UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

JOSHUA M., Petitioner, v. William BARR, in his official capacity as the Attorney General of the United States; Chad WOLF, in his official capacity as Acting Secretary for the United States Department of Homeland Security; Kenneth CUCCINELLI, in his capacity as Purported Acting Director for United States Citizenship and Immigration Services, Respondents.	Docket No.: 3:19-cv-770

BRIEF OF AMICI CURIAE IMMIGRANT JUSTICE CORPS, KIDS IN NEED OF DEFENSE (KIND), LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA, NEW JERSEY CONSORTIUM FOR IMMIGRANT CHILDREN, NORTHWEST IMMIGRANT RIGHTS PROJECT, POLITICAL ASYLUM/IMMIGRATION REPRESENTATION PROJECT (PAIR), PUBLIC COUNSEL, AND YOUNG CENTER FOR IMMIGRANT CHILDREN'S RIGHTS

LOWENSTEIN SANDLER LLP
Ario Fazli
2200 Pennsylvania Avenue, NW
Washington, DC 20037
Telephone: 202-753-3800
AFazli@lowenstein.com

Catherine Weiss (pro hac vice pending)
Joseph A. Fischetti (pro hac vice pending)
Jennifer A. Randolph (pro hac vice pending)
One Lowenstein Drive
Roseland, New Jersey 07068
Telephone: 973-597-2500
CWeiss@lowenstein.com
JFischetti@lowenstein.com
JRandolph@lowenstein.com

Counsel to (Proposed) Amici Curiae

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INTEREST OF AMICI CURIAE

Immigrant Justice Corps ("IJC") is the country's first and only fellowship program wholly dedicated to increasing access to counsel for immigrants facing the threat of deportation or seeking lawful status or citizenship. Every year, IJC identifies promising young lawyers and advocates passionate about immigration, places them at nonprofit organizations, and supports them as they provide direct legal assistance to low-income immigrants. IJC fellows represent large numbers of children and young people who have been abused, abandoned, or neglected and sought Special Immigrant Juvenile Status, many of whom are in removal proceedings.

Kids in Need of Defense ("KIND") is a national nonprofit organization dedicated to providing free legal representation to immigrant children who are unaccompanied by or separated from a parent or legal guardian, and who face removal proceedings in immigration court. Since 2009, KIND has received referrals for more than 20,000 children from seventy-two countries. KIND serves children through its ten field offices and in partnership with more than 600 law firms, corporations, law schools, and bar associations. KIND and these partners have assisted thousands of children in pursuing humanitarian protection as Special Immigrant Juveniles. KIND also advocates for laws, policies, and practices to improve the protection of unaccompanied children. KIND has a compelling interest in ensuring the lawful administration of federal protections for abused, neglected, and abandoned immigrant children.

The **Lawyers' Committee for Civil Rights of the San Francisco Bay Area ("LCCR")** is a nonprofit organization that combines direct legal services, policy advocacy, and impact litigation to advance the rights of low-income immigrants, refugees, and communities of color. Through its direct legal services and pro bono programs, LCCR assists abandoned, abused, and neglected youth in petitioning for Special Immigrant Juvenile Status and other forms of

humanitarian immigration relief. LCCR also has engaged in class action litigation to protect access to Special Immigrant Juvenile Status for youth in California.

The **New Jersey Consortium for Immigrant Children (the "Consortium")** is a statewide collaboration of advocates for immigrant children from nonprofit organizations, New Jersey's two law schools, and leading pro bono counsel from several law firms and corporate legal departments. Since its inception in May 2015, the Consortium has maintained a tripartite initiative focused on (1) high-quality direct representation; (2) recruitment and mentoring to facilitate enhanced pro bono participation by the private bar; and (3) advocacy and policy work to effectuate systemic change with and on behalf of immigrant children in New Jersey. Consortium members provide representation to undocumented immigrant children in removal proceedings, particularly children and youth who have been abused, neglected, and/or abandoned and who are eligible for Special Immigrant Juvenile Status, as well as for other forms of immigration relief.

The **Northwest Immigrant Rights Project ("NWIRP")** is a Washington State nonprofit organization that promotes justice by defending and advancing the rights of immigrants through direct legal services, systemic advocacy, and community education. NWIRP provides direct representation to low-income immigrants in removal proceedings and to other low-income immigrants applying for immigration relief. NWIRP represents scores of children and youth who have been abandoned, abused, or neglected and have applied for Special Immigrant Juvenile Status and adjustment of status.

The **Political Asylum/Immigration Representation Project ("PAIR")** is a nonprofit organization in Boston and the leading provider of pro bono legal services to indigent asylum-seekers and immigrants detained in Massachusetts. A significant percentage of PAIR's clients are young persons under the age of 21 who have been abused, abandoned, or neglected and are seeking

safety and legal protection in the United States in the form of Special Immigrant Juvenile Status. PAIR participates in systemic advocacy to protect the rights of Special Immigrant Juveniles, particularly those in removal proceedings. PAIR also conducts legal rights presentations, many of which are targeted at younger populations who would be protected by Special Immigrant Juvenile Status.

Public Counsel, based in Los Angeles, California, is the nation's largest nonprofit law firm specializing in delivering pro bono legal services. Through a pro bono model that leverages the talents of thousands of attorney and law student volunteers, Public Counsel annually assists more than 30,000 families, children, and nonprofit organizations, and addresses systemic poverty and civil rights issues through impact litigation and policy advocacy. Public Counsel's Immigrants' Rights Project provides pro bono placement and direct representation to individuals and families—including unaccompanied children and asylum seekers—in the Los Angeles Immigration Court, the Board of Immigration Appeals ("BIA"), and federal courts throughout the nation, including the United States Court of Appeals for the Ninth Circuit. The Immigrants' Rights Project provides legal representation to approximately 200 immigrant children at any time and has played an integral role in recent impact litigation on behalf of immigrant children seeking humanitarian relief.

The **Young Center for Immigrant Children's Rights (the "Young Center")** advocates on behalf of the best interests of unaccompanied and separated children in adversarial immigration proceedings. The Young Center has been appointed as the independent Child Advocate (best interests guardian *ad litem*) for more than 2,000 particularly vulnerable children and runs Child Advocate programs in eight locations across the United States. In that capacity, the Young Center provides government officials with recommendations regarding the best interests of each child,

taking into account his or her safety, expressed wishes, and rights to family, liberty, development, and identity. The Young Center has a vested interest in ensuring that children have a fair opportunity to pursue permanency in the United States and that the government meets its obligation to ensure that children are repatriated only when they will be safe. The Young Center also engages in policy initiatives to develop and promote standards for protecting the best interests of children while they are subject to decision-making by government officials.

No counsel for a party authored this brief in whole or in part, and no entity other than amici and their counsel made a monetary contribution to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Nearly thirty years ago, Congress created Special Immigrant Juvenile Status ("SIJS") as a means of establishing protection and a pathway to permanent residency for a specific subset of immigrant children. That subset includes juveniles who cannot reunify with one or both parents because of abuse, neglect, abandonment, or for some similar reason, and whose return to their home country would be contrary to their best interests.

A juvenile seeking the protection of a state court may, in the context of a family law proceeding, request certain findings related to SIJS. To obtain SIJS, the juvenile must then submit the state court order containing the findings to the United States Citizenship and Immigration Services ("USCIS"), together with a SIJS petition. If USCIS approves the petition, the juvenile may rely on SIJS to apply to adjust status and obtain a green card. Federal law removes certain barriers that would otherwise prevent the juvenile from achieving that lawful permanent resident status. Because the law limits the number of visas available to Special Immigrants (including but not limited to Special Immigrant Juveniles), however, juveniles from certain countries, mainly in

Central America, may have to wait years to obtain a visa. Young people in this position must wait to apply for their green cards until a visa is available.

The case of Petitioner Joshua M. ("Joshua") is illustrative. Both of Joshua's parents abandoned him in Honduras and moved, separately, to the United States. Joshua bounced among family members, spending the longest time with an aunt who herself eventually moved to the United States, leaving Joshua to fend for himself in Honduras as a fifteen-year-old. His lack of parental protection made him especially vulnerable to the members of a local gang, who began targeting him when he was eleven. Gang members slashed Joshua with knives and machetes and caused lasting hearing damage by launching a firecracker at his head. Joshua fled Honduras at age sixteen to escape the gang's death threats. Upon arriving in this country, Joshua tried reuniting with each of his parents. First, he moved in with his mother and stepfather, but his stepfather was abusive, and he and Joshua's mother eventually excluded Joshua from their home. Joshua then moved in with his father, but his father is an abusive alcoholic who threw Joshua out. Finally, Joshua found a stable home in the Bronx, New York, with his uncle and older brother.

Based on evidence establishing these facts, a New York Family Court placed Joshua under the guardianship of his uncle and made findings of abuse, neglect, and abandonment against his mother and father. The Family Court also found it would not be in Joshua's best interest to return to Honduras "because he does not have an adequate and secure home" there and because "gang members have sworn to kill Joshua should he return." *In re Joshua M.*, No. 212594 (N.Y. Fam. Ct. Bronx Cnty. Jan. 23, 2019) (Petition for Writ of Habeas Corpus (ECF No. 1), Exh. 1 at 2.)

Relying on the New York Family Court's findings, Joshua applied to USCIS for SIJS. USCIS was then engaged in an illegal policy of denying SIJS to juveniles whose New York Family Court orders were entered after their eighteenth birthdays, as Joshua's was. Joshua was therefore

a member of the class in *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350 (S.D.N.Y. 2019), which overturned that policy. Following the decision in *R.F.M.*, USCIS granted Joshua SIJS in September 2019. Like all Special Immigrant Juveniles, Joshua will benefit from waivers of certain bars to admissibility, as well as other provisions intended to protect his welfare in the United States.

In the instant matter, and other matters like it, the Government seeks to undermine 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 language and history of the SIJS statute. Under the statute, Special Immigrant Juveniles are shielded from removability on certain grounds, exempt from inadmissibility on certain grounds, and granted other protections in connection with SIJS. SIJS is worthless if each Special Immigrant Juvenile is nevertheless subject to removal from the United States while awaiting the opportunity to adjust status.

Moreover, SIJS is revocable only through a procedure prescribed by statute and regulation. But here, the Government attempts an end-run around this revocation procedure by seeking to remove Joshua while he pursues an appeal of his removal order and awaits the opportunity to adjust his status. If countenanced, this approach would allow the Government effectively to revoke the benefits of SIJS without following the prescribed procedure for doing so. The Government's actions violate Joshua's due process rights and pose a fundamental threat to the status of thousands of other Special Immigrant Juveniles across the country. This Court should not permit this unlawful practice to continue, and it should grant Joshua's habeas petition.

ARGUMENT

I. REMOVING SIJS BENEFICIARIES BECAUSE NO VISA IS IMMEDIATELY AVAILABLE VIOLATES DUE PROCESS AND UNDERMINES THE PURPOSE OF THE SIJS STATUTE.

The history, purpose, and relevant statutory text establish that Congress never intended a Special Immigrant Juvenile like Joshua to be removed simply because no visa allowing him to apply for lawful permanent residency is immediately available. To the contrary, SIJS was created to protect child survivors of unfit families from repatriation when it is not in their best interest. Specifically, SIJS protects an immigrant juvenile who has been "abuse[d], neglect[ed], [or] abandon[ed]" by one or both parents, and who cannot be safely "returned to [his or her] previous country of nationality or country of last habitual residence." 8 U.S.C. § 1101(a)(27)(J). An approved petition allows the Special Immigrant Juvenile to apply to adjust status to that of a lawful permanent resident ("LPR"). But SIJS is meaningless if a juvenile is nevertheless removed from the United States while awaiting the opportunity to adjust status and returned to the country where he or she was abused, neglected, or abandoned, despite a state court finding in every case that repatriation would be contrary to the juvenile's best interest. Joshua therefore has a strong likelihood of prevailing on the merits of his claims.

A. The Legislative History of the SIJS Statute Demonstrates That Congress Intended That SIJS Beneficiaries Remain in the United States to Adjust Status.

In 1990, Congress created SIJS to protect immigrant children in "long-term foster care" by designating them as Special Immigrant Juveniles and providing them a pathway to become LPRs. Immigration Act of 1990, Pub. L. No. 101-649, § 153, 104 Stat. 4978 (1990) (amending various sections of the Immigration and Nationality Act ("INA")); 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."); *see also R.F.M.*, 365 F. Supp. 3d at 361 ("SIJ status is a form of immigration relief that provides a path to lawful permanent residence for young immigrants who have been victims of abuse, neglect, or abandonment.").

In doing so, Congress embedded in the INA certain protections against removal (at that time called "deportation") for Special Immigrant Juveniles. Specifically, Section 153(b) of the 1990 Act, entitled "Waiver of Grounds for Deportation," provided that specified removal grounds "shall not apply to a special immigrant described in section 101(a)(27)(J) based upon circumstances that exist before the date the alien was provided such special immigrant status." Pub. L. No. 101-649, § 153(b).[1] Under these provisions, while Special Immigrant Juveniles could be subject to removal on certain grounds, such as serious criminal convictions or threats they might pose to the national security, 8 U.S.C. § 1227(c) (not waiving *id.* § 1227(a)(2), (4)), they could not be removed on other grounds, such as for having entered the country other than at an official checkpoint, *id.* (waiving *id.* § 1227(a)(1)(A), (B)).

In 1991, the Immigration and Naturalization Service ("INS," a predecessor federal agency) informed Congress that the statute, as currently written, did "not waive any grounds of excludability" and that "[a]n excludable alien may not be issued an immigrant visa, unless the exclusion grounds are waived." Special Immigrant Status, 56 Fed. Reg. 23207, 23208 (May 21, 1991). In other words, the original framework was not working because certain bars to adjustment of status were preventing Special Immigrant Juveniles from becoming LPRs. To correct this problem, Congress exempted SIJS beneficiaries from specified grounds for excludability (now called "inadmissibility"). *See* Miscellaneous and Technical INA Amendments of 1991, Pub. L.

[1] This same language is now codified at 8 U.S.C. § 1227(c).

No. 102-232, § 245, 105 Stat. 1733 (1991). This updated section, codified at 8 U.S.C. § 1255(h)(2), provided (and continues to provide) that "in determining the [SIJS beneficiary's] admissibility as an immigrant," certain grounds for inadmissibility "shall not apply" and others maybe be waived at the discretion of the Attorney General.

By waiving certain grounds of removability for SIJS beneficiaries and exempting them from inadmissibility on certain grounds, Congress created the legal protections necessary to effectuate the purpose of the SIJS framework by protecting and providing permanent lawful status to a particularly vulnerable group of immigrant children. 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.

In 2008, Congress again amended the SIJS statute, significantly expanding SIJS eligibility and strengthening SIJS-related provisions. Specifically, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA") removed the requirement that the child be 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, 122 Stat. 5044, 5079 (2008) (codified at 8 U.S.C. § 1101(a)(27)(J)(i)).[2] 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 offer protection from removal *permanently*. TVPRA § 235(d) (emphasis added); *Yates v. United States*, 135 S. Ct. 1074, 1083 (2015) (recognizing that although statutory "headings are not commanding," they may provide important "cues" about congressional intent).

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

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

Under the SIJS statute and regulations, a state "juvenile court" must make the following findings for a juvenile to be eligible for SIJS:

1. The petitioner is under 21 years of age;
2. The petitioner is unmarried;
3. The petitioner is dependent on the court or to be placed in the custody of, or legally committed to, a state agency or individual appointed by the court;
4. The petitioner cannot be reunified with one or both parents due to abuse, neglect, abandonment, or a similar basis found under state law; and
5. It is not in the petitioner's best interest to be returned to his or her country of nationality or last habitual residence.

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

Importantly, and logically, an immigrant is eligible for SIJS only if he or she is "present in the United States." 8 U.S.C. § 1101(a)(27)(J). This requirement is implicit in the purpose of the statute itself because SIJS is based on state court findings that a juvenile cannot be reunified with unfit parents or safely sent back to the country of origin. These required findings evince Congress's understanding that the child is here, and subject to the jurisdiction of our state courts, when the findings are made, and still here after SIJS is granted, as the child cannot be safely sent home. *See Garcia v. Holder*, 659 F.3d 1261, 1271 (9th Cir. 2011) (the SIJS provisions "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); *accord Osorio-Martinez v. Attorney Gen. United States of Am.*, 893 F.3d 153, 168 (3d Cir. 2018).

Upon receipt of a juvenile court order, an immigrant can apply for SIJS by submitting a Form I-360 petition. 8 C.F.R. § 204.11(b). Once USCIS approves the Form I-360 petition and

thus awards the immigrant SIJS, the Special Immigrant Juvenile will, in the ordinary course of events, become eligible to apply for a green card by filing a Form I-485 for adjustment of status. 8 U.S.C. § 1153(b)(4); *see Reyes v. Cissna*, 737 F. App'x 140, 142 (4th Cir. 2018) (citing 8 U.S.C. §§ 1153(b)(4), 1154(a)(1)(G)) ("Obtaining SIJ status is a significant benefit because such an alien, like others in the statutory special immigrant classification, is potentially eligible for lawful permanent resident status irrespective of her immigration status.").

In some cases, however, a SIJS beneficiary may wait years for the opportunity to file for adjustment of status. That is because an immigrant may not file a Form I-485 until a visa becomes available. 8 C.F.R. § 245.1(g)(1) ("An alien is ineligible for the benefits of [adjustment of status, provided in 8 U.S.C. § 1255] unless an immigrant visa is immediately available to him or her at the time the application is filed."). Because federal law imposes limits on the number of immigrants from a given country who may be issued visas during each fiscal year, *see* 8 U.S.C. §§ 1151, 1153, a visa is not always immediately available to each SIJS beneficiary*, see* 8 C.F.R. § 245.1(g)(1). As a result, SIJS beneficiaries from high-demand countries—which since 2016 have consistently included El Salvador, Guatemala, and Honduras (the "Northern Triangle countries")[3], and at times have also included India and Mexico[4]—are forced to apply for LPR status on a staggered timeline based on visa availability. Immigrants from these countries may

[3] *See Employment-Based Fourth Preference (EB-4) Visa Limits Reached for Special Immigrants From El Salvador, Guatemala and Honduras*, USCIS (last updated June 20, 2016), https://www.uscis.gov/archive/employment-based-fourth-preference-eb-4-visa-limits-reached-special-immigrants-el-salvador-guatemala-and-honduras.

[4] *See Employment-Based Fourth Preference (EB-4) Visa Limits Reached for Special Immigrants from India*, USCIS (last updated July 11, 2016), https://www.uscis.gov/archive/archive-news/employment-based-fourth-preference-eb-4-visa-limits-reached-special-immigrants-india; *Employment-Based Fourth Preference (EB-4) Visa Limits Reached for Special Immigrants From Mexico*, USCIS (last updated June 20, 2016), https://www.uscis.gov/archive/employment-based-fourth-preference-eb-4-visa-limits-reached-special-immigrants-mexico.

wait three years or more from the time their SIJS petitions are filed to when they can apply for a green card. *See Osorio-Martinez*, 893 F.3d at 160 n.3.[5]

These waitlisted SIJS beneficiaries remain the same persons that the SIJS statute was designed to protect. The fact that no visa is currently available because a numerical limit has been reached changes nothing. These are the same juveniles who state courts determined have been abused, neglected, abandoned, or something similar by one or both parents, and whose best interests require keeping them in the United States and not returning them to their countries of origin. Congress enlisted the state courts to make these findings to ensure the protection of vulnerable young people.

Congress also explicitly provided that certain grounds for removal, including for having entered the United States without inspection at a checkpoint, "shall not apply to a special immigrant described in section 1101(a)(27)(J) of this title [the SIJS statute] based upon circumstances that existed before the date the alien was provided such special immigrant status." 8 U.S.C. § 1227(c). Yet the Government now proposes to remove Joshua, and potentially thousands of other Special Immigrant Juveniles who are also waiting for visas, on the very ground this statute waives—because he arrived in the United States without inspection. Such a removal would violate the statute and subvert congressional intent.

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[5] *See also Visa Wait Times*, USTravelDocs.com, https://www.ustraveldocs.com/hn/hn-iv-waittimeinfo.asp (last visited Dec. 6, 2019) (noting that the wait-time could be "several years"); *Visa Bulletin for December 2019*, U.S. Dep't of State (Nov. 8, 2019), https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2020/visa-bulletin-for-december-2019.html (showing visas available in the fourth category of employment-based preferences, which includes SIJS, for those from El Salvador, Guatemala, and Honduras who filed their SIJS applications before or during July 2016, more than three years ago).

C. The Grant of SIJS Is Meaningful and Protected by Due Process.

As set forth above, 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 Government does not dispute that Joshua is entitled to the protections of the Due Process Clause. (Gov't Br. Opp. Mot. TRO & Prelim. Inj. at 3-5.) Nor could it. As courts have repeatedly acknowledged, "the Due Process Clause applies to 'all "persons" within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.'" *Santos v. Smith*, 260 F. Supp. 3d 598, 609 (W.D. Va. 2017) (quoting *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001)). Thus, "[t]here is no doubt that all persons, including those in this country unlawfully, are protected by the Due Process Clause of the Fifth . . . Amendment[]." *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 611 (E.D. Va. 2004); *see also United States v. Lopez-Collazo*, 824 F.3d 453, 460-61 (4th Cir. 2016) ("[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953))).

The due process rights of SIJS beneficiaries are reinforced by the depth of their connections in and to the United States: "[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." *Osorio-Martinez*, 893 F.3d at 168 (quoting *Castro v. U.S. Dep't Homeland Sec.*, 835 F.3d 422, 448 (3d Cir. 2016) (quoting *Landon v. Plasencia*, 459 U.S. 21, 32 (1982))); *see also al-Marri v. Pucciarelli*, 534 F.3d 213, 222 (4th Cir. 2008) ("[A] long line of Supreme Court cases establishes that aliens receive certain protections—including those rights guaranteed by the Due Process Clause—'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, 271 (1990))), *vacated and remanded with instructions to dismiss as moot sub nom. al-Marri v. Spagone*, 555 U.S. 1220 (2009). 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 that Congress accorded SIJS grantees.

Congress designed SIJS eligibility standards for the narrow purpose of "assist[ing] a limited group of abused children to remain safely in the country with a means to apply for LPR status." *Garcia*, 659 F.3d at 1271. Thus, to be eligible for SIJS, an immigrant must have "been declared dependent on a juvenile court located in the United States" or a juvenile court must have "legally committed [the immigrant] to, or placed [the immigrant] under the custody of, an agency or department of a State, or an individual or entity . . . ." 8 U.S.C. § 1101(a)(27)(J)(i). State court jurisdiction often depends on the applicant's having established some period of 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 has been adopted by 49 states. *See, e.g.*, N.Y. Dom. Rel. Law §§ 75-a(7), 76; Va. Code Ann. §§ 20-146.1, 20-146.12. While other proceedings, including foster care placements that rest on imminent risk to the child, do not involve such waiting periods, they often result in the state's assumption of legal custody over the foster child. *See, e.g.*, N.Y. Fam. Ct. Act § 614; Va. Code Ann. § 16.1-283. In other words, the SIJS statute tethers eligibility to the child's formation of significant connections within the United States.

Once the Government finds an immigrant eligible for SIJS, the law provides the grantee with protections that strengthen his or her ties to the United States pending adjustment of status. Of most immediate consequence, immigrants awarded SIJS in the United States are exempt from

myriad bars to admissibility that would otherwise preclude them from adjusting status to obtain a green card, including the bars for being at risk of becoming a public charge, entry to perform skilled or unskilled labor, presence in the United States without having been admitted or paroled, engaging in fraud to procure admission or adjustment of status, stowaways, failure to possess a valid entry document, and unlawful presence in the United States. *See* 8 U.S.C. § 1255(h) (waiving 8 U.S.C. § 1182(a)(4), (5)(A), (6)(C), (6)(D), (7)(A), (9)(B)). Indeed, far from erecting barriers to entry, the SIJS statute affirmatively states that beneficiaries are deemed to "have been paroled into the United States." 8 U.S.C. § 1255(h)(1). The intended effect of this special treatment for SIJS beneficiaries 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 the custody of the Secretary of Health and Human Services at the time the juvenile court granted a dependency order, they are entitled to the same educational services that the federal government provides for refugee children. 8 U.S.C. § 1232(d)(4)(A). If not, then any state foster funds expended on behalf of a SIJS beneficiary are subject to federal reimbursement. 8 U.S.C. § 1232(d)(4)(B). In some states, Special Immigrant Juveniles are also entitled to state-only health benefits available to individuals categorized as Permanently Residing Under Color of Law. *See* Claire R. Thomas & Ernie Collette, *Unaccompanied and Excluded from Food Security: A Call for the Inclusion of Immigrant Youth Twenty Years After Welfare Reform*, 31 Geo. Immigr. L.J. 197, 208 (2017). These education and health benefits underscore Congress's intent to keep SIJS beneficiaries in the United States.

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, SIJS may be revoked only on a showing of "good and sufficient cause" to the

Secretary of Homeland Security. 8 U.S.C. § 1155.[6] Such 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 of the approval." 8 C.F.R. § 205.2(b). USCIS must provide a written explanation for any revocation. *Id.* § 205.2(c).

In sum, under the operative statutory framework, an immigrant cannot attain SIJS without having significant ties within the United States, and, once granted, the benefits of SIJS are designed to 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; *Dia v. Ashcroft*, 353 F.3d 228, 239 (3d Cir. 2003) (en banc); *see also Reyes*, 737 F. App'x at 142 (describing obtaining SIJS as "a significant benefit"). Because the qualifications for SIJS limit grantees 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 by due process of law. *Osorio-Martinez*, 893 F.3d at 171-72.

As set forth below, in this case, the Government has done away with any pretense of due process with respect to the de facto revocation of Joshua's SIJS. Such action is an unlawful end-run around the SIJS statute.

D. The Government's Attempt to Remove a SIJS Beneficiary Because No Visa Is Currently Available Unlawfully Circumvents the SIJS Statutory Framework.

Congress created SIJS to provide at-risk juvenile immigrants a path to LPR status. *See Garcia*, 659 F.3d at 1271. Through SIJS, juveniles are afforded important waivers of removability and inadmissibility and are deemed "paroled" into the United States, thereby enabling them to pursue adjustment of status to become LPRs. 8 U.S.C. § 1255(h). As they await adjustment of

[6] *USCIS Policy Manual*, vol. 6, pt. J, ch. 4.F.3, *available at* https://www.uscis.gov/policy-manual/volume-6-part-j-chapter-4 (current as of Dec. 2, 2019). In certain circumstances, SIJS is automatically revoked. *Id.* However, none of those circumstances is relevant here.

status, they often remain in the stable home where the state court placed them; they may attend public school, *see Plyler v. Doe*, 457 U.S. 202, 226 (1982); and they sometimes receive educational and healthcare benefits, all of which facilitate their further integration into life in the United States, *see, e.g.*, 8 U.S.C. § 1232(d)(4); Thomas & Collette, 31 Geo. Immigr. L.J. at 207-08. Given the significance of SIJS, the law erects statutory and regulatory hurdles that the Government must clear before it revokes an individual's status as a Special Immigrant Juvenile. *See* 8 U.S.C. § 1155; 8 C.F.R. § 205.2.

The Government now takes the position, however, that a person like Joshua, who has met the high threshold for SIJS and may seek adjustment of status when a visa becomes available, can nevertheless be removed from the United States. Removal places a SIJS beneficiary in the very position the statute was meant to avoid, sending the juvenile back to the harmful circumstances—and often also the unfit family—from which the state court order was supposed to protect him or her. In fact, 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). It cannot be that Congress meant to protect children from harmful contact with abusive or neglectful parents during the SIJS application process only to allow the government to remove them after they are awarded SIJS, placing them again at risk of dependency on unfit parents. And even though the law provides a mechanism for the revocation of SIJS, the Government posits that it can deprive a SIJS beneficiary of all the advantages of SIJS through removal without bothering with the formal procedures for revocation.

The Government's arguments are irreconcilable with the intent and purpose of the laws giving rise to SIJS. Congress enacted a framework for SIJS beneficiaries to "be deemed . . . to

have been paroled in the United States" "for the purpose of applying" for adjustment of status. 8 U.S.C. § 1255(h); 8 C.F.R. § 1245.1(a). Such parole only has meaning if it permits the juvenile to pursue a green card, *i.e.*, to complete the pathway created by the SIJS statute. Yet removal blocks that pathway. Even though Congress exempted SIJS beneficiaries from numerous statutory bars to admissibility, 8 U.S.C. § 1255(h)(2)(A), it did *not* categorically lift the bar applicable to immigrants who have been "ordered removed," 8 U.S.C. § 1182(a)(9)(A). Under this provision, an immigrant is inadmissible for at least five years following the execution of a removal order. *Id.* Thus, a juvenile who is removed cannot rely on SIJS to obtain status as an LPR because the executed removal order makes the juvenile inadmissible.

The Government responds that, if Joshua prevails on the merits of his appeal (while in hiding in Honduras), his removal order will be reversed, and the bar to admissibility will not take effect. (Gov't Br. Supp. Mot. Dismiss at 21.) Joshua's counsel thoroughly rebut any claim that appealing his case from Honduras constitutes an adequate alternative remedy for Joshua. (Pet'r's Br. Opp. Mot. Dismiss at 11-20.) In any event, the Government's position does not gain in credibility by virtue of the possibility that the BIA and the Fourth Circuit may ultimately reject it and reverse Joshua's removal order. The Government's position results in an absurdity: one division of the Department of Homeland Security (USCIS) may grant SIJS to a juvenile in Joshua's position only to have another division of this same Department (Immigration and Customs Enforcement) assert its authority to execute a removal order against him based solely on the wait-time for a visa. Assuming, as the government claims, that such an order is lawful, it vitiates his status as a Special Immigrant Juvenile by rendering him inadmissible.

The Government defends this bait-and-switch even though a petitioner qualifies for SIJS without regard to the immediate availability of a visa and even though USCIS is aware of visa

wait-times when it grants SIJS. Congress cannot have intended to open the door to protection for abused, abandoned, and neglected immigrant juveniles only to slam it shut again. *Cf. Cruz-Miguel v. Holder*, 650 F.3d 189, 198 (2d Cir. 2011) (discussing temporary parole for "humanitarian reasons or significant public benefit" under 8 U.S.C. § 1182(d)(5)(A) and noting that "[w]hile such parole does not grant the alien 'admission' to the United States, it effectively halts removal of the alien until the underlying humanitarian or public benefit purpose is achieved" (citation omitted)). The Government's brief conspicuously avoids addressing how a removal can be reconciled with its contention that SIJS "makes [a juvenile] eligible to apply for adjustment of status . . . ." (Gov't Br. Supp. Mot. Dismiss at 19.) That is because it cannot.[7]

The only authorities the Government cites in support of its position that a person may be removed notwithstanding a grant of SIJS are *Osorio-Martinez*, 893 F.3d 153, *Gao v. Jenifer*, 185 F.3d 548 (6th Cir. 1999), and *C.J.L.G. v. Barr*, 923 F.3d 622 (9th Cir. 2019) (en banc). (Gov't Br. Supp. Mot. Dismiss at 18-19.) These cases do not help the Government but instead support Joshua's arguments.

In *Osorio-Martinez*, the Third Circuit invoked the Suspension Clause and granted a habeas petition to protect SIJS beneficiaries from expedited removal. The court discussed at length the

[7] In a last-ditch effort to sustain the plausibility of its position, the Government argues that a petitioner can apply for a waiver of inadmissibility. (Gov't Br. Supp. Mot. Dismiss at 21 (citing 8 U.S.C. § 1182(a)(9)(A)(iii); 8 C.F.R. § 212.2(d)).) As the *Osorio-Martinez* court pointed out, however, these provisions offer "small comfort indeed, as the grant or denial of such a waiver is an unreviewable discretionary decision, has no fixed timeline by which waiver applications must be processed, costs applicants many hundreds of dollars in fees, and even in the case of approval would still only result in relief after Petitioners waited in queue for available visas, which the Government informs us are backlogged by at least two years [now longer]." 893 F.3d at 172 n.15 (citations omitted). Although not mentioned by the Government, 8 U.S.C. § 1255(h)(2)(B) also permits the Attorney General to waive certain grounds for inadmissibility, including 8 U.S.C. § 1182(a)(9)(A), but that waiver, too, is wholly discretionary and in no way an effective remedy for qualified SIJS grantees who have been removed.

many benefits of SIJS and the due process protections that attach to this status. 893 F.3d at 169-75. Rejecting the Government's argument that permitting removal would reflect appropriate deference to Congress, the court wrote: "[I]f anything, it cuts the other way: the rights and safeguards that Congress has legislated for SIJ designees could be duly considered in standard removal proceedings, but they would be eviscerated by the expedited removal now sought by the Attorney General." 893 F.3d at 176. The court said nothing whatsoever about whether the "rights and safeguards" associated with SIJS can be "duly considered in standard removal proceedings" *after the SIJS grantee has already been removed*. Nevertheless, the Government attempts to transform this aside about a situation not before the Third Circuit into an endorsement of the Government's removal of a SIJS beneficiary. Such an argument finds no support in *Osorio-Martinez*. On the contrary, there, the court underscored that "the Executive to this point has consistently respected those rights and allowed SIJ designees to remain in the United States pending adjustment of status." *Id.* at 173.

In *Gao*, the Sixth Circuit was grappling with whether, under a prior version of the SIJS statute, "the fact that an immigrant is in INS 'legal custody' deprives state courts of the jurisdiction they would otherwise have." *Gao*, 185 F.3d at 554. The court held that the state court had jurisdiction to declare the juvenile dependent, and that neither the Supremacy Clause nor the doctrine of sovereign immunity posed any bar to such jurisdiction. *Id.* Rejecting the Government's argument that the state court's exercise of jurisdiction restrained the federal government's action in derogation of its sovereign immunity, the court wrote: "Granting Gao SIJ status does not, in itself, restrain or compel the government with respect to deportation. It merely makes him eligible for permanent resident status according to *the INS's own rules*. . . . It is the operation of INS rules that may prevent Gao's deportation, not the action of the county court." *Id.*

at 554-55. It is thus evident in context what the Sixth Circuit meant: it is not the state court order that prevents the federal government from deporting the juvenile; it is instead the federal law and regulations governing SIJS that stop the federal government from removing him unless and until the government denies him status as a lawful permanent resident. *Id.* (holding that SIJS grant would "entitle" juvenile to "apply for permanent status" (citing 8 U.S.C. § 1255(a))).

In *C.J.L.G.*, the Ninth Circuit granted an immigrant juvenile's petition for review, holding that the immigration court had failed in its duty to advise that he was potentially eligible for relief as a Special Immigrant Juvenile. 923 F.3d at 628-29. Far from supporting the Government's position that a SIJS grantee is removable because no visa is immediately available, the Ninth Circuit reversed the BIA and remanded for the immigration court to grant appropriate continuances so that the petitioner could complete the process of seeking SIJS. *See id.* Indeed, the court remarked that "had the [Immigration Judge ("IJ")] granted a continuance while CJ navigated the SIJ process, he would not currently be subject to a removal order." *Id.* at 629. On remand, the court advised the IJ to "exercise that discretion [whether to allow continuances] in light of CJ's apparent eligibility for SIJ status, something overlooked at the time of his hearing," and noted that the IJ "may now also consider how far he has proceeded in the process." *Id.* A court that took pains to ensure that the juvenile before it had a fair opportunity to have his SIJS petition adjudicated—vacating his removal order to allow him to await such adjudication in the United States—cannot have contemplated or countenanced that the government would turn around and remove him once he was ultimately granted SIJS. Despite the Government's reliance on *C.J.L.G.*, the case in fact undermines its position.

The Government's actions in this case and others like it—which apparently are part of an emerging but unwritten change in policy—contradict the purposes of the SIJS statute, the

Government's historical practices, and common sense. Worse, they undercut a clear expression of congressional intent by manipulating the tools at the Government's disposal to avoid the formal revocation procedures otherwise applicable to Special Immigrant Juveniles. Due process demands that if the Government desires to eliminate the myriad benefits of SIJS, it must follow lawful revocation procedures rather than stripping beneficiaries of these protections by removing them while they wait in line for a visa without taking any actions that would make them ineligible to adjust status.

II. A POLICY THAT SUBJECTS SIJS BENEFICIARIES AWAITING VISAS TO REMOVAL WILL HAVE AN EXTRAORDINARY IMPACT.

While the petitioner in this case is just one immigrant juvenile, the repercussions of this case are wide-reaching. Joshua is not alone as a SIJS beneficiary with no available visa. The government reports that 45,483 children have been granted SIJS since 2016.[8] Among those grantees are a significant number of immigrants from the Northern Triangle countries (and Mexico)—all countries for which there has been a backlog in available visas. Indeed, in 2019, of the 76,020 unaccompanied immigrant children[9] apprehended at the southwest border, approximately 96% came from El Salvador (16%), Guatemala (40%), Honduras (27%), or Mexico

[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 Year 2019*, USCIS, https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Victims/I360_sij_performancedata_fy2019_qtr3.pdf (last visited Dec. 6, 2019).

[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).

(13%).[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 by way of the southwest border, as ongoing crises in that region drive them north. *See generally*, 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 the most likely SIJS applicants. Thus, the high percentage of children from the Northern Triangle countries and Mexico apprehended at the southwest border is a strong indicator of a high percentage of children from that region among SIJS beneficiaries.

The result is that thousands of SIJS grantees are in the same position as Joshua: awaiting visa availability and the corresponding ability to seek adjustment of status. The Government's position in this case is that each and every one of them is subject to removal. The Government maintains that SIJS affords no protection from removal unless a visa is immediately available, such that the juvenile may apply to adjust status concurrently with filing his or her SIJS petition.[11] Other SIJS beneficiaries are subject to a loss of the benefits of their status at any time. If allowed to prevail in this case, the Government's position would place thousands of children at risk, despite the protections Congress enacted for their benefit.

[10] *U.S. Border Patrol Southwest Border Apprehensions by Sector Fiscal Year 2019*, U.S. Customs and Border Protection, https://www.cbp.gov/newsroom/stats/sw-border-migration/usbp-sw-border-apprehensions-fy2019 (last visited Dec. 6, 2019).

[11] *See Special Immigrant Juveniles*, USCIS, https://www.uscis.gov/green-card/sij (last visited Dec. 6, 2019).

CONCLUSION

For the foregoing reasons, this Court should grant Joshua's habeas petition, maintain the stay of removal, and deny the Government's motion to dismiss.

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Respectfully submitted,
/s/ *Ario Fazli*

Ario Fazli
LOWENSTEIN SANDLER LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037
Telephone: 202-753-3800
AFazli@lowenstein.com

Catherine Weiss (pro hac vice pending)
Joseph A. Fischetti (pro hac vice pending)
Jennifer A. Randolph (pro hac vice pending)
LOWENSTEIN SANDLER LLP
One Lowenstein Drive
Roseland, New Jersey 07068
Telephone: 973-597-2500
CWeiss@lowenstein.com
JFischetti@lowenstein.com
JRandolph@lowenstein.com

Counsel to (Proposed) Amici Curiae