*.<sup>98</sup> Doing so is essential for the development of a full evidentiary record for appeal and the administration of justice.<sup>99</sup> Therefore, a state court judge's determination that a petitioner does not meet the criteria for one of the required conclusions of law must *not* preclude

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<sup>95</sup> *Guardianship of Saul H.*, 514 P.3d 871, 877 (Cal. 2022); *E.C.D. v. P.D.R.D.*, 114 So. 3d 33, 36 (Ala. Civ. App. 2012).

<sup>96</sup> See *Matter of Tommy E.H.*, 134 A.D.3d 840, 842 (N.Y. App. Div. 2015) (holding that because the petitioner met the criteria for SIJS findings, the Family Court should have granted the mother's motion for the issuance of an SIJS order); *Matter of Ramirez v. Palacios*, 136 A.D.3d 666, 667 (N.Y. App. Div. 2016); *Matter of Alejandro V.P. v. Floyland V.D.*, 150 A.D.3d 741, 743 (N.Y. App. Div. 2017); *Matter of Alamgir A.*, 81 A.D.3d 937, 940 (N.Y. App. Div. 2011) (finding that the Family Court improperly denied Alamgir's motion for SIJS findings after determining that the petitioner met the requirements for each statutorily required finding); *Matter of Antowa McD.*, 50 A.D.3d 507, 507 (N.Y. App. Div. 2008); *In re Guardianship of Guaman*, 879 N.W.2d 668, 672 (Minn. Ct. App. 2016).

<sup>97</sup> See *Matter of Del Cid Martinez*, 144 A.D.3d 905, 906 (N.Y. App. Div. 2016) (holding that because the record did not support a determination that the child's reunification with his father is not viable, the Family Court properly denied the mother's motion for the issuance of an SIJS order); *Matter of M.U.D. v. Carlos T.C.B.*, No. 2023-03635, 2023 N.Y. App. Div. LEXIS 6317, at \*2 (N.Y. App. Div. 2023) (holding that because the record did not support a determination that the child's reunification with father was not viable, the Family Court properly denied the motion for the issuance of SIJS determinations); *Matter of Enis A.C.M.*, 152 A.D.3d 690, 692 (N.Y. App. Div. 2017); *Matter of Victor C-G- v. Santos C.-T.*, 140 A.D.3d 951, 953 (N.Y. App. Div. 2016); *Matter of Farima J.A.J.*, 137 A.D.3d 912, 914 (N.Y. App. Div. 2016); *Matter of Argueta v. Ruiz*, 128 A.D.3d 689, 690 (N.Y. App. Div. 2014); *Matter of Maria S.Z. v. Maria M.A.*, 115 A.D.3d 970, 971 (N.Y. App. Div. 2014); *Matter of Marvin E.M. de P.*, 121 A.D.3d 892, 893 (N.Y. App. Div. 2014); *Guardianship of Penate*, 76 N.E.3d 960, 968 (Mass. 2017); *De Mateo v. Mateo-Cristobal*, 938 N.W.2d 372, 377 (Neb. Ct. App. 2020) (holding that the court must make the SIJS determinations upon request *or* find that the evidence is not sufficient to make the findings); *Velasquez v. Miranda*, 297 A.D.3d 837, 847 (Pa. Super. Ct. 2023).

<sup>98</sup> See *In re Guardianship of Xitumul*, 137 N.E.3d 945, 953 (Ind. Ct. App. 2019) ("The trial court is authorized to conclude that the petitioner failed to present evidence supporting the SIJ factors or that the evidence presented was not credible, but the court has a duty to consider the factors and make relevant findings."); *Bonilla v. Maldonado*, 127 N.E.3d 1181, 1186-87 (Ind. Ct. App. 2019); *Hernandez-Lemus v. Arias-Diaz*, 100 N.E.3d 321, 323 (Mass. 2018) ("A judge simply may not decline to make findings; he or she must make the findings – whether favorable or not – concerning those criteria."); *Guardianship of Penate*, 76 N.E.3d 960, 966 (Mass. 2017) ("The judge's obligation to make the special findings also applies regardless of whether the child presents sufficient evidence to support a favorable finding under each of the criteria set forth in § 1101(a)(27)(J)."); *C.M. v. M.N.M.*, No. A-4209-14T1, 2016 N.J. Super. Unpub. LEXIS 396 at \*3 (N.J. Super. Ct. Feb. 24, 2016) (unpublished) ("The state court must address all five findings, even if the court finds the child has not been placed in the custody of another."); *O.Y.P.C. v. J.C.P.*, 126 A.3d 349, 353 (N.J. Super. Ct. 2015) ("Thus, we understand *H.S.P.* as requiring Family Part judges hearing these cases to make all of the federal-required findings, regardless of whether they believe that the juvenile should be declared dependent on the court . . .").

<sup>99</sup> *In re S.F.A.C. v. Dep't of Children & Families*, 182 So.3d 745, 749 (Fla. Dist. Ct. App. 2015) (Salter, J., dissenting) ("Detailed findings will also permit meaningful appellate review in our state appellate courts.").

the court from issuing an order addressing all three of the requested required judicial determinations. If a judge finds that the petitioner does not satisfy one of the three conclusions of law required for an SIJS order, the judge should still issue an order containing the three judicial determinations listing and explaining the court's conclusions of law and detailing its findings of fact with supporting evidence from the proceedings as it relates to each of the three judicial determinations.

Additionally, some state courts have expressed concern that requiring them to issue SIJS determinations is a drain on the court's valuable time and limited resources. However, the drafters of the SIJS laws sought to ensure that SIJS determinations could be issued in the normal course of business of the state court's juvenile proceedings. "The fact finding role of state courts in SIJS cases includes the types of findings that are within the expertise of and are akin to the daily responsibilities of state judges who routinely decide matters regarding the custody and care of children."<sup>100</sup> In fact, it is a drain on *appellate* resources to deprive the SIJS petitioner of determinations without adequate explanation. In one case, the Alabama Court of Civil Appeals had to remand to the juvenile court because it could not determine "whether the absence of the SIJ-status findings in the juvenile court's judgment was an implied denial or simply an oversight."<sup>101</sup> The Court of Appeals of Georgia similarly found that their "review of the juvenile court's decision is impaired by the lack of [SIJS] findings, and the child's immigration status hangs in the balance."<sup>102</sup> State juvenile courts that refuse to issue SIJS judicial determinations force the appellate court to remand the proceedings and/or engage in a fact finding role to determine if the petitioner met the SIJS criteria because the lower court judge did not specifically and concisely present its own reasoning for finding the petitioner did or did not meet the criteria.<sup>103</sup>

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<sup>100</sup> Leslye E. Orloff, *Chapter I: Introduction to Special Immigrant Juvenile Status*, SIJS Bench Book at 5 (Dec. 20, 2017), available at <https://niwaplibrary.wcl.american.edu/wp-content/uploads/CH-I-Intro-To-SIJS.pdf>.

<sup>101</sup> *E.C.D. v. P.D.R.D.*, 114 So.3d 33, 36 (Ala. Civ. App. 2012); see also *In the Interest of J.J.X.C.*, 734 S.E.2d 120, 124 (Ga. Ct. App. 2012) (holding that "we cannot affirm without some positive indication that the court actually addressed the issue" of the required SIJS findings).

<sup>102</sup> *In the Interest of J.J.X.C.*, 734 S.E.2d 120, 124 (Ga. Ct. App. 2012).

<sup>103</sup> See *Y.G.P. v. A.H.R.*, No. A-4357-15T1, 2017 N.J. Super. Unpub. LEXIS 1847, at \*8 (N.J. Super. Ct. App. Div. July 21, 2017) (overturning the Family Part judge's refusal to issue SIJS findings because the "unchallenged evidence plaintiff presented to the court" supported the issuance of such findings) (unpublished); see *gen.*, *In re Guardianship of Luis*, 134 N.E.3d 1070, 1076 (Ind. Ct. App. 2019) (remanding for a second time after finding the trial court once again erred in issuing SIJS determinations and forcing the appellate court to engage in a factfinding role); *In re Avila Luis*, 114 N.E.3d 855, 859 (Ind. Ct. App. 2018) (holding that the trial court erred by not stating a basis for declining to make SIJS findings and finding it was unclear from the record if the trial court had even considered making the findings); *In re Lopez-Sanchez*, No. 2018 CJ 0318, 2018 La. App. Unpub. LEXIS 157, at \*4-5 (La. Ct. App. June 1, 2018) (finding that the lower court's order containing the issuance of inadequate SIJS determinations was defective and did not constitute a final order such that the appellate court did not have jurisdiction to review the decision) (unpublished); *In the Interest of P.-M., D.*, No. 1115, 2018 La. App. Unpub. LEXIS 315, at \*3-4 (La. Ct. App. Nov. 5, 2018) (dismissing the appeal for lack of final, written judgment from the juvenile court even though the lower court appeared from the record to have determined the merits of the petitioner's request for SIJS determinations); *Matter of Jose E.S.G.*, 193 A.D.3d 856, 856 (N.Y. App. Div. 2021) (issuing findings upon review of the record after concluding the lower court erred in failing to do so); *Matter of Vasquez v. Mejia*, 170 A.D.3d 868, 870 (N.Y. App. Div. 2019) (remanding the case back to the trial court ordering it to issue

There are a batch of New York state court cases issued between 2016 and 2017 that held that state courts are not required to make these judicial determinations.<sup>104</sup> The brief opinions issued in these New York cases provided no explanation for refusing to issue the SIJS judicial determinations. For all of the reasons outlined above, blatant, unsupported refusal to issue SIJS judicial determinations is not best practice for state courts. Not only does this deprive the appellate court of a full, developed record, but as many courts across the country have found, it also is not in the best interests of the child.<sup>105</sup>

Issuing SIJS judicial determinations whenever requested by the petitioner is consistent with federal intent and the majority of available case law across the country. Some of the most negative, difficult case law on SIJS that other states' courts have followed were ultimately overruled by state statute. In 2017, the Virginia Court of Appeals held that state juvenile courts are not required to issue SIJS judicial determinations and even questioned its jurisdiction to do so, creating widespread confusion across the country and contributing to negative case law

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SIJS determinations after record was not sufficiently clear for appellate court to do so); *Matter of Denia M.E.C. v. Carlos R.M.O.*, 161 A.D.3d 853, 853 (N.Y. App. Div. 2018) (issuing findings upon review of the record after concluding the lower court erred in failing to do so); *Matter of Alejandro V.P. v. Floyland V.D.*, 150 A.D.3d 741, 743 (N.Y. App. Div. 2017) (issuing SIJS determinations on appeal after finding that the Family Court erred by refusing to issue SIJS determinations); *Matter of Axel S.D.C. v. Elena A.C.*, 139 A.D.3d 1050, 1052 (N.Y. App. Div. 2016) (issuing findings upon review of the record after concluding the lower court erred in failing to do so); *Matter of Saul A.F.H. v. Ivan L.M.*, 118 A.D.3d 878, 879 (N.Y. App. Div. 2014) (issuing findings upon review of the record after concluding the lower court erred in failing to do so); *Matter of Kamaljit S.*, 114 A.D.3d 949, 950 (N.Y. App. Div. 2014) (issuing findings upon review of the record after concluding the lower court erred in failing to do so); *Matter of Maura A.R.-R.*, 114 A.D.3d 687, 689 (N.Y. App. Div. 2014) (issuing findings upon review of the record after concluding the lower court erred in failing to do so); *In re A.M.A.*, No. 22AP-325, 2023 Ohio App. LEXIS 690, at \*P8 (Ohio Ct. App. Mar. 9, 2023) (reversing the trial court's vacatur of the Emergency Protective Order containing SIJS findings after determining there was no factual or legal basis in the record to support the trial court's decision to vacate the special findings it had previously issued); *In re J.A.S.*, 192 N.E.3d 1313, 1319 (Ohio Ct. App. 2022) (holding that is review is impaired by the lack of factual findings and remanding with instructions to the trial court to include findings of fact and conclusions of law explicit enough to sufficiently apprise the court of the grounds for its decision); *Rivas v. Villegas*, 300 A.3d 1036, 1046 (Pa. Super. Ct. 2023) (holding that a court abuses its discretion when it fails to issue SIJS judicial determinations without providing any reasoning for its refusal on the record in any capacity); *Corrales v. Wilmer*, No. 2023-UP-292, 2023 S.C. App. Unpub. LEXIS 340, at \*2 (S.C. Ct. App. Aug. 9, 2023) ("Because it is not possible to ascertain from the family court's order whether the family court simply chose not to address the SIJ findings, determined it was not authorized to make such findings, or refused to make the findings for some other reason, we remand for further proceedings consistent with this opinion.") (unpublished).

<sup>104</sup> *Matter of Angel R.L.G. v. Paula J.P.C.*, 147 A.D.3d 853 (N.Y. App. Div. 2017); *Matter of Christian P.S.-A.*, 148 A.D.3d 1032 (N.Y. App. Div. 2017); *Matter of Anibal H.*, 138 A.D.3d 841 (N.Y. App. Div. 2016); *Matter of Blanca C.S.C.*, 141 A.D.3d 580 (N.Y. App. Div. 2016); *Matter of Dimas A. v. Esmirna E.L.*, 142 A.D.3d 1164 (N.Y. App. Div. 2016); *Matter of Edgar D.M.P.*, 139 A.D.3d 956 (N.Y. App. Div. 2016); *Matter of Lorena L.Z.-C.*, 143 A.D.3d 733 (N.Y. App. Div. 2016); *Matter of Fredy L.M.M.*, 138 A.D.3d 857 (N.Y. App. Div. 2016); *Matter of Jasbir S.*, 138 A.D.3d 750 (N.Y. App. Div. 2016).

<sup>105</sup> See *Kitoko v. Salomao*, 215 A.3d 698, 707 (Vt. 2019) (holding that the court should make SIJS determinations when it is in the child's best interests to do so and erred by failing to make any findings); *In re J.A.S.*, 192 N.E.3d 1313, 1320 (Ohio Ct. App. 2022) (remanding to the lower court after holding that the state court should have made SIJS findings based on the best interests of the child, but could not determine from the record if the judge validly considered the determinations); *In re Avila Luis*, 114 N.E.3d 855, 859 (Ind. Ct. App. 2018) (holding that the trial court had a duty to consider the SIJS factors and make findings and it erred by not stating a basis for declining to make SIJS findings).

issued in other states.<sup>106</sup> However, in 2019, Virginia enacted a statute that overturned *Canales*.<sup>107</sup> This statute made it clear that the state juvenile courts *do* have jurisdiction to adjudicate the required judicial determinations, and thus calls into question other courts' reliance on *Canales* as a basis for refusing to adjudicate requests for SIJS judicial determinations.<sup>108</sup>

*State juvenile court judges are not rendering an immigration decision when they issue SIJS judicial determinations.*

When a state juvenile court issues an order containing the three required SIJS judicial determinations in support of the petitioner's SIJS petition, the court is *not* rendering an immigration decision nor adjudicating the merits of the child's immigration case.<sup>109</sup> The federal SIJS statute directs the state juvenile court to enter judicial determinations based on its factual findings "that are *advisory* to a federal agency determination."<sup>110</sup> By entering this order, the state juvenile court "is not rendering an immigration determination because the ultimate decision regarding the child's immigration status rests with the federal government."<sup>111</sup> Thus, the state court is merely serving an advisory role to the federal government.

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<sup>106</sup> *Canales v. Orellana*, 800 S.E. 208, 779 (Va. Ct. App. 2017).

<sup>107</sup> Va. Code § 16.1-241.

<sup>108</sup> See *Ramirez v. Menjivar*, No. 74030, 2018 Nev. Unpub. LEXIS 1203, at \*6 (Nev. 2018) (relying on *Canales* to support its conclusion that state juvenile courts only have to make SIJS determinations to the extent they are ancillary to proceedings under state law) (unpublished); *De Rubio v. Herrera*, 541 S.W.3d 564, 572 (Mo. Ct. App. 2017) (relying on *Canales* to support its conclusion that state juvenile courts do not have to issue SIJS judicial determinations upon request unless there is a state statute expressly authorizing them to do so); see also *In re Alas-Leiva*, 101 Va. Cir. 556, 558 (2018) (relying on *Canales* to support its conclusion that state juvenile courts do not have to issue SIJS judicial determinations upon request unless there is a state statute expressly authorizing them to do so); *Commonwealth v. N.B.D.*, 577 S.W.3d 73, 76 (Ky. 2019) (relying on *Canales* to support its conclusion that state juvenile courts are not required to issue SIJS judicial determinations).

<sup>109</sup> See *H.S.P. v. J.K.*, 121 A.3d 849, 858 (N.J. 2015); *In re Guardianship of Guaman*, 879 N.W.2d 668, 671-72 (Minn. Ct. App. 2016); see also Special Immigrant Juvenile Petitions, 87 Fed. Reg. 13081 (Mar. 8, 2022) ("Whether a State court order submitted to DHS establishes a petitioner's eligibility for SIJ classification is a question of Federal law and lies within the sole jurisdiction of DHS."); *Arizona v. United States*, 567 U.S. 387, 394 (2012) ("The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens."); *Budhathoki v. Nielsen*, 898 F.3d 504, 512 (5th Cir. 2018) (explaining that "[w]hatever responsibilities are exclusively for the [S]tate court, USCIS must evaluate if the actions of the [S]tate court make the applicant eligible for SIJ [classification]"); *Special Immigrant Juveniles*, USCIS at 2 (last updated Nov. 8, 2023), available at <https://www.uscis.gov/working-in-US/eb4/SIJ>.

<sup>110</sup> *Simbaina v. Bunay*, 109 A.3d 191, 197-98 (Md. Ct. Spec. App. 2015) (emphasis added); INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J).

<sup>111</sup> *M.F.R.V. v. J.R.M.*, No. 2495, 2019 Md. App. LEXIS 226, at \*8 (Md. Ct. Spec. App. Mar. 15, 2019) (citing *Simbaina v. Bunay*) (internal citations omitted) (unreported); see also *Velasquez v. Miranda*, 297 A.D.3d 837, 847 (Pa. Super. Ct. 2023) (affirming the lower court's order finding it acted properly in "declining to find [SIJS petitioners] eligible for SIJS," mischaracterizing the role of state juvenile courts under federal SIJS statutes and regulations explaining that state courts are not adjudicating a child's petition when issuing SIJS determinations, and thus do not determine if an SIJS-petitioner child is "eligible") (emphasis added); 6 USCIS-PM J.2, available at <https://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6>.

*It is not the state juvenile court's role to assess the merits of a child's SIJS petition.*

The SIJS regulations make it clear that the court's role is to serve as a factfinder based on state law, *not* to assess the merits of the child's overall petition for SIJ classification.<sup>112</sup> This responsibility to assess the merits of a child's petition is left solely to the federal government.<sup>113</sup> State juvenile courts that refused to issue SIJS judicial determinations or issued an order based on their assessment of the merits of the petitioner's SIJS petition were overturned on appeal.<sup>114</sup>

The Supreme Court of Massachusetts specifically ruled on this issue in *Guardianship of Penate*, holding that when the lower court judge "implicitly determined that neither child would be entitled to SIJ status based on her interpretation of the statute and declined to make special findings," this was error.<sup>115</sup> Rather, the judge's "sole function is to make the special findings, and to do so in a fashion that does not limit Federal authorities in determining the merits of the juvenile's application for SIJ status."<sup>116</sup>

The Maryland Court of Appeals further noted in *Simbaina v. Bunay* that the state court's role is "not to determine worthy candidates for citizenship, but simply to identify abused, neglected, or abandoned children under its jurisdiction who cannot reunify with a parent."<sup>117</sup>

The D.C. Court of Appeals aptly stated that "[w]hen determining whether a petitioner has established a prima facie case [for SIJS judicial determinations], the trial court must recognize that Congress to some extent has put its proverbial thumb on the scale favoring SIJS status."<sup>118</sup>

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<sup>112</sup> 8 C.F.R. § 204.11(d)(5)(i).

<sup>113</sup> See *Immigration Relief for Abused, Abandoned, or Neglected Children: Special Immigrant Juvenile Classification*, USCIS at 2 (Jan. 2024), available at <https://niwaplibrary.wcl.american.edu/pubs/uscis-sij-brochure-2024>; see also *Velasquez v. Miranda*, 297 A.D.3d 837, 847 (Pa. Super. Ct. 2023) (affirming the lower court's order finding it acted properly in "declining to find [petitioners] eligible for SIJS," mischaracterizing the role of state juvenile courts under federal SIJS statutes and regulations explaining that state courts are not responsible for assessing the merits of the petitioner's overall petition, and thus do not determine if an SIJS-petitioner child is "eligible") (emphasis added); *H.S.P. v. J.K.*, 121 A.3d 849, 858-59 (N.J. 2015); *J.U. v. J.C.P.C.*, 176 A.3d 136, 139 (D.C. 2018).

<sup>114</sup> See *Hernandez-Lemus v. Arias-Diaz*, 100 N.E.3d 321, 323 (Mass. 2018); *In re Velasquez*, 334 Mich. App. 118, 141 (Mich. Ct. App. 2022) (holding that the probate court erred in relying on the judge's conclusion that the child had entered the United States "illegally" in its refusal to grant "special immigration status," misstating the role of the state juvenile court); *Y.G.P. v. A.H.R.*, No. A-4357-15T1, 2017 N.J. Super. Unpub. LEXIS 1847, at \*5 (N.J. Super. Ct. App. Div. July 21, 2017) (unpublished); *Matter of Pineda v. Diaz*, 127 A.D.3d 1203, 1205 (N.Y. App. Div. 2015) ("[A]ny considerations regarding whether the child ought to receive SIJS are not properly the subject of this proceeding.").

<sup>115</sup> *Guardianship of Penate*, 76 N.E.3d 960, 963 (Mass. 2017).

<sup>116</sup> *Guardianship of Penate*, 76 N.E.3d 960, 963 (Mass. 2017) ("[O]n a motion for special findings, the judge shall make findings without regard to the ultimate merits or purposes of the juvenile's application.").

<sup>117</sup> 109 A.3d 191, 202 (Md. 2015).

<sup>118</sup> *B.R.L.F. v. Sarceno Zuniga*, 200 A.3d 770, 776 (D.C. 2018).

USCIS confirms that SIJS eligible children may have dual or mixed motives that include both obtaining relief from parental maltreatment and obtaining required SIJS judicial determinations.

Upon a request for SIJS determinations, state courts should first determine whether a child has been a victim of abuse, abandonment, neglect, or other maltreatment against which the child is protected under state law. If the child has suffered any of these forms of parental maltreatment, the court must make findings as to the harm suffered by the child. Based on those findings and the application of state best interests laws, the state court's role in the SIJS process is solely to issue the three required judicial determinations as directed by federal law. It is *not* the state juvenile court's duty to speculate or decide the child's federal SIJS eligibility, or "to determine whether a petition for SIJ status is 'bona fide.'"<sup>119</sup> Court rulings issued prior to 2022 confirmed the need for clarification on this issue, and so the 2022 regulations explicitly recognize that petitioners can have dual or mixed motivations for seeking SIJS judicial determinations.<sup>120</sup>

DHS modified the consent provision of the SIJS regulations to require the petitioner "to establish a *primary reason* the required juvenile court determinations were sought was to obtain relief from parental abuse, neglect, abandonment, or a similar basis under State law."<sup>121</sup> Thus, so long as the SIJS petitioner can show that relief from abuse, abandonment, or neglect is one of the primary reasons that the child turned to the state court for help and sought SIJS judicial determinations, USCIS will not reject the petitioner's application simply because the petitioner may also have had an immigration-related motive for seeking the state court order. State courts that allowed the issuance of SIJS judicial determinations to be infected with an analysis of the motivations of the SIJS eligible child have been reprimanded on appeal.<sup>122</sup>

DHS specifically refused to require state juvenile courts to engage in a fraud inquiry as to the petitioner's motivations for seeking SIJS judicial determinations. Instead, DHS maintained its sole authority to inquire into any potential fraud as part of its adjudication of the child's SIJS

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<sup>119</sup> *Del Carmen Benitez v. Doe*, 193 A.3d 134, 139 (D.C. 2018); see also *Bianka M. v. Superior Court*, 5 Cal. 5th 1004, 1011 (Cal. 2018); *In re Denis G.*, No. S240470, 2017 Cal. LEXIS 3060, at \*1 (Cal. Apr. 26, 2017); *B.R.C.M. v. Fla. Dep't of Child. & Fam.*, 215 So. 3d 1219, 1223 (Fla. 2017); *In re Y.V.*, 160 So.3d 576, 579 (Fla. Dist. Ct. App. 2015); *Guardianship of Penate*, 76 N.E.3d 960, 966 (Mass. 2017); *C.I.M. v. F.M.R.*, No. A-4138-14T1, 2016 N.J. Super. Unpub. LEXIS 397, at \*7-8 (N.J. Super. Ct. App. Div. Feb. 24, 2016) (unpublished); *Matter of M.G.M.L.*, 68 Misc. 3d 569, 571 (N.Y. Fam. Ct. 2020) (finding that although the child's guardianship petition was solely for the purposes of obtaining SIJS determinations given their twenty-first birthday in three days, there was "nothing improper about that motivation" because it was in the child's best interests to grant the petition).

<sup>120</sup> 8 C.F.R. § 204.11(b)(5) (2023).

<sup>121</sup> Special Immigrant Juvenile Petitions, 87 Fed. Reg. 13070 (Mar. 8, 2022) (New 8 C.F.R. 204.11(b)(5)) (emphasis added).

<sup>122</sup> See *Guardianship of Saul H.*, 514 P.3d 871, 882 (Cal. 2022); *F.L.M. v. Dep't of Children & Families*, 912 So.2d 1264, 1266 (Fla. Dist. Ct. App. 2005); *Ramirez v. Bautista*, No. A-19-908, 2020 Neb. App. LEXIS 159, at \*15 (Neb. Ct. App. May 26, 2020) (reversing the district court's decision finding that its failure to issue SIJS findings stemmed from its taking issue with the "propriety of or need" for such findings, rather than the sufficiency of the evidence presented); *Anagislana Ruano Cano v. Guillen*, No. A-2886-21, 2022 N.J. Super. Unpub. LEXIS 2062, at \*8 (N.J. Super. Ct. App. Div. Nov. 4, 2022); *C.M. v. M.N.M.*, No. A-4209-14T1, 2016 N.J. Super. Unpub. LEXIS 396, at \*6 (N.J. Super. Ct. App. Div. Feb. 24, 2016) (unpublished).

petition by applying federal immigration laws.<sup>123</sup> “USCIS will not grant its consent if the petitioner fails to demonstrate that a primary reason the juvenile court determinations were sought was to obtain relief from abuse, abandonment, neglect, or a similar basis under state law.”<sup>124</sup> Therefore, if the state juvenile court judge has strong suspicions about the motivations for which the petitioner sought SIJS determinations, there is nothing preventing the court from indicating this in the court’s order. However, the court’s suspicions *cannot* support a refusal to issue SIJS determinations, as it is not the role of the state juvenile court to determine whether the petitioner is utilizing the state juvenile court proceedings solely to obtain an immigration benefit. Both the SIJS statute and federal regulations and policies support this conclusion.<sup>125</sup>

### C. Evidentiary Standard & Procedural Matters

#### Standard of Proof

State juvenile courts should apply the preponderance of the evidence standard of proof and not impose a higher evidentiary burden on SIJS petitioners when making SIJS judicial determinations in the course of proceedings. It is settled law that “imposing insurmountable evidentiary burdens of production or persuasion is . . . inconsistent with the intent of Congress.”<sup>126</sup> State juvenile courts should not expect, nor do the SIJS statute and regulations require, high levels of specificity and documentary evidence to support testimony for SIJS judicial determinations.<sup>127</sup> Additionally, many state courts have opted to apply a “preponderance of the evidence” standard when considering evidence for making SIJS judicial determinations.<sup>128</sup> This lower standard should be used by state courts issuing SIJS determinations because Congress knew that there would be issues of proof such as “that those seeking [SIJ] status would have limited abilities to corroborate testimony with additional evidence.”<sup>129</sup>

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<sup>123</sup> Special Immigrant Juvenile Petitions, 87 Fed. Reg. 13081 (Mar. 8, 2022) (New 8 C.F.R. 204.11(b)(5)).

<sup>124</sup> Special Immigrant Juvenile Petitions, 87 Fed. Reg. 13081 (Mar. 8, 2022) (New 8 C.F.R. 204.11(b)(5)).

<sup>125</sup> INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11 (2023); 6 USCIS-PM J.2(D), available at <https://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6>; see also *In re Mario S.*, 38 Misc. 3d 444, 456 (N.Y. Fam. Ct. 2012).

<sup>126</sup> *In re J.M.*, No. 404, 2019 WL 1300509, at \*4 (Md. Ct. Spec. App. Mar. 20, 2019) (unreported); see also *Guardianship of Saul H.*, 514 P.3d 871, 883-84 (Cal. 2022); *J.U. v. J.C.P.C.*, 176 A.3d 136, 142 (D.C. 2018); *Romero v. Perez*, 205 A.3d 903, 915 (Md. 2019); *In re D.V.L.*, No. 3058, 2019 Md. App. LEXIS 749, at \*11 (Md. Ct. Spec. App. Aug. 30, 2019) (unreported); *Sabino v. Ozuna*, 939 N.W.2d 757, 762 (Neb. 2020); *In re Danely C.*, No. M2016-02054-COA-R3-JV, 2017 Tenn. App. LEXIS 773, at \*12 (Tenn. Ct. App. Nov. 29, 2017).

<sup>127</sup> *In re J.M.*, No. 404, 2019 WL 1300509, at \*4 (Md. Ct. Spec. App. Mar. 20, 2019) (unreported); see also *Kitoko v. Salomao*, 215 A.3d 698, 709 (Vt. 2019).

<sup>128</sup> See e.g., *B.R.L.F. v. Sarceno Zuniga*, 200 A.3d 770, 776 (D.C. 2018); *Guardianship of Saul H.*, 514 P.3d 871, 880 (Cal. 2022); *In re Velasquez*, 334 Mich. App. 118, 135 (Mich. Ct. App. 2022); *Hernandez v. Dorantes*, 314 Neb. 905, 922-923 (Neb. 2023).

<sup>129</sup> *B.R.L.F. v. Sarceno Zuniga*, 200 A.3d 770, 777-78 (D.C. 2018); see also *Guardianship of Saul H.*, 514 P.3d 871, 881 (Cal. 2022) (recognizing that a lower evidentiary burden is appropriate because SIJS petitioners are “children who had traveled many miles from their homes to escape difficult circumstances”); *J.C. v. M.T.*, No. 17-P-101, 2017 Mass. App. Unpub. LEXIS 946, at \*2-3 (Mass. App. Ct. Oct. 27, 2017) (unpublished).

*Evidence in the Record, Credibility, and Avoiding Assumptions Not Supported by the Record*

When the SIJS petitioner presents consistent, uncontested evidence supporting the three required SIJS judicial determinations, the state juvenile court judge should issue an order containing these determinations. Furthermore, the state juvenile court must consider all of the evidence presented, and if it is credible, the court may not choose to ignore it.<sup>130</sup>

In making a credibility determination, the state juvenile court should be cautious about imposing too demanding of a standard, as several state courts have been overturned on appeal for failing to issue SIJS judicial determinations based on an erroneous adverse credibility finding.<sup>131</sup> The fact that most or all of the witnesses testifying in support of SIJS judicial determinations provide identical responses to several of the questions asked by the petitioner’s counsel does *not* support an adverse credibility finding for SIJS purposes.<sup>132</sup> If the state juvenile court still has serious credibility concerns, it should ask for more testimony and do further factfinding, rather than just issuing a blanket denial.<sup>133</sup>

The Supreme Court of California has held that a child’s declaration alone can provide sufficient evidence to support the issuance of SIJS judicial determinations.<sup>134</sup> Further, the California Court of Appeal specifically held that state court juvenile judges cannot allow “misplaced policy considerations” to color their judgment with respect to credibility findings.<sup>135</sup>

The state court also may not make its own assumptions about the testimony or evidence, nor make contradictory statements in regard to the evidence it receives, if those assumptions are

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<sup>130</sup> See *gen., Guardianship of Saul H.*, 514 P.3d 871, 882 (Cal. 2022) (“[S]uperior courts may not ignore or discredit facts shown by a child’s declaration based on surmise or on evidence outside the record or draw speculative inferences against the child.”); *Eddie E. v. Superior Court*, 234 Cal. App. 4th 319, 333 (Cal. Ct. App. 2015); *Duenas v. Mendez*, No. 2742, 2019 Md. App. LEXIS 874, at \*13 (Md. Ct. Spec. App. Oct. 10, 2019) (holding that all of the appellant’s filings had some “presumptive validity”); *In re K.O.-T.*, No. 2047, 2057 Md. App. LEXIS 1206, at \*17 (Md. Ct. Spec. App. Dec. 6, 2017) (unreported) (finding it was wrong for the lower court to reject the petitioner’s reasons for not wanting to return to their home country as “speculative”); *M.E.R. v. J.P.A.*, No. A-5171-14T1, 2017 N.J. Super. Unpub. LEXIS 1427, at \*9 (N.J. Super. Ct. App. Div. June 21, 2016) (finding that there was uncontested evidence supporting a determination of abuse that the trial court judge ignored) (unpublished).

<sup>131</sup> See *L.R. v. D.C.*, No. 2345, 2018 Md. App. LEXIS 888, at \*12 (Md. Ct. Spec. App. Sept. 20, 2018) (unreported).

<sup>132</sup> See *L.R. v. D.C.*, No. 2345, 2018 Md. App. LEXIS 888, at \*5-6, 12 (Md. Ct. Spec. App. Sept. 20, 2018) (unreported).

<sup>133</sup> See *D.A.J. v. S.A.J.*, No. A-3154-06T1, 2007 N.J. Super. Unpub. LEXIS 2419, at \* (N.J. Super. Ct. App. Div. 2007); see also *Matter of Mohamed B. v. Cynthia C.*, 83 A.D.3d 829, 831 (N.Y. App. Div. 2011) (finding that the Family Court erred in refusing to issue SIJS findings due to its misplaced concern regarding the credibility of the SIJS petitioner’s story, which was not supported by the record); *In re B.M.*, No. 1521, 2018 Md. App. LEXIS 1099, at \*21 (Md. Ct. Spec. App. Nov. 28, 2018) (holding that the judge erred in failing to consider additional evidence and testimony in support of SIJS judicial determinations where the judge made “negative credibility findings, which were based on unsupported assumptions and non-evidence”); see also *In re MC*, No. 364989, 2023 Mich. App. LEXIS 5843, at \*11 (Mich. Ct. App. Aug. 17, 2023) (holding that the lower court erred in failing to consider a detailed affidavit describing the bases for SIJS judicial determinations and remanding to the lower court to reconsider whether the child was abandoned or neglected based on the affidavit and instructing the lower court to take additional testimony if necessary to properly render a decision) (unpublished).

<sup>134</sup> *Guardianship of Saul H.*, 514 P.3d 871, 881 (Cal. 2022)

<sup>135</sup> *Leslie H. v. Superior Court*, 224 Cal. App. 4th 340, 350 (Cal. Ct. App. 2014).



not supported by the record.<sup>136</sup> For example, a state juvenile court cannot deem reunification is viable with a parent in their home country, but also find that it is too dangerous for the child to return to the home country.<sup>137</sup> In one New York case, the Appellate Division found that it was error and contradictory for the lower court to find that it was in the child’s best interests to award custody to their parent residing in Long Island, but nonetheless found that it was not in the child’s best interests to remain in the United States.<sup>138</sup>

In the notice-and-comment period for the 2022 SIJS regulations, one commenter requested that DHS require the juvenile court to check the petitioner’s proof of abandonment or abuse in order to prevent fraud.<sup>139</sup> However, DHS specifically refused to mandate such a requirement, reasoning that:

USCIS cannot require State juvenile courts to act as an immigration gatekeeper or to undertake fraud investigations in connection with dependency or custody proceedings. USCIS cannot therefore require juvenile courts to take specific actions to verify that a petitioner has not reunified with his or her parent(s) or otherwise require juvenile courts to adopt specific procedures to verify or investigate parental maltreatment.<sup>140</sup>

This suggests that the federal government did not intend for the state juvenile court to have to engage in a burdensome evidentiary analysis; rather, this demonstrates that the federal government intended for state juvenile courts to apply a lower evidentiary burden for SIJS judicial determinations, leaving the analysis of the “primary reason” the determinations were sought to USCIS.

It is improper for state court judges hearing cases in which SIJS judicial determinations are being sought for a noncitizen child, or in any other type of family court proceeding, to make best interests determinations or other conclusions based on assumptions or on facts that do not appear in the record. Courts are required to apply state best interests of the child laws when making decisions regarding custody, care, placement, or dependency of a child. In the state-specific statutory list of best interests factors that the state courts must consider, no state lists the immigration status of a parent or guardian as a factor.<sup>141</sup> State court judges *must not* consider a

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<sup>136</sup> See *Guardianship of De La Cruz*, No. 14-P-505, 2014 Mass. App. Unpub. LEXIS 894, at \*5 (Mass. App. Ct. July 31, 2014) (holding that the trial court judge’s findings were “totally unsupported by the evidence”) (unpublished); *In the Interest of M.J.H.*, 884 S.E.2d 559, 562 (Ga. Ct. App. 2023) (holding that the lower court erred in denying to issue SIJS judicial determinations where its findings and conclusions were based on facts that did not appear in the record).

<sup>137</sup> *W.R.A.H. v. D.M.A.H.*, No. A-4440-16T2, 2019 N.J. Super. Unpub. LEXIS 1607, at \*8 (N.J. Super. Ct. App. Div. Jan. 22, 2018) (unpublished) (emphasis added).

<sup>138</sup> *Matter of Diaz v. Munoz*, 118 A.D.3d 989, 990-91 (N.Y. App. Div. 2013); see also *In re Christian H.*, 238 Cal. App. 4th 1085, 1092 (Cal. Ct. App. 2015); see also *In re J.A.S.*, 192 N.E.3d 1313, 1320 (Ohio Ct. App. 2022) (“Because the court found that it was in the best interest of J.A.S. for his sister to have legal custody, it is not clear why it denied the request for a special SIJ finding with regard to abandonment, abuse, or neglect.”).

<sup>139</sup> Special Immigrant Juvenile Petitions, 87 Fed. Reg. 13081 (Mar. 8, 2022) (New 8 C.F.R. 204.11(b)(5)).

<sup>140</sup> Special Immigrant Juvenile Petitions, 87 Fed. Reg. 13081 (Mar. 8, 2022) (New 8 C.F.R. 204.11(b)(5)).

<sup>141</sup> See *Best Interest of the Child Statutes – State-by-State Maps and Comparison Charts* (Dec. 2017), available at <https://niwaplibrary.wcl.american.edu/best-interest-of-the-child> (analyzing, comparing, and reporting on all state best interests of the child factors).

potential guardian’s immigration status when making a best interests determination.<sup>142</sup> The fact that a potential guardian is undocumented is not a proper basis for denying guardianship over the SIJS petitioner child.<sup>143</sup>

### SIJS Judicial Determinations Issued in A Single or Separate State Court Order

SIJS judicial determinations may be made in a single state court order or in separate court orders.<sup>144</sup> State family and juvenile courts do *not* have to hold separate hearings solely to make SIJS judicial determinations. While it is permissible for SIJS judicial determinations to be requested in a separate motion independent of a juvenile court proceeding, it is not necessary to do so.<sup>145</sup> This is because Congress “wanted to give state courts and federal authorities flexibility” in making SIJS determinations.<sup>146</sup> Further, hearing testimony and evidence related to SIJ status during the juvenile court proceeding does not differ “from common practice in proceedings without juries where the court serves as finder of fact.”<sup>147</sup> However, if a further evidentiary hearing is needed to make the required SIJS judicial determinations, a state juvenile court may not refuse to do so in favor of “judicial economy.”<sup>148</sup> At least one court has also found it is unreasonable for a state juvenile court to refuse to hold a hearing to amend its previously issued

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<sup>142</sup> See *gen.*, *Jose B. v. Maria B.*, No. 2179, 2016 Md. App. LEXIS 1306, at \*9 (Md. Ct. Spec. App. Aug. 8, 2016) (unreported); *N.C.T. v. F.T.S.*, No. A-3822-16T3, 2018 N.J. Super. Unpub. LEXIS 360, at \*6-7 (N.J. Super. Ct. App. Div. Feb. 15, 2018) (unpublished); see also Leslye E. Orloff, Andrea Carcamo Cavazos, and Abigail Whitmore, *Family Court Bench Card on Issues That Arise in Custody Cases Involving Immigrant Parents, Children and Crime Victims* (Nov. 30, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/benchcard-issues-arise-custody-cases> (“In custody cases state statutes require that courts issue custody orders based upon best interest of the child and primary caretaker determinations. The majority of courts that have taken immigration status into consideration have ruled that immigration cannot be the dispositive factor in a custody determination”).

<sup>143</sup> See *N.C.T. v. F.T.S.*, No. A-3822-16T3, 2018 N.J. Super. Unpub. LEXIS 360, at \*6-7 (N.J. Super. Ct. App. Div. Feb. 15, 2018) (finding that the trial court’s concern over the potential guardian’s undocumented status was “unfounded”) (unpublished); *Matter of Alan S.M.C.*, 160 A.D.3d 721, 722 (N.Y. App. Div. 2018) (finding that the mother was not required to demonstrate that she had legal immigration status or had taken steps to secure such status in order to be appointed as the children’s guardian); see also Brief for the Md. Ct. Spec. App. as Amicus Curiae, *In Re D.T.-O.*, No. 1360, 2021 Md. App. LEXIS 772 (Md. Ct. Spec. App. Sept. 3, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/brief-stamped> (When states attempt to use a parent’s immigration status as a factor in a decision to terminate parental rights, the state violates federal preemption in the field of immigration law. States are not free to create their own unique penalties for an immigration law violation. Permanently taking a child from a parent based in part on the parent’s immigration status is a penalty the severity of which is virtually unsurpassed and violates federal preemption in the field of immigration law.).

<sup>144</sup> 6 USCIS-PM J.3(A)(1), available at <https://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6>.

<sup>145</sup> See *Simbaina v. Bunay*, 109 A.3d 191, 199 (Md. Ct. Spec. App. 2015); see also *B.F. v. Superior Court*, 207 Cal. App. 4th 621, 629 (2012).

<sup>146</sup> *In re Erick M.*, 820 N.W.2d 639, 642 (Neb. 2012).

<sup>147</sup> *In re B.G.*, No. 1596, 2017 Pa. Super. Unpub. LEXIS 448, at \*31 (Pa. Super. Ct. Feb. 7, 2017) (unpublished); see also *Rivas v. Villegas*, 300 A.3d 1036, 1048 (Pa. Super. Ct. 2023) (holding that the grandmother’s request for SIJS determinations was proper when she did so by submitting a petition for special relief, explaining that “the title of the document should not control where the substance of the relief requested is clear”).

<sup>148</sup> *Y.G.P. v. A.H.R.*, No. A-4357-15T1, 2017 N.J. Super. Unpub. LEXIS 1847, at \*6 (N.J. Super. Ct. App. Div. July 21, 2017) (unpublished); *Arrais v. Sousa*, No. 2518 EDA 2022, 2023 Pa. Super. Unpub. LEXIS 1880, at \*28-29 (Aug. 1, 2023) (finding it was an abuse of discretion for the lower court not to allow testimony on SIJS determinations in the course of the custody proceeding and then ruling on SIJS determinations based only on the custody evidence).

SIJS determinations when USCIS determines there are deficiencies in the original order.<sup>149</sup> The approach these state courts have taken is consistent with the legislative purpose of SIJS and USCIS' implementing policies.

It is possible that the court may have already completed a proceeding in which the court made a placement or dependency ruling for a noncitizen child who was SIJS eligible, but who failed to seek SIJS judicial determinations as part of the already completed juvenile proceedings. When this occurs, USCIS recognizes that:

[T]he court may make determinations in separate hearings and the petitioner may request an order that compiles the determinations of several orders into one order to establish eligibility for SIJ classification. A special order issued to help clarify the determinations that were made so that USCIS can determine the petitioner's eligibility for SIJ classification does not mean that the order is not bona fide.<sup>150</sup>

[A] declaratory judgment may be sufficient to merit DHS consent if accompanied by or includes a qualifying court-ordered custodial placement or a declaration of dependency on the court for the provision of child welfare services and/or other court-ordered or recognized protective remedial relief.<sup>151</sup>

### Jurisdiction and Notice

Courts issuing SIJS judicial determination need to follow the service, notice, and jurisdiction laws and court rules that apply to the type of state court proceeding over which the court is presiding.<sup>152</sup> The USCIS policy manual states that:

There is nothing in USCIS guidance that should be construed as instructing juvenile courts on how to apply their own state law. Juvenile courts should follow their state laws on issues such as when to exercise their authority, evidentiary standards, and due process.<sup>153</sup>

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<sup>149</sup> *Matter of Jose S.J.*, 168 A.D.3d 844, 845-46 (N.Y. App. Div. 2019).

<sup>150</sup> 6 USCIS-PM J.2(D), available at <https://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6>.

<sup>151</sup> 6 USCIS-PM J.3(A)(2), available at <https://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6> (declaratory judgments).

<sup>152</sup> For a discussion of service of process in cases in which children seek SIJS judicial determinations, see Leslye Orloff, *Chapter VII – Service of Process in State Court: Cases Seeking Special Immigrant Juvenile Status Findings* (Dec. 29, 2017), available at <https://niwaplibrary.wcl.american.edu/pubs/chapter-vii-service-of-process-in-sijs>; see also *Family Law Service of Process and Jurisdiction Requirements Charts* (2021), available at <https://niwaplibrary.wcl.american.edu/family-law-service-jurisdiction-charts> (The Family Law Service of Process and Jurisdiction Requirement charts identify who needs to be served, organized by family court case type, and the full range of ways that service can be accomplished. This is important in cases in which courts are making placement and custody determinations in the best interests of children. In cases that involve a parent or other family member who resides abroad or in another state and needs to be served, these charts assist courts in ensuring that either personal service or alternative service is accomplished in a timely manner as authorized by state law so that the court has jurisdiction to proceed.).

<sup>153</sup> 6 USCIS-PM J.3(A)(1), available at <https://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6>.

State court rulings are consistent with USCIS' approach, as courts have held that a state juvenile court has personal jurisdiction over parents in other countries, so long as the parent receives notice of the underlying proceedings.<sup>154</sup> The Supreme Court of California held that state juvenile courts may proceed with making SIJS judicial determinations even if the absent parent is “beyond the personal jurisdiction of the court and cannot be joined as a party.”<sup>155</sup> Further, if a parent waives their right to notice of future hearings on related child welfare matters, that parent does not have to be served with notice of a request for SIJS judicial determinations in order for the state juvenile court to adjudicate this request.<sup>156</sup>

#### **D. Judicial Determinations: Three Conclusions of Law**

As explained above, there are three judicial determinations, or conclusions of law, that the state juvenile court must issue in order for a child to be eligible for SIJS. This section will explain what is required for each of these judicial determinations and what findings of fact may support these required conclusions.

##### **i. Custody or Dependency**

*The court has exercised its jurisdiction as authorized by state law to issue orders regarding the dependency, placement, and/or custody and care of an immigrant child.*<sup>157</sup>

Although a noncitizen child has up until the date they turn age twenty-one to file their SIJS petition under federal immigration law, the SIJS petitioner child must obtain a state court order containing the three required SIJS judicial determinations while the state court is authorized to exercise jurisdiction over the child. State law governs when a child ages out of the state court's jurisdiction.<sup>158</sup> Some states have found that under state law courts lose jurisdiction once the child reaches the age of eighteen,<sup>159</sup> while other states' statutes and court rulings have

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<sup>154</sup> See *Bianka M. v. Superior Court*, 5 Cal. 5<sup>th</sup> 1004, 1011 (Cal. 2018); *M.J.L.G. v. G.R.*, No. A-0577-16T1, 2017 N.J. Super. Unpub. LEXIS 2924, at \*8-9 (N.J. Super. Ct. App. Div. Nov. 27, 2017) (unpublished).

<sup>155</sup> *Bianka M. v. Superior Court*, 5 Cal. 5<sup>th</sup> 1004, 1011 (Cal. 2018).

<sup>156</sup> *Matter of Gomez v. Sibrian*, 133 A.D.3d 658, 658-59 (N.Y. App. Div. 2015); see also *Alex R. v. Superior Court*, 248 Cal. App. 4th 1, 12-13 (2016) (holding that once a noncustodial parent receives notice of the underlying action, service of an additional summons upon the appointment of a guardian ad litem is not necessary to protect the parent's due process rights and SIJS judicial determinations may be issued).

<sup>157</sup> INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J).

<sup>158</sup> See *State-by-State Age-Out Database*, Project Lifeline (last visited Dec. 16, 2023), available at <https://projectlifeline.us/resources/state-by-state-age-out-database/>; see also *Immigration Relief for Abused, Abandoned, or Neglected Children: Special Immigrant Juvenile Classification*, USCIS at 2 (Jan. 2024), available at <https://niwaplibrary.wcl.american.edu/pubs/uscis-sij-brochure-2024> (advising state juvenile courts to “[b]e [t]imely”).

<sup>159</sup> See e.g., *State ex rel. Jimenez*, 199 So. 3d 1218, 1220 (La. Ct. App. 2016) (affirming the judgment of the district court dismissing petition for SIJS findings because the child was eighteen when the petition was filed and state juvenile courts in Louisiana do not retain jurisdiction over minors eighteen years of age or older); *Baltierra-Gomez v. Guardado*, No. 68524, 2016 Nev. Unpub. LEXIS 498, at \*3 (Nev. 2016) (affirming the judgment of the district court dismissing petition for SIJS findings because the child was twenty years old and the court no longer had jurisdiction) (unpublished); *In re Jose A.*, No. M2021-00828-COA-R3-JV, 2022 Tenn. App. LEXIS 241, at \*5 (Tenn. Ct. App. June 21, 2022).

established that the court retains jurisdiction over the child until the age of twenty-one.<sup>160</sup> Several states have enacted statutes specifically extending their jurisdiction for purposes of being able to issue SIJS judicial determinations for children over the age of eighteen.<sup>161</sup> Ultimately, state courts must apply state law to determine whether the court has the authority to issue orders regarding the placement, dependency, or custody or care of the child. If the state court does have this jurisdiction, then the court has jurisdiction to issue SIJS judicial determinations.<sup>162</sup>

When the state juvenile court refuses to issue SIJS judicial determinations and the child is approaching age-out in their jurisdiction, one interesting procedural vehicle that has been used in a handful of instances by appellate courts is a peremptory writ.<sup>163</sup> In *De Martinez v. Superior Court*, the trial court had continued the child's custody proceedings to a date past her eighteenth birthday.<sup>164</sup> After advancing the hearing, the trial court still refused to rule on the requested SIJS determinations and "took the matter under submission."<sup>165</sup> Because the child was going to lose SIJS eligibility if the matter was not resolved in the next few days before her birthday, the child moved for, and the California Court of Appeal granted her, a peremptory writ commanding the trial court to award the child's mother custody and issue the requested SIJS determinations.<sup>166</sup> In so doing, the California Court of Appeal acknowledged that the case presented "exceptional

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<sup>160</sup> See *State-by-State Age-Out Database*, Project Lifeline (last visited Dec. 16, 2023), available at <https://projectlifeline.us/resources/state-by-state-age-out-database/#:~:text=A%20person%20who%20because%20of,precluded%20from%20obtaining%20SIJS%20status.>

<sup>161</sup> See *Guardianship of Saul H.*, 514 P.3d 871, 878 (Cal. 2022) (enactment of Cal. Civ. Proc. § 155 allowed juvenile courts to appoint a guardian to youth between the ages of eighteen and twenty-one for purposes of issuing SIJS judicial determinations); see also *In re Sandy J.M.-M.*, 180 A.3d 1033, 1034 (Conn. App. Ct. 2018) (relying on *In re Henry P.B.P.*, 173 A.3d 928, 937 (Conn. 2017) in holding that a Connecticut state statute allows the probate court to retain authority to make SIJS judicial determinations when the SIJS petitioner-child reaches the age of eighteen while their state court petition is pending); *In re Est. of Felipe*, No. 2-21-0272, 2022 Ill. App. Unpub. LEXIS 85, at \*12 (Ill. App. t. Jan. 26, 2022) (explaining that during pendency of the appeal the Illinois Probate Act was amended to to include eighteen to twenty-one year olds to the definition of a "minor" for the purpose of obtaining SIJS judicial determinations) (unpublished); *Matter of Sing W.C. v. Sing Y.C.*, 83 A.D.3d 84, 86-87 (N.Y. App. Div. 2011) (providing that New York's Family Court Act § 661(a) was amended in 2008 to permit the Family Court to appoint a guardian for youth between the ages of eighteen and twenty-one so that it can issue SIJS judicial determinations); *Galvez v. Cuccinelli*, 387 F. Supp. 3d 1208, 1212-13 (W.D. Wash. 2019) ("As of 2017, Washington extended juvenile court jurisdiction to cover 'judicial determinations regarding the custody and care of youth' between the ages of eighteen and twenty-one and to make findings necessary for a juvenile in that age group to seek SIJ status").

<sup>162</sup> In *Galvez v. Cuccinelli*, the Federal District Court for the Western District of Washington enjoined USCIS from relying on a new policy requiring that a state court have the power to order reunification with a parent before it can make SIJS judicial determinations, which effectively excluded eighteen to twenty-one year old juveniles across the country from SIJS protection. 387 F. Supp. 3d 1208, 1215 (W.D. Wash. 2019).

<sup>163</sup> See *De Martinez v. Superior Court*, No. A159646, 2020 Cal. App. Unpub. LEXIS 1275, at \*2-3 (Cal. Ct. App. Feb. 25, 2020) (unpublished); *D.L. v. Superior Court*, No. A144960, 2015 Cal. App. Unpub. LEXIS 3233, at \*4-5 (Cal. Ct. App. May 5, 2015) (granting a peremptory writ to a child who was about to age out of juvenile court jurisdiction after the juvenile court refused to issue SIJS determinations) (unpublished); *Bryan S. v. Superior Court*, No. B261955, 2015 Cal. App. Unpub. LEXIS 1800, at \*2 (Cal. Ct. App. 2015).

<sup>164</sup> *De Martinez v. Superior Court*, No. A159646, 2020 Cal. App. Unpub. LEXIS 1275, at \*2-3 (Cal. Ct. App. Feb. 25, 2020) (unpublished).

<sup>165</sup> *De Martinez v. Superior Court*, No. A159646, 2020 Cal. App. Unpub. LEXIS 1275, at \*3 (Cal. Ct. App. Feb. 25, 2020) (unpublished).

<sup>166</sup> *De Martinez v. Superior Court*, No. A159646, 2020 Cal. App. Unpub. LEXIS 1275, at \*5 (Cal. Ct. App. Feb. 25, 2020) (unpublished).

circumstances” justifying the issuance of a peremptory writ.<sup>167</sup> Other states have found additional bases to extend jurisdiction to an SIJS petitioner child who has reached the age of the majority during the pendency of their appeal.<sup>168</sup> The Supreme Court of Connecticut in *In re Henry P.B.-P.* explicitly called on the state’s general assembly to address the age gap created by state laws restricting access to SIJS judicial determinations to those under the age of eighteen so that more youth can access this vital form of relief.<sup>169,170</sup>

State judges are *not* permitted to subjectively determine whether they should issue custody, placement, or dependency orders or SIJS judicial determinations. Judges must defer to and follow state law. Even if a judge believes they “can’t call [the petitioner] a child” because they are at the older end of the state’s age-in range and are close to aging out, so long as they meet the state definition of a “minor” or “child” for purposes of custody, placement, or dependency, the state court judge must issue the SIJS judicial determinations.<sup>171</sup> In New Jersey, a

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<sup>167</sup> *De Martinez v. Superior Court*, No. A159646, 2020 Cal. App. Unpub. LEXIS 1275, at \*8 (Cal. Ct. App. Feb. 25, 2020) (unpublished).

<sup>168</sup> The Supreme Judicial Court of Massachusetts has found that its state family and probate courts under its broad equity power have jurisdiction “over youth between the ages of eighteen and twenty-one for the specific purpose of making the special findings necessary to apply for SIJ status pursuant to the INA.” *Recinos v. Escobar*, 473 Mass. 734, 739 (2016); *see also D.E.F. v. M.P.P.*, No. 15-P-1454, 2016 Mass. App. Unpub. LEXIS 517, at \*3-4 (Mass. App. Ct. May 11, 2016) (unpublished); *Tejada v. Lemus*, No. 17-P-1076, 2017 Mass. App. Unpub. LEXIS 944, at \*2 (Mass. App. Ct. Oct. 27, 2016) (unpublished); *In re G.M.*, No. 17-P-855, 2018 Mass. App. Unpub. LEXIS 91, at \*3 (Mass. App. Ct. Jan. 31, 2018). Furthermore, the Florida Court of Appeal has extended jurisdiction to SIJS petitioner children who had reached the age of majority, eighteen, while their appeal of the trial court’s denial of their dependency petition was pending, finding that “the petition was not moot . . . because the denial of the declaration of dependency had the effect of continuing to deprive the child of a legal basis for regularizing the child’s immigration status.” *F.L.M. v. Dep’t of Children & Families*, 912 So.2d 1264, 1269 (Fla. Dist. Ct. App. 2005); *see also L.T. v. Dep’t of Children & Families*, 48 So.3d 928, 931 (Fla. Dist. Ct. App. 2010). *See also State v. L.P.L.O.*, 381 P.3d 846, 852 (Or. Ct. App. 2016) (holding that “a juvenile court’s exclusive jurisdiction over a dependency case involving a person who is under 18 years of age attaches at the *initiation* of proceedings and is not thereafter merely lost because the child turns 18 years old before a wardship is established” (emphasis added)); *Matter of Maria C.R. v. Rafael G.*, 142 A.D.3d 165, 170-71 (N.Y. App. Div. 2016) (“[T]he proper course of action in cases where a Family Court Judge is refusing to commence a [SIJS] special findings hearing or is allegedly improperly delaying a proceeding may be to file a mandamus petition to compel the court to promptly conduct the hearing and render a determination on the motion.”).

<sup>169</sup> *In re Henry P.B.P.*, 173 A.3d 928, 941-42 n.18 (Conn. 2017).

<sup>170</sup> The Supreme Judicial Court of Massachusetts has also found that its state family and probate courts under its broad equity power have jurisdiction “over youth between the ages of eighteen and twenty-one for the specific purpose of making the special findings necessary to apply for SIJ status pursuant to the INA.” *Recinos v. Escobar*, 473 Mass. 734, 739 (2016); *D.E.F. v. M.P.P.*, No. 15-P-1454, 2016 Mass. App. Unpub. LEXIS 517, at \*3-4 (Mass. App. Ct. May 11, 2016) (unpublished); *Tejada v. Lemus*, No. 17-P-1076, 2017 Mass. App. Unpub. LEXIS 944, at \*2 (Mass. App. Ct. Oct. 27, 2016) (unpublished).

<sup>171</sup> *See E.M. v. J.R.*, No. B288718, 2019 Cal. App. Unpub. LEXIS 1824, at \*12-13 (2019) (finding the lower court erred and applied the wrong legal standard in denying a petition for guardianship of an eighteen-year-old simply because the parents “have no obligation to support him anymore”) (unpublished); *Melgar v. Hernandez*, No. B293130, 2019 Cal. App. Unpub. LEXIS 7870, at \*5 (Cal. Ct. App. Nov. 25, 2019) (unpublished); *In re J.M.*, No. 404, 2019 WL 1300509, at \*3 (Md. Ct. Spec. App. Mar. 20, 2019) (unreported); *In re S.C.*, No. 2143, 2017 Md. App. LEXIS 1282, at \*11 (Md. Ct. Spec. App. Dec. 26, 2017) (finding it was erroneous for the trial court to deny a petition for guardianship simply because the SIJS petitioner child was 18 years old) (unreported); *C.M. v. M.N.M.*, No. A-4209-14T1, 2016 N.J. Super. Unpub. LEXIS 396, at \*7 (N.J. Super. Ct. App. Div. Feb. 24, 2016) (rejecting the trial judge’s contention that the 18-year-old child could “fend for himself” in denying to extend jurisdiction, despite state law permitting such extension) (unpublished); *Matter of Khan v. Shahida Z.*, 184 A.D.3d 506, 507 (N.Y.

state in which state SIJS orders must be issued before a child turns twenty-one, the New Jersey Superior Court has held that it “would defeat the purpose of the hybrid federal-state scheme Congress created if state family courts decline to hear these cases solely because a juvenile is over the age of eighteen, so long as the juvenile is still under the age of twenty-one.”<sup>172</sup>

Because a child is no longer eligible for SIJS once they turn twenty-one, it is imperative that state family and juvenile courts issue SIJS judicial determinations upon request, *even if* these determinations are unfavorable to the petitioner. Furthermore, if a child is close to aging out of state juvenile court jurisdiction under state law, state juvenile courts should expedite the underlying proceedings to ensure the matter is heard before the child reaches the age of majority.<sup>173</sup> If the child ages out of SIJS eligibility while awaiting appeal of a state juvenile court’s refusal to issue SIJS determinations, in contradiction to now settled law and federal guidance, the child will no longer be eligible for the life-saving humanitarian protections of SIJ status.<sup>174</sup> However, if the state juvenile court judge has concerns about the child’s eligibility

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App. Div. 2020) (finding that the Family Court erred in refusing to consider evidence of circumstances that occurred after the child's eighteenth birthday); *Matter of Gabriela Y.U.M.*, 119 A.D.3d 581, 583-84 (N.Y. App. Div. 2014) (holding that the Family Court should have granted the SIJS petitioner child’s guardianship petition until they reached the age of 21); *see also Matter of Juan R.E.M.*, 154 A.D.3d 725, 727 (N.Y. App. Div. 2017) (holding that because the guardianship petition was granted prior to the child’s twenty-first birthday, the Family Court had jurisdiction to amend the previously issued special findings order after USCIS issued a “Request for Evidence” stating that the order was deficient); *Matter of Goran S.*, 152 A.D.3d 698, 700 (N.Y. App. Div. 2017) (finding it was error for the Family Court to refuse to consider evidence of circumstances which occurred after the child turned eighteen but while they were under the age of twenty-one).

<sup>172</sup> *O.Y.P.C. v. J.C.P.*, 126 A.3d 349, 352 (N.J. Super. Ct. App. Div. 2015); *see also A.E.C. v. P.S.C.*, 179 A.3d 424, 427 (N.J. Super. Ct. App. Div. 2018); *Cruz v. Mencia*, No. A-1079-15T3, 2017 N.J. Super. Unpub. LEXIS 149 (N.J. Super. Ct. App. Div. 2017) (unpublished).

<sup>173</sup> *See Montecino v. Ramos*, No. 606, 2023 Md. App. LEXIS 712, at \*8 (Md. 2023) (urging the lower court on remand to expeditiously undertake further proceedings as the petitioner’s twenty-first birthday was fast approaching); *In re Perez*, 199 A.3d 700, 701 (Md. 2018) (remanding to the lower court to issue SIJS judicial determinations with the instruction to do so as quickly as possible before the child’s imminent birthday which will age him out of state juvenile court jurisdiction); *In re A.M.*, No. 2475, 2019 Md. App. LEXIS 231, at \*9 (Md. Ct. Spec. App. Mar. 19, 2019) (remanding to the lower court to grant a guardianship petition with the instruction to do so as quickly as possible so that the child’s petition for SIJS judicial determinations can be heard prior to aging out of jurisdiction); *Matter of Maria C.R. v. Rafael G.*, 142 A.D.3d 165, 170-71 (N.Y. App. Div. 2016) (holding that it would have been “better practice” for the juvenile court to have timely ruled on the SIJS petitioner child’s guardianship petition given that his twenty-first birthday was fast approaching); *Matter of Christian J.C.U.*, 60 Misc. 3d 706, 709 (N.Y. Fam. Ct. 2018) (expediting the proceedings where the petitioner’s twenty-first birthday was near); *Matter of M.G.M.L.*, 68 Misc. 3d 569, 570 (N.Y. Fam. Ct. 2020) (deeming the petition for SIJS determinations an “essential matter” due to the child’s fast approaching twenty-first birthday); *see also In re 21st Birthday Denials of Special Immigrant Juv. Status Applications by USCIS*, 637 F. Supp. 3d 23, 26 (E.D.N.Y. 2022) (finding that the USCIS’ denial of plaintiffs’ SIJ petitions on the sole ground that the petitions were received by USCIS on their twenty-first birthday was arbitrary and capricious and a “wanton disregard of human decency”).

<sup>174</sup> *See Garcia v. Panameno*, No. 44, 2018 Md. App. LEXIS 246, at \*5-6 (Md. Ct. Spec. App. Mar. 12, 2018) (holding that the case was moot because the SIJS petitioner child had reached the age of 21 while appeal was pending and thus the court cannot remand to the juvenile court to issue SIJS determinations because it now lacked jurisdiction under state law) (unreported); *see also A.C. v. E.C.N.*, 89 So.3d 777, 779 (Ala. Civ. App. 2012) (lower court did not issue SIJS findings and at time of appeal child had aged out of SIJS eligibility); *Matter of Ardino K.*, 217 A.D.3d 769, 770-71 (N.Y. App. Div. 2023) (holding that the Family Court no longer had jurisdiction over the SIJS petitioner because they had turned twenty-one years old following the Family Court’s denial to issue SIJS determinations); *D.P. v. E.E.*, 2018 NYLJ LEXIS 3797, at \*9 (N.Y. Fam. Ct. Nov. 2, 2018) (holding that the Family Court no longer has jurisdiction to grant a motion for an SIJS order after the underlying custody order has expired

based on their age, the judge may so note this concern in the court order and leave it to USCIS, the sole entity with the authority to determine the child’s SIJS eligibility.<sup>175</sup> Issuing the court orders that contain the three required judicial determinations and the factual findings regarding parental maltreatment, reunification, custody, and best interests even when the court may have questions about whether USCIS will deem the child eligible will help expedite the appeals process and prevent delays in the child’s obtaining of an order containing the SIJS judicial determinations for submission of their SIJS petition, before the child ages out of the state court’s jurisdiction.

Similarly, a state family or juvenile court judge may not refuse to exercise jurisdiction over a child for SIJS purposes simply because the judge finds the child is “already thriving in the custody of [the non-abusive parent] and there is no reason for the [c]ourt to exercise jurisdiction other than for immigration benefits.”<sup>176</sup> This approach is inappropriate and misinterprets federal immigration laws. USCIS recognizes that an SIJS eligible child can have mixed motivations for seeking court orders that contain SIJS judicial determinations.<sup>177</sup> SIJS eligible children’s best interests are served by obtaining orders that stabilize their custody and placement and help them heal and the court issuing SIJS judicial determinations that allow the child to pursue legal immigration status through the SIJS humanitarian program.

State courts must still issue the requested orders containing SIJS judicial determinations if it finds that doing so is in the best interests of the child.<sup>178</sup> Since all SIJS eligible children will have suffered parent perpetrated maltreatment, the child obtains relief from the abuse, neglect, or abandonment when the court determines it is in the child’s best interests to be in the custody of the non-abusive parent and issues a custody order to that effect. This court order will contain findings of fact about the maltreatment the child suffered, describe its impact on the child, and discuss state best interest law factors that led the court to award custody to the non-abusive parent.

The court order is beneficial for stabilizing the child and helping them heal from the trauma suffered. It can also protect the child from their abusive parent who may, at a point in the future that the court may or may not be able to foresee, try to reenter the child’s life, harm the child, or try to take custody away from the protective parent to whom the court awarded custody. For these reasons, when a child has suffered maltreatment, the issuing of court orders for the SIJS eligible child accomplishes multiple purposes, one of which is to obtain SIJS judicial determinations. If the noncitizen child is of an age that the court under state law has jurisdiction

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due to child’s eighteenth birthday); *Lopez v. Vasquez*, No. 2014-009787, 2015 Pa. Dist. & Cnty. Dec. LEXIS 15200, at \*3-4 (Pa. D. & C. Jan. 13, 2015); *In re Jose A.*, No. M2021-00828-COA-R3-JV, 2022 Tenn. App. LEXIS 241, at \*5 (Tenn. Ct. App. June 21, 2022) (holding that the juvenile court no longer had jurisdiction over the SIJS petitioner due to reaching the age of eighteen).

<sup>175</sup> *But see Matter of Joel A.A.R.*, 216 A.D.3d 1167, 1169 (N.Y. App. Div. May 31, 2023) (holding that the Family Court erred in requiring the petitioner to submit certified copies of a birth certificate in order to establish their age for SIJS purposes as this is not a state statutory requirement); *Matter of Anuar S.A.O.*, 217 A.D.3d 869, 870 (N.Y. App. Div. 2023).

<sup>176</sup> *Y.G.P. v. A.H.R.*, No. A-4357-15T1, 2017 N.J. Super. Unpub. LEXIS 1847, at \*9 (N.J. Super. Ct. App. Div. July 21, 2017) (unpublished).

<sup>177</sup> 8 C.F.R. § 204.11(b)(5) (2023).

<sup>178</sup> *See Kitoko v. Salomao*, 215 A.3d 698, 707 (Vt. 2019).



to issue custody awards and the child’s non-abusive parent seeks a formal court order of custody, the court must exercise its jurisdiction to award custody together with issuing SIJS judicial determinations when it is in the best interests of the child to remain in the custody of their non-abusive parent.<sup>179</sup>

ii. Viability of Reunification

**Reunification with one or both of the child’s parents is not viable due to abuse, abandonment, neglect, or a similar basis under state law.<sup>180</sup>**

An analysis into the viability of reunification for the purposes of SIJS requires a “realistic look at the facts on the ground in the country of origin and a consideration of the entire history of the relationship between the minor and the parent . . . .”<sup>181</sup> This analysis requires consideration of the “workability or practicability of a forced reunification of parent with minor, if the minor were to be returned to the home country.”<sup>182</sup> Under this “common-sense practical workability” approach, it is the role of the state juvenile court to determine if reunification between the parent and child is workable given the parent’s past conduct.<sup>183</sup> It is not relevant to this analysis “whether harm the child experienced in the past was excusable or the parent’s reasons for inflicting it reasonable,” and as such state juvenile courts should not consider this in the reunification analysis.<sup>184</sup>

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<sup>179</sup> See *Kitoko v. Salomao*, 215 A.3d 698, 707 (Vt. 2019); see also *E.C.D. v. P.D.R.D.*, 114 So. 3d 33, 36 (Ala. Civ. App. 2012) (“A juvenile court’s failure to include the findings relevant to SIJ status ‘effectively terminates the application for legal permanent residence, clearly affecting a substantial right’ of the child.”); *Guardianship of Saul H.*, 514 P.3d 871, 877 (Cal. 2022) (“When the facts a petitioner has established by a preponderance of the evidence support SIJ predicate findings, the superior court must issue these findings; it has no discretion to deny the petition.”); *In the Interest of J.J.X.C., a child*, 734 S.E.2d 120, 124 (Ga. Ct. App. 2012) ([C]ourts in other states have held that a juvenile court errs by failing to consider a request for SIJ findings.”); *Romero v. Perez*, 205 A.3d 903, 908 (Md. 2019); *Hernandez-Lemus v. Arias-Diaz*, 100 N.E.3d 321, 323 (Mass. 2018) (“A judge simply may not decline to make findings; he or she must make the findings – whether favorable or not – concerning those criteria.”); *In re J.M.*, No. 404, 2019 WL 1300509, at \*4 (Md. Ct. Spec. App. Mar. 20, 2019) (unreported); *Chevez-Gaitan v. Carrillo-Aguilar*, No. 75780, 2019 Nev. App. Unpub. LEXIS 454, at \*2-3 (Nev. Ct. App. May 9, 2019) (holding that “when there is evidence . . . to support [SIJS] findings, the court shall issue an order setting forth such findings”) (unpublished); *H.S.P. v. J.K.*, 121 A.3d 849, 852 (N.J. 2015) (“Family Part courts faced with a request for an SIJ predicate order should make factual findings with regard to each of the requirements listed in 8 C.F.R. 204.11.”); *Orellana v. Mancilla*, No. A-0262-15T4, 2016 N.J. Super. Unpub. LEXIS 2079, at \*4 (N.J. Super. Ct. App. Div. Sept. 13, 2016) (unpublished); *Orozco v. Tecu*, 284 A.3d 474, 479 (Pa. Super. Ct. 2022) (finding an abuse of discretion by the trial court in flatly refusing to issue SIJS determinations).

<sup>180</sup> INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J).

<sup>181</sup> *J.U. v. J.C.P.C.*, 176 A.3d 136, 140 (D.C. 2018).

<sup>182</sup> *J.U. v. J.C.P.C.*, 176 A.3d 136, 141 (D.C. 2018); see also *Lopez v. Serbellon Portillo*, 469 P.3d 181, 185 (Nev. 2020) (holding that the reunification analysis must “consider the history of the parent-child relationship, the conditions on the ground in the child’s foreign country, and whether returning the child to the parent in the foreign country would be workable or practicable due to abandonment, abuse, or neglect”).

<sup>183</sup> *Romero v. Perez*, 205 A.3d 903, 914 (Md. 2019); *J.U. v. J.C.P.C.*, 176 A.3d 136, 140-41 (D.C. 2018); see also *Matter of Haide L.G.M. v. Santo D.S.M.*, 130 A.D.3d 734, 736 (N.Y. App. Div. 2015) (“The law does not require a finding that reunification with one or both parents is viable, but that reunification with one or both of her parents is not viable . . . .”); *Guardianship of Saul H.*, 514 P.3d 871, 885 (Cal. 2022).

<sup>184</sup> *Guardianship of Saul H.*, 514 P.3d 871, 885 (Cal. 2022)

The National Council of Juvenile and Family Court Judges (NCJFCJ) advises that “A child’s physical, emotional and psychological safety are always in his or her best interests.” NCJFCJ instructs judges to conduct “a thoughtful exploration of the child’s safety risks when abusive behavior has been part of the family fabric . . . .”<sup>185</sup>

Only one parent needs to have perpetrated the maltreatment to support the determination that reunification with “one or both” parents is not viable.<sup>186</sup> This means that even if the SIJS petitioner child is residing with their non-abusive parent, this does not preclude a determination that reunification is not viable with the other parent, thus satisfying this requirement for SIJS.<sup>187</sup> Additionally, if the child has never known one of their parents, this is sufficient for satisfying the non-viability of reunification requirement.<sup>188</sup> Furthermore, the reunification inquiry should *not* focus on the parent’s fault or blameworthiness.<sup>189</sup>

It does not matter where the abuse, abandonment, or neglect occurred for purposes of SIJS, and so the maltreatment could have taken place outside the United States.<sup>190</sup> What is important is that the state court judge apply state law in assessing whether the maltreatment suffered, either in the state, in another state, or abroad, meets the state law’s definitions of abuse, abandonment, neglect, or a similar basis under state law.

The court’s determination that reunification is not viable between the parent and the SIJS petitioner child does *not* deprive the parent of custody nor terminate their parental rights.<sup>191</sup> The state juvenile court is not required to terminate a parent’s parental rights to make the determination that parental reunification is not viable.<sup>192</sup> In the 2022 SIJS regulations, DHS

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<sup>185</sup> Jerry J. Bowles, Kaye K. Christian, Margaret B. Drew & Kathryn L. Yetter, *A Judicial Guide To Child Safety In Custody Cases*, Nat’l Council of Juvenile & Family Court Judges at 5 (2008), available at [http://www.ncjfcj.org/sites/default/files/judicial%20guide\\_0\\_0.pdf](http://www.ncjfcj.org/sites/default/files/judicial%20guide_0_0.pdf); see gen. Leslye E. Orloff, *Chapter IV – Application of the Best Interest of the Child Standard in Special Immigrant Juvenile Status Cases*, SIJS Bench Book at 12-16 (Dec. 15, 2017), available at <https://niwaplibrary.wcl.american.edu/pubs/application-of-the-best-interest-of-the-child-standard-in-sijs-2>.

<sup>186</sup> 8 C.F.R. § 204.11(c)(1)(ii) (2023); see also *Matter of Mira v. Hernandez*, 118 A.D.3d 1008, 1008 (N.Y. App. Div. 2013); *Matter of Miguel C.-N.*, 119 A.D.3d 562, 564 (N.Y. App. Div. 2014) (“The fact that the child’s mother did not also neglect and abandon [the child] does not preclude the issuance of the order requested . . .”).

<sup>187</sup> *Matter of Maria P.E.A. v. Sergio A.G.G.*, 111 A.D.3d 619, 620 (N.Y. App. Div. 2013); *Matter of Karen C.*, 111 A.D.3d 622, 623 (N.Y. App. Div. 2013); see also *E.P.L. v. J.L.A.*, 190 A.3d 1002, 1007 (D.C. 2017) (“it is immaterial that M.L.P. was living with her mother”); *Flores v. Hernandez*, No. 18-P-438, 2019 Mass. App. Unpub. LEXIS 79, at \*5 (Mass. App. Ct. Jan. 30, 2019) (“Thus, when it is alleged that reunification is not viable with one parent, the judge must limit her findings to that parent; she may not decline to find neglect or abandonment because the child is in the other parent’s custody.”) (unpublished).

<sup>188</sup> *In re Erick M.*, 820 N.W.2d 639, 646 (Neb. 2012); *Guardianship of Penate*, 76 N.E.3d 960, 968 (Mass. 2017); *Matter of Victor C-G- v. Santos C.-T.*, 140 A.D.3d 951, 953 (N.Y. App. Div. 2016); *Matter of Rosa M.M.-G.*, 194 A.D.3d 813, 814 (N.Y. App. Div. 2021).

<sup>189</sup> *Guardianship of Saul H.*, 514 P.3d 871, 887 (Cal. 2022).

<sup>190</sup> 8 C.F.R. 204.11(c)(1)(ii) (2023).

<sup>191</sup> *J.U. v. J.C.P.C.*, 176 A.3d 136, 141 (D.C. 2018); *Kitoko v. Salomao*, 215 A.3d 698, 709 (Vt. 2019); *In re J.A.S.*, 192 N.E.3d 1313, 1317 (Ohio Ct. App. 2022); *Lopez v. Serbellon Portillo*, 469 P.3d 181, 184 (Nev. 2020).

<sup>192</sup> 8 C.F.R. 204.11(c)(1)(ii) (2023); see also 6 USCIS-PM J.2(C)(2), available at <https://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6>; but see *In re Mauricio*, No. F04CP19012599A, 2019 Conn. Super. LEXIS 3451, at \*10 (Conn. Super. Ct. Dec. 27, 2019) (reasoning that to find reunification is not viable for SIJS purposes requires the court to find the existence of grounds for the termination of parental rights) (unreported).

confirmed that “[c]onsistent with longstanding practice and policy, DHS agrees that termination of parental rights is not required for SIJ eligibility . . . .”<sup>193</sup>

As discussed above, the state juvenile court should be careful not to apply “too demanding of a standard” in its analysis of the viability of reunification.<sup>194</sup> The D.C. Court of Appeals articulated the appropriate standard in *B.R.L.F. v. Zuniga*:

[I]n this international—not merely District of Columbia—environment, all the relevant factors must be understood in the light most favorable to determinations of neglect and abandonment, with an eye to the practicalities of the situation without excessive adherence to standards and interpretations that might normally apply in strictly local contexts.<sup>195</sup>

In another case, *J.U. v. J.C.P.C.*, the D.C. Court of Appeals overturned the trial court’s decision after the trial court accused the SIJS petitioner of “minimizing” the father’s involvement in his life.<sup>196</sup> Specifically, despite the fact that the child testified his father only visited his grandparent’s home where he was residing in Honduras to ask for money and that the father ignored him when he did visit, the trial court discredited this and concluded without any support from the record that it would be impossible for a father to visit the child’s home and yet “completely ignore his two sons who lived there.”<sup>197</sup> The D.C. Court of Appeals held that this was far too demanding of a standard to impose for a viability determination, and that the record overall showed that the father had “never fulfilled any day-to-day role in the support, care, and supervision” of the child.<sup>198</sup>

In *Romero v. Perez*, the Maryland Court of Appeals provided a useful, non-exhaustive list of factors for the state juvenile court judge to consider when making a SIJS judicial determination as to whether reunification with one or both parents is viable:

- 1) [T]he lifelong history of the child’s relationship with the parent (i.e., is there credible evidence of past mistreatment);
- 2) [T]he effects that forced reunification might have on the child (i.e., would it impact the child’s health); and
- 3) [T]he realistic facts on the ground in the child’s home country (i.e., would the child be exposed to danger or harm).<sup>199</sup>

In addition, the California Supreme Court in *Guardianship of Saul H.* found that courts should consider “the ongoing psychological and emotional impact on the child of the past

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<sup>193</sup> Special Immigrant Juvenile Petitions, 87 Fed. Reg. 13080 (Mar. 8, 2022) (New 8 C.F.R. 204.11(a)).

<sup>194</sup> See e.g., *E.P.L. v. J.L.A.*, 190 A.3d 1002, 1007 (D.C. 2017).

<sup>195</sup> *B.R.L.F. v. Sarceno Zuniga*, 200 A.3d 770, 777 (D.C. 2018).

<sup>196</sup> *J.U. v. J.C.P.C.*, 176 A.3d 136, 142 (D.C. 2018).

<sup>197</sup> *J.U. v. J.C.P.C.*, 176 A.3d 136, 141 (D.C. 2018).

<sup>198</sup> *J.U. v. J.C.P.C.*, 176 A.3d 136, 143 (D.C. 2018).

<sup>199</sup> *Romero v. Perez*, 205 A.3d 903, 915 (Md. 2019).

relations between the child and the parent, . . . the parent’s ability and willingness to protect and care for the child, and the parent’s living conditions.”<sup>200</sup>

### *Length of Validity of Court Orders – Viability of Reunification*

In making the non-viability of reunification SIJS judicial determination, it is important for courts to know how long that determination is expected to remain in place. As with any final appealable state court determination in a custody, guardianship, child welfare, or other family court case, the order governing the custody or placement of the child is final, absent a court finding that there has been a change in circumstances.<sup>201</sup> In addition, it is important to know that the USCIS March 2022 regulations require that the juvenile court’s orders be in effect through the time that USCIS adjudicates the child’s SIJS petition.<sup>202</sup>

The SIJS regulations and USCIS policies presume that the court’s orders were valid when issued, and so they will remain in place from the date the child files their SIJS petition through the date the child’s SIJS petition is adjudicated.<sup>203</sup> The amount of time that generally passes from the date that the state court issues its orders containing SIJS judicial determinations to the time USCIS adjudicates the child’s SIJS petition is usually under a year. This timeframe can be as short as just over 6 months in cases in which the child files their SIJS petition with USCIS immediately after the child receives the state court’s order, as the statutorily required timeframe for adjudicating SIJS petitions is 180 days after the child files their petition.<sup>204</sup> However, since the child has up to their twenty-first birthday to file their SIJS petition, in some cases the time gap between receipt of the court’s order containing SIJS judicial determinations and the filing of the SIJS petition with USCIS may be longer.

The USCIS March 2022 regulations contain two exceptions to the requirement that the juvenile court’s orders be in effect through the time that USCIS adjudicates the child’s SIJS petition. These exceptions apply when the court’s jurisdiction over the SIJS petitioner child ended solely because:

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<sup>200</sup> *Guardianship of Saul H.*, 514 P.3d 871, 884 (Cal. 2022), reversing *Guardianship of S.H.R.*, 68 Cal. App. 5th 563, 582-83 (2021); see also *Matter of Eriseldo C.*, 217 A.D.3d 512, 513 (N.Y. App. Div. 2023) (finding that it was not in child’s best interests to return to Albania where parents were unable to protect him from assaults there due to their political affiliation); *Matter of Lavdie H. v. Saimira V.*, 184 A.D.3d 409, 409 (N.Y. App. Div. 2020) (finding reunification was not viable in part due to parent’s inability to protect child from political persecution).

<sup>201</sup> See gen. Jeffrey C. Sorenson, *Changing the Changed Circumstances Requirement: A New Standard for Modifying Permanent Custody Orders*, 23 J. Juv. L. 90, 93 (2002-2003).

<sup>202</sup> By statute, adjudication is required to be completed within 180 days of the receipt date for the child’s SIJS petition. In cases where USCIS issues requests for further evidence, the case will take longer to reach a final adjudication because the 180-day clock stops and then restarts after the requested additional evidence is received. See Victims of Trafficking and Violence Protection Act of 2000 § 235(d)(2), Pub. L. No. 106-386, 114 Stat. 1464; 8 C.F.R. § 204.11(g) (2023); 6 USCIS-PM J.2(C), available at <https://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6>; 6 USCIS-PM J.4(B), available at <https://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6>.

<sup>203</sup> See 8 C.F.R. § 204.11(c)(3)(ii) (2023); 6 USCIS-PM J.2(C), available at <https://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6>.

<sup>204</sup> See Trafficking Victims Protection and Reauthorization Act of 2008, § 235(d)(2), Pub. L. 110-457, 122 Stat. 5044, 5080 (Dec. 23, 2008); 6 USCIS-PM J.4(B), available at <https://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6>.

- The child aged out of the court’s jurisdiction, provided the child filed their SIJS petition before reaching the age of 21; or
- A child welfare permanency goal was reached (e.g. adoption, placement in permanent guardianship, or another child welfare permanency goal).<sup>205</sup>

State court judges also need to know that under some limited circumstances, actions a judge takes in state court will lead to approved SIJS petitions being automatically revoked. This happens only when prior to the SIJS petitioner receiving lawful permanent resident status one of the following occurs:

- Judicial proceedings determine that it is in the child’s best interests to be returned to the child’s or their parent’s home country; or
- A court order is issued reunifying the child with the parent who perpetrated the abuse, abandonment, neglect, or similar harm.<sup>206</sup>

State courts issuing orders in neglect proceedings need to be aware that family reunification efforts can impact the child’s SIJS eligibility. Court orders reunifying a noncitizen child with an approved SIJS petition with their parent(s) who perpetrated the abuse, abandonment, neglect, or similar harm will result in automatic revocation of the child’s approved SIJS petition.<sup>207</sup>

### iii. Best Interests

**It is not in the child’s best interest to return to the home country, or last habitual residence, of the child or the child’s abusive parent.**<sup>208</sup>

This judicial determination requires the state juvenile court to apply its state’s best interests of the child laws to determine whether it would be in the best interests of the SIJS petitioner child to return to their home country, or that of their abusive parent.<sup>209</sup> For purposes of the SIJS statute, this is a “straight-forward comparison” of the child’s living situation in the United States and what the child’s living situation would be if returned to their country of origin.<sup>210</sup> This inquiry does *not* focus on the relationship between the child and the abusive

<sup>205</sup> 8 C.F.R. § 204.11(c)(3)(ii) (2023); 6 USCIS-PM J.2(C), available at <https://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6>.

<sup>206</sup> 8 C.F.R. § 204.11(j)(1) (2023).

<sup>207</sup> See 8 C.F.R. § 204.11(j)(1).

<sup>208</sup> INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J).

<sup>209</sup> All motions for SIJS judicial determinations must be evaluated under the best interests of the child standard. See *gen. Guardianship of Quillay*, No. 15-P-1694, 2016 Mass. App. Unpub. LEXIS 982, at \* 3 (Mass. App. Ct. Oct. 14, 2016) (reversing the lower court for failing to apply a best interests standard in its refusal to issue SIJS determinations for lack of “exigent circumstances”) (unpublished); see also *Matter of Carlos A.M. v. Maria T.M.*, 141 A.D.3d 526, 528 (N.Y. App. Div. 2016) (finding that the lower court misapplied the best interests standard by requiring a finding that it would be in the child’s best interests to remain in the United States, rather than in their best interests not to be returned to their home country).

<sup>210</sup> See *In re Dany. G.*, 117 A.3d 650, 659 (Md. Ct. Spec. App. 2015); *In re J.M.*, No. 404, 2019 WL 1300509, at \*3 (Md. Ct. Spec. App. Mar. 20, 2019) (unreported); *In re K.O.-T.*, No. 2047, 2017 Md. App. LEXIS 1206, at \*16-17 (Md. Ct. Spec. App. Dec. 6, 2017) (unreported); *In re S.C.*, No. 2143, 2017 Md. App. LEXIS 1282, at \*13 (Md. Ct.

parent.<sup>211</sup> If the state juvenile court judge has determined that the evidence indicates it is in the minor’s best interest to remain in the care and custody of their parent, guardian, family member, or other caregiver in the United States, it necessarily follows that it would not be in the child’s best interests to return to their country of origin.<sup>212</sup> The 2022 regulations emphasize that the best interest determination is *not* a repatriation determination, “but rather is a determination by a State court or administrative body regarding the best interest of the child.”<sup>213</sup>

The California Supreme Court’s decision in the case of *Guardianship of Saul H.* provides helpful guidance to state courts making determinations about whether it is in the child’s best interests to return to the child’s or their parent’s home country. The state court must apply state law when deciding if forcing the child to return to their home country is in their “best interest.”<sup>214</sup> The California Supreme Court also directed state court judges to conduct a “case-specific, holistic comparison of the child’s circumstances in [his current state of residence] to the circumstances in which the child would live if repatriated, including the capacities of current or potential caregivers — who may or may not be the child’s parents — in each location.”<sup>215</sup>

Education is an important factor in the best interests analysis. If the child is able to pursue an education in the United States but would be unable to in their country of origin, this supports a determination that it is in the child’s best interests to remain in the United States. This is certainly true when the child is unable to attend school in their country of origin due to threats from gangs or other threats of violence.<sup>216</sup> However, the reasons the child is unable to pursue an education in their country of origin are less important for a best interests determination, as compared to the court’s determinations about abuse, neglect, abandonment, or other parental maltreatment the child suffered, the help the child needs to overcome the trauma from the maltreatment, and the need to protect the child against future harm. Past threats from and attempts at recruitment by gangs also support a determination that it is not in the child’s best

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Spec. App. Dec. 26, 2017) (unreported); *In re J.A.*, No. 2653, 2017 Md. App. LEXIS 1082, at \*21 (Md. Ct. Spec. App. Oct. 30, 2017) (“The question the juvenile court must decide is ‘whether [the child’s] interests would be better served by remaining in Maryland . . . or if [the child] would be better served by being returned to the same conditions he fled[.]’”); *In re Velasquez*, 334 Mich. App. 118, 142 (Mich. Ct. App. 2022); *see also In re Custody of A.N.D.M.*, 527 P.3d 111, 121 (Wash. Ct. App. 2023) (“The straightforward factual determination is whether it is or is not in the best interest of ANDM to return to Honduras. While hypothetically or contextually the facts of her departure may be of interest, nothing in that factual determination requires a petitioner to explain the circumstances of her departure from her home country, let alone meet a certain threshold of trauma upon leaving.”); *see also* Monica Bates & Leslye E. Orloff, *Factors That Demonstrate That It is Not In a Child’s Best Interests to Return to Their Home Country* (June 12, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/sijs-best-interest-not-to-return-to-home-country> (for a helpful tool to help courts compare what is available in the U.S with what is available in the child’s home country to meet the child’s needs for healing, developing, safety, and ability to thrive in the future).

<sup>211</sup> *Guardianship of Saul H.*, 514 P.3d 871, 888 (Cal. 2022).

<sup>212</sup> *E.P.L. v. J.L.A.*, 190 A.3d 1002, 1008 (D.C. 2017).

<sup>213</sup> Special Immigrant Juvenile Petitions, 87 Fed. Reg. 13069 (Mar. 8, 2022) (New 8 C.F.R. 204.11(c)(2)(ii)).

<sup>214</sup> *Guardianship of Saul H.*, 514 P.3d 871, 885-86 (Cal. 2022) (citing 8 U.S.C. § 1101(a)(27)(J)(ii); 8 C.F.R. § 204.11(c)(2)(ii) (2022)).

<sup>215</sup> *Guardianship of Saul H.*, 514 P.3d 871, 885-86 (Cal. 2022).

<sup>216</sup> *In re J.M.*, No. 404, 2019 WL 1300509, at \*4 (Md. Ct. Spec. App. Mar. 20, 2019) (unreported).

interest to return to their home country.<sup>217</sup> Additionally, if the child has nowhere to live or no means of financial support in their home country, this supports a determination that it is in the child's best interests to remain in the United States.<sup>218</sup> Additionally, while state courts must apply state law to determine a child's dependency on the juvenile court, for the best interests analysis, an individual is still considered a "child" until the age of 21 under federal law.<sup>219</sup>

### E. Defining Abuse, Abandonment, Neglect, and Similar Basis Under State Law

When determining if an SIJS petitioner child has experienced abuse, abandonment, or neglect, the SIJS statute requires state juvenile court judges to apply their state's laws.<sup>220</sup> State juvenile courts are required to apply their state's law even if the child experienced the maltreatment outside of the U.S. or in another state.<sup>221</sup> The state juvenile and family courts must

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<sup>217</sup> See *In re J.J.*, No. 1421, 2022 Md. App. LEXIS 112, at \*23 (Md. Ct. Spec. App. Feb. 9, 2022); *Matter of Lucas F.V.*, 169 A.D.3d 802, 804 (N.Y. App. Div. 2019); *Matter of Victor R.C.O. v. Canales*, 172 A.D.3d 1071, 1072-73 (N.Y. App. Div. 2019); *Matter of Rina M.G.C.*, 169 A.D.3d 1031, 1033 (N.Y. App. Ct. 2019); *Matter of Grechel L.J.*, 167 A.D.3d 1011, 1013-14 (N.Y. App. Div. 2018) (finding not in child's best interests to return to Nicaragua where gang members had previously harassed her and police and her mother could not protect her); *Matter of A.M.G. v. Gladis A.G.*, 162 A.D.3d 768, 769 (N.Y. App. Div. 2018) (finding that it was not in child's best interests to return to El Salvador where gang members had threatened to kill the petitioner and his sister); *Matter of Keilyn G.G.*, 159 A.D.3d 1295, 1295 (N.Y. App. Div. 2018) (finding that it would not be in the child's best interests to return to Honduras where the child would be exposed to gang violence); *Matter of Juan R.E.M.*, 154 A.D.3d 725, 727 (N.Y. App. Div. 2017) (finding that it was not in child's best interests to return to El Salvador where gang members had threatened the child with violence and child's mother could not protect him); *Matter of Argueta v. Santos*, 166 A.D.3d 608, 610 (N.Y. App. Div. 2018) (holding that it would not be in the best interests of the child to return to El Salvador due to threats of violence by gang members and his mother's inability protect him).

<sup>218</sup> See *Matter of Gabriela Y.U.M.*, 119 A.D.3d 581, 583-84 (N.Y. App. Div. 2014); *Matter of Alamgir A.*, 81 A.D.3d 937, 940 (N.Y. App. Div. 2011); *Matter of Trudy-Ann W. v. Joan W.*, 73 A.D.3d 793, 796 (N.Y. App. Div. 2010); *Matter of K.B.*, 20 Misc.3d 1130(A), at \*11 (N.Y. Fam. Ct. Aug. 7, 2008); *Matter of Norma U. v. Herman T.R.F.*, 169 A.D.3d 1055, 1057 (N.Y. App. Div. 2019); *Matter of Jose F.M.P.*, 204 A.D.3d 801, 802 (N.Y. App. Div. 2022); *Matter of Marcelina M.-G. v. Israel S.*, 112 A.D.3d 100, 114-15 (N.Y. App. Div. 2013); *In re Custody of A.N.D.M.*, 527 P.3d 111, 121 (Wash. Ct. App. 2023); *Matter of Khan v. Shahida Z.*, 184 A.D.3d 506, 506 (N.Y. App. Div. 2020) (finding it would not be in the child's best interests to return to Thailand because parents said they "did not want him back"); *Matter of Rosa M.M.-G.*, 194 A.D.3d 813, 815 (N.Y. App. Div. 2021); *Matter of Denia M.E.C. v. Carlos R.M.O.*, 161 A.D.3d 853, 853 (N.Y. App. Div. 2018) (finding it would not be in the child's best interests to return to Honduras because there is no one there to care for him); *Matter of Jose Y.Y.*, 158 A.D.3d 200, 202 (N.Y. App. Div. 2018) (finding it would not be in the child's best interests to return to Honduras because there is no one there to care for him).

<sup>219</sup> See 8 C.F.R. § 204.11(b)(1) (2023); *Guardianship of Saul H.*, 514 P.3d 871, 889-90 (Cal. 2022) (finding that the probate court improperly concluded that the fact that Saul had turned 18 automatically disqualified him from establishing it would not be in his best interest to return to El Salvador where his parents are).

<sup>220</sup> INA § 101(a)(27)(J)(i); 8 U.S.C. § 1101(a)(27)(J)(i); 8 C.F.R. § 204.11(d)(2)(iii) (2023); *Immigration Relief for Abused, Abandoned, or Neglected Children: Special Immigrant Juvenile Classification*, USCIS at 2 (Jan. 2024), available at <https://niwaplibrary.wcl.american.edu/pubs/uscis-sij-brochure-2024>.

<sup>221</sup> *H.S.P. v. J.K.*, 121 A.3d 849, 859 (N.J. 2015) (overturning *D.C. v. A.B.C.*, 8 A.3d 260, 265 (N.J. Super. Ct. App. Div. 2010), which relied on an impermissible analysis of Guatemalan law in making its viability determination); see also *In re Pedro J.C.*, 105 A.3d 943, 955 (Conn. App. Ct. 2014); *Romero v. Perez*, 205 A.3d 903, 916 (Md. 2019); *In re Dany. G.*, 117 A.3d 650, 657 (Md. Ct. Spec. App. 2015) ("[F]ederal 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."); *In re Juvenile 2002-098*, 813 A.2d 1197, 1201 (N.H. 2002); *In re Domingo C.L.*, No. M2016-02383-COA-R3-JV, 2017 Tenn. App. LEXIS 590, at \*14-15 (Tenn. Ct. App. Aug. 30, 2017) ("If Congress's intention was to require knowledge of living conditions in other countries, surely federal immigration judges would have been a far more appropriate selection [for issuing SIJS judicial determinations].").

apply their state laws' definitions of abuse, abandonment, and neglect broadly to the facts of the case, regardless of where the parental maltreatment took place, to assess whether the evidence supports a determination under state law that the SIJS petitioner child experienced parental perpetrated abuse, neglect, abandonment, or any similar form of maltreatment as defined by state law.<sup>222</sup>

i. Abuse

In most cases, “abuse” typically captures physical mistreatment by a parent, for purposes of issuing SIJS judicial determinations. Many state courts have found that reunification of the petitioner-child with their parent is not viable due to abuse when the parent has physically harmed the child in some way.<sup>223</sup> However, abuse comes in many different forms and is not always solely physical. This is evidenced through the Violence Against Women Act (VAWA), which offers immigration relief in the form of a VAWA self-petition to noncitizens who have been abused by their U.S. citizen or lawful permanent resident parent, stepparent, or spouse.<sup>224</sup> The immigration laws governing VAWA self-petitions term the qualifying abuse as “battery or extreme cruelty,” which is defined in the regulations as:<sup>225</sup>

[B]eing the victim of any act or a threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor) or forced prostitution shall be considered acts of violence. Other abusive actions may also be acts of violence under this rule. Acts or threatened acts that, in and of themselves, may not initially appear violent may be part of an overall pattern of violence.

State child abuse, protection order, criminal child abuse, and/or domestic violence laws may similarly define “abuse” when describing what constitutes child abuse and/or family violence. Nonetheless, it may be useful to understand how federal VAWA self-petition

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<sup>222</sup> See *Romero v. Perez*, 205 A.3d 903, 914-15 (Md. 2019); *Guardianship of Saul H.*, 514 P.3d 871, 886 (Cal. 2022); see also *Lopez v. Serbellon Portillo*, 469 P.3d 181, 183 (Nev. 2020) (holding that SIJ findings do not require as high of a burden of abandonment because reunification only requires that reunification is not *viable*, rather than *possible*).

<sup>223</sup> See *Guardianship of De La Cruz*, No. 14-P-505, 2014 Mass. App. Unpub. LEXIS 894, at \*5 (Mass. App. Ct. July 31, 2014) (finding reunification was not viable where the father beat the child with tree branches, belts, and rope at various times) (unpublished); *In re Velasquez*, 334 Mich. App. 118, 139 (Mich. Ct. App. 2022) (finding reunification was not viable due to abuse where the mother would beat and hit the child); *Ramirez v. Bautista*, No. A-19-908, 2020 Neb. App. LEXIS 159, at \*5, 15 (Neb. Ct. App. May 26, 2020) (finding abuse where the father would “insult, hit, and kick the child”); *Matter of Trudy-Ann W. v. Joan W.*, 73 A.D.3d 793, 794 (N.Y. App. Div. 2010) (excessive corporal punishment); *Matter of Gurwinder S.*, 155 A.D.3d 959, 961 (N.Y. App. Div. 2017) (excessive corporal punishment); *Matter of Christian J.C.U.*, 60 Misc. 3d 706, 707-08 (N.Y. Fam. Ct. 2018) (child was repeatedly beaten and burned with cigarettes by her parents and sexually assaulted by her older brother due to her gender identity); *Matter of Grechel L.J.*, 167 A.D.3d 1011, 1013 (N.Y. App. Div. 2018) (excessive corporal punishment).

<sup>224</sup> INA § 204(a)(1)(A)(iii)-(iv); 8 U.S.C. § 1184(a)(1)(A)(iii)-(iv); INA § 204(a)(1)(B)(ii)-(iii); 8 U.S.C. § 1154(a)(91)(B)(ii)-(iii); Subtitle G – Protections for Battered Immigrant Women and Children, Violent Crime Control and Law Enforcement Act of 1994, § 40701, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

<sup>225</sup> 8 C.F.R. § 204.2(c)(1).



immigration regulations, policies, and statutory law interpret “battery or extreme cruelty” to include “a continuum of abusive activities,” such as:<sup>226</sup>

- Verbal abuse
- Psychological abuse
- Social isolation
- Excessive fighting and cursing in front of others
- Restricting diet
- Threats of physical violence
- Using children as a tool against the other parent
- Being unreasonably critical of the child
- Display of a weapon against the child

Additionally, U.S. immigration regulations provide guidance to immigration judges considering another form of VAWA relief, VAWA cancellation of removal,<sup>227</sup> that may be useful for state court judges applying their state law definitions of child abuse and domestic violence when making SIJS judicial determinations about whether it is in the child’s best interests to be returned to their home country.

In order for noncitizen spouses or children abused by their U.S. citizen or lawful permanent resident spouses, parents, or stepparents, to be granted VAWA cancellation of removal, the petitioner must prove that their deportation from the U.S. would cause extreme hardship. The factors that immigration judges use to determine extreme hardship may be useful to state court judges after finding that a child has been abused in the course of evaluating whether it is in the child’s best interests to be returned to their home country. In making this SIJS judicial determination, state court judges may find it helpful to consider the following extreme hardship factors from the VAWA immigration regulations:

- The nature and extent of the physical or psychological consequences of abuse;
- How likely it is that the abusive parent’s family, friends or those acting on behalf of the abusive parent, would physically or psychologically harm the applicant child or the applicant child’s parent [if the child were returned to their home country];

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<sup>226</sup> Immigration and Naturalization Service, Petition to Classify Alien as Immediate Relative of a United States Citizen or as a Preference Immigrant; Self-Petitioning for Certain Battered or Abused Spouses and Children, 61 Fed. Reg. 13061 (Mar. 26, 1996); see also Leslye E. Orloff, Brittany Roberts, and Stefanie Gitler, “*Battering or Extreme Cruelty: Drawing Examples from Civil Protection Order and Family Law Cases* at 5-9 (Sept. 12, 2015), available at <https://niwaplibrary.wcl.american.edu/pubs/extreme-cruelty-examples-protection-order-2>; The Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005), Pub. L. 109-162, 119 Stat. 2960 (Jan. 5, 2006).

<sup>227</sup> VAWA Cancellation of Removal provides a defense to deportation (removal) for noncitizens who have been abused by their U.S. citizen and lawful permanent resident spouse, parent, or stepparent. INA § 240A(b)(2); 8 U.S.C. § 1229b(b)(2). The VAWA self-petition originally required that child and spouse abuse victims prove that their removal from the United States would cause extreme hardship. See Violent Crime Control and Law Enforcement Act of 1994, § 40701, Pub. L. No. 103-322, 108 Stat. 1796 (1994). This requirement was later removed for VAWA self-petitioners in the 2000 enactment of VAWA. See Victims of Trafficking and Violence Protection Act of 2000, § 1503, Pub. L. No. 106-386, 114 Stat 1464 (2000).

- In domestic violence cases in which both the child and the child’s parent were abused: how likely it is that the batterer’s family, friends or those acting on behalf of the batterer would physically or psychologically harm the applicant, the applicant’s child or the applicant’s parent [if the child were returned to their home country];
- The accessibility or availability of supportive services for victims of domestic violence and/or child abuse, abandonment or neglect;
- Whether laws or social practices exist in the home country that punish the applicant or the applicant’s child or children for being victims of domestic violence or child abuse or attempting to leave an abusive household;
- Whether authorities in the home country have the capacity to protect the applicant and/or the applicant’s child or children from future abuse . . . .<sup>228</sup>

## ii. Abandonment

In the SIJS context, the Supreme Court of Vermont provides a helpful understanding on the concept of “abandonment:”

[T]he concept of abandonment is being considered not to deprive a parent of custody or to terminate parental rights but rather to assess the impact of the history of the parent's past conduct on the viability, i.e., the workability or practicability of a forced reunification of parent with minor, if the minor were to be returned to the home country.<sup>229</sup>

To support a determination that the SIJS petitioner child was abandoned, the abandonment by the parent does not require a willful act.<sup>230</sup> This conclusion is consistent with the plain language of the federal SIJS statute, which simply requires that the petitioner cannot be reunified with one or both of their parents due to “abuse, neglect, abandonment, or a similar basis under state law.”<sup>231</sup> Regardless of whether the parent or parents’ abandonment was intentional or unintentional, “its impact on the child’s welfare and ability to be cared for in his home country is the same.”<sup>232</sup> Thus, “willfulness” is not required to make the SIJS judicial determination that a parent abandoned their child.<sup>233</sup> It follows that the state juvenile court also does not have to find that the parent permanently abandoned the child for purposes of issuing SIJS determinations.<sup>234</sup> Furthermore, as noted above, if a child has never known one of their

<sup>228</sup> 8 C.F.R. § 1240.58(b) & (c) (extreme hardship); Monica Bates & Leslye E. Orloff, *Factors That Can Demonstrate That It is Not in a Child’s Best Interests to be Returned to Their Home Country* at 2 (June 12, 2021), available at <https://niwaplibrary.wcl.american.edu/pubs/sijs-best-interest-not-to-return-to-home-country>.

<sup>229</sup> *Kitoko v. Salomao*, 215 A.3d 698, 708 (Vt. 2019).

<sup>230</sup> *H.S.P. v. J.K.*, 121 A.3d 849, 852 (N.J. 2015); *Guardianship of Saul H.*, 514 P.3d 871, 886 (Cal. 2022).

<sup>231</sup> INA § 101(a)(27)(J)(i); 8 U.S.C. § 1101(a)(27)(J)(i).

<sup>232</sup> *D.M. v. Armando B.*, No. A159646, 2016 Cal. App. Unpub. LEXIS 7241, at \*12 (Cal. Ct. App. Oct. 4, 2016) (unpublished); see also *E.M. v. J.R.*, No. B288718, 2019 Cal. App. Unpub. LEXIS 1824, at \*17-18 (2019) (unpublished).

<sup>233</sup> See *D.L. v. Superior Court*, No. A144960, 2015 Cal. App. Unpub. LEXIS 3233, at \*4-5 (Cal. Ct. App. May 5, 2015) (unpublished).

<sup>234</sup> See *Kitoko v. Salomao*, 215 A.3d 698, 708 (Vt. 2019); see also *In re Estate of Nina L.*, 41 N.E.3d 930, 936 (Ill. App. Ct. 2015) (“[A] court asked to make SIJ predicate findings need not discern a parent’s motivation in abandoning the child.”).

parents, it is “difficult to avoid” a determination that reunification with that parent is not viable due to “neglect or abandonment.”<sup>235</sup> Death may also constitute abandonment for purposes of issuing a SIJS judicial determination based on the state law’s definition of abandonment.<sup>236</sup>

Several state courts have found that a parent has abandoned the SIJS petitioner child by sending them on a journey without them to the United States, even if the parents believed being in the United States was best for the child.<sup>237</sup> In *W.R.A.H. v. D.M.A.H.*, the New Jersey Superior Court found that it was undeniable that “a parent could be considered to have neglected or abandoned a child if he or she voluntarily allowed the child to freely travel for thousands of miles unsupervised, *even if* the parent did so for the benefit of the child’s well-being.”<sup>238</sup>

The fact that a SIJS petitioner child has been in a loving, stable home with adequate caregivers does not preclude a determination that the child was abandoned by their biological parent.<sup>239</sup> The issue is whether at least one of the child’s natural or adoptive parents have abandoned the child. “Whether a third party came forward and took care of [the child] is immaterial on the question whether his parents abandoned him.”<sup>240</sup>

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<sup>235</sup> *Guardianship of Penate*, 76 N.E.3d 960, 968 (Mass. 2017); *see also In re J.J.*, No. 1421, 2022 Md. App. LEXIS 112, at \*23 (Md. Ct. Spec. App. Feb. 9, 2022) (finding abandonment where child had not known his father and met him for the first time when he was fourteen years old); *A.J.L.B. v. Alvarenga*, No. 23A-JP-1436, 2023 Ind. App. LEXIS 351, at \* 11-12 (Ind. Ct. App. Dec. 13, 2023); *Bonilla v. Maldonado*, 127 N.E.3d 1181, 1187 (Ind. Ct. App. 2019); *In re Avila Luis*, 114 N.E.3d 855, 857 (Ind. Ct. App. 2018); *Lopez v. Serbellon Portillo*, 469 P.3d 181, 182 (Nev. 2020); *Matter of Gabriel H.M.*, 116 A.D.3d 855, 857 (N.Y. App. Div. 2014) (abandonment where child’s father left him at or near his birth); *Matter of Rosa M.M.-G.*, 194 A.D.3d 813, 814 (N.Y. App. Div. 2021); *Matter of Karen C.*, 111 A.D.3d 622, 623 (N.Y. App. Div. 2013) (finding abandonment where father abandoned the child before the child was born).

<sup>236</sup> *See Eddie E. v. Superior Court*, 234 Cal. App. 4<sup>th</sup> 319, 332 (Cal. Ct. App. 2015); *Matter of Luis R. v. Maria Elena G.*, 120 A.D.3d 581, 582 (N.Y. App. Div. 2014) (holding that reunification with the father is not viable because the father is deceased); *In re Avila Luis*, 114 N.E.3d 855, 857 (Ind. Ct. App. 2018) (holding that the father abandoned the noncitizen child when he had never been a part of her life and passed away before she was three years old) *cf. In re Mauricio*, No. F04CP19012599A, 2019 Conn. Super. LEXIS 3451, at \*10 (Conn. Super. Ct. Dec. 27, 2019) (finding that because the child’s father is dead, the court must determine if reunification is viable with the mother) (unreported); *but see In re Sanchez Munoz*, No. G-16-047347-M, 2017 Nev. Dist. LEXIS 107, at \*2 (Nev. Dist. Ct. Mar. 9, 2017) (holding that the father’s murder does not support a finding of abandonment); *In re Guardianship of the Pers. Of D.S.M.*, No. 72820, 2018 Nev. Unpub. LEXIS 212, at \*2 (Nev. Mar. 15, 2018) (finding that death does not constitute neglect or abandonment under Nevada law because there is no willful act) (unpublished).

<sup>237</sup> *W.R.A.H. v. D.M.A.H.*, No. A-4440-16T2, 2019 N.J. Super. Unpub. LEXIS 1607, at \*7-8 (N.J. Super. Ct. App. Div. Jan. 22, 2018) (unpublished); *Selvia Amarilis Machado v. Perez*, No. 16-008462-001, 2016 Pa. Dist. & Cnty. Dec. LEXIS 12060, at \*4 (Pa. D. & C. Oct. 21, 2016); *Lopez v. Guardado*, No. FD-15-9494, 2015 Pa. Dist. & Cnty. Dec. LEXIS 13700, at \*4 (Pa. D. & C. Dec. 22, 2015); *but see Melgar v. Hernandez*, No. B293130, 2019 Cal. App. Unpub. LEXIS 7870, at \*12-13 (Cal. Ct. App. Nov. 25, 2019) (unpublished).

<sup>238</sup> *W.R.A.H. v. D.M.A.H.*, No. A-4440-16T2, 2019 N.J. Super. Unpub. LEXIS 1607, at \*7-8 (N.J. Super. Ct. App. Div. Jan. 22, 2018) (unpublished) (emphasis added); *see also N.J. Div. of Child Prot. & Permanency v. R.L.S.*, No. A-1280-21, 2022 N.J. Super. Unpub. LEXIS 1615, at \*8 (N.J. Super. Ct. Sept. 6, 2022) (unpublished).

<sup>239</sup> *But see In the Interest of P.M.T., A Child*, No. 11-14-00346-CV, 2015 WL 3799519, at \*2 (Tex. App. June 10, 2015) (holding that a child has not been abandoned when the parents voluntarily relinquish their parental rights and give the child to their grandparents who have supported the child since birth).

<sup>240</sup> *C.M. v. M.N.M.*, No. A-4209-14T1, 2016 N.J. Super. Unpub. LEXIS 396, at \*7 (N.J. Super. Ct. App. Div. Feb. 24, 2016) (unpublished).

Even where a parent still occasionally contacts their child, this alone does not preclude a determination that the child has been abandoned.<sup>241</sup> Rather, the state court should consider whether the parent in sporadic contact with the child still provides any emotional or financial support to the SIJS petitioner child.<sup>242</sup>

### iii. Neglect

Neglect may be found based on a parent's inability or failure to take care of their SIJS petitioner child.<sup>243</sup> Similar to abandonment, the fact that a SIJS petitioner child is now in a loving, stable home does not preclude a determination that the child experienced neglect at some point in time, making them eligible for court orders containing SIJS judicial determinations.<sup>244</sup> If

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<sup>241</sup> See *People v. Christian C.*, No. A142082, 2015 Cal. App. Unpub. LEXIS 478, at \*1-2 (Cal. Dist. Ct. Jan. 22, 2015) (finding that reunification is not viable even where father has had minimal phone contact with the child); *In re MC*, No. 364989, 2023 Mich. App. LEXIS 5843, at \*11 (Mich. Ct. App. Aug. 17, 2023) (questioning the trial court's conclusion that the child's parents did not abandon her when they are still in contact solely for the purpose of finding a suitable caregiving placement for the child in the United States and in regard to the underlying proceedings) (unpublished); *D.G. v. R.S.G.*, No. A-3112-14T2, 2016 N.J. Super. Unpub. LEXIS 995, at \*10-12 (N.J. Super. Ct. App. Div. May 2, 2016) (holding that the trial court judge unduly focused on how the child's grandparents have been able to care for her for several years since the mother's absence) (unpublished); *Matter of Marcelina M.-G. v. Israel S.*, 112 A.D.3d 100, 108 (N.Y. App. Div. 2013) (finding abandonment where the child still occasionally talks on the phone with her father, but has never lived with him or been supported by him financially); *Matter of Khan v. Shahida Z.*, 184 A.D.3d 506, 506 (N.Y. App. Div. 2020) (finding abandonment where parents only occasionally contact child).

<sup>242</sup> See *E.M. v. J.R.*, No. B288718, 2019 Cal. App. Unpub. LEXIS 1824, at \*18 (2019) (finding that a child is abandoned for purposes of SIJS when the parent has left the child, provides no financial support, and only rarely communicates with the child) (unpublished); *D.G. v. R.S.G.*, No. A-3112-14T2, 2016 N.J. Super. Unpub. LEXIS 995, at \*10-12 (N.J. Super. Ct. App. Div. May 2, 2016) (unpublished); *C.M. v. M.N.M.*, No. A-4209-14T1, 2016 N.J. Super. Unpub. LEXIS 396, at \*7 (N.J. Super. Ct. App. Div. Feb. 24, 2016) (unpublished); *Matter of Cristal M.R.M.*, 118 A.D.3d 889, 891 (N.Y. App. Div. 2014) (issuing SIJS determination that child was abandoned by father because the child never lived with father and he only visited the child once); *Matter of Rina M.G.C.*, 169 A.D.3d 1031, 1033 (N.Y. App. Div. 2019) (issuing SIJS determination that child was abandoned by mother where mother lived in close proximity to child but did not visit child for four years and "did not want to support" the child); *Matter of Eriseldo C.*, 217 A.D.3d 512, 513 (N.Y. App. Div. 2023) (finding abandonment where the parents have not provided financial support nor maintained contact with child since child arrived in the United States); *Matter of Khan v. Shahida Z.*, 184 A.D.3d 506, 506 (N.Y. App. Div. 2020) (finding abandonment where the parents have not provided support to child); *Matter of Lavdie H. v. Saimira V.*, 184 A.D.3d 409, 409 (N.Y. App. Div. 2020) (finding abandonment or neglect where parents have not had contact with the child nor provided support for the child); *Matter of Keilyn GG.*, 159 A.D.3d 1295, 1298 (N.Y. App. Div. 2018) (finding abandonment where father had not physically or financially provided for the child); *Matter of Amandeep S.*, 44 Misc. 3d 1201(A), 1201(A) (N.Y. Fam. Ct. 2014) (finding abandonment where the father kicked the child out of his home and had not spoken to him in three years); *Matter of M.G.M.L.*, 68 Misc. 3d 569, 573 (N.Y. Fam. Ct. 2020) (finding abandonment where the mother had not spoken to the child in two years nor provided any financial support during that period); *Matter of Juan R.E.M.*, 154 A.D.3d 725, 727 (N.Y. App. Div. 2017) (finding abandonment where mother had failed to emotionally and financially support the child for a period of ten years).

<sup>243</sup> *State v. Luis G.*, 764 N.W.2d 648, 656 (Neb. Ct. App. 2009); *Perez v. Ralios*, No. CI 22-128, 2022 Neb. Trial Order LEXIS 490, at \*3, 7 (Neb. Dist. Ct. Oct. 11, 2022) (finding neglect where father had not provided the child with any support for several months); *In re N.C.A.*, No. 2596, 2017 Md. App. LEXIS 826, at \*12 (Md. Ct. Spec. App. Aug. 8, 2017) ("[T]he court assesses neglect by assessing the *inaction* of a parent over time.").

<sup>244</sup> *In re Srun R.*, 2005 Conn. Super. LEXIS 2620, at \*23 (Conn. Super. Ct. Sept. 15, 2005) (finding a sufficient claim for neglect by looking at the child's biological parents' actions rather than the child's current caregivers) (unpublished).

a child has never known one of their parents, this supports a determination that reunification with that parent is not viable due to neglect.<sup>245</sup>

Numerous fact patterns can support a determination that a child has been neglected for purposes of SIJS. For example, several state courts applying their state law definitions of neglect have found that parents who force their minor child to leave school to work to support the family have neglected the child.<sup>246</sup> Even further, several state courts have held that even a parent who simply *allows* their child to leave school in order to work has committed neglect as defined under state law.<sup>247</sup> It is not relevant to this analysis whether a child having to work at a young age in order to support their family is common in their country of origin; it only matters whether such action would constitute neglect under state law.<sup>248</sup>

Working at a young age may also constitute neglect for SIJS purposes.<sup>249</sup> However, poverty alone has generally not been held to constitute neglect for SIJS purposes where the parent was still able to provide the child with food, clothing, and shelter.<sup>250</sup> Neglect may be found where the parents are unable to provide vital medical care, shelter, or protection from gangs and other threats for the SIJS petitioner child.<sup>251</sup> It is important to note that parents can still

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<sup>245</sup> See *Guardianship of Penate*, 76 N.E.3d 960, 968 (Mass. 2017); cf. *Matter of Luis R. v. Maria Elena G.*, 120 A.D.3d 581, 582 (N.Y. App. Div. 2014) (holding that reunification with the father is not viable because the father is deceased).

<sup>246</sup> See *In re D.R.M.H.*, No. 2191, 2018 WL 898800, at \*4 (Md. Ct. Spec. App. Feb. 15, 2018); *In re S.C.*, No. 2143, 2017 Md. App. LEXIS 1282, at \*12 (Md. Ct. Spec. App. Dec. 26, 2017) (unreported); *In re Dany. G.*, 117 A.3d 650, 659 (Md. Ct. Spec. App. 2015); *In re J.J.*, No. 1421, 2022 Md. App. LEXIS 112, at \*23 (Md. Ct. Spec. App. Feb. 9, 2022); *Guardianship of De La Cruz*, No. 14-P-505, 2014 Mass. App. Unpub. LEXIS 894, at \*5 (Mass. App. Ct. July 31, 2014); *In re Velasquez*, 334 Mich. App. 118, 139 (Mich. Ct. App. 2022); *N.C.T. v. F.T.S.*, No. A-3822-16T3, 2018 N.J. Super. Unpub. LEXIS 360, at \*6-7 (N.J. Super. Ct. App. Div. Feb. 15, 2018); *Matter of Briceyda M.A.X.*, 190 A.D.3d 752, 753-54 (N.Y. App. Div. 2021) (“educational neglect”); *Matter of Palwinder K. v. Kuldeep K.*, 148 A.D.3d 1149, 1151 (N.Y. App. Div. 2017); *Matter of Gurwinder S.*, 155 A.D.3d 959, 961 (N.Y. App. Div. 2017); *Lopez v. Guardado*, No. FD-15-9494, 2015 Pa. Dist. & Cnty. Dec. LEXIS 13700, at \*4 (Pa. D. & C. Dec. 22, 2015).

<sup>247</sup> See *In re J.A.*, No. 2653, 2017 Md. App. LEXIS 1082, at \*15-16 (Md. Ct. Spec. App. Oct. 30, 2017) (holding that a child’s working at a young age constitutes neglect for SIJS purposes even where such work was not forced by the parent); *M.F.R.V. v. J.R.M.*, No. 2495, 2019 Md. App. LEXIS 226, at \*11-12 (Md. Ct. Spec. App. Mar. 15, 2019) (unreported); see also *In re D.V.L.*, No. 3058, 2019 Md. App. LEXIS 749, at \*11 (Md. Ct. Spec. App. Aug. 30, 2019) (finding that the SIJS petitioner-child was neglected for purposes of SIJS when he worked on the family farm in Guatemala from the ages of seven to fourteen) (unreported); *In re N.C.A.*, No. 2596, 2017 Md. App. LEXIS 826, at \*12 (Md. Ct. Spec. App. Aug. 8, 2017); *supra* Part (V)(E)(i), *Abandonment*.

<sup>248</sup> See *D.C. v. A.B.C.*, 8 A.3d 260, 264 (N.J. Super. Ct. App. Div. 2010) (overturned by *H.S.P. v. J.K.*, 121 A.3d 849, 859 (N.J. 2015)); *In re Dany. G.*, 117 A.3d 650, 659 (Md. Ct. Spec. App. 2015).

<sup>249</sup> *In re S.C.*, No. 2143, 2017 Md. App. LEXIS 1282, at \*13 (Md. Ct. Spec. App. Dec. 26, 2017) (unreported).

<sup>250</sup> See *Matter of Jeison P.-C.*, 132 A.D.3d 876, 877 (N.Y. App. Div. 2015) (finding that the parents had not neglected the child solely because they were too impoverished to provide the child with a college education or financial assistance); *Melgar v. Hernandez*, No. B293130, 2019 Cal. App. Unpub. LEXIS 7870, at \*11-12 (Cal. Ct. App. Nov. 25, 2019) (finding that the allegations of neglect were grounded entirely on the parents’ poverty) (unpublished); *In re Guardians Of: Bryan A. Aguilar Rivas*, No. G-19-051011-M, 2019 Nev. Dist. LEXIS 172, at \*2 (Nev. Dist. Ct. Mar. 28, 2019); but see *Guardianship of Saul H.*, 514 P.3d 871, 877 (Cal. 2022), (“The fact that harm to the child is attributable to a parent’s poverty does not preclude a court from determining that reunification with the parent is not viable.”).

<sup>251</sup> See *Matter of Victor R.C.O. v. Canales*, 172 A.D.3d 1071, 1072 (N.Y. App. Div. 2019); *Hernandez v. Rodas*, No. 2959, 2019 Md. App. LEXIS 720, at \*11 (Md. Ct. Spec. App. Aug. 22, 2019) (finding neglect where the parents could not protect the child from harm); *In re N.C.A.*, No. 2596, 2017 Md. App. LEXIS 826, at \*13 (Md. Ct. Spec.

neglect a child *even if* they provide the child with adequate food and shelter: a parent’s positive equities do not cancel out acts of neglect under state law for purposes of issuing SIJS judicial determinations.<sup>252</sup>

Several state courts have found that neglect is supported by the parents sending the SIJS petitioner child on a journey alone without accompaniment by one of the child’s parents to the United States, even if the parents believed being in the United States was best for the child.<sup>253</sup> The fact that the parents did not accompany the child and instead sent them with others, alone, or with strangers, supports a determination that the child was neglected by their parent or parents.<sup>254</sup> Neglect may also be established when the SIJS petitioner child has witnessed acts of domestic violence against their parent<sup>255</sup> or when the child’s parent repeatedly misuses alcohol.<sup>256</sup>

#### iv. Similar Basis

The “similar basis” language that was inserted into the SIJS statute by the TVPRA of 2008 allowed for the expansion of the protected grounds beyond those of abuse, neglect, and

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App. Aug. 8, 2017) (finding neglect where the mother did not prevent the child from leaving to live on the streets); *In re J.J.*, No. 1421, 2022 Md. App. LEXIS 112, at \*23 (Md. Ct. Spec. App. Feb. 9, 2022); *Matter of Wilson A.T.Z.*, 147 A.D.3d 962, 964 (N.Y. App. Div. 2017) (finding neglect where mother failed to exercise a minimum degree of care in providing food, shelter, clothing, and education); *Matter of Argueta v. Santos*, 166 A.D.3d 608, 610 (N.Y. App. Div. 2018) (finding neglect where the mother failed to financially provide for the child’s basic needs and “educationally neglected him”); *Matter of Nelson A.G.-L.*, 157 A.D.3d 789, 791 (N.Y. App. Div. 2018) (finding neglect where the parents did nothing to protect child from gangs); *In re B.G.*, No. 1596, 2017 Pa. Super. Unpub. LEXIS 448, at \*12 (Pa. Super. Ct. Feb. 7, 2017) (unpublished).

<sup>252</sup> See e.g., *In re D.V.L.*, No. 3058, 2019 Md. App. LEXIS 749, at \*11 (Md. Ct. Spec. App. Aug. 30, 2019) (finding that the child was still neglected after working on a family farm at a young age even where the parents had provided the child with adequate food and shelter) (unreported); *Hernandez v. Rodas*, No. 2959, 2019 Md. App. LEXIS 720, at \*12 (Md. Ct. Spec. App. Aug. 22, 2019) (finding that the child was neglected by their parents even where the parents loved and cared for the child but simply could not protect him from gang violence nor care for him due to their failing health); *Matter of Sara D. v. Lassina D.*, 206 A.D.3d 553, 553 (N.Y. App. Div. 2022) (finding that the child was neglected by her father where he did not provide for her medical, emotional, or financial needs); *Matter of Wilson A.T.Z.*, 147 A.D.3d 962, 964 (N.Y. App. Div. 2017) (finding neglect where mother received financial assistance for child’s clothing and education, but failed to use assistance for child’s benefit).

<sup>253</sup> *M.F.R.V. v. J.R.M.*, No. 2495, 2019 Md. App. LEXIS 226, at \*14 (Md. Ct. Spec. App. Mar. 15, 2019) (unreported); *B.R.L.F. v. Zuniga*, 200 A.3d 770, 777-78 (D.C. 2018); *In re Pedro J.C.*, 105 A.3d 943, 955 (Conn. App. Ct. 2014); *In re Avila Luis*, 114 N.E.3d 855, 857 (Ind. Ct. App. 2018).

<sup>254</sup> *M.F.R.V. v. J.R.M.*, No. 2495, 2019 Md. App. LEXIS 226, at \*8 (Md. Ct. Spec. App. Mar. 15, 2019) (unreported).

<sup>255</sup> See *Matter of Ena S.Y.*, 140 A.D.3d 778, 780 (N.Y. App. Div. 2015) (finding the SIJS petitioner child had been neglected when she witnessed her father kick and hit her mother), *overruling Matter of Martha R.Y. v. Antonio S.*, 2015 N.Y. Misc. LEXIS 2352, at \*11 (N.Y. Fam. Ct. July 1, 2015) (finding that reunification was still viable with father despite the violent incident with the child); *Matter of Lucas F.V.*, 169 A.D.3d 802, 804 (N.Y. App. Div. 2019) (holding that acts of domestic violence perpetrated by the father in the presence of the child constituted neglect); *Ramirez v. Bautista*, No. A-19-908, 2020 Neb. App. LEXIS 159, at \*5, 15 (Neb. Ct. App. May 26, 2020) (finding neglect where the children had witnessed their father verbally and physically abuse their mother).

<sup>256</sup> See *Matter of Agustin E. v. Luis A.E.S.*, 168 A.D.3d 840, 842 (N.Y. App. Div. 2019) (holding that a presumption of child neglect is created for SIJS purposes where the child’s father repeatedly misused alcoholic beverages to the extent of “producing a state of intoxication”); *Matter of Grechel L.J.*, 167 A.D.3d 1011, 1013 (N.Y. App. Div. 2018) (finding that child’s “physical, mental, or emotional condition was impaired or in imminent danger of becoming impaired” by father’s misuse of alcohol and related verbal aggression).

abandonment.<sup>257</sup> In *Guardianship of Saul H.*, the Supreme Court of California held that the lower court had erred in not considering whether reunification would be practicable based on the provisions Saul had cited to that did not explicitly define abuse, neglect, or abandonment, but nevertheless may have provided a “similar basis” for a nonviability of reunification determination.<sup>258</sup> Specifically, the Supreme Court of California found that Saul’s parents’ inability to protect him from gang violence constituted a “similar basis” for which reunification is not viable, as Saul would suffer “serious physical harm” if returned to his parents as a result.<sup>259</sup>

For example, being present in a state without proper care or custody is similar to neglect. In some states, this is a factor included in the state’s neglect statute, while in other states this factor is found in another statute separate from the definition of neglect.<sup>260</sup> In another example, a parent’s death may be considered a “similar basis” for finding that reunification with a parent is not viable because this leaves the child without any form of emotional or financial support from the deceased parent.<sup>261</sup> As noted in the previous section, some courts have also found that a parent’s death constitutes abandonment.<sup>262</sup>

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<sup>257</sup>*In re Dany. G.*, 117 A.3d 650, 657 n.6 (Md. Ct. Spec. App. 2015); 6 USCIS-PM J.3(A)(1), available at <https://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6>.

<sup>258</sup> *Guardianship of Saul H.*, 514 P.3d 871, 886 (Cal. 2022)

<sup>259</sup> *Guardianship of Saul H.*, 514 P.3d 871, 888 (Cal. 2022)

<sup>260</sup> See Rafaela Rodrigues & Leslye E. Orloff, *Appendix L: State Law Definitions of Abandonment*, SIJS Bench Book at 5 (Sept. 20, 2017), available at <http://niwaplibrary.wcl.american.edu/pubs/appendix-l-abandonment-of-children-statutes-definitions/>; Tolulope Adetayo, Chloe Canetti, and Leslye E. Orloff, *Appendix M: State Law Definitions of Child Neglect*, SIJS Bench Book (Oct. 2, 2017), available at <http://niwaplibrary.wcl.american.edu/pubs/appendix-m-state-law-definitions-of-child-neglect-chart/>.

<sup>261</sup> *O.T. v. N.B.*, No. 378, 2020 Md. App. LEXIS 1174, at \*9 (Md. Ct. Spec. App. Dec. 11, 2020) (“As a result of F.A.’s death, the reunification . . . is an impossibility.”) (unreported); *N.J. Div. of Child Prot. & Permanency v. R.L.S.*, No. A-1280-21, 2022 N.J. Super. Unpub. LEXIS 1615, at \*9 (N.J. Super. Ct. Sept. 6, 2022) (holding that reunification is not viable where the parent sent their child to the United States unaccompanied and then refused to care for them) (unpublished); *Matter of Guardianship of Jose YY.*, 158 A.3d 200, 202 (N.Y. App. Div. 2018) (concluding that a “similar basis” is found when “both parents [were] deceased making reunification impossible); *Carlos A.M. v. Maria T.M.*, 141 A.D.3d 526, 528 (N.Y. App. Div. 2016) (finding that reunification was not viable due to the parent’s death); *Matter of Sara D. v. Lassina D.*, 206 A.D.3d 553, 553 (N.Y. App. Div. 2022); *Matter of Jose S.S.G.*, 217 A.D.3d 864, 867 (N.Y. App. Div. 2023) (finding reunification is not viable nor possible due to the father’s death); *Matter of Emma M.*, 74 A.D.3d 968, 970 (N.Y. App. Div. 2010); *Matter of Denia M.E.C. v. Carlos R.M.O.*, 161 A.D.3d 853, 853 (N.Y. App. Div. 2018) (finding that reunification is not possible due to father’s death); *Matter of Carlos A.M. v. Maria T.M.*, 141 A.D.3d 526, 528 (N.Y. App. Div. 2016) (finding that reunification is not possible due to father’s death); *Matter of Jose YY.*, 158 A.D.3d 200, 202 (N.Y. App. Div. 2018) (finding that reunification is impossible due to both parents’ death); *Anagislena Ruano Cano v. Guillen*, No. A-2886-21, 2022 N.J. Super. Unpub. LEXIS 2062, at \*10 (N.J. Super. Ct. App. Div. Nov. 4, 2022) (remanding to the trial court to consider whether the father’s death constitutes a “similar basis” to abuse, abandonment, and neglect under state law) (unpublished).

<sup>262</sup> See *supra* Part (V)(E)(i), *Abandonment*.

## F. Drafting the Order<sup>263</sup>

When issuing SIJS judicial determinations, state court judges must make first-level factual findings as to each required judicial determination and include these in their order.<sup>264</sup> It is not sufficient for the state court juvenile judge to simply make general conclusory statements finding that the evidence introduced did or did not support the relevant SIJS judicial determinations.<sup>265</sup> Furthermore, USCIS will reject a “mere template order,” as this is not sufficient for issuing SIJS judicial determinations because these determinations must be accompanied by supporting findings of fact according to the SIJS statute.<sup>266</sup> This does not mean that the state juvenile court must recount every detail of the case. It simply means that federal government requires a factual basis for the court’s findings, as it relies on the state juvenile court to make an informed decision on the SIJS petition.<sup>267</sup>

In the state court order, the state juvenile or family court judges *must* be sure to explain their state law best interests factors so that USCIS is able to fully understand the factors the court considered. This helps USCIS properly evaluate the SIJS petition and the state laws that the court applied to the facts of the case when issuing the SIJS judicial determinations. Additionally, state court judges must cite to the applicable state law used to support their findings.<sup>268</sup>

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<sup>263</sup> This section discusses the law on SIJS dictating what should go in an SIJS order with the three judicial determinations. For a more detailed explanation of what a state juvenile court judge should include in the SIJS order, see Leslye E. Orloff & Hannah Bridges, *Answers to Questions from State Court Judges on the 2022 Special Immigrant Juvenile Status (SIJS) Regulations* at 1 (Apr. 4, 2023), available at <https://niwaplibrary.wcl.american.edu/pubs/sijs-q-and-a>; see also 6 USCIS.PM J.3(A)(1), available at <https://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6>. For a model outline of an SIJS order containing the three required judicial terminations and the supporting findings of fact, see *Selvia Amarilis Machado v. Perez*, No. 16-008462-001, 2016 Pa. Dist. & Cnty. Dec. LEXIS 12060, at \*2 (Pa. D. & C. Oct. 21, 2016); *Lopez v. Guardado*, No. FD-15-9494, 2015 Pa. Dist. & Cnty. Dec. LEXIS 13700, at \*2 (Pa. D. & C. Dec. 22, 2015).

<sup>264</sup> *Martinez v. Sanchez*, 180 A.3d 158, 163 (Md. Ct. Spec. App. 2017); *Ramos v. Patriz*, No. 1809, 2018 Md. App. LEXIS 573, at \*6 (Md. Ct. Spec. App. June 14, 2018) (unreported).

<sup>265</sup> *Martinez v. Sanchez*, 180 A.3d 158, 163 (Md. Ct. Spec. App. 2017).

<sup>266</sup> INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J); 6 USCIS-PM J.3(A)(1), available at <https://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6> (“Orders that just mirror or cite to federal immigration law and regulations are not sufficient.”); *Immigration Relief for Abused, Abandoned, or Neglected Children: Special Immigrant Juvenile Classification*, USCIS at 2 (Jan. 2024), available at <https://niwaplibrary.wcl.american.edu/pubs/uscis-sij-brochure-2024>; see also *Martinez v. Sanchez*, 180 A.3d 158, 162 (Md. Ct. Spec. App. 2017); *In re Danely C.*, No. M2016-02054-COA-R3-JV, 2017 Tenn. App. LEXIS 773, at \*12-13 (Tenn. Ct. App. Nov. 29, 2017); *In re J.A.*, No. 2653, 2017 Md. App. LEXIS 1082, at \*12 (Md. Ct. Spec. App. Oct. 30, 2017).

<sup>267</sup> INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J); *In re Dany. G.*, 117 A.3d 650, 656 (Md. Ct. Spec. App. 2015); see also *Romero v. Perez*, 205 A.3d 903, 909 (Md. 2019); *In re D.V.L.*, No. 3058, 2019 Md. App. LEXIS 749, at \*11 (Md. Ct. Spec. App. Aug. 30, 2019) (unreported); *In re Guardianship of Xitumul*, 137 N.E.3d 945, 954 (Ind. Ct. App. 2019); *In re Domingo C.L.*, No. M2016-02383-COA-R3-JV, 2017 Tenn. App. LEXIS 590, at \*12 (Tenn. Ct. App. Aug. 30, 2017).

<sup>268</sup> See *O.C. v. Superior Court*, 44 Cal. App. 5th 76, 85 (2019); *Argueta v. Santos*, 166 A.D.3d 608, 610 (N.Y. App. Div. 2018) (amending the Family Court’s order after USCIS deemed it deficient in part for failure to support its findings with state law); see also *Immigration Relief for Abused, Abandoned, or Neglected Children: Special Immigrant Juvenile Classification*, USCIS at 2 (Jan. 2024), available at <https://niwaplibrary.wcl.american.edu/pubs/uscis-sij-brochure-2024>.



It is important that state juvenile and family court judges make separate findings for *each* parent in their state court order containing the three required judicial determinations. Even if the SIJS petitioner is only alleging abuse, abandonment, or neglect by one parent, the state juvenile court must still make findings as to each parent in their SIJS order.<sup>269</sup> Including findings of fact and conclusions of law as to the placement, viability of reunification, and best interests of the child ensures that USCIS will “have sufficient information to apply 8 U.S.C.A. § 1101(a)(27)(J) as it sees fit . . . .”<sup>270</sup> Regardless of the outcome of the first analysis as to one parent, the state juvenile court must still engage in the same analysis as to the second parent.

## G. Delinquency & Dependency Proceedings

### i. Delinquency<sup>271</sup>

A state juvenile court may also issue SIJS judicial determinations in the course of juvenile delinquency proceedings. As explained above, although “delinquency” does not appear in the SIJS regulations, this is because DHS thoughtfully decided not to enumerate a list of specific types of proceedings wherein SIJS judicial determinations could be issued so as not to “create a list that may be interpreted as exhaustive.”<sup>272</sup> However, by defining “dependency” on the juvenile court to include “commitment,” it is clear that the federal government intended for the SIJS statute and federal regulations to reach juvenile wards of the state.<sup>273</sup> In its 2024 brochure for state courts titled *Special Immigrant Juvenile Classification, Immigration Relief for Abused, Abandoned, or Neglected Children, Information for Juvenile Court Judges and Child Welfare Professionals*, USCIS stated:

For SIJ purposes, a juvenile court is a U.S. court that has jurisdiction under state law to make judicial determinations about the dependency and/or care and custody of juveniles. Examples of courts that may be considered juvenile courts include: dependency, delinquency, probate, guardianship, orphan, youthful offender, and family courts.<sup>274</sup>

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<sup>269</sup> *C.M. v. M.N.M.*, No. A-4209-14T1, 2016 N.J. Super. Unpub. LEXIS 396, at \*7 (N.J. Super. Ct. App. Div. Feb. 24, 2016) (unpublished); *R.E.-E. V. E.P.-V.*, No. A0590-14T2, 2016 N.J. Super. Unpub. LEXIS 56, at \*5 (N.J. Super. Ct. App. Div. Jan. 12, 2016) (unpublished); *In re S.F.A.C. v. Dep’t of Children & Families*, 182 So.3d 745, 749 (Fla. Dist. Ct. App. 2015) (Salter, J., dissenting) (“[S]pecific written findings as to each parent and each legal claim are important for the subsequent evaluation of an immigrant juvenile’s ability to obtain federal relief.”); *Matter of Sara D. v. Lassina D.*, 206 A.D.3d 553, 553 (N.Y. App. Div. 2022) (finding that the family court erred in only making findings of fact with regard to the child’s mother and not making any findings of fact as to reunification with the child’s father).

<sup>270</sup> *H.S.P. v. J.K.*, 121 A.3d 849, 860 (N.J. 2015); see also *Martinez v. Sanchez*, 180 A.3d 158, 162-63 (Md. Ct. Spec. App. 2017).

<sup>271</sup> See Leslye E. Orloff, *Chapter V-5 Quick Reference Guide: Special Immigrant Juvenile Status Findings in Delinquency Proceedings* (Dec. 17, 2017), available at <https://niwaplibrary.wcl.american.edu/pubs/chapter-v-5-delinquency-quick-reference>.

<sup>272</sup> See *supra* Part (V)(A), *Defining “Juvenile Court.”*

<sup>273</sup> See *Special Immigrant Juvenile Petitions*, 87 Fed. Reg. 13069 (Mar. 8, 2022) (New 8 C.F.R. 204.11(c)); INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J); see also *Leslie H. v. Superior Court*, 224 Cal. App. 4th 340, 349 (Cal. Ct. App. 2014); *In re J.C.*, No. C068667, 2015 Cal. App. Unpub. LEXIS 869, at \*9 (Cal. Ct. App. Feb. 6, 2015).

<sup>274</sup> See *Immigration Relief for Abused, Abandoned, or Neglected Children: Special Immigrant Juvenile Classification*, USCIS at 2 (Jan. 2024), available at <https://niwaplibrary.wcl.american.edu/pubs/uscis-sij-brochure-2024>.

Several state courts have found that a child subject to delinquency proceedings is “dependent” on the court for SIJS purposes.<sup>275</sup> This is consistent with both the USCIS brochure and the USCIS Policy Manual which specifically states that both “juvenile” and “youthful offender” courts may meet the definition of a juvenile court for SIJS purposes, both of which in many states, by definition, have jurisdiction over delinquency cases.<sup>276</sup>

When an SIJS eligible child who has been abused, abandoned, or neglected by one or both of their parents comes to the court’s attention in a youthful offender or delinquency proceeding due to the child’s behavior, which may have included committing an act that constitutes criminal activity under state law, state courts have ruled that it is not the role of the state juvenile court to assess or opine on whether the child is or should be disqualified from receiving SIJ classification based on the child’s actions.<sup>277</sup> In the California case *Leslie H. v. Superior Court*, the California Court of Appeals overturned the ruling of a juvenile court that had wrongly refused to issue SIJS determinations in the course of delinquency proceedings because the judge felt that issuing SIJS determinations in juvenile delinquency proceedings would incentivize undocumented minors to commit crimes.<sup>278</sup> On the contrary, the California Court of Appeals held that “far from incentivizing illegal conduct,” issuing SIJS determinations and increasing “an alien minor’s chance for a permanent home in the United States may inspire his or her reform . . . .”<sup>279</sup> Similarly, the Maryland Court of Special Appeals overturned the juvenile court, finding that the judge’s reasoning was a “misplaced policy consideration[]” outside the scope of the juvenile court’s role.<sup>280</sup>

These court rulings are consistent with the fact that juvenile adjudications are *not* considered “convictions” for immigration law purposes.<sup>281</sup> Furthermore, the SIJS statute makes several criminal-inadmissibility grounds waivable for SIJS child-petitioners.<sup>282</sup> Together, these special legal protections for SIJS children demonstrate that both Congress and DHS intended

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<sup>275</sup> See *Leslie H. v. Superior Court*, 224 Cal. App. 4<sup>th</sup> 340, 350 (Cal. Ct. App. 2014); *State v. Luis G.*, 764 N.W.2d 648, 656 (Neb. Ct. App. 2009); *In re Mario S.*, 954 N.Y.S.2d 843, 849 (N.Y. Fam. Ct. 2012); *In re K.O.-T.*, No. 2047, 2017 Md. App. LEXIS 1206, at \*9 (Md. Ct. Spec. App. Dec. 6, 2017) (unreported); but see *In re D.A.T.*, No. 14AP-763, 2015 WL 1852811, at \*2 (Ohio Ct. App. Apr. 23, 2015) (holding that SIJS was not intended to “reward a juvenile who has committed felonious activity.”) (unreported).

<sup>276</sup> 6 USCIS-PM J.2(C); see also *Immigration Relief for Abused, Abandoned, or Neglected Children: Special Immigrant Juvenile Classification*, USCIS at 2 (Jan. 2024), available at <https://niwaplibrary.wcl.american.edu/pubs/uscis-sij-brochure-2024> (listing “delinquency” as a proper juvenile court proceeding.”).

<sup>277</sup> See *Special Immigrant Juvenile Classification, Immigration Relief for Abused, Abandoned, or Neglected Children, Information for Juvenile Court Judges and Child Welfare Professionals*, USCIS (2024), available at <https://niwaplibrary.wcl.american.edu/pubs/uscis-sij-brochure-2024>; but see *Matter of Keanu S.*, 167 A.D.3d 27, 33-34 (N.Y. App. Div. 2018) (holding that a child is not dependent on the juvenile court in the course of delinquency proceedings because such a child is “not an intended beneficiary of the SIJS provisions”).

<sup>278</sup> *Leslie H. v. Superior Court*, 224 Cal. App. 4<sup>th</sup> 340, 346 (Cal. Ct. App. 2014); *State v. Luis G.*, 764 N.W.2d 648, 656 (Neb. Ct. App. 2009).

<sup>279</sup> *Leslie H. v. Superior Court*, 224 Cal. App. 4<sup>th</sup> 340, 351 (Cal. Ct. App. 2014); *State v. Luis G.*, 764 N.W.2d 648, 656 (Neb. Ct. App. 2009).

<sup>280</sup> *Leslie H. v. Superior Court*, 224 Cal. App. 4<sup>th</sup> 340, 350 (Cal. Ct. App. 2014); *State v. Luis G.*, 764 N.W.2d 648, 656 (Neb. Ct. App. 2009).

<sup>281</sup> See *In re Matter of Devison-Charles*, 22 I&N Dec. 1362, 1365-66 (BIA 2000); *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981).

<sup>282</sup> See INA § 245(H)(2)(A)-(B).

that SIJS eligible children be provided this important opportunity to turn their life around by obtaining SIJS judicial determinations that will afford them a path to lawful permanent residence and promote their wellbeing and stability. Therefore, in the course of delinquency proceedings, state juvenile court judges have jurisdiction and should issue SIJS judicial determinations when doing so is in the best interest of the child.

ii. Dependency<sup>283</sup> & The Federal-Consent Rule

Dependency proceedings are also an appropriate forum for SIJS petitioners to obtain the requisite SIJS judicial determinations.<sup>284</sup> The USCIS Policy Manual provides that:

The term dependent child, as used in state child welfare laws, generally means a child subject to the jurisdiction of a juvenile court because the court has determined that allegations of parental abuse, neglect, abandonment, or similar maltreatment concerning the child are sustained by the evidence and are legally sufficient to support state intervention on behalf of the child.<sup>285</sup>

State courts that refused to issue SIJS determinations in the course of dependency proceedings because they believed that another type of family court proceeding, such as custody, was a more appropriate forum to make such a request were overturned on appeal.<sup>286</sup> When a child is without a parent and legal custodian, regardless of whether a caregiver is currently supporting the child, dependency proceedings are an appropriate forum for the child to request SIJS determinations.<sup>287</sup> While some state court judges have expressed their belief that the use of a dependency petition to obtain SIJS determinations is merely a “back door” route to naturalization, the Florida Court of Appeal, consistent with federal law,<sup>288</sup> expressly rejected this extraneous policy argument, finding that:

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<sup>283</sup> Meaghan Fitzpatrick & Leslye E. Orloff, *Chapter V-6 Quick Reference Guide: Special Immigrant Juvenile Status Findings in Dependency Proceedings* (Dec. 18, 2017), available at

<https://niwaplibrary.wcl.american.edu/pubs/chapter-v-6-dependency-quick-reference>.

<sup>284</sup> INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11(a) (2023).

<sup>285</sup> 6 USCIS.PM J.2(C)(1), available at <https://niwaplibrary.wcl.american.edu/pubs/appendix-d1-uscis-sijs-policy-manual-full-vol-6>.

<sup>286</sup> See e.g., *In the Interest of T.J.*, 59 So.3d 1187, 1190 (Fla. Dist. Ct. App. 2011) (SIJS petitioner child’s mother had died; child’s father had left the family when the child was an infant; child’s aunt volunteered to care for child); *F.L.M. v. Dep’t of Children & Families*, 912 So.2d 1264, 1266 (Fla. Dist. Ct. App. 2005) (SIJS petitioner was an orphan whose son’s maternal grandparents voluntarily offered him a place to stay); *L.T. v. Dep’t of Children & Families*, 48 So.3d 928, 930 (Fla. Dist. Ct. App. 2010) (SIJS petitioner was a seventeen-year-old orphan without a legal guardian).

<sup>287</sup> See *In the Interest of T.J.*, 59 So.3d 1187, 1191 (Fla. Dist. Ct. App. 2011) (finding that summary denial to adjudicate dependency applications by undocumented immigrants might incentivize the child’s non-legal caregiver to “truly ‘abandon’ [the child] at a police station or Department office in a misguided effort to obtain a dependency ruling.”); *In re B.G.*, No. 1596, 2017 Pa. Super. Unpub. LEXIS 448, at \*40 (Pa. Super. Ct. Feb. 7, 2017) (unpublished) (affirming the lower court’s declaration of dependency for a SIJS petitioner child without a legal guardian whose parents spoke a rare Mayan dialect and lived in Guatemala without access to mailing services); *In the Interest of H.D.G.H.*, No. A23A1659, 2024 Ga. App. LEXIS 114, at \*5 (Ga. Ct. App. Mar. 12, 2024); *In the Interest of R.E.Z.B.*, No. A23A1775, 2023 Ga. App. LEXIS 561, at \*1 (Ga. Ct. App. Dec. 12, 2023).

<sup>288</sup> See *supra* Part (V)(B), *Role of the Juvenile Court*.

This argument is unavailing, because if a child qualifies for a declaration of dependency under our statutes, the child’s motivation to obtain legal residency status from the United States Attorney General is irrelevant. If federal law grants a right to alien children to regularize their immigration status by first obtaining a state court adjudication of dependency, then there is no basis for failing to declare a child dependent so long as he or she meets the statutory criteria for dependency.<sup>289</sup>

The SIJS statute’s federal-consent rule has also caused confusion for state court judges when SIJS determinations are requested in the course of dependency proceedings. This rule is only relevant to and applicable in state court proceedings when the child is in federal government custody (i.e., the Office of Refugee Resettlement at the U.S. Department of Health and Human Services) or federal foster care and the child needs to come to court to obtain SIJS judicial determinations. The federal-consent rule, found in 8 U.S.C. § 1101(a)(27)(J)(iii)(I) provides that “no juvenile court has jurisdiction to determine the custody status or placement of an alien in the custody of the Secretary of Health and Human Services unless the Secretary of Health and Human Services specifically consents to the jurisdiction.” Based on this rule, some state court judges have previously refused to exercise jurisdiction over a SIJS petitioner child for the purpose of making SIJS judicial determinations or declaring dependency.<sup>290</sup>

However, the United States District Court for the Central District Court of California later made it clear that the federal-consent rule was intended by Congress only to apply to orders issued by a state juvenile court that specifically pertain to custody and placement decisions.<sup>291</sup> “Although the federal-consent rule prohibits the juvenile court from making any changes to custody or placement decisions without the consent of the federal government, it does not reflect congressional intent to wholly eliminate the state court’s jurisdiction to make other types of orders that are in the minor’s best interest.”<sup>292</sup> Therefore, state juvenile courts may exercise concurrent jurisdiction over a SIJS petitioner child in federal custody in the course of dependency proceedings for the purpose of issuing SIJS judicial determinations. Furthermore, a state court is only precluded from declaring dependency of an SIJS petitioner child if “the Attorney General has actual or constructive custody of the child.”<sup>293</sup>

## VI. Conclusion

In cases involving the welfare and health of immigrant children living in the United States who have survived parental abuse, abandonment, neglect, or similar harms prohibited under state law, Congress offered SIJS humanitarian relief to these immigrant children harmed by their parents and turned to state court judges’ expertise for the required SIJS judicial determinations. SIJS judicial determinations are a required prerequisite for obtaining immigration relief, without which an eligible immigrant child cannot apply for SIJS. These state

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<sup>289</sup> *F.L.M. v. Dep’t of Children & Families*, 912 So.2d 1264, 1269 (Fla. Dist. Ct. App. 2005).

<sup>290</sup> *See In re Y.M.*, 207 Cal. App. 4th 892, 904 (Cal. Ct. App. 2012) (overturning the trial court’s denial to issue SIJS determinations when SIJS child petitioner was a trafficking victim in Office of Refugee Resettlement (ORR) custody); *F.L.M. v. Dep’t of Children & Families*, 912 So.2d 1264, 1266 (Fla. Dist. Ct. App. 2005).

<sup>291</sup> *Perez-Olano v. Gonzalez*, 248 F.R.D. 248, 264-66 (C.D. Cal. 2008).

<sup>292</sup> *In re Y.M.*, 207 Cal. App. 4th 892, 911 (Cal. Ct. App. 2012).

<sup>293</sup> *F.L.M. v. Dep’t of Children & Families*, 912 So.2d 1264, 1267-68 (Fla. Dist. Ct. App. 2005).

court orders provide findings of fact and conclusions of law that provide valuable evidence that USCIS uses as part of its adjudication of the immigrant child's SIJS petition.

This article surveyed all of the publicly available SIJS cases issued through the date of this article's publication. Ultimately, this survey has demonstrated that the majority of state courts are issuing decisions that have become settled law and that these courts' decisions are consistent with federal SIJS statutes, the March 2022 USCIS regulations, and USCIS policies and publications on SIJS laws and the SIJS program. Although Congress substantially amended the SIJS statute in 2008 to expand the number of immigrant children eligible for SIJS, this article demonstrates that during the decade and a half after the law passed and before USCIS issued final regulations in 2022, many state courts struggled to issue rulings in SIJS cases that were consistent with the federal SIJS statutes and USCIS policies. Despite this fact, as this article documents, many courts did issue rulings that correctly interpreted and applied federal SIJS laws and issued SIJS judicial determinations that immigrant children who had suffered parental maltreatment could use to file their SIJS petitions with USCIS.

When state courts are asked by parties acting on behalf of SIJS eligible children to issue SIJS judicial determinations, courts should make detailed findings of fact as to the child's maltreatment by the parent and to the parent-child relationship and then apply its state laws, including those governing best interests of the child, to those facts to reach and issue the SIJS statute's required three conclusions of law. In issuing SIJS judicial determinations, it is important for courts to turn to, rely upon, follow the guidance set in, and ensure that their court orders are consistent with federal SIJS statutes and the USCIS' interpretation of these statutes contained in USCIS regulations, policies, and publications. Settled case law that is consistent with federal immigration laws as defined by Congress and USCIS can also provide very useful guidance to state courts issuing SIJS judicial determinations. However, courts considering reliance on other state court's decisions, including those issued within the judge's own state, will need to be wary of and avoid being influenced by decisions that contain, rely upon, are based upon, or use in dicta incorrect legal information about immigration laws and the SIJS program. Courts can easily ascertain whether or not another court decision or other information contained in the ruling the court is crafting is legally accurate by identifying whether it is consistent with current federal immigration law, SIJS statutes, regulations, SIJS regulatory history, and USCIS policies and publications.

Receiving SIJS helps children heal from the trauma of the parent-perpetrated maltreatment they suffered and steers these eligible children toward a path that provides the stability they need to heal and thrive. By issuing the required SIJS judicial determinations that follow both federal SIJS law, as articulated by USCIS and Congress, and the settled national case law discussed in this article, state court judges fulfill their ultimate responsibility of issuing court orders that promote the best interests, health, and welfare of vulnerable immigrant children.