No. [redacted]

United States Court of Appeals for the Tenth Circuit

[redacted],

Petitioner

v.

WILLIAM BARR, United States Attorney General,

Respondent.

On Petition for Review from the Board of Immigration Appeals, A-[redacted]

BRIEF OF AMICI CURIAE CATHOLIC LEGAL IMMIGRATION NETWORK, INC. (CLINIC), DIOCESAN MIGRANT & REFUGEE SERVICES, INC., THE DOOR, FLORENCE IMMIGRANT & REFUGEE RIGHTS PROJECT, IMMIGRANT JUSTICE CORPS, KIDS IN NEED OF DEFENSE (KIND), LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA, THE LEGAL AID SOCIETY, NEW JERSEY CONSORTIUM FOR IMMIGRANT CHILDREN, NORTHWEST IMMIGRANT RIGHTS PROJECT, POLITICAL ASYLUM/ IMMIGRATION REPRESENTATION PROJECT (PAIR), PUBLIC COUNSEL, SAFE PASSAGE PROJECT, AND YOUNG CENTER FOR IMMIGRANT CHILDREN'S RIGHTS IN SUPPORT OF REVERSAL AND THE PETITIONER

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CORPORATE DISCLOSURE STATEMENT

(Federal Rules of Appellate Procedure 26.1(a) and 29(a)(4)(A))

Amici Curiae Catholic Legal Immigration Network, Inc. (CLINIC), Diocesan Migrant & Refugee Services, Inc., The Door, Florence Immigrant & Refugee Rights Project, Immigrant Justice Corps, Kids In Need of Defense (KIND), Lawyers' Committee for Civil Rights of the San Francisco Bay Area, The Legal Aid Society, Northwest Immigrant Rights Project, Political Asylum/Immigration Representation Project (PAIR), Public Counsel, Safe Passage Project, and Young Center for Immigrant Children's Rights (collectively, "Nonprofit Corporation Amici") state that each is a nonprofit corporation with no parent corporation, and no publicly held corporation owns 10% or more of its stock.

The New Jersey Consortium for Immigrant Children ("Non-Corporate Amicus," and, with the Nonprofit Corporation Amici, "Amici") states that it is not yet a corporate entity but is fiscally sponsored by the nonprofit Community Foundation of New Jersey. The Non-Corporate Amicus has no parent company, and no publicly held corporation owns 10% or more of its stock.

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici are nonprofit legal services and child advocacy organizations that represent immigrant children, supervise pro bono volunteers representing immigrant children, provide best-interests guardian ad litem services to immigrant children, or support practitioners of immigration law. All Amici represent or advocate on behalf of children seeking Special Immigrant Juvenile Status ("SIJS"), including those whose SIJS petitions have been granted but who must await the availability of visas and the concomitant chance to apply to become lawful permanent residents. Amici share a profound interest in the fair and legal treatment of young immigrants in this position.[1]

SUMMARY OF ARGUMENT

Congress created SIJS thirty years ago to establish protection from removal and a pathway to permanent residency for certain immigrant children: those who cannot reunify with one or both of their parents because of abuse, neglect, abandonment, or some similar reason, and whose return to their country of origin would conflict with their best interests. If United States Citizenship and Immigration Services ("USCIS") approves a juvenile's SIJS petition, the juvenile may rely on SIJS to apply to adjust status and obtain a green card, and federal law removes

[1] No party's counsel authored any part of this brief. No entity other than Amici and their counsel made a monetary contribution to fund this brief's preparation or submission.

certain barriers that would otherwise stand in the way. Because the law limits the number of visas available to Special Immigrant Juveniles (among others) per country and per year, juveniles from certain Central American countries must wait years before they can obtain a visa and apply for a green card.

The case of Petitioner [redacted] ("[redacted]") is illustrative. According to the Board of Immigration Appeals' ("BIA's") opinion, [redacted] is a citizen and native of [redacted]. [redacted] witnessed his father physically abuse his mother, and his parents separated when he was about four years old. [redacted] later moved in with his grandparents in [redacted]. After [redacted]'s grandfather died, [redacted], then about sixteen years old, entered the United States. Although USCIS granted [redacted]'s SIJS petition, the immigration court entered an order of removal, sustaining the charge that he was present in the United States without admission.

In cases like this, the Government undermines the purpose of SIJS by depriving qualified grantees of its benefits. Congress created SIJS to protect an especially vulnerable subset of immigrant juveniles and permit them to remain in the United States to pursue permanent resident status — an intent made manifest by the text and history of the SIJS statutory scheme. By statute, SIJS exempts beneficiaries from certain grounds of deportability and inadmissibility, and eliminates common bars to adjustment of status. The Government's position here would vitiate these

statutory protections as to any Special Immigrant Juvenile who, because of a numerical quota, must wait in line before applying to adjust status.

SIJS is revocable only through a procedure prescribed by statute and regulation. Here, the Government tries to end-run this revocation procedure by removing [redacted] while he awaits a chance to adjust his status. This approach would allow the Government to revoke the benefits of SIJS without following the prescribed procedure for doing so. The Government's actions violate [redacted]'s due process rights and threaten the status of thousands of other juveniles across the country. If [redacted] had been granted a simple adjournment to await the availability of a visa to apply for his green card, there would have been no deprivation of his rights. The Court should vacate the removal order and remand for the grant of a continuance sufficient to allow [redacted] to apply to become a lawful permanent resident.

ARGUMENT

I. REGARDLESS OF WHETHER A VISA IS IMMEDIATELY AVAILABLE, FEDERAL LAW DOES NOT PERMIT THE REMOVAL OF A SIJS BENEFICIARY ON A GROUND WAIVED BY CONGRESS.

The history, purpose, and statutory text establish that Congress intended to allow Special Immigrant Juveniles to remain in the United States while waiting to adjust status. Immigration courts may not override this intent in cases like [redacted]'s

simply because no visa is immediately available. Congress created SIJS to protect certain children of unfit parents from repatriation when it against their best interest. An immigrant juvenile may qualify for SIJS only after a state court has found that he suffered "abuse, neglect, abandonment," or something similar by one or both parents, and that his best interests would not be served by a "return[] to [his] previous country of nationality or country of last habitual residence." 8 U.S.C. § 1101(a)(27)(J). An approved petition allows the beneficiary to apply to adjust status to that of a lawful permanent resident ("LPR"), 8 U.S.C. § 1255(a), and federal law lifts certain common barriers to this adjustment of status, 8 U.S.C. § 1255(h). But these protections are meaningless if — in derogation of a state court finding that repatriation conflicts with the juvenile's best interest — the Government separates him from the caregiver with whom the state court has placed him and removes him from the United States on one of the grounds that Congress has said is inapplicable to him. Such a removal order is not justifiable merely because the juvenile, through no fault of his own, may have to wait years before applying to adjust status.

A. The Text and Legislative History of the Statutes Related to SIJS Show That Congress Intended Beneficiaries To Remain in the United States To Adjust Status.

In 1990, Congress created SIJS to protect certain immigrant children deemed eligible for "long-term foster care" by permitting them to seek classification as Special Immigrant Juveniles and providing them a pathway to become LPRs.

Immigration Act of 1990 ("IMMACT" or the "1990 Act"), Pub. L. No. 101-649, § 153, 104 Stat. 4978, 5005–06; *see also* Special Immigrant Status, 58 Fed. Reg. 42843, 43844 (Aug. 12, 1993) ("This rule alleviates hardships experienced by some dependents of United States juvenile courts by providing qualified aliens with the opportunity to apply for special immigrant classification and lawful permanent resident status, with [the] possibility of becoming citizens of the United States in the future."); *Yu v. Brown*, 36 F. Supp. 2d 922, 925 (D.N.M. 1999) (explaining basis for SIJS eligibility).

While the history of the SIJS statutory scheme is complex, it warrants close review because it establishes that Congress intended, from the beginning, that Special Immigrant Juveniles remain in the United States with an opportunity to become LPRs. For [redacted] and many others who entered the country without inspection at an official checkpoint, a key part of the history is Congress's repeated actions over many years to ensure that "entry without inspection" would *not* lead to the removal of SIJS beneficiaries or prevent their adjustment of status. The history involves cumulative amendments to three statutes with distinct but overlapping purposes: these statutes define deportability, 8 U.S.C. § 1227; inadmissibility or

excludability, 8 U.S.C. § 1182[2]; and eligibility for adjustment of status, 8 U.S.C. § 1255.

Congress embedded certain protections against deportation in the 1990 Act that created SIJS. The law provides that specified grounds for deportation "shall not apply to a special immigrant [juvenile] based upon circumstances that exist before the date the alien was provided such special immigrant status." IMMACT, § 153(b), Pub. L. No. 101-649, 104 Stat. at 5006 (codified at 8 U.S.C. § 1227(c)). Under this provision, while Special Immigrant Juveniles could be deported on certain grounds, such as serious criminal convictions or threats they might pose to the national security, *id.* (not waiving certain grounds of deportability under Section 241 of the Immigration and Nationality Act ("INA"), including grounds then codified at 8 U.S.C. § 1251(a)(2),[3] (4), now codified as amended at 8 U.S.C. § 1227(a)(2), (4)), they were *not* subject to deportation on certain other grounds, such as having entered the country without inspection, *id.* (waiving grounds then codified at 8 U.S.C.

[2] Effective 1997, statutory amendments ("1997 Amendments") replaced the term "excludable" with "inadmissible." Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. 104-208, § 301(d)(2), 110 Stat. 3009-46, 3009-579.

[3] The 1997 Amendments also re-designated Section 241 of the INA as Section 237 and transferred the grounds for deportability codified at 8 U.S.C. § 1251 to 8 U.S.C. § 1227. IIRIRA, Pub. L. 104-208, § 305, 110 Stat. at 3009-597. The text of 8 U.S.C. § 1251 before its transfer is available at https://docs.uscode.justia.com/1994/title8/USCODE-1994-title8/pdf/USCODE-1994-title8-chap11-subchapII_2-partV-sec1251.pdf.

§ 1251(a)(1)(B) (codified as amended at 8 U.S.C. § 1227(a)(1)(B))). At its inception, the exemption from deportability based on entry without inspection protected all Special Immigrant Juveniles who, like [redacted], were physically present in the United States after crossing without inspection because, in 1990, "[a]ny alien . . . in the United States" was subject to the grounds of deportability and the associated exemptions. 8 U.S.C. § 1251(a) (1990).

Although the initial protection from deportability in the 1990 Act was broad, it did only half the job. Congress prevented Special Immigrant Juveniles from being physically removed from the United States on specified grounds but neglected to enable them to obtain legal status. When an immigrant seeks to adjust status to become a lawful permanent resident, it is not the grounds of *deportability* that may stand in the way; instead, the immigrant must show that he is both *admissible* and *eligible to adjust status*. Congress failed in the 1990 Act to lift the relevant bars to both admissibility and adjustment of status.

The Immigration and Naturalization Service ("INS") spotted these oversights and put Congress on notice. In 1991, the INS published an interim rule announcing it would seek "corrective legislation." Special Immigrant Status, 56 Fed. Reg. 23207, 23207 (May 21, 1991). First, the INS pointed out that Congress had not waived provisions of the INA pertaining to adjustment of status. *Id.* For example, 8 U.S.C. § 1255(a) "prohibits the adjustment of status of aliens who have not been

inspected and admitted or paroled into the United States." 56 Fed. Reg. at 23207. In addition, 8 U.S.C. § 1255(c) barred adjustment of status for immigrants who had not maintained continuous lawful status as nonimmigrants (*e.g.*, because they had overstayed tourist or student visas) or who had been employed without authorization. 56 Fed. Reg. at 23207. Second, Congress had failed to exempt Special Immigrant Juveniles from certain grounds of excludability, thereby precluding the issuance of an immigrant visa. *Id.* at 23208. The INS correctly "anticipate[d] that many dependent juvenile aliens w[ould] not be eligible for adjustment of status because of these provisions." *Id.* In other words, unless Congress lifted these barriers, many Special Immigrant Juveniles could not become LPRs.

In 1991, Congress amended the statute in direct response to these problems. To qualify SIJS beneficiaries for adjustment of status, Congress provided that they "shall be deemed . . . to have been paroled into the United States" and exempted them from bars based on failure to maintain status or unauthorized employment. Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 ("MTINA"), Pub. L. No. 102-232, § 302(d)(2)(A), (B), 105 Stat. 1733, 1744−45 (1991). Congress also exempted SIJS beneficiaries from specified grounds of excludability. *Id.* § 302(d)(2)(B) (providing that "in determining the [SIJS beneficiary's] admissibility as an immigrant," certain grounds of excludability "shall not apply" and the Attorney General may waive others). At that time, entry without

inspection was a ground of *deportability* (not excludability), from which the 1990 Act had already exempted SIJS beneficiaries. The 1991 statute neither eliminated this exemption nor reclassified entry without inspection as a ground of excludability.

As of 1991, therefore, a Special Immigrant Juvenile could not be deported for having entered without inspection, IMMACT, § 153(b), Pub. L. No. 101-649, 104 Stat. at 5006; he was eligible to adjust status because he was "deemed . . . to have been paroled" into the country and excused from bars based on failure to maintain status or unauthorized employment; and he was exempt from certain common grounds of excludability, MTINA, Pub. L. No. 102-232, § 302, 105 Stat. at 1744−45. Congress had achieved its goal of ensuring that SIJS beneficiaries could remain safely in the United States to apply to become LPRs.

In 1996, however, Congress passed the IIRIRA, Pub. L. 104-208, 110 Stat. 3009-546, which overhauled immigration law for reasons unrelated to SIJS. One key impetus for the change was to remove what Congress considered a perverse incentive. Before the IIRIRA took effect in 1997, if the Government sought to remove an immigrant who had entered the United States, the immigrant was nearly always entitled to a deportability hearing in which the Government bore the burden of proof. In contrast, immigrants seeking to enter the country at the border were entitled only to exclusion hearings at which they bore the burden of showing their admissibility. Congress believed that this system encouraged immigrants to cross

the border illegally to secure the greater procedural protections associated with deportability hearings. So the IIRIRA changed the criteria for who would be entitled to a deportability hearing. Entry into the United States alone would no longer be sufficient; to be entitled to a deportability hearing, an immigrant would now have to show that he had been "admitted" into the United States, with admission defined as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." *Id.* § 301 (codified at 8 U.S.C. § 1101(a)(13)); *Vartelas v. Holder*, 566 U.S. 257, 261 (2012); *see generally* Immigrant Legal Resource Center, *Inadmissibility & Deportability* § 1.4 (5th ed. 2019). To bring about this change, Congress omitted entry without inspection from the grounds of deportability, because under the new law, the deportability grounds applied only to "[a]ny alien . . . in *and admitted to* the United States." 8 U.S.C. § 1227(a) (emphasis added). Recognizing that it no longer made sense to maintain entry without inspection as a basis for deportability, Congress made it instead a basis for what was now called inadmissibility. 8 U.S.C. § 1182(a)(6)(A) ("[a]liens present without admission or parole").

This change in the law caused a potential problem for SIJS beneficiaries. Their protection from *deportability* narrowed from having originally shielded those who entered the country with or without inspection to shielding only those who entered *with* inspection, but Congress did not simultaneously exempt them from the

new ground of *inadmissibility* based on entry without inspection. The 1991 Act permitted them to apply for individual waivers from this new ground of inadmissibility, because that Act authorized such waivers for all but certain criminal and terrorist grounds. MTINA, Pub. L. 102-232, 105 Stat. at 1744−45. But SIJS beneficiaries who entered without inspection did not have a general exemption from this ground of inadmissibility, as they had from the parallel, but now defunct, ground of deportability.

Congress remedied this problem in the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA"), § 235(d)(3), Pub. L. 110-457, 122 Stat. 5044, 5080. The TVPRA exempted SIJS beneficiaries from the ground of inadmissibility that would otherwise prevent the adjustment of an immigrant who is "present . . . without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General." *Id.* (amending 8 U.S.C. § 1255(h)(2)(A) to specify that 8 U.S.C. § 1182(a)(6)(A) "shall not apply" to SIJS beneficiaries); *see also* 8 C.F.R. § 245.1(e)(3). The amendment made clear that no individual waivers would be necessary.[4]

By first waiving certain grounds of deportability for SIJS beneficiaries and then removing barriers to adjustment of status by exempting them from certain

[4] A timeline at Appendix A shows the legislative history in summary form.

grounds of inadmissibility, Congress created the legal framework necessary to effectuate the purpose of SIJS: to protect vulnerable immigrant children from removal and make them eligible for lawful permanent residency. *See Perez v. Cuccinelli*, 949 F.3d 865, 878 (4th Cir. 2020) (en banc) (acknowledging "Congress's efforts to expand eligibility for SIJ status and increase protections for vulnerable immigrant children").

The TVPRA effected other positive changes for SIJS applicants as well. It removed the requirement that the child be deemed eligible for foster care, replacing it with the more expansive requirement that a state juvenile court find that "reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law." Pub. L. No. 110-457, § 235(d)(1)(A), 122 Stat. at 5079 (codified at 8 U.S.C. § 1101(a)(27)(J)(i)).[5] Significantly, the title of the TVPRA subsection discussing SIJS protections is "*Permanent Protection* for Certain At-Risk Children," further evidencing Congress's intent that SIJS would confer protection from removal *permanently*. *Id.* § 235(d) (emphasis added); *Yates v. United States*, 574 U.S. 528, 540 (2015) (recognizing that although statutory "headings are not commanding," they may provide important "cues" about congressional intent).

[5] The implementing regulations have not been updated to reflect this change. *See* 8 C.F.R. § 204.11.

Each of these congressional actions reflects an unmistakable intent to permit SIJS beneficiaries to remain in the United States to pursue lawful permanent residency, absent independent and legally sufficient reasons to remove them.

B. The Current SIJS Statutory Framework Protects SIJS Beneficiaries from Removal.

Under the current SIJS statute and regulations, for an unmarried juvenile under 21 years old to be eligible for SIJS, a state "juvenile court" must find:

1. The applicant is dependent on the court or placed in the custody of, or legally committed to, a state agency or individual appointed by the court;
2. The applicant cannot be reunified with one or both parents due to abuse, neglect, abandonment, or a similar basis found under state law; and
3. It is not in the applicant's best interest to return to his country of nationality or last habitual residence.

8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11(c)(1)-(2).

In addition, an immigrant is eligible for SIJS only if "present in the United States." 8 U.S.C. § 1101(a)(27)(J); *see also Diaz-Calderon v. Barr*, No. 20-11235, 2020 WL 5645191, at *11 n.6 (E.D. Mich. Sept. 22, 2020) ("SIJ status individuals likely cannot litigate their adjustment of status applications once they have been removed . . . ."); *Primero Garcia v. Barr*, No. 20-1389, 2020 WL 1139660, at *3 (N.D. Cal. Mar. 9, 2020) ("[A]n immigrant granted [SIJS] is likely required to remain in the United States to maintain that status."); *Joshua M. v. Barr*, 439 F. Supp. 3d 632, 675 (E.D. Va. 2020) ("The plain language in the SIJ statute and the I-485 application process require [a SIJS applicant] to have a physical presence in this

country."). The requirement of physical presence reflects Congress's expectation that the juvenile is here, subject to the jurisdiction of our state courts when they make the requisite findings, and still here after SIJS is granted, as the child cannot return home safely. *See Osorio-Martinez v. Att'y Gen. U.S.*, 893 F.3d 153, 168 (3d Cir. 2018) ("[T]he requirements for SIJ status . . . show a congressional intent to assist a limited group of abused children to *remain safely* in the country with a means to apply for LPR status." (emphasis added) (citation omitted)).

Most significantly, under the framework Congress enacted, SIJS beneficiaries are "deemed, for purposes of subsection (a) [i.e., adjustment of status], *to have been paroled* into the United States." 8 U.S.C. § 1255(h)(1) (emphasis added); *see also* 8 C.F.R. § 1245.1(a). The tense matters. Congress did not say that SIJS beneficiaries will be deemed paroled into the country when they become eligible to apply to adjust status. Instead, Congress granted SIJS beneficiaries the right to be treated, for the purpose of adjustment of status, as if they had been lawfully paroled into the country upon entry or, at the latest, upon approval of the SIJS petition. The same statutory provision explicitly exempts from inadmissibility those, like [redacted], who were charged with being present in the United States without admission or parole. 8 U.S.C. § 1255(h)(2)(A) (waiving 8 U.S.C. § 1182(a)(6)(A)). As the applicable regulation states: "A special immigrant [juvenile] shall be deemed, for the purpose of applying the adjustment to status provisions of section 245(a) of the

Act, to have been paroled into the United States, *regardless of the actual method of entry into the United States*." 8 C.F.R. § 1245.1(a) (emphasis added). Congress's careful elimination of many barriers to adjustment of status and admissibility shows its intent to keep SIJS beneficiaries in the United States pending adjustment, unless they become removable on a ground from which Congress did not exempt them.

Other statutory provisions underscore Congress's intent that SIJS beneficiaries remain safe and present in the United States. For example, federal law provides that a SIJS petitioner "who has been battered, abused, neglected, or abandoned, shall not be compelled to contact the alleged abuser (or family member of the alleged abuser) at any stage of applying for special immigrant juvenile status." 8 U.S.C. § 1357(h). Congress cannot have meant to protect children from harmful contact with abusive or neglectful parents during the SIJS application process only to allow the Government to remove those same children after granting SIJS, placing them again at risk of dependency on unfit parents and loss of the stability available to them in the United States. *See Robbins v. Chronister*, 435 F.3d 1238, 1241 (10th Cir. 2006) (when interpreting textual ambiguity in statute, "[w]e choose the reasonable result over the 'absurd' one . . . ." (citations omitted)).

C. This Court Should Reject Any Attempt To Justify Removal on the Ground That SIJS Beneficiaries Remain Unprotected Until They Can Adjust Status.

The Government sought removal here on the charge that [redacted] is present without admission or parole, one of the inadmissibility grounds from which the statute explicitly exempts Special Immigrant Juveniles. 8 U.S.C. § 1255(h)(2)(A) (creating exemption from 8 U.S.C. § 1182(a)(6)(A)). The Government's position appears to misread the parole provision: because 8 U.S.C. § 1255(h) includes the clause "for purposes of subsection (a) [i.e., adjustment of status]," the Government reads it as having no force until a SIJS beneficiary's opportunity to adjust status materializes.

This is wrong. The retroactive language of the parole provision contradicts the Government's interpretation. 8 U.S.C. § 1255(h)(1) (deeming SIJS beneficiaries "*to have been* paroled into the United States" (emphasis added)). Although parole based on SIJS is for the purpose of adjustment of status, this only strengthens [redacted]'s case. The natural reading — supported by the legislative history — is that the approval of his SIJS petition triggers his parole, which extends until adjudication of his application to become an LPR, protecting him from removal all the while.

Courts have rejected similar attempts by the Government to subvert the protections SIJS confers. In *Garcia v. Holder*, the Government tried to remove a SIJS beneficiary who had become an LPR. 659 F.3d 1261, 1264 (9th Cir. 2011).

Mr. Garcia sought cancellation of removal, which requires that the applicant "has resided in the United States continuously for 7 years after having been admitted in any status." 8 U.S.C. § 1229b(a)(2). He argued that he qualified based on the duration of his residency after he was "deemed . . . to have been paroled into the United States" as a SIJS beneficiary. *See Garcia*, 659 F.3d at 1265. The Government responded that "being 'paroled' into the United States is not the same as being 'admitted.'" *Id.* The Ninth Circuit properly rejected this over-parsed basis for removal, focusing instead on the purpose of SIJS. Because Congress expressly exempts SIJS beneficiaries "from certain inadmissibility grounds applicable to other aliens," the court determined that Congress intended SIJS-based parole to be durable, entitling beneficiaries "*to remain in the country pending the outcome of their adjustment of status application.*" *Id.* at 1271 (emphasis added) (citing 8 U.S.C. § 1255(h)(2)).

Indeed, the whole point of SIJS is to "assist a limited group of abused children to remain safely in the country with a means to apply for LPR status." *Id.* Given SIJS grantees' "strong claims to remain in this country," the Ninth Circuit held that "SIJS-based parole qualifies as an admission 'in any status' for cancellation of removal purposes." *Id.* at 1271−72; *see also Osorio-Martinez*, 893 F.3d at 170 (Congress afforded "opportunities for this class of aliens *to strengthen their*

connections to the United States, pending a determination on their applications for adjustment of status" (emphasis added)).

As a SIJS beneficiary, [redacted] has been "deemed, for purposes of subsection (a), to have been paroled into the United States." 8 U.S.C. § 1255(h)(1). His parole is durable, designed to keep him here until, pursuant to subsection (a), he comes to the front of the line for a visa and may apply to adjust status.

D. The Government Violates Due Process When It Effectively Revokes SIJS Without Following the Lawful Revocation Procedure.

"[T]he Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *see also Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1254 (10th Cir. 2008) (same); *Wei v. Mukasey*, 545 F.3d 1248, 1257 (10th Cir. 2008) ("The Fifth Amendment guarantee of due process applies to aliens facing removal."). "As a matter of due process, aliens are entitled to 'the opportunity to be heard at a meaningful time and in a meaningful manner.'" *Matumona v. Barr*, 945 F.3d 1294, 1308 (10th Cir. 2019) (citation omitted).

SIJS "reflects the determination of Congress to accord those abused, neglected, and abandoned children a legal relationship with the United States and to ensure they are not stripped of the opportunity to retain and deepen that relationship

without due process." *Osorio-Martinez*, 893 F.3d at 170. The depth of Special Immigrant Juveniles' connections in and to the United States reinforces their due process rights: "[O]nce an alien gains admission to our country *and begins to develop the ties that go with permanent residence* his constitutional status changes accordingly." *Id.* at 168 (citation omitted); *see also M.S.P.C. v. U.S. Customs & Border Prot.*, 60 F. Supp. 3d 1156, 1175 (D.N.M. 2014) ("[A]liens receive constitutional protections when they have come within the territory of the United States *and* developed substantial connections with this country." (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270−71 (1990))). Applying these standards, Special Immigrant Juveniles are entitled to due process as a result of both the rigorous standards necessary to attain SIJS in the first instance and the substantial protections Congress accorded beneficiaries. *See J.L. v. Cissna*, 374 F. Supp. 3d 855, 868−69 (N.D. Cal. 2019).[6]

To be eligible for SIJS, an immigrant child must first invoke the jurisdiction of a state juvenile court to seek protection from parental abuse, neglect, abandonment, or similar circumstances. 8 U.S.C. § 1101(a)(27)(J)(i). State court jurisdiction often depends on the applicant having established some period of

[6] *Department of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959 (2020) is not to the contrary. That case holds that a person who has just "set foot on U. S. soil" is entitled only to those protections granted by statute, but does not strip due process protections from immigrants who, like SIJS beneficiaries, have developed significant ties to this country. *Id.* at 1982−83.

residency in the relevant state; in child custody proceedings, for example, a six-month residency requirement generally applies under the Uniform Child Custody Jurisdiction and Enforcement Act, which 49 states have adopted. *See, e.g.*, Utah Code Ann. § 78B-13-201(1). Proceedings that rest on imminent risk to the child, such as foster care placements, do not involve such waiting periods, but often result in the state's assumption of legal custody over the foster child. *See, e.g.*, *id.* § 78B-13-311. In either situation, therefore, the statute tethers eligibility to the child's formation of significant connections within the United States.

Once the Government grants SIJS, the law provides the beneficiary with protections that strengthen his ties to the United States pending adjustment of status. Of most immediate consequence, as explained above, SIJS grantees are exempt from myriad grounds of inadmissibility that would otherwise preclude them from becoming LPRs. *See* 8 U.S.C. § 1255(h). Congress also deemed beneficiaries to "have been paroled into the United States," 8 U.S.C. § 1255(h)(1), and forgave any unauthorized work or failure to maintain status, 8 U.S.C. § 1255(c)(2). The intended effect is to ensure them a durable place in line for adjustment of status.

Some Special Immigrant Juveniles are also entitled to important benefits that help them build a more secure life in the United States. For example, if they were in federal custody when the juvenile court entered a dependency order, they are entitled to the same educational services the government provides for refugee

children. 8 U.S.C. § 1232(d)(4)(A). And any state funds expended for a SIJS beneficiary in foster care are subject to federal reimbursement. *Id.* § 1232(d)(4)(B). In many states, Special Immigrant Juveniles are also entitled to health benefits. Dep't of Health and Hum. Servs., Center for Medicare & Medicaid Servs., *Medicaid and CHIP Coverage of "Lawfully Residing" Children and Pregnant Women* (July 1, 2010), https://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/SHO10006.pdf. These education and health benefits underscore Congress's intent to keep SIJS beneficiaries in the United States. *See Moreno Galvez v. Cuccinelli*, 387 F. Supp. 3d 1208, 1218 (W.D. Wash. 2020).

Having conferred a "host of important benefits" on Special Immigrant Juveniles, *Osorio-Martinez*, 893 F.3d at 163, Congress shielded them from deprivation of these benefits without due process. Thus, the Government may revoke SIJS only on a showing of "good and sufficient cause." 8 U.S.C. § 1155. Except in rare circumstances not relevant here, that revocation may proceed "only on notice to the petitioner," who "must be given the opportunity to offer evidence in support of the petition . . . and in opposition to the grounds alleged for revocation . . . ." 8 C.F.R. § 205.2(b). USCIS must provide a written explanation for any revocation. *Id.* § 205.2(c).

Thus, an immigrant cannot attain SIJS without having significant ties within the United States, and the benefits of SIJS strengthen these connections. Due

process protections attach to the statutory rights Congress has accorded to SIJS-eligible youth. *Osorio-Martinez*, 893 F.3d at 172; *Joshua M.*, 439 F. Supp. 3d at 678–79; *see also J.L.*, 341 F. Supp. 3d at 1068 (losing eligibility for SIJS constitutes irreparable harm for loss of "attendant benefits"). Because the qualifications for SIJS limit eligibility to those with serious need, the statutory protections are substantial. Thus, beneficiaries have a constitutionally protected interest in retaining SIJS unless stripped of this status under proper procedures. *Osorio-Martinez*, 893 F.3d at 171−72.

It therefore violates due process to remove a SIJS beneficiary without even the pretense of having revoked his status as a Special Immigrant Juvenile. This action effectively deprives him of the benefits of SIJS and exposes him to the very dangers Congress enacted the statute to avoid. *See Joshua M.*, 439 F. Supp. 3d at 679 (removing SIJS beneficiary and thereby "stripping [him] of his SIJ status, without 'good and sufficient cause,' appears to contravene the purpose of the SIJ statutes").

II. SIJS BENEFICIARIES ARE ENTITLED TO CONTINUANCES TO PURSUE ADJUSTMENT OF STATUS DILIGENTLY.

Because [redacted] is a Special Immigrant Juvenile, he is not subject to removal except on a ground from which Congress did not exempt him and unless the Government completes the formal process to revoke his SIJS. The immigration

court's refusal to grant a continuance of his removal proceedings led to an unlawful removal order and was an abuse of discretion.

Immigration judges ("IJs") commit reversible error by failing to follow regulations requiring them to inform respondents of their "apparent eligibility to apply for any of the benefits enumerated in this chapter," including SIJS. *C.J.L.G. v. Barr*, 923 F.3d 622, 626 (9th Cir. 2019) (en banc) (quoting 8 C.F.R. § 1240.11(a)(2)). Additionally, IJs must exercise their discretion to allow continuances "in light of [respondent's] apparent eligibility for SIJ status," considering "how far he has proceeded in the process." *Id.* at 629. There can be no point in requiring an IJ to advise a respondent of his potential eligibility for SIJS unless the IJ must also grant continuances to allow the respondent, acting with the necessary diligence, to appear in state juvenile court, file a SIJS petition, receive an adjudication from USCIS, and await the opportunity to adjust status if no visa is immediately available.

The BIA erred by declining to remand for the IJ's consideration of a continuance after USCIS approved [redacted]'s SIJS petition. Under the standards established in *In re L-A-B-R-*, 27 I&N Dec. 405, 413 (A.G. 2018), an IJ should grant continuances for applicants pursuing SIJS with reasonable diligence and should, at a minimum, adjourn removal proceedings or hold them in abeyance for juveniles

whose SIJS petitions have been granted.[7] Immigration judges "may grant a motion for continuance for good cause shown." *See* 8 C.F.R. § 1003.29. This inquiry focuses "on whether the collateral matter," such as a SIJS petition, "will make a difference in the removal proceedings — that is, 'whether a continuance is likely to do any good.'" *L-A-B-R-*, 27 I&N Dec. at 413 (citation omitted). Thus, the "primary consideration(s)" are "the likelihood that the alien will receive the collateral relief and whether the relief will materially affect the outcome of the removal proceedings." *Id.* at 413-14. Both the courts and the BIA have imposed a "presumption that discretion should be favorably exercised in appropriate cases to await resolution of [an] ancillary visa petition." *Matter of Hashmi*, 24 I&N Dec. 785, 789 (BIA 2009); *see also Wu v. Holder*, 571 F.3d 467, 468–69 (5th Cir. 2009) (collecting cases). For a juvenile whose SIJS petition has already been granted, the "good cause" to grant a continuance is even stronger, as the likelihood of successful adjustment of status increases as he clears each hurdle.

[7] In fact, there is a strong argument that removal proceedings should be terminated when a respondent is granted SIJS. The sole charge of removability alleged in the Notice to Appear, 8 U.S.C. § 1182(a)(6)(A)(i), clashes with [redacted]'s SIJS and his associated parole into the United States. Thus, the charge is unsustainable. *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462, 468 (A.G. 2018) ("Immigration judges . . . possess the authority to terminate removal proceedings where the charges of removability against a respondent have not been sustained."); *Matter of J-A-B- & I-J-V-A-*, 27 I&N Dec. 168, 169 (BIA 2017) (holding that termination is proper "when the DHS cannot sustain the charges [of removability] . . . ." (citation omitted)).

The only meaningful counterweight is the Attorney General's caution that "because adjustment of status typically requires an immediately available visa, good cause does not exist if the alien's visa priority date is too remote to raise the prospect of adjustment of status above the speculative level." *L-A-B-R-*, 27 I&N Dec. at 418 (citations omitted); *see also Luevano v. Holder*, 660 F.3d 1207, 1215 (10th Cir. 2011). But there is nothing speculative about the eventual attainment of LPR status for most SIJS beneficiaries. *See* Ruth Ellen Wassem, Cong. Res. Serv., Special Immigrant Juveniles: In Brief 6 (2014), https://fas.org/sgp/crs/homesec/R43703.pdf (according to data from the Department of Homeland Security, the vast majority of SIJS beneficiaries become LPRs). Unlike most other green card applicants, SIJS grantees are not subject to many common barriers to adjustment of status, including entry without inspection, the very ground on which [redacted] was charged. 8 U.S.C. § 1255(h)(2)(A) (waiving 8 U.S.C. § 1182(a)(6)(A)(i)). Properly applied, therefore, the standards in *L-A-B-R-* should lead the immigration courts to grant continuances or otherwise hold removal proceedings in abeyance for the overwhelming majority of SIJS beneficiaries, including [redacted].

The BIA therefore erred by denying [redacted]'s motion to remand.

III. A POLICY THAT SUBJECTS SIJS BENEFICIARIES AWAITING VISAS TO REMOVAL WILL AFFECT THOUSANDS OF YOUNG IMMIGRANTS.

The repercussions of this case are wide-reaching. USCIS has granted SIJS to 89,920 children since 2016.[8] Among these grantees are many immigrants from Guatemala, Honduras, El Salvador, and Mexico — all countries for which visa availability is backlogged: of the 30,557 unaccompanied immigrant children[9] apprehended at the southwest border in fiscal year 2020, about 96% came from El Salvador (7%), Guatemala (27%), Honduras (15%), or Mexico (47%).[10] Although the countries of origin of children arriving at the southwest border will not exactly match the countries of origin of SIJS beneficiaries, there is considerable overlap between these two groups. Most unaccompanied children arrive through the southwest border, as ongoing crises in that region drive them north. *See generally*

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[8] *Number of I-360 Petitions for Special Immigrant with a Classification of Special Immigrant Juvenile (SIJ) by Fiscal Year, Quarter and Case Status Fiscal Years 2010-2020,* USCIS, https://www.uscis.gov/sites/default/files/document/reports/I360_sij_performancedata_fy2020_qtr3.pdf.

[9] An unaccompanied immigrant child is "a child who . . . has no lawful immigration status in the United States; has not attained 18 years of age; and with respect to whom . . . there is no parent or legal guardian in the United States; or no parent or legal guardian in the United States available to provide care and physical custody." 6 U.S.C. § 279(g)(2).

[10] *U.S. Border Patrol Southwest Border Apprehensions by Sector Fiscal Year 2020*, U.S. Customs and Border Protection, https://www.cbp.gov/newsroom/stats/sw-border-migration/usbp-sw-border-apprehensions-fy2020 (last visited Nov. 21, 2020).

UNHCR, *Children on the Run* (2014), https://www.unhcr.org/56fc266f4.html. And children who arrive in the United States without their parents or legal guardians are frequent SIJS applicants. *See* Wassem, *supra*, at 7. Thus, the high percentage of children from these countries apprehended at the southwest border is a strong indicator of a significant percentage of children from that region among SIJS beneficiaries.

Given the humanitarian crises in Central America that cause children to flee their homes and seek protection in the United States, thousands of SIJS grantees are in the same position as [redacted]: awaiting visa availability and the corresponding chance to seek adjustment of status. The Government's position here is that it can remove nearly every one of them. The Government maintains that SIJS affords no protection from removal unless a visa is immediately available. This position creates a subset of SIJS grantees who are unprotected, based solely on their country of birth. If this position prevails, it would place thousands of children at risk, despite the humanitarian protections Congress has conferred on them.

CONCLUSION

For these reasons, this Court should reverse and remand to the BIA with instructions to direct the immigration court to order a continuance until an available visa number allows [redacted] to proceed with his application to adjust status.

Respectfully submitted,

Date: November 25, 2020

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APPENDIX A

TIMELINE OF STATUTORY HISTORY

- **1990** – Congress creates SIJS and exempts beneficiaries from certain grounds of deportability, including for entry without inspection. Immigration Act of 1990 ("IMMACT" or the "1990 Act"), Pub. L. No. 101-649, § 153, 104 Stat. 4978, 5005–06.

- **1991** – Congress corrects 1990 oversights by removing bars to adjustment of status and exempting beneficiaries from certain grounds of inadmissibility. Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 302(d)(2), 105 Stat. 1733, 1744−45.

- **1996** – Congress requires immigrants to have been lawfully admitted upon inspection to qualify for a deportability hearing, and moves the bar based on entry without inspection from the statute defining the grounds for deportability to the statute defining the grounds for inadmissibility. Illegal SIJS beneficiaries who entered without inspection can still seek individual waivers of this new ground of inadmissibility, but they are no longer generally exempt from this ground, as they had been when it was a deportability ground. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. 104-208, 110 Stat. 3009-46, 3009-579.

- **2008** – Congress smooths the path of SIJS beneficiaries to adjustment of status by exempting them from inadmissibility based on having entered without inspection. Congress also expands eligibility for SIJS. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA"), Pub. L. 110-457, § 235(d), 122 Stat. 5044, 5079–81.

CERTIFICATE OF COMPLIANCE

I, Catherine Weiss, certify that under Federal Rules of Appellate Procedure 29(a)(4)(G), 29(a)(5), 32(a)(7)(B), and 32(g)(1), this Brief of Amici Curiae is 6,384 words, excluding the appendix and portions exempted by Fed. R. App. P. 32(f), if applicable.

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Date: November 25, 2020

By: s/ Catherine Weiss
Catherine Weiss

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Catherine Weiss

CERTIFICATE OF SERVICE

I hereby certify that on the date below, I electronically filed the within Brief of Amici Curiae Catholic Legal Immigration Network, Inc. (CLINIC), Diocesan Migrant & Refugee Services, Inc., The Door, Florence Immigrant & Refugee Rights Project, Immigrant Justice Corps, Kids In Need of Defense (KIND), Lawyers' Committee for Civil Rights of the San Francisco Bay Area, The Legal Aid Society, New Jersey Consortium For Immigrant Children, Northwest Immigrant Rights Project, Political Asylum/Immigration Representation Project (PAIR), Public Counsel, Safe Passage Project, and Young Center for Immigrant Children's Rights with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

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