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Battered Immigrant Youth Take the Beat: Special Immigrant Juveniles Permitted to Age-Out of Status

Emily Rose Gonzalez¹

When “S” was only five years old, his father abandoned his family.² Soon after, S’s mother began to release her anger towards S’s father on S, abusing him both physically and emotionally.³ S’s mother would beat S regularly with a cord or rope, leaving his back completely black and blue.⁴ Further, S’s mother was verbally abusive, frequently insulting S and even threatening to kill him.⁵ S also believed that his mother encouraged his older half brother to abuse him.⁶ S’s half brother once knocked him unconscious by throwing a rock at him, and on another occasion, dumped boiling water on S’s legs.⁷ S finally ran away from home and attempted to live with other family members, but they ended up physically abusing him as well.⁸ Ultimately, S managed to make it to the United States (U.S.) where he hopes to receive Special Immigrant Juvenile Status (SIJ status).

Similarly, “T” suffered harsh physical abuse at the hands of her stepfather, beginning at the young age of eight.⁹ Not only did T’s stepfather prevent her from leaving the house, seeing her friends, and attending soccer practice, but he was also verbally and physically violent.¹⁰ When T disobeyed her stepfather, he would beat her with a tree branch or a whip, leaving cuts and bruises on her back and legs for days.¹¹ Although T’s mother knew about the physical and emotional abuse by the stepfather, she did nothing to stop it.¹² With no other family in her home country, T ventured to the U.S.¹³ She too hopes to receive SIJ status.

“R,” a fifteen-year-old Honduran, was also fortunate enough to escape the extreme physical abuse he suffered at the hands of his stepfather.¹⁴ R’s stepfather beat him severely with rods, pieces of wood, and a machete

handle; he also burned him with hot objects.¹⁵ R managed to flee to the U.S. to seek a safe haven, but instead found himself placed in a detention center by Immigration and Customs Enforcement (ICE).¹⁶

Congress created SIJ status so that legal citizenship could be obtained by abandoned, abused, or neglected children. Yet, even though they are eligible, countless children are unable to obtain this status due to an “age-out” predicament. Even if these children are able to apply for SIJ status, getting that status can take years, and sometimes the applications fail because processing time has run out.¹⁷ Applications for SIJ status are lost, some multiple times.¹⁸ At least one attorney has testified to a culture of “no” and passiveness towards SIJ applications. The attorney asserts that at the Department of Homeland Security Immigration Services she was “told by a supervisor she wouldn’t want anybody to take the risk of approving [an SIJ status application] and risk getting fired.”¹⁹ Furthermore, although the lack of aging-out protection undermines the purpose and intent of the SIJ statute, a federal district court recently ruled that the Department of Homeland Security’s (DHS) lack of an age-out regulation is permissible.²⁰

Section I examines the SIJ statute, its history, and the requirements for SIJ status eligibility. It also addresses the age-out phenomenon and the repercussions of aging-out for SIJs. This section also deals with the DHS’s unaccountability and delay in allowing SIJs to age-out of the status that has been specially provided for them by Congress. Currently, no policy or legislation exists to compel DHS or state courts to look into SIJ eligibility.²¹ The section proceeds with a discussion on the differing age requirements for states’ foster care eligibility. It then concludes with a focus on the aftermath of SIJs aging-out and why these children should be given the utmost opportunity to receive the status Congress has specifically reserved for them.

Section II examines the recent district court case *Perez-Olano v. Gonzalez*, where the court held that SIJs can age-out of status. This section argues that *Perez-Olano* was wrongly decided and that, in interpreting the

ultimate purpose of the SIJ statute, the court erroneously interpreted that purpose.

Section III is an examination of legal conventions that provide support for an SIJ's inability to age-out. It argues that the Child Status Protection Act should include SIJs in its list of immigrant children that it prevents from aging-out of legal citizenship opportunities. The section further holds that SIJs, like unaccompanied child asylum-seekers, should be prevented from aging-out because of the two groups' striking similarities. Next, the section demonstrates how SIJs can fulfill all the elements necessary for asylum eligibility. Section III then addresses the shamed reality that the U.S. is not a signatory to the Convention on the Rights of the Child; however, if it were, these youths would be prevented from aging-out in order to bring the statute into accordance with the Convention. Section IV argues that, like other countries, the U.S. should acknowledge that children have special needs; as such, children should be afforded a right to legal representation.

Last, Section V provides recommendations for relieving the SIJ age-out problem and answers why such changes are necessary. To remedy the problems surrounding the aging-out of potential SIJs, the SIJ statute needs to be amended to prevent these children from aging-out, and the *Perez-Olano* case must be challenged and overturned. Allowing an applicant to age-out of SIJ status eligibility is not only wrong because these applicants are some of the most vulnerable and deserving undocumented immigrants in the U.S., but also because this circumstance is inconsistent with other U.S. immigration policies and international law. In addition to revision of the SIJ statute and the *Perez-Olano* decision, SIJ applicants should be appointed representation in order to protect their interests and ensure the timely execution of their applications. SIJ applications should be expedited and not placed in the control of immigration officers, many of whom focus on deportation. Lastly, the U.S. should treat SIJ applicants as unaccompanied asylum-seekers in order to afford these minors the same age-out protection and international recognition as other asylees.

I. SPECIAL IMMIGRANT JUVENILE STATUS

In 1990, Congress added the SIJ status provision to the Immigration and Nationality Act (INA), codified at 101(a)(27)(J) and 8 U.S.C. § 1101(a)(27)(J).²² The SIJ statute provides a means to obtain legal citizenship status for some of the most vulnerable and deserving undocumented immigrants in the U.S.—children abandoned, abused, or neglected by their own families.²³ In 2007, an estimated 1.6 million SIJs (i.e., immigrant children eligible for SIJ status) lived in the U.S., with “at least 110,000 in New York State alone.”²⁴ However, as of 2008, approximately 500 SIJ status applications for permanent residency have been adjudicated by the DHS’s U.S. Citizenship and Immigration Services (USCIS).²⁵

It is imperative that these children’s applications are expedited and heard immediately, and that they receive SIJ status as soon as possible. Without legal status, these children lack rights and benefits. While these children are on the streets or in the underground world of undocumented immigrants, they are ineligible for public benefits such as medical care and student loans.²⁶ SIJ applicants also cannot legally apply for employment, and it is nearly impossible for them to legally pursue an education beyond high school.²⁷ Despite the large group of children that come to the U.S. seeking refuge from their abusive past and the beginning of a better life, SIJ status remains relatively unknown, seemingly complex, and underutilized.²⁸ Given these circumstances, this article focuses on advocating that an SIJ should not be allowed to age-out of eligibility if his or her application were submitted when the age requirement was fulfilled (i.e., while the SIJ was under the age of eighteen or twenty-one, depending on applicable state law). Statutory protections need to be put in place to prevent this occurrence.

A. Special Immigrant Juvenile Eligibility

To be eligible for SIJ status, the child must meet the following criteria: (1) the child must be under the jurisdiction of the juvenile court or the

probate and family court due to family abuse, neglect, or abandonment; (2) the child must be “deemed eligible for long-term foster care,” meaning the child cannot be reunified with his or her family because of past abuse, neglect, or abandonment, and that reunification efforts have ceased; (3) the court must determine that it is not in the child’s best interest to return to the child’s home country; and (4) the court must issue a signed order stating that the child meets the above criteria for SIJ status.²⁹ Further, the child must also meet the requirements for lawful permanent residence (LPR) status.³⁰ As such, the child must not have a criminal conviction, a history of drug use or prostitution, HIV/AIDS or other certain physical or mental conditions, or other immigration violations. If any of these conditions are present, the SIJ application may be denied.³¹

Additionally, as there is a unique administrative mechanism set by Congress, SIJ applicants must go through multiple courts. The process requires the cooperation of state and local child welfare systems, state juvenile courts, and ICE.³² To apply for SIJ status, children must go through both ICE and the state juvenile dependency system.³³ The law gives state courts the power to determine the minor’s needs and requires that ICE rely on the state juvenile or family court’s findings.³⁴ Afterward, ICE determines the child’s eligibility based upon the state court’s finding.³⁵ One author notes that, given these entangled responsibilities without clear roles for ICE and state courts, Congress has set the stage for conflict between federal and state governments.³⁶ This tension adds to ongoing disputes between federal and state agencies. For example, normally, ICE has the primary responsibility for verifying and determining the underlying facts supporting an immigrant’s petition for relief.³⁷ However, under the SIJ statute, ICE must defer to the findings of the state court, and ICE has no authority to review the state court’s determinations.³⁸ This complicated network places a great burden on the children and their legal representatives, and causes additional time and delay in the application process.

B. The “Age-Out” Predicament

Due to the workings, intricacies, and other problems with the SIJ statute, countless children in the child welfare system ultimately “age-out” of eligibility for SIJ status. There are a broad range of reasons why children age-out: lack of legal representation; nonrecognition by legal authorities of a child’s eligibility early on; a child’s unawareness of the availability of SIJ status; or aging-out of a child while his or her application is pending.³⁹ Many children age-out of the family court and foster care systems before anyone recognizes their eligibility for SIJ status.⁴⁰ Routinely, neither agency caseworkers, legal guardians, nor judges determine the legal status of these children upon first contact with them.⁴¹ Moreover, there is no legislation that requires foster care services to make these inquiries, even though they are responsible for caring for these children.

Even more troubling, SIJs are allowed to age-out of their eligibility because there is nothing in the current SIJ statute that obligates the courts to expedite or hear SIJ cases before the children age-out. First, in order to be statutorily eligible for SIJ status the child must be dependent on a state court at the time the SIJ petition or SIJ-based adjustment of status application is decided. Hence, USCIS will automatically revoke that status when the youth ceases to be a dependent of the state.⁴² Generally, state courts terminate jurisdiction when the child reaches eighteen or nineteen-years of age (a few states care for children up to the age of twenty-one), depending on the age limit of child dependency for that particular state. If USCIS refuses to adjudicate a statutorily-eligible youth’s petition by the time the dependency order terminates, the minor ages-out of the benefit.⁴³ Furthermore, in order for the immigration judge to adjudicate the SIJ’s application, DHS must complete a security investigation on the child; however, this often takes months, leaving children to age-out in the meantime.⁴⁴ Hence, by merely holding onto an application, an immigration officer can easily defeat a child’s claim for SIJ status, as nothing in the SIJ statute *requires* that an application be adjudicated before the applicant ages-

out.⁴⁵ Even if not done intentionally, this phenomenon happens time and time again due to the backlogged and increasingly over-loaded immigration courts.⁴⁶

Many advocates have attempted to bring the age-out problem to the forefront of Congress's and the courts' attention; however, they have failed to receive a favorable response. For example, the Columbia Law School Child Advocacy Clinic sent a letter to U.S. House Representative Jerrold Nadler, urging him to advocate the ending of aging-out of SIJ status.⁴⁷ The Clinic pointed out to Nadler that it is often difficult to identify a young person as undocumented, or to obtain documents necessary to apply for SIJ status before aging-out.⁴⁸ Additionally, the Immigration Prof Blog has called for advocates who know of children in danger of aging-out to join together to call this problem to the attention of the federal courts (this summons ultimately led to the recent case *Perez-Olano v. Gonzalez*, subsequently discussed).⁴⁹

Opponents to the proposition of allowing an SIJ's age to toll (i.e., stop the child's age at the time the application is filed) argue that the SIJ statute does not provide for "infinite eligibility."⁵⁰ Rather, the SIJ statute allows for SIJs to age-out.⁵¹ These opponents argue that this position is supported by legislative history; in 1993, the age-out regulations were enacted, and when Congress amended the statute in 1997 it did not disturb the age-out regulations.⁵² Further, the regulations hold that this status is for juveniles that are dependent on the juvenile court and the state; once such dependency is terminated, these juveniles are no longer deserving of the status.⁵³

However, due to the suffering and dire consequences these youths face if they age-out of this status, the SIJ statute's age-out requirement needs to be reformed to allow an applicant's age to toll instead of aging-out of the program. The court has misinterpreted the statute and has ignored the crucial purpose of the statute as clearly intended by Congress. Numerous other INA provisions allow a child's age to toll, thus preventing the child from aging-out. However, SIJs were excluded from the Child Status

Protection Act's list of immigrant youths that are protected from aging-out, even though SIJs are some of the most vulnerable and deserving immigrant youths in the U.S. The ability of the USCIS to merely delay a juvenile immigrant's application until the juvenile has exceeded the age limit is unacceptable. The SIJ statute needs to be interpreted differently because, as it currently stands, the USCIS has discretion to hold onto the juvenile's petition until the juvenile ages-out of eligibility, causing extreme hardship and jeopardizing the lives of these "specially protected" juveniles.

C. State-to-State Foster Care Age Requirements

Some SIJs age-out of foster care sooner than other SIJs because states vary as to when children age-out of foster care or state dependency. In some states, children age-out of foster care at eighteen and in others, at twenty-one. For example, in Florida, a state with one of the nation's largest immigrant populations, state law defines a child as, "any unmarried person under the age of 18 . . . alleged to be dependent, in need of services, or from a family in need of services."⁵⁴ On the other hand, in the mid-1980s, New York (also with a large immigrant population) raised its foster care age limit to twenty-one in response to advocates' calling for a higher age.⁵⁵ New York is just one in a handful of states that maintains responsibility for children in foster care until the age of twenty-one.⁵⁶

This variance in state law is critical to SIJs, as they are only eligible for status under the current law as long as they are a dependent of the state.⁵⁷ Hence, some youths will age-out sooner than others and therefore lose their eligibility sooner. Thus, it is even more important for SIJs living in states where the age limit is eighteen for SIJ-status eligibility, to begin their application process as soon as possible, and therefore be protected from aging-out. This inconsistency and geographically-determined unequal treatment represents one more reason why the SIJ program should not adhere to a strict requirement for state dependency, and instead should allow for tolling once a qualified applicant submits his or her application.

D. The Aftermath of Aging-out

Without legal status to be in the U.S., an SIJ cannot receive public benefits, such as medical care, student loans, welfare, or other financial benefits.⁵⁸ Furthermore, these youths cannot legally apply for a job.⁵⁹ Without protection from aging-out, potential SIJs will find themselves members of two at-risk social groups: undocumented immigrants living in the U.S. and unsupported ex-foster care recipients.

Youths aging-out of foster care often find themselves worse off than before. Many advocates are pushing all states to raise their foster care age limits to twenty-one because most eighteen-year-olds are still not ready or able to be self-sufficient.⁶⁰ Currently, an estimated twenty thousand children age-out of foster care every year;⁶¹ within two to four years of aging-out, 25 percent are homeless, 40 percent are on public assistance, and 50 percent are unemployed.⁶² Furthermore, about 25 percent of all aged-out males will have been incarcerated and more than 50 percent of all females will have a child.⁶³ For example, in the state of Vermont, the Department of Corrections's records show that the fastest growing group of inmates is that between the ages of eighteen and twenty-one. Additionally, children previously in state custody have a disproportionately higher rate of substance abuse, premature pregnancy, and mental health issues than the rest of the general state population.⁶⁴ One study, the Midwest Evaluation of the Adult Functioning of Former Foster Youth, shows that 90 percent of employed aged-out foster youths were making less than \$10,000 per year.⁶⁵

It is important to give potential SIJs a greater opportunity to gain citizenship status. Overcoming barriers already faced by aged-out foster youths is hard enough. However, the struggle to sustain and better one's life without citizenship, living in the underground world that many non-status immigrants are forced to live in, is much more difficult. Furthermore, by granting potential SIJs a fair chance at status rather than allowing them to age-out as the result of administrative delays, Congress would create an

opportunity for those children to better their lives by attending college and gaining legal employment.

II. *PEREZ-OLANO V. GONZALEZ*

The U.S. District Court's January 2008 decision in *Perez-Olano v. Gonzalez* destroys the opportunity for some SIJs to seek refuge in the U.S. In *Perez-Olano*, the court upheld the age-out provision of the SIJ statute.⁶⁶ The plaintiffs were immigrant youths who had "been denied specific consent to state court jurisdiction for [an] SIJ-predicate order, denied SIJ status or SIJ-based adjustment of status pursuant to the 'age-out regulations,' and/or were unable to apply for SIJ status or SIJ-based adjustment of status pursuant to the removal regulations."⁶⁷

The plaintiffs brought a class action suit challenging government policies, practices, and regulations with respect to the SIJ provisions of the INA.⁶⁸ The plaintiffs made three main allegations against the government. First, the plaintiffs challenged the regulation enacted by the Attorney General which enables an SIJ applicant to age-out of eligibility if the child turns twenty-one-years-old before being granted SIJ status or SIJ-based adjustment of status, or if the child is no longer a dependent on the state court or no longer eligible for long-term foster care.⁶⁹ Second, the plaintiffs challenged the government's policy requiring in-custody minors to obtain ICE's specific consent for an SIJ-predicate order, on the grounds that such orders do not "determine the custody status or placement" of an in-custody minor.⁷⁰ Third, the plaintiffs challenged several regulations that apply to SIJs in removal proceedings, arguing that the regulations unlawfully deny SIJs adjudication of their adjustment of status applications.⁷¹ As to the three challenges, the court granted the plaintiff's motion in part and denied it in part.⁷² Although the court ruled in the youths' favor as to the specific consent claim, the court denied the other two claims, upholding the current age-out provision.⁷³

In order to determine whether the youths could bring a class action, the plaintiffs had to meet the requirements of Rule 23 of the Federal Rules of Civil Procedure.⁷⁴ In legal parlance, class representation exists upon a showing of numerosity, commonality, typicality, or adequacy, respectively.⁷⁵

Here, the plaintiffs proposed three subclasses for each of the three claims brought. One such subclass was the “age-out subclass.”⁷⁶ The plaintiffs identified the “age-out subclass” as “youth[s] whose petitions for SIJ classification [d]efendants deny or revoke pursuant to 8 C.F.R. §§ 204.11(c)(1) or (5), or 205.1(a)(3)(iv)(A), (C), or (D).”⁷⁷

In trying to achieve class certification, the plaintiffs in *Perez-Olano* simultaneously demonstrated why SIJs were in need of legal protection due to their disadvantaged circumstances and the obstacles they faced due to delay by DHS. First, as to the “numerosity” requirement for the age-out subclass, the plaintiffs argued that the size of the subclass was uncertain because the government does not maintain records of the number of persons that submit SIJ applications and those applications are subsequently denied or left undecided once the applicant ages-out.⁷⁸ The defendants provided support for this contention by declaring that the government has “not tracked the number of persons denied SIJ classification or SIJ-based adjustment of status due to the age-out regulations.”⁷⁹ However, the plaintiffs did make an approximation based upon the government’s estimate of 2,258 SIJ applications filed between 2000 and 2006.⁸⁰ The plaintiffs proffered that approximately 375 SIJ applications are filed annually.⁸¹ The plaintiffs also noted that in 1990, the majority of detained immigrant juveniles were sixteen- or seventeen-years-old, and hence a majority of these applicants were on the verge of aging-out from SIJ eligibility.⁸²

The plaintiffs also offered declarations of immigration attorneys to support their argument. The declarations represented that there were long delays in the adjudication of SIJ applications and that there were many instances of SIJ-eligible youths losing eligibility due to the age-out

regulations.⁸³ In addition, the plaintiffs provided testimony from attorneys that had worked with immigrant children, many of whom had sought SIJ classification and adjustment of status subject to the age-out regulations. Based on the approximate statistics and information from immigration attorneys, the plaintiffs maintained that hundreds of abused, abandoned, and neglected youths are subject to the age-out regulations.⁸⁴ On the weight of this evidence, the court found that the numerosity element was satisfied.

To satisfy the “commonality” requirement of Rule 23, the plaintiffs argued that common legal issues united the age-out subclass.⁸⁵ The plaintiffs alleged that the defendants had promulgated and adhered to age-out regulations which are inconsistent with the SIJ statute.⁸⁶ Additionally, the youths claimed that the defendants unreasonably delayed decisions on SIJ and SIJ-based adjustment of status applications, causing class members to age-out from eligibility.⁸⁷ The court ultimately held that the youths’ claims established commonality as the group presented common legal issues independent of class members’ factual differences.⁸⁸

Under the “typicality” requirement, the plaintiffs claimed that the defendants had adopted policies violating the INA by requiring specific consent if the state court did not alter “custody status or placement.”⁸⁹ The plaintiffs further alleged that the defendants had a common policy of delaying adjudication of SIJ applications until the youths age-out of eligibility, creating a typicality of the class.⁹⁰ The plaintiffs also alleged that class members shared a specific injury—loss of SIJ eligibility.⁹¹

The court found that the plaintiff youths would adequately represent the age-out subclass because they challenged the defendant’s authority to enact and implement the age-out regulations, and the application of those regulations.⁹² Additionally, the class members were similarly situated in their claims, as all had lost their SIJ or SIJ-based adjustment of status eligibility.⁹³ Ultimately, the court held that the age-out regulations are “generally applicable to the class,” and as their claims challenge common

policies or practices and seek generally applicable injunctive relief, the group satisfied the requirements of Rule 23.⁹⁴

The plaintiffs also challenged several age-out regulations.⁹⁵ First, the group challenged 8 C.F.R. § 204.11(c)(1), which precludes SIJ classification once a youth is no longer “under twenty-one years of age.”⁹⁶ This provision expressly provides, “[a]n alien is eligible for classification as a special immigrant under section 101(a)(27)(J) of the Act if the alien [i]s under twenty-one years of age.”⁹⁷ Additionally, the plaintiffs challenged legislative code 8 C.F.R. § 204.11(c)(5), which requires that a youth seeking SIJ status “[c]ontinues to be dependent upon the juvenile court and eligible for long-term foster care, such declaration, dependency or eligibility not having been vacated, terminated, or otherwise ended.”⁹⁸ The plaintiffs similarly challenged the age-out regulation for SIJ-based adjustment of status, 8 C.F.R. §§ 205.1(a)(3)(iv)(A), (C), and (D), which revokes a juvenile’s SIJ classification “[u]pon the beneficiary reaching the age of 21; . . . the termination of the beneficiary’s dependency upon the juvenile court; . . . [or] the termination of the [youth’s] eligibility for long-term foster care.”⁹⁹

To determine the plaintiffs’ claims as to the age-out regulations, the court applied the deference standard derived from *Chevron v. Natural Resources Defense Council*.¹⁰⁰ Under *Chevron*, the Supreme Court adopted a two-step test for judicial review of administrative agency regulations that interpret federal statutes. The first step is to consider whether Congress spoke directly in the statute to the particular issue: “If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”¹⁰¹ However, where the statute is ambiguous or silent with respect to the issue, a court proceeds to the second step. The court must then determine “whether the agency’s answer is based on a permissible construction of the statute.”¹⁰² An agency’s interpretation of a regulation is permissible unless that interpretation is “arbitrary, capricious, or manifestly contrary to the

statute.”¹⁰³ After the SIJ statute’s enactment in 1990, the Attorney General adopted the age-out regulations under their authority to establish regulations governing administration of the immigration system.¹⁰⁴ Thus, the court’s analysis of the application of the age-out regulations proceeded under this general grant of regulatory authority.¹⁰⁵

A. Why Perez-Olano Was Wrongfully Decided

Under the *Chevron* test, “[c]ongressional intent may be determined by ‘traditional tools of statutory construction,’ and if a court using these tools ascertains that Congress had a clear intent on the question at issue, that intent must be given effect as law.”¹⁰⁶ The traditional tools of statutory construction are: (1) a review of the whole context of the statutory language; (2) a common sense reading of the whole statute; (3) a consideration of prior interpretation; and (4) a reading of applicable legislative history.¹⁰⁷ Hence, the court in *Perez-Olano* first looked to the text of the SIJ statute. The statute provides eligibility to a child:

[W]ho has been declared dependent on a juvenile court . . . has been deemed eligible by that court for long-term foster care due to abuse, neglect, or abandonment . . . [and when it] has been determined . . . that it would not be in the alien’s best interest to be returned to [their home country].¹⁰⁸

The plaintiffs stressed that the statute is written in the past-perfect tense, a grammatical construction indicating that SIJ eligibility is not conditional on either a child’s age, continued dependency on a juvenile court, or continued eligibility for long-term foster care.¹⁰⁹ Since the past-perfect tense is used to show which of several events happens first, this grammatical choice was of particular significance in interpreting the statute as written. According to the plaintiffs, the juvenile’s eligibility is established once an SIJ predicate order is granted, and the defendants must then decide whether to grant SIJ status;¹¹⁰ thus, the plaintiffs argued that any regulations

imposing additional eligibility requirements, such as continued eligibility for long-term foster care, were unauthorized by the statute.¹¹¹

The plaintiffs also argued that they were protected by the Due Process Clause of the U.S. Constitution, which incorporates the guarantees of equal protection.¹¹² The plaintiffs maintained that because states differ with respect to the age limit for state dependency (eighteen or twenty-one), it would be a denial of equal protection for the court to condition SIJ eligibility on continuing dependency.¹¹³ The plaintiffs argued that this would allow some SIJs to receive eligibility if they resided in a state with a broader dependency statute (permitting state dependency until age twenty-one) while denying other SIJs eligibility if they live in a state with a narrower statute (dependency until eighteen).¹¹⁴

On the other hand, the defendants responded that the SIJ statute does not provide for “infinite eligibility.”¹¹⁵ Rather, the statute only speaks to the criterion that establishes SIJ eligibility, not the duration of that eligibility.¹¹⁶ Further, the defendants emphasized that it was within the Attorney General’s delegated authority to grant SIJ status based on an SIJ predicate order.¹¹⁷ This is due to the fact that the Attorney General must expressly consent to the dependency order which serves as a precondition for granting SIJ status. Thus, according to the defendants, the SIJ statute permitted age-out regulations.¹¹⁸

In its ruling, the court began by looking to the express text of the statute.¹¹⁹ The court agreed that the text of the statute provides for a child’s SIJ eligibility once a state court makes the requisite findings in a SIJ predicate order.¹²⁰ However, the court reasoned that, although Congress defined eligibility in terms of past state court findings, the statute did not speak directly to the issue of aging-out.¹²¹ Thus, because Congress’s intent with respect to the age-out issue was not addressed explicitly in the statute, the court next looked to congressional intent, as reflected in the history and purpose of the statutory scheme.¹²²

As evidenced by materials discussed in the next section, the purpose of the SIJ statute is to protect abused, neglected, and abandoned immigrant youths by providing a method for adjustment to lawful permanent resident status. However, the court noted that Congress had not consistently followed this goal in relation to the age-out regulations. The pertinent age-out regulations were enacted in 1993, a few years after the passage of the SIJ statute.¹²³ In 1997, when Congress amended the SIJ statute, it did not disturb the age-out regulations.¹²⁴ Additionally, the court observed that in 2002, when Congress passed the Child Status Protection Act, it chose to exclude SIJ applicants from the list of juveniles that would be prevented from aging-out.¹²⁵ Thus, the court viewed this history as evidence that Congress condoned the age-out regulations with respect to SIJ eligibility.¹²⁶

Under *Chevron*, when Congress does not speak directly on an issue and has delegated rulemaking authority to an agency, the court will consider whether the agency interpretation is based upon a permissible construction of the statute.¹²⁷ If such interpretation is reasonable, the agency interpretation will not be disturbed. Again, the purpose of the SIJ statute is to protect immigrant children from abuse, neglect, and abandonment. Based on that purpose, the court held that it is reasonable for the Board of Immigration Appeals (BIA) to limit eligibility for SIJ status or SIJ-based adjustment of status to immigrant *children*, as opposed to older adolescents or individuals who are no longer dependent on the state.¹²⁸ Thus, the court held that the BIA's interpretation of the SIJ statute is consistent with Congress's goal. Hence, the age-out regulations were not held to be arbitrary and capricious.¹²⁹ The court ultimately reasoned that because the defendants had authority to adopt the age-out regulations, and because the regulation expressly declares that SIJs must be in continued legal custody of the state or state agency, the regulations had a reasonable basis and were therefore permissible under *Chevron*.¹³⁰ However, the court did maintain that the youths still had a right to raise claims that the defendants unreasonably delayed adjudication of SIJ applications.¹³¹

B. How Perez-Olano Should Have Been Decided

Using traditional tools of statutory construction, the court arrived at an erroneous conclusion as to the validity of the age-out regulations of the SIJ statute. The court misinterpreted the primary purpose of the statute, which is to protect abused, abandoned, and neglected children. The court ignored the fact that when these youths age-out, they still face the same struggles as they did when they applied for SIJ status.

Looking to the congressional intent from the history and purpose of the statutory scheme, it is more likely that Congress did not intend for these youths to age-out of SIJ status.¹³² However, instead of focusing on the need to protect these immigrant abuse victims, the court in *Perez-Olano* interpreted the statute as only intending to help *children*. If the court had recognized the primary purpose to be *protection*, the BIA's interpretation would have been seen as irrational and unreasonable. Thus, the court's interpretation does not adhere to the second prong of *Chevron*, as aging-out puts these children in the same place they would have been without SIJ status. How would a statute, intended to protect abandoned, abused, and neglected immigrant youths, serve its purpose if the intended beneficiaries are refused such status while their applications are pending? These youths are automatically denied eligibility merely because of timing and bureaucracy, although they continue to be in the same state of need as they were the day before their eighteenth birthdays. Although perhaps not clearly erroneous, such an evaluation takes the focus off the actual purpose of protection. It is incorrect to examine the purpose of a statute by primarily focusing on what age is to be protected without looking first to the more obvious and objective purpose.

In practical terms, it is an unreasonable interpretation of the SIJ statute to allow these youths to age-out of protection when their applications are pending, as they still face the same strife as when they applied for SIJ status. Without SIJ status, these immigrant youth fall into the shadows of American society and are forced to live life in the underground world of

undocumented immigrants. After aging-out, these children who sought refuge in the U.S. are denied opportunities to acquire higher education, are unable to get jobs due to lack of status, and will not qualify for government support. In conclusion, the court in *Perez-Olano*, upon its own statutory interpretation, erroneously emphasized “children” when determining the purpose of the SIJ statute; instead, the court should have emphasized the word “protect” when determining the purpose of the statute.

III. OTHER STATUTES AND TREATIES SUPPORTING A DIFFERENT INTERPRETATION OF THE SIJ STATUTE

A. The Child Status Protection Act

Congress passed the Child Status Protection Act (CSPA) in August 2002 after recognizing the age-out predicament faced by immigrant youths caused by administrative processing time. The CSPA allows certain non-citizens to retain classification as a “child” under the INA, even if he or she reaches the age of twenty-one. Thus, these children will never age-out of status.¹³³ The CSPA protects (a) direct beneficiaries of family-based immigration petitions and (b) derivative beneficiaries in family-based, employment-based, and diversity visa categories.¹³⁴ Sections two and three of the CSPA address the aging-out problems for the sons and daughters of U.S. citizens and the children of lawful permanent residents. The CSPA freezes the beneficiary’s age on the date that his or her visa petition is filed.¹³⁵ In other words, the beneficiary will be treated as a “child” as long as he or she is under age twenty-one at the time the petition is filed with USCIS. Further, derivative children—those applying for status through another person from a family-based, employment-based, or diversity visa petition—retain their derivative status even after turning twenty-one.¹³⁶ Similarly, children who were under the age of twenty-one at the time their parents filed an application for asylum, for refugee status, or for relief under the Violence Against Women Act (VAWA) are accorded status even if they

are over twenty-one at the time their applications are approved.¹³⁷ However, not only did Congress not include a provision that eliminates SIJs from aging-out, but Congress did not include SIJs in the list of children protected by the CSPA.

Congress should have either included a provision in the SIJ statute or provided protection for SIJs in the CSPA. Through the CSPA, Congress has recognized that certain children should not age-out of the protections of various statutes; Congress should also recognize that SIJs should be protected from aging-out. Through the passage of the CSPA, Congress acknowledged the injustice of allowing children to age-out while their applications are being processed. SIJs are just as deserving, if not more deserving, than the children protected in the CSPA. The children protected by the CSPA are those who have the family support in the U.S. By contrast, SIJs are children who lack parental guidance and support and who have come to the U.S. alone in search of safety or a better life.

The fact that SIJs do not have family in the U.S. should help, rather than hinder them, in seeking legal status. Without parental support, these children can only rely on themselves, their friends, and the U.S. government for help. Moreover, the fact that SIJs do not have parents or family in the U.S. should provide an even stronger reason for Congress to assist these children. SIJs deserve more protection through state foster care; however, this system is ill-equipped and unwilling to petition for each SIJ.

Furthermore, as subsequently discussed, SIJs face similar struggles as children seeking asylum and refuge. Since children seeking asylum and refugee status are protected by the CSPA, SIJs should also be protected by the CSPA. SIJs face the same (if not more) devastating problems as asylum-seekers. As Congress has routinely recognized through the CSPA and its asylum and refugee programs, juvenile immigrant applicants deserve to be protected from aging-out. For all of the aforementioned reasons, Congress should recognize that SIJs should also be protected from aging-out.

Moreover, the CSPA protects children filing for VAWA relief as immediate relatives of other VAWA applicants.¹³⁸ Passed in 2000, VAWA created a “U visa” for people that have suffered substantial physical or mental abuse as a result of several enumerated acts of violence, including torture, trafficking, domestic violence, sexual assault, and felonious assault.¹³⁹ SIJs should qualify as beneficiaries of this visa, since they are the direct, first-hand victims of domestic violence. SIJs have been shunned, abused both physically and mentally, and neglected by their own parents—the people that were supposed to protect and provide for them. As the CSPA protects children who are victims (or even derivative victims) of domestic violence and abuse under VAWA, so too, should SIJs be protected by the CSPA. Therefore, as Congress has recognized through the CSPA that certain children should not age-out of protection through various statutes, Congress should also recognize that SIJs should be protected from aging-out.

B. Asylum-seekers

The distinction between unaccompanied child asylum-seekers and SIJs is minimal, and both should be afforded similar protections, including the inability to age-out once a proper application is submitted. The United Nations High Commissioner for Refugees (UNHCR) Guidelines on the Protection and Care of Refugee Children and the Guidelines on Policies and Procedures in Dealing with Unaccompanied Minors has defined an unaccompanied minor as an individual “who is separated from both parents and is not being cared for by an adult who by law or custom has responsibility to do so.”¹⁴⁰ Furthermore, U.S. guidelines define an unaccompanied minor as a child “under the age of 18 who seek[s] admission to the U.S. and who [is] not accompanied by a parent or guardian.”¹⁴¹ It has been estimated that in the U.S., approximately 70 percent of children apprehended by ICE fall under this definition of an unaccompanied minor.¹⁴² It is estimated that about 4,700 unaccompanied

minors are detained annually by ICE.¹⁴³ Most significantly, when an unaccompanied minor reaches the age of adulthood (eighteen) before a decision is reached on his application for asylum or while waiting for a decision from an appeal of a denial of status, the child continues to be treated as a minor.¹⁴⁴ This is because the focus is placed on the child's circumstances and age at the time of entry, rather than the child's circumstances and age while awaiting the processing of his or her application.¹⁴⁵ Therefore, an unaccompanied child seeking asylum will never age-out of eligibility.

How can the U.S. justify making unaccompanied child asylum-seekers unable to age-out while refusing this privilege to SIJs? This question is especially puzzling because SIJs can also fulfill all the requisite requirements for asylum. In order to be granted asylum, an applicant must establish that he or she is a person "who is unable or unwilling to return to, and unable or unwilling to avail himself or herself of the protection of" his or her nationality "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."¹⁴⁶ This means that the child must show he or she was persecuted in the past or has a well-founded fear of being persecuted in the future, and that the persecution is based on one of the five enumerated grounds.¹⁴⁷

C. The Family as a Particular Social Group

The element of "particular social group," although difficult to satisfy, has been found fulfilled in the Ninth Circuit Court of Appeals in *Aguirre-Cervantes v. INS*.¹⁴⁸ In that case, the court held for the first time that "victims of domestic violence may seek asylum based on their abuse at home because the family forms a protected 'social group' under the U.S. asylum law."¹⁴⁹ The court held that an immediate family whose members all live together and are subject to severe abuse by a family member could be recognized as a "protected particular social group."¹⁵⁰ To this end, the court

also maintained that the asylum-seeker must show that the persecuting family member is a person that the government is unable or unwilling to control, and that the government often overlooks domestic violence situations.¹⁵¹ Hence, under very specific circumstances, this element might be met in a child asylum case.

D. Abandonment, Abuse, or Neglect as Persecution

Abandonment, abuse, or neglect of a child rises to the level of persecution. The Convention on the Rights of the Child (CRC) (subsequently discussed) holds that, specific to children, persecution can arise more readily because of the child's heightened dependence and need for assistance and protection.¹⁵² Additionally, article seven of the Convention establishes parental care as a basic human right of a child.¹⁵³ Thus, children who are abandoned, abused, or neglected by their parents or families may be considered persecuted because they are either unwanted or the family is unable to provide for them, and the state fails to provide adequate surrogate protection.¹⁵⁴ Further, the denial of a child's basic social and economic rights—the opportunity to attend school, access to health care, food, and housing—has been recognized by the international community through the CRC as a violation which may rise to the level of persecution.¹⁵⁵

E. The Parent as the Agent of Harm

To fulfill the elements of asylum, the child must demonstrate that the experienced or feared persecution is attributable to the government or an agent that the government is incapable or unwilling to control.¹⁵⁶ This last element is one of the biggest challenges SIJs face, and is one reason why SIJs may fail to qualify for asylum. SIJs do not face persecution by the government, but at the hands of their own parents. Although evading the government is not easy, it can be even harder to escape from one's own parents, especially within one's own country. It has been noted that

attempting to flee from a situation of domestic violence to a nearby relative's or friend's home is likely to be futile for a child, as the child is easily found by immediate family in those places.¹⁵⁷ Although parents have the right to punish and discipline their children, international human rights norms prevent punishment that is cruel, inhuman, or degrading, rising to the level of persecution.¹⁵⁸ Similarly, a parent may acquiesce to the child being abused by allowing physical or sexual abuse of the child by the parent's partner.¹⁵⁹

The most likely scenario for qualifying a parent as an agent of harm is when the parent is routinely successful in evading governmental sanctions, or if state services turn a blind eye towards the abuse of an asylum-seeking child. The Ninth Circuit, in *Aguirre-Cervantes*, found that the government of Mexico was not willing to protect a child from domestic abuse due to its lack of recognition of domestic violence.¹⁶⁰ One author notes, in speaking about principles deriving from the CRC, a child who fears persecution by abusive parents, as opposed to the government, may qualify for asylum.¹⁶¹ Hence, a parent may also be an agent of harm. *Aguirre-Cervantes* is recognized as paving the way for a small group of eligible immigrant children who fall within the same fact pattern of domestic violence to qualify for asylum.¹⁶²

While unaccompanied child asylum-seekers are strikingly similar to SIJs, the latter are prevented from aging-out of status while the former are not. First, SIJs may often fit within the particular "social group" of belonging to an abuse-stricken family. Like the victim in *Aguirre-Cervantes*, SIJs have experienced some form of abuse, abandonment, or neglect at the hands of an abusive parent, thus fulfilling the persecution requirement. Moreover, it is highly unlikely that a child would run the risk of fleeing the familiarity and comfort of his or her own country in place of a reasonable alternative or if the child knew he or she could turn to and rely on the local government for help. Thus, it seems that SIJs meet the baseline requirements of an unaccompanied child asylum-seeker; nonetheless, child asylum-seekers are

granted special help in the form of protection from aging-out. Given their similarities, it is absurd for Congress to draw distinctions between asylum-seekers and SIJs by protecting asylum-seekers from aging-out, while allowing SIJs to age-out.

F. The Convention on the Rights of the Child

International jurisprudence on the rights of children greatly improved in the last twenty years. Created in 1989, the United Nations's CRC is the first international convention to incorporate a full range of human rights for children—civil, cultural, economic, political, and social.¹⁶³ The CRC was created to address the reality that children need a particular convention, because people under eighteen years of age often need special care and protection separate from that provided for adults.¹⁶⁴ The drafters also advocated for the CRC to establish world recognition that children have human rights.¹⁶⁵ Significantly, more countries have ratified the CRC than any other human rights treaty.¹⁶⁶ Nevertheless, the U.S.—a world leader and advocate for human rights, and one of the five countries with a seat on the General Assembly of the United Nations—is one of only two countries to have signed but not ratified the treaty.¹⁶⁷ The other, Somalia, lacks an internationally recognized government capable of executing ratification.¹⁶⁸

One of the central principles of the CRC is that there should be no delay in making decisions about children. Section 1(2) of the CRC states that “in any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.”¹⁶⁹ This principle reflects the maxim that delay defeats justice, and that undue delay has heightened consequences for children and their development.¹⁷⁰ Thus, the CRC maintains that children should be held in higher regard when it comes to determining their immigration status, and, moreover, that their petitions for aid should be granted priority and expedited review.

It is unacceptable for the U.S. not to be a signatory to the CRC. Because the U.S. has not ratified the treaty, it does not have to fully abide by its terms. Thus, the U.S. must take only minimal action in upholding the rights of children as defined by its own statutes and regulations. President Barack Obama has described the failure to ratify the CRC as “embarrassing” and has promised to review the U.S. decision.¹⁷¹ Those opposed to the ratification of the CRC argue that being a party to the CRC will open the door to outside interference from government and United Nations officials regarding the parents’ rights to raise a child as they see fit.¹⁷² Fortunately, it appears as though the movement for the U.S. to ratify the CRC is becoming stronger.¹⁷³

Hopefully, President Obama will refocus the U.S. position on the CRC and formally commit to upholding the Convention. Since treaties are supreme law, if the U.S. were to adopt the CRC there would be a much stronger argument for extending aging-out protections to SIJs.¹⁷⁴ Given Section 1(2) of the CRC, eliminating the age-out provision would bring the SIJ statute into accordance with the treaty. Time regulations must be imposed on USCIS agents for reviewing SIJ applications, giving applicants closest to aging-out an expedited status, and a provision must be added to the SIJ statute to protect children from aging-out while their applications are pending. Even if the U.S. only ratified the treaty (as opposed to codifying it), it would still have to address cases involving children in a timely manner and prevent SIJs from aging-out.

IV. THE SIJ’S RIGHT TO REPRESENTATION

Currently, despite a complex and complicated immigration system, all U.S. immigrants, including child immigrants, have no legal right to representation. Legal representation for children is highly important—children lack the experience and sophistication to understand the complexity of the law and the personal implications of applying for SIJ status or other forms of relief. The United Kingdom and Canada have state-

funded representation to assist children with their asylum claims.¹⁷⁵ SIJs actually fit within Canada's definition of an unaccompanied child, as "those who are alone in Canada without their parents or anyone who purports to be a family member."¹⁷⁶ In Canada, unaccompanied children are warranted special procedural treatment throughout their refugee status determinations.¹⁷⁷ These special accommodations include: ensuring the swift identification of unaccompanied children; appointing an officer to maintain responsibility for the child's case throughout the entirety of the determination procedure; prioritizing these claims in order to process them as expeditiously as possible; and facilitating pre-hearing conferences to assess evidence the child is able to provide, including the best way to elicit this information.¹⁷⁸ Further, the best interests of the child must be taken into account and reflected in the decision regarding the child's status.¹⁷⁹

The U.S. has looked to Canada to help create procedures and standards for the adjudication of child asylum claims.¹⁸⁰ The U.S. should follow Canada's example by including SIJs in its definition of an unaccompanied child asylum-seeker and afford SIJs the same representation and procedural advantages as potential asylees, particularly by requiring that SIJ claims be processed expeditiously. From a simple appreciation of due process, SIJs should be granted the right to representation because they are children; even older adolescents may not have the requisite knowledge and capability to complete an application for SIJ status. Children and adolescents need extra guidance and help in dealing with legal matters, especially for such an important matter as that of legal citizenship status. As child asylum-seekers are very similar to SIJs, SIJs should be afforded the same type of protection in the U.S. Like Canada, the U.S. should afford potential SIJs the right to counsel as they go through the lengthy and difficult application process, especially given the timeliness and urgency such applications currently require due to the threat of aging-out.

V. RECOMMENDATIONS

To remedy the problem of deserving SIJs aging-out, first and foremost, the SIJ provision of the INA needs to be amended to prevent this occurrence. If the INA explicitly stated that SIJs could not age-out of status once a valid and qualified application were submitted, then the BIA would not be allowed to apply its own interpretation of the SIJ statute. For example, a provision could be added stating that as long as the application is filed before the child has reached the age of majority or aged-out of the foster care system, the child will not age-out of SIJ status. This way, the child's age would toll from the time the application is submitted. Thus, the holding of *Perez-Olano* would be reversed, and the application procedure would better reflect the main purpose of the SIJ program—to protect abused and vulnerable immigrant youths. Secondly, when a child comes into foster care, like in Canada, an officer or agent should be appointed to the child. This officer would be responsible for checking the child's legal status and flagging a child for SIJ eligibility if the child's situation warranted such status.

With or without a legislative revision of the INA statute, the U.S. Supreme Court should take the first available opportunity to revisit the issue of SIJs aging-out and reverse its ruling in *Perez-Olano*. The Court should recognize that the SIJ program's emphasis is on protecting abused and vulnerable immigrant youths regardless of their age of majority, and thus overrule the BIA's interpretation of the statute as unreasonable. It is not a reasonable interpretation of the statute to allow SIJs to age-out when their applications are still pending and they applied as minor children. The very thing that makes SIJs' status "special" is their vulnerability, due to the threat of living in a society where they have no legal status and are forced to live without any of that society's benefits and without a support network of family and friends. Allowing SIJs to age-out leads to the opposite outcome: harming SIJs and making their future harder than warranted.

Furthermore, special regulations should be set in place to ensure that USCIS and other immigration officers expedite and pay particular attention to SIJ applications, especially when those children are on the verge of aging-out. Immigration officers should be required to expedite those immigration applications which need immediate attention due to application deadlines. The U.S. should place these mandatory expedition requirements upon immigration officials, following the principle of “no delay” set forth by the CRC. Requiring immigration officials to prioritize SIJ applications would comport with one of the main principles of the CRC. Currently, ICE’s primary responsibility is to enforce immigration regulations within the U.S.¹⁸¹ Given this purpose, many immigration agents focus on deportation.¹⁸² Discretion as to the timing of an SIJ’s application should not be left in the hands of an agency whose inclination is to deport immigrants. Immigration authorities are not primarily focused on the well-being of SIJs and the implications of illegal status on a young immigrant’s life. Therefore, immigration processors should be required to expedite an SIJ’s application. Without such a mandate, there is little hope that an agent will exercise the expediency to push such an application through as soon as they possibly can. It is absolutely shameful for the U.S. to be one of the two countries out of 140 to have signed the CRC, but have not ratified it.¹⁸³ The U.S. needs to promptly reexamine its position on the CRC. Once it does, Congress should reformulate its position on SIJs’ ability to age-out and should conform to the principle of “no delay” in processing a child’s application.

Furthermore, the U.S. should treat SIJs like unaccompanied asylum-seekers. After the decision in *Aguirre-Cervantes*, SIJs and asylum-seekers are similar in position. First, SIJs fall within the definition of unaccompanied minors as held by both the U.S. and the UNHCR.¹⁸⁴ Further, as exemplified by *Aguirre-Cervantes*, there is a movement towards perceiving children who are victims of domestic violence as eligible for asylum.¹⁸⁵ These child asylum-seekers can show that they face persecution by their parents and fall within a particular social group of being a member

of a family suffering from abuse by a family member. As child asylum-seekers are not allowed to age-out, their similar counterparts, SIJs, should be allotted the same protection.

Finally, Congress should eliminate an SIJ's ability to age-out due to the obstacles that these children face after aging-out of foster care and, therefore, SIJ eligibility. The fact that most children who age-out of foster care, even *with* status, find themselves struggling without jobs, living with an increased rate of incarceration, or even living homeless shows that SIJs should at least be afforded an equal playing field by giving them a chance to receive legal citizenship status. Without such status, SIJs have even less chance of bettering their lives, as they lack the ability to receive public benefits and are forced to live in the underground world of undocumented immigrants. These youths deserve an opportunity to better their lives after being abandoned, abused, and neglected by their own parents. These youths need to be given a fair chance at earning status by not allowing them to age-out after going through all the procedural steps to get such status. Going one step further, Congress could follow Canada's example by providing these children with special procedural advantages and a right to legal representation.

VI. CONCLUSION

Congress passed the Special Immigrant Juvenile statute to provide a special group of immigrant children a means to create better lives for themselves and to protect these children from prior lives shadowed by abuse, abandonment, and neglect. However, SIJs are not protected when they are allowed to age-out of eligibility. Congress and the international community have recognized on numerous fronts that children deserve special protection, expedited procedures, and extra attention. Congress must give these children the special protection and opportunity that they deserve to succeed in life, especially after having suffered a life of abuse. The ability of SIJs to age-out must end.

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² Memorandum from Professor Paul Holland on Request for Consent to Juvenile Court Jurisdiction, 1–2 (2005) (on file with author).

³ *Id.*

⁴ *Id.* at 2.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Declaration of “B,” 1 (on file with author).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 2.

¹³ *Id.*

¹³ Areti Georgopoulos, *Beyond the Reach of Juvenile Justice: The Crisis of Unaccompanied Immigrant Children Detained by the U.S.*, 23 *LAW & INEQ.* 117 (2005).

¹⁴ *Id.*

¹⁶ *Id.* at 117–18.

¹⁷ Nina Bernstein, *Children Alone and Scared, Fighting Deportation*, *N.Y. TIMES*, Mar. 28, 2004, § 1, at 1.

¹⁸ *See id.*

¹⁹ *Id.*

²⁰ *See Perez-Olano v. Gonzalez*, 248 F.R.D. 248 (C.D. Cal. 2008).

²¹ Theo Liebmann, *Family Court and the Unique Needs of Children and Families Who Lack Immigration Status*, 40 *COLUM. J. L. & SOC. PROBS.* 583, 589 (1997).

²² Christopher Nugent, CASA, The Judges’ Page Newsletter, *Special Immigrant Juvenile Status: An Ideal Path to Permanency for Vulnerable Undocumented Abused, Neglected or Abandoned Youth*, Feb. 17 2008, http://www.nationalcasa.org/JudgesPage/Article/special_immigrant_juvenile_status.

²³ Gregory Zhong Tian Chen, *Eliau or Alien? The Contradictions of Protecting Undocumented Children Under the Special Immigrant Juvenile Statute*, 27 *HASTINGS CONST. L.Q.* 597, 604 (2000).

²⁴ Liebmann, *supra* note 21, at 587.

²⁵ Nugent, *supra* note 22.

²⁶ Dorothy Meyer Storrow, Esq., *Special Considerations in Representing Children*, in *II Child Welfare Practice in Massachusetts*, at ch. 23, § 23.7 (2006, Supp.2009).

²⁷ Liebmann, *supra* note 21, at 588.

²⁸ *See Chen, supra* note 23, at 604.

²⁹ Storrow, *supra* note 26, at § 23.7.

- ³⁰ *Id.*
- ³¹ *See id.*
- ³² Chen, *supra* note 23, at 604.
- ³³ *Id.*
- ³⁴ *Id.* at 608.
- ³⁵ *Id.*
- ³⁶ *Id.* at 604.
- ³⁷ *Id.* at, at 606.
- ³⁸ *Id.* at 609.
- ³⁹ *Id.* at 604.
- ⁴⁰ Liebmann, *supra* note 21, at 589.
- ⁴¹ *Id.*
- ⁴² Peter A. Schey & Carlos Holguin, Urgent Request About Clients Who Have Aged Out of SIJ Eligibility, http://lawprofessors.typepad.com/immigration/2005/11/special_immigra.html (last visited Oct. 2, 2009).
- ⁴³ *Id.*
- ⁴⁴ *Id.*
- ⁴⁵ *Id.*
- ⁴⁶ Chen, *supra* note 23, at 614–15.
- ⁴⁷ Letter from Ragini Shah, Columbia Law School Child Advocacy Clinic, to Hon. Jerrold Nadler, U.S. House of Representative, on UACPA Restriction on Age Eligibility, U.S. Committee for Refugees and Immigrants, <http://www.refugees.org/article.aspx?id=1516&subm=75&area=Participate> (last visited Oct. 13, 2009).
- ⁴⁸ *Id.*
- ⁴⁹ Schey & Holguin, *supra* note 42.
- ⁵⁰ Perez-Olano v. Gonzalez, 248 F.R.D. 248, 268 (C.D. Cal. 2008).
- ⁵¹ *Id.*
- ⁵² *Id.* at 269.
- ⁵³ *Id.* at 267.
- ⁵⁴ Carolyn S. Salisbury, Comment, *The Legality of Denying State Foster Care to Illegal Alien Children: Are Abused and Abandoned Children the First Casualties in America's War on Immigration?*, 50 U. MIAMI L. REV. 633, 643 (1996).
- ⁵⁵ J.C. Barden, *After Release From Foster Care, Many Turn to Live on the Streets*, N.Y. TIMES, Jan. 6, 1991, § 1, at 1.
- ⁵⁶ *Id.*
- ⁵⁷ 8 U.S.C. § 1101(a)(27)(J)(i) (2006).
- ⁵⁸ Storrow, *supra* note 26, at § 23.7.
- ⁵⁹ Liebmann, *supra* note 21, at 268.
- ⁶⁰ Barden, *supra* note 55.
- ⁶¹ Kevin Crust, *Passing Foster Care's Point of No Return*, L.A. TIMES, May 27, 2005, at E2.
- ⁶² *Id.*
- ⁶³ *Id.*

⁶⁴ Ken Picard, *Vermont Legislation Extends Age Limit for Foster Care Coverage*, SEVEN DAYS, June 6, 2007, available at <http://www.7dvt.com/2007/vermont-legislation-extends-age-limit-foster-care-coverage>.

⁶⁵ VARINA WINDER, ALLIANCE FOR CHILDREN & FAMILIES, UNITED NEIGHBOR CENTER OF AMERICA, AGING-OUT OF FOSTER CARE: BOXER BILL WOULD EXPAND SERVICES FOR OLDER FOSTER YOUTH (2007), available at http://alliance.org/Public_Policy/analyses/Aging-Out_%20Dec.07.pdf.

⁶⁶ *Perez-Olano v. Gonzalez*, 248 F.R.D. 248 (C.D. Cal. 2008).

⁶⁷ *Id.* at 254.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 271.

⁷³ *Id.*

⁷⁴ *Id.* at 255.

⁷⁵ *Id.*

⁷⁶ *Id.* at 256.

⁷⁷ *Id.*

⁷⁸ *Id.* at 259.

⁷⁹ *Id.* at 260.

⁸⁰ *Id.* at 259–60.

⁸¹ *Id.*

⁸² *Id.* at 260.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 258.

⁸⁹ *Perez-Olano v. Gonzalez*, 248 F.R.D. 248, 260 (C.D. Cal. 2008).

⁹¹ *Id.* at 258.

⁹² *Id.* at 260–61.

⁹³ *Id.*

⁹⁴ *Id.* at 261.

⁹⁵ *Id.* at 267.

⁹⁶ *Id.*

⁹⁷ 8 C.F.R. § 204.11(c)(1) (2009).

⁹⁸ 8 C.F.R. § 204.11(c)(5) (2009).

⁹⁹ *Perez-Olano*, 248 F.R.D. at 267 (2008).

¹⁰⁰ *Id.* at 268.

¹⁰¹ *Chevron U.S.A. Inc., v. Natural Res. Def. Council, Inc.* 467 U.S. 842, 842-43 (1984).

¹⁰² *Id.* at 843.

¹⁰³ *Id.* at 844.

- ¹⁰⁴ *Perez-Olano*, 248 F.R.D. at 268 (2008).
- ¹⁰⁵ *Chevron*, 467 U.S. at 843.
- ¹⁰⁶ *Wilderness Soc’y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1059 (9th Cir. 2003).
- ¹⁰⁷ Petition for Writ of Certiorari at 18-19, *Our Children’s Earth Found. v. U.S. Env’tl. Prot. Agency*, (2008) (No. 08-225), WL 3884297.
- ¹⁰⁸ *Perez-Olano*, 248 F.R.D. at 268 (quoting 8 U.S.C. § 1101(a)(27)(J) (2006)).
- ¹⁰⁹ *Id.*, 248 F.R.D. at 268.
- ¹¹⁰ *Id.*
- ¹¹¹ *Id.*
- ¹¹² *Id.* at 269.
- ¹¹³ *Id.*
- ¹¹⁴ *Id.*
- ¹¹⁵ *Id.* at 268.
- ¹¹⁶ *Id.*
- ¹¹⁷ *Id.*
- ¹¹⁸ *Id.*
- ¹¹⁹ *Id.*
- ¹²⁰ *Id.*
- ¹²¹ *Id.*
- ¹²² *Id.*
- ¹²³ *Id.* at 269.
- ¹²⁴ *Id.*
- ¹²⁵ *Id.*
- ¹²⁶ *Id.*
- ¹²⁷ *Chevron U.S.A. Inc., v. Natural Res. Def. Council, Inc.* 467 U.S. 842, 843 (1984).
- ¹²⁸ *Perez-Olano*, 248 F.R.D. at 269.
- ¹²⁹ *Id.*
- ¹³⁰ *Id.*
- ¹³¹ *Id.* at 271.
- ¹³² *See id.* at 268.
- ¹³³ *See Chang & Boos Attorneys-at-Law and Barristers & Solicitors, The Child Status Protection Act*, <http://www.americanlaw.com/cspa.html> (last visited Nov. 25, 2008).
- ¹³⁴ *Id.*
- ¹³⁵ STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 252 (4th ed. 2005).
- ¹³⁶ Charles Wheeler, *Challenges to Families Coming to the United States in 40TH ANNUAL IMMIGRATION & NATURALIZATION NETWORK, INC.*, at 353, 358 (Practicing L. Inst., Corp. L. and Prac. Course Handbook Series, PLI Order No. 11436, 2007).
- ¹³⁷ *Id.*
- ¹³⁸ *Id.*
- ¹³⁹ LEGOMSKY, *supra* note 135, at 402.
- ¹⁴⁰ Jacqueline Bhabha & Wendy Young, *Not Adults in Miniature: Unaccompanied Child Asylum-seekers and the New U.S. Guidelines*, 11 INT’L J. REFUGEE L. 84, 92 (1999); UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *REFUGEE CHILDREN: GUIDELINES ON PROTECTION AND CARE*, ch. 10, (1994), *available at*

[http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3b84c6c67&query=guidelines on protection and care.](http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3b84c6c67&query=guidelines%20on%20protection%20and%20care)

¹⁴¹ Bhabha & Young, *supra* note 140, at 93; 45 C.F.R. § 400.111 (2009).

¹⁴² Bhabha & Young, *supra* note 140, at 92.

¹⁴³ Annette Lopez, Comment, *Creating Hope for Child Victims of Domestic Violence in Political Asylum Law*, 35 U. MIAMI INTER-AM. L. REV. 604, 606 (2004).

¹⁴⁴ Bhabha & Young, *supra* note 140, at 93.

¹⁴⁵ *Id.*

¹⁴⁶ Lopez, *supra* note 143, at 607; 8 U.S.C. § 1101(a)(42) (2009).

¹⁴⁷ Lopez, *supra* note 143, at 607.

¹⁴⁸ *Id.* at 617; *see also* Aguirre-Cervantes v. I.N.S., 242 F.3d 1169 (9th Cir. 2001).

¹⁴⁹ Lopez, *supra* note 143, at 617.

¹⁵⁰ *Id.* at 617.

¹⁵¹ *Id.* at 618.

¹⁵² Bhabha & Young, *supra* note 140, at 105.

¹⁵³ United Nations, Convention of the Rights of the Child, 1989, *available at* <http://www2.ohchr.org/english/law/crc.htm#art7>.

¹⁵⁴ Bhabha & Young, *supra* note 140, at 105.

¹⁵⁵ *Id.*

¹⁵⁶ Lopez, *supra* note 143, at 607.

¹⁵⁷ *Id.* at 620.

¹⁵⁸ Bhabha & Young, *supra* note 140, at 108.

¹⁵⁹ *Id.*

¹⁶⁰ Lopez, *supra* note 143, at 604, 618–19.

¹⁶¹ Bhabha & Young, *supra* note 140, at 106.

¹⁶² *See* Lopez, *supra* note 143, at 625.

¹⁶³ United Nations, *supra* note 153.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Bhabha & Young, *supra* note 140 at 89.

¹⁶⁷ *Id.*; *see also* The Campaign for U.S. Ratification of the Convention on the Rights of the Child, <http://childrightscampaign.org/crcindex.php> (last visited Oct. 15, 2009).

¹⁶⁸ Bhabha & Young, *supra* note 140, at 89.

¹⁶⁹ Simon Russell, *Unaccompanied Refugee Children in the United Kingdom*, 11 INT'L J. REFUGEE L. 126, 143 (1999).

¹⁷⁰ *Id.*

¹⁷¹ Barack Obama, U.S. Presidential Candidate, Answer to question twelve at the Walden University Presidential Youth Debate (Oct. 22, 2008) (transcript available at <http://debate.waldenu.edu/debate-transcript>).

¹⁷² John Heilprin, *Obama Administration Seeks to Join U.N. Rights Of The Child Convention*, June, 22, 2009, http://www.huffingtonpost.com/2009/06/23/obama-administration-seek_n_219511.html.

¹⁷³ *Id.*

¹⁷⁴ U.S. CONST., art. 6, cl. 2.

¹⁷⁵ Bhabha & Young, *supra* note 140, at 118.

¹⁷⁶ Alison Luke, *Uncertain Territory: Family Reunification and the Plight of Unaccompanied Minors in Canada*, 16 DALHOUSIE J. LEGAL STUD. 69, 72 (2007).

¹⁷⁷ *Id.* at 73.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ U.S. Immigration and Customs Enforcement Programs, <http://www.ice.gov/pi/topics/index.htm> (last visited Nov. 26, 2008).

¹⁸² U.S. Immigration and Customs Enforcement Programs, Office of Detention and Removal, <http://www.ice.gov/pi/dro/index.htm> (last visited Sep. 16, 2009).

¹⁸³ See United Nations Treaty Collection, Status of the Convention on the Right of the Child, http://treaties.un.org/Pages/ViewDetails.aspx?src=Treaty&mtdsg_no=IV-11&chapter=4&lang=en (last visited Oct. 18, 2009).

¹⁸⁴ UNITED NATIONS, *supra* note 140; 45 C.F.R. § 400.111 (2009).

¹⁸⁵ See *Aguirre-Cervantes v. I.N.S.*, 242 F.3d 1169 (9th Cir. 2001).