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## **Children Beyond Borders: Extending Protections for Abandoned, Abused, and Neglected Unaccompanied Children and Youth**

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Rosa Aguilar\*

### I. INTRODUCTION

Sergio was three years old when his mother died, and when his father abandoned the family in Guatemala.<sup>1</sup> He was left to live with his aunt.<sup>2</sup> At the age of fourteen, gang members wanted to recruit him.<sup>3</sup> When he refused, they beat him up.<sup>4</sup> At that point, Sergio decided to drop out of school and move to a friend's house.<sup>5</sup> Despite his efforts to escape, gang members found him and brutally beat him.<sup>6</sup> The fear of retaliation from gangs deterred him from going to the hospital to treat his injuries because the hospital might have reported their activity to the authorities.<sup>7</sup> In fact, he feared leaving his home until he finally fled Guatemala at the age of seventeen.<sup>8</sup>

Upon his arrival in the United States, Sergio was quickly apprehended by immigration officials and placed in deportation proceedings.<sup>9</sup> However, with the help of the Northwest Immigrant Rights Project (NWIRP), the Washington court made the necessary findings for his application for

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<sup>1</sup> *Children & Youth*, NW IMMIGRANT RTS. PROJECT, <https://www.nwirp.org/our-work/direct-legal-services/children-youth/> [<https://perma.cc/CUT3-CNMJ>].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

Special Immigrant Juvenile Status<sup>10</sup> (SIJS), specifically that he was abandoned and abused, among other findings.<sup>11</sup> SIJS is a form of humanitarian relief that is meant to help children like Sergio, who were abandoned, abused, or neglected, obtain relief from deportation proceedings and receive a pathway to citizenship.<sup>12</sup>

To be precise, an “unaccompanied immigrant<sup>13</sup> child”<sup>14</sup> is defined as a child under eighteen years of age at the time of entry with no lawful immigration status in the United States and no parent to provide care or physical custody.<sup>15</sup> A rise in the number of undocumented children from Guatemala, El Salvador, and Honduras—collectively known as the Northern Triangle—detained at the United States–Mexico border placed immigration relief provisions like SIJS under a spotlight by critics and activists.<sup>16</sup> This form of humanitarian relief is meant to protect children fleeing dangerous situations.<sup>17</sup> However, perceptions towards humanitarian relief have changed. Critics express concern over their perception that the U.S. immigration system’s relief provisions create “loopholes” for undocumented individuals to exploit.<sup>18</sup> These concerns may explain a shift from routine approvals to routine denials.<sup>19</sup>

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<sup>10</sup> 8 U.S.C. § 1101(a)(27)(J) (defining eligibility for Special Immigrant Juvenile Status).

<sup>11</sup> Children & Youth, *supra* note 1.

<sup>12</sup> 8 U.S.C. § 1101(a)(27)(J) (defining eligibility for Special Immigrant Juvenile Status).

<sup>13</sup> The term immigrant will be used in place of the statutory term “alien.” In immigration law, the term “alien” is defined as any person not a citizen or national of the United States. 8 U.S.C. § 1101(a)(3).

<sup>14</sup> Children’s affairs, 6 U.S.C. § 279 (defining unaccompanied children).

<sup>15</sup> *Id.*

<sup>16</sup> See WILLIAM A. KANDEL, CONG. RSCH. SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 2 (2019).

<sup>17</sup> See *Immigrant Youth*, IMMIGRANT LEGAL RES. CTR., <https://www.ilrc.org/immigrant-youth> [<https://perma.cc/DR9R-ALAH>].

<sup>18</sup> See generally KANDEL, *supra* note 16, at 2.

<sup>19</sup> See generally Andrea Castro, *Young Immigrants Who Suffered Abuse Sue Over Changes to Special Protection Program*, L.A. TIMES (Jan. 2, 2019), <https://www.latimes.com/local/lanow/la-me-special-immigrant-juvenile-status-20190102-story.html> [<https://perma.cc/LR2P-WZGW>].

For context, children from the Northern Triangle are vulnerable in various ways. Children eligible for SIJS must have parents that abandoned, abused, or neglected them.<sup>20</sup> Thus, these children are left without parents to protect them, which may leave them vulnerable to abuse.<sup>21</sup> The long journey from Central America to the United States exposes children to various forms of exploitation. A staggering percentage of girls report being sexually assaulted on their journey.<sup>22</sup> In addition, children may become victims of sex or labor trafficking.<sup>23</sup> They also face the possibility of extortion, kidnapping, and forced disappearance.<sup>24</sup> Many children that survive the journey may be detained by immigration officials.<sup>25</sup> Once children are detained by immigration officials, they must navigate the complexities of the United States' immigration system.<sup>26</sup> The task of navigating the system is further complicated by the neurological effects of trauma,<sup>27</sup> which may affect a child's ability to effectively communicate their story to immigration officials<sup>28</sup> and advocates.

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<sup>20</sup> ANGIE JUNCK ET AL., SPECIAL IMMIGRANT JUVENILE STATUS & OTHER IMMIGRATION OPTIONS FOR CHILDREN AND YOUTH 42 (5th ed. 2018).

<sup>21</sup> WILLIAM A. KANDEL ET AL., CONG. RSCH. SERV., R43628, UNACCOMPANIED ALIEN CHILDREN: POTENTIAL FACTORS CONTRIBUTING TO RECENT MIGRATION 9 (2014).

<sup>22</sup> Eighty percent of women and girls reported being sexually assaulted on their travels through Mexico. DENNIS STINCHCOMB & ERIC HERSHBERG, CTR. FOR LATIN AM. & LATINO STUD., UNACCOMPANIED MIGRANT CHILDREN FROM CENTRAL AMERICA: CONTEXT, CAUSES, AND RESPONSES 9 (2014).

<sup>23</sup> Angie Junck, *Special Immigrant Juvenile Status: Relief for Neglected, Abused, and Abandoned Undocumented Children*, 63 JUV. & FAM. CT. J. 48, 49 (2012).

<sup>24</sup> STINCHCOMB & HERSHBERG, *supra* note 22, at 9.

<sup>25</sup> See generally KANDEL, *supra* note 16, at 2.

<sup>26</sup> See *id.* at 5–16 (providing an overview of agencies children and youth may encounter in the U.S. immigration system).

<sup>27</sup> Generally, unaccompanied children are physically healthy, but they are at higher risk for mental health issues. Studies suggest higher rates of anxiety, depression, and post-traumatic stress disorder when compared to immigrant children with a family. See Kiara Alvarez & Margarita Alegría, *Understanding and Addressing the Needs of Unaccompanied Immigrant Minors*, AM. PSYCH. ASS'N (June 2016), <https://www.apa.org/pi/families/resources/newsletter/2016/06/immigrant-minors> [<https://perma.cc/698K-YYU9>].

<sup>28</sup> *Id.*

In most cases, children and youth must navigate the system without an adult representing their best interest.<sup>29</sup> This lack of representation results in poor outcomes for those that have legitimate claims for relief from deportation.<sup>30</sup> A study conducted by the Transactional Records Clearinghouse indicated that children facing deportation proceedings without representation had only a ten percent chance of remaining in the United States, while children with representation had an increased fifty percent chance of avoiding deportation.<sup>31</sup>

Considering these statistics, Congress should make changes to extend protections under SIJS. First, Congress should pass legislation to eliminate the requirement that the United States Citizenship and Immigration Services (USCIS) must consent to grants of SIJS. Next, Congress should eliminate the per-country limitation on SIJS-based adjustment of status visas and triple the number of visas allocated per year in order to account for all the unaccompanied minors that may be eligible for SIJS. These implementations would give effect to the legislative intent behind SIJS, which is to protect the particularly vulnerable group of unaccompanied children and youth.

## II. ROADMAP

Part III of this article will provide context by examining the multiple factors driving the great increase in children and youth migrating from the Northern Triangle to the United States. Part IV will distinguish SIJS from other forms of immigration relief that unaccompanied minors may be eligible for depending on their individual circumstances. Part V will provide the history of SIJS along with amendments that created significant changes to the provision. This Part will also discuss the legislative intent behind creating this provision as part of a broader amendment to the

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<sup>29</sup> See STINCHCOMB & HERSHBERG, *supra* note 22, at 9.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

Immigration and Nationality Act (INA). Additionally, it will examine the application process which includes both state and federal procedures.

Part VI will offer my proposed solutions including eliminating the consent provision that allows officials to reject SIJS applicants upon finding the applicant's primary purpose is to attain an immigration benefit. This Part further illustrates the need to eliminate the per-country limitation on SIJS-based adjustment of status visas and the need to increase the number of visas allocated for SIJS. Part VII will address arguments that SIJS encourages undocumented children and youth to exploit the U.S. immigration system by taking advantage of immigration loopholes. This Part will also address both the argument that unaccompanied children and youth are likely gang affiliated and the implications of characterizing undocumented children and youth as criminals.

### III. FACTORS CONTRIBUTING TO CHILD AND YOUTH MIGRATION

Since 2011, the number of children and youth detained at the United States–Mexico border has increased significantly.<sup>32</sup> In fact, the numbers increased from approximately 16,067 children detained in 2011 to approximately 72,873 in 2019.<sup>33</sup> During this period of time, the demographics of undocumented children also shifted.<sup>34</sup> In 2009, unaccompanied minors from Mexico accounted for eighty-two percent of those minors detained, while the Northern Triangle accounted for seventeen percent.<sup>35</sup> By 2019, children from Guatemala, El Salvador, and Honduras represented eighty-five percent of the unaccompanied minors, while children from Mexico represented thirteen percent.<sup>36</sup> All other countries accounted for the remaining two percent.<sup>37</sup>

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<sup>32</sup> See KANDEL, *supra* note 16, at 2.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 3.

<sup>36</sup> *Id.* at 3.

<sup>37</sup> See *id.* at 3.

The current demographics of unaccompanied children and youth suggest that factors specific to the Northern Triangle are causing the significant increase in unaccompanied minors migrating to the United States.<sup>38</sup> Children from this region may have multifaceted motivations for emigrating.<sup>39</sup> Some of the factors include family reunification, societal violence, domestic abuse or neglect, and poverty.<sup>40</sup>

Family reunification is one of the primary reasons for the increase in unaccompanied minors.<sup>41</sup> This usually occurs because one or both parents emigrate from their home country to work in the United States and subsequently remain indefinitely due to the danger and cost of traveling back and forth.<sup>42</sup> Research conducted by the United Nations High Commissioners for Refugees suggests that a large majority of unaccompanied minors have at least one parent residing in the United States.<sup>43</sup> According to the Office of Refugee Resettlement (ORR), approximately seventy-six percent of children are released to a family member while their immigration case is pending.<sup>44</sup> In many cases, the family members living in the United States are undocumented or “lawfully present with a temporary status.”<sup>45</sup> As a result, families are unable to utilize immigration provisions that are available for family reunification purposes.<sup>46</sup>

Furthermore, the Northern Triangle struggles with slow economic growth.<sup>47</sup> One study indicated that forty-five percent of Salvadorans, fifty-

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<sup>38</sup> See KANDEL ET AL., *supra* note 21, at 5.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 14.

<sup>42</sup> See MARC R. ROSENBLUM, MIGRATION POL’Y INST., UNACCOMPANIED CHILD MIGRATION TO THE UNITED STATES: THE TENSION BETWEEN PREVENTION AND PROTECTION 1, 13 (2015).

<sup>43</sup> See KANDEL ET AL., *supra* note 21, at 14.

<sup>44</sup> KANDEL, *supra* note 16, at 11.

<sup>45</sup> ROSENBLUM, *supra* note 42, at 13.

<sup>46</sup> *Id.*

<sup>47</sup> See generally KANDEL ET AL., *supra* note 21, at 12.

five percent of Guatemalans, and sixty-seven percent of Hondurans live in poverty.<sup>48</sup> While undocumented immigrants are often motivated by economic opportunities in the United States, many undocumented children and youth may not be old enough to participate in the labor market.<sup>49</sup> Depending on their individual circumstances, those who are able to participate may be limited to low-skill and low-wage jobs due to language and educational barriers.<sup>50</sup>

In addition to high rates of poverty, the Northern Triangle has high levels of homicide and gang violence.<sup>51</sup> In 2019, the U.N. Office on Drugs and Crimes conducted a global study on homicide, which determined that El Salvador had the highest homicide rate in the world,<sup>52</sup> closely followed by Honduras and Guatemala.<sup>53</sup> Children and youth in this region are vulnerable to threats, extortion, and physical and sexual violence.<sup>54</sup> Furthermore, they are even vulnerable to violence within their homes.<sup>55</sup> Another study indicated that nearly one-fifth of these children may experience some form of physical or mental abuse in their home.<sup>56</sup>

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<sup>48</sup> KANDEL ET AL., *supra* note 21, at 7.

<sup>49</sup> *Id.* at 12.

<sup>50</sup> *Id.*

<sup>51</sup> Violence in Central America can be traced to the civil wars fought in the region during the 1970–1980s, where U.S. intervention in the region resulted in a heavily armed population. Moreover, the United States deported drug gang members to the region, which further exacerbated violence. ROSENBLUM, *supra* note 42, at 13.

<sup>52</sup> See U.N. OFF. ON DRUGS & CRIME, GLOBAL STUDY ON HOMICIDE 2019 (2019), <https://www.unodc.org/documents/data-and-analysis/gsh/Booklet2.pdf> [<https://perma.cc/8VXH-QLTV>]; see also *Murder Rates by Country*, WORLDATLAS, <https://www.worldatlas.com/articles/murder-rates-by-country.html> [<https://perma.cc/6EGQ-AFSQ>].

<sup>53</sup> See U.N. OFF. ON DRUGS & CRIME, *supra* note 52.

<sup>54</sup> STINCHCOMB & HERSHBERG, *supra* note 22, at 9.

<sup>55</sup> U.N. HIGH COMM’R FOR REFUGEES, CHILDREN ON THE RUN: UNACCOMPANIED CHILDREN LEAVING CENTRAL AMERICA AND MEXICO AND THE NEED FOR INTERNATIONAL PROTECTION 25 (2014), <https://www.unhcr.org/en-us/about-us/background/56fc266f4/children-on-the-run-full-report.html?query=children%20on%20the%20run> [<https://perma.cc/6543-VUBS>].

<sup>56</sup> *Id.*



#### IV. DISTINGUISHING SIJS FROM OTHER FORMS OF RELIEF

The motivations behind a child's migration determine their options for relief in the United States. In recognition of the trauma experienced by many children that encounter the United States' immigration system, there are various forms of humanitarian relief in place for children who have suffered some sort of harm.<sup>57</sup> While unaccompanied minors who have been abandoned, abused, or neglected<sup>58</sup> may pursue SIJS, other forms of relief may also be available to them including asylum, U nonimmigrant status, T nonimmigrant status, and the Violence Against Women Act (VAWA) protections.

Asylum<sup>59</sup> is likely the most well-known humanitarian relief provision. It provides protection for individuals who cannot return to their countries due to a credible fear of persecution based upon race, religion, nationality, political opinion, or membership in a particular social group by the government or by an organization that the government is unwilling or unable to control.<sup>60</sup> Unaccompanied children and youth that experience fear of persecution related to child abuse, including neglect and deprivation of food, medical treatment, or education, may also pursue asylum.<sup>61</sup>

In addition to asylum, U nonimmigrant status, also known as a U-Visa, is available to those who suffer substantial physical or mental harm as a result of a serious crime<sup>62</sup> and are helpful to the investigation or prosecution of that crime.<sup>63</sup> This provision was created to protect survivors<sup>64</sup> of serious crimes and to help law enforcement in investigating and prosecuting those

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<sup>57</sup> JUNCK, *supra* note 20, at 40.

<sup>58</sup> 8 U.S.C. § 1101(a)(27)(J) (defining eligibility for Special Immigrant Juvenile Status).

<sup>59</sup> Asylum, 8 U.S.C. § 1158 (defining asylum).

<sup>60</sup> *Id.*

<sup>61</sup> *See generally* JUNCK, *supra* note 20, at 297.

<sup>62</sup> The crime must take place in the U.S. or violate U.S. law. 8 U.S.C. § 1101(a)(15)(U)(IV).

<sup>63</sup> 8 U.S.C. § 1101(a)(15)(U) (defining U-Visa requirements).

<sup>64</sup> "'Survivor' is a term used in service providing organizations to recognize the strength and courage it takes to overcome victimization." JUNCK, *supra* note 20, at 407.

crimes.<sup>65</sup> Similarly, T-Visas are available to survivors of a serious form of trafficking, such as sex or labor trafficking, among other requirements.<sup>66</sup> Beyond sex work and criminal activity, trafficking often occurs in industries such as caregiving, agriculture, hospitality, restaurant, and manufacturing work, to name a few.<sup>67</sup>

Lastly, relief under VAWA is available for undocumented children and youth who are abused by a United States citizen or legal permanent resident parent.<sup>68</sup> VAWA was created to prevent abusive family members who have the ability to legally sponsor a noncitizen family member from using the person's noncitizen status as a way to further abuse them by threatening to deport them or withdraw their petition for status.<sup>69</sup> VAWA permits an individual in this situation to gain legal status on their own without having to rely on the abusive family member.<sup>70</sup>

In some cases, unaccompanied minors might be eligible for multiple forms of relief and advocates must take various practical considerations into account to determine which form of relief best serves the interests of the child.<sup>71</sup> As a hypothetical, a child named Jose leaves his home country in Central America due to domestic violence. Along his journey, he is stopped by gang members. The gang members hold him hostage and threaten to kill him if he does not give them money in exchange for his freedom. Jose is forced to work for the group in order to pay them the amount they demand. Once Jose arrives in the United States, he may be eligible for multiple forms of humanitarian relief including SIJS, asylum, and a T-Visa. In these instances, practitioners must make strategic decisions taking into consideration the benefits and risks associated with each type of

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<sup>65</sup> JUNCK, *supra* note 20, at 256.

<sup>66</sup> 8 U.S.C. § 1101(a)(15)(T) (defining T-Visa requirements).

<sup>67</sup> See JUNCK, *supra* note 20, at 410.

<sup>68</sup> Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902.

<sup>69</sup> See JUNCK, *supra* note 20, at 273.

<sup>70</sup> See *id.*

<sup>71</sup> See *id.* at 9.

humanitarian relief. However, in other cases, SIJS might be the only hope of relief.

## V. SPECIAL IMMIGRANT JUVENILE STATUS

This Part of the article will provide the history and legislative intent behind SIJS. Additionally, this Part will also examine the complicated application process that includes both state and federal procedures.

### *A. History and Legislative Intent*

Prior to the creation of SIJS, unaccompanied minors routinely were placed under state care.<sup>72</sup> They would remain in state care until they aged out at the age of eighteen.<sup>73</sup> After aging out, these individuals would remain in the United States undocumented.<sup>74</sup> In the 1980s, allegations of the mistreatment of unaccompanied children at the hands of the Immigration and Naturalization Service (INS) lead to lawsuits that resulted in the Flores Settlement Agreement (Flores Agreement) consent decree.<sup>75</sup> The Flores Agreement established national policies for the treatment of unaccompanied children in detention.<sup>76</sup> It required that INS officials provide the children with basic human necessities such as food, water, toilets, sinks, adequate temperature control, and medical assistance.<sup>77</sup> Additionally, it required detention centers to separate children from unrelated adults and to provide adequate supervision for their protection.<sup>78</sup> For many years after the consent decree, activists criticized the INS for failing to implement the requirements set forth in the Flores Agreement.<sup>79</sup>

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<sup>72</sup> *Id.* at 65.

<sup>73</sup> *See id.*

<sup>74</sup> *See id.*

<sup>75</sup> KANDEL, *supra* note 16, at 4.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 4–5.

In 1990, Congress created SIJS as part of a broader amendment to the Immigration and Nationality Act (INA)<sup>80</sup> to address concerns about foreign children in the United States who were at a high risk of homelessness.<sup>81</sup> While the committee and conference records related to this legislation do not discuss the SIJS provision,<sup>82</sup> it is generally understood that this legislation shows congressional intent to assist a limited group of children in remaining safely in the country by providing a means to apply for lawful permanent resident<sup>83</sup> status.<sup>84</sup>

In 2008, the William Wilberforce Trafficking Victim's Reauthorization Act (TVPRA)<sup>85</sup> was passed into law.<sup>86</sup> The Congressional Record indicates that the TVPRA was intended to protect children "who have escaped traumatic situations such as armed conflict, sweatshop labor, human trafficking, forced prostitution, and other life-threatening circumstances."<sup>87</sup> In fact, the plain language of the statute indicates its purpose is to "establish policies and programs to ensure that unaccompanied [noncitizen] children in the United States are protected from traffickers and other persons seeking to victimize or otherwise engage such children in criminal, harmful, or exploitative activity . . . ."<sup>88</sup>

In recognition of the extreme vulnerability of unaccompanied children and minors, the TVPRA created multiple safeguards with the "best interest of the child" as the main tenet.<sup>89</sup> These safeguards include screening the

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<sup>80</sup> Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

<sup>81</sup> RUTH ELLEN WASEM, CONG. RSCH. SERV., R43703, SPECIAL IMMIGRANT JUVENILES: IN BRIEF 2 (2014).

<sup>82</sup> *Id.* at 2 n.15.

<sup>83</sup> See generally WILLIAM A. KANDEL, CONG. RSCH. SERV., R43366, U.S. NATURALIZATION POLICY (2014).

<sup>84</sup> See *Osorio-Martinez v. Att'y Gen. U.S.*, 893 F.3d 153, 168 (3rd Cir. 2018).

<sup>85</sup> Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044; 8 U.S.C. § 1232.

<sup>86</sup> JUNCK, *supra* note 20, at 16.

<sup>87</sup> 154 CONG. REC. S10,886 (daily ed. Dec. 10, 2008) (statement of Sen. Feinstein).

<sup>88</sup> 8 U.S.C. § 1232(c)(1).

<sup>89</sup> JUNCK, *supra* note 20, at 16.

child for trafficking or fear of persecution; placing the child in the least restrictive setting possible; requiring family reunification or other placement that is in the best interest of the child; and encouraging pro-bono legal representation at no expense to the government, among other things.<sup>90</sup>

Through the TVPRA, Congress broadened the SIJS provision by eliminating the requirement that the unaccompanied children must be eligible for long-term foster care because that constraint was often interpreted as requiring that reunification with both parents was no longer viable.<sup>91</sup> As a result, the foster care requirement was replaced with the requirement that reunification with one or both parents is no longer viable.<sup>92</sup> The change meant that children with only one parent that had abandoned, abused, or neglected the child are eligible to apply for SIJS. This change effectively expanded the group of unaccompanied children that qualify for SIJS.<sup>93</sup>

These changes demonstrated a desire by Congress to protect undocumented children and youth. In the Congressional Record, Senator Feinstein remarked, “Congress took an important step to protecting unaccompanied [noncitizen] children, the most vulnerable immigrants. I believe we have a special obligation to ensure that these children are treated humanely and fairly. Unfortunately, without this legislation, there would be no procedure to make sure that happens.”<sup>94</sup> In the spirit of Senator Feinstein’s words, Congress must act again to extend protections for unaccompanied children and youth. Eliminating USCIS’ consent requirement and per-country limitation while increasing SIJS based adjustments would give proper effect to congressional efforts to protect more unaccompanied children and youth.

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<sup>90</sup> *Id.* at 17; *see also* 154 CONG. REC. S10,886 (daily ed. Dec. 10, 2008) (statement of Sen. Feinstein).

<sup>91</sup> JUNCK, *supra* note 20, at 51.

<sup>92</sup> WASEM, *supra* note 81, at 3.

<sup>93</sup> *Id.*

<sup>94</sup> 154 CONG. REC. S10,886 (daily ed. Dec. 10, 2008) (statement of Sen. Feinstein).

### *B. SIJS Application Process*

The application procedure for SIJS is a complicated process. This form of humanitarian relief is a hybrid state–federal process with multiple agencies involved along the way.<sup>95</sup> In general, children and youth who are eligible for SIJS may include those who are in the state’s welfare system; those who are currently in immigration detention centers; or those living with a foster family, guardian, or family member.<sup>96</sup>

The SIJS process may begin affirmatively or defensively.<sup>97</sup> An affirmative application is risky because it requires the child to intentionally alert immigration officials of their noncitizen status and may result in deportation if the application is denied.<sup>98</sup> Conversely, a defensive application is used once the child is already in deportation proceedings and may result in staying the deportation if approved.<sup>99</sup> For defensive cases, the process begins when the minors are detained by immigration officials. Once in the custody of immigration officials, the agency must transfer unaccompanied minors to the ORR within seventy-two hours of classifying the child or youth as “unaccompanied.”<sup>100</sup> This procedure is in place because the ORR is the agency in charge of the custody and care of unaccompanied children and youth.<sup>101</sup> Under the TVPRA, the ORR has an obligation to place the unaccompanied minor “in the least restrictive setting that is in the best interest of the child.”<sup>102</sup> It also requires the ORR to release children to their parents or other family members if the party is available

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<sup>95</sup> See generally KANDEL, *supra* note 16, at 5–16 (providing an overview of agencies unaccompanied children may encounter in the U.S. immigration system).

<sup>96</sup> *Special Immigrant Juveniles*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Feb. 10, 2020), <https://www.uscis.gov/green-card/sij> [<https://perma.cc/7C94-37VH>].

<sup>97</sup> JUNCK, *supra* note 20, at 59.

<sup>98</sup> *Id.* at 58.

<sup>99</sup> *Id.* at 59.

<sup>100</sup> 8 U.S.C. § 1232(b)(3).

<sup>101</sup> See *id.*

<sup>102</sup> 8 U.S.C. § 1232(c)(2).

and capable of providing for the child's well-being.<sup>103</sup> The ORR places unaccompanied children in immigration detention centers while it seeks to place them with a sponsor, which is usually a family member.<sup>104</sup>

However, if the ORR is unable to find a sponsor, the unaccompanied minor is placed in long-term foster care if several criteria are met.<sup>105</sup> To be placed in long-term foster care, the minor must be expected to stay in the ORR's custody for a minimum of four months, unable to find a sponsor, determined to be eligible for immigration relief, and under the age of seventeen and six months old when placed in foster care.<sup>106</sup> On a case-by-case basis, the ORR may also consider long-term placement for unaccompanied minors that may have a prolonged stay due to other extenuating circumstances.<sup>107</sup>

For unaccompanied minors to be eligible for immigration relief under SIJS, a state court must make six factual findings: (1) the child is present in the United States; (2) the child is under twenty-one years of age; (3) the child is unmarried; (4) the child is dependent on a juvenile<sup>108</sup> court;<sup>109</sup> (5) reunification is not viable with one or both parents due to abuse, abandonment, neglect, or a similar basis under the law;<sup>110</sup> and (6) it is not in the best interest of the child to return to their country of citizenship.<sup>111</sup> Notably, the "similar basis under the law" accommodates for the variation

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<sup>103</sup> 8 U.S.C. § 1232(c)(3).

<sup>104</sup> See KANDEL, *supra* note 16, at 9.

<sup>105</sup> U.S. Dep't of Health & Hum. Servs., *Children Entering the United States Unaccompanied: Section 1*, OFF. OF REFUGEE RESETTLEMENT, 1.2.6. (June 12, 2017), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1> [<https://perma.cc/Y6H3-HEW6>].

<sup>106</sup> *Id.*

<sup>107</sup> *See id.*

<sup>108</sup> The term "juvenile court" includes any state court with the jurisdiction under state law to make determinations about the custody and care of juveniles, which may include any court that handles dependency cases, guardianship cases, family law custody cases, delinquency cases, or adoption cases. JUNCK, *supra* note 20, at 68–69.

<sup>109</sup> 8 U.S.C. § 1101(a)(27)(J) (defining eligibility for Special Immigrant Juvenile Status).

<sup>110</sup> 8 U.S.C. § 1101(a)(27)(J)(i).

<sup>111</sup> 8 U.S.C. § 1101(a)(27)(J)(ii).

in the states' definitions of abandonment, abuse, and neglect, such that practitioners may advocate the court make a similar factual finding.<sup>112</sup> For example, the fact the child was "uncared for," which includes being homeless or the parent(s) being unable to "provide the specialized care that the physical, emotional or mental condition of the child requires," may constitute a similar basis under the law.<sup>113</sup>

The six factual findings can be requested by a petitioning child in any type of proceeding in which a state court has the authority to make judicial determinations about the care and custody of juveniles.<sup>114</sup> These types of proceedings may include dependency, delinquency, guardianship, custody, or adoption.<sup>115</sup> The findings should be set out in an order signed by the state court judge.<sup>116</sup> The signed order and SIJS application are then submitted to USCIS, which is the agency responsible for processing and deciding all applications for immigration benefits.<sup>117</sup>

After this stage in the process, the unaccompanied minor may apply for the adjustment of their status to legal permanent resident.<sup>118</sup> Generally, under immigration law, individuals are penalized if they fall within certain grounds of inadmissibility, previously known as grounds for exclusion.<sup>119</sup> These grounds for inadmissibility provide a list of reasons that a noncitizen may be refused admission to the United States.<sup>120</sup> To illustrate, some of the reasons include entering the United States to work without a labor certification and entering without inspection (through an unauthorized point of entry).<sup>121</sup>

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<sup>112</sup> JUNCK, *supra* note 20, at 86.

<sup>113</sup> *Id.* at 86 n.78.

<sup>114</sup> *See id.* at 68–69.

<sup>115</sup> *Id.* at 69.

<sup>116</sup> 8 C.F.R. § 204.11(11)(d)(2) (2009).

<sup>117</sup> JUNCK, *supra* note 20, at 10.

<sup>118</sup> *Id.* at 107.

<sup>119</sup> *See id.* at 108.

<sup>120</sup> *See id.* at 108.

<sup>121</sup> 8 U.S.C. § 1182(a)(5)–(6).



Notably, seven of the grounds of inadmissibility do not apply to SIJS.<sup>122</sup> The seven grounds include the public charge classification, labor certificate, presence without admission, misrepresentation relating to immigration documents, stowaway, valid entry documents, and unlawful presence in the country.<sup>123</sup> In many cases, the other grounds of inadmissibility that are applicable to SIJS recipients may be waived through a separate waiver application.<sup>124</sup> USCIS has the discretion to approve the waiver,<sup>125</sup> as the statute provides, “[a]ny other exclusion provision may be waived on an individual basis for humanitarian purposes, family unity, or when it is otherwise in the public interest.”<sup>126</sup> This waiver standard is fairly generous when compared to other immigration provisions that do not permit waiving grounds of inadmissibility like the public charge classification, among others.<sup>127</sup> In particular, the provisions that are not waivable generally relate to crimes and national security concerns, such as terrorism and espionage.<sup>128</sup>

Next, there is a federal requirement. USCIS must consent to the grant of the SIJS application.<sup>129</sup> More specifically, the Secretary of Homeland Security must consent to the grant of SIJS.<sup>130</sup> This requirement stems from the TVPRA amendment, which sought to simplify the consent process.<sup>131</sup> In

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<sup>122</sup> See JUNCK, *supra* note 20, at 111–112.

<sup>123</sup> See *id.* at 111–112.

<sup>124</sup> See 8 C.F.R. § 245.1(e) (2011); see also JUNCK, *supra* note 20, at 112.

<sup>125</sup> JUNCK, *supra* note 20, at 112.

<sup>126</sup> 8 C.F.R. § 245.1(e) (1977).

<sup>127</sup> JUNCK, *supra* note 20, at 110.

<sup>128</sup> 8 U.S.C. § 1182 (defining classes of ineligibility for visas and admission to U.S.); see also JUNCK, *supra* note 20, at 120–121.

<sup>129</sup> See JUNCK, *supra* note 20, at 94 (explaining there are two consent requirements under SIJS law; the second “specific requirement” will not be discussed in depth in this article).

<sup>130</sup> 8 U.S.C. § 1101(a)(27)(J)(iii).

<sup>131</sup> Memorandum from Donald Neufeld, USCIS Acting Assoc. Dir. of Domestic Operations, & Pearl Chang, USCIS Acting Chief of the Off. of Pol’y & Strategy, to Field Leadership 2 (Mar. 24, 2009), [https://www.uscis.gov/sites/default/files/document/memos/TVPRA\\_SIJ.pdf](https://www.uscis.gov/sites/default/files/document/memos/TVPRA_SIJ.pdf) [<https://perma.cc/A7DC-BS3F>] [hereinafter Neufeld Memorandum].

2009, USCIS issued a memorandum providing guidance on this provision, which is known as the Neufeld Memorandum.<sup>132</sup> It indicated that the amendment changed the consent requirement to function as an acknowledgment that the application was made in good faith.<sup>133</sup> In other words, the consent requirement now involves finding that the SIJS application is not “sought primarily for the purpose of obtaining legal permanent residence, rather for the purpose of obtaining relief from abuse, neglect or abandonment.”<sup>134</sup> The function of this provision was to narrow the beneficiaries of SIJS to only those who were not seeking an immigration benefit.<sup>135</sup> In practice, the approval of an SIJS application is equivalent to USCIS’s consent.<sup>136</sup>

If an SIJS application is approved, the individual may apply to become a legal permanent resident.<sup>137</sup> Generally, individuals who enter the United States without inspection that apply for a visa through family members are not permitted to remain in the U.S. while applying to adjust their legal status.<sup>138</sup> Those individuals must go back to their country of origin during the process, in some instances without the guarantee that they will be able to re-enter the United States.<sup>139</sup> However, as previously mentioned, SIJS recipients are exempt from this procedure under the current statute.<sup>140</sup> This means that SIJS recipients may apply for an adjustment of status while in the United States, despite having entered the country without inspection.<sup>141</sup>

Despite all the provisions in favor of waiving grounds of inadmissibility and granting the adjustment to lawful permanent residence, USCIS retains

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<sup>132</sup> *Id.* at 1.

<sup>133</sup> *Id.* at 3.

<sup>134</sup> *Id.*

<sup>135</sup> H.R. REP. NO. 105-405, at 130 (1997).

<sup>136</sup> Neufeld Memorandum, *supra* note 131, at 3.

<sup>137</sup> See JUNCK, *supra* note 20, at 107.

<sup>138</sup> See *id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

the discretion to grant or deny an adjustment of status.<sup>142</sup> This creates a bizarre situation in which unaccompanied children and youth may be granted humanitarian relief under SIJS, but then denied the adjustment to lawful permanent residence.<sup>143</sup> Under these circumstances, the unaccompanied children and youth may be placed in removal proceedings and eventually be deported back to their country of citizenship if no other relief provisions apply.<sup>144</sup> This outcome is permitted to occur despite a state court finding that reunification with one or both parents is not viable due to abandonment, abuse, or neglect and that returning to the country of citizenship is not in the best interest of the child. This result is not only grossly unjust, but also contrary to the legislative purpose behind SIJS.

## VI. EXTENDING PROTECTIONS FOR SIJS

Congress should implement two changes to the SIJS provisions to ensure that eligible unaccompanied minors are not denied a pathway to citizenship when a state courts finds all six requirements are met.<sup>145</sup> First, Congress should eliminate the requirement that USCIS consent to grants of SIJS. Second, Congress should eliminate the per-country limitation and triple the number of SIJS-based adjustment of status visas per year to account for all the unaccompanied minors who may be eligible for SIJS in a given year. All of these changes would give effect to Congress's legislative intent in creating SIJS to protect a particularly vulnerable group of unaccompanied minors.

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<sup>142</sup> See USCIS, POLICY MANUAL, CHAPTER 8 – DISCRETIONARY ANALYSIS, <https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-8#footnote-7> [<https://perma.cc/F7C2-GW5S>].

<sup>143</sup> See JUNCK, *supra* note 20, at 109.

<sup>144</sup> See *id.*

<sup>145</sup> See 8 U.S.C. § 1101(a)(27)(J) (defining requirements for SIJS).

### A. Eliminating USCIS's Consent to SIJS

As discussed in Part V of this article, USCIS must consent to the grant of the SIJS application once the court has made the requisite findings.<sup>146</sup> In practice, the consent provision is meant to function as an acknowledgment that the application is *bona fide*, meaning that it is not sought primarily for the purpose of obtaining an immigration benefit, but rather for the purpose of obtaining relief from abuse, neglect, or abandonment.<sup>147</sup> This means that if the USCIS officer believes that the unaccompanied minor is primarily seeking immigration relief, the application will be denied.

However, the consent provision is an unnecessary barrier for unaccompanied children and youth to attain SIJS. Other immigration relief provisions for unaccompanied minors do not require that relief is sought primarily for a purpose other than an immigration benefit.<sup>148</sup> If the intent is to help undocumented children and youths who have survived a form of domestic abuse at the hands of their parent or parents, then penalizing them for seeking the stability and relief that a pathway to legal permanent residence would provide is contrary to that intent. To deny an unaccompanied minor immigration relief, place the minor in deportation proceedings, and remove them from the United States for seeking relief that they otherwise qualify to receive is a result that does not align with the established policy goals behind SIJS.

In practice, USCIS officials may erroneously interpret that consent can be based on factors that are unrelated to the SIJS claim.<sup>149</sup> Other factors that USCIS officials may wrongfully consider include the child's demeanor, the fact that the child is in delinquency proceedings rather than dependency

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<sup>146</sup> See JUNCK, *supra* note 20, at 94.

<sup>147</sup> See *id.*

<sup>148</sup> Cf. 8 U.S.C. § 1158 (defining asylum); cf. 8 U.S.C. § 1101(a)(15)(U) (defining U-Visa); cf. 8 U.S.C. § 1101(a)(15)(T) (defining T-Visa); cf. Violence Against Women Act of 1994, Pub. L. No. 103-122, 108 Stat. 1902-1955 (defining VAWA).

<sup>149</sup> See JUNCK, *supra* note 20, at 95.

proceedings, and the fact that the child is over eighteen but under twenty-one years of age.<sup>150</sup> However, no language exists in the statute to support questioning the state court's fact finding. Rather, questioning the state court's process is outside of USCIS officials' scope.<sup>151</sup> This practice is contrary to previous guidance issued by USCIS in the Neufeld Memorandum.<sup>152</sup> The memo instructed that USCIS officials should "focus on eligibility for adjustment of status and should avoid questioning a child about the details of the abuse, abandonment or neglect suffered, as those matters were handled by the juvenile court, applying state law."<sup>153</sup> The memo previously advised that under no circumstances should the SIJS applicant be required to contact the parent, or family members of the parent, who abused, abandoned, or neglected the unaccompanied minor.<sup>154</sup> Therefore, removing the consent provision will ensure that USCIS is unable to arbitrarily deny SIJS applicants who have already met the statutorily prescribed requirements.

*B. Congress Should Eliminate the Per-Country Limitation and Increase Visas for SIJS-Based Adjustment of Status*

Merely changing the consent provision would be insufficient to extend protections for unaccompanied children and youth who have been abandoned, abused, or neglected because visas are limited in number.<sup>155</sup> Although a limit on the amount of children per country has always been in place, prior to 2016, the limitation on visas rarely came up because there were enough visas for all the unaccompanied minors who applied for an SIJS-based adjustment of status.<sup>156</sup> Due to the rise of unaccompanied

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<sup>150</sup> *See id.*

<sup>151</sup> *Id.* at 203.

<sup>152</sup> *See* Neufeld Memorandum, *supra* note 131.

<sup>153</sup> *Id.* at 4.

<sup>154</sup> *Id.*

<sup>155</sup> *See* 8 U.S.C. § 1153.

<sup>156</sup> JUNCK, *supra* note 20, at 124.

minors applying for SIJS and an increase in the availability of legal services for children and youth, visas have reached their numerical limit, which has created a backlog in the availability of visas for children from the Northern Triangle and Mexico<sup>157</sup>—who constitute the majority of SIJS applicants. The backlog poses a problem because SIJS “does not in and of itself convey actual immigration status or protection from deportation. Nor does it provide the opportunity to apply for work authorization, which can only be done once the application for adjustment can be filed.”<sup>158</sup> Thus, SIJS recipients do not receive the full immigration benefit or relief until they have attained an SIJS-based adjustment of status.

Eliminating the per-country limitation on SIJS-based visas and tripling the number of SIJS visas allocated would further give effect to Congress’ intent to protect these children and youth. This solution is premised on two grounds. First, it is estimated that approximately 72,873 unaccompanied minors were detained in 2019.<sup>159</sup> Second, studies suggest that approximately one in five of these unaccompanied minors may experience some form of physical or mental abuse in the home.<sup>160</sup> Tripling the number of visas would provide ample SIJS visas to accommodate the number of unaccompanied minors who may qualify in a year with similar numbers as 2019.

In fact, increasing the number of visas is not unprecedented.<sup>161</sup> Two significant changes to the allocation of visas have occurred in recent

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<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> KANDEL, *supra* note 16, at 2 (noting the number of unaccompanied minors for the first eleven months of 2019).

<sup>160</sup> U.N. HIGH COMM’R FOR REFUGEES, CHILDREN ON THE RUN: UNACCOMPANIED CHILDREN LEAVING CENTRAL AMERICA AND MEXICO AND THE NEED FOR INTERNATIONAL PROTECTION (2014), <https://www.unhcr.org/en-us/about-us/background/56fc266f4/children-on-the-run-full-report.html?query=children%20on%20the%20run> [https://perma.cc/6543-VUBS].

<sup>161</sup> Immigration Act of 1990, Pub. L. No. 101-649, §153(a), 104 Stat. 4978.

history.<sup>162</sup> The first major shift occurred in the amendments to the Immigration and Nationality Act in 1965,<sup>163</sup> which replaced a quota system based on national origin with numerical limitations determined on a per-country basis.<sup>164</sup> The second significant change to the per-country limitation occurred in the Immigration Act of 1990.<sup>165</sup> This included an increase in visas allocated for various categories.<sup>166</sup> One of the categories increased included employment-based visas, which encompass various special immigrant provisions.<sup>167</sup> Special immigrants include religious workers, other employees, and juveniles.<sup>168</sup> The Act allocated seven percent for employment-based visas.<sup>169</sup> It also created exceptions to the per-country ceiling under certain circumstances.<sup>170</sup> Currently, the visa provision allocates 140,000 employment-based visas and provides no more than 5,000 visas to special immigrants.<sup>171</sup>

A similar proposal to increase visas exists for a different category of special immigrants. In July 2019, the Fairness for High-Skilled Immigrants Act<sup>172</sup> was proposed to eliminate the per-country numerical limitation for high-skilled workers and increase the per-country numerical limitation for family-sponsored immigrants.<sup>173</sup> The bill was intended to address concerns regarding the lengthy backlog for high-skilled workers and families, particularly those from countries like China and India, where the backlog is

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<sup>162</sup> See Immigration and Nationality Act, Pub. L. No. 89-236, 79 Stat. 911 (1965); see also Immigration Act of 1990, Pub. L. No. 101-649, §153(a), 104 Stat. 4978.

<sup>163</sup> WILLIAM A. KANDEL, CONG. RSCH. SERV., R42866, PERMANENT LEGAL IMMIGRATION TO THE UNITED STATES: POLICY OVERVIEW 5 (2018).

<sup>164</sup> Immigration & Nationality Act, Pub. L. No. 89-236, 79 Stat. 911 (1965).

<sup>165</sup> Immigration Act of 1990, Pub. L. No. 101-649, §153(a), 104 Stat. 4978.

<sup>166</sup> *Id.*

<sup>167</sup> See KANDEL, *supra* note 163, at 5.

<sup>168</sup> Immigration Act of 1990, Pub. L. No. 101-649, §153(a), 104 Stat. 4978; see also KANDEL, *supra* note 163.

<sup>169</sup> Immigration Act of 1990, Pub. L. No. 101-649, §153(a), 104 Stat. 4978.

<sup>170</sup> *Id.*

<sup>171</sup> 8 U.S.C. § 1153; see also KANDEL, *supra* note 163.

<sup>172</sup> Fairness for High-Skilled Immigrants Act of 2019, H.R. 1044, 116th Cong. (2019).

<sup>173</sup> *Id.*

so large that it may take as long as a decade to attain a visa.<sup>174</sup> The amendment would completely eliminate the seven percent ceiling on high-skilled-employment-based immigrant visas.<sup>175</sup> It would also increase the per-country ceiling on family-based visas from seven percent to fifteen percent.<sup>176</sup>

Notably, the bill received bipartisan support<sup>177</sup> when it passed in the House of Representatives in July 2019. The bipartisan support demonstrated recognition that the current framework for allocating visas is unfit to meet modern immigration issues surrounding particular groups with special needs. United States Representative Zoe Lofgren remarked that we are “inextricably bound by the imperfections of an immigration framework that was formulated nearly 30 years ago and is out of touch with the needs of the 21st century. Major reforms are required to truly fix our outdated legal system.”<sup>178</sup> Recognizing the limitations of our current framework, other U.S. Representatives expressed concern over the arbitrary nature of allocating visas based upon country of birth without further considerations.<sup>179</sup>

In response to the Fairness for High-Skilled Immigrants Act of 2019, the Senate proposed its own bill, the Resolving Extended Limbo for Immigrant Employees and Families Act,<sup>180</sup> also referred to as the RELIEF Act.<sup>181</sup> It proposes very similar provisions as the Fairness for High-Skilled Immigrants Act, such as eliminating the limitations for employment-based visas and increasing the limits on family-based visas.<sup>182</sup> The main

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<sup>174</sup> 165 CONG. REC. H5325 (daily ed. July 10, 2019) (statement of Rep. Lofgren).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> See 165 CONG. REC. H5325 (daily ed. July 10, 2019) (statement of Rep. Lofgren, Rep. Buck & Rep. Curtis).

<sup>180</sup> RELIEF Act, S. 2603, 116th Cong. (2019).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*



difference is that the RELIEF Act proposes to increase the overall limitation on visas over a period of five years.<sup>183</sup> It is unclear which bill, if either, will pass both the House and Senate to become law.

Under the current anti-immigration political climate, it is remarkable that the Fairness for High-Skilled Immigrants Act received bipartisan support. Supporters of the bill emphasize that high-skilled workers are valuable to the United States because they emigrate legally, work hard, pay their taxes, and create U.S. jobs.<sup>184</sup> Indeed, similar policy rationales exist to support increasing the number of visas allocated for SIJS applicants. Increasing the number of visas for SIJS would ensure that applicants have a legal pathway to citizenship, the opportunity to gain an education, and the ability to engage in the labor market openly, just like high-skilled workers.

In the summer of 2020, I interned at the Northwest Immigrant Rights Project in Wenatchee, Washington. I worked on several SIJS cases during the course of my internship. While interviewing children applying for SIJS, I asked the children at the end of each intake interview, “What do you want to be when you grow up?” The children overwhelmingly expressed dreams of becoming doctors, engineers, and teachers when they grow up. Eliminating the per-country limitations and increasing the number of SIJS-based visas would ensure that these children and youth are able to attain the safety, stability, and opportunities that come with legal permanent residency and citizenship.

## VII. RESPONSE TO CRITICISMS OF SIJS AND THE IMPLICATIONS OF CHARACTERIZING UNACCOMPANIED CHILDREN AND YOUTH AS CRIMINALS

There are two main criticisms of SIJS. First, critics perceive immigration relief provisions as “loopholes” that encourage undocumented individuals

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<sup>183</sup> *Id.*

<sup>184</sup> 165 CONG. REC. H5325 (daily ed. July 10, 2019) (statement of Rep. Buck).

to exploit the United States' immigration system.<sup>185</sup> Second, critics believe that unaccompanied children and youth are criminals with gang affiliation based on anecdotal evidence and trends in gang recruitment.<sup>186</sup> However, characterizing unaccompanied minors as criminals is inaccurate and harms their ability to obtain legal status.

#### *A. SIJS Does Not Encourage Undocumented Migration*

The first criticism of provisions like SIJS is that they encourage individuals to exploit immigration loopholes.<sup>187</sup> Critics argue that immigration relief for unaccompanied minors is a specific loophole that is utilized by undocumented families and human smugglers to exploit the United States' immigration system.<sup>188</sup> They believe that noncitizen immigrants are motivated by U.S. immigration policies rather than the various factors specific to the Northern Triangle.<sup>189</sup> One critic noted that because homicide rates have decreased in the Northern Triangle, there is no logical connection between homicide rates and the increase in migration to the United States.<sup>190</sup> Rather, the critic posits that families with unaccompanied children and youth are encouraged by relaxed immigration policies to pay smugglers to bring their children to the United States.<sup>191</sup> As

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<sup>185</sup> ANDREW R. ARTHUR, CTR. FOR IMMIGR. STUD., UNACCOMPANIED ALIEN CHILDREN AND THE CRISIS AT THE BORDER 1 (2019), <https://cis.org/sites/default/files/2019-03/arthur-uacs.pdf> [<https://perma.cc/U6F9-TJQU>]; cf. *Center for Immigration Studies*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/center-immigration-studies> [<https://perma.cc/7KGE-HJC2>] (categorizing the Center for Immigration Studies as an anti-immigration hate group).

<sup>186</sup> ANDREW R. ARTHUR, CTR. FOR IMMIGR. STUD., UNACCOMPANIED ALIEN CHILDREN AND THE CRISIS AT THE BORDER 5 (2019), <https://cis.org/sites/default/files/2019-03/arthur-uacs.pdf> [<https://perma.cc/U6F9-TJQU>].

<sup>187</sup> *Id.* at 1.

<sup>188</sup> *Id.* at 1, 5.

<sup>189</sup> *Id.* at 12 (arguing there is no connection between homicide rates in the Northern Triangle and increased detention at the border).

<sup>190</sup> *Id.* at 12.

<sup>191</sup> *Id.* at 13.

a result of this perception, critics argue that migration should be discouraged by eliminating or limiting provisions for immigration relief.<sup>192</sup>

However, the causal link between immigration relief and the increase in unaccompanied children and youth detained in the last several years is tenuous at best. Many provisions that critics highlight as being responsible for encouraging unaccompanied minors to migrate to the United States have existed for decades. To illustrate, Congress established SIJS in 1990;<sup>193</sup> it has existed for thirty-one years. Similarly, Congress established the Refugee Act in 1980;<sup>194</sup> it has existed for forty-one years. Lesser known provisions like the U-Visa and the T-Visa have existed for at least twenty years.<sup>195</sup> Therefore, it is misleading for critics to suggest that U.S. immigration relief provisions are the basis for the increase in unaccompanied children and youth in recent years. As previously discussed, it is more likely that a combination of many factors is contributing to the increase in unaccompanied minors traveling to the United States.

### *B. Unaccompanied Minors Are Not Gang Members*

The second concern expressed by critics is that gang members likely exploit the unaccompanied minor classification.<sup>196</sup> The fear is that gangs bring gang members into the United States, who are then designated as unaccompanied minors, and that unaccompanied minors provide an ideal recruiting opportunity for gang recruiters.<sup>197</sup> In particular, MS-13<sup>198</sup> is

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<sup>192</sup> See Press Briefing, Press Briefing by Press Secretary Sarah Sanders & DHS Secretary Kirstjen Nielson (June 18, 2018).

<sup>193</sup> See 8 U.S.C. § 1101(a)(27)(J).

<sup>194</sup> See 8 U.S.C. § 1158.

<sup>195</sup> See 8 U.S.C. § 1101(a)(15)(U) (defining U-Visa requirements); see also 8 U.S.C. § 1101(a)(15)(T) (defining T-Visa requirements).

<sup>196</sup> See KRISTIN FINKLEA, CONG. RSCH. SERV., R45292, MS-13 IN UNITED STATES AND FEDERAL LAW ENFORCEMENT EFFORTS 14 (2018).

<sup>197</sup> *Id.*

<sup>198</sup> Mara Salvatrucha (MS-13) is a gang operating in the United States and Central America. *Id.* at 1.

highlighted as recruiting unaccompanied children and youth in the United States.<sup>199</sup> However, even when United States Customs and Border Patrol releases numbers relating to unaccompanied minors and gang affiliations, the numbers are not based on confirmed cases of gang affiliation.<sup>200</sup> With no official statistics on how many apprehended unaccompanied minors are associated with gangs,<sup>201</sup> critics rely on anecdotal evidence to fuel concerns that MS-13 and unaccompanied minors are a danger to the United States.<sup>202</sup>

Thus, the current data that exists on the relationship between unaccompanied minors and gangs relies on broad generalizations about gang recruitment trends.<sup>203</sup> No statistics exist as to the percentage of unaccompanied minors with gang affiliations.<sup>204</sup> In the past, the FBI published reports called the National Gang Threat Assessment (NGTA) and the National Gang Report (NGR)<sup>205</sup> compiled by the National Drug Intelligence Center in collaboration with a multitude of agencies. The 2015 NGR was the last official report on gangs published by the FBI.<sup>206</sup> Overall, the reports are meant to provide an overview of gang activity and trends in the United States. In relation to juveniles, the 2011 report indicated that

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<sup>199</sup> Press Release, Unaccompanied Alien Children and Family Units Are Flooding the Border Because of Catch and Release Loopholes (Feb. 15, 2018), <https://www.dhs.gov/news/2018/02/15/unaccompanied-alien-children-and-family-units-are-flooding-border-because-catch-and> [<https://perma.cc/BDR5-PZEH>].

<sup>200</sup> FINKLEA, *supra* note 196, at 15.

<sup>201</sup> *Id.* at 1.

<sup>202</sup> See ARTHUR, *supra* note 185, at 12.

<sup>203</sup> Cf. NAT'L DRUG INTEL. CTR, F.B.I., 2011 NATIONAL GANG THREAT ASSESSMENT – EMERGING TRENDS 1, 18 (2012), <https://www.fbi.gov/file-repository/stats-services-publications-2011-national-gang-threat-assessment-2011%20national%20gang%20threat%20assessment%20%20emerging%20trends.pdf/view> [<https://perma.cc/Z6PD-G2LY>].

<sup>204</sup> See FINKLEA, *supra* note 196, at 1 (stating no centralized database exists on gang membership).

<sup>205</sup> NAT'L DRUG INTEL. CTR, F.B.I., 2015 NATIONAL GANG REPORT (2016), <https://www.fbi.gov/file-repository/stats-services-publications-national-gang-report-2015.pdf/view> [<https://perma.cc/4SU7-J5EP>].

<sup>206</sup> See *Gang Reports*, F.B.I., <https://www.fbi.gov/resources/library/gang-reports> [<https://perma.cc/6ZL4-CSLQ>].

gangs generally seek to recruit children and youth because of their vulnerability to recruitment tactics and their likelihood of avoiding harsh criminal sentencing.<sup>207</sup>

The 2011 survey did not discuss any connection between MS-13, or any other gang, in relation to unaccompanied minors.<sup>208</sup> Furthermore, the report warned against relying on the information to compile statistics or rankings.<sup>209</sup> The report cautioned that the information does not provide insight into the variables that affect crime, which may lead to an overly simplistic and incomplete analysis that creates a misleading perception that may negatively affect many people.<sup>210</sup> Notably, the FBI does not rely on this data for its assessments of gang threats and indicates that others should not rely on the data either.<sup>211</sup> Critics of SIJS rely solely on unreliable data that includes suspected—not confirmed—gang related cases and anecdotal stories. The concerns over unaccompanied minors being gang affiliated lack any meaningful or tangible support, and instead, rely on stereotypes that overly criminalize undocumented children and youth.

### *C. Characterizing Unaccompanied Children and Youth as Criminal Aliens Has Real Implications*

Generally, characterizing undocumented individuals as criminals is not a new phenomenon. The United States has a long history of criminalizing undocumented individuals.<sup>212</sup> The term “alien” that current United States immigration law uses to describe noncitizen individuals has a pejorative

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<sup>207</sup> NAT’L DRUG INTEL. CTR, *supra* note 203, at 18.

<sup>208</sup> *See id.*

<sup>209</sup> *Id.* at 1.

<sup>210</sup> *Id.*

<sup>211</sup> *See id.*

<sup>212</sup> *See* Emily C. Tortveit Ngara, *Aliens, Aggravated Felons, and Worse: When Words Breed Fear and Fear Breeds Injustice*, 12 STAN. J. CIV. RTS. & CIV. LIBERTIES 389, 414–417 (2016).

connotation.<sup>213</sup> It serves to dehumanize individuals in both public and legal discourse. The term alien is most frequently associated with extraterrestrial creatures, typically depicted in movies as attempting to take over or destroy the planet.<sup>214</sup> Whether implicitly or explicitly, this is the imagery that our law invokes in its use of the term “alien” to describe human beings.

Additionally, in U.S. culture, undocumented immigrants are also referred to as “illegal aliens.”<sup>215</sup> The term implies criminality, casting undocumented people as criminal immigrants, and those with legal status as good, law-abiding immigrants. When lawmakers choose to label undocumented individuals as “aliens,” they also project an image that associates this group of people with illegal acts, namely crossing the border without inspection<sup>216</sup> or overstaying their visa. The consequences of this association may lead to the public being very suspicious of a disfavored group of people because they are predominately associated with criminality in political discourse.<sup>217</sup>

For instance, Iowa Representative Steve King stated in his opposition to the DREAM Act,<sup>218</sup> “They aren’t all valedictorians. They weren’t all brought in by their parents. For everyone who’s a valedictorian, there’s another hundred out there who weigh a hundred and thirty pounds—and they’ve got calves the size of cantaloupes because they’re hauling seventy-five pounds of marijuana across the desert. . . .”<sup>219</sup> Statements that describe undocumented children and youth in this manner have real consequences that disparately affect their ability to gain legal status. Stereotypes of

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<sup>213</sup> See *id.* at 417; see also Nicole Acevedo, *Biden Seeks to Replace ‘Alien’ with Less ‘Dehumanizing Term’ in Immigration Laws*, NBC NEWS (Jan. 20, 2021, 12:34 PM), <https://www.nbcnews.com/news/latino/biden-seeks-replace-alien-less-dehumanizing-term-immigration-laws-n1255350> [https://perma.cc/23SG-P3CL].

<sup>214</sup> See Ngara, *supra* note 212, at 414.

<sup>215</sup> *Id.* at 417.

<sup>216</sup> *Id.*

<sup>217</sup> See *id.*

<sup>218</sup> DREAM Act of 2010, S. 744, 113th Cong. (2013).

<sup>219</sup> Amy Davidson Sorkin, *Steve King and the Case of the Cantaloupe Calves*, NEW YORKER (July 25, 2013), <https://www.newyorker.com/news/amy-davidson/steve-king-and-the-case-of-the-cantaloupe-calves> [https://perma.cc/PXT9-JZY2].

criminality create legal and social barriers for unaccompanied children and youth seeking SIJS and other relief provisions, based on unfounded suspicions that they are more likely to be “criminal aliens” rather than children and youth fleeing the harsh conditions of abandonment, abuse, or neglect.

The effect of criminalizing rhetoric is to drive undocumented children and youth into the shadows without any legal status.<sup>220</sup> In general, undocumented minors are already more likely to live in poverty and less likely to have access to health insurance, public benefits, and social services than their citizen counterparts.<sup>221</sup> Additionally, noncitizen children and youth are also more vulnerable to abuse and crime.<sup>222</sup> In fact, abusers commonly use the victim’s immigration status to threaten them with deportation as leverage against being reported for abuse.<sup>223</sup> As a result, noncitizen children and youth are less likely to report crimes committed against them.<sup>224</sup> To further exacerbate the problem of reporting crimes, Immigration and Customs Enforcement (ICE) has an aggressive practice of arresting undocumented individuals outside of courthouses.<sup>225</sup> The fear of deportation not only limits their ability to attain redress under the law, but also limits their ability to seek emergency services such as medical assistance.<sup>226</sup> The result is a society that has a group of undocumented children and youth living in instability—who must remain invisible to avoid deportation.

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<sup>220</sup> See JUNCK, *supra* note 20, at 3.

<sup>221</sup> *Id.*

<sup>222</sup> Tom Dart, *Fearing Deportation, Undocumented Immigrants Wary of Reporting Crimes*, GUARDIAN (Mar. 23, 2017), <https://www.theguardian.com/us-news/2017/mar/23/undocumented-immigrants-wary-report-crimes-deportation> [<https://perma.cc/Z2XR-D9BZ>].

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> Nursing USC Staff, *Know Your Rights: Encouraging Undocumented Immigrants to Seek Healthcare*, USC (June 28, 2017), <https://nursing.usc.edu/blog/undocumented-immigrants-health-care/> [<https://perma.cc/ATA4-29ZJ>].

## VIII. CONCLUSION

Unaccompanied children and youth have a myriad of reasons for making the extraordinarily dangerous journey to the United States including family renunciation, societal violence, domestic abuse or neglect, and extreme poverty. Many of them likely experience inexplicable trauma in their home countries before embarking on the journey. In many cases, the journey may require surviving the harsh conditions of crossing through a desert, being exposed to physical and sexual violence, and facing potential starvation or dehydration. In recognition of the trauma experienced by many unaccompanied minors who encounter the immigration system, Congress developed SIJS to address the specific needs of children and youth fleeing life-threatening situations. In some cases, SIJS is the only provision available to provide relief for unaccompanied minors who have experienced abandonment, abuse, or neglect. Therefore, it is imperative that Congress acts to extend SIJS in a time when unaccompanied children and youth are increasingly in need of its protection.



