

ARTICLES

THE RACIAL JUSTICE IMPERATIVE TO REIMAGINE IMMIGRANT CHILDREN'S RIGHTS: SPECIAL IMMIGRANT JUVENILES AS A CASE STUDY*

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The immigration legal system has codified and perpetuated racial violence in many ways, yet the experiences of young people of color in this system have yet to be deeply examined. This Article surfaces the distinct and varied racialized harms that children experience in the immigration system through the example of Special Immigrant Juveniles. Special Immigrant Juvenile Status (SIJS) is the only immigration status created for and limited to children. A child—defined in immigration law as someone who is under twenty-one years of age and unmarried—is eligible to seek SIJS with U.S. Citizenship and Immigration Services (USCIS) if a state court has found that the child has been abandoned, abused, or neglected by a parent and it is not in their best interests to return to their country of origin. USCIS's approval of a child's SIJS petition does not provide an absolute protection from deportation on its own, but it creates a pathway to apply for a work permit and lawful permanent resident (LPR)

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status—often referred to as a “green card.” These benefits have the potential to create more security in the young person’s life. On their pathway to LPR status, immigrant youth seeking SIJS experience precarity in their lives and racialized harms within the immigration system.

In Part I, this Article examines how racism has been implicated in immigration law and legal systems and how immigrant children are impacted by racism, even though this has been understudied. In Part II, this Article focuses on three features of the SIJS legal framework to understand how the law’s design and implementation has resulted in racialized harms: the consent function, the SIJS backlog, and the process by which SIJS children seek LPR status. Part III offers specific prescriptions as interim steps to address the racialized harms and challenges special immigrant juveniles face. Ultimately, this Article calls for a racial justice analysis of the immigration legal system as it applies to children.

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INTRODUCTION

The immigration legal system has codified and perpetuated racial violence in many ways, yet the experiences of children¹ of color in this system have yet to be deeply examined. This Article surfaces the distinct and varied racialized harms that children experience in the immigration system through the example of Special Immigrant Juveniles. Special Immigrant Juvenile Status (SIJS) is the only immigration status created for and limited to children. A child—defined in immigration law as someone who is under twenty-one years of age and unmarried²—is eligible to seek SIJS with U.S. Citizenship and Immigration Services (USCIS) if a state court has found that the child has been abandoned, abused, or neglected by a parent and it is not in their best interest to return to their country of origin. USCIS's approval of a child's SIJS petition does not provide an absolute protection from deportation on its own, but it creates a pathway to apply for a work permit and lawful permanent resident (LPR) status—often referred to as a “green card.” These benefits have the potential to create more security in the child's life. On their pathway to LPR status, immigrant³ children seeking SIJS experience precarity in their lives and racialized harms⁴ within the immigration system.

F.E. is one such immigrant child who faced a variety of racialized harms on his journey to SIJS-based LPR status. F.E. is a seventeen-year-old Latino boy who came to the United States in 2014 to escape death threats from gang members in El Salvador.⁵ Although F.E.'s race is not identified in the court filings from which this narrative is based,

1. The Authors generally use the term “child” when referring to an individual seeking or approved for SIJS because Special Immigrant Juveniles must be “children” under immigration law, although due to the backlog many individuals granted SIJS become adults while waiting to become LPRs.

2. See Immigration and Nationality Act, 8 U.S.C. § 1101(b)(1). Pursuant to regulations implementing the SIJS statute, an individual must be under twenty-one and unmarried at the time of filing the SIJS petition and remain unmarried through the petition's adjudication. 8 C.F.R. § 204.11(b)(1)–(2) (2022).

3. We used the term immigrant informally to include all noncitizens in the United States, regardless of their intent to stay permanently or temporarily.

4. By racialized harms, we refer to harms resulting from or relating to racism, whether systemic, institutional, interpersonal, or internalized.

5. First Amended Petition for Writ of Habeas Corpus and Class Action Complaint for Injunctive and Declaratory Relief for Petitioners at 20, *Saravia v. Sessions*, 280 F. Supp. 3d 1168 (N.D. Cal. 2017) (No. 3:17-cv-03615-VC), ECF No. 31, *aff'd*, 905 F.3d 1137 (9th Cir. 2018) [hereinafter Habeas Corpus Petition].

Latina/o⁶ children from Central America include children who may also be racialized as Black, brown or *mestizo*, and Indigenous. Child migration from El Salvador and nearby Central American countries to the United States is not particularly new. El Salvador in particular has been plagued by gross inequality, instability in part due to civil war, multiple coups, and a neocolonial relationship with the United States, whose policies have worked to repress institutions seeking more inclusive governance in El Salvador.⁷ Yet, even as U.S. foreign intervention policies have furthered instability and violence in El Salvador and surrounding Central American countries,⁸ U.S. officials have historically applied immigration policies in a discriminatory fashion to keep out Latina/o immigrants. This is particularly true for Central Americans, including the 1980s systematic denial of asylum claims as well as more modern administrative decisions.⁹ Furthermore, immigration laws and policies that create negative consequences for involvement in the criminal legal system amplify the racism that Black and brown people experience in the criminal legal system.¹⁰ Children like F.E. face a myriad of challenges navigating the immigration system

6. The term “Latina/o” includes a diverse collective of persons and communities, which “necessarily oversimplifies and centers identity in the colonial relationship while also lacking in gender inclusivity.” Marc Tizoc Gonzalez, Saru Matambanadzo & Sheila I. Vélez Martínez, *Latina and Latino Critical Legal Theory: LatCrit Theory, Praxis and Community* 1318 n.1 (2021), <https://www.scielo.br/j/rdp/a/jWXHVnyzqqFdy7SGmnxzyG/?lang=en&format=pdf> [<https://perma.cc/ADE3-JXB2>]. Even knowing these imperfections, the Authors use “Latina/o” generally to refer to people with nationalities or ancestries from Latin America. We find this term most helpful, as robust conversation continues about how to prioritize inclusivity along the gender spectrum with other evolving terms, such as Latinx or Latine, while also honoring how community members use terms that they are most comfortable with. See, e.g., Antonio Campos, *What’s the Difference Between Hispanic, Latino and Latinx?*, U.C. (Oct. 6, 2021), <https://www.universityofcalifornia.edu/news/choosing-the-right-word-hispanic-latino-and-latinx> [<https://perma.cc/G2S9-9KJK>].

7. Susan Bibler Coutin, *Roots of Juvenile Migration from El Salvador*, in RESEARCH HANDBOOK ON CHILD MIGRATION 113, 114 (Jacqueline Bhabha, Jyothi Kanics, & Daniel Senovilla Hernández eds., 2018).

8. Nora Hamilton & Norma Stoltz Chinchilla, *Central American Migration: A Framework for Analysis*, 26 LATIN AM. RSCH. REV. 75, 105 (1991).

9. See Kevin R. Johnson, *Trump’s Latinx Repatriation*, 66 UCLA L. REV. 1442, 1446–47 (2019); Sarah Sherman-Stokes, *Reparations for Central American Refugees*, 96 DENV. L. REV. 585, 589 (2019).

10. See generally Yolanda Vázquez, *Crimmigration: The Missing Piece of Criminal Justice Reform*, 51 U. RICH. L. REV. 1093, 1096 (2017) (discussing how harms in crimmigration systems tend to disproportionately impact Black and brown people).

because of their race and youth status, including being subjected to racialized policing and over-enforcement in immigration.¹¹

F.E. had a viable path to LPR status through SIJS, but he became stuck in a years-long backlog. F.E. applied for SIJS in October 2016 after a juvenile court¹² issued an order finding that he could not reunify with his father and that it was not in his best interest to return to El Salvador.¹³ USCIS approved his SIJS petition in February 2017, but because of a phenomenon known as the “SIJS backlog,” he was forced to wait years, while vulnerable to deportation, before he was eligible to seek LPR status.

The SIJS backlog’s origins are statutory. Congress passed the law creating SIJS in 1990, in an effort to provide stability and permanency for certain vulnerable immigrant children.¹⁴ The law allowed SIJS children to apply to become LPRs, or “adjust status,” by making visas from the employment-based visa system available to them, specifically as part of the fourth employment-based visa category that includes some special immigrant workers.¹⁵ There is no legislative history explaining why Congress put visas for Special Immigrant Juveniles in an employment category, which contains numerical caps on the

11. See generally *id.* This narrative and Article only focus on a few aspects of racialized harm that children face. Other examples may include youth who at age eighteen are excluded from facilities for minors and face racialized violence in adult detention; Black youth who are more likely to be presumed to be adults and face solitary confinement; Indigenous youth who are more likely to face unnecessary barriers in family reunification and release from detention; transgender children who face medical harm instead of supportive health care; and the weaponization of reproductive rights against children of color. See *As a Result of ACLU Litigation, Trump Administration Ends Policy Prohibiting Immigrant Minors from Accessing Abortion*, ACLU (Sept. 29, 2020), <https://www.aclu.org/press-releases/result-aclu-litigation-trump-administration-ends-policy-prohibiting-immigrant-minors> [https://perma.cc/G75S-SNCD] (asserting that immigrant children shelters had been obstructing children from accessing abortion and confidential reproductive health care).

12. Under the SIJS federal regulations, a juvenile court may include family courts, probate courts, juvenile courts, and courts of general jurisdiction, as long as they have jurisdiction over the dependency and/or custody and care of children. See 8 C.F.R. § 204.11(a) (2022); Kids in Need of Defense, *Chapter 4: Special Immigrant Juvenile Status (SIJS)* 2 (2015), <https://supportkind.org/wp-content/uploads/2015/04/Representing-Children-In-Immigration-Matters-FULL-VERSION.pdf> [https://perma.cc/Q6FJ-LGW4].

13. Habeas Corpus Petition, *supra* note 5, at 22.

14. See Immigration Act of 1990, Pub. L. No. 101-649, sec. 153, 104 Stat. 4978, 5005 (amending 8 U.S.C. § 1101(a)(27)).

15. 8 U.S.C. § 1153(b)(4).

number of visas available annually for each employment category and imposes per-country numerical limits on each category.¹⁶ Due to limited visas available in the fourth employment-based category and the per-country caps, children from El Salvador, like F.E., as well as children from Guatemala, Honduras, and Mexico, are forced to wait years after applying for and being granted SIJS to start the process of applying for LPR status, while children from other countries can often apply for SIJS and LPR status simultaneously.¹⁷

The SIJS backlog first began in 2016 and grew to nearly 64,000 by April 2020.¹⁸ On average, children in the SIJS backlog—those from El Salvador, Guatemala, Honduras, and Mexico—wait twice as long as other children to receive their green cards.¹⁹ This waiting time is even more notable because U.S. foreign intervention has contributed to instability in El Salvador, Guatemala, and Honduras, pushing more children to migrate. Activist and author Harsha Walia has described the growth of migration by Salvadoran, Guatemalan, and Honduran citizens as “a crisis of displacement generated by US policies.”²⁰ Despite the United States’ role in creating push factors of migration in El Salvador, Guatemala, and Honduras,²¹ these countries have been

16. *See id.* §§ 1101 (a) (27), 1152(a) (2).

17. RACHEL LEYA DAVIDSON & LAILA L. HLASS, “ANY DAY THEY COULD DEPORT ME”: OVER 44,000 IMMIGRANT CHILDREN TRAPPED IN THE SIJS BACKLOG 11 (2021), <https://static1.squarespace.com/static/5fe8d735a897d33f7e7054cd/t/61a7bceb18795020f6712eff/1638382830688/Any+Day+They+Could+Deport+Me+Over+44%2C000+Immigrant+Children+Trapped+in+the+SIJS+Backlog+%28FULL+REPORT%29.pdf> [https://perma.cc/D25Z-6LTN] (noting that EB-4 visa availability for El Salvador, Guatemala, and Honduras was oversubscribed). When F.E. applied in October of 2016, there was no visa availability for his country in EB-4. *See* BUREAU OF CONSULAR AFFS., U.S. DEP’T OF STATE, VISA BULL. NO. 97-9, IMMIGRANT NUMBERS FOR OCTOBER 2016 (2016), https://travel.state.gov/content/dam/visas/Bulletins/visabulletin_October2016.pdf [https://perma.cc/U2TG-BQKD].

18. DAVIDSON & HLASS, *supra* note 17, at 6.

19. *Id.*

20. HARSHA WALIA, BORDER & RULE: GLOBAL MIGRATION, CAPITALISM, AND THE RISE OF RACIST NATIONALISM 38 (2021).

21. Aviva Chomsky, *The Root Cause of Central American Migration? The United States.*, WASH. POST (July 8, 2021, 6:00 AM), <https://www.washingtonpost.com/outlook/2021/07/08/root-cause-central-american-migration-united-states/> [https://perma.cc/3VPP-43YA].

lumped together and face the same per-country visa cap as countries with lower migration.²²

Because of the SIJS backlog, F.E. was not allowed to apply for LPR status or a work permit for four years, until June 2020.²³ Four years of waiting in legal limbo can wreak havoc on children's lives, deepening existing precarities which may have been imposed on them related to their race, immigration status, and other factors. Precarity is defined as a "politically induced condition in which certain populations suffer from failing social and economic networks of support and become differentially exposed to injury, violence, and death."²⁴ "Such populations are at heightened risk of disease, poverty, starvation, displacement, and of exposure to violence without protection."²⁵ Immigrant children in the SIJS backlog face heightened precarity, because the backlog extends the time they are in a limbo status and thereby increases the likelihood that they will experience harms, such as over-policing and attendant negative immigration consequences, a negative policy change, over-scrutinization of their cases, or removal by court order because an immigration judge considers their relief too far into the future to merit continuances. Furthermore, this precarity may lead to other negative outcomes, such as children delaying schooling, preventing foster children from moving to independent living, complicating access to health insurance, and pushing children into exploitative situations as they try to survive.²⁶ Black, brown, and Indigenous immigrant children make up the vast majority of the Special Immigrant Juvenile population²⁷ and are already more

22. See Immigration and Nationality Act, 8 U.S.C. § 1152(a)(2); BUREAU OF CONSULAR AFFS., U.S. DEP'T OF STATE, VISA BULL. NO. 65-10, IMMIGRANT NUMBERS FOR MAY 2022 (2022), https://travel.state.gov/content/dam/visas/Bulletins/visabulletin_may2022.pdf [<https://perma.cc/B9QB-YC86>].

23. See BUREAU OF CONSULAR AFFS., U.S. DEP'T OF STATE, VISA BULL. NO. 42-10, IMMIGRANT NUMBERS FOR JUNE 2020 (2020), https://travel.state.gov/content/dam/visas/Bulletins/visabulletin_june2020.pdf [<https://perma.cc/LWX7-SWZW>].

24. Judith Butler, *Performativity, Precarity and Sexual Politics*, 4 REVISTA DE ANTROPOLOGIA IBEROAMERICANA [J. IBERO-AMERICAN ANTHROPOLOGY], no. 3, 2009, at ii.

25. *Id.*

26. DAVIDSON & HLAAS, *supra* note 17, at 9.

27. While race is not tracked, SIJS children from Central and South America as well as the Caribbean make up the vast majority of those granted SIJS. Laila L. Hlaas, *States and Status: A Study of Geographic Disparities for Immigrant Youth*, 46 COLUM. HUM. RTS. L. REV. 266, 339 (2014). A significant number of Guatemalan SIJS petitioners are Indigenous and many children migrating from Honduras are Black Garifuna.

vulnerable to over-policing and the negative use of discretion, so they are particularly impacted.²⁸

While in the protracted legal limbo of the SIJS backlog, F.E., like numerous Latina/o children, experienced over-policing in his school and neighborhood in Long Island.²⁹ Racial discrimination is common in F.E.'s town of Brentwood, New York, including in the housing context, with anti-Black bias most strongly evidenced, in addition to discrimination against those identified as Hispanic.³⁰ A Department of Justice civil rights investigation, and resulting consent decree, is based on years of racist policing within the Latina/o community in Long Island.³¹

Schools are a common site where children experience discrimination. Immigrant children, particularly children of color, face a number of educational barriers, including challenges to enrollment,³² over-policing and excessive disciplinary action,³³ and barriers to language

28. There is a great deal written about race, enforcement, and discretion. *See generally* Alpa Parmar, *The Power of Racialized Discretion in Policing Migration*, 10 INT'L J. FOR CRIME, JUST. & SOC. DEMOCRACY, 10(3), 41–55 (2021) (describing how “certain discretionary practices and decisions are animated because of race, through race and with the effect (intentional or not) of racially disproportionate outcomes”); Shawn D. Bushway & Anne Morrison Piehl, *Judging Judicial Discretion: Legal Factors and Racial Discrimination in Sentencing*, 35 L. & SOC'Y REV. 733, 733 (2001) (explaining that “[t]here is a large literature on racial discrimination in sentencing outcomes that begins with the disproportionate representation of African Americans and other minorities in prison”).

29. Habeas Corpus Petition, *supra* note 5, at 21. *See generally* Laila L. Hlass, *The School to Deportation Pipeline*, 34 GA. STATE U. L. REV. 697, 720 (2018) (noting that Latina/o children are particularly vulnerable to over-policing, in part due to a rise of gang affiliations in immigration proceedings).

30. *The Jim Crow South? No, Long Island Today*, N.Y. TIMES (Nov. 21, 2019), <https://www.nytimes.com/2019/11/21/opinion/long-island-real-estate-discrimination.html> [<https://perma.cc/3C5W-4FZS>].

31. *See* Press Release, U.S. Dep't of Just., United States Agrees to Comprehensive Settlement with Suffolk County Police Department to Resolve Investigation of Discriminatory Policing Against Latinos (Dec. 3, 2013), <https://www.justice.gov/opa/pr/united-states-agrees-comprehensive-settlement-suffolk-county-police-department-resolve> [<https://perma.cc/6BC6-R9ZQ>].

32. Mark Greenberg, Kylie Grow, Stephanie Heredia, Kira Monin, & Essey Workie, *Strengthening Services for Unaccompanied Children in U.S. Communities*, MIGRATION POL'Y INST. 6 (June 2021), https://www.migrationpolicy.org/sites/default/files/publications/mpi-unaccompanied-children-services_final.pdf [<https://perma.cc/F8CN-ERLP>].

33. Patricia Maloney, Duke W. Austin, & Saunjuhi Verma, *Fear of a School-to-Deportation Pipeline: How Teachers, Administrators, and Immigrant Students Respond to the Threat of Standardized Tests and Deportation*, SAGE 4 (2021), <https://journals-sagepub-com.proxywcl.wrlc.org/doi/pdf/10.1177/00420859211026403>.

access, particularly for Indigenous children.³⁴ At the same time, immigrant children also face enforcement in a harsh Immigration system, whereby they may be pushed out of school as U.S. immigration authorities place them into removal proceedings and sometimes detain them. The multiple factors leading immigrant children to being steered out of schools as well as directed into removal proceedings has been referred to as the “school to deportation pipeline.”³⁵ This trajectory is not always a linear process—sometimes children are already in removal proceedings when they face additional challenges in school, which increase their precarity to actual deportation. All of these contributors to children’s experiences within the crosshairs of punitive immigration, education, and other policing systems can be understood as part of the school to deportation pipeline phenomenon.

F.E. experienced multiple aspects of the school to deportation pipeline. This includes racial profiling, over-policing, and disciplinary action in his school, as well as punitive immigration consequences, including detention and attempted revocation of his SIJS. F.E.’s school, Brentwood High School, briefly suspended him based on an unsubstantiated allegation that he was affiliated with a gang, and local police regularly stopped him in his neighborhood asking for his name and address.³⁶ One day in June 2017, on the way home after playing soccer with a friend, police arrested him for disorderly conduct and held him overnight at the police station.³⁷ Police officers handcuffed and shackled him to the wall, such that he could not even walk around the cell.³⁸ They did not let F.E. talk to his mother but instead told him he was “illegal” and that he might be deported.³⁹ After police transferred him to immigration custody, his family posted an immigration bond, and

34. Luis Javier Pentón Herrera, *Supporting Indigenous Latinx Students’ Success in U.S. Schools*, ¡COLORÍN COLORADO! (2021), <https://www.colorincolorado.org/article/supporting-indigenous-latinox-students-success-us-schools> [https://perma.cc/E4BL-MQ6C].

35. Hlass, *The School to Deportation Pipeline*, *supra* note 29, at 697.

36. Habeas Corpus Petition, *supra* note 5, at 21.

37. *Id.*

38. *Id.* There appears to be a typo in the complaint—it is clear from news reports that he was detained five months, so it should be June 2017, not 2016. *See* Press Release, ACLU, Teenage Client Freed After ACLU Wins Relief for Immigrant Minors Jailed Without Due Process (Nov. 22, 2017), <https://www.aclunc.org/news/teenage-client-freed-after-aclu-wins-relief-immigrant-minors-jailed-without-due-process> [https://perma.cc/SA4M-G9WT].

39. Habeas Corpus Petition, *supra* note 5, at 21.

he was released.⁴⁰ Two days later, a police officer arrested him again, saying he wasn't "legal."⁴¹ The police handed him to Immigration and Customs Enforcement (ICE) officers, who arrested him and sent him to a secure juvenile facility in Virginia, called Shenandoah, which is essentially a jail, purportedly because of a gang allegation.⁴² Children—mainly from El Salvador, Guatemala, Honduras, and Mexico—have sued the Shenandoah facility because of staff members' mistreatment of the children in their care, including harsh measures like shackling and strapping children to emergency restraint chairs until they "tire themselves out."⁴³

For children seeking SIJS like F.E., previous contact with the criminal legal system may lead USCIS to prolong or deny the SIJS case, using as a justification the so-called "consent function" provision of the SIJS law.⁴⁴ USCIS has relied on its purported authority bestowed by this consent function to deny the validity of state court orders that find it is not in a child's best interest to return to their country of origin. Officials do so under a theory that derogatory allegations call into question whether the court had all of the information necessary to make its determination.⁴⁵ This was the case for F.E. After his arrest, USCIS issued F.E. a notice stating that the agency intended to revoke his SIJS, claiming that the juvenile court that had issued his SIJS findings had not been informed of his "gang activities," even though officials never provided F.E. information about what these purported activities were.⁴⁶ F.E. was one of many children swept up in an apparent

40. *Id.*

41. *Id.*

42. *Id.* at 21–22.

43. *Doe 4 v. Shenandoah Valley Juv. Ctr. Comm'n*, 985 F.3d 327, 331 (4th Cir. 2021).

44. See *infra* Section II.A.ii (discussing how the USCIS weaponizes the consent function to disproportionately harm children of color); Amy Joseph, Amy Pont & Cristina Romero, *Consent Is Not Discretion: The Evolution of SIJS and the Consent Function*, 34 GEO. IMMIGR. L.J. 263, 268–69 (2020); see also, SHARON HING, ALISON KAMHI & RACHEL PRANDINI, SPECIAL IMMIGRANT JUVENILE STATUS: RESPONDING TO INAPPROPRIATE RFES AND NOIDS IN SPECIAL IMMIGRANT JUVENILE STATUS CASES, IMMIGRANT LEGAL RES. CTR. 10 (Dec. 2018), available at https://www.ilrc.org/sites/default/files/resources/sijs_respond_inapp_rfes_noids-20190102.pdf [<https://perma.cc/WY5V-NBX7>].

45. Multiple lawsuits have challenged the legality of USCIS's scrutiny and rejection of state court orders in the SIJS context. See, e.g., *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350 (S.D.N.Y. 2019); *J.L. v. Cuccinelli*, No. 18-CV-04914-NC, 2019 WL 6911973 (N.D. Cal. Dec. 18, 2019).

46. Habeas Corpus Petition, *supra* note 5, at 22–23.

immigration agency initiative wherein law enforcement, school officials, and immigration agents used non-uniform and broad guidelines to label immigrant children as gang-affiliated based on their clothes, friends, or even where they live.⁴⁷ These gang allegations were grounded in race-based policing and stereotypes relating to the Latina/o community.⁴⁸ In turn, immigration officials used these gang allegations to detain, deny immigration benefits, and deport immigrant children, particularly Latina/o children, in growing numbers.⁴⁹ In the SIJS context, USCIS sometimes used these gang allegations as excuses to rely on its so called consent function to deny the validity of the juvenile court order,⁵⁰ as it did in F.E.'s case.⁵¹

In June 2017, F.E. sued the U.S. government in a class action on behalf of other immigrant children who were detained based on allegations of gang membership.⁵² After a federal judge ordered custody hearings in immigration court for this class of children, F.E. was one of the first children released from detention in the fall of 2017.⁵³ When he was released, he said, "I thought I'd never see my 'Mami' again And I just kept telling myself that God knows well who I am and that he was going to help me get out."⁵⁴

F.E.'s harrowing journey to seek SIJS is not unique. Immigrant children, particularly children of color, have confronted steep barriers in the immigration system, often with racially disproportionate impacts.⁵⁵ Like F.E., many Black and brown immigrant children seeking

47. Hlass, *The School to Deportation Pipeline*, *supra* note 29, at 697.

48. NERMEEN ARATSU, ANU JOSHI, MAYA LESZCZYNSKI, CAMILLE MACKLER, TALIA PELEG & KIM SYKES, N.Y. IMMIGR. COAL. & CUNY SCH. OF L.'S IMMIGR. & NON-CITIZEN RTS. CLINIC, SWEEP UP IN THE SWEEP: THE IMPACT OF GANG ALLEGATIONS ON IMMIGRANT NEW YORKERS 32–33 (2018), https://nyic.org/wp-content/uploads/2018/06/SweptUp_Report_Final-1.pdf [<https://perma.cc/U5YZ-QNNK>].

49. Hlass, *The School to Deportation Pipeline*, *supra* note 29, at 697.

50. See Joseph at al., *supra* note 44, at 316.

51. There is also the problem of children who become involved in gangs, often due to the coercion and violence children experience from recruitment efforts coupled with children who feeling compelled to join due to isolation, lack of opportunities, and hostile living conditions.

52. See *Saravia v. Sessions (Due Process for Immigrant Youth)*, ACLU OF N. CAL. (Sept. 1, 2017), <https://www.aclunc.org/our-work/legal-docket/saravia-v-sessions-due-process-immigrant-youth> [<https://perma.cc/TP3X-WQR6>].

53. Sarah Gonzalez, *Held for Months, Teens Accused of MS-13 Affiliation Start Returning to Long Island*, WNYC NEWS (Nov. 29, 2017), <https://www.wnyc.org/story/teens-accused-ms-13-affiliation-start-returning-long-island> [<https://perma.cc/RGN4-QMFJ>].

54. *Id.*

55. See DAVIDSON & HLASS, *supra* note 17, at 9.

SIJS face racist policing in schools and neighborhoods as part of the school to deportation pipeline trajectory, where they become more vulnerable to deportation and lose access to education.⁵⁶ Children of color seeking SIJS have also experienced racialized harm when immigration adjudicators make claims of gang affiliation and attempt to invalidate SIJS orders, under the guise of the consent function. The precarity which Salvadoran, Guatemalan, Honduran, and Mexican SIJS seekers face is further protracted and exacerbated because of the “per-country” caps and resulting SIJS backlog, causing them to remain essentially undocumented for years. Lastly, Black and brown immigrant children may face racist treatment in consideration of their applications for LPR status, where adjudicators can use discretion to deny claims and where even minor criminal issues might not be “forgiven” by existing waivers.⁵⁷

Building racial hierarchies through regulating migration has been part of American history since the colonial period. Immigration laws have long prioritized white immigrants, while disadvantaging immigrants of color through formal and informal discrimination.⁵⁸ Children have not been spared from this system of racial hierarchies.⁵⁹ This Article builds upon critical immigration literature and posits that a racial justice lens should be used to critique treatment of children by the immigration legal system. Racial justice has been defined as the “systematic fair treatment of people of all races, resulting in equitable opportunities and outcomes for all,” which includes addressing

56. See Hlass, *The School to Deportation Pipeline*, *supra* note 29, at 697.

57. See *infra* Sections II.A.i–ii.

58. D’Vera Cohn, *How U.S. Immigration Laws and Rules Have Changed Through History*, PEW RSCH. CTR. (Sept. 30, 2015), <https://www.pewresearch.org/fact-tank/2015/09/30/how-u-s-immigration-laws-and-rules-have-changed-through-history> [<https://perma.cc/6N5V-BUWA>]; Elizabeth Keyes, *Race and Immigration, Then and Now: How the Shift to “Worthiness” Undermines the 1965 Immigration Law’s Civil Rights Goals*, 57 HOW. L.J. 899, 908–14 (2014) (discussing formal and informal racism in immigration laws).

59. A handful of immigration scholars have begun to address how racism impacts immigrant children. See Karla M. McKanders, *America’s Disposable Youth: Undocumented Delinquent Juveniles*, 59 HOW. L.J. 197, 200–01 (2015); Beth K. Zilberman, *The Myth of Second Chances: Noncitizen Youth and Confidentiality of Delinquency Records*, 31 GEO. IMMIGR. L.J. 561, 564 (2017); Hlass, *The School to Deportation Pipeline*, *supra* note 29, at 697–98; Laila L. Hlass, *The Adultification of Immigrant Children*, 34 GEO. IMMIGR. L.J. 199, 203–04 (2020) (hereinafter Hlass, *Adultification*); Anita Ortiz Maddali, *The Immigrant “Other”: Racialized Identity and the Devaluation of Immigrant Family Relations*, 89 IND. L.J. 643, 646–47 (2014).

discriminatory and inequitable practices as well as the developing “deliberate systems and supports to achieve and sustain racial equity.”⁶⁰ By contemplating how structural systems of inequity and racism impact child immigrants, particularly looking at those who are or hope to be classified as Special Immigrant Juveniles, this Article will more precisely illustrate gaps in protection faced by immigrant children and ultimately consider how to create more equitable opportunities and outcomes. It traces the distinct and intersecting forms of racism illustrated by SIJS, from explicit racialized harm to those systems that are formally race-neutral but function to disproportionately impact children across racial lines, as well as those that exacerbate existing racial disparities. This includes identifying the more explicit racism wielded through the use of the consent function, the formally race-neutral regional and country caps which only harm children from El Salvador, Guatemala, Honduras, and Mexico, and the way that discretion and inadmissibility factors exacerbate existing racialized harm perpetuated through racial profiling and over-policing of children of color.

In Part I, this Article examines how racism has been implicated in immigration law and legal systems, including some particular impacts immigrant children experience. In Part II, this Article focuses on three features of the SIJS legal framework to understand how the law’s design and implementation have resulted in racialized harms: the consent function, the SIJS backlog, and the process by which SIJS children seek LPR status. Part III offers specific prescriptions as interim steps to address the racialized harms and challenges Special Immigrant Juveniles face. Ultimately, this Article calls for a racial justice analysis of the immigration legal system as it applies to children.

I. RACIAL VIOLENCE AND DISCRIMINATION AGAINST IMMIGRANTS, INCLUDING CHILDREN

White supremacist ideology has played a dominant role in the development of U.S. immigration laws and practices since the country’s inception.⁶¹ Underdeveloped in this history is an account of

60. RACE FORWARD, RACE REPORTING GUIDE, RACE FORWARD 31–32 (2015), https://www.raceforward.org/sites/default/files/Race%20Reporting%20Guide%20by%20Race%20Forward_V1.1.pdf [<https://perma.cc/T589-4GKH>].

61. *See generally* MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2004); ALINA DAS, NO JUSTICE IN THE SHADOWS: HOW AMERICA

the specific impact of racism on immigrant children,⁶² as well as the subordination of children more generally to adults in immigration histories.⁶³ Immigrant children are made in some ways invisible in “cimmigration” literature, which describes the parallels in the immigration and criminal legal systems, the punitive nature of immigration enforcement, and the racial animus underlying the immigration legal system. Similarly, immigration law often erases children’s identities as children, by treating them, in most ways, just as adults.⁶⁴ The lack of perspective from children’s experience in cimmigration literature may also relate to the trend of only depicting immigrant children as innocent and vulnerable without acknowledging children who much of society deems disposable because of their contact with the juvenile or criminal legal systems.⁶⁵ This narrative has been particularly prominent in advancing the Development, Relief, and Education for Alien Minors Act⁶⁶ (DREAM Act), whereby the innocence of children in arriving to the United States served to justify their worthiness for protection.⁶⁷

CRIMINALIZES IMMIGRANTS (2020); CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *MIGRATING TO PRISON: AMERICA’S OBSESSION WITH LOCKING UP IMMIGRANTS* (2019); KELLY LYTLE HERNÁNDEZ, *MIGRA!: A HISTORY OF THE U.S. BORDER PATROL* (2010).

62. Some immigration texts that focus on children’s experiences do not explicitly address how children’s race might cause them to be formally excluded or more vulnerable to exclusion or deportation. *See, e.g.*, SUSAN S. FORBES & PATRICIA WEISS FAGEN, *UNACCOMPANIED REFUGEE CHILDREN: THE EVOLUTION OF U.S. POLICIES—1939 TO 1984* (1984); EVERETT M. RESSLER, NEIL BOOTHBY, DANIEL J. STEINBOCK, *UNACCOMPANIED CHILDREN: CARE AND PROTECTION IN WARS, NATURAL DISASTERS, AND REFUGEE MOVEMENTS* (1987).

63. Hlass, *The School to Deportation Pipeline*, *supra* note 29, at 702–03; *see also* Coutin, *Introduction to RESEARCH HANDBOOK ON CHILD MIGRATION*, *supra* note 7, at 7 (“[A] definitive history of child migration has yet to be written.”). Some scholars have written about the subordination of children in immigration law, without drawing out how racial subordination impacts children. *See, e.g.*, David B. Thronson, *You Can’t Get Here from Here: Toward a More Child-Centered Immigration Law*, 14 VA. J. SOC. POL’Y & L. 58, 68 (2006) (“Immigration law is systemically and specifically designed to limit the role of children and the value placed on their interests.”).

64. *See* Hlass, *Adultification*, *supra* note 59, at 226.

65. *Id.* at 202; *see, e.g.*, Sherally Munshi, *Unsettling the Border*, 67 UCLA L. REV. 1720, 1764 (2021) (describing how immigrant children are viewed as “favored *objects* of sympathy” (emphasis added)).

66. S. 264, 117th Cong. (2021).

67. *See* Mariela Olivares, *Resistance Strategies in the Immigrant Justice Movement*, 39 N. ILL. U. L. REV. 1, 22 (2018); *see also* Elizabeth Keyes, *Defining American: The DREAM Act, Immigration Reform and Citizenship*, 14 NEV. L.J. 101, 112 (2013).

Racist logic and outcomes have impacted the U.S. immigration legal system thoroughly, including within early colonial immigration laws, citizenship and naturalization laws, the national origins quota system, the consequent visa allocation system, and the more recent immigrant detention and crimmigration crisis. This Part articulates the attendant and embedded racist structures in early colonial immigration laws, citizenship laws, the quota and visa allocation systems, and crimmigration crisis, as well as the exclusion of children's unique experiences in these histories.

There is a well-developed history of the colonial period as early immigration history, tracking how laws and policies furthered racial subordination and bolstered white supremacy.⁶⁸ The Colonial period began with the violent removal of Indigenous residents, leading to the ethnic cleansing of Native Americans through war and disease.⁶⁹ The Settler Colonial project of establishing the United States can further be understood through an immigration lens as the large-scale violent forced migration and enslavement of hundreds of thousands of people of African descent under the chattel slavery system.⁷⁰ Scholar Rhonda Magee posits that the laws governing slavery should be considered the nation's first system of immigration law.⁷¹

Children's experiences of racial subordination have been understudied in the context of these histories.⁷² For example, in the U.S. chattel slavery system, historians have vastly undercounted and unaccounted for children, despite the fact that a significant portion of enslaved people were children.⁷³ Furthermore, while some critical

68. Sherally Munshi has critiqued immigration history scholarship for at times solely focusing on racial exclusion and not the contemporaneous recruitment and support of white migration. *Id.* See Munshi, *supra* note 65, at 1742.

69. KEVIN R. JOHNSON, RAQUEL ALDANA, BILL ONG HING, LETICIA M. SAUCEDO & ENID TRUCIOS-HAYNES, *UNDERSTANDING IMMIGRATION LAW* 42 (2nd ed. 2015); Monika Batra Kashyap, *Unsettling Immigration Laws: Settler Colonialism and the U.S. Immigration Legal System*, 46 *FORDHAM URB. L.J.* 548, 554 (2019).

70. Laila L. Hlass, *Lawyering from a Deportation Abolition Ethic*, 110 *CALIF. L. REV.* (forthcoming 2022).

71. Rhonda V. Magee, *Slavery as Immigration?*, 44 *U.S.F. L. REV.* 273, 276 (2009).

72. *But see* LAURA BRIGGS, *TAKING CHILDREN: A HISTORY OF AMERICAN TERROR* (UC Press, 2020) (connecting the removal of immigrant and refugee children to American histories of taking Black, Native, and Latin American children).

73. Undercounting may be a result of unreliable means of determining age, such as the British definition of childhood as those enslaved persons under four feet four inches. Audra A. Diptee, *African Children in the British Slave Trade During the Late Eighteenth Century*, 27 *SLAVERY & ABOLITION* 183, 185 (2006).

immigration scholars have discussed the ethnic cleansing of Native Americans as a foundation of immigration history, legal immigration histories have generally left out the specific experience of children in being kidnapped, re-socialized, and forced into boarding schools.⁷⁴

Citizenship and naturalization law is another area where there is an emerging body of critical literature regarding racial and gender subordination without attending to children's experience.⁷⁵ Some scholars have described how citizenship has been used as a means of racial subordination.⁷⁶ This includes an analysis of *jus sanguinis* citizenship laws, governing citizenship of children born to U.S. citizens living abroad; *jus soli* citizenship, referring to citizenship due to birth within the United States; and naturalization, the process by which immigrants apply to become a citizen after being an LPR.⁷⁷ Scholars of *jus sanguinis* citizenship have examined the nativist and sexist dynamics that have animated the development of this area of law over time, resulting in gender- and race-based inequities for children of U.S. citizens and people of color.⁷⁸

Similarly, immigration scholars have studied birthright or *jus soli* citizenship as a means of racial and gender subordination without addressing the subordination of children.⁷⁹ The first naturalization law, enacted in 1790, similarly furthered racial subordination, directing that citizenship was reserved for only "free white person[s]."⁸⁰ Although the 1790 law did not specify the age of the "persons" who can

74. JOHNSON ET AL., UNDERSTANDING IMMIGRATION LAW, *supra* note 69, provides a leading critical immigration history which includes some discussion of genocide against Native Americans. For an examination of Native American children's experience, see Angelique Eagle Woman (Wambdi A. WasteWin) & G. William Rice, *American Indian Children and U.S. Indian Policy*, 16 TRIBAL L.J. 1, 1-2 (2016).

75. For a discussion of the need for more collaborative study between mainstream immigration legal scholars and critical legal scholars, see Jennifer Gordon & R.A. Lenhardt, *Citizenship Talk: Bridging the Gap Between Immigration and Race Perspectives*, 75 FORDHAM L. REV. 2493, 2494 (2007).

76. See Rose Cuison-Villazor, *Rejecting Citizenship*, 120 MICH. L. REV. (forthcoming 2022).

77. See Amanda Frost, "By Accident of Birth": The Battle over Birthright Citizenship After *United States v. Wong Kim Ark*, 32 YALE J.L. & HUMANS. 38, 48-49 (2021).

78. See generally Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134 (2014).

79. Frost, *supra* note 77, at 48; Jonathan Weinberg & Wong Kim Ark, *Rewritten*, in FEMINIST JUDGMENTS: IMMIGRATION LAW OPINIONS REWRITTEN (Kathleen Kim, Kevin Lapp, & Jennifer Lee eds., forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3945956.

80. Naturalization Act of March 26, 1790, ch. 3, § 1, 1 Stat. 103 (repealed 1795).

naturalize, the text makes clear children's ability to become citizens stems from their parents, instead of being able to naturalize on their own.⁸¹ This subordination of children persisted, even as the subsequent 1824 Act eventually created a specific provision for "minor residents" to naturalize.⁸² The provision is a misnomer because children had to still wait until age twenty-one to naturalize, although they could count three years of residence as a minor towards the five-year residency requirement.⁸³ Although the age restriction on naturalization continues today, very little has been written about the subordination of children in the history of naturalization and citizenship laws.⁸⁴ Under naturalization law, the Supreme Court upheld the denaturalization of Indians due to race,⁸⁵ but the extent to which children were impacted by this law has been under-studied.

Racial hierarchies were also built through the former quota system, with its explicitly racist bars to immigration, and the current visa allocation system.⁸⁶ Before the quota system was introduced in the 1920s, existing immigration laws prohibited immigration from China and the so-called "Asiatic Barred Zone."⁸⁷ In the 1920s, the contours of the "white race" became more rigid in immigration law through the establishment of the quota system. Eugenacists intent on promoting white immigration were proponents of the quota system,⁸⁸ because it allocated visas based on country of origin, preferencing Western

81. *Id.* at 104 ("And the children of such persons so naturalized, dwelling within the United States, being under the age of twenty-one years at the time of such naturalization, shall also be considered as citizens of the United States.").

82. Act of May 26, 1824, ch. 186, 4 Stat. 69 (repealed 1906).

83. *Id.*

84. T. Alexander Aleinikoff, *Citizenship Talk: A Revisionist Narrative*, 69 FORDHAM L. REV. 1689, 1689 (2001) (cataloguing citizenship literature from mainstream immigration legal scholars and critical legal scholars).

85. *United States v. Bhagat Singh Thind*, 261 U.S. 204, 213 (1923); Sherally Munshi, "You Will See My Family Became So American": *Toward a Minor Comparativism*, 63 AM. J. COMP. L. 655, 660 (2015) (describing the denaturalization hearing of an adult man, Dinshah P. Ghadiali).

86. Sherally Munshi has described how "an architecture of nativism—legal structures and a rationale for excluding others" remain a key feature of the modern immigration legal system even as the explicit racist text and cultural nativism of Asian exclusion in the late nineteenth century has been dismantled. Sherally Munshi, *Manners of Exclusion: From the Asiatic Barred Zone to the Muslim Ban*, in DEEPENING DIVIDES: HOW TERRITORIAL BORDERS AND SOCIAL BOUNDARIES DELINEATE OUR WORLD 119 (Didier Fassin ed., 2020).

87. *Id.* at 126.

88. DAS, *supra* note 61, at 51–52.

European immigrants.⁸⁹ The quota system performed as designed to maintain “the racial status quo in the United States”⁹⁰ by using a formula for regulating immigrants based on the number of foreign-born persons of their national origin as of the 1890 Census, when migration was dominated by white Western Europeans and while U.S. immigration law explicitly restricted Chinese immigration.⁹¹

The 1924 Johnson-Reed quota system cemented high levels of majority white Western European migration establishing “a *global* racial and national hierarchy that favored some immigrants over others.”⁹² The impacts of the quota system were born out in its implementation. Seven out of eight immigrants were coming from Western Europe in 1960 when the quota system remained in place.⁹³ The Johnson-Reed Act⁹⁴ also barred entry to any immigrant ineligible to naturalize, establishing a racial bar against entry for Asians.⁹⁵ Immigration from the Western Hemisphere was largely unrestricted, with the notable exception of Black immigrants from the Caribbean.⁹⁶ Unlike the previous quota system, the Johnson Reed Act counted Caribbean subjects not under their own countries, but instead their associated colonizing European power.⁹⁷ Furthermore, even though Britain under used its quota, evidence suggests that British Caribbean migration was restricted, even as white Europeans were allowed to migrate.⁹⁸

After decades of exclusion, the 1940s and 1950s saw the phasing out of the explicit Asian migration ban. In 1943, Congress lifted the bar on Chinese people naturalizing and immigrating but left an annual quota of only 105 immigrants, much lower than the quota for less populous

89. MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 24–25 (rev. ed. 2014).

90. H. Comm. on Immigr. & Naturalization, *Restriction of Immigr.*, H.R. REP. NO. 68-350, pt. 1, at 16 (1924).

91. Rose Cuison Villazor & Kevin R. Johnson, *The Trump Administration and the War on Immigration Diversity*, 54 WAKE FOREST L. REV. 575, 581-82 (2019).

92. NGAI, *supra* note 89, at 3.

93. Tom Gjelten, *The Immigration Act That Inadvertently Changed America*, ATLANTIC (Oct. 2, 2015), <https://www.theatlantic.com/politics/archive/2015/10/immigration-act-1965/408409> [<https://perma.cc/K3V8-U2QT>].

94. Public L. No. 68-139, ch. 190, § 26, 43 Stat. 153, 167 (1924).

95. Sherally Munshi, *Race, Geography, and Mobility*, 30 GEO. IMMIGR. L.J. 245, 278 (2016).

96. *Id.* at 279.

97. *Id.*

98. *Id.*

European countries.⁹⁹ Similarly, in 1946, Congress lifted the ban on immigration from India and the Philippines but imposed a strict annual quota of only 100 immigrants from each country.¹⁰⁰ Earlier legislation was combined into the Immigration and Nationality Act (INA) of 1952,¹⁰¹ which maintained the nominal annual quota of one hundred immigrants from the “Asia Pacific Triangle,” and imposed ancestry and race exclusions, such that someone of Indian ancestry born in the Caribbean was considered Indian for purposes of the quota.¹⁰²

The discriminatory national origins quota system continued until 1965, when Congress amended the Immigration and Nationality Act to provide that “no person shall . . . be discriminated against in the issuance of an immigrant visa because of the person’s race.”¹⁰³ The 1965 amendments abolished explicit racial exclusion, and in an effort at formal equality, the statute established country-specific and regional caps for those immigrating through the family and employment visa systems.¹⁰⁴ These caps have functioned to limit migration of immigrants from “the poorest, most dangerous, and most populous countries.”¹⁰⁵ Importantly, the 1965 Act coincided with an ending of the Bracero program, which had allowed many Mexican nationals to migrate and work in the United States.¹⁰⁶ The 1965 Act imposed a first time hard cap on the Western Hemisphere, thus stopping the regular entry Mexicans had previously engaged in.¹⁰⁷ For Mexicans, this shift and cap is deeply misaligned with the numbers of immigrants who hope to enter.¹⁰⁸ Then, in 1976, per-country caps were introduced.¹⁰⁹ Current law treats children no differently than adults, and no country can exceed seven percent of visas in any category.¹¹⁰ These per-country limits in the visa system have particularly and disproportionately impacted immigrants from certain higher population and higher

99. *Id.*

100. *Id.* at 279–80.

101. Pub. L. No. 82-414, § 202, 66 Stat. 163, 177 (1952).

102. Munshi, *supra* note 95, at 280.

103. 8 U.S.C. § 1152(a)(1)(A).

104. Munshi, *supra* note 95, at 281.

105. *Id.* at 283–84.

106. Villazor & Johnson, *supra* note 91, at 583–84.

107. *Id.* at 584.

108. Nina Rabin, *Understanding Secondary Immigration Enforcement: Immigrant Youth and Family Separation in a Border Country*, 47 J.L. & EDUC. 1, 8 (2018).

109. *Id.*

110. 8 U.S.C. § 1152(a)(2).

migration countries—like China, India, and the Philippines—who began to face years long waits for various employment and family based visas.¹¹¹ For example, as of April 2022, individuals from the Philippines seeking to immigrate based on a petition by a U.S. citizen sibling had a visa available to them if their petition had been filed twenty years before, and certain workers from India had an employment-based visa available to them if they had filed their petition ten years prior.¹¹²

While the Immigration and Nationality Act of 1965 worked to diversify the vastly over-represented Western European migration that had existed before,¹¹³ per-country caps function to discriminate against some migrants based on national origin. National origin discrimination has long been a core part of the immigration system¹¹⁴ because modern national borders stem from an international order that is neocolonial and “inherently racial,” and “the racial disparities enforced by national borders structurally benefit some nations and racial groups at the expense of others.”¹¹⁵ Tendayi Achiume describes how so-called “first-world” countries like the United States have long employed racialized exclusion and inclusion in establishing their borders, permitting entry through visas and citizenship, including through race-neutral policies,

111. See BUREAU OF CONSULAR AFFS., U.S. DEP’T OF STATE, VISA BULL. No. 64-10, IMMIGRANT NUMBERS FOR JANUARY 2022 (2022), <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2022/visa-bulletin-for-january-2022.html> [https://perma.cc/M43A-HMTQ].

112. See BUREAU OF CONSULAR AFFS., U.S. DEP’T OF STATE, VISA BULL. No. 64-10, IMMIGRANT NUMBERS FOR APRIL 2022 (2022), <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2022/visa-bulletin-for-april-2022.html> [https://perma.cc/S2PN-P2KD] (Family Based Category 4 (U.S. Siblings) for the Philippines is processing applications made in August of 2002, while Indian workers in Employment Based 3 must have applied in January of 2012 to be current in the system). For an explanation of how the visa bulletin dates correspond with predication for future wait times for a visa, see Charles Wheeler, *Backlogs in Family-Based Immigration: Shedding Light on the Numbers*, CATH. LEGAL IMMIGR. NETWORK, INC. (updated Mar. 1, 2019), <https://cliniclegal.org/resources/family-based-immigrant-law/backlogs-family-based-immigration-shedding-light-numbers> [https://perma.cc/4EKH-RFJV].

113. Tom Gjelten, *The Immigration Act That Inadvertently Changed America*, ATLANTIC (Oct. 2, 2015), <https://www.theatlantic.com/politics/archive/2015/10/immigration-act-1965/408409> [https://perma.cc/GL27-8JBU].

114. Peter J. Spiro, *Trump’s Anti-Muslim Plan is Awful. and Constitutional.*, N.Y. TIMES (Dec. 8, 2015), <http://www.nytimes.com/2015/12/10/opinion/trumps-anti-muslim-plan-is-awful-and-constitutional.html> [https://perma.cc/U3TD-YET7].

115. E. Tendayi Achiume, *Racial Borders*, GEO. L.J. (forthcoming 2022) (manuscript at 4), <https://ssrn.com/abstract=3962563>.

which fundamentally privilege whiteness in international mobility.¹¹⁶

In the context of the modern-day country caps, immigrants from China, India, the Philippines, Mexico, El Salvador, Guatemala, and Honduras are forced to wait years in the family- and employment-based visa systems.¹¹⁷ Notably these country caps have not impacted migration from Europe, which is comprised of countries with predominantly white populations. While the per-country caps have achieved formal equality amongst countries and opened the door to Asian and African migration, these caps have had a disproportionate impact on some immigrants of color from the most populous countries and those countries that are the most unstable and poor, creating a different form of a racial restriction.¹¹⁸

Modern day racial discrimination in immigration law is perhaps most evident in the crimmigration arena. Crimmigration scholarship often has employed a critical race lens to describe how U.S. immigration officials drafted laws, policies, and practices in the context of waves of racial violence and discrimination directed at Black,¹¹⁹ Asian, Middle Eastern,¹²⁰ and Latina/o migrants¹²¹ in the United States. While legislators employ explicitly racist language less often in immigration

116. *Id.*

117. See BUREAU OF CONSULAR AFFS., U.S. DEP'T OF STATE, VISA BULL. NO. 64-10, IMMIGRANT NUMBERS FOR APRIL 2022 (2022), <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2022/visa-bulletin-for-april-2022.html> [<https://perma.cc/S2PN-P2KD>]. In the Family-Sponsored preference system, India, Mexico and the Philippines have extended wait times, longer than other countries. In the Employment-Based system, immigrants from China, El Salvador, Guatemala, Honduras, India, and Mexico have extended times in certain categories. See ANNUAL REPORT OF VISA APPLICANTS IN THE FAMILY-SPONSORED AND EMPLOYMENT-BASED PREFERENCES REGISTERED AT THE NATIONAL VISA CENTER AS OF NOVEMBER 1, 2020 (2020), https://travel.state.gov/content/dam/visas/Statistics/Immigrant-Statistics/WaitingList/WaitingListItem_2020_vF.pdf [<https://perma.cc/K8C8-WBZT>].

118. Munshi, *supra* note 95, at 282.

119. See Carl Lindskoog, *Violence and Racism Against Haitian Migrants Was Never Limited to Agents on Horseback*, WASH. POST (Sept. 30, 2021, 6:00 AM), <https://www.washingtonpost.com/outlook/2021/10/02/violence-racism-against-haitian-migrants-was-never-limited-horseback-riders/> [<https://perma.cc/5782-AHF8>]; NANCY ADOSSI, TADIOS BELAY, CARL LIPSCOMBE, & BENJAMIN NDUGGA-KABUYE, BLACK ALL. FOR JUST IMMIGR., BLACK LIVES AT THE BORDER 3 (2018), <http://baji.org/wp-content/uploads/2020/03/black-lives-at-the-borderfinal-2.pdf> [<https://perma.cc/E5XS-55DK>]; DAS, *supra* note 61.

120. Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling after September 11*, 34 CONN. L. REV. 1185, 1192 (2002); Shoba Sivaprasad Wadhia, *Business as Usual: Immigration and the National Security Exception*, 114 PENN ST. L. REV. 1485, 1499 (2010).

121. Kevin Johnson, *Trump's Latinx Repatriation*, 66 UCLAL. REV. 1444, 1446 (2019).

laws, the narrative of immigrant criminality has continued to be used to justify large-scale restriction and deportation of immigrant communities of color.¹²² Since the 1980s and 1990s the immigration legal system has seen a rise in for-profit detention centers, widespread tracking and surveillance of immigrants at the border and post-entry, increased collaboration between local law enforcement and immigration officials, and expanded grounds for deportation of long-term residents, resulting in what some have termed a “crimmigration crisis.”¹²³

Children have been impacted by the crimmigration crisis through racist discourse as well as racist policing, which may lead to harsh and unjust consequences, like detention and deportation. Public discourse about immigrant children often draws on racial tropes invoking gangs—from the 1990s “super-predator” mythology to present day conflation of immigrant children and gangs.¹²⁴ This is particularly true of President Trump, who was open about his animus toward Central American children seeking safety in the United States—a population who makes up the majority of SIJS applicants.¹²⁵ He said that Central American children are “not innocent” and accused them of “exploit[ing] the loopholes in our laws to enter the country as unaccompanied alien minors.”¹²⁶ The Trump administration repeatedly suggested that Central American unaccompanied children were gang

122. DAS, *supra* note 61, at 24 (“[W]hen overtly racist language was no longer legally or socially acceptable, the immigrant-as-criminal narrative emerged to help justify what the overly racist narrative once did—the large-scale exclusion and expulsion of communities of color from the United States.”).

123. Juliet P. Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 369, 388 (2006); César Cuauhtémoc García Hernández, *Migrating to Prison: America’s Obsession with Locking Up Immigrants* (2019); DAS, *supra* note 61.

124. Hlass, *supra* note 29, at 727–28 (citing John J. DiIulio’s debunked article, *The Coming of the Super-Predators*, attacking Black children and referring to an emerging danger of Latina/o “youth street gangs”).

125. DAVIDSON & HLASS, *supra* note 17, at 6; Laila L. Hlass, *States and Status: A Study of Geographical Disparities for Immigrant Youth*, 46 COLUM. HUM. RTS. L. REV. 266, 276 (2014).

126. Seung Min Kim, *Trump Warns Against Admitting Unaccompanied Migrant Children: ‘They’re Not Innocent,’* WASH. POST (May 23, 2018), https://www.washingtonpost.com/politics/trump-warns-against-admitting-unaccompanied-migrant-children-theyre-not-innocent/2018/05/23/e4b24a68-5ec2-11e8-8c93-8cf33c21da8d_story.html [<https://perma.cc/T8D6-6JY5>].

members,¹²⁷ whom President Trump referred to as “animals.”¹²⁸ President Trump’s former head of Customs and Border Protection stated on Fox News that he could go into a child immigration detention facility and “look[] at the eyes” of a “so-called minor[], 17 or under” and “unequivocal[ly]” say that the child “is a soon-to-be MS-13 gang member.”¹²⁹ President Trump’s Attorney General Jeff Sessions called Central American unaccompanied children “wolves in sheep’s clothing.”¹³⁰ This racist language mimics discourse leading to creation of more severe consequences for children in the domestic juvenile delinquency court system.¹³¹

The school to deportation pipeline phenomenon illustrates how immigrant children of color face racist policing in schools and neighborhoods, which makes them vulnerable to being pushed out of schools and pushed into criminal and immigration legal systems that lead to detention and possible exile.¹³² Immigration officials have cast immigrant children, particularly Latino boys, as gang members, causing them to face increased immigration enforcement and making them vulnerable to detention and deportation.¹³³ The mere suspicion

127. See *Unaccompanied Alien Children and Family Units are Flooding the Border Because of Catch and Release Loopholes*, U.S. DEP’T OF HOMELAND SEC. (Feb. 15, 2018), <https://www.dhs.gov/news/2018/02/15/unaccompanied-alien-children-and-family-units-are-flooding-border-because-catch-and-#> [<https://perma.cc/8JAZ-SCU9>]. This government source references a Fox News article asserting that “while most [unaccompanied Central American teenagers] are likely not criminals, some most certainly are.” Joseph J. Kolb, *Feds Crack Down on MS-13, but Immigration Policy Lets New Recruits in, Figures Show*, FOX NEWS (Nov. 30, 2017), <https://www.foxnews.com/us/feds-crack-down-on-ms-13-but-immigration-policy-lets-new-recruits-in-figures-show> [<https://perma.cc/636H-ULHE>].

128. Kim, *supra* note 126.

129. Matt Stieb, *ICE Director Nominee Can Look at Migrant Child and Identify a ‘Soon-to-Be MS-13 Gang Member’*, N.Y. MAG. (May 16, 2019), <https://nymag.com/intelligencer/2019/05/trumps-ice-director-pick-says-he-has-a-superpower.html> [<https://web.archive.org/web/20220312165234/https://nymag.com/intelligencer/2019/05/trumps-ice-director-pick-says-he-has-a-superpower.html>].

130. Lauren Dezenski, *Sessions: Many Unaccompanied Minors Are ‘Wolves in Sheep’s Clothing’*, POLITICO (Sept. 21, 2017, 6:19 PM), <https://www.politico.com/story/2017/09/21/jeff-sessions-border-unaccompanied-minors-wolves-242991> [<https://perma.cc/KK4J-7AJA>].

131. See Hlass, *Adultification*, *supra* note 59, at 201–02.

132. Hlass, *supra* note 29, at 697.

133. NERMEEN ARASTU, ANU JOSHI, MAYA LESZCZYNSKI, CAMILLE MACKLER, TALIA PELEG, & KIM SYKES, N.Y. IMMIGR. COAL. & CUNY SCH. OF L.’S IMMIGR. & NON-CITIZEN RTS. CLINIC, *SWEPT UP IN THE SWEEP: THE IMPACT OF GANG ALLEGATIONS ON*

of gang affiliation, no matter how flimsy, can lead to removal proceedings and the denial of immigration benefits.¹³⁴

The school to deportation pipeline impacts Black immigrant children, in particular. Ousman Darboe, who came to the United States from Gambia at age six, is one such Black child impacted by racist policing.¹³⁵ Growing up in the Bronx, he faced a series of racist stops, over-policing in school, and alleged misidentifications, starting with a wrongful arrest for stealing headphones at age sixteen.¹³⁶ Although that case was quickly dismissed, the police continued stopping him, which is in keeping with reports that the New York City Police Department disproportionately targeted Black and Latina/o youth under its stop and frisk policy.¹³⁷ Just after turning eighteen years old, police picked up Ousman for a petty theft and sent him to Rikers for pretrial detention.¹³⁸ After being in Rikers for a total of nineteen months—ten months while awaiting his hearing and nine months for the petty theft conviction—ICE picked up Ousman for deportation soon after he was released on parole.¹³⁹ Black immigrants are particularly impacted by racist policing leading to immigration enforcement: while only comprising 7.2% of the immigrant population in the United States, more than 20% of people facing deportation on criminal grounds are Black.¹⁴⁰

The immigration legal system, through informal and formal means, is deeply implicated in building racial hierarchies. In some ways,

IMMIGRANT NEW YORKERS 7 (2018), https://nyic.org/wp-content/uploads/2018/06/SweptUp_Report_Final-1.pdf

[<https://perma.cc/XCA8-N4T6>]. Vague criteria is being “used to label Latinx youth and young men as gang affiliated and then to subsequently justify their arrest, detention and deportation.” *Id.*

134. Hlass, *supra* note 29, at 701.

135. Shamira Ibrahim, *Ousman Darboe Could Be Deported Any Day. His Story Is a Common One for Black Immigrants.*, VOX (Feb. 5, 2020, 11:58 AM), <https://www.vox.com/identities/2019/9/30/20875821/black-immigrants-school-prison-deportation-pipeline> [<https://perma.cc/LKP2-WANV>].

136. *Id.*

137. *Stop-And-Frisk Data*, N.Y. CIV. LIBERTIES UNION, <https://www.nyclu.org/en/stop-and-frisk-data> [<https://perma.cc/R4YZ-CV9E>]; *see also* *Floyd v. City of New York*, 959 F.Supp.2d 540, 667 (S.D.N.Y. 2013).

138. Ibrahim, *supra* note 135.

139. *Id.*

140. JULIANA MORGAN-TROSTLE, KEXIN ZHENG & CARL LIPSCOMBE, BLACK ALL. FOR JUST IMMIGR. & N.Y.U. IMMIGRANT RTS. CLINIC, THE STATE OF BLACK IMMIGRANTS 20 (2022), <http://stateofblackimmigrants.com/wp-content/uploads/2018/09/sobi-fullreport-jan22.pdf> [<https://perma.cc/3G5G-2FUC>].

children face the same racialized harms as adults in the immigration legal system, such as with the national quota system that favored Western Europeans. However, immigrant children of color may have additional vulnerabilities and distinct experiences, such as harms stemming from the school to deportation pipeline. This Article does not attempt to unearth all the ways in which children experience racialized harm in the immigration legal system; instead, the intention is to draw light on the need for children's perspective. Building on this, Part II uses SIJS as a case study to examine how specific immigration laws, policies, and practice may cause racialized harm to children.

II. SIJS AS A LENS FOR THE RACIAL SUBORDINATION OF IMMIGRANT CHILDREN

Congress created SIJS to protect children who have been abandoned, abused, or neglected by a parent and whose best interest was not served by return to their country of origin.¹⁴¹ Although the text of the law is not facially discriminatory, various provisions and practices reveal how racialized harm is embedded within the law. This Part examines the existing SIJS legal framework with an eye towards how it perpetuates racial inequities. First, this Part explores the consent function, whereby the immigration agency has second-guessed state court orders making determinations about the child's best interest and parental maltreatment, including how this provision and agency practice has perpetuated racialized harm. Next, it considers how the SIJS backlog operates as a racial quota system and furthers the school to deportation pipeline. Lastly, this Part scrutinizes discretion and inadmissibility within the legal framework through which SIJS children seek LPR status and how these legal schema further racial inequities.

A. *Weaponization of the Consent Function Against Children of Color*

The SIJS statute's consent function has furthered the immigration legal system's project of building racial hierarchies, as it has been weaponized against immigrant children of color. From its inception in 1990, the SIJS statute has always defined a child's eligibility based on a state court order making certain determinations about the child's history of mistreatment and best interests.¹⁴² The statutory scheme is premised on deference to the expertise of state court child welfare

141. 8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11 (2022).

142. Joseph et al., *supra* note 44, at 267–68.

determinations.¹⁴³ Congress first added the consent function to the statute in 1997, against the back drop of immigration restrictionists¹⁴⁴ with purported concerns about “fraud.”¹⁴⁵ Perhaps unsurprisingly, since the adoption of the consent function, the agency—formerly the Immigration and Naturalization Service (INS) and now USCIS—has relied on it to improperly claim a role for itself to overrule state court determinations and deny SIJS to eligible children, even after Congress acted in 2008 to sharply curtail it. The broad discretion USCIS allocates to itself in its policy interpretations of its consent authority—despite the statute containing no discretionary language—invites arbitrary and discriminatory decision-making by individual adjudicators. In effect, USCIS has weaponized the consent function to apply heightened scrutiny in certain children’s petitions, resulting in arbitrary decision-making that harms children of color. In particular, USCIS uses the consent function to justify burdensome Requests for Evidence (RFE), Notices of Intent to Deny (NOID), denials of SIJS petitions, and revocations of approved petitions in cases of certain children, even though those children have submitted a juvenile court order making all of the findings required by statute.

1. *The SIJS consent function: its restrictionist origins and current law*

Tracing the origins of the consent provision reveals its immigration restrictionist underpinnings.¹⁴⁶ Congress added a consent provision to the SIJS statute in 1997, apparently in response to Senator Pete Domenici’s (R-NM) unsubstantiated allegations that older Mexican teenagers arriving on student visas were abusing the SIJS statute,

143. At the same time, the child welfare system has been widely critiqued for targeting and disproportionately criminalizing Black, brown, and Indigenous parents as risky to their children. See DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 6 (2002) (discussing how Black families are overrepresented in the American welfare system).

144. Immigration restrictionists seek to substantially contract pathways for immigrants to migrate to the United States. See Anil Khan Kalhan, *Immigration Enforcement, Strategic Entrenchment, and the Dead Hand of the Trump Presidency*, 2021 U. ILL. L. REV. ONLINE 46, 48–49 (describing how immigration restrictionists aggressively attempted to stop President Biden from taking steps to reduce or reprioritize immigration enforcement and improve access to existing immigration benefits).

145. Hlass, *States and Status*, *supra* note 27, at 335 app. A; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, sec. 113, 111 Stat. 2440, 2460–61 (1997).

146. For a thorough tracing of the consent function from its origins to present, see generally Joseph et al., *supra* note 44, at 269, 308.

obtaining juvenile court predicate orders and then SIJS-based green cards without having actually suffered any parental mistreatment.¹⁴⁷ This discourse foreshadowed more recent rhetoric from the Trump White House, casting suspicion on older children and claiming that some children seeking refuge in the United States were actually adults masquerading as children.¹⁴⁸ The 1997 law amended the SIJS provision by requiring a showing of abuse, neglect, or abandonment, and, as relevant here, adding a requirement that the attorney general must “expressly consent[] to the dependency order serving as a precondition to the grant of special immigrant juvenile status.”¹⁴⁹ The 1997 law also created a separate “specific consent” provision that applied to children in “actual or constructive” immigration custody and required that the attorney general “specifically consent” to a juvenile court’s jurisdiction to determine the juvenile’s custody status or placement.¹⁵⁰ A conference report discussing the 1997 changes states that the changes were intended to “address several problems encountered in the implementation of the special immigrant juvenile provision,” to

limit the beneficiaries of this provision to those juveniles for whom it was created, namely abandoned, neglected, or abused children, by requiring the Attorney General to determine that neither the dependency order nor the administrative or judicial determination of the alien’s best interest *was sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence,*

147. Angela Lloyd, *Regulating Consent: Protecting Undocumented Immigrant Children from Their (Evil) Step-Uncle Sam, or How to Ameliorate the Impact of the 1997 Amendments to the SIJ Law*, 15 B.U. PUB. INT. L.J. 237, 244 (2006); *Hearing on H.R. 2267/S. 1022, Before a Subcomm. of the Comm. on Appropriations*, 105th Cong. 2, 111–12 (1997) (statement of Sen. Domenici).

148. Trump White House Archives, Remarks by President Trump at a Roundtable Discussion on Immigration, Bethpage, N.Y. (May 23, 2018), <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-roundtable-discussion-immigration-bethpage-ny> [<https://perma.cc/SL3Q-T89F>].

149. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, sec. 113, 111 Stat. 2440, 2460-61 (1997). Compare with the Immigration Act of 1990, which contained no consent requirement. Pub. L. No. 101-649, sec. 153, 104 Stat. 4978, 5005-06 (amending 8 U.S.C. § 1101(a)(27)).

150. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, sec. 113 (codified at 8 U.S.C. § 1101(a)(27)(J)(iii) (2000)).

rather than for the purpose of obtaining relief from abuse or neglect.¹⁵¹

The agency seized on the “primary purpose” language from the 1997 conference report to assert for itself a role in rejecting SIJS petitioners it deemed unworthy of permanent status, even though the child had applied with the required state court findings. While the agency never issued regulations to implement the 1997 version of the consent provision, it issued a number of guidance documents describing its interpretation of the provision.¹⁵² In its early implementing memos, USCIS’s predecessor, INS, asserted “enormous powers of review over the substance of the minor’s dependency claims.”¹⁵³ In practice, advocates observed that immigration officers would re-adjudicate the juvenile court case “based on their perceptions of improper decisions on abuse, abandonment, and neglect.”¹⁵⁴

Advocates also raised concerns with the agency’s exercise of the 1997 law’s “specific consent” function, which applied only to children in actual or constructive immigration custody. Until 2008, specific consent authority was exercised first by INS and then by Immigration and Customs Enforcement (ICE), the branch of Department of Homeland Security (DHS) tasked with immigration enforcement

151. H.R. Rep. No. 105-405, at 130 (1997) (Conf. Rep.) (emphasis added).

152. See, e.g., Memorandum from Thomas E. Cook, Acting Asst. Comm’r., Adjudications Div., Immigration and Naturalization Serv., U.S. Dep’t. of Justice (Aug. 7, 1998); Memorandum from Thomas E. Cook, Acting Asst. Comm’r., Adjudications Div., Immigration and Naturalization Serv., U.S. Dep’t. of Justice (Jul. 9, 1999), <https://www.aila.org/infonet/ins-advises-on-special-immigrant-juveniles> [<https://perma.cc/Z6SW-N9DL>]; Memorandum from William R. Yates, Asst. Director for Operations, USCIS, Memorandum #3 - Field Guidance on Special Immigrant Juvenile Status Petitions (May 27, 2004), https://www.uscis.gov/sites/default/files/document/memos/sij_memo_052704.pdf [<https://perma.cc/85CZ-WP27>].

153. Elizabeth Keyes, *Evolving Contours of Immigration Federalism: The Case of Migrant Children*, 19 HARV. LATINO L. REV. 33, 52 (2016); see Katherine Porter, *In the Best Interests of the INS: An Analysis of the 1997 Amendment to the Special Immigrant Juvenile Law*, 27 J. LEGIS. 441, 442 (2001) (“The revised [1997] SIJ law gives additional power and discretion to INS officials, arguably allowing them to usurp authority better placed with the juvenile courts.”).

154. Wendi J. Adelson, *The Case of the Eroding Special Immigrant Juvenile Status*, 18 J. TRANSNAT’L L. & POL’Y 65, 78–81 (2008); see 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, 623 (2000) (noting that in ostensible exercise of “express consent” function, INS officers “asked minors to offer additional documentation about their family abuse, neglect, and abandonment, including questions regarding physical or sexual abuse”).

actions, such as detention and removal. In exercising specific consent and thereby deciding whether the child could even initiate the required state court proceeding, the agency would essentially pre-adjudicate the determinations the statute reserved for the state juvenile court to decide if the child's case was meritorious.¹⁵⁵ For a period of time, one senior ICE official, Josh Pogash, was charged with final authority over all specific consent requests, and he frequently denied them.¹⁵⁶ In *Perez-Olano v. Gonzalez*,¹⁵⁷ a class action lawsuit filed in 2005, advocates challenged the agency's implementation of the 1997 law's specific consent provision, alleging that immigration authorities were "arrogat[ing] the authority of state dependency courts to determine whether a minor has been abused, neglected, or abandoned" and requiring such children to meet an "amorphous and malleable definition of abuse, abandonment, or neglect."¹⁵⁸

Likely, at least in part, in response to the *Perez-Olano* litigation, Congress acted in 2008 to remedy the agency's overreach in its exercise of both the express and specific consent functions through amendments it made to the SIJS statute with the 2008 Trafficking Victims Protection Reauthorization Act¹⁵⁹ (TVPRA), which expanded

155. See, e.g., *M.B. v. Quarantillo*, 301 F.3d 109, 110, 116 (3d Cir. 2002) (upholding INS's denial of specific consent based on the agency's conclusion that the child was too old for New Jersey juvenile court jurisdiction, and further noting that the child had not provided the INS with "evidence that [his] parents had been killed or that his aunt had abused him"); *Yeboah v. U.S. Dep't of Just.*, 345 F.3d 216, 219, 224-25 (3d Cir. 2003) (upholding INS's denial of specific consent where it determined that the child had not been abused as he claimed based on the findings of a medication medical examination and comments from detention center staff that he was "relatively happy," and that repeated phone contact between the child and his father in Ghana, among other things, showed that his true purpose in seeking SIJS was to become a permanent resident); *A.A.-M v. Gonzales*, No. C05-2012C, 2005 WL 3307531, at *3 (W.D. Wash. Dec. 6, 2005) (concluding that ICE abused its discretion in denying specific consent based on an adverse credibility finding and alleged gang affiliation without having ever spoken with the child, who alleged that he was physically and emotionally abused and neglected by his parents).

156. See, e.g., *Zheng v. Pogash*, 416 F. Supp. 2d 550, 553, 559 (S.D. Tex. 2006) (describing that Pogash denied specific consent to the plaintiff on four occasions without sufficient evidence to support his findings).

157. 248 F.R.D. 248 (C.D. Cal. 2008).

158. Fourth Amended Complaint ¶ 35, ECF No. 52, *Perez Olano v. Gonzalez*, No. 05-3604 (C.D. Cal. Sept. 13, 2006).

159. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (codified at 8 U.S.C. § 1101(a)(27)(J)).

the group of children who were eligible for SIJS in a number of ways.¹⁶⁰ The TVPRA eliminated the express consent function, replacing it with a more deferential general consent provision described below, and it amended the specific consent function to transfer specific consent authority to the Office of Refugee Resettlement, an agency with a child welfare mandate not traditionally considered part of the immigration enforcement system.¹⁶¹ As for the express consent provision, the TVPRA struck the language that had allowed the attorney general to “expressly consent[] to the dependency order serving as a precondition to the grant of special immigrant juvenile status.”¹⁶² In its place, the law simply provides that a Special Immigrant Juvenile is an individual about whom a state court has made specified findings and “in whose case the Secretary of Homeland Security consents to the grant of special immigrant juvenile status.”¹⁶³ As the Citizenship and Immigration Services Ombudsman observed in a 2015 report, “[b]y eliminating the ‘express’ nature of the consent requirement, TVPRA recognized State court authority and ‘presumptive competence’ over determinations of dependency, abuse, neglect, abandonment, reunification, and the best interests of children.”¹⁶⁴ However, USCIS continued to second-guess state court determinations, relying on the consent function to apply heightened scrutiny in certain children’s SIJS petitions.¹⁶⁵

160. *Id.* at § 235(d), 5079–80; *see* DEBORAH LEE, MANOJ GOVINDAIAH, ANGELA D. MORRISON & DAVID THRONSON, UPDATE ON LEGAL RELIEF OPTIONS FOR UNACCOMPANIED ALIEN CHILDREN FOLLOWING THE ENACTMENT OF THE WILLIAM WILBERFORCE TRAFFICKING VICTIMS PROTECTION 2–8 (2009), <https://scholarship.law.tamu.edu/facscholar/820> [<https://perma.cc/HRQ8-6C8U>] (describing TVPRA’s changes regarding SIJS).

161. After the TVPRA’s changes and the *Perez-Olano* litigation, the specific consent provision became relevant in a smaller percentage of cases—those where a child is in ORR custody and seeking a juvenile court order that alters their custody status or placement. An exploration of the current use of the specific consent function is beyond the scope of this Article.

162. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, § 235(d)(1)(B)(i), 122 Stat. at 5079–80 (codified at 8 U.S.C. § 1101(a)(27)(J)).

163. 8 U.S.C. § 1101(a)(27)(J).

164. MARIA ODOM, CITIZENSHIP AND IMMIGRATION SERVICES OMBUDSMAN: ENSURING PROCESS EFFICIENCY AND LEGAL SUFFICIENCY IN SPECIAL IMMIGRANT JUVENILE ADJUDICATIONS 4 (2015), https://www.dhs.gov/sites/default/files/publications/CISOMB%20SIJ%20Recommendation%202015_2.pdf [<https://perma.cc/P3W8-XKRD>].

165. *See Keyes supra* note 153, at 57 (“[D]espite this shift, consent became a significant way for the federal government to continue exerting authority.”).

2. *USCIS weaponizes the consent function to disproportionately harm children of color*

From the outset, USCIS policy guidance interpreting the post-2008 general consent provision has relied on the 1997 legislative history governing the since-repealed statute to continually assert for USCIS a role to question the “primary purpose” of the state court action.¹⁶⁶ USCIS has wielded its consent function selectively to single out for higher scrutiny the child’s “primary purpose” in certain types of cases, such as those where the child was nearing the age of eighteen or twenty one.¹⁶⁷ In a 2015 report on SIJS adjudications, the Citizenship and Immigration Services Ombudsman called out USCIS’s “overreach in the exercise of its consent function” and the agency’s “overly expansive review of the petitioner’s intentions for seeking a dependency court order,” and it called on USCIS to “[i]nterpret the consent function consistently with the statute by according greater deference to State court findings.”¹⁶⁸ As the Ombudsman recognized, the “primary purpose” inquiry is problematic not only because it is not grounded in

166. Memorandum from Donald Neufeld, Acting Assoc. Dir. of Domestic Operations, U.S. Citizenship and Immigr. Serv. & Pearl Chang, Acting Chief, Office of Policy & Strategy, U.S. Citizenship and Immigr. Serv., to Field Leadership (March 24, 2009), https://www.uscis.gov/sites/default/files/document/memos/TVPRA_SIJ.pdf [<https://perma.cc/K8XS-GW77>]; ODOM, *supra* note 164 (“USCIS policy, however, did not keep up with those very significant revisions, relying instead on language that had disappeared from the statute.”).

167. IMMIGR. LEGAL RESOURCE CTR., RESPONDING TO INAPPROPRIATE RFES & NOIDS IN SPECIAL IMMIGRANT JUVENILE STATUS CASES 1–2 (2015), https://www.ilrc.org/sites/default/files/resources/sijs_rfes_noids_pa_final.pdf [<https://perma.cc/8J7J-M4FW>] (noting trend that USCIS was requesting numerous juvenile court documents due to questioning the primary purpose of the state court action, in certain types of cases, such as those involving children close to age eighteen or twenty-one); *see* JANUARY CONTRERAS, SPECIAL IMMIGRANT JUVENILE ADJUDICATIONS: AN OPPORTUNITY FOR ADOPTION OF BEST PRACTICES 7 (2011), <https://www.dhs.gov/xlibrary/assets/Citizenship-and-Immigration-Services-Ombudsman-Recommendation-Special-Immigrant-Juvenile-Adjudications.pdf> [<https://perma.cc/BT95-6M29>] (“When USCIS requests the evidence underlying juvenile court dependency orders, it is, in effect, engaging in an inappropriate review of the state tribunal’s decision. Juvenile court dependency determinations are not a matter of federal law. USCIS is not vested with authority to make dependency determinations. It is not empowered to engage in post-decision legal or factual review of such decisions and it lacks the expertise possessed by state tribunals specializing in family law.”); ODOM, *supra* note 164 (“The Ombudsman continues to observe inconsistencies in USCIS’ adjudication of SIJ petitions, its application of legal principles, and the factual evaluations that are conducted under its consent authority.”).

168. ODOM, *supra* note 164.

the statute or regulations (and instead stems from legislative history surrounding a provision that Congress has since repealed) but also because it:

relies on a false dichotomy that suggests it is possible that a State court action may only focus on either protections against future harm or securing immigration benefits, when almost always, the court protections inevitably provide both in tandem. Securing stability in the form of status in the United States is irrevocably a key aspect of protecting a child from future harm. As a consequence of the “bona fide” review, “express consent” continues unaltered and USCIS adjudicators have in practice nullified the clause amended by Congress in the TVPRA.¹⁶⁹

Even more problematic is that encouraging individual adjudicators to assess an immigrant child’s subjective intent in seeking state court protection invites arbitrary and capricious decision-making and the risk of disparate outcomes for similarly situated individuals, based on the adjudicating officers’ implicit biases or other improper factors.¹⁷⁰ USCIS’s “bona fide” consent inquiry—in which the agency examines the child’s primary purpose in seeking state court protection—has parallels to the “bona fide” standard used in marriage-based immigration cases, which has been critiqued for its racist implications.¹⁷¹ As one scholar noted around the time the marriage “bona fide” requirement was created, “[t]he perception that ‘foreigners’ abuse marriage—an institution surrounded by romantic notions and still regarded by many as sacred—may provoke deep-seated feelings of xenophobia and racism.”¹⁷² Like the “bona fide” test in marriage cases, USCIS’s

169. *Id.* at 8.

170. See Letter from Anna Marie Gallagher, Exec. Dir., Cath. Legal Immigr. Network, Inc., to Samantha Deshommes, Chief, Regulatory Coordination Div., Office of Pol’y & Strategy, U.S. Citizenship & Immigr. Servs. (Nov. 14, 2019), <https://cliniclegal.org/resources/federal-administrative-advocacy/clinic-submits-comments-special-immigrant-juvenile> [<https://perma.cc/Z335-6RJS>]; ODOM, *supra* note 164, at 12 (noting “adjudication inconsistencies regarding USCIS’ exercise of consent”).

171. See, e.g., Lee Ann S. Wang, *Of the Law, but Not Its Spirit: Immigration Marriage Fraud As Legal Fiction and Violence Against Asian Immigrant Women*, 3 U.C. IRVINE L. REV. 1221, 1249–50 (2013) (arguing that “immigration marriage fraud is a legal fiction based on the measurement of whether an immigrant spouse can prove an absence of desire for citizenship or legal status,” and is aimed at protecting “the heteronormative white subject against fraud”).

172. Note, *The Constitutionality of the INS Sham Marriage Investigation Policy*, 99 HARV. L. REV. 1238, 1254 (1986); see also, e.g., Ty S. Wahab Twibell, *The Road to Internment:*

consent standard, scrutinizing whether the child's primary purpose is to secure an immigration benefit presumes fraud on the part of the immigrant. Unlike the "bona fide marriage" test, however, the "primary purpose" inquiry USCIS employs in SIJS cases is not grounded in the statute.

The concern that the consent function invites racially discriminatory decision-making was borne out during the Trump administration, when the agency began using consent as a weapon against Central American children, making explicit the racial animus underlying the policies that may have otherwise existed. And the Trump administration wasted no time in setting its sights on weaponizing the SIJS program—and the consent function in particular—to exclude Central American children. The administration issued public statements referring to the SIJS program as a "loophole" that needed to be closed.¹⁷³ An internal DHS memo leaked to media, titled "Policy Options to Respond to Border Surge of Illegal Immigration," dedicated two of its sixteen recommendations to attacking the SIJS program, including a recommendation to "Eliminate Abuses in the SIJ Program" by more "carefully scrutiniz[ing] the possibility of gang membership/affiliation" and "review[ing] whether USCIS' consent function can be used to deny a case involving gang membership."¹⁷⁴ In the fall of 2019, the Trump administration took formal steps to maximize the power of the consent function, issuing three adopted

Special Registration and Other Human Rights Violations of Arabs and Muslims in the United States, 29 VT. L. REV. 407, 480 (2005) ("U.S. Citizens with Muslim or Arab Spouses Falsely Accused of Fraudulent Marriages or Forced to Withdraw Immigrant Petitions").

173. E.g., U.S. Dep't of Homeland Sec., *Unaccompanied Alien Children and Family Units are Flooding the Border Because of Catch and Release Loopholes*, U.S. DEP'T OF HOMELAND SEC. DHS.GOV (Feb. 15, 2018), <https://www.dhs.gov/news/2018/02/15/unaccompanied-alien-children-and-family-units-are-flooding-border-because-catch-and#> [<https://perma.cc/3FMF-58K2>] (referring to a "loophole" in SIJS program and stating, "[w]e must end abuse of the Special Immigrant Juvenile (SIJ) visa to ensure the applicant proves reunification with *both* parents is not viable due to abuse, neglect, or abandonment and that the applicant is a victim of trafficking").

174. Exhibit 5: Draft Memorandum—Policy Options to Respond to Border Surge of Illegal Immigration at 2–3, J.E.C.M. *ex rel.* Saravia v. Lloyd, 352 F. Supp. 3d 559 (E.D. Va. 2019) (no. 1:18-cv-00903-LMB-MSN), https://www.splcenter.org/sites/default/files/72.6_3d_am.compl._exh._5_leaked_memo_01-18-2019.pdf [perma.cc/S6DP-4AHU].

decisions¹⁷⁵ condoning the problematic “primary purpose” framework for exercising the consent function and reopening the comment period on a long-dormant proposed rule.¹⁷⁶ In a statement about these actions, then-acting director of USCIS, Ken Cuccinelli, stated that the changes would “better protect deserving juvenile immigrants”¹⁷⁷ but called on Congress to address unspecified “loopholes in the SIJ program.”¹⁷⁸ USCIS did not act in time to finalize the rule before the

175. U.S. CITIZENSHIP AND IMMIGR. SERVS., POLICY MEMORANDUM, PM-602-0174.1 (Oct. 11, 2019), https://www.uscis.gov/sites/default/files/document/memos/Matter_of_E-A-L-O_Adopted_Decision_2019-04_AAO_Oct_11_2019.pdf [<https://perma.cc/L62E-UTZF>]; U.S. CITIZENSHIP AND IMMIGR. SERVS., POLICY MEMORANDUM, PM-602-0173.1 (Oct. 11, 2019), https://www.uscis.gov/sites/default/files/document/memos/Matter_of_A-O-C_Adopted_Decision_2019-03_AAO_Oct_11_2019.pdf [<https://perma.cc/J85V-WAJJ>]; U.S. CITIZENSHIP AND IMMIGR. SERVS., POL’Y MEMORANDUM, PM-602-0175.1 (Oct. 11, 2019), https://www.uscis.gov/sites/default/files/document/memos/Matter_of_D-Y-S-C_Adopted_Decision_2019-02_AAO_Oct_11_2019.pdf [<https://perma.cc/5CZS-WBJL>]. Also note accompanying changes in the policy manual. CATH. LEGAL IMMIGR. NETWORK, INC., COMPARISON CHART—NOVEMBER 2019 USCIS POLICY MANUAL CHANGES TO VOLUME 6, PART J (SPECIAL IMMIGRATION JUVENILE STATUS) 5 (2019) <https://cliniclegal.org/resources/childrens-issues/special-immigrant-jvenile-status/special-immigrant-jvenile-status> [<https://perma.cc/2PVH-L9QD>].

176. *USCIS Clarifies Special Immigrant Juvenile Classification to Better Ensure Victims of Abuse, Neglect and Abandonment Receive Protection*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Oct. 15, 2019), <https://www.uscis.gov/news/news-releases/uscis-clarifies-special-immigrant-jvenile-classification-to-better-ensure-victims-of-abuse-neglect> [<https://perma.cc/Y9FY-N6HU>] [hereinafter *USCIS Clarifies*]; Catholic Legal Immigr. Network, Practice Alert: Special Immigration Juvenile Status Policy Updates and Proposed Regulations, CATH. LEGAL IMMIGR. NETWORK & IMMIGR. LEGAL RES. CTR. (last updated Nov. 6, 2019), <https://cliniclegal.org/resources/childrens-issues/special-immigrant-jvenile-status/practice-alert-special-immigration> [<https://perma.cc/M9EL-JQVK>].

177. *USCIS Clarifies*, *supra* note 176; cf. Sarah Rogerson, *The Politics of Fear: Unaccompanied Immigrant Children and the Case of the Southern Border*, 61 VILL. L. REV. 843, 889–92 (2016) (noting that the “sorting device” of “worthiness” in rhetoric about children arriving at the border “functions as a proxy for race discrimination in modern immigration law”).

178. See *USCIS Clarifies*, *supra* note 176. Cuccinelli had made numerous statements about undocumented immigrants in past positions, such as calling a D.C. pest extermination ordinance “worse than our immigration policy” because under the ordinance “[y]ou can’t break up the rat families . . . [o]r raccoons, and all the rest, and you can’t even kill [them].” Nick Wing, *Ken Cuccinelli Once Compared Immigration Policy to Pest Control, Exterminating Rats*, HUFFPOST (July 26, 2013, 9:37 AM), https://www.huffpost.com/entry/ken-cuccinelli-immigration-rats_n_3658064 [<https://perma.cc/VC79-D35P>].

end of the Trump presidency, so the public never saw how exactly Trump's USCIS would have further weaponized the consent function.

During the Trump administration, USCIS used its consent authority to deny SIJS—or revoke previously approved SIJS petitions—based on allegations that the child's request for state court protection was not “bona fide.”¹⁷⁹ Under the consent standard articulated in the aforementioned 2019 adopted decisions—which was also incorporated into USCIS's policy manual provisions on SIJS—USCIS scrutinizes the “nature and purpose” of the juvenile court proceedings to decide if the “primary purpose in seeking the court decree was to obtain relief from parental abuse, neglect, abandonment, or a similar basis under [state] law, rather than to obtain an immigration benefit.”¹⁸⁰ In practice, it appears that USCIS has conducted this more subjective “nature and purpose” inquiry only in some cases, resulting in disparate treatment of eligible children.¹⁸¹

One trend that began to emerge during the Trump administration was USCIS officers denying SIJS, or revoking approval, based on unsubstantiated gang allegations, claiming that the gang allegations

179. See, e.g., Matter of E-G-R-R, ID# 2331305 5 (AAO Feb. 2, 2019), https://www.uscis.gov/sites/default/files/err/C6%20-%20Dependent%20of%20Juvenile%20Court/Decisions_Issued_in_2019/FEB252019_05C6101.pdf [https://perma.cc/Z8EZ-HYEP] (denying consent where Guatemalan petitioner had obtained Texas dependency order shortly before his 18th birthday, concluding that petitioner had not shown his request for SIJS was “bona fide”); Matter of C-A-A-O, ID# 955014 (AAO Jun. 12, 2018), https://www.uscis.gov/sites/default/files/err/C6%20-%20Dependent%20of%20Juvenile%20Court/Decisions_Issued_in_2018/JUN122018_01C6101.pdf [https://perma.cc/KMN7-LEL8] (denying consent despite concluding that court's determinations were supported by reasonable factual basis because the petitioner had not shown he sought the family court orders primarily to obtain relief from parental abuse, neglect, abandonment, or a similar basis to these grounds).

180. U.S. CITIZENSHIP AND IMMIGR. SERVS., PM-602-0174.1, POLICY MEMORANDUM (2019), https://www.uscis.gov/sites/default/files/document/memos/Matter_of_E-A-L-O_Adopted_Decision_2019-04_AAO_Oct_11_2019.pdf [https://perma.cc/7G3H-95AX]; see CATH. LEGAL IMMIGR. NETWORK, INC., COMPARISON CHART—NOVEMBER 2019 USCIS POLICY MANUAL CHANGES TO VOLUME 6, PART J (SPECIAL IMMIGRATION JUVENILE STATUS) 5 (2019) <https://cliniclegal.org/resources/childrens-issues/special-immigrant-juvenile-status/special-immigrant-juvenile-status> [https://perma.cc/E4XD-9T9E].

181. See Rosa Aguilar, *Children Beyond Borders: Extending Protections for Abandoned, Abused, and Neglected Unaccompanied Children and Youth*, 19 SEATTLE J. SOC. JUST. 547, 565–66 (2021) (noting that USCIS officers sometimes consider irrelevant factors in exercising consent function, such as the “child's demeanor, the fact that the child is in delinquency proceedings rather than dependency proceedings, and the fact that the child is over eighteen but under twenty-one years of age”).

called into question whether the juvenile court made an informed best interest determination. This trend followed the leaked DHS memo playbook of curbing migration from Central America by using the consent function to deny SIJS.¹⁸² Increasingly during the Trump administration, DHS would assert that Latina/o immigrant children were gang members, “using vague criteria and relying on cultural and geographic indicators, with disproportionate racial consequences.”¹⁸³ As Professor Laila Hlass observed, these “broad and subjective criteria can lead to misclassification and racial profiling of youth of color based on how they look and where they live,” which is “compounded by law enforcement over-policing, focusing on certain neighborhoods, and pervasively stopping youth of color.”¹⁸⁴

In the SIJS context, USCIS has raised gang allegations as a basis to deny consent despite the child’s meeting all of the statutory SIJS criteria, which are solely focused on whether a child has been abused, neglected, or abandoned and whether it is in the child’s best interest to remain in the United States and not return to the child’s country of origin. One such example is the case of Jefferson Randolph Flores Zabaleta, a Guatemalan child abandoned by his father at birth who came to the United States at the age of ten to live with his mother.¹⁸⁵ Jefferson applied for SIJS after a New York family court appointed his mother as his guardian and found that he could not reunify with his father due to abandonment and neglect and that it was not in his best interest to return to Guatemala.¹⁸⁶ Immigration officials put a memo in Jefferson’s file stating that he was an MS-13 gang member, justifying the conclusion based on factors including the color of his clothing, a tattoo, and his purported association with gang members.¹⁸⁷ USCIS

182. Second Amended Petition ¶¶ 59, 134, *Saravia v. Whitaker*, ECF No. 164 (N.D. Cal. Nov. 15, 2018) (alleging that USCIS issued NOIDs or NOIRs and revocations for SIJS petitioners based on unsubstantiated gang allegations based solely on clothing, appearance, and associations); *see also* *Flores Zabaleta v. Nielsen*, 367 F. Supp. 3d 208, 214 (S.D.N.Y. 2019) (concluding that USCIS unlawfully denied SIJS petition by withholding consent based on gang allegations—which petitioner challenged as false).

183. Hlass, *The School to Deportation Pipeline*, *supra* note 29, at 720; NERMEEN ARATSU, ANU JOSHI, MAYA LESZCZYNSKI, CAMILLE MACKLER, TALIA PELEG & KIM SYKES, *SWEPT UP IN THE SWEEP: THE IMPACT OF GANG ALLEGATIONS ON IMMIGRANT NEW YORKERS* 32 (2018), https://nyic.org/wp-content/uploads/2018/06/SweptUp_Report_Final-1.pdf [<https://perma.cc/MQQ9-LX47>].

184. Hlass, *The School to Deportation Pipeline*, *supra* note 29, at 733.

185. *Flores Zabaleta*, 367 F. Supp. 3d at 212.

186. *Id.* at 214.

187. *Id.*

ultimately denied Jefferson's SIJS petition, concluding that consent was not warranted because he had not shown that the New York family court was aware of his alleged "gang activities" when it made its best interest finding about him.¹⁸⁸ While Jefferson's denial was ultimately overturned through successful federal court litigation,¹⁸⁹ most SIJS children lack the resources to bring a federal court challenge. Unsurprisingly, during the Trump administration, denials and revocations of SIJS petitions increased significantly.¹⁹⁰

Denying SIJS to an otherwise-eligible child, about whom a juvenile court has made the required findings, based on unsubstantiated gang allegations illustrates how USCIS's interpretation of the consent function risks racially discriminatory treatment. Law enforcement's identification of an individual as "gang associated" is notoriously nebulous, frequently resulting in erroneous conclusions of gang involvement and disproportionately impacting Black and Latina/o youth.¹⁹¹

USCIS ultimately abandoned the practice of denying consent based on gang allegations, after years of litigation in a case called *Saravia v. Barr*.¹⁹² concluded in a 2021 settlement agreement.¹⁹³ The *Saravia* case

188. *Id.*

189. *Id.* at 219.

190. Ashlyn Still & Mica Rosenberg, *Shrinking Projections*, U.S. CITIZENSHIP & IMMIGR. SERVS. (last updated Jul. 2019), <https://graphics.reuters.com/USA-IMMIGRATION-ABUSE/010090X114V/index.html> [<https://perma.cc/YS95-CVRZ>]; DEP'T OF HOMELAND SECURITY, U.S. CITIZENSHIP & IMMIGR. SERVS., OFFICE OF PERFORMANCE & QUALITY, NUMBER OF I 360 PETITIONS FOR SPECIAL IMMIGRATION WITH A CLASSIFICATION OF SPECIAL IMMIGRANT JUVENILE (SIJ) BY FISCAL YEAR, QUARTER AND CASE STATUS: FISCAL YEARS 2010–2021, https://www.uscis.gov/sites/default/files/document/data/I360_sij_performancedata_fy2021_qtr3.pdf [<https://perma.cc/5A93-F8MK>].

191. Martitza Perez, *Mistaken Identity: The Dangers of Sweeping Gang Labels for Black and Latino Youth* (Sept. 13, 2018), <https://www.americanprogress.org/article/mistaken-identity> [<https://perma.cc/8VYJ-PK7L>] (noting "disproportionate racial impact of gang identification" and that "affixing gang labels is often used to criminalize black and Latino youth"); *Countering Trump's Nativist Narrative About Immigrant Youth*, IMMIGR. LEGAL RESOURCE CTR., https://www.ilrc.org/sites/default/files/resources/counter_trump_nativist_narrative_immig_youth-20180518.pdf [<https://perma.cc/3M8B-9U9N>]; Emmanuel Felton, *Gang Databases are a Life Sentence for Black and Latino Communities*, PAC. STANDARD (Mar. 15, 2018), <https://psmag.com/social-justice/gang-databases-life-sentence-for-black-and-latino-communities> [<https://perma.cc/Y6MW-5NLT>] (calling gang databases a "prime tool for racial profiling").

192. 3:17-cv-03615 (N.D. Cal. Sept. 17, 2020).

193. See, e.g., Settlement Agreement at 18–19, *Saravia v. Barr*, 3:17-cv-03615 (N.D. Cal. Sept. 17, 2020); *Saravia v. Sessions*, 905 F.3d 1137 (9th Cir. 2017), *aff'g* 280 F. Supp. 3d 1168 (N.D. Cal. 2017).

challenged, inter alia, immigration authorities' practice of using unsubstantiated claims of gang affiliation to unlawfully re-detain unaccompanied children whom immigration officials had previously released to sponsors, to deny their SIJS petitions, or to revoke previous SIJS approvals.¹⁹⁴ After the plaintiffs prevailed on a preliminary injunction, the government acceded to a final settlement of the case wherein, inter alia, USCIS agreed to stop withholding consent in SIJS adjudications based on the fact that a state court did not sufficiently consider evidence of a petitioner's gang affiliation.¹⁹⁵

While the banning of this flavor of problematic consent denials is a significant step, President Biden's USCIS has not otherwise disclaimed the flawed consent interpretation, which invites a subjective inquiry into the petitioner's primary purpose.¹⁹⁶ Instead, on March 8, 2022, USCIS published a final rule updating the SIJS regulations, which, for the first time in the SIJS statute's history, included a regulatory provision interpreting the statutory consent function. Disappointingly, the rule cemented the agency's problematic "primary purpose" test for the consent inquiry, stating that "[f]or USCIS to consent, the request for SIJ classification must be bona fide, which requires the petitioner to establish that a primary reason the required juvenile court determinations were sought was to obtain relief from parental abuse, neglect, abandonment, or a similar basis under State law."¹⁹⁷ In doing so, USCIS disregarded the recommendations of the Citizenship and Immigration Services Ombudsman and numerous commenters urging the agency to disclaim reliance on the legislative history of the repealed statute and accord proper deference to the state court determination in accordance with Congress's intent. Instead, USCIS's new consent

194. Second Amended Complaint ¶¶ 86, 92–93, *Saravia*, 905 F.3d at 1140–41.

195. See Settlement Agreement, *supra* note 193, at 1918–19; *Policy Alert*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Mar. 18, 2021), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210318-SIJ.pdf> [<https://perma.cc/ZP2K-RAXK>].

196. See, e.g., *Matter of Appeal of National Benefits Center Decision*, No. 6529635 at 2, 4–5 (AAO Apr. 22, 2021), https://www.uscis.gov/sites/default/files/err/C6%20-%20Dependent%20of%20Juvenile%20Court/Decisions_Issued_in_2021/APR222021_01C6101.pdf [<https://perma.cc/WBQ4-9KPJ>] (denying consent in case of orphan with a juvenile court dependency order, stating that the order did not address petitioner's request to grant custody to his cousin); *Doe v. Mayorkas*, No. 20-2521, 2022 WL 424978, at *7–8 (D.D.C. Feb. 11, 2022) (granting summary judgment to plaintiff challenging USCIS's denial of consent for not being "bona fide" because the court ordered order referenced the SIJS and the Immigration and Nationality Act).

197. Special Immigrant Juvenile Petitions, 87 Fed. Reg. 13,066, 13,111 (Mar. 8, 2022) (codified at 8 C.F.R. § 204.11(b)(5)).

provision doubles down on the “bona fide” standard, which empowers individual adjudicators to scrutinize the subjective motivations of the petitioner, even when the state court order has the required findings and is supported by a reasonable factual basis. It remains to be seen whether Biden’s USCIS, in response to these new regulations, will modify its consent adjudication practices; advocates certainly hope that USCIS will move away from a subjective inquiry and focus on objective criteria.¹⁹⁸ Unfortunately, because the regulations embrace the “bona fide,” motivation-based framing derived from the repealed statute, even if consent adjudications do improve under Biden’s USCIS, the regulatory language now codified empowers future anti-immigrant administrations to again weaponize the consent function.

In summary, by allowing individual USCIS adjudicators to use the consent function to deny SIJS to an otherwise-eligible child based on the officers’ subjective opinion about the child’s primary intent in seeking state court protection, the consent function invites disparate treatment of similarly situated applicants and gives cover for discriminatory treatment of petitioners based on race and national origin.

B. The SIJS Backlog and Racial Quota System

Children are subject to the racial hierarchy of U.S. immigration law as enacted through the immigrant visa system with its purportedly race-neutral country of origin visa quotas. This is particularly clear in the context of the SIJS backlog.¹⁹⁹ As of April 2021, there were over 44,000 immigrant children from El Salvador, Guatemala, Honduras, and Mexico trapped in the SIJS backlog, many of whom are Black, brown, and Indigenous.²⁰⁰ The SIJS backlog prevents those children from becoming LPRs for years despite being approved for SIJS.

198. The final regulation’s provision on consent is an improvement from the proposed version in at least two ways. First, it retreats from the agency’s previous position in the proposed regulation that the consent function involves an exercise of discretion. Second, it uses the language “a primary purpose” rather than “the primary purpose,” recognizing that a child could have multiple motives for seeking state court relief. Further, the regulation’s provisions about what evidence a petitioner should provide to support an exercise of consent do not appear to include evidence that would go to a petitioner’s subjective motivations. *See id.* § (d)(5).

199. While children also experience the racial impacts of similar geographic limits in the family-based immigration system, for the purposes of this Article, we are focusing on the SIJS context.

200. DAVIDSON & HLASS, *supra* note 17, at 2.

To analyze the SIJS backlog through a racial justice lens is to understand that the geographic limitations of the visa allocation system serve essentially as a racial quota system with disparate impacts on immigrant children from El Salvador, Guatemala, Honduras, and Mexico and all survivors of parental abuse, abandonment, and neglect.²⁰¹ As of April 2021, the quota impacted eighty-six percent of all SIJS petitioners who filed in that fiscal year, creating a separate caste system within the SIJS program for children of color from El Salvador, Guatemala, Honduras, and Mexico.²⁰² A racial justice analysis also requires an understanding of how the SIJS backlog feeds immigrant children who have already experienced trauma into a broader school to deportation pipeline and how their extended legal limbo leads to the precarity and erasure of those same immigrant children from public life. To that end, this Section first explores the SIJS employment-based visa allocation system as a racial quota system, then examines the SIJS backlog as part of the broader school to deportation pipeline and nexus of racial harm.

1. *The racial quota system*

Historically, SIJS-eligible children were able to apply for LPR status and accompanying work permits concurrently with their SIJS petitions. Children would receive a decision on their SIJS petition and, at the same time or shortly thereafter, a decision on their work permit and LPR status application.²⁰³ This process had a typical span of six months to one year, but that all changed in May 2016 when the SIJS backlog became a reality.²⁰⁴ The backlog emerged when the numerical and per-country limits within the employment-based fourth preference category that year were reached for certain countries. This meant that SIJS children from the higher migration countries of El Salvador, Guatemala, Honduras, and Mexico had no visa immediately available

201. Stephen H. Legomsky, *Immigration, Equality and Diversity*, 31 COLUM. J. TRANSNAT'L L. 319, 321 (1993) (arguing for “both geographic and ethnic neutrality” in immigration selection policies).

202. U.S. CITIZENSHIP AND IMMIGR. SERV., FOIA PRODUCTION COW2021—1524 (CD-ROM, Sept. 2021) [hereinafter FOIA PRODUCTION COW2021—1524].

203. DAVIDSON & HLASS, *supra* note 17, at 10.

204. BUREAU OF CONSULAR AFFAIRS, U.S. DEPT. OF STATE, VISA BULL. NO. 92-9, IMMIGRANT NUMBERS FOR MAY 2016 (2016), https://travel.state.gov/content/dam/visas/Bulletins/visabulletin_May2016.pdf [<https://perma.cc/RJT3-RJSU>] (In May 2016 the priority date for El Salvador, Guatemala, and Honduras was January 2010).

to them.²⁰⁵ As a result, these children were prohibited from immediately applying for LPR status and the work permit available to adjustment applicants.²⁰⁶ The sudden visa retrogression to January 1, 2010, effectively halted visa processing for SIJS children from El Salvador, Guatemala, Honduras, and Mexico for the remainder of the fiscal year.²⁰⁷ By applying a priority date or, in other words, by activating the SIJS backlog, the U.S. government interrupted the pathway to permanency and stability for children from El Salvador, Guatemala, Honduras, and Mexico despite the United States' role in contributing to the underlying instability in these countries.

The backlog grew to more than 63,000 children in April 2020.²⁰⁸ Although the backlog declined the following year, presumably due to the impacts of COVID-19 on border closures and migration patterns,²⁰⁹ more than 44,000 children remained in the SIJS backlog as of April 2021.²¹⁰

205. At the onset of the backlog, per-country limits also impacted children from India. This backlog cleared up within less than six months and since that time has only impacted children from El Salvador, Guatemala, Honduras, and Mexico.

206. *Employment-Based Fourth Preference (EB-4) Visa Limits Reached for Special Immigrants From El Salvador, Guatemala and Honduras*, U.S. CITIZENSHIP & IMMIGR. SERVS. <https://www.uscis.gov/archive/employment-based-fourth-preference-eb-4-visa-limits-reached-for-special-immigrants-from-el-salvador> (June 20, 2016) [<https://perma.cc/YDG2-97UK>] (articulating that those three countries had reached their respective visa limits for the fiscal year of 2016).

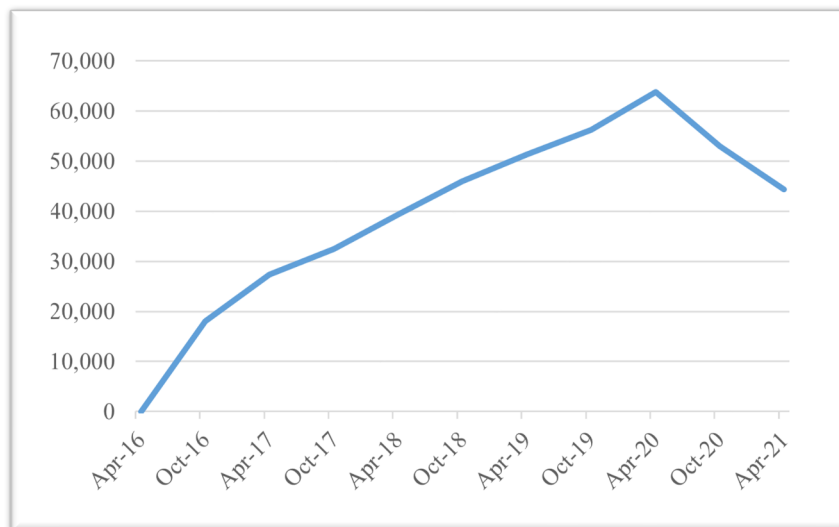
207. *Id.*

208. FOIA PRODUCTION COW2021—1524, *supra* note 202.

209. The impact of COVID-19 on the entry of migrants at the southern border, as well as an excess in visas from the family-based categories that could not be allocated due to border closures and were reallocated to other categories like EB-4, may have led to the decrease in the backlog.

210. DAVIDSON & HLASS, *supra* note 17, at 9 (citing to FOIA PRODUCTION COW2021—1524, *supra* note 202).

Figure 1. SIJS Backlog, October 1st and April 1st from FY 2016 to 2021²¹¹

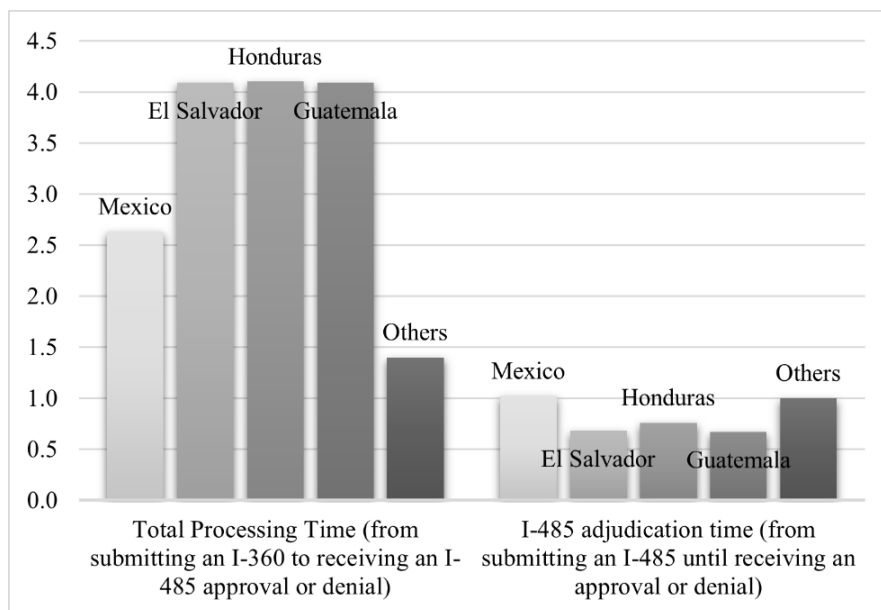


In March of 2022, the visa bulletin—which had slowly progressed since its nadir in May 2016 to a 2019 date by early 2022—retrogressed two years for SIJS children from El Salvador, Guatemala, and Honduras, bringing their priority date back to 2017. Children from El Salvador, Guatemala, and Honduras who submitted their SIJS petition five years ago can only now apply for green cards, while Mexican children who submitted their SIJS petition almost two years ago are now allowed to apply.²¹² In contrast, SIJS children from all other countries have no waiting period and can immediately file for LPR status and an accompanying work permit. On average, SIJS children not subjected to the backlog receive a decision on their LPR status applications less than a year after they initially file the SIJS petition.

211. MPI and Laura Harjanto provided the analysis of data on SIJS petitions and LPR applications, obtained from USCIS through a FOIA request. FOIA PRODUCTION COW2021—1524, *supra* note 202.

212. Because there is no limit to how many SIJS petitions are filed, it is not possible to estimate exactly how long it will take for a priority date to become current using the visa bulletin. See BUREAU OF CONSULAR AFFS., U.S. DEP'T OF STATE, VISA BULL. NO. 63-10, IMMIGRANT NUMBERS FOR MARCH 2022 (2022), https://travel.state.gov/content/dam/visas/Bulletins/visabulletin_March2022.pdf [<https://perma.cc/D72Q-HTW4>].

Figure 2. Total SIJS Petition and LPR Application Processing Times²¹³



While some legal scholars, including the Authors, have framed the categorization of SIJS, a humanitarian status, as an employment-based visa and the corresponding quota as a “legislative accident”²¹⁴ or an “oddity,”²¹⁵ that characterization obscures the explicit race-based immigration restrictions that the United States has historically imposed. It also ignores how race-neutral immigration laws have prioritized white mobility and assisted in racial exclusion. The SIJS quota and the backlog it creates are stark and explicit examples of how a race-neutral law, purportedly enacted to create equality among applicants, ultimately upholds the historical and present exclusion of certain immigrants from El Salvador, Guatemala, Honduras, and Mexico.

213. Median processing times in years are for SIJS cases that received a final LPR approval or denial in FY 2020 or FY 2021, through April 2021. MP and Laura Harjanto provided analysis of the data on SIJS and LPR applications, obtained from USCIS through a FOIA request. FOIA PRODUCTION COW2021—1524, *supra* note 202.

214. DAVIDSON & HLASS, *supra* note 17, at 11, 15.

215. STEPHEN H. LEGOMSKY & DAVID B. THRONSON, IMMIGRATION AND REFUGEE LAW AND POLICY 1411 (7th ed. 2019) (“The provision for SIJS is oddly placed under the “special immigrant” sub-part of the employment-based fourth preference.”).

SIJS children are further subordinated by their placement within the fourth preference employment-based visa category, which forces them to compete against skilled foreign workers for an already limited number of visas.²¹⁶ The fourth preference category is a catch-all provision for “special immigrants,” including religious workers and translators with the U.S. armed forces, among many others.²¹⁷ Despite the breadth of immigrants included in this classification and changes in migration patterns, only 7.1% of the overall employment-based visas available each year are allocated to the category.²¹⁸

The impact of the quota and the years-long wait for stability and permanency on a child surviving trauma cannot be equated with the impacts of visa caps on a nun coming from Belgium to work in the United States. As SIJS children wait for their employment-based visas, they are subject to myriad collateral impacts that exacerbate their trauma and threaten their lives and well-being, including the school to deportation pipeline.²¹⁹ Children in foster care are unable to achieve independent adulthood and at times face homelessness, children who cannot work and cannot receive financial aid for college abandon their educational dreams, and so many youth, unable to access the protection of work authorization, are exploited, discriminated against, and trafficked.²²⁰

While immigration law sets forth visa limits by country rather than region, it is notable that the State Department groups together Special Immigrant Juveniles from El Salvador, Guatemala, and Honduras in the visa bulletin, despite the fact that these three countries have unique migration patterns.²²¹ Treating El Salvador, Guatemala, and Honduras

216. BUREAU OF CONSULAR AFFS., U.S. DEP’T OF STATE, VISA BULL. NO. 61-10, IMMIGRANT NUMBERS FOR JANUARY 2022 (2022), https://travel.state.gov/content/dam/visas/Bulletins/visabulletin_january2022.pdf [<https://perma.cc/8JUB-RB8F>] (describing the employment-based preferences for employment-based immigrant visas in five categories).

217. 8 U.S.C. §§ 1101(a)(27), 1152(a)(2).

218. 8 U.S.C. § 203(b)(4); WILLIAM A. KANDEL, CONG. RSCH. SERV., R42866, PERMANENT LEGAL IMMIGRATION TO THE UNITED STATES: POLICY OVERVIEW 5 (2018), <https://fas.org/sgp/crs/homesec/R42866.pdf> [<https://perma.cc/G4E6-6SMX>].

219. DAVIDSON & HLASS, *supra* note 17, at 36.

220. *See id.* at 27, 41.

221. Data collected by Customs and Border Protection on the number of apprehended minors from each country can be extrapolated to better understand the increase in migration:

COUNTRY	FY 2013	FY 2014	FY 2015	FY 2016
El Salvador	5,990	16,404	9,389	17,512

as a regional unit with respect to SIJS-based visa processing, despite each country being entitled to the same percentage of visas,²²² seems to be a reflection of broader U.S. immigration policy trends that act to exclude Latina/o migrants from those three countries as well as Mexico.

Harsha Walia has identified that the purported race-neutral language of “border surge”—is actually deeply racially coded,” and the policing of the southern border acts as one means of racial exclusion.²²³ In conjunction with the governments in the region, the United States has funded information campaigns aimed at discouraging migration from Central America and Mexico by highlighting potential perils of the journey and attempting to explain the complexity of the U.S. immigration process.²²⁴ Most recently, we saw Vice President Kamala Harris in Guatemala at a press conference repeatedly stating, “Do not come. Do not come,” while purportedly on a trip to address the root causes of migration.²²⁵ Other strategies include bolstering economic

Guatemala	8,068	17,057	13,589	18,913
Honduras	6,747	18,244	5,409	10,468

United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016, U.S. CUSTOMS & BORDER PROT. (June 17, 2019), <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016> [<https://perma.cc/T44E-E6GA>]; CONG. RSCH. SERV., IF11151, CENTRAL AMERICAN MIGRATION: ROOT CAUSES AND U.S. POLICY (2021), <https://sgp.fas.org/crs/row/IF11151.pdf> [<https://perma.cc/W6BU-4WQW>]; *Refugee Data Finder*, UNITED NATIONS HIGH COMMISS’R FOR REFUGEES, <https://www.unhcr.org/refugee-statistics/download/?url=gSj2pM> [<https://perma.cc/4JJW-ADHQ>].

222. See Dalia Castillo-Granados, *A Long Wait for Special Immigrant Juveniles Means a Risk of Deportation*, AM. BAR ASS’N (Feb. 23, 2021), https://www.americanbar.org/groups/public_interest/immigration/generating_justice_blog/a-long-wait-for-special-immigrant-juveniles-means-a-risk-of-depo (explaining that “[e]ach country has a 7 percent visa (green card) cap, meaning each country is afforded about 696 visas per year”).

223. Lois Beckett, ‘A System of Global Apartheid’: Author Harsha Walia on Why the Border Crisis Is a Myth, *GUARDIAN* (Apr. 7, 2021, 6:00 AM), <https://www.theguardian.com/world/2021/apr/07/us-border-immigration-harsha-walia>.

224. Lindsay M. Harris, *Contemporary Family Detention and Legal Advocacy*, 21 HARV. LATINX L. REV. 136, 146 (2018); Priscilla Alvarez, *US Is Running More Than 30,000 Radio Ads a Month to Deter Migration from Central America*, CNN (July 14, 2021, 8:13 PM), <https://www.cnn.com/2021/07/14/politics/migration-central-america-radio-ads/index.html> [<https://perma.cc/MS66-L2C5>].

225. Brian Naylor & Tamara Keith, *Kamala Harris Tells Guatemalans Not to Migrate to the United States*, NPR (June 7, 2021, 10:55 PM) <https://www.npr.org/2021/06/07/1004074139/harris-tells-guatemalans-not-to-migrate-to-the-united-states> [<https://perma.cc/R58G-ZUV5>].

assistance to Mexico so that the Mexican government can more effectively stop or deport Central American migrants before they cross the U.S.-Mexico border.²²⁶ All of these rhetorical, economical, and political maneuverings to limit the entry of immigrants across the southern border cannot be divorced from the implementation of the SIJS quota, which acts to do the same. Despite the hardships for these children while they wait in the backlog and advocacy efforts to elevate the issue,²²⁷ Congress has failed to prioritize fixing this supposed legislative “accident,” instead choosing to focus most recently on the exemption from visa caps of other employment- and family-based visa applicants²²⁸ and the appropriation of over 250 million dollars towards border surveillance.²²⁹ These choices reinforce Congress’s devaluation of children trapped in the SIJS backlog as well as the U.S. government’s exclusionary policy when it comes to the southern border. In the absence of congressional action, in March of 2022, six years into the backlog, the Biden administration issued a new deferred action policy for SIJS youth impacted by “visa unavailability,” attempting to mitigate the harms of the quota system by providing work authorization and protections from deportation for some impacted children.²³⁰ While this new development is monumental, it does not resolve the underlying

226. Nick Miroff & Mary Beth Sheridan, *As U.S. Seeks to Outsource Immigration Enforcement, Mexico Gains Leverage*, WASH. POST (May 3, 2021, 6:00 AM), https://www.washingtonpost.com/national/mexico-immigration-enforcement-leverage/2021/05/02/ca2af3aa-a854-11eb-b166-174b63ea6007_story.html [https://perma.cc/9RRV-FAVJ].

227. Rachel Davidson & Laila Hlass, *Any Day They Could Deport Me: Immigrant Children in Legal Purgatory*, Ms. Magazine (Dec. 14, 2021) <https://msmagazine.com/2021/12/14/sijs-immigrant-children-special-immigrant-juvenile-status-backlog> [https://perma.cc/8FDN-D4LS]; Lauren Aronson, Theo Liebmman, & Andrea Ramos, *Biden Could Protect Tens of Thousands of Abused Immigrant Children with One Small Fix*, SLATE (June 30, 2021) <https://slate.com/news-and-politics/2021/06/biden-sijs-humanitarian-status-immigration.html> [https://perma.cc/2RRA-EDV6].

228. H.R. 5376, 117th Cong. § 60002 (2021-2022); see *Featured Issue: Immigration Reforms Through Budget Reconciliation*, AM. IMMIGR. LAWS. ASS’N (Jan. 11, 2022), <http://www.aila.org/advo-media/issues/all/featured-issue-immigration-reforms-through-budget> [https://perma.cc/HD4K-AW98].

229. HOUSE APPROPRIATIONS COMM., FUNDING FOR THE PEOPLE 1 (2021), <https://appropriations.house.gov/sites/democrats.appropriations.house.gov/files/Homeland%20Security.pdf> [https://perma.cc/65VV-DN8G].

230. U.S. CITIZENSHIP & IMMIGR. SERV., USCIS POLICY ALERT: SPECIAL IMMIGRANT JUVENILE CLASSIFICATION AND DEFERRED ACTION 2 (2022), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220307-SIJAndDeferredAction.pdf> [https://perma.cc/EL2S-BXPT].

issue of the SIJS quota and the years of limbo it engenders. It does not bring SIJS children any closer to LPR status and the permanency and stability that status affords. Moreover, USCIS has not explained in any detail how it will make deferred action determinations under the policy except to emphasize that they will be discretionary and conducted on a “case-by-case” basis. While the policy notes that a SIJS approval will be considered as a positive factor, it does not articulate the “negative factors” that could cause USCIS to deny SIJS children deferred action. The decision to treat children with approved SIJS petitions differently depending on how the agency decides to exercise its discretion about each individual child’s worthiness opens the door to biased decision-making on the part of individual adjudicators. The government’s choice to make the deferred action discretionary rather than providing work authorization and protection from removal to all children with approved SIJS petitions, further subjects SIJS children in the backlog to the same bias inherent in the other discretionary processes described in this Article. Specifically, the policy’s structure raises the risk that adjudicators will rely on prejudicial evidence, including contact with the racist criminal legal system or questionable gang allegations as a means to deny deferred action despite a child’s approved SIJS petition. As each child has already undergone the scrutiny of a state juvenile court as well as USCIS before receiving a SIJS approval notice, there is no need for a separate additional discretionary process for this program and the discretionary nature of the protection leaves an opening for certain Latina/o SIJS children from El Salvador, Guatemala, Honduras, and Mexico to be left out.

2. *Precarity and the school to deportation pipeline*

Leaving SIJS children in legal limbo for years creates greater opportunity for them to fall victim to the school to deportation pipeline. When considered in concert with the racist rhetoric surrounding the “surge” of migrant children at the border,²³¹ and the articulated need to keep unaccompanied children from crossing it,²³² the school to deportation pipeline can be seen as another means of excluding Black and brown children from obtaining permanent

231. Grace Panetta, *AOC Says Referring to Migrants Coming to the US as a “Surge” Is a White Supremacist Dog Whistle*, BUS. INSIDER (Mar. 31, 2021, 10:36 AM), <https://www.businessinsider.com/aoc-calling-migrants-surge-invokes-white-supremacist-ideas-2021-3> [https://perma.cc/SE28-8XFS].

232. Exhibit 5 Draft Memorandum, *supra* note 174, at 1.

stability and immigration relief in the United States, furthering precarity in the lives of these children.

The government's lack of protection and care for immigrant children, which is an extension of the over-policing by law enforcement and immigration officials that animates the broader school to deportation pipeline, acts to limit immigrant children of color's access to education, employment, and the fulfilment of their dreams. Tellingly, in the context of the SIJS backlog, children from El Salvador, Guatemala, and Honduras with pending LPR status applications are disproportionately subjected to immigration court "removal proceedings,"²³³ where ICE attorneys are seeking their deportation, as compared to children from other countries.²³⁴ Many children from countries impacted by the backlog are apprehended at the border and placed in removal proceedings, while others end up in immigration court when caught up in the crosshairs of over-policing and immigration enforcement via the school to deportation pipeline. Because of the backlog, these children must deal with a long and unnecessary court process after being granted SIJS and before they can adjust to LPR status. Specifically, only twenty-seven percent of SIJS children with pending LPR status applications from countries other than El Salvador, Guatemala, and Honduras were in removal proceedings.²³⁵ Meanwhile, more than eighty percent of children from El Salvador, Guatemala, and Honduras who had approved SIJS petitions and were seeking LPR status were in removal proceedings.²³⁶ Despite these children having approved SIJS petitions, many ICE attorneys refuse to exercise prosecutorial discretion or dismiss their cases, choosing to keep them on active dockets and aggressively pursuing their removal.²³⁷

While recent guidance from the ICE Office of the Principal Legal Advisor (OPLA) directing that children with pending SIJS petitions should generally be considered to be non-priority cases until USCIS adjudicates the SIJS petition,²³⁸ this guidance leaves many children,

233. DAVIDSON & HLASS, *supra* note 17, at 6.

234. *Id.*

235. *Id.* at 6.

236. *See id.*

237. This evidence is anecdotal and based on the Authors' own experiences and conversations with colleagues in the field.

238. Memorandum from Kerry E. Doyle, Principal Legal Advisor, ICE OPLA, Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws

especially those in the backlog, vulnerable to deportation at the discretion of individual judges.

*Table 1. SIJS Children with Pending LPR Status Applications in Removal Proceedings*²³⁹

	Mexico	El Salvador	Honduras	Guatemala	Other	All
Total applicants	3,630	5,822	3,969	4,459	7,053	24,933
In removal proceedings	1,021	4,919	3,646	4,034	1,879	15,499
Share in removal proceedings	28%	84%	92%	90%	27%	62%

For these large numbers of SIJS backlog-impacted children in removal proceedings, the broad discretion afforded to individual immigration judges presiding over removal proceedings, alongside changing policies, leads to these children facing a real risk of deportation. A judge's broad discretionary authority creates an environment ripe for implicit bias, which may affect judges' decision-making.²⁴⁰ Moreover, the immigration court experience itself is daunting enough for SIJS children. The ongoing, years-long, tangible threat of deportation can result in chronic anxiety and fear for children with already compounded traumas.²⁴¹

The SIJS backlog and extended legal limbo also increases the precarity of immigrant children from El Salvador, Guatemala, Honduras, and Mexico by making them vulnerable to political whims and racist practices writ large. For example, starting in February 2018, based on internal guidance, the Trump administration began systematically denying SIJS for petitioners from certain states who were over age eighteen at the time a state court predicate order was issued.²⁴²

and the Exercise of Prosecutorial Discretion at 5 n.8 (Apr. 3, 2022) https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_guidanceApr2022.pdf [<https://perma.cc/FK2L-C4PP>].

239. This includes applicants who submitted their LPR application (Form I-485 based on a SIJS approval) on or after May 2016. MPI and Laura Harjanto provided analysis of data of SIJS petitions and LPR applications, obtained from USCIS through a FOIA. FOIA PRODUCTION COW2021—1524, *supra* note 202.

240. Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 431 (2011).

241. DAVIDSON & HLASS, *supra* note 17, at 21.

242. *See id.*, at 35.

The policy cannot be divorced from the rhetoric and public animus of the then-President regarding children applying for SIJS. Federal judges declared the practice unlawful in October 2018 in California²⁴³ and in March 2019 in New York.²⁴⁴ USCIS stopped applying the policy nationwide in October 2019 but not before thousands of cases were unlawfully denied.²⁴⁵

Correspondingly, USCIS data shows a steep increase in the number of SIJS petitions being targeted with RFE notices from USCIS requiring the submission of additional evidence to thwart potential denial of the petition.²⁴⁶ There was also a steep increase in the number of SIJS children receiving NOIDs, which indicate the agency plans to deny the petition unless the petitioner can address key areas with more evidence or additional legal argument.²⁴⁷

RFE notices spiked after a relatively uneventful period from 2012 to 2016.²⁴⁸ From 2012 to 2016, the rate of SIJS children receiving an RFE hovered between two and five percent, but in 2017 that number rose to twenty-seven percent overall for SIJS children.²⁴⁹ In 2018, this overall RFE rate for SIJS children peaked at thirty-five percent.²⁵⁰ While the RFE rate has declined somewhat under the Biden administration, it remains notably higher than it was before the Trump era.²⁵¹ Similarly, from 2012 to 2016, the NOID rates for SIJS petitions were between zero and two percent.²⁵² In 2017, the rate doubled to four percent and then multiplied in 2018 four-fold to sixteen percent of all petitioners receiving NOIDs.²⁵³

243. *J.L. v. Cissna*, 341 F. Supp. 3d 1048, 1070–71 (N.D. Cal. 2018).

244. *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350, 383 (S.D.N.Y. 2019).

245. U.S. CITIZENSHIP & IMMIGR. SERV., PA-2019-08, POLICY ALERT: SPECIAL IMMIGRANT JUVENILE CLASSIFICATION 3 (2019), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20191119-SIJ.pdf> [<https://perma.cc/U5SS-Q4FS>].

246. *See* Table 2 on the next page.

247. *See* Table 3 on the next page.

248. *See* Table 2 on the next page.

249. *See id.*

250. *See id.*

251. *See id.*

252. *See* Table 3 on the next page.

253. *Id.*

*Table 2. “Request for Evidence” Rate for SIJS Petitions*²⁵⁴

Fiscal year of RFE Issuance	RFE Rate for all SIJS petitions
2012	4%
2013	3%
2014	4%
2015	5%
2016	2%
2017	27%
2018	35%
2019	23%
2020	18%
2021 (through April)	14%

254. MPI and Laura Harjanto provided analysis of data on SIJS petitions and LPR applications, obtained from USCIS through a FOIA request. FOIA PRODUCTION COW2021—1524, *supra* note 202.

*Table 3. “Notice of Intent to Deny” Rate for SIJS Petitions*²⁵⁵

Fiscal year of NOID Issuance	NOID rate for all SIJS petitions
2012	0%
2013	0%
2014	2%
2015	2%
2016	2%
2017	4%
2018	16%
2019	9%
2020	4%
2021 (through April)	4%

Ultimately the backlog and the corresponding extended length of time a child is in legal limbo adds to the precarity of SIJS children’s lives, not only making them vulnerable to over-policing, which may lead to deportation, but also making them more susceptible to changing administrative policies, such as the SIJS denials authorized by the Trump administration.²⁵⁶ This convergence of risks can be understood to be part and parcel of the school to deportation pipeline.

The backlog contributes to children and youth of color’s extended immigration vulnerability. Due to their race, age as adolescents, trauma, and immigration status during this period of time, some of the children in the SIJS backlog will experience added vulnerabilities when they are overpoliced in schools and neighborhoods by law enforcement and immigration agents, which may lead to detention and deportation. Furthermore, the collateral impacts of the backlog

255. MPI and Laura Harjanto provided analysis of data on SIJS petitions and LPR applications, obtained from USCIS through a FOIA request. FOIA PRODUCTION COW2021—1524, *supra* note 202.

256. SARAH PIERCE & JESSICA BOLTER, MIGRATION POL’Y INST., DISMANTLING AND RECONSTRUCTING THE U.S. IMMIGRATION SYSTEM: A CATALOG OF CHANGES UNDER THE TRUMP PRESIDENCY 3, 64, 78, 80–81 (2020), https://www.migrationpolicy.org/sites/default/files/publications/MPI_US-Immigration-Trump-Presidency-Final.pdf [<https://perma.cc/GD8S-GRNH>].

act as an erasure of children and youth from El Salvador, Guatemala, Honduras, and Mexico from public life by barring them from lawful work and making higher education inaccessible. The constant fear and anxiety caused by years in limbo and vulnerability to deportation wreak havoc on the emotional world of children. Tatiana, a SIJS backlog-impacted child shared, “To know that . . . anything can happen [while in the backlog], ICE sees us and they ask us . . . and tell us: *you’re going back to your country*. That was my biggest fear.”²⁵⁷ As a result of this fear, SIJS children feel less comfortable in public spaces. In the words of Chris, a SIJS backlog-impacted child who left Honduras at the age of sixteen and currently lives in California, “If I had my green card[,] I’d feel different . . . I’d walk around, I’d feel more safe going out . . . because right now when I go out to San Francisco, I don’t feel very safe.”²⁵⁸

Until the March 2022 Biden administration policy providing work authorization for SIJS youth in the backlog, SIJS youth could not seek work permits as they waited in the backlog either.²⁵⁹ “As the years pass[,] these young people transition into adulthood without legal permission to work,” forcing them into the unregulated labor economy and “exposing them to trafficking and labor abuse, the [types of] harms that SIJS was created to protect them from.”²⁶⁰ Young people who can find jobs report unsafe working conditions, wage theft, and even forced labor.²⁶¹ In the words of Fernando, who left Guatemala at age fifteen and is currently in the SIJS backlog, “I think the hardest thing is the work part. Because you have to work to live, so without papers it’s very difficult . . . they discriminate against you and treat you poorly.”²⁶²

The inability to work,²⁶³ coupled with a lack of access to federal financial aid for college, which cannot be accessed until a SIJS youth finally receives a green card, further push SIJS children and youth outside of public life, as youth give up on their dreams of higher education, forgoing applying or dropping out when the bills come.

257. DAVIDSON & HLASS, *supra* note 17, at 22.

258. *Id.*

259. *Id.* at 12. At time of publication, implementation of this policy had just begun and so it remains to be seen how long it will take for youth to have access to work authorization.

260. *Id.*

261. *Id.*

262. *Id.* at 18.

263. The new USCIS deferred action policy issued in March 2022 will provide work authorization to SIJS youth in the backlog.

The associated inability to transition into independent adulthood further marginalizes and makes precarious the lives of children in the backlog. Where the backlog does not lead to the physical deportation of children, it perpetuates discrimination in their lives by forcing them into the shadows, straining their economic potential, and freezing them in time, accomplishing the U.S. immigration system's racial hierarchy by limiting the number and presence of Salvadoran, Guatemalan, Honduran, and Mexican immigrants in American society and life.

C. How Discretion and Inadmissibility Grounds Cause Racialized Harm

Another aspect of SIJS protection that scholars should analyze within a racial justice framework is SIJS children's pathway to LPR status.²⁶⁴ The current structure highlights how the continuing racist policing and criminal legal systems cause harm to SIJS children seeking a green card. The harm stems from statutes created by Congress, policies adopted by agencies, and bias, even animus, from individual actors.

Children granted SIJS may apply to become LPRs when their visa is current—meaning they are not or are no longer subject to the backlog—as long as they both merit an exercise of positive discretion and are considered “admissible.”²⁶⁵ This introduction of discretion amplifies bias and encourages the inclusion of prejudicial evidence, such as a sealed delinquency record or questionable gang allegations. Under immigration law, immigrants who are considered “inadmissible” are generally unable to enter the country or obtain a green card.²⁶⁶ Inadmissibility grounds include certain health issues, such as having a communicable disease or mental illness, being likely to become dependent on government assistance, having violated certain immigration provisions, being a security threat, as well as certain entanglements in the criminal legal system.²⁶⁷ While the law offers SIJS children some exceptions to the harsh inadmissibility rules, they are not spared from the criminal grounds.²⁶⁸ This can lead to harsh results for the most vulnerable SIJS children who do not fit

264. See 8 U.S.C. § 1255(a) (describing adjustment of status).

265. *Id.*; see 8 C.F.R. § 245.1 (2022) (eligibility for adjustment of status).

266. 8 U.S.C. § 1182(a).

267. See *id.* (enumerating these grounds of inadmissibility).

268. See *id.* § 1255(h) (allowing waiver for certain grounds, not including criminal convictions); 8 C.F.R. § 245.1(e)(3) (same).

within the mold of a worthy immigrant.²⁶⁹ In fact, pervasive racist policing systems may mean that Black and brown immigrant children are disproportionately arrested, prosecuted, and sentenced with devastating immigration consequences.²⁷⁰ Although SIJS children are receiving a humanitarian protection, the confluence of surviving early trauma and the resulting consequences to mental health, alongside adolescent decision-making, which may lead to entanglement in the juvenile delinquency or criminal legal system and result in a bar to adjustment, are often dismissed and unacknowledged. Instead, SIJS children are forced to fit within a statutory framework that is more unforgiving than other humanitarian, stand-alone adjustment provisions, such as those provided to refugees, asylees, and U and T nonimmigrants.²⁷¹ Ultimately, immigration law ignores the trauma this community of immigrants has experienced as well as their status as children who are not fully matured and developed.

Discretion has been critiqued in legal contexts for the propensity to perpetuate harm,²⁷² yet it plays an outsized role in SIJS adjustment of status applications, which require an exercise of positive discretion for approval. When SIJS children seek LPR status, they are not entitled to a green card merely because they meet all the requirements. The law makes clear an applicant “*may* be adjusted by the Attorney General, in his *discretion* and under such regulations as he may prescribe.”²⁷³ The immigration agency further bolsters the role of discretion in this process, stating in USCIS guidance, “[t]he favorable exercise of

269. See Rebecca Sharpless, “*Immigrants Are Not Criminals*”: *Respectability, Immigration Reform, and Hyperincarceration*, 53 HOUS. L. REV. 691, 760 (2016) (explaining the contrast used by the immigration advocacy community on who deserves immigration protections, and the move under a racial justice lens to shift the narrative from “respectability messaging” to a more inclusive framework).

270. See Karla M. McKanders, *Immigration and Racial Justice: Enforcing the Borders of Blackness*, 37 GA. ST. U. L. REV. 1139, 1145 (2021) (discussing the disparate impact that racist policing has on Black immigrants).

271. SIJS children adjust under 8 U.S.C. § 1255(a). Refugees and asylees apply for adjustment of status under 8 U.S.C. § 1159; victims of serious crime with U nonimmigrant status adjust under 8 U.S.C. § 1255(m); and victims of human trafficking with T nonimmigrant status adjust under 8 U.S.C. § 1255(l). VAWA beneficiaries also adjust status under 8 U.S.C. § 1255(a) because VAWA is an alternative to family-based adjustment for certain immigrant survivors of domestic abuse.

272. See generally Shoba Wadhia, *Darkside Discretion in Immigration Cases*, 72 ADMIN. L. REV. 367 (2020) (on the use of discretion to deny an immigration remedy even when an individual is eligible, and the denial will cause harm).

273. 8 U.S.C. § 1255(a) (emphases added).

discretion and the approval of a discretionary adjustment of status application is a matter of administrative grace, which means that the application is worthy of favorable consideration.”²⁷⁴ The analysis requires weighing positive and negative factors and involves the individualized assessment of the adjudicator. Negative factors include “[h]istory of unemployment or underemployment” and “[m]oral depravity or criminal tendencies,” while “[p]roperty, investment, or business ties in the United States” and “[r]espect for law and order, and good moral character” are considered positive factors.²⁷⁵ In *Matter of Marin*,²⁷⁶ the Board of Immigration Appeals found that an application for discretionary relief “necessitates a balancing of the adverse factors of record evidencing an alien’s undesirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether the granting of relief is in the best interest of this country.”²⁷⁷ The decision goes on to state that a “criminal record will ordinarily be required to make a showing of rehabilitation before relief will be granted.”²⁷⁸ As stated, these factors fail to consider how racism, poverty, and past trauma may have hindered the ability of immigrants of color to achieve these standards. For children, a delinquency record, even when confidential in other areas of law and policy, is considered in the discretionary analysis.²⁷⁹ This discretion can result in bias against SIJS children seeking LPR status, especially against low-income boys of color, which may lead adjudicators to focus unfairly on factors deemed negative for the country and ignore positive factors for children, such as family unity.²⁸⁰

Discretion also comes into play differently depending on which agency—USCIS or the immigration court—is making the decision on

274. U.S. CITIZENSHIP & IMMIGR. SERVS., USCIS POLICY MANUAL vol. 7, pt. A, ch. 10, sec. B.1 (2022), <https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-10> [<https://perma.cc/E6Z4-6GT4>].

275. *Id.* sec. B.2.

276. 16 I. & N. Dec. 581 (B.I.A. 1978).

277. *Id.* at 581.

278. *Id.*

279. See U.S. CITIZENSHIP & IMMIGR. SERVS., USCIS POLICY MANUAL vol. 7, pt. F, ch. 7, sec. C.4 (2022), <https://www.uscis.gov/policy-manual/volume-7-part-f-chapter-7> [<https://perma.cc/PAP6-JMT8>].

280. See Hlass, *Adultification*, *supra* note 59, at 201–03 (discussing the susceptibility of children within the immigration legal system to be perceived under extremes of good or bad); McKanders, *supra* note 59, at 218 (discussing the disparate impact that the amount of discretion has particularly on Latino males with delinquency adjudications).

an application for LPR status. Generally, SIJS children are allowed to seek adjustment of status with USCIS unless they are in removal proceedings.²⁸¹ Because they are in removal proceedings, a disproportionate number of SIJS children in the backlog²⁸² must have their adjustment of status applications adjudicated before the immigration court, a system that is adversarial by nature,²⁸³ not child-friendly,²⁸⁴ and filled with opportunities for implicit bias.²⁸⁵ In contrast, adjustment before USCIS allows the applicant to have their case adjudicated in a non-adversarial setting, and SIJS children typically go through this without an interview.²⁸⁶ To be clear, bias can have a detrimental impact in any setting when an adjudicator is granted decision-making power to weigh the negative factors of an individual

281. See 8 C.F.R. § 245.2(a)(1) (2022) (conferring jurisdiction to adjudicate adjustment of status to USCIS unless an immigration judge has jurisdiction); 8 C.F.R. § 1245.2(a)(1) (conferring jurisdiction to adjudicate adjustment of status to an immigration judge when the immigrant has been placed in deportation proceedings, except for “arriving aliens,” over whom USCIS has exclusive adjustment of status jurisdiction regardless of removal proceedings).

282. DAVIDSON & HLASS, *supra* note 17, at 31 (finding that eighty percent of SIJS children from El Salvador, Guatemala, and Honduras are in removal proceedings).

283. Although adversarial, it is important to note that children do not have a right to appointed counsel in immigration court. See 8 U.S.C. § 1229a(b)(4)(A).

284. Although guidance exists for immigration judges on unmarried children under the age of eighteen, child friendly processes should be implemented especially because the concept of the “best interest” of a child is not mandated in immigration court. See EXEC. OFF. FOR IMMIGR. REV., FIM-OPPM 17-03, GUIDELINES FOR IMMIGRATION COURT CASES INVOLVING JUVENILES, INCLUDING UNACCOMPANIED ALIEN CHILDREN (2017) (providing guidance on the use of discretion in judging immigration cases); see also Laila L. Hlass, *Minor Protections: Best Practices for Representing Child Migrants*, 47 N.M.L. REV. 247, 253–54 (2017) (recommending a child-centered approach in removal proceedings).

285. See Marouf, *supra* note 243, at 428–42 (analyzing the factors that contribute to implicit bias in immigration judges).

286. The USCIS Policy Manual states: “USCIS recognizes the vulnerable nature of SIJ based applicants for adjustment of status and generally conducts interviews of SIJ based applicants for adjustment of status when an interview is deemed necessary.” See U.S. CITIZENSHIP & IMMIGR. SERVS., USCIS POLICY MANUAL vol. 7, pt. F, ch. 7, sec. E.2 (2022), <https://www.uscis.gov/policy-manual/volume-7-part-f-chapter-7> [<https://perma.cc/PAP6-JMT8>]. Since USCIS centralized processing for SIJS petitions and SIJS adjustment applications at the National Benefits Center, a USCIS adjudication center in Missouri, in November 2016, interviews have been rare. See U.S. CITIZENSHIP & IMMIGR. SERVS., USCIS TO CENTRALIZE PROCESSING OF SPECIAL IMMIGRANT JUVENILE CASES (2016), <https://www.uscis.gov/archive/uscis-to-centralize-processing-of-special-immigrant-juvenile-cases> [<https://perma.cc/LCP4-HKG8>] (announcing the centralization of processing).

over their contributions and worthiness. During the Trump administration, USCIS became increasingly enforcement-oriented, and that agency certainly cannot always be relied on to be a neutral setting.²⁸⁷ For traumatized children of color, the impact of the resulting decision, regardless of the setting, can have profound consequences. However, the additional burden of an adversarial court proceeding for SIJS children who must wait years before they can seek a green card only adds a layer of complexity. Many children from El Salvador, Guatemala, and Honduras are arrested and placed into removal proceedings after presenting themselves at the U.S.-Mexico border.²⁸⁸ If their case is not dismissed, these children must deal with a long and unnecessary court process so they can adjust status before an immigration judge after being granted SIJS. The current immigration court system lacks independence, adequate resources, and robust appellate review, which creates the opportunity for bias.²⁸⁹ The adjustment of status is a defense against removal, and the hearing is conducted by an immigration judge with an ICE prosecutor as opposing counsel, who cross-examines the child and may argue for the child's removal.²⁹⁰ The ICE attorney's role is a perfect opportunity for bias to play a role against applicants who are not deemed worthy. Some ICE offices or attorneys may take an aggressive approach, especially against applicants with negative behavior or delinquency history,

287. Nina Rabin, *Searching for Humanitarian Discretion in Immigration Enforcement: Reflections on a Year as an Immigration Attorney in the Trump Era*, 53 U. MICH. J. L. REFORM 139 (2019), <https://repository.law.umich.edu/mjlr/vol53/iss1/4> [<https://perma.cc/Q2YD-C9BT>] (discussing the shift in the way discretionary decisions were made in individual cases during the Trump administration).

288. See 8 U.S.C. § 1232(a)(5)(D)(i) ("Any unaccompanied alien child . . . shall be placed in removal proceedings"). See generally U.S. CUSTOMS & BORDER PROT., SOUTHWEST LAND BORDER ENCOUNTERS (2022), <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters> [<https://perma.cc/68W7-8Y4X>] (displaying the number of encounters with children from Honduras, Guatemala, and El Salvador at the U.S.-Mexico border).

289. See Marouf *supra* note 240 (discussing how these factors contribute to implicit bias in immigration adjudications). See generally INNOVATION L. LAB & S. POVERTY L. CTR., THE ATTORNEY GENERAL'S JUDGES: HOW THE U.S. IMMIGRATION COURTS BECAME A DEPORTATION TOOL (2019), https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf [<https://perma.cc/3SAT-LDMB>] (examining the dysfunction of the immigration court system due to its placement under the executive branch).

290. See 8 C.F.R. § 1003.14, 1003.16 (2022) (describing the procedural elements, including an immigration judge presiding over the proceedings and an attorney to represent the government).

forcing the child to prove they merit an opportunity to remain in the United States.

Consider the case of Victor Alfonso Acevedo-Perez from Mexico.²⁹¹ Victor requested a waiver of inadmissibility under the SIJS-specific waiver provision for a single offense of simple possession of thirty grams or less of marijuana, his sole ground of inadmissibility.²⁹² The immigration judge denied his application and found him ineligible for the waiver for reasons not discussed in the decision.²⁹³ Instead of analyzing whether Victor qualified for the waiver, the Board of Immigration Appeals (BIA) affirmed the immigration judge's decision to deny the adjustment application in the broader exercise of discretion.²⁹⁴ The BIA recounted the "significant equities" in Victor's case, which included the fact that he lived in the United States for most of his life, that his mother and younger brother live in the United States, that he was abused in Mexico by his father and in the United States by his stepfather, and other underlying facts that likely led to his SIJS grant.²⁹⁵ The BIA went to great lengths rehashing the negative factors in his case that, although significant, were committed while he was a minor and did not make him inadmissible.²⁹⁶ The BIA also gave substantial weight to allegations of gang association, although these records have been found to be faulty, overinclusive, and inherently racist.²⁹⁷ Even with evidence of rehabilitation, the BIA found that "[t]he Immigration Judge properly balanced the 'adverse factors evidencing [the respondent's] undesirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether the granting of [waiver] relief appears in the best interests of this country.'"²⁹⁸ Substantial positive factors weighing in favor of Victor's adjustment application, the likely role that over-

291. The example is taken from a Board of Immigration Appeals case, *In re Victor Alfonso Acevedo-Perez*, No. AXXX-XX1-565 - PEA, 2018 WL 8333469, at *1 (B.I.A. Dec. 28, 2018).

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.* at *1, *3.

296. *See id.* at *2 n.1.

297. *See* Hlass, *The School to Deportation Pipeline*, *supra* note 29, at 707 (discussing the use of gang allegations in immigration proceedings to perpetuate racial inequality against children in the immigration system).

298. *In re Victor Alfonso Acevedo-Perez*, No. AXXX-XX1-565 - PEA, 2018 WL 8333469 (B.I.A. Dec. 28, 2018) (citing *Matter of Marin*, 16 I. & N. Dec. 581, 584 (B.I.A. 1978)).

policing played in Victor's delinquency record, and the introduction of suspect gang allegations by the ICE attorney were insufficient in overcoming the strong bias against an applicant like Victor.

In an adversarial setting, Victor's interest in remaining in the United States with his family was pitted against a hostile attorney from ICE, who was resolved to deport Victor to Mexico because of past actions that did not bar him from obtaining a green card. It is well documented that early childhood trauma may lead children to make poor choices.²⁹⁹ However, with consistent support, resilience is possible.³⁰⁰ In Victor's case, a trained ICE attorney expertly presented all the negative factors in his case without any obligation to also consider the positive equities. Recent guidance from ICE OPLA encourages ICE attorneys to treat SIJS petitioners as nonpriority cases.³⁰¹ Although the recognition of SIJS as a victim-based immigration benefit³⁰² is a step in the right direction, the arbitrary nature of prosecutorial discretion allows for unequal treatment of similarly situated children across ICE OPLA offices, most often to the detriment of the children most impacted by an abusive, neglecting, or abandoning parent and exhibiting trauma responses. The current DHS guidance on prosecutorial discretion prioritizes detaining and removing immigrants who are deemed threats to "national security,

299. The effects of adverse childhood experiences risk factors for chronic negative health outcomes in adulthood, have yet to be studied in the SIJS population, although in other populations, such as juvenile offenders, their incidence is high. See Michael T. Baglivio, Nathan Epps, Kimberly Swartz, Mona Sayedul Huq, Amy Sheer, & Nancy S. Hardt, *The Prevalence of Adverse Childhood Experiences (ACE) in the Lives of Juvenile Offenders*, 3 OFF. JUV. JUST. & DELINQ. PREVENTION J. JUV. JUST. 13, 20 – 21 (2014).

300. The single most common factor for children who develop resilience is at least one stable and committed relationship with a supportive parent, caregiver, or other adult. *Resilience*, CTR. ON THE DEVELOPING CHILD, HARV. UNIV., <https://developingchild.harvard.edu/science/key-concepts/resilience> [<https://perma.cc/H52R-6GA6>].

301. Memorandum from Kerry E. Doyle, *supra* note 238, at 5 n.8. The memo makes clear that SIJS petitioners should generally be treated as nonpriority "until U. S. Citizenship and Immigration Services (USCIS) adjudicates the application or petition." It is hoped that this continues through adjudication of the adjustment application, but that remains to be seen.

302. See U.S. IMMIGR. & CUSTOMS ENF'T, ICE DIRECTIVE 11005.3, USING A VICTIM-CENTERED APPROACH WITH NONCITIZEN CRIME VICTIMS (2021), <https://www.ice.gov/doclib/news/releases/2021/11005.3.pdf> [<https://perma.cc/HS7P-3TM8>] (describing the benefits of providing humanitarian protection to immigrants).

public safety, and border security.”³⁰³ The threat to public safety involves a “serious criminal record” but leaves government officials with broad discretion to decide who merits prosecutorial discretion, and it is often those SIJS children with behavioral issues or police interactions who are left in removal proceedings battling against a trained ICE attorney. It is also worth noting that immigration enforcement priorities are up to the discretion of the current presidential administration and can easily be restricted based on the political objectives of the executive branch.³⁰⁴ Without more, prosecutorial discretion is unable to provide the reform needed to combat the bias found in the immigration enforcement system.³⁰⁵

Victor’s case also demonstrates how immigration officials may consider juvenile delinquency adjudications³⁰⁶ and any suspicion of gang involvement, no matter how tenuous, under the discretionary analysis to the detriment of children already granted humanitarian protection. Despite legal safeguards for those with juvenile adjudications, confidentiality provisions, and even expungement,³⁰⁷

303. U.S. DEP’T OF HOMELAND SEC., GUIDELINES FOR THE ENFORCEMENT OF CIVIL IMMIGRATION LAW, 2 (2021), <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf> [<https://perma.cc/6JBZ-PHM9>].

304. *Id.*; see Muzaffar Chishti & Randy Capps, *Biden Immigration Enforcement Priorities Emphasize a Multi-Dimensional View of Migrants*, MIGRATION POL’Y INST. (Oct. 28, 2021), <https://www.migrationpolicy.org/article/biden-immigration-enforcement-priorities> [<https://perma.cc/ZM5B-XEXF>] (on how the “seesaw” of immigration enforcement priorities expand and restrict prosecutorial discretion).

305. Nicole Hallett, *Rethinking Prosecutorial Discretion in Immigration Enforcement*, 42 CARDOZO L. REV. 1765 (2021) (on the limitations of prosecutorial discretion to create the systemic change needed to address humanitarian issues).

306. The USCIS Policy Manual states:

USCIS will consider findings of juvenile delinquency on a case-by-case basis based on the totality of the evidence to determine whether a favorable exercise of discretion is warranted. Therefore, an adjustment applicant must disclose all arrests and charges. If any arrest or charge was disposed of as a matter of juvenile delinquency, the applicant must include the court or other public record that establishes this disposition.

U.S. CITIZENSHIP & IMMIGR. SERVS., USCIS POLICY MANUAL vol. 7, pt. F, ch. 7, sec. C.4 (2021), <https://www.uscis.gov/policy-manual/volume-7-part-f-chapter-7> [<https://perma.cc/BLF5-NP3R>].

307. The USCIS Policy Manual states: “In the event that an applicant is unable to provide such records because the applicant’s case was expunged or sealed, the applicant must provide information about the arrest and evidence demonstrating that such records are unavailable under the law of the particular jurisdiction. USCIS evaluates sealed and expunged records according to the nature and severity of the

immigration adjudicators can and do consider delinquency history. In Victor's case, his juvenile record served to sway the immigration judge and appellate agency that he should not be granted permanent protection because he was not "desirable" as a permanent resident, and they instead ordered him removed.³⁰⁸ While the juvenile delinquency system incorporates confidentiality protections with the intention of limiting bias for youthful offenses, the immigration system uses these same records to make a life-altering decision with the potential consequence of forcing family separation and continued trauma.

Another way that SIJS children face racially disproportionate impacts as they seek to become LPRs is through the adjustment statute's "inadmissibility" bars. Again, the current legal regime does not appreciate that many SIJS children are low-income children of color, especially vulnerable to the effects of multiple traumas, and the unforgiving structure does not reflect the commitment required to protect this population. While SIJS children remain eligible for LPR status despite their economic instability or entering the United States without visas³⁰⁹—factors that would otherwise cause inadmissibility—they do face exclusion from residency for a variety of grounds related to mental health, immigration violations, and crimes. One example that could be especially relevant for this population is a bar for applicants with "a physical or mental disorder . . . that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others," or "is likely to recur or to lead to other harmful behavior," or for an applicant found "to be a drug abuser or addict."³¹⁰ Another example applicable to children in precarious situations is a bar for those who are "unlawfully present" for more than one year or were "ordered removed" and "enter[] or attempt[] to reenter the United States

criminal offense." *See id.*; *see also* Beth Zilberman, *The Myth of Second Chances: Noncitizen Youth and Confidentiality of Delinquency Records*, 31 GEO. IMMIGR. L. REV. 561, 578–81 (2017) (describing the frequent use of delinquency records in immigration proceedings despite the purpose of the juvenile delinquency system and the confidentiality provisions to protect these records).

308. *In re* Victor Alfonso Acevedo-Perez, No. AXXX-XX1-565-PEA, 2018 WL 8333469, at *2–4 (B.I.A. Dec. 28, 2018).

309. 8 U.S.C. § 1255(h)(2)(A). These grounds relate to public charge, lack of a labor certification, being present without admission or parole, fraud or misrepresentation, stowaways, certain documentation requirements, and unlawful presence.

310. *Id.* § 1182(a)(1)(A)(iii).

without being admitted.”³¹¹ A final common example that could affect the eligibility for a green card for SIJS children involves “a crime involving moral turpitude,”³¹² one of the most contested provisions of immigration law.³¹³

While a waiver is available for some of these grounds of inadmissibility “for humanitarian purposes, family unity, or when it is otherwise in the public interest,”³¹⁴ this SIJS-specific waiver is limited and, again, relies on the discretion of the adjudicator.³¹⁵ Other humanitarian forms of relief have much more favorable waivers, in recognition of the U.S. commitment to offer refuge to victims of trafficking and other serious crimes.³¹⁶ Additionally, the discretionary nature of the waiver without specific guidance leaves too much room for adjudicators to make negative discretionary decisions for children seeking a second opportunity. For some SIJS children, the SIJS-specific waiver may be unavailable altogether because the SIJS adjustment

311. *Id.* § 1182(a)(9)(C)(i).

312. *Id.* § 1182(a)(2)(A)(i)(I).

313. See Abel Rodríguez & Jennifer A. Bulcock, *Legislating Morality: Moral Theory and Turpitudinous Crimes in Immigration Jurisprudence*, 53 LOY. L.A. L. REV. 39, 92–93 (2019) (indicating that for decades, the vague and arbitrary nature of the moral turpitude designation has perplexed practitioners, judges, and legal scholars and concluding that due to its myriad failings, the moral turpitude designation must be eliminated from the country’s immigration laws); see also Elijah T. Staggars, *The Racialization of Crimes Involving Moral Turpitude*, 12 GEO. J.L. & MOD. CRITICAL RACE PERSP. 17, 19 (2020) (arguing that the executive branch’s attempt to remove non-citizens for criminal street gang activity is not an effort to target immoral conduct, but that the executive branch is, and has been historically, manipulating the phrase “moral turpitude” to systematically target, condemn, and exclude racial groups deemed socially undesirable).

314. 8 U.S.C. § 1255(h)(2)(B). These waivable grounds are health-related, related to a single offense of simple possession of 30 grams or less of marijuana, prostitution or commercialized vice, certain security-related grounds, failure to attend removal proceedings, smuggling, those subject to civil penalties, student visa abusers, ineligibility for citizenship, certain people previously removed, those unlawfully present after previous immigration violations, and certain miscellaneous grounds, such as polygamists. See *id.* § 1182 (enumerating these waivable grounds).

315. Although the SIJS statute was updated to include the “one or both” language regarding parental reunification, the statute fails to consider the relationship between the SIJS child and their parent, even a non-offending parent, for a waiver. Compare *id.* § 1101(a)(27)(J)(i) with 8 U.S.C. § 1255(h)(2)(B).

316. All grounds of inadmissibility are waivable for U nonimmigrant status if it is “in the public or national interest” except Nazi persecutors. See *id.* § 1182(d)(14). For T nonimmigrant status, all grounds of inadmissibility are waivable if it is in the national interest to do so, except security-related grounds and two miscellaneous grounds. See *id.* § 1182(d)(13).

statute provides no waiver for crime-related grounds.³¹⁷ This strict statutory scheme leaves little room for the realities of children who have limited familial support and deal with difficult financial situations in a new country, especially those with few social support networks and even fewer resources to access them. It is unsurprising that the children most impacted by multiple traumas seeking SIJS-based adjustment are vulnerable to contact with the juvenile delinquency and criminal legal systems.

As most crime-related grounds do not qualify for an SIJS-specific or independent waiver, many children with criminal convictions will be ordered removed even though USCIS has granted them protective status. This is especially troubling given the precarious situation of SIJS children who are stuck in the visa backlog and must wait years before seeking a green card. Although juvenile delinquency adjudications are not considered crimes,³¹⁸ they may be considered under numerous conduct-based grounds of inadmissibility that can be triggered without a conviction. For example, a common crime-related bar for children is a ground that excludes immigrants if the agency has a “reason to believe” that the person has assisted or participated in trafficking a controlled substance.³¹⁹ The volatile situation in Central America and Mexico along with the dangerous migration to the U.S.-Mexico border means that the most vulnerable children are susceptible to human and drug traffickers.³²⁰ With no waiver available for this ground of

317. See *id.* § 1182(h) (not including an exception for SIJS children).

318. In *In re Devison*, a landmark immigration decision on juvenile delinquency, reiterates “that juvenile delinquency proceedings are not criminal proceedings, that acts of juvenile delinquency are not crimes, and that findings of juvenile delinquency are not convictions for immigration purposes.” *In re Miguel Devison-Charles*, 22 I. & N. Dec. 1362, 1365 (B.I.A. 2000); see also KATHY BRADY & RACHEL PRANDINI, IMMIGR. LEGAL RES. CTR., SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) & THE GROUNDS OF INADMISSIBILITY 6–7 (2020), https://www.ilrc.org/sites/default/files/resources/sijs_and_grounds_of_inadmissibility_8.27.20.pdf [<https://perma.cc/YK2C-MWAW>].

319. 8 U.S.C. § 1182(a)(2)(C). See generally ANGIE JUNCK, VERA INST. JUST., THE IMPACT OF DRUG TRAFFICKING ON UNACCOMPANIED MINOR IMMIGRATION CASES (2015), https://www.ilrc.org/sites/default/files/resources/impact_drug_trffk_unaccomp_minor_cases-20180719.pdf [<https://perma.cc/3TY5-T59G>] (explaining that often, unaccompanied minors are forced to carry drugs across the U.S.-Mexico border but that U.S. immigration enforcement authorities do not characterize this phenomenon as human trafficking and instead punish juvenile immigrants for it).

320. U.N. HIGH COMM’R FOR REFUGEES, CHILDREN ON THE RUN: UNACCOMPANIED CHILDREN LEAVING CENTRAL AMERICA AND MEXICO AND THE NEED FOR INTERNATIONAL

inadmissibility, these children will likely be barred from obtaining LPR status and may be deported.

In summary, the unnecessary use of discretion and the many inadmissibility grounds still applicable to SIJS children in the LPR process show a lack of regard for child survivors of trauma. The racialized harm present in the lives of SIJS children must be acknowledged, and a renewed commitment toward protection of all children is essential to achieve racial justice.

III. A RACIAL JUSTICE ANALYSIS FOR IMMIGRANT CHILDREN'S RIGHTS

A racial justice framework shines light on how immigrant children may be harmed by the immigration legal system and demands new systems to achieve racial equity and systematic fair treatment. In the context of the SIJS legal framework, multiple aspects of the statute and adjustment of status system are implicated in the larger project of immigration law's building of racial hierarchies and discriminating based on national origin and race. Here, we offer prescriptions for how to address the specific issues identified in the context of SIJS: the consent function, the backlog, and the process for seeking SIJS-based LPR status. This list is not exhaustive but merely a representation of how a racial justice lens can inform a critique of existing aspects of the immigration legal system and potential solutions. We prescribe legislative and administrative fixes for the consent function, the backlog, and the adjustment of status regime.

In advocating for these changes in law and policy, advocates should be conscious of not framing SIJS children as "merely innocent children," lest they fall into the trap of depicting the children in the SIJS backlog as exceptional, different from other migrants and therefore more deserving of protection and exemption, thereby reifying the racist underpinnings of the system itself.

PROTECTION 37–38 (2014), <https://www.unhcr.org/56fc266f4.html>. For more information regarding the treatment of Mexican children and the unique vulnerabilities that make them targets for human and drug traffickers, see Alejandra Aramayo, Comment, *Disparate Treatment of Mexican Unaccompanied Alien Children: The United States' Violation of the Trafficking Protocol, Supplementing the UN Convention Against Transnational Organized Crime*, 30 AM. U. INT'L L. REV. 839, 840–41 (2015).

A. *De-Weaponizing the Consent Function*

The simplest and most effective way to fix the consent function problem would be to eliminate it completely from the statute.³²¹ The SIJS statute had no consent function for the first seven years of its existence.³²² While Congress added an “express consent” function in 1997 out of concern that children were able to obtain SIJS even if they had not been abused, neglected, or abandoned,³²³ that concern was wholly addressed when Congress replaced the requirement that a child merely be “eligible . . . for long term foster care” with the requirement that they show that reunification with one or both parents is not viable due to abuse, neglect, or abandonment.³²⁴ Congress’s attempt in the 2008 TVPRA to rein in the consent function by revoking the agency’s authority to “expressly consent” to the dependency order has proved to be inadequate.³²⁵ As described above, the agency continues to exercise the same “express consent” authority to scrutinize the subjective motivations behind a child’s seeking state court protection in certain cases, inviting arbitrary and racially discriminatory decision-making.³²⁶ Nor is the consent function needed to ensure the integrity of the SIJS program, as USCIS has exclusive authority over SIJS adjudications and only approves those petitions in which it confirms that a state court has made the required findings.

Even in the absence of any statutory change, USCIS should mitigate the risk of racial discrimination and other arbitrary treatment in its exercise of the consent function by interpreting the consent function consistent with congressional intent to show deference to state court child welfare determinations. To lessen the harm of the consent function, USCIS should take three steps. First, USCIS should withdraw the three 2019 Administrative Appeals Office (AAO) decisions on SIJS adopted under the Trump administration that condone the “primary

321. Others have called for this. See, e.g., Rosa Aguilar, *Children Beyond Borders: Extending Protections for Abandoned, Abused, and Neglected Unaccompanied Children and Youth*, 19 SEATTLE J. FOR SOC. JUST. 547, 565–66 (2021).

322. See *supra* Section II.A (explaining how the consent function came to being).

323. See *supra* Section II.A (discussing the origins of the consent function).

324. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(d)(1)(A), 122 Stat. 5044, 5079–80 (codified at 8 U.S.C. § 1101(a)(27)(J)).

325. See *supra* notes 142–45 and accompanying text (discussing the weaponization of the consent function since its inception).

326. See *supra* notes 142–45 and accompanying text.

purpose” inquiry.³²⁷ Second, the agency should withdraw and disclaim all other policy references to a subjective “primary purpose” inquiry and stop relying on the legislative history surrounding the repealed statute, including in the USCIS Policy Manual.³²⁸ Finally, USCIS should issue revised final regulations that modify the 2022 regulations’ consent provision to omit references to examining a petitioner’s “primary purpose” and whether the request is “bona fide” and instead direct USCIS officers to engage only in a more targeted assessment to simply verify that the state court order has the required findings and has “articulated the foundation for such findings.”³²⁹ The rules should prohibit any subjective inquiry into a child’s perceived intentions in seeking juvenile court protection. In the absence of revised regulations, USCIS should issue guidance implementing the 2022 regulations that directs adjudicators to grant consent upon verifying that the state court order has the required findings and that the record has a factual basis for those findings. The guidance should prohibit adjudicators from relying on evidence purporting to reveal a child’s subjective motivations and should direct adjudicators to rely solely on evidence listed in the regulation itself—the factual basis for the findings and the relief granted by the court.³³⁰

These changes would restore USCIS’s role to what Congress intended and give proper deference to state court expertise in child welfare adjudications. And, it would decrease the likelihood that

327. See U.S. CITIZENSHIP & IMMIGR. SERVS., PM-602-0174.1, POLICY MEMORANDUM: MATTER OF E-A-L-O 7 (2019); U.S. CITIZENSHIP & IMMIGR. SERVS., PM-602-0174.1, POLICY MEMORANDUM: MATTER OF A-O-C 2 (2019); U.S. CITIZENSHIP & IMMIGR. SERVS., PM-602-0174.1, POLICY MEMORANDUM: MATTER OF D-Y-S-C 8 (2019).

328. See *supra* notes 166–72 and accompanying text.

329. See OFF. CITIZENSHIP & IMMIGR. SERVS. OMBUDSMAN, ENSURING PROCESS EFFICIENCY AND LEGAL SUFFICIENCY IN SPECIAL IMMIGRANT JUVENILE ADJUDICATIONS 7–8, 11 (2015), https://www.dhs.gov/sites/default/files/publications/CISOMB%20SIJ%20Recommendation%202015_2.pdf [<https://perma.cc/3MNN-JZW6>]. Many commenters pointed out problems with the consent provision as written in the 2011 proposed regulation. See, e.g., Elizete Velado & Genevieve Harper, *Comment on Proposed 8 C.F.R. 204, 205 & 245: Special Immigrant Juvenile Petitions Proposed by United States Citizenship & Immigration Services*, REGULATIONS.GOV (Nov. 8, 2011), <https://www.regulations.gov/comment/USCIS-2009-0004-0033>; see also Joseph et. al., *supra* note 44, at 321 (calling on USCIS to “re-orient its process around the congressional intent to protect vulnerable immigrant juveniles and return to its proper role of granting or denying SIJS after verifying whether state court documents, which must enjoy a presumption of validity, contain the requisite findings”).

330. Special Immigration Juvenile Petitions, 87 Fed. Reg. 13,066, 13,070 (Mar. 8, 2022) (modifying 8 C.F.R. § 204.11(d)(5)).

eligible children are denied SIJS due to factors that arise from racially discriminatory practices, such as unfounded gang allegations.

B. Abolishing the SIJS Quota and Mitigating Its Harms

While the impacts of the SIJS quota on immigrant children from El Salvador, Guatemala, Honduras, and Mexico are profound, the technical solution is simple. Congress has the power to end the SIJS quota and the backlog it creates by amending the Immigration and Nationality Act to exempt SIJS children from the per-country and worldwide employment-based visa limitations that are the cause of the backlog. While this does not abolish the racial quota system which the backlog is a manifestation of and which applies to immigrants seeking LPR status in the employment- and family-based preference systems writ large, it would bring SIJS children in line with other humanitarian classes of immigrants, like asylees, who are exempt from these restrictions.³³¹ The backlog solution also depends on the political will of Congress. Unless the proposed amendments pass through an appropriations or reconciliation bill, based on the make-up of Congress at the time of this Article's publication, they will need the support of at least ten Republican politicians, many of whom have demonstrated a public racial animus towards immigrants of color.³³²

Below, we outline two minor textual amendments that Congress could enact to end the SIJS backlog immediately. While these amendments make their way through the political machine, a DHS appropriations bill should prohibit the use of federal funds to detain and deport children who are eligible for and apply for SIJS, as was

331. The Refugee Act formally introduced asylum into federal law and specifically left the asylum category without a numerical cap. In 2005 the Real ID Act of 2005 eliminated the 10,000 annual cap on the number of asylees who could adjust status to LPRs. See Pub. L. No. 109-13, 119 Stat. 302. Currently, (i) there are no geographic constraints on asylum grants, (ii) there are no numerical limitations on asylum grants or adjustment of status for asylees and (iii) asylum applicants are generally eligible to apply for employment authorization while their application is pending.

332. See, e.g., Bess Levin, *Republicans Are Basically Starting a White Supremacist Caucus*, VANITY FAIR (April 16, 2021), <https://www.vanityfair.com/news/2021/04/republicans-america-first-caucus> [https://perma.cc/KU6M-MR43]; Chris Cillizza, *How the Ugly, Racist White 'Replacement Theory' Came to Congress*, CNN (Apr. 15, 2021, 3:33 PM), <https://www.cnn.com/2021/04/15/politics/scott-perry-white-replacement-theory-tucker-carlson-fox-news/index.html> [https://perma.cc/F9NQ-5B79].

proposed in the 2022 DHS House appropriations bill,³³³ thereby halting, in part, the contributions of the backlog to the broader school to deportation pipeline.

First, Special Immigrants Juveniles (found under subparagraph (J) of INA § 101(a)(27)) should be added to the list of statuses exempt from worldwide annual visa limitations found in INA § 201(b)(1)(A).

INA § 201 - Worldwide level of immigration

....

(B) ALIENS NOT SUBJECT TO DIRECT NUMERICAL LIMITATIONS

Aliens described in this subsection, who are not subject to the worldwide levels or numerical limitations of subsection (a), are as follows:

(1)(A) Special immigrants described in subparagraphs (A) ~~OR~~, (B), **OR (J)** of section 1101(a)(27) of this title.³³⁴

Second, SIJS should be added to the list of statuses exempt from the 7.1 percent of worldwide levels allocated for special immigrants in INA § 203(b)(4).

INA § 203- Allocation of immigrant visas

....

(b) Preference allocation for employment-based immigrants

Aliens subject to the worldwide level specified in section 1151(d) of this title for employment-based immigrants in a fiscal year shall be allotted visas as follows:

....

(4) Certain special immigrants

Visas shall be made available, in a number not to exceed 7.1 percent of such worldwide level, to qualified special immigrants described in section 1101(a)(27) of this title (other than those described in subparagraphs (A), ~~or~~ (B), **or (J)** thereof), of which not more than 5,000 may be made available in any fiscal year to special immigrants described in subclause (II) or (III) of section 1101(a)(27)(C)(ii) of this title, and not more than 100 may be made available in any fiscal

333. Department of Homeland Security Appropriations Act, H.R. 4431, 117th Cong. § 216 (2021). In the spring of 2022, Representative Jimmy Gomez circulated an e-dear colleague letter advocating for the inclusion of this funding restriction in the FY2023 DHS Appropriations Bill.

334. 8 U.S.C. § 1151(b). Authors' recommended changes to the statutory text are indicated in bold.

year to special immigrants, excluding spouses and children, who are described in section 1101(a)(27)(M) of this title.³³⁵

Together, these two minor textual changes would abolish the SIJS racial quota, end the backlog, and protect the more than 44,000 SIJS children currently trapped in it, as well as future children seeking SIJS. By exempting SIJS children from the worldwide visa limitations in this manner, the per-country caps found in INA § 202(a)(2) which, together with the worldwide and employment-based fourth preference specific limits, create the backlog that immigrant children from El Salvador, Guatemala, Honduras, and Mexico are currently subject to are consequently inapplicable to SIJS children and therefore abolished.³³⁶

Congress has exempted categories of immigrants from visa limitations on a number of occasions.³³⁷ Most recently, exemptions for other employment-based immigrant categories were introduced in the 2021 House Reconciliation Bill.³³⁸ As long as Congress continues to ignore the plight of children in the SIJS backlog, while prioritizing the exemption from visa caps of other employment-based immigrants, such as high-skilled workers, it sends the message that the current status quo and its disparate racial impacts are acceptable.³³⁹

While there is no way to permanently resolve the SIJS backlog without legislative action, there are specific administrative solutions that the Biden administration can take to mitigate the harmful effects of the SIJS quota and extensive backlog on immigrant children while Congress works on a legislative solution.

335. *Id.* § 1153(b)(4).

336. Exempting SIJS children from the worldwide visa limitations in INA sections 201 and 203 as described herein will, *inter alia*, exempt SIJS children from the per-country caps in INA section 202(a)(2).

337. INA § 201(b) already exempts two categories of “special immigrants” from the worldwide numerical limitations. *See* 8 U.S.C. § 1151(b) (“Aliens not subject to direct numerical limitations”); 8 U.S.C. § 1101(a)(27)(A) (“[A]n immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad”); 8 U.S.C. § 1101(a)(27)(B) (“[A]n immigrant who was a citizen of the United States and may, under section 1435(a) or 1438 of this title, apply for reacquisition of citizenship.”).

338. H.R. 5376, 117th Cong. (2021). *See Featured Issue: Immigration Reforms through Budget Reconciliation*, AM. IMMIGR. LAWYERS ASS’N (Nov. 3, 2021), <http://www.aila.org/advo-media/issues/all/featured-issue-immigration-reforms-through-budget> [<https://perma.cc/U2SF-L95R>].

339. At the time of this Article’s publication, certain members of Congress had begun working towards a legislative fix to the backlog.

These actions, by protecting SIJS children and youth in the backlog from deportation and providing them with work authorization, could interrupt both the school to deportation pipeline as well as the erasure of children in the SIJS backlog from public life. On March 7, 2022, the Biden administration took the first step towards a politic of justice for children in the backlog by announcing a deferred action policy for SIJS children impacted by “visa unavailability.”³⁴⁰ Through this policy, USCIS will make case-by-case discretionary determinations to grant deferred action, and thereby protections from deportation and access to work permits, for youth with approved SIJS. It remains unclear exactly how the policy will be implemented, and the discretionary nature of the program raises many of the same racial justice challenges as the other discretionary decision-making process described in this Article. The choice to make this program discretionary in nature rather than recognizing all children with approved SIJS petitions as deserving of protection from removal while they await the chance to become LPRs opens the door to further racial discrimination of children in the SIJS backlog. Moreover, this new program is a policy. Regulation is more powerful than sub-regulatory guidance and is a preferable way to grant work authorization and protections from deportation to SIJS youth in the backlog. The administration should take the following steps to mitigate the worst harms of the backlog:

- The Biden administration should make a public statement of support and encourage Congress to take action to end the SIJS quota.
- DHS/USCIS should issue regulations, with an opportunity for public comment, providing work authorization and non-discretionary protections from deportation for SIJS children.
- ICE should issue robust SIJS-specific guidance to ensure that SIJS children are not deported before being permitted to seek a green card. Recent guidance from OPLA protects a limited category of SIJS-eligible children, directing that OPLA should generally consider children with pending SIJS petitions to be non-priority cases until USCIS adjudicates the SIJS petition.³⁴¹ This guidance

340. U.S. CITIZENSHIP & IMMIGR. SERVS., PA-2022-10, POLICY ALERT: SPECIAL IMMIGRANT JUVENILE CLASSIFICATION AND DEFERRED ACTION (2022), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20220307-SIJAndDeferredAction.pdf> [<https://perma.cc/A4KA-VU5Q>].

341. Memorandum from Kerry E. Doyle, *supra* note 238, at 5 n.8.

leaves many children, especially those with approved SIJS petitions in the backlog, vulnerable to deportation at the discretion of individual judges. ICE should issue new guidance directing OPLA attorneys to join motions to dismiss removal proceedings and join motions to reopen previously concluded removal proceedings resulting in a removal order.

- The Department of Justice and Executive Office for Immigration Review should fully restore immigration judges' authority to use the full range of docket management tools to ensure SIJS children in the backlog are not ordered deported merely because they are waiting for their priority date to become current.³⁴²

C. Addressing Discretion and Inadmissibility as Part of Seeking LPR Status

Although SIJS is a humanitarian form of protection for children who have suffered parental abuse, abandonment, and neglect, the pathway to permanence through permanent immigration status as a green card holder risks bias against applicants by leaving too much discretion in the hands of adjudicators. Doing so fails to consider the real-world results of an unstable home environment and racist policing systems.

SIJS children should be granted the opportunity to recover and thrive in their communities, but they can only do so if the U.S. immigration system recognizes the impact of early traumas and racist police practices that are amplified through criminal and juvenile legal systems' racially disproportionate convictions and sentencing.

To give children impacted by parental mistreatment and over-policing in Black and brown communities a fair chance to gain lawful permanency in their new home, the SIJS adjustment of status statute should be amended to adequately consider the life experiences of this population. SIJS children in removal proceedings, those most likely impacted by the SIJS backlog, are often low-income children of color. They did not have the advantage of two supportive parents, as children who have been abandoned, abused, or neglected. Many have recently

342. This would include vacating *Matter of S-O-G- & F-D-B*, 27 I&N Dec. 462 (Att'y Gen. 2018); and *Matter of L-A-B-R*, 27 I&N Dec. 405 (Att'y Gen. 2018). It would also include eliminating restrictive language found in policy guidance that purports to narrow immigration judges' authority to postpone the cases of those awaiting visa availability. See Memorandum from James R. McHenry III, Director, DOJ EOIR, Use of Status Dockets (Aug. 16, 2019), <https://www.justice.gov/eoir/page/file/1196336/download> [<https://perma.cc/QH5V-HY7H>].

arrived in the United States and are still adjusting to their communities. They deserve compassionate rules and policies that prove the U.S. commitment to providing protection to victims of parental mistreatment. The changes outlined below align with protections created for other grounds of humanitarian relief.

First, the SIJS adjustment of status statute should be amended to remove the discretionary component. There are other examples of non-discretionary adjustment of status provisions, such as refugees who can adjust as long as they meet all statutory and regulatory requirements.³⁴³ In order to allow children the space to learn, mature, and live among their chosen community, the same benefit should be extended to SIJS children. If they meet the statutory and regulatory requirements for adjustment of status, they should be granted LPR status. By definition, SIJS children have suffered from instability in their young lives. It is well understood and accepted that a child's home life can cause behavioral issues to manifest³⁴⁴ and, coupled with the racist nature of policing,³⁴⁵ discretion allows a perfect opportunity to discount the trauma of children of color. Instead, SIJS children should be granted ample opportunity to move forward.

Second, SIJS children should have their adjustment of status cases heard first before a non-adversarial adjudicator. The statute should be revised to give USCIS initial jurisdiction to adjudicate SIJS-based adjustment of status applications, even for those in removal proceedings, with a second opportunity to go before the immigration court if USCIS denies the application. This approach would be similar to the initial jurisdiction provision for asylum applications filed by unaccompanied children.³⁴⁶ Already, applicants for adjustment of status under the humanitarian grounds of relief for U and T nonimmigrant status have the right to adjust status in a non-adversarial

343. See 8 U.S.C. § 1159(a)(2). Other non-discretionary provisions include the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA), Pub. L. No. 105-100, 111 Stat. 2160 (1997); the Haitian Refugee Immigration Fairness Act of 1998 (HRIFA), Pub. L. No. 105-277, 112 Stat. 2681 (1998); and the Liberian Refugee Immigration Fairness Act (LRIF), Pub. L. No. 116-92, § 7611, 113 Stat. 2309 (2019).

344. See Baglivio et al., *supra* note 299, at 20–21.

345. See *supra* notes 29–31 and accompanying text (discussing disparate policing against Latinos on Long Island).

346. See 8 U.S.C. § 1158(b)(3)(C) (providing asylum officers with initial jurisdiction over any asylum application).

process before the immigration agency.³⁴⁷ The statute should include an adjudication deadline for adjustment applications, similar to the one for SIJS petitions.³⁴⁸ While the adjustment application is pending, removal proceedings should be administratively closed or terminated. Given the vulnerabilities inherent in being a child granted SIJS, whom a state juvenile court has found they are unable to reunify with one or both of their parents because of parental mistreatment in addition to finding that it would not be in their best interest to return to their home country, it is unnecessary to put them through a system that puts their application in a defensive posture.³⁴⁹

Finally, the SIJS adjustment of status statute should be revised to expand the list of inadmissibility grounds that do not apply to SIJS children, and the inadmissibility waiver provision should be amended to permit waiver of all grounds of inadmissibility. Ideally, SIJS children should be exempt from all health, immigration, and criminal inadmissibility grounds. Regardless, there should also be expansive waivers that could address any ground of inadmissibility. For example, the immigration waivers for U and T nonimmigrants are much more favorable,³⁵⁰ allowing waiver of almost all inadmissibility grounds. The SIJS waiver should give greater weight to the child's youthfulness, including their immaturity and stage of development, as well as contextualizing circumstances surrounding any potential inadmissibility grounds. Juvenile delinquency adjudications should not be considered, and confidentiality laws should be respected. Additionally, the waiver should allow for consideration of the SIJS child's relationship with any non-offending parent³⁵¹ in recognition of the expansion of the SIJS

347. The statute and regulations for adjustment of status of victims of serious crime with U nonimmigrant status and victims of trafficking with T nonimmigrant status make clear that USCIS has sole jurisdiction to adjudicate the application. *See* 8 U.S.C. § 1255(m) (victims of crimes against women); 8 C.F.R. § 245.24(f) (2022) (U nonimmigrant status); 8 U.S.C. § 1255(l) (victims of trafficking); 8 C.F.R. § 245.23 (T nonimmigrant status).

348. *See* 8 U.S.C. § 1232(d)(2).

349. Lindsay M. Harris, *The One-Year Bar to Asylum in the Age of the Immigration Court Backlog* (Oct. 4, 2016) (unpublished manuscript), <https://ssrn.com/abstract=2833404> (for another example of humanitarian relief being adjudicated unnecessarily in removal proceedings).

350. *See supra* note 316 (explaining the grounds for waiving inadmissibility for U and T nonimmigrants).

351. *See supra* note 318 (explaining the update to the SIJS statute with no accompanying change for the consideration to consider the relationship with a non-offending parent for a waiver.) *See also* 8 CFR 245.1(e)(3)(v)(B).

statute and to the stabilizing force of a parent. The relationship between the child and non-offending parent should be nurtured, not punished for the actions of the abusive, abandoning, or neglectful parent.

In the absence of statutory reform, USCIS, ICE, and Executive Office for Immigration Review (EOIR) should each take administrative steps to address racialized harm in SIJS children's pathway to LPR status. First, USCIS should revise its policy to make clear that juvenile adjudications cannot be considered in the exercise of discretion for adjustment of status applications. Second, adjudicators who handle the assessment of SIJS petitions and SIJS-based adjustment of status cases should receive training on adjudicating these petitions and applications in a trauma-informed and holistic manner. Next, if requested, ICE should use its prosecutorial discretion authority to join in motions to dismiss or terminate cases so that SIJS children can pursue adjustment before USCIS regardless of the child's delinquency or criminal record. EOIR should issue comprehensive guidance for child and youth-friendly practices in its courts, including on the limited role that ICE prosecutors should play in these proceedings. Finally, EOIR and ICE should revise its training for judges and government attorneys to include addressing bias against Central Americans and the exclusionary history of immigration law and policy.

CONCLUSION

Immigrant children of color confront multiple and intersecting systems of oppression and subordination due to their immigration status, race, and youth.³⁵² Special Immigrant Juvenile Status provides an instructive case study of how a racial justice lens can reveal the ways in which a facially race-neutral law, with its attendant policies and practices, perpetrates racialized harm against children. USCIS's use of the consent function to undermine state court orders finding abandonment, abuse, and neglect has been weaponized against children of color. Similarly, the use of discretion and inadmissibility within the SIJS-based adjustment of status provision may further racial inequities. The SIJS visa quota and resulting backlog disadvantages Guatemalan, Honduran, Mexican, and Salvadoran children who are often racialized as Latina/o, as well as Black, brown, and Indigenous

352. Children, like adults, have complex identities impacted by many factors including but not limited to class, disability, religion, sexual orientation, and gender identity.

children. The protracted legal limbo of the SIJS backlog destabilizes children during a period of precarity, where they are particularly susceptible to being entangled in the school to deportation pipeline and more vulnerable to deportation than those children who were able to immediately apply to become LPRs. A racial justice lens can make apparent the extent of the depth and breadth of harm within certain immigration laws, policies, and practices, while guiding what prescriptions will work best to address the harm. For example, understanding how discretion has been misused against children of color informs the suggested reform that adjustment of status should be mandatory for those who are eligible. To address the harms some children of color experience in the SIJS process, the “per-country” caps must be abolished, and the government must take steps to rein in the agency practice known as the consent function. Ultimately, SIJS is only one area where immigrant children are experiencing racialized harm in the immigration system. To unearth children’s experiences in the legal system and move toward equity for all children, we must re-envision immigrant children’s rights to incorporate a racial justice analysis. We encourage those engaged in critical immigration literature to include children’s experiences and perspectives within this important project, as well as call on those scholars engaged in writing about immigrant children, like ourselves, to use a critical lens to understand how race may be implicated in children’s experience in the immigration legal system.