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## Cooperative Federalism and SIJS

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SHANI M. KING  
NICOLE SILVESTRI HALL

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# COOPERATIVE FEDERALISM AND SIJS

SHANI M. KING\*

NICOLE SILVESTRI HALL\*\*

**Abstract:** Recognizing the plight of young immigrants who have suffered abuse, neglect, or abandonment, and cannot be reunited with a parent, Congress has accorded those who qualify Special Immigrant Juvenile Status (SIJS). SIJS has created an expedited path for them to permanent residency and, ultimately, citizenship. The statutory scheme Congress crafted is unusual in that it requires each applicant to obtain a state court order finding that they meet the requirements for SIJS before the United States Citizenship and Immigration Service decides whether to confer that status on them. The implementation of this scheme has been fraught with difficulty, representing for some a challenge to federal control over immigration and representing for others an impermissible encroachment on state sovereignty. That it does both symbolizes that Congress reached a pragmatic compromise that acknowledges the interdependence of the federal government and the states, as well as the shared and overlapping interests each have in young and vulnerable immigrants. In this Article, we examine the structure of the SIJS statutory scheme and the roles of state and federal actors contemplated therein. We review relevant principles of federalism, plenary powers, and the exceptional treatment of immigration laws within the federalism framework. Using these principles, we then consider the responses of states that have sought to broaden or restrict access to SIJS. Finally, we consider the potential for a cooperative model of federalism to help resolve tensions and correct misunderstandings surrounding the SIJS statute. It is just such a pragmatic approach, which accepts the interactive and interdependent relationships between the federal government and the states, that allows us to best make sense of the SIJS statute. We suggest that

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this approach can accommodate the SIJS statute as a legal hybrid that addresses the issues of immigration where they lie: both at the external federal borders and within those borders in the several states.

## INTRODUCTION

Ana Herrera was eighteen years old when she arrived in the United States, having fled her native El Salvador out of desperation after witnessing the murder of her cousin and knowing her own life was at risk because the gang perpetrators saw her witness the crime.<sup>1</sup> Both of Ana's parents abandoned her when she was four months old, and she spent the remainder of her childhood living with her grandmother who was very poor and could not afford to adequately care for or feed her. Nevertheless, Ana remained in El Salvador and endured desolate, often violent conditions and extreme poverty until she witnessed her cousin's murder and felt she had to flee, or she too would be killed.<sup>2</sup>

After a long, treacherous journey, Ana arrived at the U.S. border and Immigration Control and Enforcement (ICE) detained her shortly thereafter. She spent almost two months in detention centers until agents found Ana's aunt in Maryland, and sent Ana to be with her. To prepare for her case in court, Ana was required to relive the horrible events of her childhood trauma.<sup>3</sup> Fortunately, Ana qualified for Special Immigrant Juvenile Status (SIJS), which permits juveniles who are unable to reunite with their parents due to abuse, abandonment, or neglect, among other criteria, to obtain lawful permanent resident status.<sup>4</sup> She was even more fortunate because her aunt lived in Maryland, where legislators had passed a bill to expand jurisdiction for courts of equity to be consistent with federal SIJS age limits, explicitly allowing the courts to take jurisdiction over immigrant children up to the age of twenty-one.<sup>5</sup> Thus, and because she had access to pro bono legal aid, Ana first obtained a state predicate order in a Maryland juvenile state court, then filed a petition with United

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<sup>1</sup> Elizabeth Doerr, *Young People Traveling Across the Border Alone Are Making It to Maryland—and Fighting to Stay*, BALT. SUN (May 25, 2016), <https://www.baltimoresun.com/citypaper/bcp-062516-feature-ana-profile-20160525-story.html> [<https://web.archive.org/web/20200919195308/https://www.baltimoresun.com/citypaper/bcp-062516-feature-ana-profile-20160525-story.html>].

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

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

<sup>4</sup> See 8 U.S.C. § 1101(a)(27)(J) (2018) (defining eligibility for SIJS). This Article refers to 8 U.S.C. § 1101 as the "SIJS Statute."

<sup>5</sup> MD. CODE ANN., FAM. LAW § 1-201 (West 2020); see also *In re Dany G.*, 117 A.3d 650, 655 (Md. Ct. Spec. App. 2015) ("If the underlying juvenile court filing is properly before the court, state courts are required to make [SIJS] factual findings." (citing *Simbaina v. Bunay*, 109 A.3d 191 (Md. Ct. Spec. App. 2015))).

States Citizenship and Immigration Services (USCIS) to obtain SIJS,<sup>6</sup> and finally, once SIJS was granted, went on to apply for permanent legal residency status.<sup>7</sup> If her aunt had settled in, and Ana had been relocated to, Kentucky, for example, her court case may not even have been heard.<sup>8</sup> Ana was able to take the quick path to residency that the SIJS statute provided because her aunt happened to live in a state that treated SIJS applicants favorably.

In recent years, unaccompanied children like Ana have been arriving at the southern border of the United States in unprecedented numbers, many fleeing horrific living conditions and violence in the Central American countries of Honduras, Guatemala, and El Salvador.<sup>9</sup> Some have blamed the failures of U.S. foreign policy over the past century for the chronic economic and political instability these countries experience today.<sup>10</sup> Although the drivers of these immigration patterns are debatable, the consequences are clear. By creating SIJS, Congress has acknowledged and attempted to respond to the human suffering of children abroad by designing a form of relief intended to ameliorate that suffering within the borders of the United States.

The underlying objective of the SIJS statute—the regulation of noncitizen entry, exit, and status—is an appropriate exercise of the federal government’s plenary power.<sup>11</sup> Yet, with the statute, Congress intentionally crafted a cooperative process involving the several states to identify children who qualify for SIJS relief.<sup>12</sup> The first step of this process—fact-finding by a state court that,

<sup>6</sup> Doerr, *supra* note 1; see *I-360, Petition for Amerasian, Widow(er), or Special Immigrant*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/i-360> [<https://perma.cc/3FPL-LHZG>] [hereinafter *Form I-360*]. Form I-360 is what juveniles use in order to obtain SIJ status. *Form I-360, supra*.

<sup>7</sup> Doerr, *supra* note 1; see KIDS IN NEED OF DEFENSE, CHAPTER 4: SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) (2015), <https://supportkind.org/wp-content/uploads/2015/04/Chapter-4-Special-Immigrant-Juvenile-Status-SIJS.pdf> [<https://perma.cc/X8B4-E23R>] (describing SIJS generally and offering advice on how to apply, including how to move for SIJS predicate order).

<sup>8</sup> See *infra* Part III (discussing states, including Kentucky, with more restrictive definitions of “child” or states that do not require courts to make SIJS factual findings as part of a “best interest” determination).

<sup>9</sup> See *United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016*, U.S. CUSTOMS & BORDER PROTECTION, <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016> [<https://perma.cc/7PJM-3QS3>]. In 2016, the United States Customs and Border Patrol apprehended 59,692 unaccompanied children on the southwest border. *Id.* Of these children, 17,512 were from El Salvador (29.3%), 18,913 were from Guatemala (33.4%), and 10,468 were from Honduras (17.5%). *Id.*

<sup>10</sup> See, e.g., Mark Tseng-Putterman, *A Century of U.S. Intervention Created the Immigration Crisis*, MEDIUM (June 20, 2018), <https://medium.com/s/story/timeline-us-intervention-central-america-a9bea9ebc148> [<https://perma.cc/39UZ-T3VE>] (tracing and discussing the role of the U.S. military intervention and policy of economic neoliberalism in undermining democracy and stability in Central America, as well as creating vacuums of power where drug cartels and paramilitary alliances could thrive).

<sup>11</sup> Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601, 615–16 (2013).

<sup>12</sup> See 8 U.S.C. § 1101(a)(27)(J).

*inter alia*, the child is under twenty-one years old, has suffered abuse, neglect, or abandonment, and cannot be reunited with a parent—is more traditionally thought of as a state power.<sup>13</sup> The second step, making the determination of whether vulnerable children qualify for SIJS relief, is left to the federal government.<sup>14</sup> State courts, in other words, simply act in an identifier or filtering role by assisting the federal government in finding children who qualify for this form of relief, which will propel them more expeditiously along a path to permanent residency and, ultimately, citizenship.

In practice, despite Congress's intentions, children continue to struggle to gain access to state courts for fact-finding purposes. Many states have adopted something more akin to a "gatekeeper" function in the framework of SIJS relief. Indeed, although the SIJS statutory scheme contemplated a cooperative partnership between federal and state governmental entities, the reality on the ground is anything but cooperative: many states refuse to cooperate with the SIJS congressional mandate, which results in wildly varying chances of receiving SIJS depending on the state where the applicant resides.<sup>15</sup> More "immigrant-friendly" states have enacted legislation or issued rulings from the bench that require their courts to make the predicate findings that are required to process SIJS applications, and have, where necessary, expanded their jurisdiction to ensure that courts make such findings for all potentially eligible SIJS applicants up to the maximum age the SIJS statute permits.<sup>16</sup> In contrast, less "im-

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<sup>13</sup> See *id.* § 1101(a)(27)(J)(i)–(ii).

<sup>14</sup> See *id.* § 1101(a)(27)(J)(iii).

<sup>15</sup> 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) [hereinafter Chen, *Eliau or Alien?*] ("The law vests power in state courts to make important decisions regarding the minors' needs and requires that the [Immigration and Naturalization Service (INS)] rely upon those state court decisions. However, by giving state courts significant responsibility for determining minors' eligibility for this immigration benefit without clearly defining the roles of the INS and state courts in this process, Congress set the stage for conflict between the federal government and state governments.").

<sup>16</sup> See, e.g., *In re Y.M.*, 144 Cal. Rptr. 3d 54, 73 (Ct. App. 2012) (finding that the lower court erred in declining to consider a juvenile's request for SIJS findings); *In re J.J.X.C.*, 734 S.E.2d 120, 124 (Ga. Ct. App. 2012) (finding that the lower court "had a duty to consider the SIJ factors and make findings"); see also *infra* notes 116–119 and accompanying text (discussing states in which courts have found an affirmative duty for state courts to make SIJS factual findings). The SIJS statute permits applications from individuals up to the age of twenty-one and some states have passed legislation to ensure that their state courts will make findings for all potentially eligible SIJS applicants up to the maximum age. See, e.g., CAL. PROB. CODE § 1510.1 (West 2020) (empowering California probate courts to "appoint a guardian of the person for an unmarried individual who is 18 years of age or older, but who has not yet attained 21 years of age, in connection with a petition to make the necessary findings regarding special immigrant juvenile status"); MD. CODE ANN., FAM. LAW § 1-201(a), (b)(10) (providing specifically that, for the purposes of "Special Immigrant Juvenile factual findings," Maryland equity courts have jurisdiction over immigrant children, including "unmarried individual[s] under the age of 21 years").

migrant-friendly” states and judges have thwarted access to the SIJS benefit, in some cases declining jurisdiction entirely. In other cases, courts are allowed to use discretion on whether to make underlying factual findings for an SIJS application. When they do decide to make factual findings, they are made only incidentally as part of independent proceedings under state law.<sup>17</sup> At the federal level, USCIS has recently started to second-guess state court findings and jurisdiction.<sup>18</sup> Moreover, USCIS policy guidance on SIJS has shifted several times since 2018 without clear notice and under the pretense that the guidance is merely a “clarification” rather than a formal change to policy.<sup>19</sup>

In this Article, we argue that neither USCIS nor the individual states should interfere with or block access to the statutory pathway Congress created to provide additional expeditious relief for a vulnerable group of immigrant children. States should not refuse to make SIJS findings: rather, they are *required* to participate, albeit while applying whatever state laws govern a “best-interests” determination.<sup>20</sup> As long as all required information is provided,

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<sup>17</sup> See Bernard P. Perlmutter, *Judges Behaving Badly . . . Clinics Fighting Back: The Struggle for Special Immigrant Juveniles in State Dependency Courts in the Age of Trump*, 82 ALBANY L. REV. 1553, 1555 (2019) (evaluating changing state judicial trends in SIJS cases, using Florida judges and caselaw as a field study to evaluate recent polarized attitudes in the state judiciary over immigrant children).

<sup>18</sup> See *infra* notes 126–131 and accompanying text.

<sup>19</sup> Several news agencies have reported on the lack of transparency underlying recent USCIS “rule changes” that question state court authority and suggest that state courts lack jurisdiction over the custody of applicants over the age of eighteen, and these changes have correlated with a massive increase in SIJS application denials. See, e.g., Liz Robbins, *A Rule Is Changed for Young Immigrants, and Green Card Hopes Fade*, N.Y. TIMES (Apr. 18, 2018), <https://www.nytimes.com/2018/04/18/nyregion/special-immigrant-juvenile-status-trump.html> [<https://perma.cc/FN6A-5KBC>] (investigating USCIS’s recent trend to arbitrarily deny SIJS applications when cases with similar sets of facts had been approved in the past and reporting that this trend had happened with no change in formal policy directive); Ted Hesson, *USCIS Explains Juvenile Visa Denials*, POLITICO: WEEKLY SHIFT (Apr. 25, 2018), <https://www.politico.com/newsletters/morning-shift/2018/04/25/travel-ban-at-scotus-182935> [<https://perma.cc/ZDN5-QES6>] (documenting the USCIS change in policy that called for the agency to reject pending SIJS applications to the extent that the applicants could not be returned to the parent’s custody, and reporting on USCIS’s characterization of this policy change as a mere “clarification”). This trend serves to undermine state sovereignty to broaden SIJS eligibility to the federal statute’s maximum age of twenty-one. As this Article goes to print, USCIS has officially adopted a series of Administrative Appeals Office (AAO) decisions relating to SIJS, resulting in an update in USCIS Policy Manual on November 19, 2019 that, among other things, limits the types of state courts allowed to issue predicate orders and requires a state court to grant some form of relief (involving care and custody determinations or the provision of child welfare services or both) before USCIS will issue consent to granting SIJS. See, e.g., 6 U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP’T OF HOMELAND SECURITY, POLICY MANUAL, ch. 2(C) (Nov. 19, 2019) [hereinafter USCIS POLICY MANUAL].

<sup>20</sup> Best interest determinations may, indeed, be the purview of state family courts. But a state court judge cannot discharge her duty to act in a child’s best interest if she refuses to make SIJS findings entirely. All states use a “best interest of the child” test as the yardstick for making child welfare determinations, but states have yet to harmonize a nationally accepted best interests standard. One aspect of the best interest calculation, however—consideration of the safety and welfare of children—

USCIS *must* accept state court predicate orders, and the jurisdiction that states exercise to generate them, at face value.<sup>21</sup>

In theory, we propose that SIJS could be an example of a deliberately orchestrated legal hybrid that draws on the strengths of state and federal actors alike to identify and provide immigration relief to a group of neglected children. To that end, the SIJS statute is best conceptualized as a “border” law, where congressional exercises of plenary power are more appropriate and less likely to be impugned.<sup>22</sup> Congress identified the states as the appropriate *procedural* vehicle to operationalize an immigration benefit for a group of children in need of assistance. But the overarching target of the statute is to regulate a core function of immigration. Of course, plenary power is not absolute, but the “core” functions of immigration (*i.e.*, admission and removal) are ap-

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is uniformly prioritized by *all* courts. Failure to consider all forms of relief available to protect a child’s wellbeing may very well be a failure to act in that child’s best interest, no matter the child’s state of residence. The one sub-group of potential SIJS applicants for whom courts in some states may be justified in declining to make SIJS predicate findings is those over the age up to which the courts, under their respective state laws, are required to make “best interests” findings, but under the maximum age of SIJS applicants. *See, e.g., In re Jimenez*, 199 So. 3d 1218, 1220 (La. Ct. App. 2016) (affirming the lower court’s ruling that dismissed a petition for SIJS predicate findings because the district court did not have juvenile jurisdiction where a Louisiana state law defined children and minors as persons under eighteen years of age and petitioner was eighteen when she filed her petition); *In re J.L.E.O.*, No. 14-10-00628-CV, 2011 Tex. App. LEXIS 1342, at \*1 (App. Feb. 14, 2011) (affirming a lower court ruling that, because the child had turned eighteen, the juvenile court no longer had jurisdiction under section 101.003(a) of the Texas Family Code to make SIJS predicate findings). Some states have explicitly expanded the jurisdiction of their courts to permit them to make SIJS predicate findings for this particular group of applicants. *See, e.g., CAL. PROB. CODE* § 1510.1 (empowering California probate courts to “appoint a guardian of the person for an unmarried individual who is 18 years of age or older, but who has not yet attained 21 years of age, in connection with a petition to make the necessary findings regarding special immigrant juvenile status”); *MD. CODE ANN., FAM. LAW* § 1-201(a), (b)(10) (providing specifically that, for the purposes of “Special Immigrant Juvenile factual findings,” Maryland equity courts have jurisdiction over immigrant children, including “unmarried individual[s] under the age of 21 years”); *see also R.F.M. v. Nielsen*, 365 F. Supp. 3d 350, 366 (S.D.N.Y. 2019) (noting that, “although [New York family courts] typically only ha[ve] jurisdiction over juveniles up to age of eighteen, [they] ha[ve] jurisdiction to appoint a guardian over a juvenile between ages of eighteen and twenty-one with the juvenile’s consent” (according to section 661(a) of the New York Family Court Act) and New York courts have held that this establishes jurisdiction to make predicate findings under the SIJS statute (first citing *Trudy-Ann W. v. Joan W.*, 901 N.Y.S.2d 296, 298 (App. Div. 2010); then citing *Antowa McD. v. Wayne McD.*, 856 N.Y.S.2d 576, 577 (App. Div. 2008))).

<sup>21</sup> *See* 8 U.S.C. § 1101(a)(27)(J)(i)–(ii) (requiring that state courts make certain predicate findings and not providing a mechanism for USCIS to dispute those findings).

<sup>22</sup> We borrow from Ming Chen’s characterization of immigration laws operating “at the border” and “between borders” to distinguish between exercises of power relating to “core” immigration functions (removal and admission) and thus more appropriate for an exercise of plenary power, and alienage laws where plenary power may yield to traditional state powers. Ming H. Chen, *Immigration and Cooperative Federalism: Toward a Doctrinal Framework*, 85 U. COLO. L. REV. 1087, 1092–94 (2011) [hereinafter Chen, *Immigration and Cooperative Federalism*].



propriate exercises of this power.<sup>23</sup> The state's role, to identify children who may qualify for SIJS, is subordinate to Congress's main objective. Likewise, immigration agencies cannot overstep congressionally delegated bounds of authority to second-guess the application of state law.

Part I discusses the general legislative framework within which the SIJS statute sits.<sup>24</sup> We first provide background on the SIJS statute, showing how Congress has broadened access to SIJS since its passage in 1990.<sup>25</sup> We then discuss the doctrinal "web" at play in immigration matters, and include a discussion on federalism, preemption principles, immigration exceptionalism, and plenary power that we will use to evaluate the different approaches states have taken in SIJS matters.<sup>26</sup>

In Parts II and III, we outline differing state approaches.<sup>27</sup> In Part II, we examine state policies, legislative initiatives, and judicial interpretations that have attempted to *broaden* access to SIJS protection in concert with Congress's evident intent to extend greater protection to a specific group of immigrant children.<sup>28</sup> We then consider current USCIS policy guidance and trends in recent SIJS application rejections.<sup>29</sup> We examine the idea that a federal agency cannot question or reinterpret state law or jurisdiction and discuss pertinent recent cases in California and New York.<sup>30</sup> Finally, we explore the implications of immigration agencies second-guessing state laws and state judicial decisions, which represents a significant deviation from Congress's careful design, and introduces unintended variability into the treatment of immigrant children depending on who occupies the White House.<sup>31</sup>

Part III considers the contingent of states that have sought to reject the federal mandate to participate in the SIJS scheme and *limit* access to SIJS protection.<sup>32</sup> We examine the state sovereignty arguments such states have used to justify their respective refusals to participate in Congress's cooperative scheme.<sup>33</sup> In so doing, we argue that the SIJS statute is best understood as having conferred a valuable federal right to a subset of eligible, vulnerable children. Rather than thinking of SIJS as a federal statute directly requiring state courts or officials to act, it is more appropriate to conceptualize the statute as triggering protections

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<sup>23</sup> See Abrams, *supra* note 11, at 603.

<sup>24</sup> See *infra* notes 37–93 and accompanying text.

<sup>25</sup> See *infra* notes 40–58 and accompanying text.

<sup>26</sup> See *infra* notes 59–93 and accompanying text.

<sup>27</sup> See *infra* notes 94–155 and accompanying text.

<sup>28</sup> See *infra* notes 94–121 and accompanying text.

<sup>29</sup> See *infra* notes 122–132 and accompanying text.

<sup>30</sup> See *infra* notes 133–155 and accompanying text.

<sup>31</sup> See *infra* notes 133–155 and accompanying text.

<sup>32</sup> See *infra* notes 156–191 and accompanying text.

<sup>33</sup> See *infra* notes 156–191 and accompanying text.

offered under state law, which spring from the state's duty to ensure the welfare of its residents.<sup>34</sup> This view presents a critical distinction when analyzing the constitutional viability of Congress's scheme under the Tenth Amendment.<sup>35</sup>

In Part IV, we consider the potential for the application of a cooperative model of federalism to help to resolve tensions and correct misapprehensions resulting from the unusual structure of the SIJS statute.<sup>36</sup> As a legal hybrid, SIJS invokes a cooperative approach to an immigration benefit, intended to operate both *at* the borders and *between* borders. Substantively, SIJS operates *at* the border because SIJS is an immigration benefit that makes admission more accessible for a certain group. Procedurally, it operates *between* borders because states can broaden access to the benefit by enlarging protection for juveniles in alignment with federal standards. Congress appropriately sought to control immigration law at the border by deciding the pathway to naturalization for certain vulnerable children. States use powers reserved to them under the Constitution to make procedural best-interest determinations for children. State legislators can make efforts to align their state laws with federal requirements for SIJS, or not. This cooperative system, however, has outer limits; states cannot frustrate the intent of Congress nor deny equal protection to SIJS litigants. As a hybrid, we offer a "that/how" cooperative federalism distinction to guide a litigant through the SIJS application process: *that* a state court consider SIJS as a form of relief for litigants in state courts is obligatory; *how* a state court proceeds with judicial fact-finding may involve discretion.

## I. ORGANIZING PRINCIPLES

Section A of this Part provides an overview of the SIJS statute: what it says, how it came to be, and how Congress has changed its scope since its inception in 1990.<sup>37</sup> Then, in Section B, we discuss the unique aspects of immigration law, including federalism, preemption principles, and the federal plenary power over immigration, and how they impact the application of the SIJS statute.<sup>38</sup> Finally, Section C discusses the role of implied preemption in interpreting and applying the SIJS statute.<sup>39</sup>

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<sup>34</sup> See *infra* notes 156–191 and accompanying text.

<sup>35</sup> See *infra* notes 156–191 and accompanying text.

<sup>36</sup> See *infra* notes 192–217 and accompanying text.

<sup>37</sup> See *infra* notes 40–58 and accompanying text.

<sup>38</sup> See *infra* notes 59–77 and accompanying text.

<sup>39</sup> See *infra* notes 78–93 and accompanying text.

### A. A Brief History of the SIJS Statute

Congress first recognized the unique needs of a particularly vulnerable group of child immigrants in 1990, when it created a SIJS statutory pathway to naturalization. This Section offers a historical framework for the SIJS statute.<sup>40</sup> It begins by describing the initial language of the statute.<sup>41</sup> It then explores how subsequent amendments changed the scope of the law.<sup>42</sup>

From its inception, SIJS legislation intended to use states as a procedural vehicle for making best interest determinations for children, and Congress unequivocally enlisted the aid of states to accomplish this objective.<sup>43</sup> Congress enacted SIJS as a pathway to citizenship in 1990, and identified certain criteria that would qualify an immigrant for this form of relief: first, the immigrant must be declared “dependent” on a juvenile court in the United States and eligible for long-term foster care and second, an administrative or judicial body must determine that it would not be in the individual’s best interest to return to their previous country of nationality or residence.<sup>44</sup>

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<sup>40</sup> See *infra* notes 43–58 and accompanying text; see also Laila L. Hlass, *States and Status: A Study of Geographical Disparities for Immigrant Youth*, 46 COLUM. HUM. RTS. L. REV. 266, 335–38 (2014) (succinctly summarizing the evolution of the SIJS statute and how access to SIJS relief has been both expanded and restricted over the past three decades).

<sup>41</sup> See *infra* notes 43–44 and accompanying text.

<sup>42</sup> See *infra* notes 45–55 and accompanying text.

<sup>43</sup> See 8 U.S.C. § 1101(a)(27)(J); see also Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exemption to Marriage Fraud Amendments; Adjustment of Status, 58 Fed. Reg. 42,843, 42,847 (Aug. 12, 1993) (confirming that immigration officials would look to the state court determinations of the minor’s best interests). See generally Bridgette A. Carr, *Incorporating a “Best Interests of the Child” Approach into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120, 156–57 (2009) (noting the hybrid nature of SIJS proceedings); Chen, *Eliau or Alien?*, *supra* note 15, at 611 (discussing relevant capacity and competence of federal and state judiciaries in dealing with individual child welfare cases); David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children’s Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 1005–11 (2002) (discussing the design of the SIJS statute and noting that “[t]he statute, recognizing that juvenile courts have particularized training and expertise in the area of child welfare and abuse, places critical decisions about the child’s best interests and the possibility of family reunification with state juvenile courts”). But see Emily Rose Gonzalez, Symposium, Student Scholarship, *Battered Immigrant Youth Take the Beat, Special Immigrant Juveniles Permitted to Age-Out of Status*, 8 SEATTLE J. SOC. JUST. 409, 413 (2009) (arguing that bifurcated process prejudices SIJS claimants due to imposing delays); Jessica R. Pulitzer, Note, *Fear and Failing in Family Court: Special Immigrant Juvenile Status and the State Court Problem*, 21 CARDOZO J.L. & GENDER 201, 211 (2014) (identifying challenges in SIJS implementation arising from state court involvement).

<sup>44</sup> Immigration Act of 1990, Pub. L. No. 101-649, § 153, 104 Stat. 4978, 5005–06 (1990) (amended 1997). The Immigration and Naturalization Service issued an interim rule on May 21, 1991, defining key terms and requiring juvenile court orders finding the child to be dependent on that court and eligible for long-term foster care, and evidence of a best interest determination that the child should not be “returned to the country of nationality or last habitual residence of the beneficiary or his or her parent or parents.” Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Bona

Shortly after SIJS was enacted, however, Congress passed a few revisions to the statute to restrict the number of individuals who could apply. First, Congress directly inserted the Attorney General (AG) into the approval process, complicating and lengthening the review process.<sup>45</sup> The AG now acted as gatekeeper to SIJS relief because the AG had to give *consent* to jurisdiction of a state court over a child in removal proceedings in order for that court to make factual findings on SIJS status.<sup>46</sup> Second, only those juveniles deemed eligible for long-term foster care based on abuse, neglect, or abandonment were now eligible for relief, which intentionally limited access to SIJS.<sup>47</sup> A year later, in 1998, USCIS issued guidance clarifying that, for children to be considered for SIJS, the Attorney General must review the dependency order and other supporting evidence as a precondition to the grant of status.<sup>48</sup>

SIJS requirements and procedure continued to evolve, and in 2004, USCIS<sup>49</sup> issued guidance to clarify the type of information that should be included in state court findings.<sup>50</sup> Most importantly, the guidance made clear that USCIS should not question state court findings.<sup>51</sup> In pertinent part, the guidance stated:

The adjudicator generally should not second-guess the court rulings or question whether the court's order was properly issued. Orders that include or are supplemented by specific findings of fact as to the above-listed rulings will usually be sufficient to establish eligi-

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Fide Marriage Exemption to Marriage Fraud Amendments, 56 Fed. Reg. 23,207, 23,208 (proposed May 21, 1991) (to be codified at 8 C.F.R. § 101.6(c)(6)).

<sup>45</sup> See Memorandum from Thomas E. Cook, Acting Assistant Comm'r, Adjudications Div., Immigration & Naturalization Serv., Special Immigrant Juveniles—Memorandum #2: Clarification of Interim Field Guidance (July 9, 1999), <https://www.aila.org/infonet/ins-advises-on-special-immigrant-juveniles> [<https://perma.cc/ZGP3-FM7P>].

<sup>46</sup> These changes, however, were not immediately accompanied by any guidance for *how* to request the Attorney General's consent. See Pub. L. No. 105-119, § 113, 111 Stat. 2440, 2460–61 (1997) (amended 2008); Memorandum from Thomas E. Cook, Acting Assistant Comm'r, Immigration & Naturalization Serv., Interim Field Guidance Relating to Public Law 105-119 (Sec. 113) Amending Section 101(a)(27)(J) of the INA—Special Immigrant Juveniles, HQ/70/6.1P (Aug. 7, 1998) [hereinafter Cook Memo (Aug. 7, 1998)] (“In the past, individuals who did not suffer abuse, abandonment, or neglect were known to have sought the court’s protection merely to avail themselves of legal permanent resident status. This amendment ensures that this will no longer be possible.”).

<sup>47</sup> See Pub. L. No. 105-119, § 113; see also Cook Memo (Aug. 7, 1998), *supra* note 46.

<sup>48</sup> See Hlass, *supra* note 40, at 336.

<sup>49</sup> In 2003, the Homeland Security Act rearranged the INS into multiple bureaus, and USCIS was relocated under the newly created Department of Homeland Security. Incidentally, USCIS was briefly named the Bureau of Citizenship and Immigrations Services before it took its current name, USCIS.

<sup>50</sup> Memorandum from William R. Yates, Assoc. Dir. for Operations, U.S. Citizenship and Immigration Servs., Memorandum #3—Field Guidance on Special Immigrant Juvenile Status Petitions 5 (May 27, 2004), [https://www.uscis.gov/sites/default/files/document/memos/sij\\_memo\\_052704.pdf](https://www.uscis.gov/sites/default/files/document/memos/sij_memo_052704.pdf) [<https://perma.cc/2FUR-TMYM>] [hereinafter Yates Memo].

<sup>51</sup> *Id.*

bility for consent. Such findings need not be overly detailed, but must reflect that the juvenile court made an informed decision.<sup>52</sup>

The 2004 guidance further reiterated strict requirements regarding the requirement of specific consent,<sup>53</sup> and discussed the problems surrounding youths “aging out”—referring to children who are eligible when they apply for SIJS but, due to application processing times or delays, no longer meet the statute’s age limit of 21<sup>54</sup>—encouraging advocates to apply in a timely fashion to avoid this pitfall.<sup>55</sup> Of course, SIJS-eligible youth also run the risk of aging out of the jurisdiction of state court before they reach twenty-one years old, depending on individual states’ respective age limits for juvenile court jurisdiction.<sup>56</sup>

After narrowing the SIJS criteria in 1997, Congress in 2008 broadened access to SIJS through the Trafficking Victim Protection Reauthorization Act (TVPRA). The TVPRA expanded the SIJS definition and made a few major changes, including: (1) loosening the requirement that reunification not be viable from applying to *both* parents to applying to *only one* parent; (2) expanding the grounds for protection by adding the language “or a similar basis found under state law” to the requirement that reunification not be viable due to abuse, neglect, or abandonment; and (3) removing language requiring the child be found eligible for “long-term foster care,” thus expanding potential coverage to include children in guardianship, adoption, and custody proceedings.<sup>57</sup> The TVPRA amendments also added protections against aging out by designating a child’s age *at filing* as controlling and mandating the adjudication of petitions within six months.<sup>58</sup>

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<sup>52</sup> *Id.* at 4–5.

<sup>53</sup> *Id.* at 5 (stating that “[i]f specific consent was necessary but not timely obtained,” the dependency order should be considered invalid and the SIJS application denied).

<sup>54</sup> *Id.* at 6.

<sup>55</sup> *Id.*

<sup>56</sup> USCIS POLICY MANUAL, *supra* note 19, at ch. 2(B). State law is controlling as to whether the petitioner is considered a child or any other equivalent term for a juvenile subject to the jurisdiction of the state juvenile court for custody or dependency hearings. *Id.*

<sup>57</sup> See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235, 122 Stat. 5044, 5074–82 (codified at 8 U.S.C. § 1101 (2018)) (seeking to prevent human trafficking, and therefore to protect youth who were still vulnerable and in need of protection, even if close to aging out); Hlass, *supra* note 40, at 337–38; Memorandum from Donald Neufeld, Acting Assoc. Dir., Domestic Operations, U.S. Citizenship and Immigration Servs., Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juveniles Status Provisions, HQOPS 70/8.5 (Mar. 24, 2009), [http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/2009/TVPRA\\_SIJ.pdf](http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/TVPRA_SIJ.pdf) [<https://perma.cc/7UG2-2AG7>].

<sup>58</sup> See Hlass, *supra* note 40, at 338. Also, the TVPRA amendments eased procedures for children currently in the custody of the Office of Refugee Resettlement, and detained children who were approved for SIJS could be transferred to the Unaccompanied Refugee Minor program to receive social services. *Id.*

Despite the changes it has undergone since its creation, the most unusual feature of the SIJS statute, and its primary source of conflict and debate, has remained its structure, which necessarily requires state and federal action: state courts have to make predicate findings in order for the federal USCIS to be able to approve SIJS applications. By its terms, the statute cannot operate effectively without state and federal buy-in.

### *B. Federalism and Exceptionalism in Immigration Law*

A debate over the SIJS statutory scheme can either devolve into a conceptual debate over the limits of federalism or it can be focused on the details of a statutory immigration benefit granted by Congress to young immigrants who are both vulnerable and difficult to identify. This Section pinpoints and discusses both the federalism and immigration-specific principles at play within the SIJS scheme.<sup>59</sup> It proposes a set of principles that will guide us through the remainder of the Article.<sup>60</sup>

The Framers of the Constitution envisioned a dual system of government that allows the people to throw their weight onto the federal or state side of the scale to correct for abuses of government power on either side. But abuse of power is not the only reason powers are reserved to the states. Indeed, many other benefits accrue from a dual sovereignty structure, including decentralized government that can be more sensitive to the diverse needs of a heterogeneous society, increased opportunity for citizen involvement in democratic processes, allowing for more innovation and experimentation in government, and making government more responsive by putting the states in competition for a mobile citizenry.<sup>61</sup>

During the earliest days of America's independence, individual states, not the federal government, largely controlled immigration matters.<sup>62</sup> The normative shift to federal dominance over immigration-related matters began shortly

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<sup>59</sup> See *infra* notes 61–66 and accompanying text.

<sup>60</sup> See *infra* notes 67–77 and accompanying text.

<sup>61</sup> See *Gregory v. Ashcroft*, 501 U.S. 452, 457–59 (1991).

<sup>62</sup> See PRATHEEPAN GULASEKARAM & S. KARTHICK RAMAKRISHNAN, *THE NEW IMMIGRATION FEDERALISM* 14–17 (2015) (reviewing and explaining the lack of federal primacy in immigration law from 1776 through the end of the Civil War). One major reason that states dominated in immigration matters during this period was that the constitutional power to regulate immigration was an implied power, in contrast to the power to control naturalization that is expressly stated in the Constitution. Thus, expansion of federal power over immigration evolved as an exercise in judicial interpretation by the Supreme Court. Constitutional ambiguities also conveniently disguised a more practical reality underlying state-dominated power over immigration during this time: the federal government shied away from involving itself in immigration matters as southern lawmakers viewed federal government involvement in immigration regulation as a step toward regulation of the slave trade. *Id.*

after the end of the Civil War.<sup>63</sup> *Chy Lung v. Freeman*, a 1875 Supreme Court case, was the first of a series of cases to begin this gradual shift,<sup>64</sup> and subsequent cases began to delineate a bifurcation of power that left the federal government as the sole administrator of “immigration law” (that is, entry, exit, and enforcement) with state governments retaining power over laws that regulated the lives of immigrants (so-called “alienage laws”).<sup>65</sup> Today, states continue to legislate in the immigration space, and courts continue to shape the contours of the line between alienage and enforcement law. But the federal government’s power to regulate immigration insofar as it relates to matters of the entry, exit, and immigration status is so absolute that it is termed a “plenary power.”<sup>66</sup>

Within the traditional notion of federalism, scholars have treated the field of immigration as exceptional. Hiroshi Motomura first coined the phrase “immigration exceptionalism” to describe the dual pillars that allow scholars to treat and conceptualize immigration law differently than other substantive areas of the law.<sup>67</sup> The first pillar refers to the core immigration functions of admission and removal that are exclusively federal in nature and implicate uniquely federal concerns.<sup>68</sup> This first pillar is rooted in the commerce power rather than a more specific textual constitutional grant of power and will always preempt state efforts to legislate in the area (“structural preemption”).<sup>69</sup> The second pillar refers to the “plenary power doctrine,” which considers these

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<sup>63</sup> *See id.*

<sup>64</sup> 92 U.S. 275, 279–80 (1875) (noting the importance of foreign nations to be able to confer with one national sovereign, rather than the fifty separate states, to discuss the status, safety, and security of their nationals in the United States).

<sup>65</sup> *See, e.g., Arizona v. United States*, 567 U.S. 387 (2012) (striking down three of four provisions intended to allow local law enforcement in Arizona to supplement federal immigration enforcement efforts on preemption grounds); *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941) (“One of the most important and delicate of all international relationships . . . has to do with the protection of the just rights of a country’s own nationals when those nationals are in another country.”). *But see De Canas v. Bica*, 424 U.S. 351, 358 (1976) (finding that Congress did not have clear intent to preclude harmonious state regulation regarding undocumented immigrants, reasoning that the state of California was not regulating in the space of making determinations on citizenship requirements, admission, or conditions under which an individual is allowed to stay). Congress subsequently enacted the Immigration Reform and Control Act ten years after *De Canas v. Bica* was decided, making it “unlawful for a person or other entity . . . to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien.” 8 U.S.C. § 1324a(a)(1) (2018); *see De Canas*, 424 U.S. at 354–56.

<sup>66</sup> *Arizona v. United States*, 567 U.S. at 387 (describing the “Federal Government’s broad, undoubted power over immigration and alien status”).

<sup>67</sup> Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1363–64 (1999).

<sup>68</sup> *Id.* at 1361–62 (noting federal exclusivity over “‘immigration law’ as traditionally defined—the law pertaining to the entry of noncitizens and their continued stay in the United States”).

<sup>69</sup> Although, as noted *infra*, some justify the exception treatment of immigration law on the basis that the Constitution grants the federal government the power “[t]o establish a uniform Rule of Naturalization.” U.S. CONST. art. I, § 8, cl. 4; *see infra* note 71.

functions so important to national security, and to national control over foreign affairs issues, that when Congress acts, courts must exercise extraordinary deference, even where fundamental constitutional rights are at stake.<sup>70</sup>

Justifications for the exceptional treatment of immigration law abound. Most prominently, the textual constitutional argument that the federal government has the power to “establish an uniform Rule of Naturalization.”<sup>71</sup> Further, immigration policy implicates international relations and national security concerns, and impacts areas like tourism, trade, diplomatic relations, and treatment of American nationals abroad. A consistent national policy most readily ensures that these concerns are addressed in a singular voice.<sup>72</sup> Yet, even in light of the justifications for the exceptional federal power over immigration matters, this power is far from absolute. Constraints on federal power yield to possibilities for concurrent, cooperative state action in the immigration space. Still, defining the outer bounds of the federal immigration power has proven a challenging task.<sup>73</sup> The contours of immigration federalism are subject to internal and external threat levels, global pressures, national security, political climate, and a myriad of other forces. A “one-size-fits-all” approach to every issue that touches—however minimally—on immigration hardly seems practical or prudent. In practice, no such approach can be derived from a review of judicial decisions.

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<sup>70</sup> See Abrams, *supra* note 11, at 611–18 (outlining the history of the plenary power doctrine and immigration exceptionalism as it applies to the core functions of immigration enforcement); Motomura, *supra* note 67, at 1364 (noting “the plenary power doctrine, which severely limits judicial review when a government decision regarding a noncitizen’s entry or continued presence in the United States is challenged on constitutional grounds”).

<sup>71</sup> U.S. CONST. art. I, § 8, cl. 4; see also *Arizona v. United States*, 567 U.S. at 394–95 (“The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens . . . . This authority rests, in part, on the National Government’s constitutional power to ‘establish an uniform Rule of Naturalization[.]’ . . . .” (citation omitted)).

<sup>72</sup> See *Arizona v. United States*, 567 U.S. at 394–95; David Weissbrodt & Laura Danielson, *Chapter 2: The Source and Scope of the Federal Power to Regulate Immigration and Naturalization*, in DRAFT CHAPTERS OF THE IMMIGRATION NUTSHELL (2004), <http://hrlibrary.umn.edu/immigrationlaw/chapter2.html> [<https://perma.cc/EZQ3-T4WV>] (providing a full historical accounting on the source and scope of the federal government’s power to regulate immigration).

<sup>73</sup> See Kevin R. Johnson, *Immigration and Civil Rights: State and Local Efforts to Regulate Immigration*, 46 GA. L. REV. 609, 614 n.14 (2017) (discussing the vigorous scholarly debate about “the appropriate role for state and local governments in immigration and immigrant regulation,” and identifying two camps that have emerged: “[s]ome commentators see a more expansive role for the states than currently exists” and “[o]thers propose limited state and local government involvement in immigration enforcement”); see also *De Canas*, 424 U.S. at 354–56 (discussing cases and noting that although “[p]ower to regulate immigration is unquestionably exclusively a federal power . . . the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted by this constitutional power, whether latent or exercised” (citations omitted)).



Generous deference to the federal government's plenary power may operate well at the outskirts, but interior spaces can be quite suitable for concurrent state-directed initiatives on matters that relate to, but are more tangential to, removal or naturalization.<sup>74</sup> Embedded in the principles of federalism is the notion that both national and state governments have elements of sovereignty that deserve mutual respect. The idea of having two sovereigns, however, creates ample opportunity for conflict. In the event of such conflict, the Supremacy Clause provides a clear answer: federal law dominates over state law.<sup>75</sup> Indeed, flowing from the Supremacy Clause is the idea that, where there is conflict, federal law preempts state action. Whether there is conflict, however, is often a complicated question in itself.

If Congress intends express preemption, it may withdraw specific powers of the States by enacting a statute that contains an express preemption provision (although in this process, Congress often leaves other powers untouched or explicitly leaves them to the States).<sup>76</sup> Congress can also impliedly withdraw specified powers from the states, as we discuss further *infra*.<sup>77</sup> The SIJS statute does not contain an express preemption clause, nor would it make sense for Congress to designate state courts as a filter for a federal benefit but then entirely preclude them from fulfilling this role by preempting any state law that attempted to facilitate their involvement. Thus, the SIJS statute could only preempt state action under implied preemption principles.

### C. Implied Preemption and the Impact on SIJS

This Section discusses types of preemption and their implications for the SIJS.<sup>78</sup> The first type of implied preemption, field preemption, occurs when Congress has legislated so extensively in a particular area that it has precluded enforcement of state laws on the same subject. The second type, conflict preemption, is when the essence of federal and state laws conflict such that compliance with both would be impossible. Even when preemption is implied, its

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<sup>74</sup> See Chen, *Eliau or Alien?*, *supra* note 15, at 602 (noting the federal government's plenary power over immigration, but also discussing state and local government's historical role in "protecting the health, safety, and welfare of children within their territories," including undocumented minors).

<sup>75</sup> Federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

<sup>76</sup> See, e.g., *Chamber of Commerce v. Whiting*, 563 U.S. 582, 600 (2011) ("[The Immigration Control and Reform Act] expressly preempts some state powers dealing with the employment of unauthorized aliens and it expressly preserves others. We hold that Arizona's licensing law falls well within the confines of the authority Congress chose to leave to the States and therefore is not expressly preempted.").

<sup>77</sup> See *infra* note 79 and accompanying text.

<sup>78</sup> See *infra* notes 78–93 and accompanying text.

principles are grounded in an assumption that Congress tries to protect state sovereignty concerns. Particularly when states have traditionally occupied a certain function, implied preemption “start[s] with the assumption that the historic police powers of the State[] were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress.”<sup>79</sup> Further, a well-established principle of preemption maintains that state laws are preempted when they “stand ‘as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”<sup>80</sup> Thus, preemption will be implied only where Congress is clear in its purpose and a state law frustrates that clear purpose.

If Congress had intended field preemption within the SIJS statutory framework, no state action, including complementary or parallel action, would be allowed. The relevant inquiry would be whether federal statutory directives provide a full set of standards to govern the area of concern, which were “designed as a ‘harmonious whole’”<sup>81</sup> and which “reflect[] a congressional decision to foreclose any state regulation in the area.”<sup>82</sup> Once again, given that Congress delegated the task of making best interest determinations to the states, it would be difficult to argue that Congress would have intended to exclude states entirely from complementing federal SIJS law. The two-tiered system certainly envisioned distinct state and federal roles in the process of gaining SIJS, but Congress firmly embedded the states at the heart of this process by making them responsible for generating the factual determinations upon which grants of SIJS relief are based. Thus, we see no colorable argument in favor of field preemption.

Conflict preemption, then, is the form of preemption that could most likely be at play within the SIJS scheme. This could occur in one of two ways: (1) were it “impossible for a private party to comply with both state and federal law,”<sup>83</sup> or (2) were state laws to “stand[] as an obstacle to the accomplishment

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<sup>79</sup> *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); see also *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 88 n.13 (2006) (“[W]e are concerned instead with Congress’ intent in adopting a pre-emption provision, the evident purpose of which is to limit the availability of remedies under state law.”); *N.Y. State Dep’t of Soc. Servs. v. Dublino*, 413 U.S. 405, 413 (1973) (“If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of power of the state . . . .”) (quoting *Schwartz v. Texas*, 334 U.S. 119, 202–03 (1952)); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (“[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”); *Barber v. Unum Life Ins. Co. of Am.*, 383 F.3d 134, 136 (3d Cir. 2004) (finding that the express text of ERISA preempts state law claims).

<sup>80</sup> See *Arizona v. United States*, 567 U.S. at 388 (quoting *Hines*, 312 U.S. at 67).

<sup>81</sup> *Id.* at 401 (quoting *Hines*, 312 U.S. at 72).

<sup>82</sup> *Id.*

<sup>83</sup> *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000).

and execution of the full purposes and objectives of Congress”—known, respectively, as “impossibility preemption” and “obstacle preemption.”<sup>84</sup> Preemption doctrine and analysis can appear confusing but, in application, it is more straightforward than it appears: most litigated cases are obstacle conflict preemption cases.<sup>85</sup> A state law or regulations that stand as an impediment to the implementation of the SIJS statute and the provision of SIJS relief could theoretically be invalidated on obstacle conflict preemption grounds.

Courts have not formally recognized a fourth type of preemption, termed “plenary power preemption.” Nevertheless, some immigration scholars have identified plenary power preemption as operating to invalidate state “alienage statutes” that touch on immigration issues but do not officially deal with the core immigration functions of admissions or removal consequences.<sup>86</sup> As Kerry Abrams notes, when plenary power preemption is invoked, Congress’s power to control immigration becomes pervasive, and “[Congress’s] power over immigration—exclusion and removal—and its ties with foreign affairs imbues everything that touches on immigration with an immigration-like quality.”<sup>87</sup>

Most recently, the Supreme Court in *Arizona v. United States* addressed four provisions of a controversial Arizona statute called “Support Our Law Enforcement and Safe Neighborhoods Act,” commonly referred to as S.B. 1070: (1) section 3 created a state misdemeanor for failure to comply with federal alien-registration; (2) section 5 made it a misdemeanor for unauthorized individuals to seek or engage in work in the state; (3) section 6 gave law enforcement officers the authority to arrest a person if the officer had probable cause to believe the individual had committed a removable offense; and (4) section 2(b) required officers who conducted a stop, detention, or arrest to attempt to verify a person’s immigration status with the federal government.<sup>88</sup> The United States filed suit against the State of Arizona to enjoin the enactment of these provisions, and was successful in enjoining the enactment of three out of four of these provisions. Section 2(b) was the sole survivor after the application of preemption principles, and the Court warned that it too could

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<sup>84</sup> *Id.* at 372–73 (quoting *Hines*, 312 U.S. at 67).

<sup>85</sup> Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 226–29 (2000) (noting that conflict preemption “is ubiquitous” and that, although the impossibility preemption subset of conflict preemption cases is “vanishingly narrow,” obstacle preemption “potentially covers not only cases in which state and federal law contradict each other, but also all other cases in which courts think that the effects of state law will hinder accomplishment of the purposes behind federal law”); see also Abrams, *supra* note 11, at 608–09 (discussing the reasons that most preemption cases are obstacle conflict in nature, concluding that, “in most cases, both the federal and state governments have a legitimate claim that they have the power to legislate in the area, and the court must ascertain whether the state’s legislation gets in the way of federal legislation to such an extent that it frustrates the federal purpose”).

<sup>86</sup> Abrams, *supra* note 11 *passim*.

<sup>87</sup> *Id.* at 623.

<sup>88</sup> *Arizona v. United States*, 567 U.S. at 393–94.

be preempted—or struck down on other constitutional challenges—to the extent Arizona enforced it in a way that created conflict between state and federal regulations.<sup>89</sup>

At first glance, the decision in *Arizona* seems to support the notion of federal primacy in immigration matters. After all, the Court struck down three of the four provisions, and upheld the fourth only to the extent that it did not result in Fourth Amendment violations or use racial profiling to accomplish its objectives, in violation of the Fourteenth Amendment. Indeed, the decision appears to offer no break from prior law, buttressing the primacy of the federal government's role in immigration policy and enforcement.<sup>90</sup> But against a backdrop where states have become increasingly proactive in regulating the immigration space over the past twenty years (in some cases, becoming the primary point of contact for noncitizens who face removal), *Arizona* creates some confusion. This is particularly true at a time when local law enforcement has become more empowered in exercising its “inherent authority” to perform immigration status checks during other law enforcement efforts and through the enforcement of state and local criminal law provisions aimed at migrants.<sup>91</sup>

Under the Trump administration, executive management of local and state law enforcement in immigration enforcement has been actively encouraged and become an even more widespread practice. The Secure Communities program—under which the Federal Bureau of Investigations (FBI) shares fingerprints, received from local law enforcement to check for a criminal record and outstanding warrants, with the DHS to check against immigration databases—

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<sup>89</sup> *Id.* at 415–16.

<sup>90</sup> Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS. J. 577, 597–606 (2012) (discussing the shift toward immigration enforcement at the state and local level because of the federal government's increasing reliance on local enforcement agencies and tracing this shift mostly to changes in executive policy that led to fundamental change in the culture of some state and local law enforcement agencies, some of which now “view immigration enforcement as a core function”).

<sup>91</sup> See Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1581 (2010) (summarizing the changes in executive policy after September 11, 2001, that started a trend toward increasing local and state enforcement of immigration laws). *But see* GULASEKARAM & RAMAKRISHNAN, *supra* note 62, at 123–25 (noting the sudden shift in immigration policy landscape starting in 2012 as result of *Arizona*, such as the Deferred Action for Childhood Arrivals (DACA) program under the Obama administration, which allowed unauthorized immigrant youth to apply for a period of deferred prosecution from federal authorities). Gulasekaram and Ramakrishnan note that the state legislative momentum shifted away from restrictive policy and toward legislation that favored integration of immigrants. GULASEKARAM & RAMAKRISHNAN, *supra* note 62, at 125 (“Thus, the announcement and rollout of DACA in 2012, combined with the Supreme Court decision in *Arizona*, tipped the political scales away from restrictionist solutions to immigration policy and toward immigrant integration.”).

has expanded in scope.<sup>92</sup> Moreover, the federal government has prioritized increasing local participation in the 287(g) program, under which the Director of ICE can enter into agreements with state and local law enforcement agencies that permit designated officers to perform limited immigration law enforcement function.<sup>93</sup> Thus, the contours of plenary power preemption in the immigration context are unclear and in flux.

In the context of SIJS, state and local government has encroached upon the federal government's authority in immigration matters and this encroachment has had both pro- and anti-immigrant effects. Currently, state courts have taken two general approaches: either (1) to expand access to SIJS, with states crafting legislation to explicitly create jurisdiction for SIJS actions and/or extended jurisdiction for SIJS applicants up to twenty-one years of age, consistent with federal age limits, or (2) to restrict access to SIJS, with state court judges refusing to entertain SIJS factual findings under the ostensible excuse that Congress has no power to exert control over state courts or to confer jurisdiction on those courts. We discuss the bases and consequences of these different approaches below.

## II. SIJS-FRIENDLY STATES AND THE RECENT (IMPERMISSIBLE) USCIS RESPONSE

In this Part, we examine various state legislative and judicial efforts to support Congress's intent to ensure and expand access to SIJS protection.<sup>94</sup> Section A of this Part describes states whose legal frameworks facilitate children's access to SIJS relief.<sup>95</sup> Section B highlights helpful actions that state courts have taken to increase SIJS access.<sup>96</sup> Section C follows this with a dis-

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<sup>92</sup> See, e.g., Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017) (pertaining to "[e]nhancing [p]ublic [s]afety" within the United States). This executive order directed the Secretary of Homeland Security to immediately terminate the "Priority Enforcement Program," adopted by the Obama Administration, which had limited the scope of the Secure Communities Program in response to criticisms that the program shared information between local and federal law enforcement agencies, thus placing noncitizens with relatively minor criminal charges (rather than convictions) into the queue for removal. *Id.* at 8,801. The executive order sought to embrace the full breath of the Secure Communities program to permit crime-based removals to cover all aliens arrested for any crime. *Id.*

<sup>93</sup> See, e.g., Exec. Order No. 13,767, 82 Fed. Reg. 8,793 (Jan. 25, 2017) (expressing the policy to "cooperate fully with States and local law enforcement in enacting Federal-State partnerships to enforce Federal immigration priorities" and directing the Secretary of Homeland Security to "immediately take appropriate action to engage with the Governors of the States, as well as local officials, for the purpose of preparing to enter into agreements under [§] 287(g) of the INA (8 U.S.C. [§] 1357(g))"). *Id.* at 8,794–8795. The Trump Administration has also sought to revive cooperative section 287(g) agreements that had fallen into disfavor by the Obama Administration because of concerns for racial profiling and the negative impact on civil rights. See 8 U.S.C. § 1357(g) (2018).

<sup>94</sup> See *infra* notes 99–155 and accompanying text.

<sup>95</sup> See *infra* notes 99–114 and accompanying text.

<sup>96</sup> See *infra* notes 115–121 and accompanying text.

cussion of recent USCIS policy changes under the Trump administration, how these policy changes have been addressed by courts, and why these changes have impermissibly surpassed the congressional grant of authority to USCIS under the SIJS statute.<sup>97</sup> Lastly, Section D utilizes two state court cases to illustrate how these laws and policies operate in practice.<sup>98</sup>

### *A. States and Cities with “SIJS-Friendly” Policies and Laws*

This Section elaborates on state laws and policies, as well as city legislation, that help children obtain SIJS protection.<sup>99</sup> A juvenile’s ability to access a state court and obtain a predicate SIJS order varies greatly according to that state’s child welfare policy and practice, family law, and access to specialized representation.<sup>100</sup> Laila Hlass has analyzed SIJS application rates and found that states with high application rates, including California, New York, Massachusetts, and Texas, have immigration resources in place to assist potential SIJS applicants.<sup>101</sup> These states have some combination of the following: specialized SIJS forms, more nonprofit attorneys practicing youth immigration law, and/or regular trainings for child welfare workers on SIJS practice.<sup>102</sup> They also tend to have a history of immigration liaisons, child welfare policies to address immigration needs, and sophisticated screening.<sup>103</sup>

For example, California, a state with a child welfare system that its counties administer, passed legislation in 2014 to harmonize the care counties provide to SIJS applicants and require the Department of Child Services to identify and share best practices annually to help children applying for SIJS assistance in juvenile court.<sup>104</sup> New York state competes with California in its high numbers of SIJS applicants.<sup>105</sup> New York City has developed programs and legislation to assist children who may potentially be eligible for SIJS. For example, Local Law 6 was drafted with an intent that the Administration for Children Services (ACS) would “ensure that immigration relief is a factor in

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<sup>97</sup> See *infra* notes 122–132 and accompanying text.

<sup>98</sup> See *infra* notes 133–155 and accompanying text.

<sup>99</sup> See *infra* notes 100–114 and accompanying text.

<sup>100</sup> See Hlass, *supra* note 40, at 301.

<sup>101</sup> *Id.* at 304–15 (examining the resources and practices of the “[h]igher-[a]pplication [r]ate [j]urisdictions” of California, New York, Massachusetts, and Texas).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 304.

<sup>104</sup> CAL. WELF. & INST. CODE § 10609.97 (West 2019); see Hlass, *supra* note 40, at 304–07 (describing California’s child welfare system and treatment of SIJS applications).

<sup>105</sup> See Hlass, *supra* note 40, at 308. Hlass notes that New York surpassed California for SIJS applicants for the first time in 2012 after New York City created legislation to address the needs of SIJS applicants. *Id.*

permanency planning for non-citizen youth[s].”<sup>106</sup> ACS, as a result, has been tasked with designating someone to create and implement a plan for available forms of relief, tracking children, providing children with immigration-related services, and training workers on relevant immigration-related issues.<sup>107</sup>

Florida and Massachusetts have also developed policies in response to the influx of SIJS applicants. Florida passed legislation *requiring* its Department of Children and Families and community-based care providers to “petition the court for an order finding that the child meets the criteria for [SIJ] status” if that child might be eligible.<sup>108</sup> In Massachusetts, the Department of Children and Families (Massachusetts DCF) has a longstanding history of helping immigrant children and referring them for appropriate immigration-related relief.<sup>109</sup> Massachusetts DCF not only has an immigration unit, but it also contracts with a private law firm that specializes in immigration-related issues.<sup>110</sup> The firm assists the department in liaising with caseworkers to assess the forms of immigration relief available to each child and to identify and direct an appropriate course of action.<sup>111</sup> Further, Massachusetts DCF policy and guidance is explicit and extensive, and dictates multiple points in the child’s life where immigration status and possible forms of relief should be considered.<sup>112</sup> In addition, Massachusetts judges are required to attend trainings on SIJS topics.<sup>113</sup>

In contrast to states like Massachusetts, California, New York, and Florida, states with low SIJS application rates typically have little support in place for minors who could potentially qualify for this form of relief.<sup>114</sup> Thus, SIJS relief goes largely unclaimed when a state does little to develop the infrastructure needed for children to take advantage of it. It is little surprise, then, that the states that have responded to the influx of unaccompanied minors with policies and education connecting youth to SIJS-related resources have more ex-

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<sup>106</sup> N.Y.C., N.Y., A Local Law to Amend the Administrative Code of the City of New York, in Relation to Requiring the Administration for Children’s Services to Review Strategies and Create a Plan of Action to Protect Children Who Qualify for Special Immigrant Juvenile Status, 2010/006 § 1 (April 14, 2010).

<sup>107</sup> N.Y.C., N.Y., CITY ADMIN. CODE § 21-904(a) (2020) (containing a sunset provision for 2015).

<sup>108</sup> FLA. STAT. ANN. § 39.5075(4) (West 2019). Florida’s statute provides: “If the child may be eligible for special immigrant juvenile status, the department or community-based care provider shall petition the court for an order finding that the child meets the criteria for special immigrant juvenile status.” *Id.*

<sup>109</sup> See *Unaccompanied Refugee Minors Program*, MASS. EXEC. OFFICE OF HEALTH & HUMAN SERVS., <https://www.mass.gov/service-details/unaccompanied-refugee-minors-program> [<https://perma.cc/TR72-S2FP>] (discussing Massachusetts DCF’s program for assisting immigrant children).

<sup>110</sup> See Hlass, *supra* note 40, at 310–11.

<sup>111</sup> See *id.*

<sup>112</sup> *Id.* at 311.

<sup>113</sup> *Id.*

<sup>114</sup> See *id.* at 315–18.

perience with SIJS applicants, a better understanding of the harms Congress was attempting to address when it created and later expanded access to relief, and more helpful caselaw in the area of SIJS to further shape the legal landscape in ways that benefit these children.

### *B. Supportive Efforts by State Judiciaries*

This Section discusses actions by state courts to help children access SIJS relief.<sup>115</sup> Concurrent with legislation and policy efforts, many state courts have now had the opportunity to address whether the SIJS statute requires courts to make factual findings to be included in a predicate order for SIJS relief. In some states, recent state caselaw has offered broader protection to children seeking SIJS relief, noting that Congress, through the SIJS statutory framework, created an affirmative duty for state courts to make SIJS factual findings.<sup>116</sup>

Not surprisingly, California and New York have emerged as leaders in interpreting the SIJS statutory scheme in this way. For example, in California, where a juvenile court refused to make factual findings in support of an application for SIJS for Y.M., a minor with significant intellectual impairments who was subject to a deportation hearing, the state Court of Appeals held:

Under federal law, an unaccompanied minor has the right to petition the juvenile court for findings under the SIJ statute. Because Y.M. was potentially eligible for SIJ status, she was entitled to a hearing where the juvenile court would determine whether findings required for SIJ status existed. We find nothing in federal immigration law that permits a state juvenile court to determine which route, if any, an unaccompanied child or minor may explore to lawfully remain in the United States. Although the federal government will ultimately determine Y.M.'s immigration status, including her right to permanent residency, the juvenile court erred in declining to consider Y.M.'s request for SIJ findings.<sup>117</sup>

Thus, California interprets the SIJS statute as *requiring* state courts of competent jurisdiction to make SIJS-related findings. California is not alone in its interpretation of the statute. Georgia affirmed this approach, stating that, “[a]lthough the court was authorized to conclude that the petitioners failed to

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<sup>115</sup> See *infra* notes 116–121 and accompanying text.

<sup>116</sup> If states have been left out of this Section, it is unintentional. Nonetheless, it does not affect the general point of this Section, which is to show that a majority of states that have taken on this question have resolved the issue in favor of providing broader access to SIJS protection for vulnerable children.

<sup>117</sup> *In re* Y.M., 144 Cal. Rptr. 3d 54, 72–73 (Ct. App. 2012) (citations omitted).



present evidence to support the SIJ factors or that their evidence was not credible, the court had a duty to consider the SIJ factors and make findings.”<sup>118</sup> Courts in Maryland, Massachusetts, Minnesota, New York, New Jersey, and Tennessee have also supported this interpretation of the statute.<sup>119</sup>

Integrationist policies, like those that expand access to SIJS, are often not challenged in federal court as it can be difficult to show that a litigant opposing the ordinance has legal redress or injury to maintain standing.<sup>120</sup> In lieu of making a federal court challenge, USCIS has deployed another tactic in an effort to restrict access to SIJS applicants. Where states have attempted to align with Congress’s intent and plain language of the SIJS statute, USCIS has begun questioning the underlying predicate orders upon which SIJS would be granted. The agency’s new policies, which appear to allow USCIS to look behind state predicate orders to question state law and jurisdiction, have created a recent increase in SIJS application denials.<sup>121</sup>

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<sup>118</sup> *In re J.J.X.C.*, 734 S.E.2d 120, 124 (Ga. Ct. App. 2012).

<sup>119</sup> See, e.g., *In re Dany G.*, 117 A.3d 650, 655 (Md. Ct. Spec. App. 2015) (“If the underlying juvenile court filing is properly before the court, state courts are required to make [SIJS] factual findings.”); *Simbaina v. Bunay*, 109 A.3d 191, 198–201 (Md. Ct. Spec. App. 2015) (finding that a court is obliged to make SIJS findings of fact, even in the absence of a separate motion requesting SIJS findings, as long as the matter is properly before the court and the moving party has requested SIJS findings as a form of relief); *In re Guardianship of Penate*, 76 N.E.3d 960, 965–67 (Mass. 2017) (noting that Congress delegated the task of making special findings of fact related to SIJS to the states, and the judge is obliged to make these findings even if she suspects that the immigrant child’s motivation is something other than relief from abuse, neglect, or abandonment); *In re Guardianship of Guaman*, 879 N.W.2d 668, 673 (Minn. Ct. App. 2016) (“The SIJ statute ‘employs a unique hybrid procedure that directs the collaboration of state and federal systems.’ This collaborative procedure is impaired when state courts fail to consider a request for SIJ findings. Here . . . the probate court abused its discretion by declining to consider appellant’s request for SIJ findings.” (quoting *In re Hei Ting C.*, 969 N.Y.S.2d 150, 152 (2013))); *H.S.P. v. J.K.*, 121 A.3d 849, 852 (N.J. 2015) (“Family Part courts faced with a request for an SIJ predicate order should make factual findings with regard to each of the requirements . . . .”); *In re Mohamed B.*, 921 N.Y.S.2d 145, 147 (App. Div. 2011) (“The Family Court improperly denied Mohamed’s motion for the issuance of an order declaring that he is dependent on the Family Court and making specific findings that would allow him to apply to the USCIS for special immigrant juvenile status—a gateway to lawful permanent residency in the United States.”); *In re Domingo C.L.*, No. M2016-02383-COA-R3-JV, 2017 Tenn. App. LEXIS 590, at \*19–20 (Ct. App. Aug. 30, 2017) (holding that lower court had jurisdiction to make finding of whether it was in best interest of minor child to be returned to child’s home country of Guatemala, remanding case, and directing lower court to make requested finding).

<sup>120</sup> See GULASEKARAM & RAMAKRISHNAN, *supra* note 62, at 181.

<sup>121</sup> U.S. CITIZENSHIP & IMMIGRATION SERVS., NUMBER OF I-360 PETITIONS FOR SPECIAL IMMIGRANT WITH A CLASSIFICATION OF SPECIAL IMMIGRANT JUVENILE (SIJ) BY FISCAL YEAR, QUARTER AND CASE STATUS FISCAL YEAR 2019 (2019), [https://www.uscis.gov/sites/default/files/document/data/i360\\_sij\\_performancedata\\_fy2019\\_qtr2.pdf](https://www.uscis.gov/sites/default/files/document/data/i360_sij_performancedata_fy2019_qtr2.pdf) [<https://perma.cc/8F97-29VP>] [hereinafter NUMBER OF I-360 PETITIONS TABLE, 2010–2019].

*C. Recent Federal Policy Changes to SIJS Application Review Procedure Created Impermissible Restraints on State Action*

This Section focuses on adjustments to federal policy that changed the procedure for SIJS application review.<sup>122</sup> The SIJS statutory scheme is inherently complicated and unique, given Congress's choice to insert state actors into what is traditionally a federally dominated immigration system. But this insertion was, in fact, very deliberate, and Congress's reliance upon state juvenile courts in the SIJS statutory scheme demonstrates a clear indication that states should retain primary responsibility and administrative proficiency in safeguarding child welfare.<sup>123</sup> In contrast to other forms of immigration relief, such as petitions for asylum or petitions for relief under the Violence Against Women Act (VAWA), where Congress retained USCIS as the sole adjudicator of these claims for relief, the SIJ statute limits the role of USCIS to the verification of only certain information.<sup>124</sup> Further, although the Secretary of Homeland Security must "consent[ ] to the grant of special immigrant juvenile status," the statute specifically provides that the USCIS must rely upon juvenile court findings of the history of "abuse, neglect, abandonment, or a similar basis found under State law."<sup>125</sup> Thus the statute explicitly preconditions receipt of a substantive immigration benefit upon a state court order. In fact, Congress envisioned a system that would preclude USCIS from revisiting or re-adjudicating the matter at all.<sup>126</sup> Since the creation of the SIJS statute, USCIS

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<sup>122</sup> See *infra* notes 123–132 and accompanying text.

<sup>123</sup> See 8 U.S.C. § 1101(a)(27)(J)(i) (2018) (requiring a predicate order from a "juvenile court located in the United States"); Chen, *Eliau or Alien?*, *supra* note 15, at 609.

<sup>124</sup> Chen, *Eliau or Alien?*, *supra* note 15, at 607–09 (contrasting VAWA and asylum legislative schemes with the SIJS statute and concluding that "the SIJ statute *does not authorize* federal agency review of the state court determinations," but rather, "the state court's order is the substantive requirement for the immigration benefit" (emphasis added and omitted)); see also Zhen-Hua Gao v. Jenifer, 185 F.3d 548, 555 (6th Cir. 1999) ("[T]he INA specifically delegates determinations of dependency, eligibility for long-term foster care, and the best interest of the child to state juvenile courts.").

<sup>125</sup> See 8 U.S.C. § 1101(a)(27)(J) (requiring a predicate order from a "juvenile court located in the United States"); see also Special Immigrant Status; Certain Aliens Declared Dependent on a Juvenile Court; Revocation of Approval of Petitions; Bona Fide Marriage Exemption to Marriage Fraud Amendments; Adjustment of Status, 58 Fed. Reg. 42,843, 42,847 (Aug. 12, 1993) ("The final [regulations] state[] that the decision concerning the best interest of the child *may only be made* by the juvenile court or in administrative proceedings authorized or recognized by the juvenile court." (emphasis added)).

<sup>126</sup> USCIS policy, regulations, and administrative judges have supported this interpretation of congressional intent. See 8 C.F.R. § 204.11(c)(1) (2020) (presuming the jurisdiction of state juvenile courts to issue dependency orders for individuals over the age of eighteen); Yates Memo, *supra* note 50, at 4–5; see also *In re Self-Petitioner*, 2015 WL 3545456, at \*3 (Dep't of Homeland Sec., AAO May 7, 2015) (finding that the SIJS provision does not permit USCIS to go "behind the [juvenile] court's order to make [its] own determination under state child welfare law" in a decision by USCIS's own administrative judges).

has continued to reaffirm its policy of giving broad deference to state court determinations in their own jurisdiction and power to issue the findings contained within juvenile court orders.<sup>127</sup>

A recent dramatic increase in the number of SIJS denials followed a change in USCIS policy.<sup>128</sup> Following this change in policy, USCIS began to question state court jurisdiction over SIJS applicants.<sup>129</sup> The change in policy also resulted in challenges to the underlying factual findings within state predicate orders,<sup>130</sup> disregarding congressional statutory language to the contrary.<sup>131</sup> Changes in late 2019 threaten to erode a SIJS applicant's chances even more.<sup>132</sup> Recent cases in California and New York successfully challenged USCIS's authority under the Administrative Procedure Act (APA) to re-adjudicate SIJS petitions and to question a state court's interpretation of its own state law or jurisdictional requirements.

#### *D. J.L. v. Cissna (CA) and R.F.M. v. Nielsen (NY)*

This Section analyzes two cases that disputed USCIS's authority to change decisions on SIJS petitions and second-guess the findings of state

<sup>127</sup> 58 Fed. Reg. at 42,848; Interoffice Memorandum from Michael Aytes, Acting Assoc. Dir., U.S. Citizenship & Immigration Servs., AFM Update: Chapter 22: Employment-Based Petitions (AD03-01) 82 (Sept. 12, 2006) [https://www.uscis.gov/sites/default/files/document/memos/afm\\_ch22\\_091206r.pdf](https://www.uscis.gov/sites/default/files/document/memos/afm_ch22_091206r.pdf) [<https://perma.cc/RXY4-RNQJ>].

<sup>128</sup> USCIS data shows that there has been a significant increase in denials of SIJS applications since 2010 when the agency started recording this data. For example, in 2010, the rate of application denials was 6.5%. Most recently in 2019, following the change in policy in 2018, the rate has almost doubled since then and now is at its peak, at 12.28%. See NUMBER OF I-360 PETITIONS TABLE, 2010–2019, *supra* note 120.

<sup>129</sup> See *supra* note 19.

<sup>130</sup> See, e.g., *W.A.O. v. Cuccinelli*, No. 2:19-cv-11696 (MCA) (MAH), 2019 WL 3549898, at \*3 (D.N.J. July 3, 2019) (“Based on the New Jersey law[,] . . . USCIS shall not, until further Order of this Court, delay, deny, or revoke SIJS petitions on the ground that the [Court] lacks jurisdiction to make SIJ Findings as to juveniles who are between 18 and 21 years old, so long as New Jersey law establishes that the juvenile is subject to such jurisdiction.”).

<sup>131</sup> See *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350, 360 (S.D.N.Y. 2019) (“[F]ollowing a policy . . . [t]hat effectively precludes those immigrants in New York State from obtaining SIJ status despite the fact that the immigration statute otherwise provides that relief . . . [is a] change [that] must come from Congress and not from the immigration authorities.”); *J.L. v. Cissna*, 341 F. Supp. 3d 1048, 1062 (N.D. Cal. 2018) (finding that a USCIS policy that questions state interpretation of its own law is “inconsistent with the plain text of the SIJ statute”); see also 8 U.S.C. § 1101(a)(27)(J); *W.A.O.*, 2019 WL 3549898, at \*1 (“Congress reserved a critical role for state courts in the SIJS framework because state courts are expert in making child welfare determinations, including with what individual or agency a juvenile should be placed; whether the juvenile has been abused, neglected, or abandoned; and what is in his or her best interest.”).

<sup>132</sup> See generally USCIS POLICY MANUAL, *supra* note 19, at chs. 2(C), 3 (limiting the types of juvenile state courts capable of generating predicate orders and requiring applicants to have petitioned and received specific forms of relief (*i.e.*, decisions on custody and child welfare provisions) in order for USCIS to consent to grant of SIJS, among other changes).

courts.<sup>133</sup> The plaintiffs in *J.L. v. Cissna*, a 2018 case brought in the United States District Court for the Northern District of California, were four young immigrants who sought to represent a class of children who (1) were subject to guardianship orders under California state law, and (2) either had or could have their SIJS petitions denied because the state court could not reunify the children with their parents.<sup>134</sup> The petitioners requested injunctive relief, arguing that they were denied SIJS status based on a new policy USCIS promulgated that imposed requirements beyond the scope of the law and that, in turn, violated the APA.<sup>135</sup>

In 2014, the California legislature added a provision to the California Code of Civil Procedure granting jurisdiction to the state Superior Court to make factual findings required for a SIJS petition.<sup>136</sup> Specifically the legislature empowered California probate courts to appoint a guardian for a juvenile between the ages of eighteen and twenty-one to make the factual findings required for an SIJS petition,<sup>137</sup> explicitly giving them governing power under the same substantive law as guardianship of minors.<sup>138</sup>

In *Cissna*, the plaintiffs contended that, in the summer of 2017, USCIS began holding SIJS applications for individuals between the ages of eighteen and twenty for longer than 180 days to implement a new policy regarding SIJS.<sup>139</sup> USCIS initially denied any change of policy, but then did an about-face and publicly acknowledged that a change in policy had, in fact, occurred.<sup>140</sup> In February 2018, the USCIS Office of the Chief Counsel (OCC) released its guidance that “[t]he evidence submitted must establish that the court had the power and authority to make the required determinations about the care and custody of the petitioner, which includes parental reunification, as

<sup>133</sup> See *infra* notes 134–155 and accompanying text.

<sup>134</sup> *Cissna*, 341 F. Supp. 3d at 1056.

<sup>135</sup> *Id.* at 1054.

<sup>136</sup> CAL. CIV. PROC. CODE § 155(a)(1) (Deering 2019).

<sup>137</sup> CAL. PROB. CODE § 1510.1 (West 2019).

<sup>138</sup> CAL. PROB. CODE § 1514 (West 2019) (citing CAL. FAM. CODE Div. 8, Pt. 2, chs. 1, 2).

<sup>139</sup> *Cissna*, 341 F. Supp. 3d at 1056–57.

<sup>140</sup> On April 18, 2018, in a statement to the *New York Times*, USCIS denied that there had been any change in policy with regard to SIJS applications. See Robbins, *supra* note 19 (“U.S.C.I.S. has not issued any new guidance or policy directives regarding the adjudication of S.I.J. petitions.” (quoting USCIS spokesman)). One week later, however, USCIS publicly conceded that it had recently started to deny SIJS applications based on new guidance issued in February 2018. See Hesson, *supra* note 19 (noting that USCIS clarified that its chief counsel’s office issued guidance in February 2018 for the agency to reject pending applications in cases where applicants could not be returned to the custody of a parent). According to *Politico*, “The logic [of the new guidance] is that if a state court can’t legally place a young person in the custody of a parent or guardian (for instance, in cases where the young person is over 18), the applicant shouldn’t be eligible for an SIJ visa. The guidance effectively means young people over age 18 can be denied visas, even though the program remains open to people under age 21.” *Id.*

a juvenile.”<sup>141</sup> According to the *Cissna* court, the USCIS, after making the statement that “most courts . . . do not have power and authority to make the reunification finding for purposes of SIJ eligibility,” went on to revise its policy position to reflect OCC’s legal guidance.<sup>142</sup>

The court in *Cissna* granted the plaintiffs a preliminary injunction based on the arbitrary and capricious nature of USCIS’s policy change and failure to provide adequate notice of the change in violation of the APA.<sup>143</sup> The court also offered a view of the SIJS statute consistent with our understanding of it as a model of cooperative federalism, with discernable and more predictable boundaries. In this way, the states and the federal government can work together in the interior spaces of the United States where threats to national security may be less acute. The court noted that:

USCIS guidance states that “[g]enerally, a petition should not be denied based USCIS’ [sic] interpretation of state law, but rather officers should *defer to the juvenile court’s interpretation of the relevant state laws.*” The evidence accompanying a SIJ petition only needs to “establish that the juvenile court based its decision, *including whether or not it has jurisdiction to issue the order, on state law rather than federal immigration law.*” The California Supreme Court has found that California probate courts have jurisdiction to make “necessary state court findings,” including reunification determinations. Under USCIS’s own guidance, this should settle the issue.<sup>144</sup>

In other words, Congress created a system that delineated specific roles for federal and state powers: state courts make underlying factual determinations regarding a child’s best interest, and USCIS decides whether each of these factual determinations has been met *without questioning the underlying*

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<sup>141</sup> *Cissna*, 341 F. Supp. 3d at 1057 (quoting U.S. Citizenship & Immigration Servs., Office of the Chief Counsel, Legal Guidance Clarifying OCC Interpretation of Reunification with One or Both Parents for Purposes of Establishing Eligibility for SIJ Classification (Feb. 2018), at 1 (on file with author)).

<sup>142</sup> *Id.* at 1057 (quoting statement from USCIS spokesperson Jonathan Withington to *Politico*) (“USCIS then revised its Consolidated Handbook of Adjudication Procedures, a companion resource to its Policy Manual, to reflect OCC guidance.”) The USCIS Policy Manual appears to be replacing the Consolidated Handbook of Adjudication Procedures (CHAP) and other policy and guidance repositories. The American Immigration Lawyers Association reports that “[t]he USCIS Policy Manual is the agency’s centralized online repository for USCIS’s immigration policies. The USCIS Policy Manual will ultimately replace the Adjudicator’s Field Manual (AFM), the USCIS Immigration Policy Memoranda site, and other policy repositories.” *Tracking USCIS Policy Manual Changes*, AM. IMMIGR. LAWS. ASS’N, <https://www.aila.org/infonet/tracking-uscis-policy-manual-changes> [<https://perma.cc/5K5G-WD42>].

<sup>143</sup> *Cissna*, 341 F. Supp. 3d at 1058–66.

<sup>144</sup> *Id.* at 1061–62 (internal citations omitted).

*application of state law.* In *Cissna*, the court found a USCIS policy that questioned a state's ability to apply its own law to be "inconsistent with the plain text of the SIJ statute."<sup>145</sup> Presumably, and within congressional limits, the state is then left to expand or constrict SIJS protections for juvenile applicants living within its borders. Of course, a state could not expand SIJS protections beyond what the statute specified. As an obvious example, if a state expanded its definition of "child" to include people over the age of twenty-one, it would conflict with the SIJS statute because the statute's upper age boundary defines a child as twenty-one years of age or younger.<sup>146</sup> But aligning state law with federal law to maximize protection for the very group of immigrants Congress intended to protect would be an example of a permissible way states could complement the statutory scheme.

In *R.F.M. v. Neilsen*, a 2019 case that closely paralleled *Cissna* legally and factually, the United States District Court for the Southern District of New York granted summary judgment to a group of young immigrant plaintiffs who contended that USCIS's new policy violated the APA.<sup>147</sup> The plaintiffs in *R.F.M.* were young immigrants whom the New York State Family Court had determined were abused, abandoned, or neglected, and who had sought and failed to receive SIJS.<sup>148</sup> The court made it very clear that immigration authorities were not authorized to make changes to the SIJS statute in a way that precluded SIJS relief that New York state had otherwise allowed for, stating:

It is plain that the defendants, contrary to their prior practice, and in contravention of federal law, are now following a policy whereby the New York Family Court cannot issue the necessary findings to juvenile immigrants between the ages of eighteen and twenty-one to enable them to obtain SIJ status. That effectively precludes those immigrants in New York State from obtaining SIJ status despite the fact that the immigration statute otherwise provides that relief. If the immigration laws are to be changed in that way, the change must come from Congress and not from the immigration authorities. Therefore, the plaintiffs' motion for summary judgment should be granted . . . .<sup>149</sup>

Most of the opinion relates to the plaintiffs' arguments that the USCIS's new policy violated the APA. The court disposed of the policy by finding that

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<sup>145</sup> *Id.* at 1062. As we discuss *infra* in Part III of this Article, a federal statute designed to question a state court's ability to apply its own law would raise distinct constitutional issues as well.

<sup>146</sup> 8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11(c)(1).

<sup>147</sup> 365 F. Supp. 3d at 383.

<sup>148</sup> *Id.* at 359.

<sup>149</sup> *Id.* at 360.

it contravened the plain meaning of the SIJS statute. Therefore, the court undertook no constitutional analysis on the appropriateness of a federal agency questioning the application of state law or state jurisdiction. Nonetheless, in the context of addressing the argument that USCIS acted beyond the scope of its consent authority, the court made explicit that the plain language of the SIJS statute, as Congress drafted it, does not give USCIS the authority to question the application of New York state law, stating:

The USCIS Policy Manual explains that the agency relies on the state court's expertise in these matters, and the agency is not to reweigh the evidence on which the state court relied in issuing a Special Findings Order . . . . By arguing that the New York Family Court lacks jurisdiction to make the requisite SIJ findings, the agency is substituting its interpretation of New York law for that of the New York Family Court. The defendants have not cited any authority to support such a broad use of the consent function. Indeed, such a broad use of the consent function contravenes the directives in the agency's Consolidated Handbook of Adjudication Procedures . . . .<sup>150</sup>

The initial outcomes in *Cissna* and *R.F.M.* provided a positive signal from the courts: states are free to operate in concert with the federal government in the immigration space, provided Congress has carefully delineated the boundaries of their involvement. Both New York and California created statutory frameworks that went no further than the boundaries defined under the SIJS statute: where a gap existed between state and federal law, New York and California filled the gap to extend coverage for children between the ages of eighteen and twenty-one who were otherwise eligible for SIJS relief.<sup>151</sup>

Ultimately, the USCIS reached a court-approved settlement in *Cissna*, in which the parties agreed that:

1. USCIS will no longer require state courts to have the authority to place into custody or order reunification of a SIJ applicant with his or her parents in order to determine whether the reunification with one or both of their parents is not viable for the purposes of SIJ eligibility;
2. Pursuant to Cal. Prob. Code § 1510.1 and Cal. Code Civ. Proc. § 155, the Probate Division of the California Superior Court is a "juvenile court" for the purpose of making findings and issuing orders for SIJ purposes;

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<sup>150</sup> *Id.* at 380–81.

<sup>151</sup> CAL. PROB. CODE § 1510.1; N.Y. FAM. CT. ACT § 661 (McKinney 2011).

3. An individual is not disqualified from SIJ status if (a) state law confers upon a state court the jurisdiction to declare her dependent, legally commit her to an individual or entity, or place her under the custody of another individual or entity regardless of her age; and (b) she is unmarried and under the age of 21 when she petitions for SIJ status;
4. A “child” as defined by Cal. Prob. Code § 1510.1 is not disqualified from SIJ status, despite having reached California’s age of majority before obtaining a custodial placement or legal commitment as required for SIJ eligibility because California Probate Courts have jurisdiction over such “child” as a “juvenile” for purposes of SIJ status under § 1510.1.<sup>152</sup>

Thus, the plaintiffs received all of the relief that they sought. Although much of the focus in *Cissna* and *R.F.M.* was on whether USCIS’s change in policy violated the APA, both courts upheld their respective states’ legislative efforts that were intended to operate in tandem with federal law to fill the gaps serving to block access to SIJS relief, and rejected USCIS’s attempt to restrict SIJS relief contrary to the plain language of the SIJS statute.<sup>153</sup>

The outcomes in *Cissna* and *R.F.M.* may have temporarily halted the application of the Trump administration’s policy allowing re-adjudication of state child welfare laws or jurisdiction in California and New York (and with some broader geographic applications). Yet the intent of the administration is clear and the geographically broader settlement in *Cissna* was only effective to benefit those who filed for SIJS prior to December 15, 2019.<sup>154</sup> As a result, we can expect to see additional changes to USCIS policy that seek to undercut state legislative efforts to broaden access to SIJS relief to the fullest extent permissible under the SIJS statute. Elsewhere, children hoping to apply for SIJS relief continue to face state-imposed barriers that preclude access to relief by maintaining that it is unconstitutional for Congress to compel states to make SIJS findings.<sup>155</sup>

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<sup>152</sup> *J.L. v. Cuccinelli*, No. 18-cv-04914-NC, 2019 U.S. Dist. LEXIS 218536, at \*5–6 (N.D. Cal. Dec. 18, 2019) (quoting the parties’ settlement agreement).

<sup>153</sup> *R.F.M.*, 365 F. Supp. 3d at 378; *Cissna*, 341 F. Supp. 3d at 1059.

<sup>154</sup> Robbins, *supra* note 19; see also Ingrid V. Eagly, *The Movement to Decriminalize Border Crossing*, 61 B.C. L. REV. 1967, 1977 (2020) (discussing the Trump administration’s immigration policy and executive orders on immigration).

<sup>155</sup> See, e.g., *Commonwealth v. N.B.D.*, 577 S.W.3d 73, 78 (Ky. 2019) (noting that Kentucky state courts have jurisdiction to make SIJS findings but are not required to engage in SIJS factfinding); *de Rubio v. Rubio Herrera*, 541 S.W.3d 564, 571–73 (Mo. Ct. App. 2017) (finding that Missouri state courts were permitted to make SIJS findings but “federal law cannot mandate a state court to make findings,” and courts are only obligated to do so where they must act in the child’s best interest such that state courts would only make such findings in “the proper circumstances”); *Ramirez v. Menjivar*, No. 74030, 2018 Nev. Unpub. LEXIS 1203, at \*5–6 (Dec. 27, 2018) (finding that Nevada dis-



### III. SIJS-HOSTILE STATES AND THEIR IMPERMISSIBLE EFFORTS TO BLOCK ACCESS TO SIJS RELIEF

SIJS cases account for less than one percent of applications for lawful permanent status adjudicated by USCIS each year.<sup>156</sup> The number of children who could potentially qualify for relief, however, is likely to be significantly higher than this figure given the risks associated with applying.<sup>157</sup> Many children remain in the shadows for fear that bringing a claim for a predicate order might expose them to adverse immigration consequences, or because they are unaware of or cannot afford legal representation to pursue this form of relief.<sup>158</sup> Politicized judicial attitudes toward unauthorized immigrants further

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strict courts had jurisdiction to make SIJS findings “only to the extent those findings are ancillary to proceedings under state law,” and that courts are not required to make such findings and “may make findings relevant to an SIJ application only to the extent they are ancillary to proceedings under state law”); *see also* *Canales v. Torres Orellana*, 800 S.E.2d 208, 217 (Va. Ct. App. 2017) (finding that the SIJS statute “does not require that the state court make [findings required for a SIJS petition] or convey jurisdiction upon them to do so”), *superseded by statute*, VA. CODE ANN. § 16.1-241(A)(1) (2019), *as recognized in* *Esmeralda v. Edmundo*, No. JA2019-0000118, 2019 Va. Cir. LEXIS 440, at \*2 (Cir. Ct. Aug. 29, 2019).

<sup>156</sup> *See* CTR. FOR GENDER & REFUGEE STUDIES & KIDS IN NEED OF DEF., A TREACHEROUS JOURNEY: CHILD MIGRANTS NAVIGATING THE U.S. IMMIGRATION SYSTEM 38 (2014). In 2012, for example, USCIS received only 2,959 SIJS petitions. *Id.* In 2014, USCIS received 5,776 petitions for SIJS status. *See* NUMBER OF I-360 PETITIONS TABLE, 2010–2019, *supra* note 121. The total number of successful applications for SIJS-lawful permanent resident status granted in 2017 was 4,681, out of 1,127,167 total successful applications for permanent resident status (0.42%). *See* 2017 *Yearbook of Immigration Statistics, Table 7: Persons Obtaining Lawful Permanent Resident Status by Type and Detailed Class of Admission: Fiscal Year 2017*, U.S. DEP’T OF HOMELAND SEC., <https://www.dhs.gov/immigration-statistics/yearbook/2017/table7> [<https://perma.cc/F7TV-6Z6A>].

<sup>157</sup> *See generally* RACHEL PRANDINI & ALISON KAMHI, IMMIGRANT LEGAL RES. CTR., RISKS OF APPLYING FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) IN AFFIRMATIVE CASES (Sept. 2018), [https://www.ilrc.org/sites/default/files/resources/risks\\_apply\\_sijs\\_affirm\\_cases-20180831.pdf](https://www.ilrc.org/sites/default/files/resources/risks_apply_sijs_affirm_cases-20180831.pdf) [<https://perma.cc/RZL2-JYVJ>] (describing the heightened risk of applying for SIJS since 2018 policy guidance has required USCIS to refer applicants who are denied and who lack immigration status to ICE or to issue a Notice to Appear, which is the charging document that begins immigration removal proceedings). It is recommended that an affirmative SIJS packet should only be filed if the practitioner believes it will be granted, unless the applicant is willing to be placed in removal proceedings. *Id.*

<sup>158</sup> Recent USCIS memoranda have created new risks for SIJS applicants, who now have to weigh the likelihood of obtaining an adjustment to their immigration status with the risk of exposing themselves to immigration enforcement authorities since applying for SIJS is not a confidential process. It is unclear when the guidance will be implemented. Nonetheless, advocates must engage in the risk analysis that the USCIS Notice to Appear (NTA) Memo now requires in all affirmative cases and advise their clients of the same. *See, e.g.*, U.S. CITIZENSHIP & IMMIGRATION SERVS., POLICY MEMORANDUM: UPDATED GUIDANCE FOR THE REFERRAL OF CASES AND ISSUANCE OF NOTICES TO APPEAR (NTAs) IN CASES INVOLVING INADMISSIBLE AND DEPORTABLE ALIENS, PM-602-0050.1 (June 28, 2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf> [<https://perma.cc/XS9G-B834>]; U.S. CITIZENSHIP & IMMIGRATION SERVS., UPDATED GUIDANCE ON THE IMPLEMENTATION OF NOTICE TO APPEAR POLICY MEMORANDUM (July 30, 2018), <https://www.uscis.gov/news/alerts/updated-guidance-implementation-notice-appear-policy-memorandum> [<https://perma.cc/WB9N-F3FN>] (announcing

restrain access to SIJS.<sup>159</sup> Recent USCIS policy changes have further restricted access on the federal side, and state court judges have discovered creative ways to erect roadblocks to access as well.

This Part first discusses the approach taken by states that have concluded that state court judges are not required under federal law to make SIJS factual findings during state court proceedings.<sup>160</sup> We then present a critical analysis of the conceptualization of the SIJS statute. We argue that SIJS does not simply describe a form of relief available to children who may incidentally meet the criteria for it, but rather is better conceptualized as a federal right or a form of individual relief available to a group of children.<sup>161</sup> States are not obligated to do anything other than what they already do—make best interest determinations—and use existing “best-interests machinery” as a means for unauthorized immigrant children to access a form of immigration relief. In other words, in refusing to entertain a potential form of federal relief available to a child, a state court would appear not to appropriately discharge its obligation to act in that child’s best interest by ignoring a meaningful form of relief.

*Canales v. Torres Orellana*, decided in the Court of Appeals of Virginia in 2017, is the leading precedent to take this approach and, despite subsequently being superseded by state statute, it has influenced the judiciaries of several other states.<sup>162</sup> *Canales* involved an immigrant juvenile living with his mother in Virginia.<sup>163</sup> A lower court had granted custody to the juvenile’s mother but refused to make findings related to the father’s abuse and abandonment of his

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USCIS postponement of the USCIS NTA Memo pending USCIS components to “create or update operational guidance on NTAs and Referrals to ICE”).

<sup>159</sup> See *In re* B.R.C.M., 182 So. 3d 749, 756, 763 (Fla. Dist. Ct. App. 2015) (Salter, J., dissenting) (“Florida appellate cases reported from 2005 to 2011 were receptive to immigrant juveniles petitioning for dependency . . . . From the elaboration of rulings in 2015 in this district . . . it is apparent that . . . the circuit court and this Court have concluded that private petitions by immigrant juveniles are generally appropriate for summary denial, despite the more deliberate consideration previously afforded the SIJ petitioners in [a circuit court case in] 2013 . . . and in prior opinions by the district courts of appeal.”), *overruled by* *In re* B.R.C.M. v. Fla. Dep’t of Children & Families, 215 So. 3d 1219 (Fla. 2017); Perlmutter, *supra* note 17, at 1595 (discussing the shift in judicial response to SIJS petitions after the spread of fear of unaccompanied child migrant flow from Central America and noting that, “[i]n just a few years, judges’ attitudes changed from being receptive to the petitions to summarily dismissing them”); Ashley Cleek, *Florida Judges Are Turning Their Backs on Abused Young Immigrants*, THE NATION (Jan. 22, 2018), <https://www.thenation.com/article/florida-judges-are-turning-their-backs-on-abused-young-immigrants/> [<https://web.archive.org/web/20200919201600/https://www.thenation.com/article/archive/florida-judges-are-turning-their-backs-on-abused-young-immigrants/>].

<sup>160</sup> See *infra* notes 162–179 and accompanying text.

<sup>161</sup> See *infra* notes 180–191 and accompanying text.

<sup>162</sup> 800 S.E.2d 208, 220 (Va. Ct. App. 2017), *superseded by statute*, VA. CODE ANN. § 16.1-241(A)(1).

<sup>163</sup> *Id.* at 212–13.

son, claiming a lack of jurisdiction to do so.<sup>164</sup> The court believed that the Immigration and Nationality Act (INA) must confer specific jurisdiction necessary for a state court to make findings that might be used in an immigration matter, and that nothing in the INA mandated that state courts make SIJS findings upon a litigant's request.<sup>165</sup> In spite of the court's clear jurisdiction over the parental mistreatment and best-interests-of-the-child issues the case presented, it nevertheless held that it had no obligation to make independent SIJS findings because Virginia state law had no provision for making these findings.<sup>166</sup>

In *Canales*, the court interpreted the SIJS statute as creating no obligation, mandate, or jurisdictional grant on behalf of the individual states, but instead offered an alternative reading that "the SIJ definition only [operates as a] list[] [of] certain factors which, if established in state court proceedings, permit a juvenile immigrant to petition [USCIS] for SIJ status."<sup>167</sup> States following *Canales* support this interpretation with provisions from the USCIS Policy Manual, which (1) states that "[t]here is nothing in the [INA] that allows or directs juvenile courts to rely upon provisions of the INA or otherwise deviate from reliance upon state law and procedure in issuing state court orders" and (2) instructs state "[j]uvenile courts [to] follow their state laws on issues such as when to exercise their authority, evidentiary standards, and due process."<sup>168</sup> Further reasoning in the case relies on the fact that Congress incorporated the SIJS scheme into the definitions section of the statute, stating that "it would strain basic principles of statutory construction to infer a grant of jurisdiction from the definition of a term of art."<sup>169</sup>

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<sup>164</sup> *Id.* at 213.

<sup>165</sup> *Id.* at 218 ("Nothing in the INA directs a state court to do anything more than carry out its adjudicatory responsibilities under state law.").

<sup>166</sup> *Id.* at 223 (holding that Virginia law does not permit circuit courts to make "separate SIJ findings of fact").

<sup>167</sup> *Id.* at 217.

<sup>168</sup> See *id.* at 217–18 (citing USCIS POLICY MANUAL, *supra* note 19, at chs. 1(A) n.1, 3(A)(2)); see also *Commonwealth v. N.B.D.*, 577 S.W.3d 73, 78 (Ky. 2019) (citing same); *Ramirez v. Menjivar*, No. 74030, 2018 Nev. Unpub. LEXIS 1203, at \*9–10 (Dec. 27, 2018) (citing same).

<sup>169</sup> *Canales*, 800 S.E.2d at 217. We find further evidence that the SIJS statute is, in fact, a mandatory program when we contrast the program to other schemes inviting states to participate in the immigration space. In the case of the 287(g) program, for example, the federal government invites states to elect to participate in cooperative efforts to provide law enforcement assistance to immigration authorities. The 287(g) program allows for partnerships between ICE and state and local law enforcement agencies to identify and remove immigrants who are, according to ICE guidance, "amenable" to removal. See *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <https://www.ice.gov/287g> [<https://perma.cc/YZ33-M36E>]. ICE provides training to local law enforcement that allows them to perform limited law enforcement functions. 8 U.S.C. § 1357(g) (2018). States and local agencies have the option to cooperate with federal immigration enforcement agencies, but the statute explicitly frames participation as a choice rather than an obligation. It thus reads: "Nothing in this subsection shall be construed to require any State or political subdivision of a State to enter into an agreement with the Attorney General under

In 2018, the Supreme Court of Nevada added a constitutional argument to the statutory analysis offered in *Canales*.<sup>170</sup> In *Ramirez v. Menjivar*, the court declared that “refusing to infer a grant of jurisdiction under this term of art avoids possible constitutional issues under the Tenth Amendment and the separation of powers doctrine.”<sup>171</sup> In a footnote, the court expounded:

For example, under the Tenth Amendment, “[t]he Federal Government may not compel the States to enact or administer a federal regulatory program.” Thus, even if the federal program contemplates the states’ participation, it cannot *force* the states to participate. Also at issue is the separation of powers doctrine. Until recently, the Nevada Legislature was silent on what the state courts were required to do in regards to 8 U.S.C. § 1101(a)(27)(J). Because the Nevada Constitution grants the legislature with the power to establish family courts “as a division of any district court” and to “prescribe its jurisdiction,” inferring a grant of jurisdiction under 8 U.S.C. § 1101(a)(27)(J) would also likely encroach on the legislature’s exercise of power.<sup>172</sup>

Missouri courts have also been in accord with this approach. In *de Rubio v. Rubio Herrera*, a 2017 case that was factually similar to *Canales*, the Court of Appeals of Missouri found that the SIJS statute did not impose—nor could it impose—an obligation for states to make SIJS findings, unless the court made findings incidentally in the normal course of resolving another matter already before the court.<sup>173</sup> At issue in *de Rubio* was a custody determination, which required the court to make findings related to what was in the child’s best interest.<sup>174</sup> Yet the court refused to make additional special findings requested by the child’s mother that could have potentially qualified the child for special immigrant status.<sup>175</sup> In so holding, the court stated:

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this subsection.” 8 U.S.C. § 1357(g)(9). The SIJS statute, by contrast, contains no such “opt-out” language. We contrast these two statutes not for the purpose of endorsing 287(g) agreements, but simply for the purpose of contrasting the language and the implications of this language, and to provide additional evidence that the congressional intent of the SIJS statute is to mandate participation rather than create an option for states to participate.

<sup>170</sup> *Ramirez*, 2018 Nev. Unpub. LEXIS 1203, at \*11.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* n.6 (citations omitted).

<sup>173</sup> 541 S.W.3d 564, 571–73 (Mo. Ct. App. 2017) (finding that Missouri state courts were permitted to make SIJS findings and may be obligated to make findings when the court has a duty to act in the child’s best interest, but “federal law cannot mandate a state court to make findings,” and, thus, state courts would only make such findings in “the proper circumstances”).

<sup>174</sup> *Id.* at 568.

<sup>175</sup> *Id.* at 573.

In the proper circumstances, a court exercising jurisdiction over an immigrant child may, while acting in *parens patriae*, find it necessary to make the findings at issue herein. That obligation arises neither from federal law or regulation, nor from the request of a litigant, but solely from that judicial officer's obligation to act in the best interest of that child. Depending upon the facts found by the state court to support its judgment in any of the above proceedings, such findings could arguably also support a decision to grant SIJ status, but, as noted, that is for the federal authorities to decide. Our reading of the SIJ statute is in accordance with the analysis in *Canales*, which is consistent with the idea that federal law cannot mandate a state court to make findings but may rely on state courts in the proper circumstances to make such findings that are in a child's best interest and required of the court while in the position of *in loco parentis*.<sup>176</sup>

After concluding that the trial court had no obligation to make findings that could qualify the child for SIJS, the appeals court then turned to the mother's equal protection claim, summarily disposing of the claim with a complete lack of reasoning, stating that "it is abundantly clear that the trial court's decision was not based 'solely' upon [the] [m]other's immigration status."<sup>177</sup> Yet, at the conclusion of the hearing, the judge stated that "he could not justify making arrangements for or suggesting that an undocumented minor should stay in the United States when that minor does not have a parent in the United States who is a legal citizen."<sup>178</sup> Thus, it seems at least plausible from the record that the judge's reasoning for denying the mother's motion to make special findings that could have assisted her son in applying for SIJS was related to her undocumented status. It also seems clear that the trial judge either did not understand or was unwilling to comply with the SIJS statute. But the court dismissed the mother's equal protection claim because the court was "concerned only with the correctness of the result, not the route taken to reach that result."<sup>179</sup>

Courts have historically shied away from tackling discrimination concerns directly in favor of implicitly meshing federalism and equal protection together.<sup>180</sup> One can choose to downplay this trend in the caselaw, as long as

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

<sup>177</sup> *Id.* at 575.

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

<sup>179</sup> *Id.*

<sup>180</sup> See GULASEKARAM & RAMAKRISHNAN, *supra* note 62, at 187 (discussing a line of cases, starting in the late nineteenth century, that have intermingled federalism concepts with discriminatory origins and effects of state and local restrictive laws); see, e.g., *Graham v. Richardson*, 403 U.S. 365,

the judicial reasoning reaches the normatively desirable result. Intermingling these principles too closely, however, can have far-reaching consequences, eroding both the doctrine of equal protection and, accordingly, immigrant rights. Using preemption and federalism concerns as the dispositive rationale gives the impression that restrictive state and local laws are legitimate *but for* their overreaching of federal power when, more often, they are designed and carried out with discriminatory intent and replete with racial profiling problems in practice.<sup>181</sup> Other scholars have outlined the details and merits of making an equal protection claim under the SIJS statute, as well as the potential negative side effects advancing such a claim might expose (the biggest risk likely being the potential for invalidating the entire SIJS framework). Therefore, we will limit our commentary to merely identifying the potential for an equal protection claim.<sup>182</sup>

Although there are plenty of state judiciaries that have proven hostile to SIJS applicants and the SIJS statutory scheme, we are not aware of any states

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377, 378 (1971) (finding that the Equal Protection Clause of the Fourteenth Amendment prevented a state from conditioning welfare benefits on possession of citizenship or the beneficiary residing in United States for a certain number of years, but emphasizing that “[t]he National Government has ‘broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization,’” and holding that “[s]tate laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with these overriding national policies in an area constitutionally entrusted to the Federal Government” (quoting *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 419 (1948)); *Takahashi*, 334 U.S. at 414–15 (finding that a state could not refuse to supply petitioner, an alien ineligible for citizenship because of federal law, with a commercial fishing license because such refusal violated the Fourteenth Amendment, but viewing questions raised as being “of importance in [both] the fields of federal-state relationships and of constitutionally protected individual equality and liberty”); *Hines v. Davidowitz*, 312 U.S. 52, 65–66 (1941) (finding that the Pennsylvania Alien Registration Act is field preempted by the federal statutory scheme regarding alien registration, but discussing at length discriminatory impact of the Act on aliens); *Truax v. Raich*, 239 U.S. 33, 43 (1915) (finding that an Arizona state law requiring at least 80% of employer’s workforce to be U.S. citizens violated the Fourteenth Amendment because the authority to control immigration was vested solely in the federal government and the state was acting to deny some lawful inhabitants their right to earn a living); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (striking down a facially neutral municipal laundry ordinance on equal protection ground but citing *Chy Lung v. Freeman*, 92 U.S. 275 (1875), a seminal structural preemption case, suggesting that the Court understood that, although decided on federal preemption ground, law at issue in *Chy Lung* had discriminatory purpose).

<sup>181</sup> See GULASEKARAM & RAMAKRISHNAN, *supra* note 62, at 187; HIROSHI MOTOMURA, *IMMIGRATION OUTSIDE THE LAW* 111–16 (2014).

<sup>182</sup> For a detailed discussion of equal protection violations under the SIJS statute and the potential for an equal protection challenge to the SIJS law, see generally Rebecca A. Delfino, *The Equal Protection Doctrine in the Age of Trump: The Example of Undocumented Immigrant Children*, 84 BROOK. L. REV. 73 (2018) (citing the failure or impracticability of traditional methods aimed at solving problems with the implementation of the SIJS statute—like amending SIJS or revising implementing regulations—because of a stalemate within and between the executive and legislative branches, as reasons for advancing a constitutional challenge to the framework).

that have, as of yet, specifically blocked access to SIJS directly via statute. Certainly, challenging state laws or local ordinances that restrict access to SIJS is viable, to the extent such laws exist. Obstacles to the realization of the benefits of the SIJS statute have, however, surfaced in less conspicuous, more insidious ways.

Perhaps the most ironic and lamentable roadblock to SIJS access is found in the attitudes of some judges. Widespread misinterpretation of the SIJS statute and state law has severely limited access to SIJS over the past decade just as ominous predictions of floods of children entering the United States through Mexico from Central America have taken hold in the popular, and judicial, imagination.<sup>183</sup> Bernard Perlmutter, a seasoned clinic director and litigator at University of Miami School of Law, recently drafted a field study offering his perspective on the judicial skepticism around granting SIJS predicate orders and the undercurrents of anti-immigrant sentiment seeping into recent trial rulings and appellate opinions in Florida.<sup>184</sup> In the absence of the option to challenge unconstitutional ordinances, he offers strategies his clinic has deployed to expose and counter judges whose misperceptions of immigrants, and national immigration policy views, impacted their rulings from the bench or may have scared children into not applying for SIJS factual findings in the first place.<sup>185</sup> One strategy was to meet with and counsel individual judges who had reported undocumented children to immigration authorities after they appeared in their courtrooms to petition for SIJS findings.<sup>186</sup> His clinic educated judges on the purpose of SIJS and clarified that his role was not, as he had originally viewed it, as a “*de facto* immigration judge,” but instead as a juvenile court judge acting in the best interest of the immigrant children appearing before him.<sup>187</sup> Perlmutter effected change through educating law school students, judges, lawyers, and policymakers, collaborating with other advocates, reaching out to the media, and telling clients’ stories to the courts.<sup>188</sup>

Judicial court battles have prompted, in some cases, a greater sense of urgency on the part of state legislatures to create jurisdiction where state courts have interpreted the SIJS statute to convey none. In Virginia, for example, as

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<sup>183</sup> See Perlmutter, *supra* note 17, at 1596.

<sup>184</sup> See generally *id.* Florida has adopted laws and policies that aim to assist and encourage SIJS applicants, but such efforts can, obviously, be undermined by misinformed or even decidedly anti-immigrant judges. *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 1582–93.

<sup>187</sup> *Id.* at 1590.

<sup>188</sup> *Id.* at 1613–26. Examples of Perlmutter’s work include participating in Florida Department of Children and Families rulemaking, updating the clinic SIJS Bench Book, inviting USCIS policy specialists to train Florida dependency judges on SIJS, and developing strategies and best practices for seeking best interest orders in probate court.

noted *supra*, the legislature created a “fix” for *Canales* by granting jurisdiction to juvenile and domestic relations courts to make specific findings of fact required by federal law to enable a child to apply for or receive any state or federal benefit.<sup>189</sup> Nonetheless, not all states have followed suit in creating a legislative fix to court decisions that have limited access to SIJS relief. In states where courts refuse to recognize that Congress mandates them to make SIJS findings, courts tragically, and impermissibly, deny children access to this form of relief.

When Congress invokes its plenary power to regulate borders, as it has in the case of the enactment of the SIJS statute, it has already created any jurisdiction necessary for litigants to petition a state court to make SIJS factual findings. State legislation aiming to create a cause of action requiring judges to hear SIJS cases is unnecessary, although understandable in the current political climate where immigration is a hot-button issue and where some judges may either fail to understand or intend to thwart the SIJS legislative scheme.<sup>190</sup> A federal “right” to relief has already created jurisdiction. This is a crucial distinction that goes a long way toward immunizing the statute from a Tenth Amendment challenge. Despite a general trend towards dismissing claims alleging violations of state sovereignty, directly commandeering or controlling state legislative or executive officials and resources is the one remaining area where state sovereignty claims still have purchase under the Tenth Amendment.<sup>191</sup> If one conceptualizes the SIJS statute as a federal right accorded to a group of immigrants as an appropriate congressional exercise of plenary power, the concerns surrounding commandeering are alleviated somewhat.

Now that we have discussed the ways states have opted to handle SIJS, as well as an evaluation of the permissibility of these approaches, we propose a model of federalism that can help address the concerns of state and federal actors and, hopefully, eliminate some of the conceptual confusion that has plagued the implementation of the SIJS statute.

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<sup>189</sup> VA. CODE ANN. § 16.1-241(A)(1) (2020).

<sup>190</sup> *See, e.g.*, CAL. CIV. PROC. CODE § 155 (Deering 2019). This law, among other things, clarified that family courts have jurisdiction to make the findings necessary for SIJS. *Id.*

<sup>191</sup> *See, e.g.*, *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1478 (2018) (finding that a federal prohibition against a state authorization of sports gambling violated the anti-commandeering rule because it unequivocally dictated what state legislature may and may not do); *Printz v. United States*, 521 U.S. 898, 935 (1997) (striking down as unconstitutional a detailed federal scheme that governed distribution of firearms but directed state law enforcement officers to participate in its administration).



#### IV. A COOPERATIVE FEDERALISM MODEL FOR THE SIJS STATUTE

Federalism concerns shift as an applicant proceeds through the SIJS application process. When an applicant petitions a state court for SIJS findings, states may get concerned about sovereignty.<sup>192</sup> When the applicant petitions the USCIS for SIJS status, USCIS may question state jurisdiction. Ultimately, both reactions inappropriately block access to SIJS and undercut or bypass congressional protections for applicants. There is no basis for states to refuse to make factual findings under the SIJS statute. Similarly, there is no basis for USCIS to second-guess the application of state law or jurisdiction when reviewing an SIJS application.<sup>193</sup> This Part will propose a workable model of cooperative federalism to address existing impermissible expressions of state and federal agency power.<sup>194</sup> Section A lays out our cooperative federalism and concurrent jurisdiction approach to the issue.<sup>195</sup> Section B posits that the legal framework of SIJS could embody a working model of cooperative federalism.<sup>196</sup>

##### *A. A Cooperative Federalism Framework and Concurrent Jurisdiction*

This Section explores our proposed concept of cooperative federalism.<sup>197</sup> Ming Chen provides a useful framework for resolving immigration-related conflict.<sup>198</sup> She argues for an approach that could allow for state engagement while preserving the federal interests central to immigration law.<sup>199</sup> Application of a model that espouses a cooperative form of immigration federalism requires first that we identify existing nuances in immigration law.<sup>200</sup> More specifically, we are referring to the difference between regulating core functions of immigration law (“border laws”) and regulating in the space of the day-to-day affairs of undocumented persons present in the United States (laws that operate “between borders”).<sup>201</sup> Identifying the character of the law helps to guide our analysis; for example, reliance on the plenary power doctrine to usurp state power may be justified to the extent that the law is a primary law

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<sup>192</sup> See *supra* notes 94–191 and accompanying text.

<sup>193</sup> To be clear, the USCIS does have to “consent[] to the grant of special immigrant juvenile status,” but the statute does not permit the USCIS to question the findings and determinations of the state courts. 8 U.S.C. § 1101(a)(27)(J)(i)–(iii) (2018).

<sup>194</sup> See *infra* notes 197–217 and accompanying text.

<sup>195</sup> See *infra* notes 197–212 and accompanying text.

<sup>196</sup> See *infra* notes 213–217 and accompany text.

<sup>197</sup> See *infra* notes 198–212 and accompanying text.

<sup>198</sup> Chen, *Immigration and Cooperative Federalism*, *supra* note 22, at 1094.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 1092.

<sup>201</sup> *Id.* at 1092–94.

operating in the zone *at the border*, and considerably less appropriate to the extent the law operates in the secondary space *between borders*.

Ming Chen's framework harmonizes immigration federalism with the principles of cooperative federalism.<sup>202</sup> Cooperative federalism envisions federal and state governments sharing power over certain areas, permitting cooperation within those areas.<sup>203</sup> When cooperative federalism is appropriate, harmonization would require the usual presumptions of concurrent jurisdiction and shared power between state and federal government.<sup>204</sup> To the extent that a law can be fairly characterized as a border law, moderating entry and exit, the plenary power doctrine could be clearly invoked so that federal law would override state law.<sup>205</sup> If plenary power justifications are not clearly presented, however, a preemption analysis would consider the possibility that Congress envisioned a system of shared power and cooperation, as was certainly the case in the SIJS statute.<sup>206</sup> If there is apparent conflict, courts should take an additional step of considering the state's purpose in effectuating a law in addition to the federal purpose.<sup>207</sup> If the purpose is cooperative, the law would more likely withstand scrutiny.<sup>208</sup>

Federal law is as much the law of the several states as are the laws passed by their legislatures.

Federal and state law "together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated

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<sup>202</sup> *Id.*

<sup>203</sup> See, e.g., Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 665 (2001).

<sup>204</sup> Chen, *Immigration and Cooperative Federalism*, *supra* note 22, at 1092.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 1093.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*; see also Charlton C. Copeland, *Federal Law in State Court: Judicial Federalism Through a Relational Lens*, 19 WM. & MARY BILL RTS. J. 511, 525 (2011). Copeland rejects allocation as the exclusive method of federalism enforcement and proposes relational federalism enforcement, the judicial mediation of the interaction of the national government and state governments that is grounded in the recognition that the Constitution establishes an enduring relationship between states and the national government. Copeland, *supra*, at 511–12. In short, rather than view federalism as governing how power is allocated between distant and discrete sovereigns, Copeland takes a more nuanced and pragmatic view, informed by how federal and state governments actually interact in the modern era and their intertwined interdependent relationship. *Id.* at 512. Informed by such an attitude, courts would, we believe, appreciate Congress's attempts in the SIJS statute to acknowledge and shape cooperation between the states and the national government rather than viewing the statute in terms of its perceived threat to state and/or federal sovereignty.

by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent.”<sup>209</sup>

So strong is this presumption that it can be defeated only in two narrow circumstances: (1) when Congress expressly ousts state courts of jurisdiction, and (2) when a state court refuses jurisdiction because of a neutral state rule regarding the administration of the courts.<sup>210</sup> Thus, “although States retain substantial leeway to establish the contours of their judicial systems, they lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies.”<sup>211</sup> The presumption that federal law binds state court judges is grounded textually in the Supremacy Clause, although virtually all Supreme Court opinions have grounded this concurrent jurisdiction as implicit in our system of dual sovereigns.<sup>212</sup>

### *B. The SIJS Statutory Scheme as an Example of Cooperative Federalism*

This Section applies the normative principles we identified *supra* to the SIJS statutory regime.<sup>213</sup> Characterizing the nature of the SIJS statutory scheme as relating to “core” or “non-core” immigration functions is an inquiry crucial to making determinations of which state laws can coexist with the scheme, and which state laws operate to impede congressional statutory intent. The characterization of the SIJS scheme is exactly what makes application of a cooperative model challenging: the two-step statutory dance Congress envisioned for SIJS determinations seems to invoke *both* border laws *and* laws that operate between borders. The SIJS scheme invokes border law because the very essence of the SIJS immigration benefit goes to the heart of Congress’s role in immigration matters: the admission and removal function. Yet, it also implicates law between borders because the process for gaining access to SIJS benefits depends on the core state functions of family law and best-interest-of-the-child determinations. At least in academic discourse, the use of the plenary power doctrine to justify federal primacy over border laws generates much less

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<sup>209</sup> Haywood v. Drown, 556 U.S. 729, 734–35 (2009) (quoting Claflin v. Houseman, 93 U.S. 130, 136–37 (1876)). In *Haywood*, N.Y. CORRECT. LAW § 24 (LexisNexis 2020) was held unconstitutional under the Supremacy Clause. 556 U.S. at 742. A prisoner who had sought damages under 42 U.S.C. § 1983 in New York state court had his claim dismissed for want of jurisdiction and was left, instead, to pursue a claim for damages in a court of limited jurisdiction and against an entirely different party (the State) under section 24. *Id.* at 732. The State’s policy was contrary to Congress’s judgment that all persons who violate federal rights while acting under color of state law are liable for damages under 42 U.S.C. § 1983. *Id.* at 736–37.

<sup>210</sup> See Howlett *ex rel.* Howlett v. Rose, 496 U.S. 356, 372 (1990); *Claflin*, 93 U.S. at 136.

<sup>211</sup> *Haywood*, 556 U.S. at 736.

<sup>212</sup> Josh Blackman, *State Judicial Sovereignty*, 2016 U. ILL. L. REV. 2033, 2039.

<sup>213</sup> See *infra* notes 214–217 and accompanying text.

controversy than the use of plenary power to usurp state power *vis-à-vis* laws *between* borders (*i.e.*, traditional state functions).<sup>214</sup> In this case, SIJS could be thought of as an expression of federal power that is wholly dependent on traditional state power for procedural execution.

But application of Chen's model of cooperative federalism does not completely assuage the inherent federalism tensions built into the SIJS statute. SIJS lacks the characteristics needed for easy classification in Chen's binary model because it is not exclusively a border law nor is it exclusively a law between borders. When an applicant petitions a state court judge for SIJS findings, it looks like a law between borders, but when the applicant petitions USCIS for SIJS status, the law looks more like a border law. If we conceptualize the statute as a border law that simply requires state assistance to operationalize, then only the federal government could regulate in this space. The wrinkle here, however, is that Congress instructed states to participate in the procedure required to access this "core function" immigration benefit. States have no obligation to expand SIJS access consistent with federal standards, but if they choose to, USCIS cannot second-guess cooperative efforts to allow more applicants to access SIJS benefits.

Chen's model can still work, albeit with modifications. One can imagine the SIJS statute as an expression of plenary power because its dominant objective is to regulate the entry, exit, and naturalization path of certain children. By extension, state courts function as the "bridge" connecting this group to the relief Congress afforded them. The bridge may be longer or steeper in certain states, producing variation in accessibility, but states cannot dismantle it completely. In other words, states have an affirmative duty to hear SIJS fact-finding cases. If the applicant does not present facts sufficient to meet requirements for SIJS, USCIS may request more information.<sup>215</sup> If the applicant obtains a state predicate order that meets SIJS statutory requirements, USCIS cannot second-guess the state law or jurisdiction to deny SIJS relief.<sup>216</sup>

Thus, we proceed under the theory that overcoming the presumption of concurrent jurisdiction is a difficult task; accordingly, state court judges have not only the authority but, indeed, the *obligation* to make SIJS findings using appropriate state law principles. Thus, insofar as the overarching aim of the

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<sup>214</sup> Core immigration functions (removal and admission) are more appropriate exercises of plenary power as compared to alienage laws where plenary power may yield to traditional state powers. See generally Chen, *Immigration and Cooperative Federalism*, *supra* note 22.

<sup>215</sup> See, e.g., KATIE ANNAND ET AL., IMMIGRANT LEGAL RESOURCE CTR., KIDS IN NEED OF DEF., LEGAL SERVS. FOR CHILDREN, GUIDANCE FOR SIJS STATE COURT PREDICATE ORDERS IN CALIFORNIA (2017), [https://www.ilrc.org/sites/default/files/resources/guidance\\_for\\_sij\\_predicate\\_orders\\_11.29.17.pdf](https://www.ilrc.org/sites/default/files/resources/guidance_for_sij_predicate_orders_11.29.17.pdf) [<https://perma.cc/ZN4J-S2E5>] (providing examples of applications that offer a sufficient level of detail to provide USCIS with enough information to approve a child's request for SIJS).

<sup>216</sup> See Yates Memo, *supra* note 50, at 4–5.

SIJS statute is to regulate borders (by providing relief to certain immigrants who meet certain requirements), state courts are required, by way of Congress's plenary power, to exercise concurrent jurisdiction to make SIJS findings. *How* courts apply their state law to regulate immigrants' everyday affairs—areas relating to education, housing, drivers' licenses, health care, and, in the case of what we are concerned with here, child welfare—is an exercise of traditional state powers that federal immigration agencies cannot question.<sup>217</sup>

Cooperative state legislative efforts that align with congressional statutory intent should be upheld under such a model. If state legislation expands access to SIJS beyond congressional statutory intent, it could be preempted on obstacle conflict grounds (although these may go unchallenged because USCIS has the final word on the substantive grant of SIJS relief), and state laws that operate to block access to courts for SIJS applicants, based on their status alone, could potentially be invalidated on either obstacle conflict preemption grounds or equal protection grounds.

#### CONCLUSION

Conceptualizing the SIJS statute using a cooperative federalism framework best approximates Congress's original intent and can further provide an ideal paradigm for dual sovereigns operating in step toward the common goal of providing relief to an identifiable and vulnerable group of children. But when federal or state actors violate the statutory framework in ways that impermissibly restrict access to SIJS, the cooperative hybrid no longer functions as intended and children suffer as a direct result. Entry at the border may be an immigrant child's first contact with immigration authorities, but their journey continues long after crossing into the United States. Their chosen state of residence as well as the political leanings of the incumbent White House administration will have considerable and direct impacts on them. The cooperative federalism model proposed herein can help resolve tensions and correct misunderstandings surrounding the SIJS statute, but only when federal agencies do not exceed the authority vested in them, and when states and federal agents alike have understood the SIJS statute as conferring a federal right to applicants. This approach offers both a pragmatic and constructive model for resolving current federalism tensions (while affording apposite respect to both federal and state authorities), attends to the immigration issues that arise both at the border and within, and most importantly, best protects the group of children Congress originally identified as so desperately in need of our assistance.

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<sup>217</sup> Chen, *Immigration and Cooperative Federalism*, *supra* note 22, at 1092.