State of California
Office of the Attorney General
XAVIER BECERRA
ATTORNEY GENERAL

November 14, 2019

Via electronic submission to www.regulations.gov
ATTN: DHS Docket No. USCIS-2009-0004

Samantha Deshommes, Chief
Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

RE: Comments from States Attorneys General Regarding Proposed Rule: DHS Docket No. USCIS-2009-0004, *Special Immigrant Juvenile Petitions*, 76 Fed. Reg. 54978 (Sept. 6, 2011), RIN: 1615-AB81

Dear Chief Deshommes:

We, the Attorneys General of California, Connecticut, Delaware, the District of Columbia, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Vermont, and Washington (collectively States), write to urge the U.S. Department of Homeland Security to withdraw the Proposed Rule: Special Immigrant Juvenile Petitions, 76 Fed. Reg. 54978 (proposed Sept. 6, 2011) (to be codified at 8 C.F.R. pts. 204, 205, 245) (Proposed Rule). As detailed in this comment, with respect to Special Immigrant Juvenile (SIJ) status, the Proposed Rule: (1) seeks to implement changes that complicate the SIJ process (contrary to the stated purpose of "clarify[ing]" it, 76 Fed. Reg. 54979); (2) creates unnecessary additional burdens for SIJ-eligible children; and (3) could undermine the predicate orders issued by state courts, which are required for SIJ applications.

The States have an interest in the Proposed Rule because a significant number of SIJ-eligible youth live within our boundaries. Between October 2013 and September 2019, a total 36,186 unaccompanied children, many of whom are SIJ-eligible, were released to adult sponsors in California—which amounts to 13% of the nationwide total.[1] Together, during this same time

[1] *See* Office of Refugee Resettlement (ORR), *Unaccompanied Children Released to Sponsors by State*, (Sept. 27, 2019), https://tinyurl.com/HHS-UACsReleased.

period, 107,390 unaccompanied children have been released to adult sponsors in the States, amounting to 38% of the nationwide total.[2] These children become members of our communities; they live in our neighborhoods, attend our schools, grow into adults, and, in some cases, raise their own families.

As with adult immigrants present in the United States, unaccompanied children may be deported unless they are granted permission to stay. *In re Y.M.*, 207 Cal. App. 4th 892, 914 (2012). In the Immigration Act of 1990, Congress created SIJ status to protect certain abused, neglected, or abandoned children and set forth a procedure to determine who qualifies for this classification. *Eddie E. v. Superior Court* 234 Cal. App. 4th 319, 326 (2015); *see* Immigration Act of 1990, 8 U.S.C. § 1101(a)(27)(J)(iii). SIJ status gives these children a path to legalization, and, eventually, citizenship. *In re Israel O.*, 233 Cal. App. 4th 279, 283, (2015). Moreover, certain grounds of inadmissibility do not apply to the adjudication of the SIJ petition, therefore, children seeking SIJ status are not always required to apply for an inadmissibility waiver.[3] The States have a *parens patriae* interest in protecting the welfare of SIJ-eligible youth and ensuring they can pursue potential claims for legal status. Indeed, since the creation of the classification—and consistent with Congressional design and intent—states have played an integral role in making the state court determinations that enable children to apply for SIJ status.

In addition, some of the States provide significant resources to support the well-being of unaccompanied immigrant children, including many who are SIJ-eligible. For example:

- California's programs include full scope health benefits to low-income children regardless of immigration status;[4] funding to school districts to improve the well-being, English-language proficiency, and academic performance of their students;[5] and funding for immigration legal services.[6] The State operates an Immigration Services Unit, which was appropriated $77.2 million in State funds for Fiscal Year 2018-2019, including $2.9 million dedicated to serving unaccompanied children. Since 2014, California has awarded $15 million to support legal services for this population.[7]

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[2] *Id.*

[3] U.S. Citizenship and Immigration Servs, *Policy Manual*, Vol. 6, Part J, Ch. 2 – Eligibility Requirements, https://www.uscis.gov/policy-manual/volume-6-part-j-chapter-2, (last visited Nov. 11, 2019) [hereinafter *USCIS Policy Manual*].

[4] *Immigrant Eligibility for Health Care Programs in the United States*, Nat'l Conf. St. Legis. (Oct. 19, 2017), https://tinyurl.com/ncls-eligibility [hereinafter *Immigrant Eligibility for Health Care*].

[5] *California Newcomer Education and Well-Being*, Cal. Dep't of Soc. Servs., https://tinyurl.com/calif-newcomer (last visited Nov. 4, 2019).

[6] *Unaccompanied Undocumented Minors*, Cal. Dep't of Soc. Servs., https://tinyurl.com/calif-uam (last visited Nov. 4, 2019).

[7] Cal. Dep't of Soc. Servs., *Immigration Services Program Update*, at 1 (Mar. 2019).

- Unaccompanied children who are paroled into Connecticut are immediately eligible for state-funded Medicaid health insurance, and in 2018, Connecticut's Judicial Branch provided $13,886,873 through the Connecticut Bar Foundation to nonprofit civil legal services providers.[8] All of these nonprofits provide legal services regardless of legal status to immigrants, including children.[9]

- The Delaware Department of Services for Children, Youth, and Their Families provides services to children without regard to their citizenship status. Moreover, Delaware provides funding to legal and public service organizations such as Community Legal Aid Society, Inc. (CLASI), Catholic Charities Immigration Project (CCIP), and La Esperanza to provide services to the community, including specifically to unaccompanied minors.[10]

- The District of Columbia, among other things, provides healthcare to immigrant children who are ineligible for Medicaid because of their immigration status. *See* 29 DCMR §§7300-7399. In Fiscal Year 2020, the District has also provided $2.5 million for a variety of legal services for immigrants, including for "filing applications for … Special Immigrant Juvenile visas."[11]

- The Illinois All Kids program provides affordable complete health insurance for children regardless of immigration status.[12] Illinois also offers Medicaid benefits to all income-eligible children, regardless of immigration status.[13] Effective January 1, 2020, noncitizen student Illinois residents will be eligible for state educational financial aid and benefits.[14]

- Massachusetts offers an array of programs and services to support unaccompanied children. Low-income children have access to state-funded health insurance,

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[8] *See, See* Conn. Bar Found. Internal Revenue Serv. Form 990, Schedule I (2018), https://www.ctbarfdn.org/ctbar/CBF%202018%20Form%20990.pdf.

[9] *See, e.g.*, Beth Fertig, *Two Immigrant Children In Connecticut Get Temporary Legal Status After Separation From Parents*, WSHU Connecticut (Aug. 31, 2018) https://tinyurl.com/wshu-CT (describing immigration advocacy efforts of state-funded Connecticut Legal Services lawyers on behalf of unaccompanied children).

[10] Fiscal Year 2020 Appropriations Act, H.B. 260, 150 Gen. Assemb. (Del. 2019) (effective July 1, 2019), https://tinyurl.com/Grantsinaid.

[11] *Mayor Bowser Announces $2.5 Million Available for FY 2020 Immigrant Justice Legal Services Grant Program*, DC.gov (July 12, 2019), https://tinyurl.com/DC-Grant.

[12] *About All Kids*, Ill. Dep't of Healthcare & Family Services https://tinyurl.com/yexo998l (last visited Nov. 8, 2019).

[13] *Immigrant Eligibility for Health Care, supra* note 4.

[14] Retention of Illinois Students and Equity Act, 110 Ill. Comp. Stat. § 986/7 (West 2019).

regardless of their immigration status,[15] and SIJ applicants may be eligible for the standard Medicaid program, which provides a higher level of service.[16] In addition, Massachusetts provides increased funding to school districts to support the academic and social-emotional needs of English Language Learners.[17] Many of the state's legal aid organizations offer services to immigrants, and in Fiscal Year 2019, the state provided $19 million to legal aid organizations.[18]

- Minnesota provides support for immigrant students through its English Learners program, which received state funds totaling $52 million in 2018.[19] Immigrant children may also receive state-funded special education, mental health services, and other social assistance through their school district.[20] In addition, unaccompanied children residing in Minnesota can receive health care through Minnesota's Emergency Medical Assistance Program.[21]

- New Mexico law provides for extended state benefits for undocumented immigrant children who "age out" of foster care through its "fostering connections" program, including major medical and behavioral health care coverage and housing. N.M. Stat. § 32A-26-3. Moreover, the New Mexico human trafficking statute, N.M. Stat. Ann. § 30-52-2, offers benefits and services without regard to immigration status for victims of human trafficking. These benefits and services include emergency temporary housing, health care, mental health counseling, English language instruction, job training, child care, state-funded cash assistance, and food assistance.

- Washington's Office of Refugee and Immigrant Assistance (ORIA), under the Department of Social and Health Services, utilizes federal and state funding to

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[15] *Immigrant Eligibility for Health Care*, *supra* note 4.

[16] *Understanding the Affordable Care Act: Non-citizens' Eligibility for MassHealth & Other Subsidized Health Benefits, 2018*, Mass. Law Reform Institute (Mar. 2018), https://tinyurl.com/MassLegalServ.

[17] *See e.g.*, *FY19 Chapter 70 Aid and Required Contribution Calculations*, Mass. Dept. of Elementary and Secondary Educ., https://tinyurl.com/Mass-Finance (last visited Nov. 12, 2019); *Demystifying the Chapter 70 Formula: How the Massachusetts Education Funding System Works*, Mass. Budget and Policy Ctr. (Dec. 7, 2010), https://tinyurl.com/MassPolicyCtr.

[18] *FY19 Report to the Governor and the General Court*, Mass. Legal Assistance Corp., (2019), https://tinyurl.com/mlac-fy19.

[19] *English Learner Education in Minnesota*, Minn. Dep't of Educ., https://education.mn.gov/MDE/dse/el/ (last visited Nov. 7 2019).

[20] *E.g., School-Linked Mental Health Services*, Minn. Dep't of Hum. Servs. (Mar. 2018), https://mn.gov/dhs/assets/school-linked-mental-health_tcm1053-333534.pdf (last visited Nov. 7, 2019).

[21] *Emergency Medical Assistance*, Randall Chun, House Research (Oct. 2016), https://www.house.leg.state.mn.us/hrd/pubs/ss/ssema.pdf (last visited Nov. 7, 2019).

> provide services to refugees and immigrants, including unaccompanied children. ORIA partners with private non-profit organizations that provide foster care and group homes for refugee and immigrant children.

These programs funded and/or administered by the States support SIJ-elibile children, and enable them to transition into our communities and thrive as community members.

Moreover, the States have an interest in ensuring that their laws are correctly interpreted and applied. While the federal government retains the authority to grant or deny an SIJ petition, Congress has delegated certain tasks to state courts in light of their "institutional competence . . . as the appropriate forum for child welfare determinations regarding abuse, neglect, or abandonment, and a child's best interests." *In re Israel O.*, 233 Cal. App. 4th 279, 284 (Ct. App. 2015); 8 U.S.C. § 1101(a)(27)(J). The SIJ statute "commits to a juvenile court only th[is] limited, factfinding role." *Leslie H. v. Superior Court*, 224 Cal. App. 4th 340, 344 (Ct. App. 2014). With this in mind, some State legislatures have vested their state courts with authority to issue SIJ predicate findings in compliance with the plain language requirements of federal law. *See, e.g.*, Cal. Civ. Proc. Code § 155; Conn. Gen. Stat. §§ 45a-608n, 45a-608o; D.C. Code §§ 11-1101(a)(4), 16-4602.01; 705 Ill. Comp. Stat. § 405/2-4a (amended by 110 Ill. Comp. Stat. § 986/5, effective Jan. 1, 2020, to provide Illinois courts explicit jurisdiction to make findings for children to petition for SIJ); Md. Code Ann., Fam. Law § 1-201(b)(10); N.M. Stat. § 32A-4-23.1. Where State legislatures have not explicitly vested this authority, State courts have nonetheless recognized it. *See, e.g., Recinos v. Escobar*, 473 Mass. 734, 738-739 (2016) (immigrant children "may petition for special findings" and state courts have jurisdiction "for the specific purpose of making special findings necessary to apply for SIJ status"); *In re Guardianship of Guaman*, 879 N.W.2d 668 (Minn. Ct. App. 2016) (recognizing Minnesota courts' authority to issue SIJ findings in guardianship proceedings).[22]

The Proposed Rule raises concerns regarding the role of U.S. Citizenship and Immigration Services (USCIS) officials in interpreting state laws and re-adjudicating determinations made by state court judges. *See infra* Part I. In the commentary to the Proposed Rule, for example, USCIS improperly attempts to characterize the laws of California, the District of Columbia, New York, and Connecticut. *See* 76 Fed. Reg. 54,980-54,981. In particular, the Proposed Rule's commentary purports to describe California's "basic" definition of child abuse or neglect, but leaves out fundamental statutory components such as willfully permitting a child to suffer or permitting the child to be placed in a situation in which his or her person or health is endangered, and it omits reference to key statutory sections. *Compare* 76 Fed. Reg. 54,980-54,981 (citing Cal. Penal Code §§ 11165.3, 11165.6) *with* Cal. Penal Code §§ 11165.1-11165.6; Cal. Fam. Code, §§ 3402, 7822; Cal. Welf. & Inst. Code, § 300. Notably, the components

[22] *See also In re D.A.M.* No.A12-0427, 2012 WL 6097225 (Minn. Ct. App. Dec. 10, 2012) (recognizing Minnesota courts' authority to issue SIJ findings in juvenile delinquency proceedings); *De Guardado v. Guardado Menjivar*, 901 N.W.2d 243 (Minn. Ct. App. 2017) (recognizing Minnesota courts' authority to issue SIJ findings in marriage dissolution proceedings).

missing from the Proposed Rule already existed in the state statutes at the time the Proposed Rule was initially published. *See, e.g.*, Cal. Penal Code § 11165.3 (as effective since Jan. 1, 2005). Similarly, the Proposed Rule states that under District of Columbia law "'physical child abuse' refers to infliction of physical or mental injury upon the child and sexual abuse or exploitation of a child," when in fact the referenced law defines "abused," when used with reference to a child, to mean "(i) infliction of physical or mental injury upon a child; (ii) sexual abuse or exploitation of a child; or (iii) negligent treatment or maltreatment of a child." *Compare* 76 Fed. Reg. at 54,981 (citing D.C. Code § 16-2301), *with* D.C. Code § 16-2301(23)(A), *and* D.C. Code § 16-2301(23)(A) (as effective Mar. 8, 2011 to Sept. 25, 2012). The Proposed Rule also incorrectly cites Connecticut law, and leaves out the third category of uncared-for youth which is now a part of the law: a child who has been "identified as a victim of trafficking." *Compare* 76 Fed. Reg. at 54,981 (incorrectly citing Conn. Gen. Stat. § 46b-120(9)) *with* Conn. Gen. Stat. § 46b-120(8) (as effective July 1, 2011 to Sept. 30, 2011) *and* Conn. Gen. Stat. § 46b-120(6) (effective since July 1, 2019). Even beyond the Proposed Rule, recent USCIS policy changes have already sought to deny SIJ status to transition-age youth who apply with predicate orders from dependency and probate courts.[23] The Proposed Rule, if finalized, will further attempt to undermine child welfare determinations in State courts and reduce protections for SIJ-eligible youth.

I. USCIS Should Not Re-Adjudicate State Court Orders or Require Submission of Confidential Evidence Supporting the State Court Findings

The procedure to obtain SIJ status requires applicants to navigate both state and federal legal systems. Before applying with the federal government, a child must first obtain a state court order finding that: (1) she is "dependent" upon a juvenile court or has been "committed to, or placed under the custody of" a state entity or other individual or entity; (2) she cannot be reunified with "1 or both" parents "due to abuse, neglect, abandonment, or a similar basis found under state law"; and (3) it is not in her "best interest to be returned to [her] parent's previous country of nationality or country of last habitual residence." 8 U.S.C. § 1101(a)(27)(J). Federal law recognizes the expertise of state courts in making child welfare determinations. *See* 8 U.S.C. § 1101(a)(27)(J)(i). Indeed, "federal courts have long recognized that state courts have jurisdiction over child welfare determinations, including matters pertaining to undocumented minors, absent an express federal provision to the contrary." *In re Y.M.*, 207 Cal. App. 4th 892, 908 (2012) (citing *Perez-Olano v. Gonzalez*, 248 F.R.D. 248, 265 (C.D. Cal. 2008) ("Congress appropriately reserved for state courts the power to make child welfare decisions, an area of traditional state concern and expertise.")). Similarly, USCIS guidance cautions against

[23] These attempts are subject to pending legal challenges. *See J.L. v. Cuccinelli*, No. 5:18-cv-04914-NC (N.D. Cal. filed Aug. 14, 2018) (the court has preliminarily enjoined USCIS and, on Oct. 25, 2019, granted preliminary approval of settlement); *A.O. v. Cuccinelli*, No. 5:19-cv-6151 (N.D. Cal. filed Sept. 27, 2019); *Galvez v. Cuccinelli*, 387 F. Supp. 3d 1208 (W.D. Wash. 2019) (granting preliminary injunction) *reconsideration denied* 2019 WL 3996850 (W.D. Wash. Aug. 23, 2019), *notice of appeal filed; R.F.M. v. Nielsen*, 365 F. Supp. 3d 350 (S.D.N.Y. 2019) (granting plaintiffs' motions for class certification and summary judgment).

"reweigh[ing] evidence and mak[ing] independent determinations about abuse, neglect, or abandonment."[24] Nonetheless, the Proposed Rule raises concerns that USCIS may be blurring this line.

Section 204.11(d)(3) of the Proposed Rule lists the evidence required to file an SIJ petition. 76 Fed. Reg. 54,985-54,986. In addition to the state court predicate order, the Proposed Rule requests submission of findings of fact "or other relevant evidence . . . establishing the basis for a finding that reunification with one or both parents is not viable due to abuse, neglect, or a similar basis under state law." 76 Fed. Reg. 54,985 (emphasis added) (to be codified as 8 C.F.R. § 204.11 (d)(3)(ii).). Furthermore, "if the evidence includes a finding that reunification is not viable due to a similar basis under State law, the petitioner must establish that such a basis is similar to finding of abuse, neglect, or abandonment." 76 Fed. Reg. 54,982 (emphasis added). It is unclear how a petitioner would establish this to the satisfaction of USCIS. USCIS adjudicators lack expertise in interpreting state laws, and are not equipped to determine whether the evidence supports a state court order based on state law issues. Therefore, adjudicators at USCIS should not second-guess or re-adjudicate determinations already made by the state courts. *See Schlesinger v. Councilman*, 420 U.S. 738, 755 (1975) (recognizing that "[state courts] alone can define and interpret state law"). Instead, USCIS should deem a petition bona fide if it includes a state court order with findings of fact establishing that: (1) the petitioner is in the custody of a court-appointed agency, guardian, or other individual; (2) she cannot reunify with one or both parents due to abuse, neglect, abandonment, or a similar basis under state law; and (3) it is not in her best interests to return to her country of origin. California's predicate orders, for example, already include the factual findings relied on by the judge to support the court order.[25] USCIS should only request additional evidence as to these three factors when the order does not include such findings of fact.

The commentary to the Proposed Rule that discusses the evidence to be submitted to USCIS also raises concerns. Among the listed types of evidence, it includes the "actual records from the [state court] proceedings" and further states that USCIS may obtain records "directly from a court." 76 Fed. Reg. 54,981, 54,982. This runs contrary to state policies, which protect children's privacy by making their court records confidential and strictly limiting access to them. Under California law, for example, records from state court proceedings are confidential and those which are not can be filed under seal. Cal. Welf. & Inst. Code §§ 827, 828, 831; Cal. Civ. Proc. Code § 155(d). California Welfare and Institutions Code section 831 explicitly states that juvenile court records are to be kept confidential and cannot be provided to federal officials absent a court order. Cal. Welf. & Inst. Code § 831(a). This section was enacted to address concerns that federal immigration authorities were obtaining confidential information about children outside of California-mandated processes.

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[24] *USCIS Policy Manual*, *supra* note 3.

[25] *See, e.g.*, California Judicial Counsel Form FL-357/GC-224/JV-357, which calls for these findings of fact under each determination.

Requiring petitioners to submit these records to USCIS, or instructing USCIS agents to request them directly from state courts, conflicts with the policy determinations reflected in our State laws that these documents should remain confidential, including from federal immigration authorities. *Id.; see also Helman v. State*, 784 A.2d 1058, 1072 (Del. 2001) ("Records of delinquency adjudications and other Family Court matters involving juveniles are kept confidential as required by court rules and statute."); D.C. Code § 16-2331(b) ("juvenile case records shall be kept confidential and shall not be open to inspection, nor shall information from records inspected be divulged to unauthorized persons"); 705 Ill. Comp. Stat. § 405/1-8(A) ("All juvenile court records which have not been expunged are sealed and may never be disclosed to the general public or otherwise made widely available."); Md. Code Ann., Cts. & Jud. Proc. § 3-8A-27(b)(1) (court records pertaining to a child are confidential and may not be divulged absent a court order for good cause); Conn. Probate Ct. R. § 16.2; Mich. Comp. Laws § 710.67(1); Minn. Stat. §§ 260C.171, 260B.171(4); Minn. R. Juv. Prot. P. 8.04; Nev. Rev. Stat. § 432B.280; Vt. Stat. Ann. tit. 33 §§ 5110, 5117; Wash. Rev. Code § 13.50.100.

In California, providing the records to USCIS would first require a petition, in compliance with the requirements outlined in California Welfare and Institutions Code section 827, which would not only be burdensome for the petitioning children and their advocates, but also for California courts, which already face high caseloads. Cal. Welf. & Inst. Code § 827. Moreover, as discussed above, predicate orders in California already include the required factual findings, therefore obtaining the underlying court record is unnecessary.[26]

II. The Consent Requirement, as Written, Undermines the Rights of the Child

One of the SIJ requirements under the Immigration and Nationality Act (INA) is that the child obtain consent from the Secretary of Homeland Security to classification as a special immigrant juvenile. 8 U.S.C. § 1101(a)(27)(J)(iii). Under the Proposed Rule, in assessing whether to provide consent, USCIS must determine whether the child sought the state court order primarily for the purpose of obtaining relief from abuse, neglect, abandonment, or some similar basis under state law, and not primarily for the purpose of obtaining lawful immigration status. 76 Fed. Reg. 54,981-54,982. A problematic aspect of this determination is that "USCIS may consider any evidence of the role of a parent or other custodian in arranging for [the child] to travel to the United States or to petition for SIJ classification." 76 Fed. Reg. 54,982. To the extent that such a role of a parent or custodian is considered as a factor weighing against eligibility, this would be highly problematic and contrary to federal law.

In 2008, the INA's SIJ section was amended by the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(d)(1)(A), 122 Stat. 5044 (2008) (TVPRA). The 2008 amendments eliminated the requirement that the child be eligible for long-term foster care, and replaced it with language requiring that that reunification not be viable with "1 or both of the immigrant's parents" due to abuse, neglect, abandonment or a similar basis found under state law. 8 U.S.C. § 1101 (a)(27)(J)(i). Courts have found that,

[26] *Id.*

through this change, Congress expanded SIJ eligibility to children who are only separated from one parent, even when they reside or can be reunited with a non-abusive parent. *See, e.g.*, *In re Israel O.*, 233 Cal. App. 4th 279, 287-91 (2015); *Eddie E. v. Superior Court*, 234 Cal. App. 4th 319, 327-332 (2015).[27] Moreover, the statute and Proposed Rule already state that "no natural parent or prior adoptive parent" of a child who receives SIJ status can be eligible to obtain an immigration benefit as a result of that relationship. 8 U.S.C. § 1101 (a)(27)(J)(iii)(II); 76 Fed. Reg. 54,986 (to be codified as 8 C.F.R. § 204.11(g)). Therefore, help from a non-abusive parent in getting to the United States or seeking SIJ status to escape abuse, neglect, or abandonment from the offending parent would not provide any immigration benefits to the non-abusive parent and should not be considered when assessing the child's motive in seeking SIJ classification. Punishing children for their parents' actions ignores the independent right of the child to receive relief, and it contravenes the purpose of the statute to protect vulnerable children. *See* H.R. Rep. No. 105-405, at 130 (1997) (Conf. Rep.) (observing that the statutory language was modified "in order to limit the beneficiaries ... to those juveniles for whom it was created, namely abandoned, neglected, or abused children"). Moreover, help from a non-abusive parent does not bear on whether a child meets the criteria for SIJ eligibility.

The Proposed Rule's "consent" inquiry into whether the child sought the state court order primarily for the purpose of obtaining relief from abuse, neglect, abandonment, or some similar basis under state law, and not primarily for the purpose of obtaining lawful immigration status, ignores another crucial point. *See* 76 Fed. Reg. 54,981-54,982. Delinquency and dependency proceedings are in place to address forms of parental neglect and maltreatment—they do not exist as a mere step in the SIJ process. The States have a strong interest in keeping families together and children in delinquency proceedings are only removed from their home after careful consideration and only if removal is determined to be in their best interest. *See* Cal. Welf. & Inst. Code, § 202 (children in delinquency should only be removed from their parents' "when necessary for his or her welfare or for the protection of the public."); *see also* Cal. Welf. & Inst. Code, § 281.5 (if a child is to be removed from the physical custody of her parent, primary consideration shall be given to placing the child with a relative of the minor); Del. Code Ann. tit. 13 § 2512(b) (Prior to awarding custody of child to the State, the Family Court must find, as to each parent, that a child is dependent, neglected, or abused, and that awarding custody is in the child's best interests). Likewise, children adjudged to be dependents of the court are those who, among other things, have suffered or are at a substantial risk of suffering serious physical harm or illness, inflicted by her parents, or a result of the parent's neglect, or inability to care for them. Cal. Welf. & Inst. Code, § 300. Therefore, a state court's findings of abuse, neglect, abandonment (or a similar basis under state law) should create a presumption that the predicate order was sought for relief from those circumstances, and not for immigration purposes.

[27] The commentary to the Proposed Rule cites a case that predates the 2008 amendments to the SIJ statute to support the contention that "USCIS may consider any evidence of the role of a parent…in arranging for a petitioner to travel to the United States or to petition for SIJ classification." 76 Fed. Reg. 54,982 (citing *In Yeboah v. U.S. Dep't of Justice*, 345 F.3d 216 (3d Cir. 2003)).

III. Continued Juvenile Court Jurisdiction Imposes Unnecessary Burdens

The INA requires that to be eligible for SIJ status, the child must be someone who "has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a [juvenile court]." 8 U.S.C. § 1101(a)(27)(J)(i). The Proposed Rule goes beyond this statutory language, by requiring that such "dependency, commitment, or custody . . . continue through the time of adjudication." 76 Fed. Reg. 54,985 (to be codified as 8 C.F.R. § 204.11(b)(iv)). Although this new requirement exempts children who age out of state jurisdiction, the regulation should clarify that the exemption also applies to children over whom the court's jurisdiction terminates by operation of law. This addition is important because, for example, adoption and guardianship terminate the court's jurisdiction over the child in a dependency proceeding, as state law recognizes these as permanent placements over which state court oversight is no longer necessary or appropriate. Cal. Welf. & Inst. Code § 366.3; Del. Code Ann. tit. 13 § 2513; D.C. Code § 16-2389(f) ("The court shall make a permanency determination and close the neglect case upon motion by any party to the permanent guardianship proceeding if the court finds that such a determination is in the child's best interest."); Mich. Comp. Laws §§ 710.51(3), 712A.19a(12), 712A.19c(9); Nev. Rev. Stat. 432B.4675; N.J. Stat. Ann. §§ 30:4C-58.1, 30:4C-53; Wash. Rev. Code § 13.34.237(3).

Similarly, children who have been made wards of the court in juvenile delinquency proceedings can seek to terminate wardship when the conditions of their probation have been met. Cal. Welf. & Inst. Code § 785. Termination of wardship ends the court's jurisdiction. *See, e.g.*, 705 Ill. Comp. Stat. § 405/2-31(2) ("Whenever the court determines . . . that health, safety, and the best interests of the [dependent] minor and the public no longer require the wardship of the court, the court shall order the wardship terminated and all proceedings . . . closed and discharged."); 705 Ill. Comp. Stat § 405/5-755(2) ("Whenever the court finds that the best interests of the minor [in delinquency proceedings] and the public no longer require the wardship of the court, the court shall order the wardship terminated and all proceedings . . . closed and discharged."). Requiring children to seek continued jurisdiction or dependency after achieving permanency or completing probation would impose unnecessary and onerous burdens on SIJ-eligible children, advocates, social workers, and the state courts, which already manage heavy caseloads.[28] It is also inconsistent with the overall scheme of juvenile court matters—that the best interests of the child are paramount and should be the primary concern. *See Montenegro v. Diaz*, 26 Cal. 4th 249, 255 (2001) ("Under California's statutory scheme governing child custody and visitation determinations, the overarching concern is the best interest of the child."); *In re Roger S.*, 4 Cal. App. 4th 25, 30–31 (1992) ("Although both the family court and the juvenile court focus on the best interests of the child, the juvenile court has a special responsibility to the child as *parens patriae* and must look at the totality of the child's circumstances."); *In re B.C.*,

[28] A 2011 report found that the California deficit in judicial positions for family and juvenile law was 262. *Judicial Workload Assessment: Updated Caseweights*, Report to the Judicial Council of California (Nov. 7, 2011) https://www.courts.ca.gov/documents/jc-121211-item3.pdf.

582 A.2d 1196, 1198 (D.C. 1990) ("The purpose of the child neglect statute is to promote the best interests of allegedly neglected children. Therefore, the primary concern of the court in this case must be the welfare of the neglected children."); Mass. Gen. Laws Ch. 208, § 31 ("the happiness and welfare of the children shall determine their custody"); Mass. Gen. Laws Ch. 119, § 1 (in juvenile court matters in particular, "the health and safety of the child shall be of paramount concern and shall include the long-term well-being of the child"); Minn. Stat. § 260C.193(3) ("The policy of the state is to ensure that the best interests of children in foster care . . . are met."); Minn. Stat. § 260C.301(7) ("In any proceeding under this section, the best interest of the child must be the paramount consideration.").

Requiring children who move to a different state to seek a new order in the new state is also unnecessary, as these orders are generally honored in other states. *See* Uniform Child Custody Jurisdiction and Enf't Act § 202 (1997). State laws require that their courts recognize and enforce child custody determinations from other states if the out-of-state court exercised jurisdiction in substantial conformity with the law of that state or made the determination under factual circumstances that meet the state's jurisdictional standards. *See* Cal. Fam. Code § 3443; Conn. Gen. Stat. § 46b-115x; Del. Code Ann. tit. 13 § 1932; D.C. Code Ann. § 16-4603.03; 750 Ill. Comp. Stat. § 36/303(a)**;** Md. Code Ann., Fam. Law § 9.5-303; Mich. Comp. Laws § 722.1101 *et seq*; Nev. Rev. Stat. § 125A.445; N.J. Stat. Ann. § 2A:34-87. States are better qualified to determine when a new court order is needed, therefore the blanket requirement included in the Proposed Rule is inappropriate.

In addition, the problem with requiring continued court oversight until the child's SIJ petition is adjudicated is exacerbated by delays in the SIJ adjudication process. Although the TVPRA requires USCIS to adjudicate the SIJ application within 180 days, some children's petitions remain pending longer than a year,[29] and the Proposed Rule allows the clock to reset whenever USCIS sends a request for initial evidence. *Compare* TVPRA § 235(d)(2), 8 U.S.C. § 1232(d)(2) ("All applications for [SIJ] status . . . shall be adjudicated . . . not later than 180 days after the date on which the application is filed.") *with* 76 Fed. Reg. 54,986 (to be codified as 8 C.F.R. § 204.11(h)) ("[A] request for required initial evidence . . . will restart the 180-day timeframe. Any request for additional evidence will suspend the timeframe."). Continued court oversight for a prolonged period of time requires that the child's life circumstances remain static or unfavorable in order to continue to be eligible for SIJ status.

IV. The Definition of "State" Is Insufficient

The Proposed Rule's definition of State includes "an Indian tribe, tribal organization or tribal consortium, operating a program under a plan approved under 42 U.S.C. 671." 76 Fed. Reg. 54,985 (to be codified as 8 C.F.R. § 204.11(a)). This definition should be expanded to

[29] Mica Rosenberg, *Exclusive: For Migrant Youths Claiming Abuse, U.S. Protection Can Be Elusive*, Reuters (Mar. 7, 2019) https://preview.tinyurl.com/Reuters-Rosenberg.

clarify that it also includes "any State, district, commonwealth, or any territory under the administrative control of the Government of the United States."

V. USCIS Should Generally Waive SIJ Petition Interviews

The Proposed Rule states that "although an interview is not a prerequisite to the adjudication of a Special Immigrant Juvenile petition, USCIS may require an interview as a matter of discretion." 76 Fed. Reg. 54,986 (to be codified as 8 C.F.R. § 204.11(e).) The Proposed Rule should clarify that, generally, SIJ interviews should be waived and instead only scheduled when USCIS requires further information that cannot be obtained through a request for evidence. "Children who have been removed from their homes due to abuse and neglect . . . have an extremely high risk for traumatic stress[, which] involves intense feelings of terror, horror or helplessness."[30] This experience of trauma can lead to post traumatic stress disorder, depressive disorder, and anxiety disorders. Reminders of the trauma, such as interviews by USCIS agents, "can evoke a range of negative emotions including sadness, anger, and anxiety."[31] Limiting interviews to instances in which the required information cannot be obtained through a request for evidence would not only conserve USCIS resources, but it would protect children who can be re-traumatized when asked to recount the worst moments of their lives. This is particularly true given that to obtain the predicate orders, children applying for SIJ status have already presented such evidence of abuse, neglect, or abandonment to the state court.

VI. The Proposed Rule Presents Due Process Concerns

The Proposed Rule does away with a requirement that "if a petition is denied, the petitioner … be notified of [her] right to appeal the decision." *Compare* 8 C.F.R. § 204.11(e) *with* proposed 8 C.F.R. § 204.11(h) (omitting notification of appeal rights). To protect the due process rights of children, denial notifications should also inform children of their rights to appeal that determination. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (immigrants who are physically present in the United States are guaranteed the protections of the Due Process Clause); *Saravia v. Sessions*, 280 F. Supp. 3d 1168, 1205 (N.D. Cal. 2017), *aff'd sub nom. Saravia for A.H. v. Sessions*, 905 F.3d 1137 (9th Cir. 2018) (granting preliminary injunction on behalf of noncitizen children to remedy likely violation of their procedural due process rights).

VII. The Additional Barriers to SIJ Status Will Impact Children Who Are Racial Minorities

The additional barriers to SIJ status imposed by the Proposed Rule will have a greater impact on children who are racial minorities. Most unaccompanied children arriving to the United States hail from Mexico and the Northern Triangle countries of El Salvador, Guatemala,

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[30] Nicole Taylor & Christine B. Siegfried, *Helping Children in the Child Welfare System Heal from Trauma: A Systems Integration Approach*, Nat'l Child Traumatic Stress Network, at 5 (2005), https://tinyurl.com/NCTSN-Helping-Children.

[31] *See id.* at 8.

and Honduras. SIJ applications have surged in the last decade. In Fiscal Year 2010, USCIS received 1,646 petitions, which grew to 5,815 applications in Fiscal Year 2014, and 21,917 in Fiscal Year 2018.[32] As a result of the surge and country limits on visa availability, these children already face long wait times on their path to legal residence.[33] This disproportionate impact on children who are racial minorities raises a concern that the reopening of the Proposed Rule is potentially motivated by animus in violation of the Fifth Amendment.[34] *See, e.g.*, *Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec. (Regents II)*, 298 F. Supp. 3d 1304, 1315 (N.D. Cal. 2018) (denying motion to dismiss Equal Protection claims, holding that allegations raised "a plausible inference that animus towards Mexicans and Latinos was a motivating factor in the decision to end DACA"), *aff'd*, 908 F.3d 476 (9th Cir. 2018).

Although the Proposed Rule was first introduced by the previous administration in 2011, multiple comments filed by immigration advocates were critical of the Proposed Rule, and that federal administration declined to finalize the rule. The decision to proceed with the Proposed Rule now—and particularly if the final rule deviates from the Proposed Rule in any manner that further burdens SIJ petitioners—must be understood in the context of the history of statements and actions by the Trump Administration indicating animus towards non-white immigrants and Latinos.[35] In addition to general derogatory statements about Central America, President Trump and members of his administration have made derogatory statements about unaccompanied children, specifically. For example, they have—without any evidence—accused unaccompanied children arriving at the southern border, most of whom are Mexican and from the Northern Triangle countries, of being future gang members and fueling a gang "resurgence."[36]

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[32] *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*, U.S. Citizenship and Immigration Servs. (July 2019), available at https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I360_sij_performancedata_fy2019_qtr3.pdf.

[33] *Unaccompanied Alien Children: Facts and Data*, U.S. Office of Refugee Resettlement (May 18, 2019), https://www.acf.hhs.gov/orr/about/ucs/facts-and-data (listing the countries of origin for unaccompanied children) (last visited Nov. 4, 2019); *Visa Bulletin For October 2019*, U.S. Dep't. of State, https://preview.tinyurl.com/yypld4wl, (last visited Nov. 4, 2019) (indicating that special immigrant visas for these four countries are oversubscribed).

[34] The same is true about "transition-age" children (aged 18-20), who have been targeted by the Trump administration in the SIJ context.

[35] *See, e.g.*, Vivian Salama, *Trump Claims Women 'Are Raped at Levels Never Seen Before' During Immigrant Caravan*, NBC News (Apr. 5, 2018), https://tinyurl.com/Salama-NBC. More recently, in the discussing the Public Charge rule, Kenneth Cuccinelli, Acting Director of USCIS stated that the poem at the base of the Statute of Liberty referred to "people coming from Europe." Jacey Fortin, *'Huddled Masses' in Statue of Liberty Poem Are European, Trump Official Says*, N.Y. Times (Aug. 14, 2019), https://tinyurl.com/NYT-Huddled-Masses.

[36] Seung Min Kim, *Trump Warns Against Admitting Unaccompanied Migrant Children: 'They're Not Innocent'*, Wash. Post (May 23, 2018), https://tinyurl.com/Trump-warns-againstUAC; Matt Stieb, *ICE Director Nominee Can Look at Migrant Child and Identify a*

This history of statements and actions indicates animus is a motivating factor behind the reviving of the Proposed Rule. Courts have already recognized infirmities relating to the federal government's immigration policies that primarily impact non-European, non-white migrants. *See Casa de Maryland, Inc. v. Trump*, 335 F. Supp. 3d 307, 325-26 (D. Md. 2018); *Ramos v. Nielsen (Ramos II)*, 336 F. Supp. 3d 1075, 1098-1104 (N.D. Cal. 2018); *Centro Presente v. U.S. Dep't of Homeland Sec.*, 332 F. Supp. 3d 393, 414-15 (D. Mass. 2018). Lastly, the targeting of vulnerable children of racial minorities falls short of our country's Constitutional guarantees, therefore the Proposed Rule should be withdrawn. *See U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) ("If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.").

* * *

For the reasons set forth above, the States urge you to reconsider this Proposed Rule, which, among other things, is inconsistent with the congressionally established SIJ classification, impinges on the expertise of state courts to make child welfare determinations, and raises significant constitutional concerns. Protecting the health, safety, and well-being of SIJ-eligible children is something we must work together to accomplish.

Sincerely,

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KATHLEEN JENNINGS
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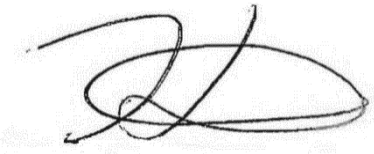

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'Soon-to-Be MS-13 Gang Member, New York Magazine (May 16, 2019), https://tinyurl.com/y3f63y4l (quoting Mark Morgan, Acting Commissioner of Customs and Border Patrol as having stated: "I've walked up to these individuals that are so-called minors . . . and I've looked at their eyes . . . and I've said, 'That is a soon-to-be MS-13 gang member.' It's unequivocal.").

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