

JUDGES BEHAVING BADLY . . . CLINICS FIGHTING BACK:  
THE STRUGGLE FOR SPECIAL IMMIGRANT JUVENILES IN  
STATE DEPENDENCY COURTS IN THE AGE OF TRUMP

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*When people talk about refugees, the words used are “they”,  
“us” or “them”. The moment of realization that we are a part  
of them, and they are a part of us, is the moment when we can  
begin to affect change.*

– Ai Weiwei, *Law of the Journey*<sup>1</sup>

I. INTRODUCTION: A JOURNEY TO THE COURTHOUSE

In the first half of 2016, nearly 26,000 unaccompanied children—most of them from Central America—were apprehended at the U.S. border.<sup>2</sup> The majority of these children came from the “Northern Triangle”—El Salvador, Guatemala and Honduras—escaping gang violence, high murder rates, endemic poverty, and family break-up.<sup>3</sup> After making treacherous journeys through Mexico to the U.S., many

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<sup>1</sup> AI WEIWEI, *LAW OF THE JOURNEY: JIRI FAJT IN CONVERSATION WITH AI WEIWEI* (Mar. 2017). See also Jessica Stewart, *Ai Weiwei Draws Attention to the Refugee Crisis with Powerful New Installation*, MY MODERN MET (Mar. 20, 2017), <https://mymodernmet.com/ai-weiwei-law-of-the-journey/> (depicting images from this multi-media art installation on the global refugee crisis).

<sup>2</sup> See *United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016: Statement by Secretary Johnson on Southwest Border Security*, U.S. CUSTOMS & BORDER PROTECTION (Oct. 18, 2016), [www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016](http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016).

<sup>3</sup> See Rocio Cara Labrador & Danielle Renwick, *Central America’s Violent Northern Triangle*, COUNCIL ON FOREIGN RELS. (June 26, 2018), <https://www.cfr.org/background/central-americas-violent-northern-triangle>.

of these unaccompanied minors presented themselves to state court judges in Florida and other states, seeking protection from neglect and harm and the opportunity to legalize their immigration status.<sup>4</sup>

One of the ways that these children sought to legalize their status was through adjudications of dependency and “best interest orders” issued by state dependency court judges.<sup>5</sup> A best interest order is a prerequisite for an immigrant child to qualify for immigration relief as a Special Immigrant Juvenile.<sup>6</sup> Special Immigrant Juvenile Status (“SIJS”) is a federal visa status available for certain immigrant children whom the court declares dependent, *i.e.*, unable to reunify with one or both of their parents “due to abuse, neglect, abandonment, or a similar basis under State law.”<sup>7</sup> The juvenile court must also find that it would not be in the child’s best interests to return to his or the parent’s previous country of nationality or residence.<sup>8</sup>

Once the court makes the required findings, the child is then eligible to apply to the Department of Homeland Security (“DHS”) for SIJS and lawful permanent residence.<sup>9</sup> This two-step process, which involves both state courts and the federal DHS, is a classic illustration of immigration federalism.<sup>10</sup> What makes it unique is the centrality of the state court in this hybrid federal-state immigration decision-making system. The powers of the state courts vis-à-vis the federal government have waxed and waned over the twenty-eight years since the original passage of the law in 1990.<sup>11</sup>

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<sup>4</sup> See Paula Trujillo Gonzalez, *A Precarious Journey: Unaccompanied Minor Migrants of Central America*, HUMANIUM (Dec. 6, 2016), <https://www.humanium.org/en/unaccompaniedminorscentral-america/>. Between 2013 and 2015, 8,353 potential Special Immigrant Juvenile-eligible children were released to sponsors in Florida. See *Unaccompanied Alien Children Released to Sponsors by State*, OFF. REFUGEE RESETTLEMENT (Mar. 28, 2019), <https://www.acf.hhs.gov/orr/resource/unaccompanied-alien-children-released-to-sponsors-by-state>. In 2014, approximately 5,000 unaccompanied alien children arrived in Florida, and about one-third of them were placed with adult family and non-family sponsors in Miami-Dade County. *Unaccompanied Children Released to Sponsors by County FY14*, OFF. REFUGEE RESETTLEMENT (Dec. 2, 2015), <https://www.acf.hhs.gov/orr/resource/unaccompanied-children-released-to-sponsors-by-county-fy14>.

<sup>5</sup> See 8 U.S.C. § 1101(a)(27)(J)(i)–(ii) (2012 & Supp. V 2018).

<sup>6</sup> See 8 U.S.C. § 1101(a)(27)(J)(ii); Bridgette A. Carr, *Incorporating a ‘Best Interests of the Child’ Approach Into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120, 136 (2009).

<sup>7</sup> See 8 U.S.C. § 1101(a)(27)(J)(i), (iii).

<sup>8</sup> See 8 U.S.C. § 1101(a)(27)(J)(ii). Federal regulations define juvenile court as “a court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles.” 8 C.F.R. § 204.11(a) (2009).

<sup>9</sup> See 8 U.S.C. § 1101(a)(27)(J)(iii).

<sup>10</sup> See Elizabeth Keyes, *Evolving Contours of Immigration Federalism: The Case of Migrant Children*, 19 HARV. LATINO L. REV. 33, 37 (2016).

<sup>11</sup> See *id.* at 40 (charting the changing power balances between the state courts and the

Advocates in Florida for immigrant children seeking dependency adjudications and best interest orders encountered resistance from state court judges in the years following the Central American influx.<sup>12</sup> In this Article I parse the body of judicial interpretations of state dependency and federal SIJS law rejecting state court petitions filed by immigrant children, primarily in Florida. I trace undercurrents of anti-immigrant sentiment seeping into recent trial court rulings and appellate opinions.

Some of the judicial skepticism was motivated by a perception or fear that the flow of migrant children from Central America was showing no signs of letting up.<sup>13</sup> Perhaps for these reasons, judges felt obligated to raise the bar to claims of dependency by these children. They constructed different narratives to undergird their rulings. The narratives depicted hordes of alien children coming from Central America, entering their courtrooms, and alleging “fictional cases” of dependency which did not request anything from the court other than a best interest order as a pretext for obtaining immigration relief.<sup>14</sup> The implication was that they were going through the “back door” of dependency court to qualify for green cards from the U.S. Citizenship and Immigration Services (“USCIS”).<sup>15</sup>

I frame this case or field study of shifting judicial attitudes toward immigrant children in Florida, written largely in the first-person, as a lawyer who has devoted nearly three decades of my career providing advocacy for these clients, first as a legal services staff attorney, and for the last twenty-three years as a law school clinician. When I established the Children & Youth Law Clinic in 1996, our focus was on advocating for the legal needs of older children in the state foster care system. From the beginning, we also identified the

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federal government in the SIJS cooperative system from 1990 to 2008).

<sup>12</sup> See Ashley Cleek, *Florida Judges Are Turning Their Backs on Abused Young Immigrants*, NATION (Jan. 22, 2018), <https://www.thenation.com/article/florida-judges-are-turning-their-backs-on-abused-young-immigrants/>.

<sup>13</sup> See *id.*

<sup>14</sup> See, e.g., Order Requiring Briefing & Scheduling Oral Argument at 5, *In re M.A.S.-Q. & Y.E.S.-Q.*, No. 09-15392 (11th Cir. Sept. 19, 2013) (“[I]t appears that there is no purpose served by this proceeding and that the Court is nothing more than a paper tiger ‘presiding’ over a fictional ‘case.’ The Court questions whether these Children are—or ever were—‘dependent’ on the State, as they are not seeking any services and do not appear to require any protection from this Court. So it seems that the only objective of this Petition was to obtain the Court’s ‘assistance’ in immigration matters.”).

<sup>15</sup> See *In re T.J.*, 59 So. 3d 1187, 1194–95 (Fla. Dist. Ct. App. 2011) (Wells, J., concurring in part, dissenting in part) (“[T]hus what T.J. is seeking here is to be declared dependent to secure a ‘back door’ route to naturalization. While I do not believe that Chapter 39 was ever intended to secure a pathway to citizenship for foreign minors, I must agree that the manner in which that Chapter currently is written may be interpreted to provide an avenue for such use.”).

needs of unaccompanied immigrant children in our community as a secondary priority. Clinic faculty and students developed expertise in the intersecting bodies of state and federal law involved in these cases.

Our clinic's first client, nicknamed "Tyson," was a homeless, undocumented Haitian-born teenager, abandoned by his parents, living on the streets of Miami, playing in a midnight basketball league where he was mentored by a tax lawyer, who did not have any background in Florida dependency law or federal immigration law and did not know how to assist him. We represented this first client on a private petition for dependency, filed in the Miami-Dade Circuit Court, asking the court to adjudicate him dependent based on allegations and evidence that he had been abandoned and neglected by his parents. Following several hearings in front of the dependency judge assigned to hear his case, Tyson was declared dependent and placed in the foster care system, where he thrived.

After his adjudication of dependency, the judge signed a best interest order, and we assisted Tyson in petitioning the Immigration and Naturalization Service (precursor to USCIS) for approval of his SIJS and lawful permanent residence applications. Today Tyson is a U.S. citizen and tech entrepreneur with two sons, and he has established a small foundation to assist young immigrants like him.<sup>16</sup>

Over the years, our clinic has represented dozens of clients like Tyson in dependency and foster care, delinquency, family custody and probate court, as well as in the immigration visa phase of the SIJS and permanent residence process.<sup>17</sup> For almost all of these clients, their journeys to the courthouse and their experiences in the courtroom before receptive judges have been transformative, even life-changing. Representing these clients has also fueled our efforts to share our expertise and experiences with others wanting to assist immigrant children.

I evaluate changing state judicial trends in SIJS cases and explore broader themes about state courts in a time of polarized attitudes towards immigrants. I discuss in equal measure the evolving legal doctrine and the fears of an onslaught that shaped the doctrine, even though the available data suggest that the fears were exaggerated. I

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<sup>16</sup> See *Children and Youth Law Clinic Turns Twenty*, U. MIAMI SCH. L. (Nov. 29, 2016), <https://www.law.miami.edu/news/2016/november/children-and-youth-law-clinic-turns-twenty>.

<sup>17</sup> See *Children and Youth Law Clinic*, U. MIAMI SCH. L., <https://www.law.miami.edu/academics/clinics/children-and-youth-law-clinic> (last visited May 11, 2019); see, e.g., Lissette Corsa, *Orphans of the State*, MIAMI NEW TIMES (Mar. 30, 2000), <https://www.miaminewtimes.com/news/orphans-of-the-state-6356793>.

also examine how our clinic and others challenged these legal trends and tried to refute the underlying messages. I write this Article from the perspective of a law school clinician, fighting in the trenches to help these clients. Law school clinics are on the front line before these courts, together with other advocates, and I discuss some of the arguments and strategies that we deployed to challenge judges. I look at the role of clinical legal education, through the training of law students, providing direct legal representation of these powerless and often unpopular clients, and trying to effectuate broader systems reforms. I give some examples of how we advocated not just in courts but other arenas (legislative and administrative) where state and federal policies affecting immigrant children seeking SIJS are developed.

In Part II, I analyze a recent decision of the Florida Supreme Court, *B.R.C.M. v. Florida Department of Children & Families*,<sup>18</sup> halting this trend, and the different views expressed by the plurality, concurring, and dissenting justices about the standards for adjudicating an immigrant child dependent under Florida law, notwithstanding the child's intent to seek a best interest order for SIJS eligibility under federal law. I discuss the importance and impact of this largely favorable decision, and speculate about whether the plurality opinion issued by the court is likely to endure in the current climate.

In Part III, I analyze historical antecedents to the recent trends rejecting dependency claims by immigrant children in Florida, and some of the responses by law school clinics and child and immigrant advocates. I focus on one egregious case of judicial hostility that posed a threat to undocumented children and families who appeared in his courtroom in Palm Beach County fourteen years ago. I describe some of the judge's actions of sharing confidential court records about undocumented immigrants with U.S. Border Patrol from the bench and the anti-immigrant views that he aired to the public. I write about different strategies we used, and some not used, to put a halt to the xenophobia that he displayed on and off the bench.

In Part IV, I delve a little further into some of the sources of the recent backlash against immigrant children by the state judiciary in Florida and elsewhere. In Part V, I profile the rulings of another juvenile court judge, in Miami-Dade County, who was a catalyst and theorist for rulings by other dependency judges and adverse appellate court decisions that the Florida Supreme Court in *B.R.C.M. II* halted.

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<sup>18</sup> *B.R.C.M. v. Fla. Dep't of Children & Families (B.R.C.M. II)*, 215 So. 3d 1219 (Fla. 2017).

In Part VI, I show how the Miami judge's rulings influenced other judges before *B.R.C.M. II* and give a few examples of continuing problems in our state, even after this decision.

In Part VII, I describe different ways our clinic participated in the efforts to fight judges whose perceptions of immigrants and national immigration policy views may have influenced their rulings.<sup>19</sup> I evaluate how the modest *B.R.C.M. II* plurality opinion, achieved through legal argument and client storytelling, helped to ensure a modicum of procedural due process for one undocumented immigrant child, and I conjecture about its prospects to keep the courthouse door open for other immigrant children. I give a descriptive account of the different strategies we used and use this account as a guide for future strategy to sustain and enforce the *B.R.C.M. II* decision.

Finally, I evaluate recent polarization in the state judiciary over immigrant children in light of the immigrant-baiting, wall-building rhetoric that brought Donald Trump to the presidency, from his descent down the escalator in his gilded Tower, and now from the White House, as he separates children from parents at the border, holds over 14,000 immigrant children in tents and cages, and demands a wall at the southern border.<sup>20</sup> Throughout the Article, I urge law school clinicians to deepen their understanding of their roles as educators and advocates for these children when confronted by similar views and rulings from state court judges, who build walls to keep them out of their courtrooms, extending a long and regrettable tradition of racial exclusion and inequality in our nation's treatment of immigrants.<sup>21</sup>

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<sup>19</sup> See, e.g., *In re B.R.C.M. (B.R.C.M. I)*, 182 So. 3d 749, 766 (Fla. Dist. Ct. App. 2015) (Salter, J., dissenting) ("That B.R.C.M.'s petition floats on an undercurrent of polarized views regarding national immigration policy is also without question.").

<sup>20</sup> See Robert Costa et al., *Trump Sticks to Demand for Border Wall Funding as Shutdown Drags On*, WASH. POST (Jan. 6, 2019), [https://www.washingtonpost.com/politics/president-trump-heads-to-camp-david-as-shutdown-enters-third-week/2019/01/06/22af03c0-11c3-11e9-b6ad-9efd62dbb0a8\\_story.html?utm\\_term=.08106fd63be0](https://www.washingtonpost.com/politics/president-trump-heads-to-camp-david-as-shutdown-enters-third-week/2019/01/06/22af03c0-11c3-11e9-b6ad-9efd62dbb0a8_story.html?utm_term=.08106fd63be0); Jennifer Rubin, *Trump Is Back to Racist Rhetoric*, WASH. POST (Apr. 5, 2018), [https://www.washingtonpost.com/blogs/right-turn/wp/2018/04/05/trump-is-back-to-racist-rhetoric/?utm\\_term=.49b4eb4cd72b](https://www.washingtonpost.com/blogs/right-turn/wp/2018/04/05/trump-is-back-to-racist-rhetoric/?utm_term=.49b4eb4cd72b); Kate Sullivan, *Record 14,000 Unaccompanied Immigrant Children in US Custody, HHS Confirms*, CNN (Nov. 23, 2018), <https://www.cnn.com/2018/11/23/politics/hhs-record-14000-immigrant-children-us-custody/index.html?no-st=1553692429>; *Trump Migrant Separation Policy: Children 'in Cages' in Texas*, BBC NEWS (June 18, 2018), <https://www.bbc.com/news/world-us-canada-44518942>.

<sup>21</sup> See generally David B. Oppenheimer et al., *Playing the Trump Card: The Enduring Legacy of Racism in Immigration Law*, 26 BERKELEY LA RAZA L.J. 1, 2, 39 (2016) (underscoring the interplay of longstanding racial animus and immigration policy).

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## II. JOURNEYS HALTED AT THE COURTHOUSE DOOR

*[S]tatutory dependency in Florida cannot and should not be allowed to be transformed into an immigration processing system which is strictly reserved for our federal immigration authorities.*

–Florida Supreme Court Justice Fred Lewis<sup>22</sup>

The recent Florida juvenile court trend of denying private petitions relied on interpretations of Florida statutory law, calculated to exclude immigrant children from the protections of state dependency law.<sup>23</sup> Immigrant children’s journeys to stability and safety were time and time again stopped at the state courthouse door.<sup>24</sup> The children and their advocates, many from law school clinics, encountered different forms of judicial resistance, in addition to the exclusionary jurisprudence, that made their petitions for relief from abuse and neglect impossible to be heard or granted.<sup>25</sup> Immigrant children stopped getting what other children in Florida routinely received from dependency judges, *i.e.*, “an investigation and individualized adjudication of their exigent circumstances.”<sup>26</sup> This judicial resistance in turn denied them the ability to seek immigration relief as SIJS petitioners. In effect, by preventing children from obtaining best interest orders, as the first “gatekeepers” in the two-tiered SIJS process, the dependency judges were operating as *de facto* immigration courts.<sup>27</sup>

A. *B.R.C.M. I and II*

One such child was B.R.C.M., who presented himself to a Florida state dependency court on a private petition for dependency, filed through his *pro bono* counsel at the Florida International University

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<sup>22</sup> *B.R.C.M. II*, 215 So. 3d at 1224 (Lewis, J., concurring in result).

<sup>23</sup> *See, e.g., id.*

<sup>24</sup> *See, e.g., B.R.C.M. I*, 182 So. 3d at 750 (citing *In re F.J.G.M.*, 40 Fla. L. Weekly 1908, 1908 (Fla. Dist. Ct. App. 2015); *D.A.O.L. v. Dep’t of Children & Families*, 170 So. 3d 927, 927 (Fla. Dist. Ct. App. 2015); *In re J.A.T.E.*, 170 So. 3d 931, 931 (Fla. Dist. Ct. App. 2015); *M.J.M.L. v. Dep’t of Children & Family Servs.*, 170 So. 3d 931, 931 (Fla. Dist. Ct. App. 2015); *In re B.Y.G.M.*, 176 So. 3d 290, 293 (Fla. Dist. Ct. App. 2015); *In re K.B.L.V.*, 176 So. 3d 297, 300 (Fla. Dist. Ct. App. 2015)).

<sup>25</sup> *See, e.g., B.R.C.M. I*, 182 So. 3d at 749, 763–64 (Salter, J., dissenting).

<sup>26</sup> *Id.* at 766.

<sup>27</sup> *See generally* Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 555, 580 (2013) (describing how local prosecutors in their capacity as “gatekeepers” for lawfully present noncitizens charged with crimes displaced federal removal priorities exercised by the Executive branch, pre-*Padilla v. Kentucky*, 559 U.S. 356 (2010)).

College of Law's Immigrant Children's Justice Clinic ("FIU clinic"), which also was B.R.C.M.'s "next friend."<sup>28</sup> According to the dependency petition, he was born in Guatemala in 1999.<sup>29</sup> His "father abandoned him [after] birth and never provided him with [any] food, shelter, clothing, [or] medical care."<sup>30</sup> When B.R.C.M. was age four, his mother abandoned him and stopped providing him with these basic necessities.<sup>31</sup> He was taken in by his elderly grandmother who cared for him until age thirteen, when he was forced to leave her home because she was too ill to care for him.<sup>32</sup> Having no family to take care of him and fearing that local gangs would try to recruit him, B.R.C.M. fled his home and came to the U.S. through Mexico.<sup>33</sup> Upon arrival at the border in Hidalgo, Texas, he turned himself in to authorities and was remanded to the custody of the Office of Refugee Resettlement ("ORR"), which placed him in the home of his immigration sponsor, a godmother who lived in Miami.<sup>34</sup> The sponsorship agreement that the godmother entered into with the ORR advised her to petition a state court to establish "legal guardianship" over her ward.<sup>35</sup> A short time after he made it to the

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<sup>28</sup> See *B.R.C.M. I*, 182 So. 3d at 749, 751. The FIU clinic served the dual role of counsel and next friend because under Florida law (as in every jurisdiction), a child may not initiate or defend a court action except through a guardian or next friend. See FLA. R. CIV. P. 1.210(b) (2019); see also *Kingsley v. Kingsley*, 623 So. 2d 780, 783–84 (Fla. Dist. Ct. App. 1993) (citing *Roberts v. Ohio Cas. Ins. Co.*, 256 F.2d 35, 39 (5th Cir. 1958); *Zaro v. Strauss*, 167 F.2d 218, 220 (5th Cir. 1948); *Brown v. Ripley*, 119 So. 2d 712, 716 (Fla. Dist. Ct. App. 1960); then citing *Brown v. Caldwell*, 389 So. 2d 287, 288 (Fla. Dist. Ct. App. 1980); and then citing *Youngblood v. Taylor*, 89 So. 2d 503, 506 (Fla. 1956)) (discussing Rule 1.210(b)).

Florida law allows an attorney for the Department of Children and Families ("DCF") or "any other person who has knowledge of the facts alleged or is informed of them and believes that they are true," to initiate a proceeding seeking an adjudication that a child is dependent. See FLA. STAT. § 39.501(1) (2019).

As counsel for the child, and as B.R.C.M.'s fiduciary, the FIU clinic was under a special obligation to conduct in-depth interviews with the child and significant people in the child's life, fully investigate all of the facts, integrate the facts into a coherent form, understand the "child-in-context," and demonstrate utmost fidelity to the child's unique perspective in making allegations of abuse, abandonment or neglect in the dependency petition. See generally JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 147–80 (3rd ed. 2007).

<sup>29</sup> See *B.R.C.M. I*, 182 So. 3d at 756 (Slater, J., dissenting).

<sup>30</sup> *B.R.C.M. II*, 215 So. 3d 1219, 1221 (Fla. 2017).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* As the child's sponsor, the godmother was "entrusted with his care and custody by the federal government," but she did not have the plenary authority that a parent or guardian exercises for a child. See *id.* at 1221 n.1.

<sup>35</sup> *Id.* at 1221 n.1. In reviewing the sponsor care agreement, the Florida Supreme Court plurality observed: "[t]he sponsor care agreement encourages sponsors who are neither parents nor legal guardians to establish legal guardianship with the local court. . . . An adjudication of dependency would not preclude B.R.C.M. from continued care by his godmother, but would

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U.S., following his placement in ORR care, he met his father for the first time and had some telephone contact with him while in the godmother's care, but the father continued not to provide any support for his basic needs.<sup>36</sup> B.R.C.M.'s godmother did not seek a child support order from the father, but after settling in with the godmother, fifteen year-old B.R.C.M., through his FIU clinic lawyers, petitioned a Florida state juvenile court judge for an adjudication of dependency.<sup>37</sup>

B.R.C.M. alleged three legal grounds for adjudication of dependency under section 39.01(15), Florida Statutes.<sup>38</sup> The petition asserted that B.R.C.M. was dependent pursuant to section 39.01(15)(a), which defines a "dependent child" as one found by the court "to have been abandoned, abused or neglected by the child's parent or parents or legal custodians."<sup>39</sup> Second, he said that he was dependent under section 39.01(15)(e), which defines dependent child as one who has "no parent or legal custodians capable of providing supervision and care."<sup>40</sup> His third ground alleged dependency under section 39.01(15)(f), defining a dependent child as one who is at "substantial risk of imminent abuse, abandonment, or neglect," which in this case referred to the risks that B.R.C.M. faced if he returned to Guatemala.<sup>41</sup> B.R.C.M. also sought a separate "best interests order" from the court, as a predicate for SIJ status, with findings that reunification with one or both of his parents was not possible and that it was not in his best interests to be returned to Guatemala.<sup>42</sup> At the conclusion of an eight-minute hearing in a Miami dependency court, at which no questions were asked of the child, no evidence was presented, and his counsel was only granted a brief chance to summarize the allegations in the child's petition, the court denied the petition.<sup>43</sup>

The order was affirmed by the Florida Third District Court of Appeal in an opinion written by Judge Frank Shepherd.<sup>44</sup> The appellate court majority held that B.R.C.M. was not "truly" abused,

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ensure appropriate placement for the child, consistent with the permanency goals of Chapter 39 of the Florida Statutes." *Id.*

<sup>36</sup> *Id.* at 1221.

<sup>37</sup> *B.R.C.M. I*, 182 So. 3d 749, 751 n.1 (Fla. Dist. Ct. App. 2015); *id.* at 756 (Salter, J., dissenting).

<sup>38</sup> *B.R.C.M. II*, 215 So. 3d at 1221.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *See id.*

<sup>42</sup> *See B.R.C.M. I*, 182 So. 3d at 756, 578 (Salter, J., dissenting).

<sup>43</sup> *Id.* at 755.

<sup>44</sup> *Id.* at 751, 754 (majority opinion).

abandoned or neglected under Florida law, that his godmother *qua* sponsor was providing for all of his needs, and his sole reason or “agenda” for filing his petition for dependency was to facilitate an application for SIJS, as evidenced by his failure to seek services from DCF.<sup>45</sup> The majority repeatedly ascribed to B.R.C.M. what it categorized as an illicit intent to seek SIJS and not protection from abuse, abandonment or neglect.<sup>46</sup> This intent, according to the court, categorically disqualified him from being declared dependent under Florida statutory law.<sup>47</sup> Although the court conceded that “[a] godmother is neither a parent nor legal custodian under the [dependency] statute,” it determined that it was “plain on the face of the petition that B.R.C.M. is not ‘truly’ abandoned, abused or neglected within the meaning of Chapter 39.”<sup>48</sup> It concluded, “The purpose of the dependency laws of this state is to protect and serve children and families in need, not those with a different agenda.”<sup>49</sup>

This holding spurred a thirteen-page dissent by Judge Vance Salter, grounded in a deep understanding of the applicable federal and state laws at issue.<sup>50</sup> The dissenting judge’s interpretation of Florida dependency law was significant for its careful, scholarly, and critical analysis of the trend toward summary denials of dependency petitions by immigrant juveniles based on a belief or conclusion that the juveniles are not entitled to adjudicative findings because they are only seeking immigration relief, not state assistance following abuse, abandonment or neglect.<sup>51</sup> Judge Salter concluded that the facts alleged in B.R.C.M.’s petition stated a *prima facie* case of dependency,<sup>52</sup> and that absent an investigation by DCF of B.R.C.M.’s allegations, the trial court had no basis to summarily deny the child’s petition.<sup>53</sup> Judge Salter urged a reversal of the trial court ruling, stating that “Florida circuit courts should enter findings of fact and conclusions of law that address each juvenile petitioner’s individual

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<sup>45</sup> See *id.* at 751–52, 754 (citing *In re K.B.L.V.*, 176 So. 3d 297, 301 (Fla. Dist. Ct App. 2015) (Shepherd, J., specially concurring)).

<sup>46</sup> See *B.R.C.M. I*, 182 So. 3d at 751–52.

<sup>47</sup> See *id.* at 754 (citing *In re K.B.L.V.*, 176 So. 3d at 301 (Shepherd, J., specially concurring)).

<sup>48</sup> *B.R.C.M. I*, 182 So. 3d at 751–52, 754.

<sup>49</sup> *Id.* at 754 (citing *In re K.B.L.V.*, 176 So. 3d at 301 (Shepherd, J., specially concurring)).

<sup>50</sup> See *B.R.C.M. I*, 182 So. 3d at 754–67 (Salter, J., dissenting).

<sup>51</sup> See *id.* at 766.

<sup>52</sup> See *id.*

<sup>53</sup> See *id.* at 755. “In my view, DCF cannot assess whether a petitioning juvenile immigrant has been ‘truly’ abandoned, abused, or neglected without investigation, and should not decline to support or oppose the claims in a sworn SIJ petition, as occurred in B.R.C.M.’s case.” *Id.* at 755 n.6.

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claims.”<sup>54</sup>

The divergent views in the majority and dissenting opinions illustrated a split in the court. On one end of the judicial spectrum was Judge Shepherd, basing his opinion on sweeping assumptions about the immigrant children’s illicit motivations and “agenda[s]” for filing dependency petitions.<sup>55</sup> On the other side was the Salter dissent, which saw B.R.C.M. as an individual child or litigant whose “individual claims” the dependency court had a duty to adjudicate.<sup>56</sup>

On petition for review, Judge Salter’s view that B.R.C.M.’s petition “warrant[ed] individualized consideration and adjudication rather than summary denial,” was adopted by a plurality of the Florida Supreme Court.<sup>57</sup> Three justices, plus one concurring justice, found the summary denial of B.R.C.M.’s petition had deprived him of the essentials of due process in the hearing.<sup>58</sup> The majority held that the trial court must provide B.R.C.M. with a full evidentiary hearing to prove allegations of abuse, neglect or abandonment, and make written findings of fact specific to the case presented to the juvenile court in determining whether the child was dependent based on one or more of the statutory grounds for dependency.<sup>59</sup> All seven justices rejected the lower court view that the claims must be denied merely because the child was able to apply for immigration benefits and did not seek state services after an adjudication of dependency under state law.<sup>60</sup>

In accepting jurisdiction over the appeal on conflict grounds, the court held that *B.R.C.M. I* “expressly and directly conflict[ed]”<sup>61</sup> with the First District Court of Appeal decision in *In re Y.V.*<sup>62</sup> On the merits, as indicated, the court unanimously rejected the false dichotomy posited by Judge Shepherd in *B.R.C.M. I*, *i.e.*, that an intent to seek dependency status trumps the trial court’s duty to adjudicate an immigrant child dependent based on one of the seven

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<sup>54</sup> *Id.* at 766.

<sup>55</sup> *See id.* at 754 (majority opinion) (quoting *In re K.B.L.V.*, 176 So. 3d 297, 301 (2015) (Shepherd, J., specially concurring)).

<sup>56</sup> *See B.R.C.M. I*, 182 So. 3d at 766 (Salter, J., dissenting).

<sup>57</sup> *See B.R.C.M. II*, 215 So. 3d 1219, 1223–24 (Fla. 2017) (quoting *B.R.C.M. I*, 182 So. 3d at 754–55 (Salter, J., dissenting)).

<sup>58</sup> *See B.R.C.M. II*, 215 So. 3d at 1223, 1224 (Lewis, J., concurring in result).

<sup>59</sup> *See id.* at 1223 (citing *B.R.C.M. I*, 182 So. 3d at 755, 766 (Salter, J., dissenting)).

<sup>60</sup> *See B.R.C.M. II*, 215 So. 3d at 1223, 1225 (Canady, J., dissenting).

<sup>61</sup> *See* FLA. CONST. art. V, § 3(b)(3).

<sup>62</sup> *See B.R.C.M. II*, 215 So. 3d at 1222; *see also In re Y.V.*, 160 So. 3d 576, 581 (Fla. Dist. Ct. App. 2015) (“An intent to obtain SIJ status says nothing in and of itself regarding the facial sufficiency of the dependency allegations . . . . Therefore, a petition for dependency should not be rejected in Florida based on mere motivation of the petitioner.”).

independent grounds enumerated in section 39.01(15).<sup>63</sup> The plurality agreed that B.R.C.M.'s petition sought relief consistent with the purposes of Chapter 39, *i.e.*, "[t]o provide for the care, safety, and protection of children . . . ; to ensure secure and safe custody; to promote the health and well-being of *all* children under the state's care; and to prevent the occurrence of child abuse, neglect, and abandonment."<sup>64</sup>

The plurality thus embraced Judge Salter's criticism of the "recent spate of summary denial orders in the trial court and the per curiam affirmances in [the Third District]," suggesting "a categorical rejection of such petitions rather than the usual individualized evidentiary hearings and written findings of fact."<sup>65</sup> The court held, "[w]e disapprove of the categorical summary denial of dependency petitions filed by immigrant juveniles, and find no authority in the statutory scheme that allows for dismissal or denial without factual findings by the circuit court."<sup>66</sup> It quashed the decision of the district court.<sup>67</sup>

The plurality opinion, authored by Chief Justice Jorge Labarga, spurred three concurrences, two with opinions. The concurrences articulated concerns about the potential impact of the court's decision on dependency courts.<sup>68</sup> Both saw the potential for the decision to spur more dependency filings and overwhelm the courts, but they gave slightly different reasons for this concern.<sup>69</sup> Justice Fred Lewis agreed with the plurality's conclusion that the summary nature of the trial court proceeding in B.R.C.M.'s case was improper, but he also expressed sympathy for the sentiments of "multiple district

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<sup>63</sup> See *B.R.C.M. II*, 215 So. 3d at 1222 (quoting *O.I.C.L. v. Fla. Dep't. of Children & Families (O.I.C.L. II)*, 205 So. 3d 575, 578 (Fla. 2016)). "[I]f a child qualifies for a declaration of dependency under our statutes, the child's motivation to obtain legal residency . . . is irrelevant." *B.R.C.M. II*, 215 So. 3d at 1222 (quoting *F.L.M. v. Fla. Dep't. of Children and Families*, 912 So. 2d 1264, 1269 (Fla. Dist. Ct. App. 2005)). "[I]f federal law grants a right to alien children to regularize their immigration status by first obtaining a state court adjudication of dependency, then there is no basis for failing to declare a child dependent so long as he or she meets the statutory criteria for dependency." *B.R.C.M. II*, 215 So. 3d at 1222 (quoting *F.L.M.*, 912 So. 2d at 1269).

<sup>64</sup> See *B.R.C.M. II*, 215 So. 3d at 1222 (emphasis added).

<sup>65</sup> *Id.* at 1223 (quoting *B.R.C.M. I*, 182 So. 3d at 764 (Salter, J., dissenting)).

<sup>66</sup> *B.R.C.M. II*, 215 So. 3d at 1223.

<sup>67</sup> See *id.*

<sup>68</sup> See *id.* at 1224 (Lawson, J., specially concurring); *id.* (Lewis, J., concurring in result).

<sup>69</sup> Compare *id.* at 1224 (Lawson, J., specially concurring) ("[P]rivate dependency petitions cannot simply be summarily and categorically denied because they appear to be motivated by a desire to gain immigration relief for the child."), with *id.* at 1224 (Lewis, J., concurring in result) ("[T]he structure of statutory dependency in Florida cannot and should not be allowed to be transformed into an immigration processing system which is strictly reserved for our federal immigration authorities.").

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courts in Florida, including the Third District which have essentially held that the structure of statutory dependency in Florida cannot and should not be allowed to be transformed into an immigration processing system.”<sup>70</sup> He exhorted the legislature to pay more attention to these concerns and find a way to narrow the grounds for dependency, thus potentially closing the door, at least partly, on future dependency petitions filed by immigrant children.<sup>71</sup> He incorrectly characterized the SIJS law as one “strictly reserved for our federal immigration authorities,”<sup>72</sup> overlooking the hybrid federal-state character of the SIJS statute.<sup>73</sup>

The special concurrence by Justice Charles Alan Lawson agreed with the plurality that “private dependency petitions cannot simply be summarily and categorically denied because they appear to be motivated by a desire to gain immigration relief for the child.”<sup>74</sup> He also agreed with Justice Lewis that the legislature needed to clarify Florida statutory law in this area, warning that the “valuable resources” of the state’s judiciary would be taxed by “trying to figure out whether and how to apply our dependency statute to facts that do not appear to have even been contemplated when it was enacted.”<sup>75</sup> He did not give any examples of how the facts alleged in B.R.C.M.’s case or any other immigrant children’s reported cases had strayed outside of the legislature’s intent in enacting Chapter 39. Nor did he suggest any language to amend the statute in order to limit immigrant children’s overuse of the dependency courts, which he

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<sup>70</sup> *Id.* at 1224 (Lewis, J., concurring in result). Because Justice Lewis agreed on narrow grounds with the plurality (Chief Justice Labarga, and Justices Pariente and Lawson), in this article I refer to the opinion as the “plurality opinion.” Given the tight 3-1-3 breakdown, this seemed to make sense, to emphasize the slender agreement between the justices, which came with varying degrees of disagreement. The dissent referred to it as the “majority opinion.”

My clinic colleague Robert Latham called it the “controlling opinion” in his blog post analyzing the decision in April 2017. See Robert Latham, *Florida Supreme Court: No More Summary Dismissals of Private Dependency Petitions Filed by Immigrant Kids*, ROBERTLATHAMESQ.ORG (Apr. 20, 2017), <https://robertlathamesq.org/florida-supreme-court-no-more-summary-dismissals-of-private-dependency-petitions-filed-by-immigrant-kids>; see generally Mark Alan Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419, 451 (1992) (discussing alternatives to “narrowest grounds” doctrine adopted by *Marks v. United States*, 430 U.S. 188 (1977)). The “narrowest grounds doctrine states, “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of the five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’” Thurmon, *supra*, at 420.

<sup>71</sup> See *B.R.C.M. II*, 215 So. 3d at 1224 (Lewis, J., concurring in result).

<sup>72</sup> See *id.*

<sup>73</sup> See 8 U.S.C. § 1101(a)(27)(J) (2018).

<sup>74</sup> *B.C.R.M. II*, 215 So. 3d at 1224 (Lawson, J., specially concurring).

<sup>75</sup> *Id.*

implied was wasting the state judiciary's limited resources.<sup>76</sup> The fact that both of these concurrences voiced these concerns exemplifies the narrow scope of agreement in the plurality opinion.

Justice Charles Canady's dissent, joined by Justices Peggy Quince and Ricky Polston, agreed with the other justices that "if a child meets the statutory criteria for dependency, the child must be adjudicated accordingly, regardless of immigration motivations."<sup>77</sup> They also all agreed that if the child alleges a *prima facie* case of dependency, the child should be permitted the opportunity to present evidence in support of the petition.<sup>78</sup> This point of agreement was noteworthy for finding some common ground with concurring Justice Lewis, whose sole reason for joining the plurality in the result was that summary dismissal of a dependent petition that establishes a *prima facie* case of dependency violates the child's due process rights.<sup>79</sup>

But the dissenters parted company with Justice Lewis and the plurality at this point, concluding that B.R.C.M.'s petition did not satisfy the minimum *prima facie* standards for a declaration of dependency under sections 39.01(15)(a), (e), and (f).<sup>80</sup> In doing so they opined that B.R.C.M. had failed to allege facts that "pass[ed] the threshold requirement for an evidentiary hearing" under these three sections.<sup>81</sup> Much of the dissent's analysis was based on a parsimonious reading of the facts alleged in the petition in order to reach this conclusion about their legal sufficiency.<sup>82</sup> As to the section 39.01(15)(e) allegation, the dissent stated that B.R.C.M.'s petition was "devoid of any claim" that he could be adjudicated dependent as a child found "[t]o have no parent or legal custodians capable of providing supervision and care."<sup>83</sup> This short, conclusory point was itself devoid of any analysis of the actual words in the petition to reach the conclusion that it had failed to allege that he had no parent or legal custodian capable of providing supervision and care. This circular argument gave the dissent a pretext to suggest that an evidentiary hearing on an "unpleaded claim [was] totally unjustified."<sup>84</sup> This was obliquely disputed by the plurality's more

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<sup>76</sup> *See id.*

<sup>77</sup> *Id.* at 1225 (Canady, J., dissenting).

<sup>78</sup> *See id.*

<sup>79</sup> *See id.* at 1224 (Lewis, J., concurring in result).

<sup>80</sup> *See id.* at 1225 (Canady, J., dissenting).

<sup>81</sup> *See id.*

<sup>82</sup> *See id.* at 1225–26.

<sup>83</sup> *Id.* at 1225.

<sup>84</sup> *See id.*

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generous reading of the child's petition, which it viewed as alleging "sufficient facts" to establish a *prima facie* case on all three grounds.<sup>85</sup> The *B.R.C.M. II* dissent also implicitly took issue with the *B.R.C.M. I* dissent, which observed that these facts *were* alleged, and in the absence of an investigation by DCF into the allegations, a court could not find that the child had no parent or legal custodian capable of providing supervision and care.<sup>86</sup>

The dissent's view of the legal sufficiency of the facts alleged in support of sections 39.01(a) and (f), was similarly punctilious in finding them faulty. Running the allegations in the petition through the "definitional maze of section 39.01," it cherry-picked facts to conclude that B.R.C.M. did not state a *prima facie* case of abandonment or neglect under section 39.01(15) (a).<sup>87</sup> Regarding the abandonment allegations, it called the child's abandonment in Guatemala too "temporally remote" to qualify as abandonment under section 39.01(15).<sup>88</sup> The dissent read the present-tense definition of "[c]hild who *is* found to be dependent" to be a categorical reason to dismiss allegations of abandonment happening long ago, in a land far away from Florida.<sup>89</sup>

The dissent's next abandonment point read section 39.01(15)(a) in *pari materia* with section 39.01(1), requiring abandonment to allege that the parent, "*while being able*, has made no significant contribution to the child's care and maintenance."<sup>90</sup> It pointed to pleading defects, *viz.*, that the petition failed to allege that the parents "were able to do anything to remedy their failures regarding the care of B.R.C.M."<sup>91</sup> The plurality skirted this point in general terms, again giving the petition the benefit of the doubt for stating "sufficient facts" as a *prima facie* case on all three statutory grounds.<sup>92</sup>

In evaluating the legal sufficiency of both the abandonment and neglect allegations, the dissent split hairs, cobbling together different sections of Chapter 39 to find no legal grounds to declare B.R.C.M. dependent because he was being properly cared for by his godmother,

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<sup>85</sup> See *id.* at 1223 (plurality opinion).

<sup>86</sup> See *id.* at 1124–25 (Canady, J., dissenting); *B.R.C.M. I*, 182 So. 3d 749, 754–55, 756 (Fla. Dist. Ct. App. 2015) (Salter, J., dissenting).

<sup>87</sup> See *B.R.C.M. II*, 215 So. 3d at 1225.

<sup>88</sup> See *id.*

<sup>89</sup> See *id.* (emphasis added).

<sup>90</sup> See *id.* (emphasis added).

<sup>91</sup> See *id.* at 1226.

<sup>92</sup> See *id.* at 1223 (plurality opinion).

the ORR-designated sponsor *qua* caregiver.<sup>93</sup> Since the godmother qualified as a “caregiver,”<sup>94</sup> was “legally responsible for the child’s welfare” as defined by section 39.01(47), and had been entrusted by the federal government to provide care for him, *and* since B.R.C.M. wanted to “remain in the custody of the caregiver,”<sup>95</sup> how could *she* be deemed to have abandoned or neglected him?<sup>96</sup> It was at this point that the dissent’s interpretation of the legal significance of a sponsor agreement with ORR went a little off the rails.

Justice Canady failed to appreciate that a sponsor agreement with ORR carries far less legal significance than a state court order conferring legal custody status.<sup>97</sup> The two are not the same, as pointed out by the plurality in a footnote.<sup>98</sup> Justice Canady leapt to the conclusion that the placement of B.R.C.M. with the godmother/sponsor transformed her into the child’s “caregiver” under section 39.01(10), and seeing B.R.C.M. as being “in the custody of the government of the United States, which has ultimate responsibility for his well-being, thereby ignoring the fact that it is the *state court’s* ultimate responsibility for making individualized determinations of care and custody for children like B.R.C.M.<sup>99</sup> Justice Canady ignored the fact that it is the *state court’s* ultimate responsibility for making

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<sup>93</sup> See *id.* at 1225, 1226 (Canady, J., dissenting).

<sup>94</sup> *Id.* at 1226.

<sup>95</sup> See *id.*; see also *O.I.C.L. v. Dep’t of Children & Families (O.I.C.L. D)*, 169 So. 3d 1244, 1246–47 (Fla. Dist. Ct. App. 2015) (holding that 17 year-old Guatemalan child, abandoned by his father during mother’s pregnancy, neglected by mother since age 12, but later detained by ORR following his entry into the U.S. and apprehension, did not qualify to be declared dependent under Fla. Stat. § 39.01(15)(a) because ORR released child to an uncle and there were no allegations of abandonment, abuse or neglect against the child’s uncle, and a presumption arose that he was indeed capable of providing both supervision and care to O.I.C.L.).

<sup>96</sup> See *B.R.C.M. II*, 215 So. 3d at 1226.

<sup>97</sup> Cf. FLA. STAT. § 39.01(39) (2018) (“‘Legal custody’ means a legal status created by a court which vests in a custodian of the person or guardian, whether an agency or an individual, the right to have physical custody of the child and the right and duty to protect, nurture, guide, and discipline the child and to provide him or her with food, shelter, education, and ordinary medical, dental, psychiatric, and psychological care.”).

<sup>98</sup> See *B.R.C.M. II*, 215 So. 3d at 1221 n.1 (plurality opinion).

We recognize that B.R.C.M. appears to reside with his godmother, who as a sponsor, is entrusted with his care . . . . The sponsor care agreement encourages sponsors who are neither parents nor legal guardians to establish legal guardianship with the local court. We observe that Florida courts have exclusive jurisdiction of all proceedings relating to child welfare. An adjudication of dependency would not preclude B.R.C.M. from continued care by his godmother, but would ensure appropriate placement for the child, consistent with the permanency goals of Chapter 39 of the Florida Statutes.

*Id.*

<sup>99</sup> See *id.* at 1226 (Canady, J., dissenting).

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individualized determinations of care and custody for children like B.R.C.M.<sup>100</sup> Justice Canady thus elevated the importance of the federal government's role over the state court's role in his analysis of the dueling responsibilities of the court and ORR. This reflected a lack of appreciation of the state court's co-equal role in the SIJS cooperative federalism system.<sup>101</sup>

The dissent summarized B.R.C.M.'s dependency petition as falling short of the "specific requirements of the dependency statute," with the caveat that "not every undocumented child will necessarily meet the requirements for a determination of dependency."<sup>102</sup> However, a heightened pleading standard for immigrant children is not required or permitted by Florida dependency law.<sup>103</sup> Justice Canady, with his repeated demands for "specificity," departed from the requirements of the Florida Rules of Juvenile Procedure, which state that a petition need only "allege *sufficient facts* showing the child to be dependent based upon applicable law."<sup>104</sup>

### B. *The Importance and Impact of B.R.C.M. II*

The *B.R.C.M. II* decision halted categorical rejections by judges of claims of abuse, abandonment or neglect by immigrant children, which had escalated in Florida trial and appellate courts.<sup>105</sup> It also

<sup>100</sup> See *id.* at 1222 (plurality opinion); *id.* at 1226 (Canady, J., dissenting).

<sup>101</sup> See *id.* at 1226 (Canady, J., dissenting). The dissent also found the neglect allegation to be defective inasmuch as it was based on the categorical disqualifying ground of the Guatemalan family's and father's "financial inability." See FLA. STAT. § 39.01(50); *B.R.C.M. II*, 215 So. 3d at 1226. It also played down the potential for deportation to Guatemala as a basis to support claim that B.R.C.M. was "at substantial risk of imminent abuse, abandonment, or neglect by the parent or parents." See FLA. STAT. § 39.01(15)(f); *B.R.C.M. II*, 215 So. 3d at 1226.

<sup>102</sup> See *B.R.C.M. II*, 215 So. 3d at 1227.

<sup>103</sup> See *id.* at 1223 (plurality opinion) (citing *In re B.R.C.M. I*, 182 So. 3d 749, 755 (Fla. Dist. Ct. App. 2015) (Salter, J., dissenting)).

<sup>104</sup> FLA. R. JUV. P. 8.310(a)(1) (2016) (emphasis added).

<sup>105</sup> One appellate court covering Miami-Dade and Monroe Counties, the Third District Court of Appeal, affirmed trial court dismissals no fewer than thirteen times, starting with two affirmances with majority and strongly-worded concurring opinions. See, e.g., *In re B.Y.G.M.*, 176 So. 3d 290, 293 (Fla. Dist. Ct. App. 2015); *In re K.B.L.V.*, 176 So. 3d 297, 300 (Fla. Dist. Ct. App. 2015). They were followed by at least eleven *per curiam* and other affirmances of trial court summary denials of dependency petitions. See, e.g., *W.B.A.V. v. Dep't of Children & Families*, 229 So. 3d 850, 851 (Fla. Dist. Ct. App. 2016) (*per curiam*); *W.O.V. v. Dep't of Children & Families*, 193 So. 3d 85, 85 (Fla. Dist. Ct. App. 2016) (*per curiam*); *In re S.A.R.D.*, 182 So. 3d 897, 905 (Fla. Dist. Ct. App. 2016); *In re F.J.G.M.*, 196 So. 3d 534, 540 (Fla. Dist. Ct. App. 2016); *In re E.P.N.*, 180 So. 3d 249, 249 (Fla. Dist. Ct. App. 2015) (*per curiam*); *W.A.Z.R. v. Dep't of Children & Families*, 187 So. 3d 245, 245 (Fla. Dist. Ct. App. 2015); *H.D.C.H.M. v. Dep't of Children & Families*, 176 So. 3d 392, 393 (Fla. Dist. Ct. App. 2015) (*per curiam*); *In re D.A.M.*, 185 So. 3d 535, 536 (Fla. Dist. Ct. App. 2015); *D.A.O.L. v. Dep't of Children & Families*, 170 So. 3d 927, 927 (Fla. Dist. Ct. App. 2015); *In re J.A.T.E.*, 170 So. 3d 931, 931 (Fla. Dist. Ct. App. 2015) (*per curiam*); *M.J.M.L. v. Dep't of Children & Families*, 170 So. 3d 931, 932 (Fla. Dist.

firmly and unanimously rejected a false dichotomy, debunking the view articulated by Judge Shepherd that would shut the courthouse door on any dependency petition filed by a child motivated to seek SIJS.<sup>106</sup> This consensus on one fundamental question was undercut by the differing perspectives expressed by a fragmented court. At a more granular level, the hesitant and elliptical reasoning in the plurality opinion did not offer detailed guidance to dependency courts on how to treat allegations in dependency petitions filed by immigrant children living with ORR-approved sponsors.<sup>107</sup>

This equivocation, and the differing points of view expressed in the concurring and dissenting opinions, may have reflected the justices' differences in statutory interpretation; disagreements about the role of the juvenile court in the SIJS statutory scheme; stated or unstated partisan differences about immigration policy; and their contrasting

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Ct. App. 2015) (per curiam).

<sup>106</sup> See *B.R.C.M. II*, 215 So. 3d at 1222, 1223 (citing *In re Y.V.*, 160 So. 3d 576, 578, 581 (Fla. Dist. Ct. App. 2015)).

<sup>107</sup> The Florida Supreme Court declined Judge Salter's *B.R.C.M. I* request to certify the following question of "great public importance":

REGARDING PETITIONS FOR DEPENDENCY FILED ON BEHALF OF IMMIGRANT JUVENILES UNDER CHAPTER 39, FLORIDA STATUTES, IS SUMMARY DENIAL OF SUCH PETITIONS APPROPRIATE IF THE PETITIONER IS LIVING IN FLORIDA WITH A FAMILY MEMBER OR VOLUNTEER APPROVED BY THE OFFICE OF REFUGEE RESETTLEMENT?

*B.R.C.M. I*, 182 So. 3d at 766 (Salter, J., dissenting). Salter referred to the New Jersey Supreme Court's decision in *H.S.P. v. J.K.*, 121 A. 3d 849 (N.J. 2015), as providing clear guidance to the trial courts on how to make factual findings in family court and SIJS "one parent" cases. *B.R.C.M. I*, 182 So. 3d at 765. He saw this as a model of judicial drafting which would inure to the children's benefit in securing best interest orders from family court judges, and provide greater clarity to USCIS in fulfilling its obligations to render SIJS decisions, "exclusively the province of the federal government," predicated on best interest orders issued by the family courts:

In an effort to ensure that factual findings issued by New Jersey courts provide USCIS with the necessary information to determine whether a given alien satisfies the eligibility criteria for SIJ status, we instruct courts of the Family Part to *make separate findings as to abuse, neglect, and abandonment with regard to both legal parents of an alien juvenile*. For example, the Family Part should first determine whether reunification with one of the child's parents is not viable due to abuse, neglect, or abandonment. Regardless of the outcome of that analysis, the court should next conduct the same analysis with regard to the child's other legal parent. *By requiring the Family Part to make independent findings as to both of the juvenile's parents, we ensure that USCIS will have sufficient information to apply 8 U.S.C.A. § 1101(a)(J)(27) as it sees fit when a juvenile subsequently submits the Family Part's order to USCIS in support of an application for SIJ status*. That is the role Congress envisioned for the juvenile courts of the fifty states, and that is the process that should be followed by the Family Part.

*Id.* (quoting *H.S.P.*, 121 A. 3d at 860).

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views of immigrants at the border and in the community.<sup>108</sup>

### C. *The Politics of B.R.C.M. II*

The politics of *B.R.C.M. II* are perhaps most obvious in the concurring justices' exhortations to the legislature to clarify Florida dependency law, suggesting that such clarification should restrict immigrant children's access to the courts in the future.<sup>109</sup> Neither concurring justice offered any concrete suggestions for substantive amendments to Chapter 39.<sup>110</sup> However, given the partisan views of many members of the Florida Republican-controlled legislature, which are often not hospitable to immigrants, there is probably little chance that legislation responding to these suggestions from the judiciary would benefit immigrant children in dependency court proceedings.<sup>111</sup> Political considerations also ran through the labyrinthine reasoning of the three dissenting justices' opinion, which engaged in circuitous statutory construction to criticize the legal sufficiency of B.R.C.M.'s petition.<sup>112</sup> The dissent's views about the nature and level of harm that must be pled in a petition,<sup>113</sup> if adopted by rule or statute, could have an adverse impact on petitions filed on behalf of citizen children as well as immigrant children, although that is beyond the scope of this Article. With three new conservative justices appointed by Republican Governor Ron DeSantis to replace retiring Justices Lewis, Pariente, and Quince,<sup>114</sup>

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<sup>108</sup> This fragmentation or polarization is to some degree a reflection of hyper-partisanship over immigrants in our national politics today. See generally Cassandra Burke Robertson, *Judicial Impartiality in a Partisan Era*, 70 FLA. L. REV. 739, 774 (2018) ("The perception of judicial impartiality is essential to a belief in judicial legitimacy. In the current era, however, the public's deepening political divide threatens the perception of judicial neutrality.").

<sup>109</sup> See *B.R.C.M. II*, 215 So. 3d at 1224 (Lawson, J., concurring); *id.* (Lewis, J., concurring).

<sup>110</sup> Cf. *id.* at 1224 (Lawson, J., concurring) (recommending the legislature should make amendments but not describing how); *id.* (Lewis, J., concurring) (recommending the legislature should make amendments but not describing how).

<sup>111</sup> See, e.g., Gray Rohrer, *Immigration Dominates Florida's Race for Governor*, ORLANDO SENTINEL (Feb. 2, 2018), <https://www.orlandosentinel.com/news/politics/political-pulse/os-sanctuary-cities-governor-race-20180202-story.html> ("State leaders have no authority over federal immigration policy, but that hasn't stopped the issue from becoming the hottest topic in the early stages of the Florida governor's race. Republican House Speaker Richard Corcoran has made it the center of his not-quite-yet-announced campaign by fast-tracking a bill banning 'sanctuary cities' in Florida and releasing an ad Democrats have slammed as 'race-baiting.'").

<sup>112</sup> See *B.R.C.M. II*, 215 So.3d at 1226 (Canady, J., dissenting).

<sup>113</sup> See *id.* at 1225.

<sup>114</sup> See *Governor Ron DeSantis Appoints Barbara Lagoa to the Florida Supreme Court*, FLA. GOVERNOR (Jan. 9, 2019), <https://www.flgov.com/2019/01/09/governor-ron-desantis-appoints-barbara-lagoa-to-the-florida-supreme-court/>; *Governor Ron DeSantis Appoints Carlos Muñiz to the Florida Supreme Court*, FLA. GOVERNOR (Jan. 22, 2019), <https://www.flgov.com/2019/01/22/governor-ron-desantis-appoints-carlos-muniz-to-the-florida-supreme-court/>; *Governor Ron*

this modest plurality opinion is probably the last chance to establish baseline legal protections for immigrant children in Florida's courts.

The recent judicial hostility to private petitions by immigrant children can be seen as using different statutory interpretations as proxies for partisan views about undocumented immigrants, although the judicial opinions did not necessarily divide along traditional liberal-conservative lines.<sup>115</sup> The Third District Court of Appeal's view that these children were not "truly" abandoned, abused, or neglected if they sought immigration benefits but not services from the state, was a way of saying that they were not worthy of the courts' attention.<sup>116</sup> This is now a debunked viewpoint even though the future of the cases is uncertain.<sup>117</sup>

#### D. Foreshadows and Echoes in *B.R.C.M. II*

Earlier rulings by trial courts and opinions by intermediate appellate courts, and one earlier SIJS-dependency opinion by the Florida Supreme Court, foreshadowed many of the contrasting points of view expressed by the court in *B.R.C.M. II*, particularly by the concurrences and dissent.<sup>118</sup> The views also echoed critical observations made by trial and appeal courts in earlier rulings suggesting that children were gaming the system to obtain unwarranted judicial relief on "paper" only.<sup>119</sup> Another

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*DeSantis Appoints Robert Luck to the Florida Supreme Court*, FLA. GOVERNOR (Jan. 14, 2019), <https://www.flgov.com/2019/01/14/governor-ron-desantis-appoints-robert-luck-to-the-florida-supreme-court/>.

<sup>115</sup> For example, African-American Florida Supreme Court Justice Peggy Quince during her many years on the bench typically joined the more liberal wing of the Court in cases involving children. See, e.g., *In re Amendments to the Fla. Rules of Juvenile Procedure*, 26 So. 3d 552, 556–57 (Fla. 2009) (prohibiting a generalized practice of shackling children in the courtroom); *The Honorable Peggy A. Quince*, FLORIDA'S WOMEN'S HALL OF FAME, <https://flwomenshalloffame.org/bio/honorable-peggy-a-quince/> (last visited May 11, 2019). This time she was allied in dissent with politically conservative Justices Canady and Polston. See *B.R.C.M.*, 215 So. 3d at 1224; *Charles Canady*, BALLOTPEDIA, [https://ballotpedia.org/Charles\\_Canady](https://ballotpedia.org/Charles_Canady) (last visited May 11, 2019); *Ricky Polston*, BALLOTPEDIA, [https://ballotpedia.org/Ricky\\_Polston](https://ballotpedia.org/Ricky_Polston) (last visited May 11, 2019).

<sup>116</sup> This was the point of view that prevailed in the Third District Court of Appeal in numerous opinions and *per curiam* affirmances before *B.R.C.M. I and II*. See, e.g., *In re B.Y.G.M.*, 176 So. 3d 290, 293 (Fla. Dist. Ct. App. 2015) ("It is understood that B.Y.G.M. filed her petition to secure SIJS, and that she did not do so in order to obtain relief from abuse, abandonment, or neglect.").

<sup>117</sup> See *B.R.C.M. II*, 215 So. 3d at 1222, 1224 (quoting *B.R.C.M. I*, 182 So. 3d 749, 754 (Fla. Dist. Ct. App. 2015)).

<sup>118</sup> See *B.R.C.M. II*, 215 So. 3d at 1224 (Lawson, J., specially concurring); *id.* at 1224 (Lewis, J., concurring in result); *id.* at 1225 (Canady, J., dissenting); e.g., *O.I.C.L. II v. Fla. Dep't of Children & Families*, 205 So. 3d 575, 577 (Fla. 2016); *In re Y.V.*, 160 So. 3d 576, 581 (Fla. Dist. Ct. App. 2015); *In re B.Y.G.M.*, 176 So. 3d at 291.

<sup>119</sup> See, e.g., *Order Requiring Briefing & Scheduling Oral Argument*, *supra* note 14, at 5 ("[I]t

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foreshadowing of skepticism about the legitimacy of private dependency petitions filed by immigrant children was expressed in a Third District Court of Appeal partial concurrence in an earlier case, which chastened these children for going through the dependency “back door” to qualify for immigration status, while conceding that this was permissible under Florida dependency law and the SIJS statute.<sup>120</sup> Many trial court dismissals, and many appellate opinions affirming dismissals, also anticipated Justice Lawson’s *B.R.C.M. II* special concurrence, which implicitly criticized the immigrant children’s private dependency petitions as pushing the boundaries of Chapter 39 “that do not appear to have even been contemplated when it was enacted.”<sup>121</sup>

One way that courts saw Chapter 39 boundary-pushing can be seen in their statutory interpretations of cases alleging abandonment before or at birth or early in a child’s life as a basis for affirming the dismissal.<sup>122</sup> A Miami-Dade trial court’s interpretation of abandonment allegations in a petition foreshadowed the *B.R.C.M. II* dissent’s reasoning that abandonment during pregnancy or after the child’s birth was too “temporally remote” to qualify the child for a declaration of dependency under Florida law.<sup>123</sup> In classifying the claims as too remote to qualify for a dependency adjudication, the dependency court order conflated the statutory requirements for “abandonment” and “abuse” allegations, and inserted requirements that recent “harm” be alleged in cases of parental abandonment, when the abandonment occurred at or before the child’s birth and the parent continued the acts or omissions that qualified as “abandonment” pursuant to the statute.<sup>124</sup> Notably, the abandonment statute does not require a showing of harm to qualify a child as a dependent,<sup>125</sup> unlike the statutory definition of abuse which does contain a harm requirement.<sup>126</sup>

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appears that there is no purpose served by this proceeding and that the Court is nothing more than a *paper tiger ‘presiding’ over a fictional ‘case.’*) (emphasis added).

<sup>120</sup> See *In re T.J.*, 59 So. 3d 1187, 1194–95 (Wells, J., dissenting in part).

<sup>121</sup> See *B.R.C.M. II*, 215 So. 3d at 1224 (Lawson, J., concurring).

<sup>122</sup> See *id.* at 1225 (Canady, J., dissenting).

<sup>123</sup> See *In re M.A.S.-Q. & Y.E.S.-Q.*, 22 Fla. L. Weekly Supp. 213a (11th Cir. Ct. Oct. 22, 2013) (citing *B.C. v. Dep’t of Children & Families*, 846 So. 2d 1273, 1275 (Fla. Dist. Ct. App. 2003); *R.V. v. Dep’t of Children & Servs.*, 939 So. 2d 200, 202 (Fla. Dist. Ct. App. 2006); *C.R. v. Dep’t of Children & Families*, 45 So. 3d 988, 988 (Fla. Dist. Ct. App. 2010) (per curiam); *W.T. v. Dep’t of Children & Families*, 787 So. 2d 184, 185 (Fla. Dist. Ct. App. 2001)) (“[A]bsent a continuing threat of harm, incidents of alleged abuse found “too remote in time” will generally not support a dependency adjudication.”); *infra* Part V, VI.

<sup>124</sup> See *In re M.A.S.-Q & Y.E.S.-Q.*, 22 Fla. L. Weekly Supp. 213a.

<sup>125</sup> See FLA. STAT. § 39.01(1).

<sup>126</sup> See FLA. STAT. § 39.01(2).

The age of the child at the time of an appeal factored into a decision by the Supreme Court a year before *B.R.C.M. II*, which dismissed the appeal of O.I.C.L., who “aged out” of juvenile court jurisdiction by turning 18 during the lengthy appeal, thus “mooting” the appeal.<sup>127</sup> In an opinion written by Justice Polston, joined by concurring *B.R.C.M. II* centrist Justice Lewis and dissenting *B.R.C.M. II* Justices Canady and Quince, the court held that O.I.C.L.’s argument that the lower court had failed to consider whether he was dependent pursuant to section 39.01(15)(e), was now moot, as he had reached the age of majority while the appeal was pending.<sup>128</sup> The court considered the 18th birthday as a “change in circumstances . . . thereby making it impossible for the court to provide effectual relief,” as the dispositive factor in the mootness dismissal.<sup>129</sup> The fact that the court’s mootness analysis would now preclude O.I.C.L. from qualifying for SIJS was seen as a “collateral legal consequence” of the dependency adjudication and was of no concern to the majority.<sup>130</sup>

Dismissing a dependency petition because it alleged that the parental abandonment occurred too long ago to qualify for adjudication of dependency in the present, and dismissing an appeal because the appellant was no longer a “child” under Florida law, again in the present,<sup>131</sup> were judicial artifices, imposing temporal inelasticity into statutory definitions while overlooking the statute’s purposes and intent.<sup>132</sup> Implying that “abandonment” at the inception of a child’s life was not relevant to the child’s dependency status as an adolescent, implied that past events themselves, no matter how grave, were not worthy of the court’s consideration.<sup>133</sup> Also, holding that a child could not have his appeal decided on the

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<sup>127</sup> See *O.I.C.L. v. Fla. Dep’t of Children & Families (O.I.C.L. II)*, 205 So. 3d 575, 579 (Fla. 2016).

<sup>128</sup> See *id.* at 578, 579 (citing *Godwin v. State*, 593 So. 2d 211, 212 (Fla. 2012); *Lund v. Dep’t of Health*, 708 So. 2d 645, 646 (Fla. Dist. Ct. App. 1998)).

<sup>129</sup> See *O.I.C.L. II*, 205 So. 3d at 578 (citing *Lund*, 708 So. 2d at 646).

<sup>130</sup> See *O.I.C.L. II*, 205 So. 3d at 579 (“Accordingly, the fact that obtaining a state court order of child dependency is a first step in potentially securing SIJ status from the federal government at a later date does not change our mootness analysis by transforming the immigration context into a collateral legal consequence. Florida courts simply cannot declare an individual over 18 years of age to be a dependent child under current Florida law.”).

<sup>131</sup> See FLA. STAT. § 39.01(12) (“Child” or “youth” is an unmarried person under the age of 18 who has not been emancipated by the court); *O.I.C.L. II*, 205 So. 3d at 579; *In re M.A.S.-Q. & Y.E.S.-Q.*, 22 Fla. L. Weekly Supp. 213a (11th Cir. Ct. Oct. 22, 2013).

<sup>132</sup> See, e.g., FLA. STAT. § 39.001(1)(d) (“The purposes of this chapter are . . . [t]o provide a child protection system that is sensitive to the social and cultural diversity of the state.”). Chapter 39 is to be “liberally interpreted and construed in conformity with its declared purposes.” FLA. STAT. § 39.001(12); *accord B.C. v. Dep’t of Children & Families*, 887 So. 2d 1046, 1052 (Fla. 2004); *In re Y.V.*, 160 So. 3d 576, 578 (Fla. Dist. Ct. App. 2015).

<sup>133</sup> See, e.g., *In re E.G.S.-H.*, 22 Fla. L. Weekly Supp. 639b (11th Cir. Ct. Jan. 27, 2015).

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merits because he had reached age 18 during a lengthy appeal, implied that he never really was a “child” whose past abandonment or neglect was worthy of the court’s consideration.<sup>134</sup>

Some of the judicial resistance as I describe it in this Article could be seen as a deliberate effort to diminish, or even nullify, the state court’s important, but limited, role in the cooperative federalism scheme of SIJS.<sup>135</sup> In its more extreme form, the judges questioned the fundamental premise of the federal statute that juveniles be

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<sup>134</sup> Chief Justice Labarga’s dissent articulated the view that “[a]lthough O.I.C.L. has already reached majority age, [i]t is well settled that mootness does not destroy an appellate court’s jurisdiction . . . when the questions raised are of great public importance or are likely to recur.” *O.I.C.L. II*, 205 So. 3d at 579 (Labarga, J., dissenting) (quoting *Holly v. Auld*, 450 So. 2d 217, 218 n.1 (Fla. 1984)) (citing *Del Valle v. State*, 80 So. 3d 999, 1005 (Fla. 2011)). Justice Polston and the majority disputed this characterization, and offered O.I.C.L. consolation that his now mooted question of great public importance would eventually be addressed in a future case, but not his case. See *O.I.C.L. II*, 205 So. 3d at 579 (“*In re B.R.C.M.* . . . addresses an issue that is very similar to the issue in this case, but the Third District’s decision involves a child who is currently less than 18 years of age. Therefore, the legal questions raised are not likely to evade appellate review, and we cannot ignore the mootness of this particular case.”).

Notably, the court’s dismissal on mootness grounds overlooked authority to overturn a trial court’s order of dismissal, and direct adjudication *nunc pro tunc* to the date of the original ruling, a common practice in dependency cases. See, e.g., *F.L.M. v. Dep’t of Children & Families*, 912 So. 2d 1264, 1270 (Fla. Dist. Ct. App. 2005) (“The judge in question having since retired, we therefore return this case to a successor judge with instructions to enter an order *nunc pro tunc* declaring the child dependent under Florida law and further providing that the Department’s responsibility over him necessarily terminated when he attained the age of 18.”); see also *L.T. v. Dep’t of Children & Families*, 48 So. 3d 928, 931 (Fla. Dist. Ct. App. 2010) (following the holding in *F.L.M.* that the petition was not moot) (citing *F.L.M.*, 912 So. 2d at 1269). Had the *O.I.C.L. II* majority taken this authority into account, it would also provide a basis for the dependency court to not only adjudicate O.I.C.L. dependent, but to retain jurisdiction over him well past his 18th birthday. See FLA. STAT. § 39.5075(6) (authorizing dependency court to retain jurisdiction past age 18, through age 22, over an immigrant dependent child who has a “petition and application” for SIJS pending with USCIS and to conduct “[r]eview hearings for the child . . . for the purpose of determining the status of the petition and application” until the final decision, which terminates the jurisdiction.).

Instead of seeing multiple benefits to O.I.C.L. of a dependency adjudication post-age of majority, the majority chose to emphasize this statutory-extended jurisdiction grant as “solely for the purpose of allowing the continued consideration of the [SIJ status] petition and application by federal authorities.” *O.I.C.L. II*, 205 So. 3d at 578. But there would be more than just immigration benefits post-18 for O.I.C.L. As an adjudicated dependent child, now a young adult, he could continue to receive services in the form of supportive living, case management, and stipends from DCF after turning 18. See FLA. STAT. § 39.6251 (extended foster care until age 21); FLA. STAT. § 409.1451(2) (post-secondary education support and aftercare services until age 23); FLA. STAT. § 1009.25(1)(c) (post-secondary education tuition waiver benefits until age 28); FLA. STAT. § 409.903(4) (medical benefits, including Medicaid eligibility until age 21); FLA. STAT. § 409.1676(1) (access to specialized medical and therapeutic programs for children with extraordinary needs).

<sup>135</sup> See, e.g., *In re K.B.L.V.*, 176 So. 3d 297, 301 (Fla. Dist. Ct. App. 2015) (Shepherd, J., specially concurring) (“Despite the long settled understanding in our federal system that ‘[p]olicies pertaining to the entry of aliens and their right to remain here are . . . entrusted exclusively to Congress,’ . . . the United States Congress, for reasons of its own, has decreed that our stamp of approval is a *sine qua non* for consideration by the United States Citizenship and Immigration Services of a child’s request for SIJS status [sic] and permanent residency.”).

permitted (indeed, were required) to seek relief in state court as a prerequisite to SIJ status.<sup>136</sup> More mainstream skeptical questioning did not attack the facial requirement that the state court play its designated role in the federalism scheme.<sup>137</sup> But their Chapter 39 analysis relied on statutory construction that reified the courts' social or political constructs about immigrants and immigration policy, rather than the intent of the legislature, in assuring that *all* children in the state were entitled to individualized hearings on petitions alleging abuse, abandonment or neglect under Florida law.<sup>138</sup> Imputing ill intent to the children or their counsel, making sweeping generalizations about them as children, and disparaging the quality of their allegations of maltreatment were political statements, as much as they were judicial pronouncements.<sup>139</sup>

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<sup>136</sup> See, e.g., *O.I.C.L. v. Dep't of Children & Families (O.I.C.L. I)*, 169 So. 3d 1224, 1250 (Fla. Dist. Ct. App. 2015) (“[J]udicial resources too often are being misused to obtain dependency orders for minors who are neither abused, neglected, or abandoned, and who seek a dependency adjudication and best-interest order not because they are endangered and need protection but because they want preferential immigration treatment without having to comply with the requirements of the customary legal immigration process.”); *In re B.Y.G.M.*, 176 So. 3d 290, 293 (Fla. Dist. Ct. App. 2015) (“It is understood that B.Y.G.M. filed her petition to secure SIJS, and that she did not do so in order to obtain relief from abuse, abandonment, or neglect.”); *In re K.B.L.V.*, 176 So. 3d at 301 (Shepherd, J., specially concurring) (“It is as if we are customs agents, although the federal government will make the final decision. . . . However, we are not yet colonies or territories of the United States government. We correctly decline to subordinate ourselves to the whim of the United States Congress in this case.”); *In re E.G.S.-H.*, 22 Fla. L. Weekly Supp. 693b (“While the Court is sympathetic to the plight of alien minors who desire and seek nothing more than the opportunity of a better life, my role is not to set immigration policy or decide whether, as a humanitarian gesture, any particular alien child should be permitted to stay in the United States.”).

<sup>137</sup> See, e.g., *O.I.C.L. II*, 205 So. 3d at 578 (“While ‘a state court’s adjudication of dependency or other custody determination is the first step in the process of obtaining SIJ status,’ federal immigration law ‘then requires additional findings, which may come from any judicial or administrative body.’”) (quoting *In re Y.V.*, 160 So. 3d at 580).

<sup>138</sup> See *O.I.C.L. I*, 169 So. 3d at 1248 (citing *Vrchota Corp. v. Kelly*, 42 So. 3d 319, 322 (Fla. Dist. Ct. App. 2010); see also *State v. Rife*, 789 So. 2d 288, 292 (Fla. 2001) (first quoting *State v. Cohen*, 696 So. 2d 435, 438 (Fla. Dist. Ct. App. 1997); and then quoting *State v. Brigham*, 694 So. 2d 793, 797 (Fla. Dist. Ct. App. 1997)) (“[Florida courts] are ‘without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power. This principle . . . reflects the constitutional obligation of the judiciary to respect the separate powers of the legislature.’”); *Fast Track Framing, Inc. v. Carabello*, 994 So. 2d 355, 357 (Fla. Dist. Ct. App. 2008) (“[W]hen interpreting a statute, it is not the judiciary’s prerogative to question the merit of a policy preference or to substitute its preference for the legislature’s judgment.”).

<sup>139</sup> See, e.g., *O.I.C.L. I*, 169 So. 3d at 1247 (citing *Fla. Dep’t of Children & Families v. Y.C.*, 82 So. 3d 1139, 1142 (Fla. Dist. Ct. App. 2012) (emphasis added) (“At their core, *these petitions* are probably best described as ‘merely an unopposed request for the assistance of the court,’ . . . for entry of orders to help a child obtain legal immigration status.”); *In re B.Y.G.M.*, 176 So. 3d at 294 (Shepherd, J., concurring) (emphasis added) (“In *these cases*, the express purpose of the petition is to obtain an adjudication of dependency, based on abuse, abandonment, or neglect, as a predicate to requesting special immigrant status for the purpose of seeking lawful

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Justice Lawson's concurrence intimated that Florida's courts were being inundated by immigrant children overwhelming the state courts' limited capacities and resources.<sup>140</sup> His concern echoed prior warnings by circuit and appellate judges that "many" cases were being initiated by immigrant children from Central America flooding the dependency courts with questionable or even illegitimate claims of dependency.<sup>141</sup> Consciously or not, these warnings also echoed the rhetoric in countless Trump administration pronouncements and tweets that the federal political asylum system was being overrun and taxed to the limit by "meritless" asylum applications filed by large numbers of migrants arriving at the border in caravans originating in Central America.<sup>142</sup> Whether the alarms being sounded were about securing the border and limiting asylum applications, or securing the courthouse to limit meritless dependency-SIJS filings, immigrants were viewed as unworthy of fair treatment and individualized attention by our government and courts.<sup>143</sup> State courts portray these cases as a part of a massive influx tended to convey the message that individual children like B.R.C.M. were not truly victims of abuse in their homelands but were in fact predators, fraudulently pursuing immigration benefits from the dependency courts.<sup>144</sup> Similar generalities have abounded in the

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permanent residence in the United States.”).

<sup>140</sup> See *B.R.C.M. v. Fla. Dep't of Children & Families (B.R.C.M. II)*, 215 So. 3d 1219, 1224 (Lawson, J., specially concurring).

<sup>141</sup> See, e.g., *Order Requiring Briefing & Scheduling Oral Argument*, *supra* note 14, at 1 (emphasis added) (“This case is one of *many* initiated by a ‘Private Petition for Dependency’ filed on behalf of alien children . . .”); see also Sarah Rogerson, *The Politics of Fear: Unaccompanied Immigrant Children and the Case of the Southern Border*, 61 VILL. L. REV. 843, 850–53 (2016) (describing and refuting fears of unaccompanied Central American children flooding into the U.S.).

<sup>142</sup> See, e.g., DEPT OF JUSTICE, DOJ AND DHS ISSUE NEW ASYLUM RULE: APPLIES PRESIDENT'S AUTHORITY TO SUSPEND ENTRY TO ASYLUM (2018), <https://www.justice.gov/opa/pr/doj-and-dhs-issue-new-asylum-rule> (“Our asylum system is overwhelmed with too many meritless . . . claims from aliens who place a tremendous burden on our resources, preventing us from being able to expeditiously grant asylum to those who truly deserve it.”); Abigail Abrams, *President Trump Says He Wants to Limit Asylum Seekers. Experts Say He's on Shaky Legal Ground*, TIME (Nov. 1, 2018), <http://time.com/5442286/trump-seeks-limit-asylum-seekers-legal-questions/>.

<sup>143</sup> See, e.g., Antonio Olivo, *For a Special Visa, Young Immigrants Need a Judge to Rule They've Been Abandoned. Some Judges Refuse to Decide.*, WASH. POST (May 17, 2017), [https://www.washingtonpost.com/local/virginia-politics/to-apply-for-a-special-visa-young-immigrants-need-a-judge-to-rule-they-have-been-abandoned-some-local-judges-are-refusing-to-decide/2017/05/17/11f4900c-35a8-11e7-b412-62beef8121f7\\_story.html?utm\\_term=.1fe8e5d91580](https://www.washingtonpost.com/local/virginia-politics/to-apply-for-a-special-visa-young-immigrants-need-a-judge-to-rule-they-have-been-abandoned-some-local-judges-are-refusing-to-decide/2017/05/17/11f4900c-35a8-11e7-b412-62beef8121f7_story.html?utm_term=.1fe8e5d91580) (“Critics of the [SIJS] visa program have raised similar concerns, alleging that some immigrant parents are making false claims of mistreatment in hopes of keeping their children from being sent back to their homelands, and that in many cases the journey to the U.S. is arranged by both parents.”).

<sup>144</sup> See, e.g., *B.R.C.M. I*, 182 So. 3d 749, 754 (Fla. Dist. Ct. App. 2015) (quoting *In re K.B.L.V.*,

migrant crisis-infused rhetoric of border policy.<sup>145</sup>

These narratives of faceless illegal alien hordes rather than individual children—many of whom *have* suffered serious abuse and neglect in their home countries—depersonalize and dehumanize them, treating them as second-class children unworthy of the protections of the dependency courts.<sup>146</sup> But the purposes of Florida dependency law, as listed in Chapter 39, are not undermined when children such as B.R.C.M ask the courts for adjudications of dependency.<sup>147</sup> To the contrary, federal and state law work together to ensure that “vulnerable” children like this are protected.<sup>148</sup> Thus it is essential to appreciate and understand the federal SIJS statute and its interplay with state law, which provide these children an

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176 So. 3d 297, 301 (Fla. Dist. Ct. App. 2015) (Shepherd, J., specially concurring)). The myth of the “superpredator” is a pervasive theme in the history of juvenile court. *See generally* Tamar R. Birekhead, *The Racialization of Juvenile Justice and the Role of the Defense Attorney*, 58 B.C. L. REV. 379, 388 (2017). The fear-driven portrayals by judges of hordes of Central American children stampeding into their courts for SIJS could be seen as a stereotyping and racializing of the children, adding a new dimension to the structural racism that pervades this institution.

<sup>145</sup> *See* Susan M. Akram, *Are They Human Children or Just Border Rats?*, 15 B.U. PUB. INT. L.J. 187, 188 (2006); Kevin R. Johnson, *“Aliens” and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 268–69, 273, 276 (1997).

<sup>146</sup> *See, e.g.*, Akram, *supra* note 145, at 188; Johnson, *supra* note 145, at 269 (“Today’s faceless ‘illegal aliens’ are invading the nation and must be stopped or we shall be destroyed. Such images help animate, invigorate, and reinforce the move to bolster immigration enforcement efforts and seal the borders.”).

<sup>147</sup> *See In re Y.V.*, 160 So. 3d 576, 578 (Fla. Dist. Ct. App. 2015) (“[Chapter 39] provides a lengthy list of purposes, the first of which is ‘[t]o provide for the care, safety, and protection of children.’”). In enacting this statutory scheme, the legislature also sought to: “ensure secure and safe custody” of children; “prevent the occurrence of child abuse, neglect, and abandonment”; provide children with protection “from abuse, abandonment, neglect, and exploitation”; provide children “[a] permanent and stable home”; and provide children “[a] safe and nurturing environment which will preserve a sense of personal dignity and integrity.” FLA. STAT. §§ 39.001(1)(a), (3)(a)–(c) (2018). The Chapter also expressly conveys the legislature’s determination that “it is the state’s responsibility to ensure that factors impeding the ability of caregivers to fulfill their responsibilities are identified through the dependency process and that appropriate recommendations and services to address those problems are considered in any judicial or nonjudicial proceeding,” and “that the prevention of child abuse, abandonment, and neglect shall be a priority of this state.” FLA. STAT. §§ 39.001(7)–(8).

<sup>148</sup> *See* Memorandum from Lori Scialabba, USCIS Deputy Director, Response to Recommendation 47, Special Immigrant Juvenile Status (SIJ) Adjudications: An Opportunity for Adoption of Best Practices (July 13, 2011), <https://www.uscis.gov/sites/default/files/USCIS/Resources/Ombudsman%20Liaison/Responses%20to%20Formal%20Recommendations/cisomb-2011-response47.pdf> (“USCIS appreciates the sensitivity and urgency surrounding these cases and makes every effort to provide the proper attention to this vulnerable population.”); *see also* David B. Thronson, *Kids Will Be Kids? Reconsidering Conceptions of Children’s Rights Underlying Immigration Law*, 63 OHIO ST. L.J. 979, 1004 (2002) [hereinafter Thronson, *Kids Will Be Kids?*] (“[SIJS] created a unique hybrid system of state and federal collaboration, drawing on state child welfare expertise to complement INS expertise in immigration matters.”).

opportunity to seek best interest orders in dependency and other state court proceedings as a predicate for SIJS.

*E. Federal SIJS Framework in B.R.C.M. II*<sup>149</sup>

Congress introduced SIJS into law through the Immigration and Nationality Act of 1990, to “provide a gateway for undocumented children who have been abused, neglected, or abandoned to obtain lawful permanent residency in the United States.”<sup>150</sup> The statute was amended in 2008 as part of the Trafficking Victims Protection Reauthorization Act (“TVPRA”).<sup>151</sup> Through this amendment, Congress increased the availability of SIJS relief by replacing the requirement that the child be “eligible . . . for long-term foster care,” with the condition 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.”<sup>152</sup> Although this amendment expanded eligibility for SIJS, it remains a limited form of relief, accounting for only about .5 percent of cases for lawful

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<sup>149</sup> This section has been adapted from the amicus curiae brief submitted by three Miami Law clinics in *B.R.C.M.* See Brief of Univ. of Miami Sch. of Law Children & Youth Clinic et al. as Amicus Curiae Supporting Petitioners at 10–19, *B.R.C.M. v. Florida Dept. of Children & Families*, No. SC16-179 (Fla. Sept. 16, 2016); *infra* Part VII.

<sup>150</sup> *In re Marcelina M.-G. v. Israel S.*, 973 N.Y.S.2d 714, 715 (N.Y. App. Div. 2013); see also *Yeboah v. United States Dep’t. of Justice*, 345 F.3d 216, 221 (3rd Cir. 2003) (describing the purpose of SIJS). Responding to concerns about fraud, Congress amended the statute in 1997 to prevent “juveniles entering the United States as visiting students” from taking advantage of its provisions. See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1997, Pub. L. No. 105-119, § 113, 111 Stat. 2440, 2460; *Yeboah*, 345 F.3d at 221.

<sup>151</sup> See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235(d)(1), 122 Stat. 5044, 5079.

<sup>152</sup> See *id.* at 5079; see also *H.S.P. v. J.K.*, 121 A.3d 849, 851–52 (N.J. 2015) (“In this appeal, we examine the role of our state courts in making the predicate findings necessary for a non-citizen child to apply for ‘special immigrant juvenile’ (SIJ) status under the Immigration Act of 1990, as amended by the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008.”). Compare § 113, 111 Stat. at 2460 (“Section 101(a)(27)(J) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(27)(J)) is amended to read as follows: ‘(J) an immigrant who is present in the United States—(i) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State and who has been deemed eligible by that court for long-term foster care due to abuse, neglect, or abandonment . . . .’”), with 8 U.S.C. § 1101(a)(27)(J)(i) (2019) (“The term ‘special immigrant’ means—(J) an immigrant who is present in the United States—(i) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States, and whose 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 . . . .”).

*permanent status* adjudicated by USCIS each year.<sup>153</sup>

Applying for SIJS status is a two-step process. First, an immigrant child must qualify for, and obtain, a state court order making findings that:

- (1) The child “[i]s under twenty-one years of age;”
- (2) The child “[i]s unmarried;”
- (3) The child “has been declared dependent on a juvenile court,” or the court has “legally committed” the child or placed the child “under the custody of . . . an individual or entity appointed by a State or juvenile court;”
- (4) “[R]eunification 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;” and
- (5) It is not in the child’s “best interest” to be returned to his or her home country.<sup>154</sup>

Congress delegated these factual findings to state courts, in recognition of the expertise of states in child welfare determinations.<sup>155</sup> A state dependency court’s role in the SIJS application process is limited to adjudicating the petition for

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<sup>153</sup> See CTR. FOR GENDER & REFUGEE STUDIES, A TREACHEROUS JOURNEY: CHILD MIGRANTS NAVIGATING THE U.S. IMMIGRATION SYSTEM 38 (2014). In 2012, for example, USCIS received only 2,959 SIJS petitions. See *id.* In 2014, USCIS received 5,776 petitions for SIJS status. See U.S. DEPT. OF HOMELAND SEC., NUMBER OF I-360 PETITIONS FOR SPECIAL IMMIGRANT WITH A CLASSIFICATION OF SPECIAL IMMIGRANT JUVENILE (SIJ) BY FISCAL YEAR AND CASE STATUS 2010-2016 (2016), [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Adjustment%20of%20Status/I360\\_sij\\_performancedata\\_fy2016\\_qtr4.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Adjustment%20of%20Status/I360_sij_performancedata_fy2016_qtr4.pdf). The total number of applications for SIJS-lawful permanent residence status granted in 2017 was 4,681 [hereinafter NUMBER OF I-360 PETITIONS]. See U.S. DEPT. OF HOMELAND SEC., 2017 YEARBOOK OF IMMIGRATION STATISTICS: TABLE 7 (2017), <https://www.dhs.gov/immigration-statistics/yearbook/2017/table7> [hereinafter 2017 YEARBOOK: TABLE 7].

<sup>154</sup> See 8 U.S.C. § 1101(a)(27)(J)(i); 8 C.F.R. § 204.11(c) (2019). The implementing regulations for SIJS have not been updated to reflect the 2008 statutory amendments. For example, the regulations still include reference to a child’s eligibility for “long-term foster care,” a phrase defined federally as requiring that reunification with both of the child’s parents not be viable. See § 204.11(a).

<sup>155</sup> See Gregory Zhong Tian Chen, *Eliau or Alien? The Contradictions of Protecting Undocumented Children Under the Special Immigrant Juvenile Statute*, 27 HASTINGS CONST. L.Q. 597, 609, 613 (2000) (“The reliance upon state juvenile courts anticipated in the SIJ statutory scheme signals Congress’ recognition that the state retain primary responsibility and administrative competency to protect child welfare.”).

dependency and requests for factual findings.<sup>156</sup> Other visa options such as visas for undocumented immigrant victims of domestic violence through the Violence Against Women Act<sup>157</sup> and U Visas for undocumented victims of certain crimes,<sup>158</sup> may also rely on the state court to make certain predicate findings but the court's role in SIJS is mandatory.<sup>159</sup> While the state court plays a key role in the process, its "role . . . is not to determine worthy candidates for citizenship, but simply to identify abused, neglected, or abandoned alien children under its jurisdiction."<sup>160</sup> Theoretically, the adjudication of dependency should be based on the *same legal standard* for both citizen and immigrant children.

If and when the state court makes the requisite factual findings, the child may file a petition with USCIS, which has authority to approve or deny SIJS.<sup>161</sup> In considering whether to approve such a petition, USCIS will consider, among other things, whether the application is bona fide, meaning that SIJS is being sought to protect the child from abuse, neglect, or abandonment.<sup>162</sup> If USCIS grants SIJS, the child may apply for lawful permanent residency, assuming that the child meets all additional eligibility criteria.<sup>163</sup> This short course in SIJS law serves as a frame for understanding *B.R.C.M. II*

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<sup>156</sup> See *H.S.P.*, 121 A.3d at 852 ("The [state court] plays a critical role in a minor immigrant's attempt to obtain SIJ status but that role is closely circumscribed. . . . The [court] does not have jurisdiction to grant or deny applications for immigration relief."); *In re Avila Luis*, 114 N.E.3d 855, 858 (Ind. Ct. App. 2018) ("[A] state court's role in the SIJ process is not to determine worthy candidates for citizenship, but simply to identify abused, neglected, or abandoned alien children under its jurisdiction who cannot reunify with a parent or be safely returned in their best interests to their home country.").

<sup>157</sup> See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40701, 108 Stat. 1796, 1953–54.

<sup>158</sup> See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1502, 114 Stat. 1464, 1518. The U visa is incorporated in the section of this Act and is referred to as the Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1518. See Theo Liebmann, *Ethical Advocacy for Immigrant Survivors of Family Crisis*, 50 FAM. CT. REV. 650, 653 (2012) [hereinafter Liebmann, *Ethical Advocacy*].

<sup>159</sup> See Liebmann, *Ethical Advocacy*, *supra* note 158, at 652–54, 654 tbl.1.

<sup>160</sup> *Leslie H. v. Superior Court*, 168 Cal. Rptr. 3d 729, 737 (Cal. Ct. App. 2014); see also U.S. DEP'T. OF HOMELAND SEC., SPECIAL IMMIGRANT JUVENILE STATUS: INFORMATION FOR JUVENILE COURTS, [https://www.ncjfcj.org/sites/default/files/Information\\_for\\_Juvenile\\_Courts\\_-FINAL%20%281%29.pdf](https://www.ncjfcj.org/sites/default/files/Information_for_Juvenile_Courts_-FINAL%20%281%29.pdf). ("[J]uvenile judges should note that providing an order does not grant SIJ status or a 'Green Card'—only USCIS can grant or deny these benefits. The role of the court is to make factual findings based on state law about the abuse, neglect, or abandonment; family reunification; and best interests of the child.").

<sup>161</sup> See 8 U.S.C. § 1101(a)(27)(J)(iii); 8 C.F.R. § 204.11(b), (e).

<sup>162</sup> See U.S. DEP'T. OF HOMELAND SEC., HQOPS 70/8.5, TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT OF 2008: SPECIAL IMMIGRANT JUVENILE STATUS PROVISIONS 3 (2009), [https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/2009/TVpra\\_SIJ.pdf](https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/TVpra_SIJ.pdf).

<sup>163</sup> See 8 C.F.R. § 204.11(c); U.S. DEP'T. OF HOMELAND SEC., *supra* note 160.

and other cases involving the federal law. In the next parts, I evaluate some of the ways that state judges before and since that decision was rendered have applied and misapplied the federal law.

### III. HISTORICAL ANTECEDENTS: A JUDGE BEHAVING BADLY

*[W]hen someone comes into my courtroom and says I am here illegally, I have a duty to report that, as any U.S. citizen would do . . . .*

—Florida Circuit Judge Roger Colton.<sup>164</sup>

#### A. *The Judicial Misbehavior*

In 2004, in a Florida Circuit Court in Palm Beach County, Judge Roger Colton denied a petition for dependency filed on behalf of an undocumented immigrant child from Central America alleging abuse and neglect.<sup>165</sup> During the hearing, the judge also refused to consider or grant the child's motion for a best interest order to qualify for SIJS.<sup>166</sup> After the child left the courtroom with her *pro bono* lawyer, the judge wrote down the names, addresses and birthdates of the child and her family, and faxed this information over to the U.S. Border Patrol.<sup>167</sup>

When the incident hit the media, the judge defended himself, proclaiming: “[t]hey’re violating the law, and I’m a judge. . . . Don’t I have some type of obligation to the system to report it . . . when it’s smack-dab right out in front of me?”<sup>168</sup> A short time later, in an appearance on *The O’Reilly Factor*, the judge elaborated:

The reason I turned them over is because I have a sworn duty as a circuit judge to uphold not only the Constitution of the State of Florida but also the Constitution of the United States, and, when someone comes into my courtroom and says I am here illegally, I have a duty to report that, as any U.S. citizen would do, and, therefore, I have decided that, if you come in the front of me and you say I shouldn’t be here, I’m illegal,

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<sup>164</sup> See Interview by Bill O’Reilly with Roger Colton, Florida Circuit Judge, *The O’Reilly Factor* (21<sup>st</sup> Century Fox Jan. 28, 2004) [hereinafter *The O’Reilly Factor* Transcript].

<sup>165</sup> See, e.g., Memorandum from [lawyer’s name withheld at request] to Fifteen Coal. Members 2 (Apr. 27, 2004) (on file with author).

<sup>166</sup> See *id.*

<sup>167</sup> See *Judge Accused of Abusing Power by Reporting Immigrant Children*, MIAMI HERALD, Jan. 19, 2004, at 8B [hereinafter *Judge Accused of Abusing Power*].

<sup>168</sup> See *id.*

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then I will report that individual to the U.S. Border Patrol for whatever appropriate action they see fit.<sup>169</sup>

In explaining why he reported children to INS, Judge Colton leveled two complaints about the cases that have become standard lines of attack in the recent judicial pushback against alien children petitioning courts in Florida for dependency adjudications. He complained about older children (*i.e.*, 17-year-olds) seeking dependency adjudications in order to “have a leg up, so to speak, for a special immigrant visa and hopefully to avoid deportation.”<sup>170</sup> The judge’s view that older children were not really “children” has been a recurring objection to their petitions, as noted above.<sup>171</sup> The disparaging views voiced by Judge Colton about the circumstances of these older children and their reasons for filing petitions in their teenage years, made broad assumptions about them that did not necessarily reflect their realities as individual children.<sup>172</sup> The fact

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<sup>169</sup> *The O’Reilly Factor* Transcript, *supra* note 164, at 1.

<sup>170</sup> *Id.*

<sup>171</sup> See *O.I.C.L. v. Fla. Dep’t of Children & Families (O.I.C.L. II)*, 205 So. 3d 575, 578 (Fla. 2016); see also *O.I.C.L. v. Dep’t of Children & Families (O.I.C.L. I)*, 169 So. 3d 1244, 1247 (Fla. Dist. Ct. App. 2015) (“These types of petitions . . . routinely share the following common elements: the child is about to turn eighteen years old; the Department of Children and Families (DCF) neither supports nor opposes the child’s petition; the child agrees not to seek any services from the State; one or more of the child’s parents sign consent forms agreeing to entry of a dependency order; no testimony is presented to the court opposing the petition; and, DCF files no briefs in any subsequent appeal.”).

<sup>172</sup> See, e.g., *O.I.C.L. II*, 205 So. 3d at 580 (Labarga, C.J., dissenting) (“[S]eventeen-year-olds are the most frequent SIJS applicants—from 1999 to 2012, the median age has hovered between seventeen and eighteen annually, with an overall median age of 17.4.”)(quoting Laila Hlass, *States & Status: A Study of Geographical Disparities for Immigrant Youth*, 46 COLUM. HUM. RTS. L.REV. 266, 290 (2014)). The *O.I.C.L. II* dissent elaborated on this statistical finding, quoting Hlass’s survey of the implementation of the SIJS law across multiple jurisdictions, which found that there were many reasons why state court petitions were often filed shortly before the child reached the age of majority:

First, the average age of unaccompanied minors entering the country is around sixteen or seventeen, and . . . many of these youths are SIJS eligible. Further, for someone who has not been apprehended by the immigration agency, this is the age at which he may consider getting a driver’s license or taking college entrance tests. These events can trigger a realization that he is unauthorized, because he does not have the required identification. At this point, he may be more likely to seek help and get screened for eligibility. Lastly, age seventeen might be so common because many state laws lose jurisdiction over youths at age eighteen, so SIJS-eligible youths eighteen and older may not be able to obtain the predicate state court order and therefore never apply for federal immigration protection. These hypotheses are certainly not exhaustive, but they are reflective of the conventional understanding of child advocates.

*Id.*; see also Emily Rose Gonzalez, *Battered Immigrant Youth Take the Beat: Special Immigrant Juveniles Permitted to Age-Out of Status*, 8 SEATTLE J. SOC. JUST. 409, 410 (2009) (discussing the SIJS “aging-out” predicament).

that the child filed a petition for dependency a few months before turning 18 was not a proper basis for presuming that the petition was illegitimate, fraudulent or lacked merit.

In his *O'Reilly* appearance, Judge Colton also cited one instance of an “illegal alien” who had come to his court

admittedly so, to try to get medical care from the United States—and it was decided, well, maybe we could put him into a special school, and I made up my mind, well, why should we be giving that individual the opportunity for that slot when we have U.S. citizens who are trying to get into a school also?<sup>173</sup>

The complaint that allowing a foreign-born child to petition for dependency adjudication and seek services would thereby deprive more deserving U.S. citizen children of their entitlement to medical or educational benefits, was another recurring, zero-sum objection voiced by judges.<sup>174</sup> It was also one of the reasons why advocates made prudential, strategic decisions *not* to ask for any state services in their dependency filings. But if the petition did *not* seek services, the courts would take a dismissive posture that the child was not truly “dependent.”<sup>175</sup> Yet if the petition *did* make a claim for services, this would spark another negative reaction from judges, *i.e.*, that the services would deplete the state’s resources intended to assist deserving citizen children.<sup>176</sup> This damned if you do, damned if you don’t (seek services) criticism leveled by different judges was a paradoxical thread running through the recent spate of state court SIJS litigation. It was one of the key objections animating the Florida court trend of summarily dismissing petitions filed by immigrant children through their *pro bono* counsel, particularly when the petition sought no assistance from the state.<sup>177</sup>

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<sup>173</sup> *The O'Reilly Factor* Transcript, *supra* note 164, at 1.

<sup>174</sup> *See id.* The view also revealed the judge’s glaring lack of understanding of equal protection precedent guaranteeing immigrant children access to certain public benefits and the right to a public education. *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (state cannot deny K-12 public education to undocumented children because undocumented children are a quasi-suspect class and public education is a quasi-fundamental right); *Graham v. Richardson*, 403 U.S. 365, 366, 382 (1971) (quoting *United States v. Vuitch*, 402 U.S. 62, 70 (1971) (state statute denying welfare benefits to resident aliens and aliens who had not resided in the U.S. for a specified number of years violated the Equal Protection Clause).

<sup>175</sup> *See, e.g.*, *In re B.R.C.M. (B.R.C.M. I)*, 182 So. 3d 749, 751, 754 (Fla. Dist. Ct. App. 2015) (quoting *In re K.B.L.V.*, 176 So. 3d 297, 301 (Fla. Dist. Ct. App. 2015) (Shepherd, J., specially concurring)).

<sup>176</sup> *See The O'Reilly Factor* Transcript, *supra* note 164, at 1; Cleek, *supra* note 12.

<sup>177</sup> *See The O'Reilly Factor* Transcript, *supra* note 164, at 3; Cleek, *supra* note 12.

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The fact that the child did not simultaneously seek services from the state did not signify that this was a meritless dependency case under Florida law.<sup>178</sup> In fact, nothing in the statutes or rules governing a petition for an adjudication of dependency requires that any kind or quantum of services be sought from the state.<sup>179</sup> Furthermore, the trial court is free to order services to the child and family at the post-adjudicatory dispositional hearing, regardless of whether the child asks for services.<sup>180</sup>

When asked by the host about why he was making this appearance on the O'Reilly program to explain and defend his actions, he likened it to “speak[ing] to the Rotary Club or the Kiwanis Club, and . . . that I have a duty as a judge to help educate the public about our jurisprudence system and particularly the system of law in the State of Florida, as I see it.”<sup>181</sup> Much of what the judge offered to the O'Reilly audience had very little to do with educating the public and was more his partisan opinion about “illegal aliens,”<sup>182</sup> tainted by personal bias and prejudice.<sup>183</sup> To make an obvious point, an appearance on a politically conservative pundit's show on a conservative cable network is nothing like an appearance before an

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<sup>178</sup> See, e.g., *In re T.J.*, 59 So. 3d 1187, 1191 (Fla. Dist. Ct. App. 2011) (citing *F.L.M. v. Dep't of Children & Families*, 912 So. 2d 1264, 1270 (Fla. Dist. Ct. App. 2005)). Florida appellate courts have uniformly held that a child who makes “no request for services” may nonetheless be “dependent”—as defined by FLA. STAT. § 39.01(15)—and that a finding to the contrary would encourage immigrant children to deplete state resources available for “other needy children.” See FLA. STAT. § 39.01(15); *In re T.J.*, 59 So. 3d at 1191 n.5 (quoting *F.L.M.*, 912 So. 2d at 1270).

<sup>179</sup> See FLA. STAT. § 39.501(3)(a).

<sup>180</sup> See, e.g., FLA. STAT. § 39.521(1)(b) (2018).

<sup>181</sup> *The O'Reilly Factor* Transcript, *supra* note 164, at 2. Several of the judge's statements on the O'Reilly program did not accurately describe “our jurisprudence system” or even the law in this area, which certainly cast doubt on and eroded public confidence in his abilities as a member of the judiciary and especially his impartiality as a judicial officer presiding over claims concerning “illegal alien” children and families. As pointed out in Part IIIB *infra*, he had no apparent awareness that he was prohibited by federal and Florida law from sharing information contained in his court files with the Border Patrol or any other federal immigration entity, and was under a strict duty to preserve the confidentiality of the proceedings over which he presided as a state judge, subject to very limited exceptions granted under state or federal law.

<sup>182</sup> See *id.* at 1–3. The judge used the words “illegal” or “illegally” seven times to describe immigrants or aliens during his short interview with O'Reilly, as recorded in the three-page transcript of his interview. See *id.*

<sup>183</sup> See FLA. CODE OF JUDICIAL CONDUCT, Canon 4A(1)–(2) (2019); *id.* cmt. Canon 4A (“A judge is encouraged to participate in activities designed to improve the law, the legal system, and the administration of justice. In doing so, however, it must be understood that expressions of bias or prejudice by a judge, even outside the judge's judicial activities, may cast reasonable doubt on the judge's capacity to act impartially as a judge and may undermine the independence and integrity of the judiciary.”); FLA. CODE OF JUDICIAL CONDUCT, Canon 4 cmt. Canon 4B (emphasis added) (“Judges are encouraged to participate in efforts to promote the fair administration of justice, the independence of the judiciary and the integrity of the legal profession . . .”).

apolitical civic organization. Moreover, given that he was presiding over these cases, and in a later conversation mentioned that three of his rulings involving undocumented immigrants were on appeal, and thus theoretically could be remanded to him, he really had no business commenting on these questions to the press or the public.<sup>184</sup> But the judge doubled down to O'Reilly regarding his actions and pledged to continue on his crusade: "I'm reporting illegal activities to the appropriate authorities."<sup>185</sup> The fact that he used his judicial office to turn over undocumented immigrants to Border Patrol and INS, and thus flouted the law and his judicial obligations of impartiality and independence, did not seem to trouble him in the least.<sup>186</sup>

### B. *The Response by Advocates*

Immigrant advocates reacted to Judge Colton's acts and public proclamations with alarm. A board member of the American Immigration Lawyers Association called the practice "shocking," and said, "[h]e's taken upon himself a duty he was not sworn to do . . . . He's a state court judge enforcing federal law."<sup>187</sup> A *Palm Beach Post* editorial accused the judge of "overstepping his bounds when he preempts the opportunity of abused children to request dependency."<sup>188</sup>

Florida advocates formed a coalition to respond to the judge's

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<sup>184</sup> See FLA. CODE OF JUDICIAL CONDUCT, Canon 3B(9) ("A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing."). See also Phyllis Williams Kotey, *The Real Costs of Judicial Misconduct: Florida Taking a Step Ahead in the Regulation of Judicial Speech and Conduct to Ensure Independence, Integrity, and Impartiality*, 31 NOVA L. REV. 645, 685 (2007) (citing an instance of a Florida judge removed from his position as a Chief Judge of a circuit court for making public statements that undermined the public's confidence in the judge's impartiality).

<sup>185</sup> See *The O'Reilly Factor* Transcript, *supra* note 164, at 1. As if to demonstrate that this was not a one-sided explanation of the law and the jurisprudence system by this opinionated judge, the Fox program featured a counterpoint appearance by Jeff Devore, a Palm Beach immigration lawyer critical of the judge's acts and the views that he expressed to the program audience. See *id.* at 1–2.

<sup>186</sup> See *id.* at 1. *But cf.* Aimee Green, *Judge Didn't Violate Rules in Letting Immigrant Leave Through Back Door, Review Finds*, OREGONIAN (June 19, 2017), [https://www.oregonlive.com/portland/index.ssf/2017/06/court\\_officials\\_find\\_no\\_violat.html](https://www.oregonlive.com/portland/index.ssf/2017/06/court_officials_find_no_violat.html) (judge who permitted undocumented alien to elude federal agents waiting outside of her courtroom, giving alien exit through the back door, found by trial court administrator in the Multnomah County Oregon Circuit Court administrator's office not to have abused Oregon judicial canons).

<sup>187</sup> Susan Spencer-Wendel, *Judge's Reports to Border Patrol Roil Legal Waters*, PALM BEACH POST, Jan. 18, 2004, at 1A.

<sup>188</sup> *Opinion-Editorial: A Judge Goes Too Far*, PALM BEACH POST, Jan. 26, 2004, at 10A.

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actions and public statements.<sup>189</sup> Rather than target just one rogue judge, we decided to educate all of the state's judges handling dependency, family custody, and guardianship cases about the confidentiality requirements of abuse and neglect law.<sup>190</sup> My clinic students and I prepared a legal memorandum that was incorporated into a letter that we sent to these judges.<sup>191</sup>

The letter advised them that judges were prohibited from contacting federal authorities about the immigration status of undocumented children in dependency court and similar proceedings.<sup>192</sup> It detailed federal and state laws mandating the preservation of confidentiality for these court proceedings and the policies underlying the prohibitions against such contacts.<sup>193</sup> We apprised Judge Colton and the other judges that this practice also violated DCF's Florida Alien Child Rule, which was promulgated nine years earlier, in 1995.<sup>194</sup> This rule forbade state officials from

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<sup>189</sup> See Memorandum from Florida's Children First!, Inc. to All Florida Circuit Judges Assigned to Juvenile, Family, and Probate Divisions 1 (Apr. 17, 2004) [hereinafter Memorandum from Florida's Children First] (on file with author).

<sup>190</sup> See *id.* Best interest orders for SIJS can be sought in a variety of a state court actions, including child custody, guardianship/conservatorship, abuse/neglect, juvenile delinquency, and divorce/child support. See 8 C.F.R. § 204.11(c)(6), (d)(2)(iii) (2019); Liebmann, *Ethical Advocacy*, *supra* note 158, at 656 ("In SIJ cases, for example, family reunification and a child's best interests are findings that establish eligibility for relief; both of these determinations are made regularly in dependency, adoption, guardianship, and other proceedings, and lawyers must be extensively familiar with the procedural and substantive bases for making arguments related to those issues.").

Depending on the state, a "family court," "probate court," or "district court" may be vested with the authority to make the requisite orders for SIJ eligibility. See, e.g., Gao v. Jenifer, 185 F.3d 548, 551, 557 (6th Cir. 1999) (affirming Michigan probate court's exercise of jurisdiction over child and the determination that child was a dependent of the court); Arteaga v. Texas Dep't. of Protective & Regulatory Servs., 924 S.W.2d 756, 760 (Tex. App. 1996) (noting that district court of Texas took jurisdiction over minor, declared her a ward of the court, and thus enabled her to obtain SIJ status).

<sup>191</sup> See Memorandum from Florida's Children First, *supra* note 189, at 1.

<sup>192</sup> See *id.* at 3; see also 42 U.S.C. § 671(a)(8) (federal law only allows release of information to another governmental agency for purposes directly connected with the administration of the child's foster care permanency plan).

<sup>193</sup> See Memorandum from Florida's Children First, *supra* note 189, at 1; see also FLA. STAT. § 39.202 (2018) (records shall be kept confidential unless otherwise prescribed by Chapter 39); FLA. STAT. § 39.0132(4)(a) (2018) (mandating confidentiality of juvenile court records); Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C. § 5106a (b)(2)(B) (viii) (2019) (noting that every state receiving grants under CAPTA must provide methods to preserve the confidentiality of "all records in order to protect the rights of the child and of the child's parents or guardians."); see also Matthew I. Fraidin, *Stories Told and Untold: Confidentiality Laws and the Master Narrative of Child Welfare*, 63 ME. L. REV. 1, 30–33 (2010) (describing how confidentiality laws operate in child welfare cases).

<sup>194</sup> See FLA. ADMIN. CODE ANN. r. 10M-47.001 (1995) ("Alien Child Rule"); Memorandum from Florida's Children First, *supra* note 189, at 3; see also Carolyn S. Salisbury, Comment, *The Legality of Denying State Foster Care to Illegal Alien Children: Are Abused and Abandoned Children the First Casualties in America's War on Immigration?*, 50 U. MIAMI L. REV. 633, 645

reporting the child's or parents' identifying information to the INS, irrespective of the outcome of the dependency proceeding.<sup>195</sup> Although he had presided in dependency court for some time, Judge Colton was unaware of the Florida Alien Child Rule and that it barred sharing court records with the Border Patrol.<sup>196</sup> The letter explained that such contacts undermined the goals of the state child protection system and would deter or chill children (and advocates) from petitioning state courts for protection from parental abuse or seeking SIJS.<sup>197</sup>

One of our group met with Judge Colton in chambers to explain our position. We decided not to air our concerns in public to avoid embarrassing the judge, who otherwise had a reputation for fairness and evenhandedness in his dependency docket.<sup>198</sup> A Palm Beach County civil litigator agreed to be our diplomatic envoy to the judge, whom he knew and had supported. The judge explained why he reported the children to Border Patrol, but gave a somewhat different account than what he told Bill O'Reilly's audience. He said the child was point-blank not "dependent" under Florida law and implied that the child's lawyers were underhanded in abusing the dependency court for their clients. According to our colleague's post-meeting account, Judge Colton implied "that the process was being subverted in order to have this illegal immigrant obtain legal status in an illegal way . . . . He had simply been put up to filing this petition by [his] lawyer and the whole thing was a subterfuge."<sup>199</sup> Judge Colton's

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(1996) (describing Florida's alien child rule's obligations to children).

<sup>195</sup> See FLA. ADMIN CODE ANN. r. 10M-47.001 (1995) ("[I]ntended to resolve . . . [that] Chapter[] 39 . . . appli[ies] to all children in Florida without regard to alienage or immigration status."); FLA. ADMIN CODE ANN. r. 10M-47.002 (1995); FLA. ADMIN CODE ANN. r. 10M-47.003 (1995) (establishing certain procedures for handling alien children in child protection proceedings). See generally Angela M. Elspenger, *Florida's Battle With the Federal Government Over Immigration Policy Holds Children Hostage: They Are Not Our Children!*, 13 LAW & INEQ. 141, 144, 168 (1994) (summarizing history of Florida Alien Child Rule); Salisbury, *supra* note 194, at 645 (1996) (same).

<sup>196</sup> See, e.g., Memorandum from [lawyer's name withheld at request] to 15 Coal. Members, *supra* note 165, at 2.

<sup>197</sup> See Memorandum from Florida's Children First, *supra* note 189, at 8; see also Chen, *supra* note 155, at 626 ("[F]ederal confidentiality laws reinforce the well-established policies regarding the treatment of [immigrant] minors who are the subject of child abuse, neglect, or abandonment investigations.").

<sup>198</sup> See Maxine Goodman, *Three Likely Causes of Judicial Misbehavior and How These Causes Should Inform Judicial Discipline*, 41 CAP. U. L. REV. 949, 995 (2013) [hereinafter Goodman, *Three Likely Causes*] ("[D]iscipline that serves to humiliate and degrade the offending judge may work against the judicial conduct agencies' goals of preventing judicial misconduct and ensuring the integrity of the judiciary.").

<sup>199</sup> Memorandum from [lawyer's name withheld at request] to 15 Coal. Members, *supra* note 165, at 2.

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complaints about these kinds of purported SIJS abuses have been heard before and since, in various contexts.<sup>200</sup>

In their conversation, Judge Colton moderated the tone of his more inflammatory rhetoric on O'Reilly's program. He promised to read our letter, especially the parts that called him out for violating the children's confidentiality protections, and agreed to revisit this practice after reviewing the legal analysis that we offered to give him. He also invited us to file *amicus* briefs in three pending appeals challenging similar acts. The meeting was described as cordial and helpful.

Afterwards, Judge Colton ended his practice. He stopped turning over undocumented immigrant children to the Border Patrol. Other Florida judges tempted to follow his example were persuaded to refrain. We viewed this voluntary cessation and the accompanying silence as a victory, not only because the judge stopped targeting alien children based on their alienage and immigration status, but because he stopped being a negative role model for similarly-tempted state court judges.

### C. Advocacy Lessons Learned

We saw this episode as a cautionary tale about state judges who take it upon themselves to “enforce” immigration law, motivated by (1) personal views hostile to immigrants, (2) reactions to perceived abuses of dependency court processes by immigrants, (3) suspicions about their lawyers, or a combination of all three. With other immigration policy challenges looming on the horizon for immigrants, joining forces with other advocates and collaborating with community groups seemed to me like an opportunity to engage in a localized form of “rebellious lawyering.”<sup>201</sup> Some of us saw the threats and envisioned this type of strategy to meet other challenges

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<sup>200</sup> See, e.g., Katherine Porter, *In the Best Interests of the INS: An Analysis of the 1997 Amendment to the Special Immigrant Juvenile Law*, 27 J. LEGIS. 441, 448 (2001) (describing how “a few cases of abuse of the SIJ statute in [the 1997 SIJS amendment sponsor’s] state” were the spur for tightened standards enacted by the resulting amendment); Kirk Semple, *Federal Scrutiny of a Youth Immigration Program Alarms Advocates*, N.Y. TIMES (Mar. 31, 2015), [https://www.nytimes.com/2015/04/01/nyregion/federal-scrutiny-of-a-youth-immigration-program-alarms-advocates.html?\\_r=0](https://www.nytimes.com/2015/04/01/nyregion/federal-scrutiny-of-a-youth-immigration-program-alarms-advocates.html?_r=0) (discussing reported instances of SIJS “abuses” by Punjabi children filing petitions in New York family courts, prompting Congressional demands for DHS investigations into the federal SIJ law).

<sup>201</sup> See generally Bill Ong Hing, *Contemplating a Rebellious Approach to Representing Unaccompanied Immigrant Children in a Deportation Defense Clinic*, 23 CLIN. L. REV. 167, 203–10 (2016) (describing rebellious immigrant advocacy strategies informed by client experiences, animated by collaboration with community groups and other alliances, and taking on battles “[e]ven if the [odds [s]eem [i]nsurmountable.”).

around the state, or even in the federal arena, to protect the interests of immigrants. Advocacy for DACA recipients and DREAMers prompted legal confrontation and debate on all sides.<sup>202</sup> Community organizing and advocacy were part of the mix.<sup>203</sup> After January 2017, attention turned to policies inflicted by Trump on immigrant children.<sup>204</sup> Inflammatory anti-immigrant rhetoric about immigrants as rapists, human traffickers and drug dealers, endlessly repeated in speeches, rallies, online conversations, and tweets, called for concerted counterattacks and responses, including accurate and factual information about who the undocumented immigrants in our communities and states actually were.<sup>205</sup>

These larger considerations loomed over our comparatively small-scale experience with Judge Colton, which involved just one uninformed, xenophobic judge who engaged in egregious and unlawful actions harmful to a few of the “illegal aliens” who had the misfortune to appear in his court. But they also gave us a chance to teach him, and potentially other judges, some basic points about his obligation to protect—and to not jeopardize—the tenuous status of immigrants who were appearing before him, so that, at the very least, he would abide by confidentiality safeguards in Florida and federal law. It was very obvious from what he did and said in these cases, that he saw himself as a *de facto* immigration judge, serving the interests of the U.S. Border Patrol, rather than as a juvenile court judge, serving the best interests of the immigrant children who appeared before him. Clearly, he needed to be told that his loyalties were misplaced.

This lesson was an important opportunity to teach judges throughout Florida about their “indispensable role in enabling children to obtain SIJ status” and “their limited but vital role in assisting undocumented immigrant youth.”<sup>206</sup> As the legal educator

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<sup>202</sup> See, e.g., Peter Margulies, *Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Powers*, 94 B.U. L. REV. 105, 106, 115–16 (2014).

<sup>203</sup> See Arelis R. Hernández, *What Will Happen to DACA? Federal Court Cases Could Lead to an Answer*, WASH. POST (Aug. 19, 2018), [https://www.washingtonpost.com/local/md-politics/what-will-happen-to-daca-federal-court-cases-could-lead-to-an-answer/2018/08/19/95dc35f2-9b30-11e8-843b-36e177f3081c\\_story.html?utm\\_term=.334619cdda76](https://www.washingtonpost.com/local/md-politics/what-will-happen-to-daca-federal-court-cases-could-lead-to-an-answer/2018/08/19/95dc35f2-9b30-11e8-843b-36e177f3081c_story.html?utm_term=.334619cdda76).

<sup>204</sup> See Vivian Yee & Kirk Semple, *Policy Under Trump Bars Obama-Era Path to U.S. for Central American Youths*, N.Y. TIMES (Aug. 15, 2017), [https://www.nytimes.com/2017/08/15/us/trump-central-american-refugees.html?mwrsm=Email&\\_r=0](https://www.nytimes.com/2017/08/15/us/trump-central-american-refugees.html?mwrsm=Email&_r=0).

<sup>205</sup> See, e.g., IMMIGRATION POLICY CTR., AM. IMMIGRATION COUNCIL, WHO AND WHERE THE DREAMERS ARE, REVISITED ESTIMATES 1 (2012).

<sup>206</sup> See Theo Liebmann, *Family Court and the Unique Needs of Children and Families Who Lack Immigration Status*, 40 COLUM. J.L. & SOC. PROBS. 583, 588, 601 (2007) [hereinafter Liebmann, *Family Court*].

in this coalition, I too recognized this as a teaching moment. One way to teach judges would be to prepare bench books, briefs, and informational manuals about SIJS.<sup>207</sup> Another way to elevate practices in their courts on issues concerning undocumented immigrants would be to conduct surveys of existing practices and prepare reports and assessments, with informed recommendations about improvements in the administration of justice. Law schools and clinics frequently undertake these policy, court improvement, and practice-oriented educational activities.<sup>208</sup> Judges, lawyers, and all of the ancillary dependency and family court professionals involved in these cases need structured guidance and training to better understand a child's or family's immigration status and how it can influence the outcome of the proceedings, and law schools do this work.<sup>209</sup>

Enlisting fifteen organizations—law school clinics, children's rights groups, immigration advocates, client groups and several sections of the Florida bar—to sign on to the letter to “All Florida Circuit Court Judges Assigned to Juvenile, Family, and Probate Divisions” was a challenging but ultimately effective strategy.<sup>210</sup> The

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<sup>207</sup> See, e.g., WENDI J. ADELSON, SPECIAL IMMIGRANT JUVENILE STATUS IN FLORIDA: A GUIDE FOR JUDGES, LAWYERS, AND CHILD ADVOCATES 7 (2007), <https://media.law.miami.edu/clinics/children-and-youth/pdf/2007/special-immigrant-juvenile-manual-2007.pdf>; ANGIE JUNCK ET AL., SPECIAL IMMIGRANT JUVENILE STATUS AND OTHER IMMIGRATION OPTIONS FOR CHILDREN & YOUTH (5th ed. 2018); VERA INST. OF JUSTICE, SPECIAL IMMIGRANT JUVENILE STATUS: FREQUENTLY ASKED QUESTIONS FOR STATE COURT JUDGES 1 (2012); WASH. LEADERSHIP INST., WASHINGTON STATE COURT SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) BENCH BOOK AND RESOURCE GUIDE 7 (2016), <https://www.courts.wa.gov/committee/pdf/SIJSBenchbook.pdf>.

<sup>208</sup> See, e.g., FEERICK CTR. FOR SOC. JUSTICE, NEW YORK UNACCOMPANIED IMMIGRANT CHILDREN PROJECT FAMILY COURT WORKING GROUP: FINDINGS FROM A SURVEY OF LAWYERS REPRESENTING IMMIGRANT YOUTH ELIGIBLE FOR SPECIAL IMMIGRANT JUVENILE STATUS IN NYS FAMILY COURT 6–14 (2014), [https://www.fordham.edu/download/downloads/id/3019/findings\\_from\\_a\\_survey\\_of\\_lawyers\\_representing\\_immigrant\\_youth\\_eligible\\_for\\_special\\_immigrant\\_juvenile\\_status\\_in\\_nys\\_family\\_court.pdf](https://www.fordham.edu/download/downloads/id/3019/findings_from_a_survey_of_lawyers_representing_immigrant_youth_eligible_for_special_immigrant_juvenile_status_in_nys_family_court.pdf) (recommending improvements in state court handling of SIJS cases, strengthening access to competent counsel, and educating courts and lawyers about the needs and vulnerabilities of immigrant communities).

<sup>209</sup> See, e.g., David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TEX. HISP. J.L. & POL'Y 45, 72 (2005) [hereinafter Thronson, *Of Borders*] (“[C]ourts and practitioners need to be alert to immigration status and its role in proceedings. While immigration status often will be argued openly, such issues and the family power dynamics that accompany them may not be obvious at first glance. Courts must develop sensitivity and awareness to these issues, together with a willingness to engage in them thoughtfully.”).

<sup>210</sup> See Memorandum from Florida Children's First, *supra* note 189, at 1, 10–11. Sign-on letters, like *amicus* briefs (in which multiple organizations participate), are frequently used by public interest advocates to present a policy or doctrinal position in which they share a common interest. See, e.g., Sally Chaffin, *Challenging the United States Position on a United Nations Convention on Disability*, 15 TEMP. POL. & CIV. RTS. L. REV. 121, 128 n.55 (2005) (coalition letter to support congressional action to ensure human rights of persons with disabilities); Michele A. Voss, *Young and Marked for Death: Expanding the Definition of “Particular Social*

message that these organizations conveyed reflected their collective authority and credibility as advocates for the rights of immigrants and children, community-based client groups, and Florida bar organizations.<sup>211</sup>

Although we achieved this end without much of a fight from the offending judge, we did not always agree about tactics. All of us agreed that the judge's public anti-immigrant pronouncements and other conduct compromised his integrity, independence and impartiality as a member of the judiciary. Not all agreed that we should lodge a Judicial Qualifications Commission complaint for violating judicial canons.<sup>212</sup> One or two of us defended him as basically a "good judge" who had lost his way. Others saw this conduct and his public statements on and off the bench as markers of a "bad judge" clearly irritated by having to preside over cases involving aliens in his courtroom, obviously harboring animosity toward them, and eager to scold them and cast them out of his courtroom.<sup>213</sup> Some saw him as an "angry judge," unapologetically

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*Group*" in *Asylum Law to Include Youth Victims of Gang Persecution*, 37 RUTGERS L.J. 235, 237 n.16 (2005) (AILA Sign-On Letter to DHS Secretary).

<sup>211</sup> See Memorandum from Florida's Children First, *supra* note 189, at 1. Bringing together organizations with expertise in different, and sometimes opposing, forms of advocacy (e.g., appellate advocacy vs. grassroots organizing) united around a common cause, is a quintessential public interest lawyer's strategy—and challenge. See, e.g., Rebecca Sharpless, *More than One Lane Wide: Against Hierarchies of Helping in Progressive Legal Advocacy*, 19 CLINICAL L. REV. 347, 400 (2012) ("We should consider the ways in which collaborations of different groups following different advocacy models, or a mix of more than one, can effectively come together in common cause. . . . Such meta-strategies can take advantage of the talents offered by each organization.").

<sup>212</sup> Arguably, the judge's activities and public pronouncements violated provisions of virtually all of the canons, including Canon 1 ("A Judge Shall Uphold the Integrity and Independence of the Judiciary"); Canon 2 ("A Judge Shall Avoid Impropriety and the Appearance of Impropriety in all of the Judge's Activities"); Canon 3 ("A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently"); Canon 5 ("A Judge Shall Regulate Extrajudicial Activities to Minimize the Risk of Conflict With Judicial Duties"); and Canon 7 ("A Judge or Candidate for Judicial Office Shall Refrain From Inappropriate Political Activity"). FLA. CODE OF JUDICIAL CONDUCT, Canons 1–3, 5, 7 (2018). As noted above, Judge Colton's disinformation or misinformation about "our jurisprudence system and particularly the system of law in the State of Florida" in his newspaper and O'Reilly interviews, were especially egregious violations of his duty to abide by Canon 4, in that his activities to "improve" the law and the administration of justice did just the opposite. See *id.* Canon 4 ("A Judge is Encouraged to Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice").

<sup>213</sup> Professor Geoffrey Miller, in his encyclopedic survey of "bad judges," cataloged many varieties of inappropriate or "bad" judicial conduct and gave examples of each. See Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 432 (2004). He described "judicial independence" as the gold standard or hallmark of good judging: "[o]n the one hand, independence is itself a quality enhancing policy. If judges are not independent, they will be subject to influence that could distort the outcomes of cases, skew the development of substantive law, and detract from public confidence in the judicial system." *Id.* at 456–57. Judge Colton's undisguised contempt

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irked at what he perceived to be an unwarranted invasion of his courtroom by “illegal aliens” who had, in his view, no place there; perhaps angry at the federal authorities for failing to capture these illegal aliens and send them back to their home countries; angry at Congress for foisting on the judge the responsibility of conducting hearings to allow these children to avoid deportation and remain in the U.S.; or angry at their unethical lawyers subverting the dependency process to enable illegal immigrants to obtain legal status in a dubious and illicit way, all of which was anathema to this judge’s personal political views.<sup>214</sup> For a variety reasons we reached an impasse over the filing of a judicial misconduct complaint and did not do so.<sup>215</sup>

#### IV. GOOD (AND NOT SO GOOD) JUDGES BEHAVING BADLY

*[I]t is apparent that . . . the circuit court and this Court have concluded that private petitions by immigrant juveniles are generally appropriate for summary denial.*

—Florida District Court of Appeal Judge Vance Salter<sup>216</sup>

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for illegal aliens influenced and distorted outcomes, compromised his judicial independence in conducting hearings and deciding their individual cases, and in his efforts to use his judicial office to facilitate their deportation rather than ensure their protection, degraded public confidence in the judiciary.

One of the other broad categories of misconduct that he examined in depth, again quite obviously relevant to this episode, involved displays on and off the bench of judicial “bias, prejudice, and insensitivity” towards disfavored groups:

Bad judges display bias, prejudice, and stereotypical thinking. . . . They insult a melting pot of groups including African Americans, Hispanics, Jews, Catholics, Italian-Americans, English, Danes, Yugoslavians, Japanese, and otherwise-unidentified, undocumented aliens. They look down on poor people, harbor animosity against homosexuals, and scold or discriminate against women for being prostitutes, unwed mothers, welfare abusers, and caregivers.

*Id.* at 445–47.

<sup>214</sup> See, e.g., Maxine D. Goodman, *Shame, Angry Judges, and the Social Media Effect*, 63 CATH. U. L. REV. 589, 590 (2014) [hereinafter Goodman, *Shame*] (“As commentators begin to wrestle with the issue of angry judges, the public and the legal community are calling for greater transparency within the system of judicial discipline, hoping to stem the tide of judicial misbehavior.”).

<sup>215</sup> Cf. Molly McDonough, *Tenn. Judge Slapped for Harsh Treatment of Immigrant Juvies*, A.B.A. J. (May 19, 2008), [http://www.abajournal.com/news/article/tenn\\_judge\\_slapped\\_for\\_harsh\\_treatment\\_of\\_immigrant\\_juviess](http://www.abajournal.com/news/article/tenn_judge_slapped_for_harsh_treatment_of_immigrant_juviess) (describing Tennessee Court of the Judiciary censure of judge for conduct involving cases of children of undocumented immigrants and children he perceived to be in U.S. illegally).

<sup>216</sup> *In re B.R.C.M. (B.R.C.M. I)*, 182 So. 3d 749, 763 (Fla. Dist. Ct. App. 2015) (Salter, J., dissenting).

As the Palm Beach County judicial controversy subsided, we had a few years of peaceful coexistence with the judiciary in Florida, until the unaccompanied child migrant flow from Central America ticked up and more petitions started to be filed. Before the 2016 surge in border apprehensions, judges had begun to see some new cases in the courts, but there were, and still are, no hard statistics on the number of new case filings.<sup>217</sup> Even though there was no hard data, there is every reason to believe that the real numbers were exaggerated. Anecdotal reports suggested an increase in filings, which in turn provoked the reactionary response by judges.<sup>218</sup> Even though judges may have seen some more Central American children's cases in their courtrooms, their stated fears of an influx leading to an onslaught of new filings in Miami-Dade County were probably overestimating the magnitude and extent of the problem.<sup>219</sup>

Nevertheless, at this point more judges, many of whom had previously been sympathetic to the cases, began to push back. The

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<sup>217</sup> Chief Justice Labarga's dissenting opinion in *O.I.C.L. II* harvested the federal data about the number of children released by ORR to sponsors in Florida, and combined it with extrapolations about how many would likely opt to pursue SIJS relief, in order to make an educated guess about the numbers of new Central American children's dependency court filings in our state. See *O.I.C.L. v. Fla. Dep't of Children & Families (O.I.C.L. II)*, 205 So. 3d 575, 580 (Fla. 2016) (Labarga, C.J., dissenting) ("In fiscal year 2015, an estimated 39,970 unaccompanied minors were apprehended at the border. Approximately 2,908 of those children were released to sponsors in Florida. This number increased in fiscal year 2016, with approximately 4,264 unaccompanied minors released to sponsors in Florida as of July 2016. One of the common types of relief sought by these children is Special Immigrant Juvenile Status (SIJS), which allows unaccompanied minors to apply for lawful permanent residency in the United States.").

<sup>218</sup> See Cleek, *supra* note 12 ("As more minors came before the court, judges began to question, sometimes aggressively, why these immigrant kids were in their courtrooms at all and deny these cases.").

<sup>219</sup> Florida accounted for 148 SIJS applications—3.7%—of the 3,994 applications filed nationally with USCIS in 2013. See Laila L. Hlass, *Minor Protections: Best Practices for Representing Child Migrants*, 47 N.M. L. REV. 247, 267, 289–90 (2017) [hereinafter Hlass, *Minor Protections*]. And based on that percentage, the national number of USCIS approvals of SIJS cases in 2017, as reported by the DHS Office of Immigration Statistics (4,681), would signify approximately 173 total approvals for children in the entire state of Florida in that year. See 2017 YEARBOOK: TABLE 7, *supra* note 153.

The unknown number, of course, was the cases that did not make it that far in the SIJS two-tiered process, because they were summarily dismissed by judges. But even if five or fifty or more cases had come into the Miami-Dade Children's Court during the relevant period, it is hard to see how this or even a higher estimated volume of cases would have burdened or overwhelmed the court and the judges assigned to hear dependency, delinquency and unified family court cases. See David Ovalle, *Miami-Dade's New Children's Courthouse Called 'Place of Hope'*, MIAMI HERALD (Apr. 24, 2015), <https://www.miamiherald.com/news/local/community/miami-dade/downtown-miami/article19365378.html> ("Hundreds of civic leaders and the biggest names in the legal community gathered on Friday to celebrate the opening of Miami-Dade's Children's Courthouse—a gleaming modern building featuring 18 courtrooms and bear sculptures in the lobby to greet visitors.").

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undocumented immigrant children were now forced to navigate a complex and increasingly more hostile court system, more than what they had previously experienced.<sup>220</sup> Latin American and Caribbean children with unauthorized status suffer more severe family stress and instability, have poorer health outcomes and less educational attainment, and experience greater social isolation than other “legal” and U.S.-citizen children.<sup>221</sup> Excluding children without legal status from Florida’s dependency courts, and thus preventing them from acquiring SIJS, could be considered a form of “silencing” that exacerbates stressors and increases social isolation.<sup>222</sup>

The shift in judicial responses to private petitions filed by these children was dramatic. In just a few years, judges’ attitudes changed from being receptive to the petitions to summarily dismissing them.<sup>223</sup> Immigrant children’s lawyers saw claims of abuse or neglect being completely disregarded, in much more dismissive ways than they had experienced in prior years.<sup>224</sup> Not every judge was openly

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<sup>220</sup> See Keyes, *supra* note 10, at 36 (“Immigration litigation is always difficult, but the children’s cases raise a host of special challenges: not only are these minors with varying degrees of capacity and legal competence, but a sizable portion have suffered terrible traumas that may make it hard to build a case.”).

<sup>221</sup> See Jorge M. Chavez et al., *Sufren Los Niños: Exploring the Impact of Unauthorized Immigration Status on Children’s Well-Being*, 50 FAM. CT. REV. 638, 640, 642–45 (2012).

<sup>222</sup> See, e.g., Evelyn H. Cruz, *Validation Through Other Means: How Immigration Clinics Can Give Immigrants a Voice When Bureaucracy Has Left Them Speechless*, 17 ST. THOMAS L. REV. 811, 812–13 (2005).

<sup>223</sup> Judge Salter’s *B.R.C.M. I* dissent traced the trajectory of these changes in Florida, finding routine grants of dependency petitions at the outset and summary denials in later years:

Florida appellate cases reported from 2005 to 2011 were receptive to immigrant juveniles petitioning for dependency.

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From the elaboration of rulings in 2015 in this district . . . , it is apparent that . . . the circuit court and this Court have concluded that private petitions by immigrant juveniles are generally appropriate for summary denial, despite the more deliberate consideration previously afforded the SIJ petitioners in [a circuit court case in] 2013 . . . and in prior opinions by the district courts of appeal.

*In re B.R.C.M. (B.R.C.M. I)*, 182 So. 3d at 756, 763 (Salter, J., dissenting).

<sup>224</sup> See, e.g., Shani M. King, *Alone and Unrepresented: A Call to Congress to Provide Counsel for Unaccompanied Minors*, 50 HARV. J. ON LEGIS. 331, 342 (2013) (“Perhaps the biggest obstacle that the lawyer had to overcome was convincing DHS, the dependency judge, and the immigration officer that [unaccompanied alien child] Catherine’s story was credible . . . .”); Christopher Nugent, *Whose Children Are These? Towards Ensuring the Best Interests and Empowerment of Unaccompanied Alien Children*, 15 B.U. PUB. INT. L.J. 219, 227 (2006) (“While unaccompanied children’s cases are more exacting and more difficult to prepare by virtue of the child’s development, sometimes DHS resistance and skepticism often makes representing children even more challenging, time-consuming and expensive than representing adults. Individual cases can easily become polarizing and politicized.”).

hostile to immigrants, but a child's immigration status undoubtedly influenced bad rulings in these cases.<sup>225</sup> The ominous if inaccurate warnings of floods of children entering the U.S. was not a sentiment or fear isolated to Florida judges.<sup>226</sup> Nor were the novel interpretations of state and federal laws limiting access to SIJS at the dependency court phase unique to Florida courts.<sup>227</sup> But the events in Florida were more systemic and pervasive in their barely disguised fears of the massive influx from the Northern Triangle and its impact on the courts.

There was an anti-immigrant unworthiness or illegality subtext to the reasoning in many of these opinions.<sup>228</sup> It struck at their identities as immigrant children, deemed unworthy of having their day in court.<sup>229</sup> As Professor David Thronson has observed: “[j]udges

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<sup>225</sup> See Thronson, *Of Borders*, *supra* note 209, at 71–72 (“[T]he patterns that emerge from reviewing family court decisions indicate that the impact of immigration status in family court is not an irregular occurrence. Whether family courts are discriminating, manipulating, obfuscating or accommodating, immigration status influences, sometimes determinatively, the outcome of cases.”).

<sup>226</sup> See, e.g., *In re Luis G.*, 764 N.W.2d 648, 653 (Neb. Ct. App. 2009) (“Both [the juveniles’ attorney] and [the attorney representing DHHS] argued persuasively it is in the best interests of the juveniles that they remain in this country. The Court is convinced that is true. However, the Court is equally convinced there are, in all probability, tens if not hundreds of thousands of people who are here illegally or who would like to come to the United States because they would be better off in this country.”).

<sup>227</sup> See, e.g., *In re Erick M.*, 820 N.W.2d 639, 641–42, 644–45, 648 (Neb. 2012) (interpreting “1 or both parents” language of 8 U.S.C. § 1101 (a)(27)(J), as amended by the 2008 TVPRA amendment, to disallow the entry of a best interest order for a child, based on a juvenile court’s finding that the child could be reunified with his mother, which barred entry of the order); *Canales v. Orellana*, 800 S.E.2d 208, 217–18 (Va. Ct. App. 2017) (en banc) (“[Best interest] orders should have been generated by state courts applying state law in the normal course of their responsibilities under the laws of the respective states. Nothing in the INA directs a state court to do anything more than carry out its adjudicatory responsibilities under state law.”). These two decisions have spurred critical commentary for departing from the intent of Congress and pertinent state laws, reflecting concerns about disparate results in the SIJS two-tiered process in different states. See, e.g., *In Case of First Impression, Virginia Court of Appeals Holds that State’s Juvenile and Domestic Relations Courts and Circuit Courts Lack Jurisdiction to Make Special Immigrant Juvenile Status Findings of Fact*, 94 no. 27 Interpreter Releases (West) Art. 13 (July 7, 2017) (discussing *Canales v. Orellana*); Kristen Jackson, *Special Status Seekers: Through the Underused SIJS Process, Immigrant Juveniles May Obtain Legal Status*, 34 L.A. LAW. 20, 23 (2012) (discussing *Erick M.*); Heryka Knoespel, *Special Immigrant Juvenile Status: A “Juvenile” Here Is Not a “Juvenile” There*, 19 WASH. & LEE J. CIV. RTS. & SOC. JUST. 505, 510 (2013) (discussing *Erick M.*); Priya Konings, *An Advocate’s Guide to Protecting Unaccompanied Minors*, 31 CHILD L. PRAC. June 2012, at 81, 86 (discussing *Erick M.*); Randi Mandelbaum & Elissa Steglich, *Disparate Outcomes: The Quest for Uniform Treatment of Immigrant Children*, 50 FAM. CT. REV., 606, 613 n.56 (2012) (discussing *Erick M.*). See also Richard F. Storrow, *Unaccompanied Minors at the U.S.-Mexico Border: The Shifting Sands of Special Immigrant Juvenile Status*, 33 GEO. IMMIGR. L.J. 1, 20–29 (2018) (mapping across several jurisdictions different forms of state court “resistance” to the SIJS requirements, “some more benign than others”).

<sup>228</sup> See Thronson, *Of Borders*, *supra* note 209, at 54–55.

<sup>229</sup> See *id.* at 55.

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who discriminate on the basis of immigration status reflect acceptance, consciously or otherwise, of a pervasive societal narrative that constructs an expanding notion of unworthiness and ‘illegality’ regarding undocumented immigrants and a diminished popular sense regarding the availability of protection from prejudice and discrimination.”<sup>230</sup>

## V. A GOOD JUDGE ASKING HARD QUESTIONS

*Do these ‘Private Petitions’ present a “case or controversy” appropriate for judicial determination?*

—Florida Circuit Judge Michael Hanzman<sup>231</sup>

Years before *B.R.C.M. II*, some dependency judges, concerned about the influx of new cases from Central American children, began to ask questions about “the legitimacy of these cases.”<sup>232</sup> Perhaps the most provocative and difficult questions about the legitimacy of private petitions filed on behalf of immigrant children were asked by Judge Michael Hanzman, who presided in the Juvenile Division of the Miami-Dade Circuit Court from 2011 to 2016.<sup>233</sup> Judge Hanzman was appointed to the bench by Rick Scott, Florida’s conservative Republican governor, to fill a judicial vacancy in 2011, and won election in 2012.<sup>234</sup> As a former civil litigator, with twenty-five years of experience handling class actions and other types of complex litigation in federal and state courts,<sup>235</sup> he brought sophisticated trial lawyer skills and experience to the juvenile bench. He gained a reputation as an activist judge known for asking tough questions of lawyers, child welfare agency administrators and staff, and other participants in the dependency court, to make sure that children

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<sup>230</sup> *Id.* at 54–55.

<sup>231</sup> Order Requiring Briefing & Scheduling Oral Argument, *supra* note 14, at 6.

<sup>232</sup> See *In re M.A.S.-Q. & Y.E.S.-Q.*, 22 Fla. L. Weekly Supp. 213a (11th Cir. Ct. Oct. 22, 2013).

<sup>233</sup> See Carlos Harrison, *From Beginning, Judge Hanzman Targeted the Courtroom*, DAILY BUS. REV. (Oct. 23, 2015), <https://www.law.com/dailybusinessreview/almID/1202740574993/from-beginning-judge-hanzman-targeted-the-courtroom/>; see also *Complex Business Kerfuffle*, JUST. BUILDING BLOG (Nov. 14, 2016), <http://justicebuilding.blogspot.com/2016/11/complex-business-kerfuffle.html> (Judge Hanzman transferred from juvenile dependency court to criminal court at the end of 2016).

<sup>234</sup> See *Governor Scott Appoints Michael A. Hanzman to the Eleventh Judicial Circuit Court*, FLA. GOVERNOR (May 23, 2011), <http://www.flgov.com/2011/05/23/governor-scott-appoints-michael-a-hanzman-to-the-eleventh-judicial-circuit-court/>; *Michael A. Hanzman*, BALLOTPEdia, [https://ballotpedia.org/Michael\\_A.\\_Hanzman](https://ballotpedia.org/Michael_A._Hanzman) (last visited Mar. 31, 2019); *Rick Scott*, BALLOTPEdia, [https://ballotpedia.org/Rick\\_Scott](https://ballotpedia.org/Rick_Scott) (last visited Mar. 31, 2019).

<sup>235</sup> See Harrison, *supra* note 233.

were safe, secure and getting necessary treatment and services while under his watch.<sup>236</sup>

Our clinic participated in several of these cases, which Judge Hanzman conducted very much like a skilled trial attorney, aggressively posing questions to parties, participants and agency representatives that he subpoenaed to appear before him, all in an effort to investigate harmful practices toward children that he encountered in his daily docket.<sup>237</sup> When these hearings concluded, he issued orders with detailed findings and sophisticated analysis that allowed him to craft broad, systemic remedies for the children affected. He also frequently enlisted the media to cover these hearings and he shared with his colleagues on the bench the well-written and carefully-reasoned orders that he issued after the hearings.<sup>238</sup>

Judge Hanzman is generally credited with (or blamed for) initiating the wave of judicial rulings from trial and appellate courts that ultimately resulted in viewing the petitions as appropriate for summary denial.<sup>239</sup> He began with one case, *In re M.A.S.-Q. & Y.E.S.-Q.*, involving two children from Guatemala, siblings who had been apprehended by federal agents and placed in the custody of ORR.<sup>240</sup> The children were represented by an immigration lawyer with a

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<sup>236</sup> See *id.*

<sup>237</sup> The judge's activist posture in the dependency court proceedings over which he conducted his own investigations of wrongdoing by agencies runs counter to the generally accepted practice of judges relying on court-appointed advocates such as guardians and particularly attorneys to do this investigative monitoring and advocacy. See, e.g., *Kenny A. v. Perdue*, 356 F. Supp. 2d 1353, 1361 (N.D. Ga. 2005) ("Judges, unlike child advocate attorneys, cannot conduct their own investigations and are entirely dependent on others to provide them information about the child's circumstances.").

<sup>238</sup> See, e.g., Carol Marbin Miller, *DCF Gets a Grilling from Judges over 4-Year-Old's Care*, MIAMI HERALD (Aug. 20, 2013), <http://www.miamiherald.com/news/local/community/miami-dade/article1954287.html> ("At Tuesday's hearing, Hanzman challenged the agency to 'give me an argument or a rationale for looking at this set of facts where you leave a 4-year-old home in the circumstances of this case?"); see also Carol Marbin Miller, *Under Fire from Judge, DCF Provides Treatment for Troubled Siblings*, MIAMI HERALD (Jan. 28, 2015), <http://www.miamiherald.com/news/state/florida/article8528555.html> ("Miami-Dade Circuit Judge Michael Hanzman chided lawyers and administrators at both DCF and the Agency for Health Care Administration—which runs the state Medicaid program for needy Floridians, and is responsible, at least indirectly, for securing treatment beds—for making children like the siblings wait for necessary care."); David Ovalle, *Miami Foster Group Home Under Scrutiny for Video of Kids Fighting*, MIAMI HERALD (Jan. 11, 2016), <http://www.miamiherald.com/news/local/community/miami-dade/article54125210.html> ("In extraordinarily blunt language, the judge blasted Children's Home Society of Florida, a statewide company that runs 11 foster homes in Miami-Dade.").

<sup>239</sup> See *In re B.R.C.M. (B.R.C.M. I)*, 182 So. 3d 749, 760 (Fla. Dist. Ct. App. 2015) (Salter, J., dissenting), *rev'd sub nom.* *B.R.C.M. v. Fla. Dep't of Children & Families (B.R.C.M. II)*, 215 So. 3d 1219 (Fla. 2017).

<sup>240</sup> *In re M.A.S.-Q & Y.E.S.-Q.*, 22 Fla. L. Weekly Supp. 213a (Fla. Cir. Ct. 2013).

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private practice in Miami, who was later substituted by the FIU clinic.<sup>241</sup> At least one of the parents was appointed legal counsel through the state-funded Office of Criminal Conflict and Civil Regional Counsel, and counsel for DCF and the Guardian ad Litem (“GAL”) Program also participated in the litigation.<sup>242</sup>

Eventually, other organizations (including our clinic) participated in a friend-of-the-court capacity, at the invitation of the judge. My students and I prepared an *amicus* brief on behalf of these organizations, describing our shared interests in the litigation as advocating “to protect and promote the basic human rights of immigrants through a unique combination of free direct services, impact litigation, policy reform, and public education at local, state and national levels.”<sup>243</sup>

The judge was clearly puzzled about how to address the facts alleged in the children’s petition as they were framed by the immigration lawyer who prepared the petition. He wanted answers to various procedural and doctrinal questions implicated by the legal theories that the child’s counsel put forward to support the dependency. This prompted him to ask for further briefing by the parties (the child’s counsel, DCF, GAL, and the parents’ attorneys) along with an open invitation that he tendered to “[c]haritable organizations, Legal Aid Societies, or private counsel involved in these cases . . . .”<sup>244</sup>

This was not his first case involving an undocumented immigrant child in his docket seeking an adjudication of dependency and a SIJS best interest order. In his unusual, open invitation soliciting input from non-parties about the law, Hanzman was blunt about his growing discomfort with “these cases.”<sup>245</sup> He laid out concerns about the particulars of this one case, but he also wanted answers to more general questions presented in the cases of “many” other alien

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<sup>241</sup> *Id.* The FIU clinic provides students opportunities to “represent children in court seeking to have them declared dependent in juvenile court so they can then apply for special immigrant juvenile status or asylum.” Isabel Gamarra, *FIU Students Help Newly Arrived Immigrant Children*, FIU NEWS (Oct. 1, 2014), <https://news.fiu.edu/2014/10/fiu-students-help-newly-arrive-d-immigrant-children/81581>. The clinic handles complex SIJS-related dependency and family court cases and has been involved in several significant Florida SIJS appellate cases. *See, e.g., In re T.J.*, 59 So. 3d 1187, 1188 (Fla. Dist. Ct. App. 2011); *B.R.C.M. II*, 215 So. 3d 1219; *B.R.C.M. I*, 182 So. 3d 749.

<sup>242</sup> *See In re M.A.S.-Q. & Y.E.S.-Q.*, 22 Fla. L. Weekly Supp. at 213a.

<sup>243</sup> *Id.*; Brief of Americans for Immigrant Justice et al. as Amicus Curiae for Petitioner at 2, *In re M.A.S.-Q & Y.E.S.-Q.*, 22 Fla. L. Weekly Supp. at 213a (No. 13-15672 D09) (on file with author).

<sup>244</sup> Order Requiring Briefing and Scheduling of Oral Argument at 6, 7, 22 Fla. L. Weekly Supp. 213a (Fla. Cir. Ct. 2013).

<sup>245</sup> *Id.* at 1.

children over which he had presided. He did not enumerate how many other cases like this one had been filed in his court.

The judge crystallized his concerns in the opening paragraphs of his request for briefing. He expressed uncertainty about his jurisdiction to adjudicate the extraterritorial abuse and maltreatment occurring years earlier in two different Central American countries, and the particularly the temporal remoteness as applied to the dependency allegations raised in the litigation years later by these 16 and 17 year olds:

This case is one of many initiated by a “Private Petition for Dependency” filed on behalf of alien children who: (a) entered the country illegally, and (b) are in the custody of the Department of Health and Human Services (“HHS”). These petitions typically are filed by pro-bono counsel recruited by Legal Aid or charitable organizations and, with few exceptions, are brought on the eve of the child’s eighteenth (18<sup>th</sup>) birthday.

In the vast majority of these cases it is alleged that the subject child was abused, abandoned or neglected in their home country – usually years prior to filing.<sup>246</sup>

The judge asked whether the facts of this case, which alleged prior abuse by their father and stepfather in El Salvador and Guatemala, and abandonment by the stepfather, in addition to substantial risk of imminent abuse or abandonment if forced to return to El Salvador or Guatemala qualified for an adjudication of dependency.<sup>247</sup> The dependency petition sought the court’s “protect[ion] . . . from further abuse, abandonment or neglect[,] to allow [the two siblings] to remain safely in the [U.S.]”<sup>248</sup> There were also allegations of sexual abuse by a family member and severe neglect.<sup>249</sup> The petition contended that they were dependent pursuant to two of the statutes at issue in *B.R.C.M.*, section 39.01(15)(a), defining a “dependent child” as one found by the court “[t]o have been abandoned, abused, or neglected by the child’s parent or parents or legal custodians[,]” and section 39.01(15)(f), defining a dependent child as one who is at “substantial risk of imminent abuse, abandonment or neglect,” which in this case referred to the risks that the children faced if returned to their

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<sup>246</sup> *Id.*

<sup>247</sup> *See id.* at 2–3.

<sup>248</sup> *Id.* at 3.

<sup>249</sup> *See id.* at 2, 3.

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homelands.<sup>250</sup>

These facts, and the supporting legal argument in the children's petition, prompted Judge Hanzman to ask for briefing first on this question: "Can a Chapter 39 Dependency case be based upon alleged abuse, abandonment or neglect occurring wholly outside the United States? If so, can it [be] based upon alleged abuse occurring years prior to the filing of the Petition?"<sup>251</sup> Secondly, the judge was also troubled by whether the children's parents' "consents" to the petition would support an adjudication of the dependency.<sup>252</sup> The mother was uncharged in the petition but she nevertheless gave "express" consent to allegations directed at the children's father.<sup>253</sup> The father's consent was "implied" by his failure to respond to the petition, which was served upon him constructively through a diligent search completed prior to adjudication, and an affidavit of diligent search filed and reviewed by the court.<sup>254</sup>

But this case also instigated broader systemic questions from the judge about how "private petitions' filed on behalf of alien minors . . . typically not prompted by an 'abuse' report," and other irregularities or departures from normal dependency practice.<sup>255</sup> Judge Hanzman had previously adjudicated the children dependent and he was now *sua sponte* asking for briefing to revisit the prior issued adjudicatory order.<sup>256</sup>

In addition to the questions of extraterritorial abuse and parental consent, Judge Hanzman asked more general questions about whether the petition should be granted in view of the children's failure to ask for any child welfare services from DCF, observing—with some sarcasm—that "it appears that there is no purpose served by this proceeding and that the Court is nothing more than a *paper tiger 'presiding' over a fictional 'case.'*"<sup>257</sup> He provocatively asked whether the "[c]hildren are – or ever were – 'dependent' on the State,

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<sup>250</sup> FLA. STAT. § 39.01(15) (2019); see Order Requiring Briefing and Scheduling of Oral Argument, *supra* note 244, at 2.

<sup>251</sup> Order Requiring Briefing and Scheduling of Oral Argument, *supra* note 244, at 6.

<sup>252</sup> See *id.*

<sup>253</sup> See *id.* at 3.

<sup>254</sup> See *In re M.A.S.-Q & Y.E.S.-Q.*, 22 Fla. L. Weekly Supp. 213a (Fla. Cir. Ct. 2013); see also FLA. STAT. § 39.502(1) (2018) ("Unless parental rights have been terminated, all parents must be notified of all proceedings or hearings involving the child."); FLA. R. JUV. P. 8.225(b) (describing the requirements and procedures for a diligent search to locate a parent in dependency cases); *In re T.J.*, 59 So. 3d 1187, 1194 (Fla. Dist. Ct. App. 2011) (remanding for further proceedings to determine whether a diligent search as required by law was conducted).

<sup>255</sup> *In re M.A.S.-Q & Y.E.S.-Q.*, 22 Fla. L. Weekly Supp. at 213a.

<sup>256</sup> See Order Requiring Briefing and Scheduling of Oral Argument, *supra* note 244, at 3–4, 6.

<sup>257</sup> *Id.* at 5 (emphasis added).

as they are not seeking any services and do not appear to require any protection from this Court.”<sup>258</sup> He reduced the gravamen of their case to a mere request for “the Court’s ‘assistance’ in immigration matters,” not any of the expected child welfare needs typically presented in a dependency action filed in state court.<sup>259</sup> And perhaps most provocatively, he questioned whether the “scarce” resources of the dependency court “should be devoted to cases involving children and families who are truly ‘dependent’ on the State; not children whose needs are being met by the federal government, and who seek a ‘dependency’ adjudication and ‘best interest order’ solely for purposes of securing preferential immigration treatment.”<sup>260</sup> Many of these concerns echoed those voiced by the Palm Beach County judge years earlier and they prefigured objections made by subsequent trial and appellate judges.

The judge was also perplexed by the interplay and perceived conflicts between the federal and state governments undermining his judicial authority vis-à-vis these children.<sup>261</sup> His analysis anticipated Justice Canady’s *B.R.C.M. II* dissent.<sup>262</sup> ORR, as he saw it, had “custody” of the children after their apprehension by DHS and transfer to ORR, and it had placed them with their mother, in disregard of the judge’s prior custody orders.<sup>263</sup> Conflicts over his judicial authority to oversee the children’s care, safety and protection, and the federal government’s exercise of its powers with respect to the children’s placement, were a source of frustration—and confusion—to the court. But this should not have detracted from his appraisal of the legal sufficiency of the allegations in the children’s petition.<sup>264</sup>

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<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *See id.* at 4–5.

<sup>262</sup> *Compare id.* at 7 (“How are alien children in the legal custody of HHS, which has ‘placed’ them with a parent it deemed adequate to provide care, ‘dependent’ on the State of Florida?”), with *B.R.C.M. v. Fla. Dep’t of Children & Families (B.R.C.M. II)*, 215 So. 3d 1219, 1226 (Fla. 2017) (Canady, J., dissenting) (“[T]here is no allegation of any deficiency on the part of the caregiver—B.R.C.M.’s godmother—to whom B.R.C.M. has been entrusted by the federal government. Indeed, B.R.C.M. seeks to remain in the custody of the caregiver.”).

<sup>263</sup> *See Order Requiring Briefing and Scheduling of Oral Argument, supra* note 244, at 2, 4 (“The Court also ordered that a representative from ORR be present ‘to show cause why the children were placed with the Mother without approval from this Court, in violation of its Order.’”).

<sup>264</sup> Federal government authority to place apprehended alien children with parents and other caregivers derives from statutory sources, see 8 U.S.C. § 1232(b)(1) (2012), and the settlement of a nationwide federal class action lawsuit, see Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997). The judge’s concern about the limits of his jurisdiction over the children in this case, based on his frustration that he had

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Judge Hanzman questioned the “collusive” nature of the hearings (the “consents” to dependency offered by the parents) and asked whether “private petitions” present a justiciable “case or controversy” when they are uncontested by parents and the state offers no position on the merits or legal sufficiency of the petition.<sup>265</sup> He asked for guidance on whether the court had properly adjudicated these children based on the parents’ consents (express consent by the mother and implied consent by the father).<sup>266</sup> He asked for briefing on whether the U.S. Attorney General was required to consent to the court’s jurisdiction, as the children were in federal custody.<sup>267</sup> And, as noted, he wanted briefing on whether the court could adjudicate a child dependent based on acts that occurred years earlier in a foreign jurisdiction.<sup>268</sup>

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no sway over the conflicting ORR decision to place them with the mother, as required by *Flores*, no doubt caused him to view the private petition filed by the children as just a vehicle to use his court to obtain immigration relief and not protection from parental abuse or neglect from the court.

Conflicts between federal and state governments with respect to the immigration rights of children under the jurisdiction of state courts are subsumed under Supremacy Clause doctrine, elevating federal rights over state law. *See, e.g.,* *Ridgway v. Ridgway*, 454 U.S. 46, 54 (1981) (first citing *McCarty v. McCarty*, 453 U.S. 210, 220 (1981); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979); *In re Burrus*, 136 U.S. 586, 593–94 (1890); and then citing *McCarty*, 453 U.S. at 236–37; *Hisquierdo*, 439 U.S. at 590; *Free v. Bland*, 369 U.S. 663, 670 (1962); *Wissner v. Wissner*, 338 U.S. 655, 659 (1950); *McCune v. Essig*, 199 U.S. 382, 389–90 (1905)) (“Notwithstanding the limited application of federal law in the field of domestic relations generally, this Court, even in that area, has not hesitated to protect, under the Supremacy Clause, rights and expectancies established by federal law against the operation of state law, or to prevent the frustration and erosion of the congressional policy embodied in the federal rights.”). ORR’s disregard of his custody orders was no doubt one reason the judge saw the case as really “about” immigration rather than child protection. Of course, the children did not have any say in their placement with their mother by ORR which rendered this placement decision, rightly or wrongly, on its own.

Dependency courts are vested with *parens patriae* responsibilities “[t]o provide for the care, safety, and protection of children in an environment that fosters healthy social, emotional, intellectual, and physical development; to ensure secure and safe custody,” FLA. STAT. § 39.001(1)(a) (2019), and Hanzman had every reason to be frustrated by ORR, which had much less competency to assess the children’s needs than he had as a circuit court judge, *see, for example, Chen, Eliau or Alien?*, *supra* note 155, at 611 (“The federal government’s more limited regulatory role in child welfare has resulted in comparatively less operational capacity in dealing with individual child welfare cases. . . . As a result, state courts have developed greater competency for administration of child welfare matters.”).

<sup>265</sup> *In re M.A.S.-Q & Y.E.S.-Q.*, 22 Fla. L. Weekly Supp. 213a (Fla. Cir. Ct. 2013) (citing *In re T.J.*, 59 So. 3d 1187, 1194 (Fla. Dist. Ct. App. 2011)).

<sup>266</sup> *See In re M.A.S.-Q & Y.E.S.-Q.*, 22 Fla. L. Weekly Supp. at 213a; Order Requiring Briefing and Scheduling of Oral Argument, *supra* note 244, at 6.

<sup>267</sup> *See In re M.A.S.-Q & Y.E.S.-Q.*, 22 Fla. L. Weekly Supp. at 213a (first citing *P.G. v. Dep’t of Children & Family Servs.*, 867 So. 2d 1248 (Fla. Dist. Ct. App. 2004); then citing *F.L.M. v. Dep’t of Children & Families*, 912 So. 2d 1264 (Fla. Dist. Ct. App. 2005); and then citing *M.B. v. Quarantillo*, 301 F.3d 109 (3d Cir. 2002)).

<sup>268</sup> *See In re M.A.S.-Q & Y.E.S.-Q.*, 22 Fla. L. Weekly Supp. at 213a; Order Requiring Briefing and Scheduling of Oral Argument, *supra* note 244, at 6.3e.

Judge Hanzman used this as a “test case” to examine his own evolving skeptical views on the merits of immigrant children’s private petitions. Typically, a test case like this is filed by a civil rights or plaintiff’s lawyer, and it is not initiated or litigated by the judge, although there are instances of judges fashioning broad remedies to effectuate broader policy reform that may go outside of the parameters of a complaint.<sup>269</sup> Judge Hanzman performed a role beyond mere fact-finder and adjudicator. He aggressively prosecuted the case to frame policy that would guide him and other judges in alien children’s cases. The judge appeared to genuinely want to understand “the nature of these cases; the interests at stake; the interplay between Federal and State law as it relates to the rights and needs of alien minors; the Court’s designated role in addressing these petitions; and the impact the Court’s decisions can have on the lives of these immigrant youth.”<sup>270</sup>

Ultimately, most of Judge Hanzman’s questions were answered and his concerns were assuaged. His carefully reasoned fourteen-page, single-spaced ruling was quoted at length in Judge Salter’s *B.R.C.M. I* dissent.<sup>271</sup> Judge Hanzman’s judicial posture was consistent with the activism that he displayed throughout his time in Miami-Dade Children’s Court. He was ambitious and perhaps arrogant in dictating systems-reform edicts from the bench, but I do not think he was motivated by anti-immigrant impulses. Although he expressed “[d]oubt as to the legitimacy of these cases,”<sup>272</sup> I do not think that he was a “bad judge” as I describe that term in this Article. He was a good judge asking hard questions.<sup>273</sup> Although his efforts to import his considerable analytical skills into this process were unusual for a judge sitting in dependency court,<sup>274</sup> other judges did

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<sup>269</sup> See, e.g., Carl E. Schneider, *Lawyers and Children: Wisdom and Legitimacy in Family Policy*, 84 MICH. L. REV. 919, 920 (1986) (reviewing ROBERT H. MNOOKIN ET AL., IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY (1985)) (“[The book] investigates the role of the judge not just in deciding cases, but in writing policy.”).

<sup>270</sup> *In re M.A.S.-Q. & Y.E.S.-Q.*, 22 Fla. L. Weekly Supp. at 213a.

<sup>271</sup> See *In re B.R.C.M. (B.R.C.M. I)*, 182 So. 3d 749, 757 (Fla. Dist. Ct. App. 2015) (Salter, J., dissenting) (quoting *In re M.A.S.-Q. & Y.E.S.-Q.*, 22 Fla. L. Weekly Supp. at 213a), *rev’d sub nom.* *B.R.C.M. v. Fla. Dep’t of Children & Families (B.R.C.M. II)*, 215 So. 3d 1219 (Fla. 2017).

<sup>272</sup> *In re M.A.S.-Q. & Y.E.S.-Q.*, 22 Fla. L. Weekly Supp. at 213a.

<sup>273</sup> He responded to our joint *amicus* brief and arguments in the court hearing with much interest and gratitude, quoting several passages from it in his order. See *id.* at n.2 (“The Court appreciates their assistance and commends them on the quality of their jointly filed *Amicus Curiae* brief.”). Our students found the work of preparing the *amicus* and participating in the hearings to be a capstone of their law school and clinic experiences.

<sup>274</sup> See, e.g., Leonard P. Edwards, *The Juvenile Court and the Role of the Juvenile Court Judge*, 43 JUV. & FAM. CT. J., no. 2, 1992, at 33, 34–35 (“One of the greatest challenges facing the juvenile court is attracting competent jurists to serve as juvenile court judges. . . . The

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not display the intellectual curiosity or jurisprudential rigor in the immigrant children's cases that they heard and decided.

## VI. JUDGES ANSWERING GOOD QUESTIONS BADLY AND NOT ASKING QUESTIONS

*We correctly decline to subordinate ourselves to the whim of the United States Congress in this case. The purpose of the dependency laws of this state is to protect and serve children and families in need, not those with a different agenda.*

—Florida District Court of Appeal Judge Frank Shepherd<sup>275</sup>

### A. Judges Answering Questions Badly

Two years after *M.A.S.-Q. and Y.E.S.-Q.*, Judge Hanzman revisited his concerns. This time he had a private petition case of a Central American child abandoned by his mother years earlier and now living with his “uncharged” father.<sup>276</sup> The petition also alleged that the child had been threatened by gangs in his home country, which the judge concluded would “not support a dependency adjudication unless perhaps a parent’s failure to protect a child from such abuse rises to the level of ‘neglect.’”<sup>277</sup> The judge denied the petition without prejudice, finding the abandonment too remote (“long stale”), and not connected to any imminent or continuing risk of harm.<sup>278</sup>

In rendering his ruling, Hanzman considered dependency only under section 39.01(15)(a) (abandonment, abuse, or neglect by the child’s parent, parents, or legal custodian).<sup>279</sup> The child was residing with his uncharged father, and the allegations of abuse, abandonment or neglect as to the mother were found to be too remote in time to support dependency.<sup>280</sup> In evaluating the legal sufficiency of the abandonment claim, he inserted a “harm” requirement into his

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juvenile court is perceived of as a social and not a legal court . . .”).

<sup>275</sup> *In re K.B.L.V.*, 176 So. 3d 297, 301 (Fla. Dist. Ct. App. 2015) (Shepherd, J., specially concurring).

<sup>276</sup> *In re E.G.S.-H*, 22 Fla. L. Weekly Supp. 693b (Fla. Cir. Ct. 2015).

<sup>277</sup> *Id.* at n.1. The child was represented by a non-dependency practitioner from Miami. In my years of handling and observing SIJS cases in the Miami juvenile court, I noticed practitioners, including immigration lawyers with less sophisticated knowledge of dependency law, submit petitions with facts not always germane to chapter 39, many better suited for political asylum petitions.

<sup>278</sup> *See id.* at 693b.

<sup>279</sup> *See id.*

<sup>280</sup> *See id.*

analysis.<sup>281</sup> He also criticized the “long stale” abandonment by the mother as urging overly “literal” reading of chapter 39.<sup>282</sup> He warned of an “unreasonable and ridiculous result[]” from reading the dependency statute to “permit[] a child to be adjudicated dependent so long as they have ever been abused, abandoned or neglected by any parent or legal custodian at *any* time, and regardless of whether the child continues to be at any risk of harm.”<sup>283</sup>

Judge Hanzman’s cramped statutory analysis was problematic for several reasons. First, as noted, he conflated the statute’s abuse and abandonment definitions, adding “harm” into the abandonment definition.<sup>284</sup> Requiring proof of independent harm might reward the passive actions of abandoning parents over the active actions of abusive parents. Such a requirement could allow a parent to argue as a defense to the petition that the child they abandoned was not “truly” harmed by that abandonment because the custodial parent continued to provide for the child’s care. And the harm requirement might incentivize loving caretakers of children—both immigrant and non-immigrant—to withdraw their support in order to prove that the offending parent’s abandonment was sufficiently harmful to the child.<sup>285</sup>

The court’s temporal remoteness point would allow the parent of

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<sup>281</sup> *Id.* (quoting *In re M.A.S.-Q. & Y.E.S.-Q.*, 22 Fla. L. Weekly Supp. 213a (Fla. Cir. Ct. 2013)).

<sup>282</sup> *In re E.G.S.-H.*, 22 Fla. L. Weekly Supp. at 693b.

<sup>283</sup> *Id.*

<sup>284</sup> *See id.* (quoting *In re M.A.S.-Q. & Y.E.S.-Q.*, 22 Fla. L. Weekly Supp. at 213a). The Order Denying Petition for Adjudication of Dependency cited to inapposite abuse dependency law, for example, *B.C. v. Dep’t of Children & Families*, 846 So. 2d 1273, 1275 (Fla. Dist. Ct. App. 2003), for the proposition that “instances of domestic violence in the presence of the child occurring more than a year and a half prior to filing were ‘simply too remote in time to support an adjudication of dependency.’” *In re E.G.S.-H.*, 22 Fla. L. Weekly Supp. at 693b (quoting *B.C.*, 846 So. 2d at 1275).

Undercutting Hanzman’s misplaced reliance on inapposite, time-barred abuse or domestic violence case law, Florida dependency actions are often based on allegations of abandonment that began years earlier. *See V.C.B. v. Shakir*, 145 So. 3d 967, 968, 968 n.1 (Fla. Dist. Ct. App. 2014) (upholding dependency where children had been abandoned by father 5 years earlier); *L.W. v. Dep’t of Children & Families*, 71 So. 3d 221, 222, 223 (Fla. Dist. Ct. App. 2011) (upholding order of dependency when children had not seen their mother for more than 3 years and 9 month months). In fact, the very nature of abandonment requires that it be at least some time removed from the filing of the petition of dependency and be ongoing. Florida law thus properly contemplates that abandonment must be continuing. “[A]bandonment” is defined as the “fail[ure] to establish or *maintain* a substantial and positive relationship with the child,” including “*frequent and regular contact* with the child through *frequent and regular* visitation or *frequent and regular* communication.” FLA. STAT. § 39.01(1) (2019) (emphasis added); *see also* § 39.806(1)(e) (providing for the termination of parental rights based on allegations that the child “continues to be . . . abandoned”).

<sup>285</sup> *See, e.g., In re T.J.*, 59 So. 3d 1187, 1191 (Fla. Dist. Ct. App. 2011) (“A summary denial, on the other hand, might incent T.J.’s aunt to truly ‘abandon’ T.J. at a police station or Department office in a misguided effort to obtain a dependency ruling.”).

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any child in Florida—immigrant or non-immigrant—abandoned by the parent at birth and then years later subjected to abuse or neglect by the custodial parent, to frustrate a dependency petition for a child in whose life the parent had next to zero involvement.<sup>286</sup> These consequences, which were not considered by Hanzman in his order, undermined the purposes of chapter 39 and, if adopted by a higher court, would narrow DCF grounds to petition courts for protection in citizen children’s cases.

Lastly, because E.G.S.-H. was residing with his uncharged father, and the allegations of abandonment, abuse, and neglect as to the mother were found to be too remote in time, the petitioner and counsel or the court may not have focused on the single-parent finding of dependency for SIJ purposes.<sup>287</sup> Florida Statute section 39.01(15)(a) allows for a finding that a child is dependent even when allegations are made against one parent—and the statutory definition of “abandonment” speaks to the actions of a singular parent, using the terms “the parent” or “a parent.”<sup>288</sup> The definition includes situations where the child may still be receiving care from another parent or caregiver, such as when the abandoning parent “fail[s] to establish or maintain a substantial and positive relationship with the child[.]”<sup>289</sup> Dependencies are appropriate under section 39.01(15)(a) even where a child has “locatable, living parents” and a responsible loving adult is caring for the child.<sup>290</sup> What matters is whether the child has met the statutory definition for a dependency adjudication as to either parent.

### B. Judges Not Asking Questions

Another result of *In re E.G.S.-H* was that it started to influence other circuit court judges in the Miami-Dade Children’s Court. Judge

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<sup>286</sup> On its face, the statute requires a finding of dependency for a child who is “abandoned, abused or neglected,” *regardless of when* that child was abandoned, abused or neglected. Indeed, the provision does not even require the child to be at imminent risk. *In re Y.V.*, 160 So. 3d 576, 578 (Fla. Dist. Ct. App. 2015) (quoting § 39.01(15)(f) (“[S]etting forth a *separate* ground for dependency when the child is at ‘substantial risk of imminent abuse, abandonment, or neglect by the parent or parents or legal custodians.’”) (emphasis added).

<sup>287</sup> Compare *In re E.G.S.-H.*, 22 Fla. L. Weekly Supp. at 693b (“Mother’s alleged abandonment was realized [many] years ago and the child . . . now resides . . . with his uncharged Father [and] is at no risk of abuse, abandonment or neglect.”), with *H.S.P. v. J.K.*, 121 A.3d 849, 852 (N.J. 2015) (examining the “1 or both” parents language of the SIJ statute to support a New Jersey family court one-parent adjudication for the purpose of making the necessary best interest findings to declare a child eligible for SIJS).

<sup>288</sup> FLA. STAT. § 39.01(1), (15)(a).

<sup>289</sup> FLA. STAT. § 39.01(1).

<sup>290</sup> *In re Y.V.*, 160 So. 3d at 579.

Hanzman's ruling, language, and reasoning made their way into family court custody rulings and percolated into appellate court opinions.<sup>291</sup> Judge Hanzman also submitted it and the earlier order to the Florida Law Weekly Supplement for publication.<sup>292</sup> Once the judge shared his "case law" with the juvenile dependency court bench, they began to rely on it and use it. The other judges apparently saw Judge Hanzman's ruling as giving them permission to stop conducting hearings over any immigrant children's private petitions.<sup>293</sup> A group-think mindset began to emerge. Judges issued dismissals without hearing evidence, asking questions, or performing expected judicial roles of engaging in fact-finding or legal analysis.<sup>294</sup> At one point, each judge had a stack of Hanzman's orders on their bench, and asked their clerk or judicial assistant to fill in by hand the case number, name of child, and date of hearing of each case dismissed at the end of the short, meaningless hearings.<sup>295</sup>

The result of petitions dismissed *en masse* by judges in the Miami-Dade dependency court was that children born in other countries stopped getting any form of due process or protection from the court no matter what facts their petitions alleged or what relief they sought from the court.<sup>296</sup> I observed immigrant children's lawyers leave courtrooms with their clients, moments after entering, stunned by the resistance they encountered in the courtrooms after their short, unsuccessful appearances before the judges. There is no doubt that the effects of the published but non-binding order in *In re E.G.S.-H* influenced other judges' lack of interest in these cases.<sup>297</sup>

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<sup>291</sup> See, e.g., *In re B.R.C.M. (B.R.C.M. I)*, 182 So. 3d 749, 755, 759, 760, 762 (Fla. Dist. Ct. App. 2015) (Salter, J., dissenting), *rev'd sub nom.* *B.R.C.M. v. Fla. Dep't of Children & Families (B.R.C.M. II)*, 215 So. 3d 1219 (Fla. 2017).

<sup>292</sup> See *In re E.G.S.-H.*, 22 Fla. L. Weekly Supp. at 693b.

<sup>293</sup> "Only the written, majority opinion of an appellate court has precedential value" binding on Florida trial courts. *Miller v. Florida*, 980 So. 2d 1092, 1094 (Fla. Dist. Ct. App. 2008) (citing *Gould v. Florida*, 974 So. 2d 441, 445 (Fla. Dist. Ct. App. 2007)).

<sup>294</sup> See *B.R.C.M. I*, 182 So. 3d at 755, 763 (Salter, J., dissenting); Cleek, *Florida Judges*, *supra* note 12.

<sup>295</sup> This routinized process of mass denials rather than individual hearings and individually crafted judicial orders rendered in each individual child's case brought to mind Walter Benjamin's *THE WORK OF ART IN THE AGE OF MECHANICAL REPRODUCTION* (Prism Key Press ed. 2010).

<sup>296</sup> See *B.R.C.M. I*, 182 So. 3d at 755, 763 (Salter, J., dissenting); *DUE PROCESS IN IMMIGRATION PROCEEDINGS E-13* (2019), [https://cdn.ca9.uscourts.gov/datastore/uploads/immigration/immig\\_west/E.pdf](https://cdn.ca9.uscourts.gov/datastore/uploads/immigration/immig_west/E.pdf) (noting that aliens are entitled to due process before neutral fact-finders rather than partisan adjudicators); Cleek, *supra* note 12.

<sup>297</sup> See *B.R.C.M. I*, 182 So. 3d at 760 (Salter, J., dissenting). There were some exceptions to this lack of interest. At least one circuit judge remained receptive to conducting evidentiary hearings over private petitions, as did a General Magistrate who devoted (and continues to devote) several days each month in her docket to conducting judicial review hearings for

In the 2015 case of 17-year-old Honduran child K.B.L.V., the child sought dependency based on abandonment by only the father.<sup>298</sup> The father consented to the petition, and DCF did not oppose it.<sup>299</sup> “Following a seven-minute colloquy with the [child’s *pro bono*] counsel, the [judge] dismissed the petition on the grounds detailed in *In re E.G.S.-H.*”<sup>300</sup> The judge asked no questions of the child, the father, or any other party, including DCF.<sup>301</sup> “The trial court did not hear evidence, enter findings regarding each parent, or indicate that the dismissal was without prejudice.”<sup>302</sup> The dismissal was affirmed later by the Third District Court of Appeal, with a special concurring opinion by Judge Shepherd that echoed and amplified many of Judge Hanzman’s points in *In re E.G.S.-H.*<sup>303</sup>

I attended the oral argument in this case and a companion case, *In re B.Y.G.M.*, in which my students and I had submitted an *amicus* brief on behalf of several organizations urging reversal.<sup>304</sup> Judge Shepherd and the other panel members intensely questioned the *pro bono* lawyers for the children, from two prominent law firms.<sup>305</sup> The lawyers struggled to get in a word edgewise as they were barraged with questions.<sup>306</sup> One of these lawyers had ceded a few minutes of his time to me, but the judge who asked him the most questions forced the lawyer to exceed his allotted time, and I was told to sit down without getting a chance to say one word.<sup>307</sup> We were not

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dependent children with USCIS applications pending, pursuant to FLA. STAT. § 39.5075(6) (2019). But once the binding adverse case law began to roll out of the Third District Court of Appeals, see, for example, *In re B.Y.G.M.*, 176 So. 3d 290, 291 (Fla. Dist. Ct. App. 2015) and *In re K.B.L.V.*, 176 So. 3d 297, 298 (Fla. Dist. Ct. App. 2015), the judges’ hands were tied, and virtually no petitions were granted or even heard. See, e.g., *In re F.J.G.M.*, 196 So. 3d 534, 539, 540 (Fla. Dist. Ct. App. 2016) (citing *In re S.A.R.D.*, 182 So. 3d 897, 903 (Fla. Dist. Ct. App. 2016); *In re K.B.L.V.*, 176 So. 3d at 299).

<sup>298</sup> See *In re K.B.L.V.*, 176 So. 3d at 298.

<sup>299</sup> See *id.* at 298, 299.

<sup>300</sup> *B.R.C.M. I*, 182 So. 3d at 760 (Salter, J., dissenting).

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *In re K.B.L.V.*, 176 So. 3d at 300; *id.* at 300, 301 (Shepherd, J., specially concurring) (citing *In re B.Y.G.M.*, 176 So. 3d 290).

<sup>304</sup> See Amicus Curiae Brief Submitted by Americans for Immigrant Justice, et al. in Support of Appellant at i, *In re B.Y.G.M.*, 176 So. 3d 290 (Fla. Dist. Ct. App. 2015) (No. 3D14-2409).

<sup>305</sup> See Oral Argument at 00:15–16:00, *In re B.Y.G.M.*, 176 So. 3d 290 (No. 3D14-2409), [http://www.3dca.flcourts.org/Archived\\_Video.shtml](http://www.3dca.flcourts.org/Archived_Video.shtml).

<sup>306</sup> See *id.*

<sup>307</sup> See *id.* at 00:15, 00:15-16:00, 16:14. The video archives of oral arguments in *In re K.B.L.V.* (Case No. 3D14-2746) and *In re B.Y.G.M.* (Case No. 3D14-2409) can be accessed on the Third DCA website, [http://www.3dca.flcourts.org/Archived\\_Video.shtml](http://www.3dca.flcourts.org/Archived_Video.shtml). Video of the argument in *In Re B.R.C.M.*, heard two years later by a different panel (which did include one judge from the earlier cases: Judge Shepherd), can be viewed at: <https://www.youtube.com/watch?v=L49TwNT88aM>.

surprised to get two very strongly worded opinions on the same day several months later, with Shepherd's even more opinionated special concurrences, affirming the trial court dismissals.

Similarly, as described above, in the brief trial court phase of *B.R.C.M.*, "[t]he transcript of the only hearing in the trial court regarding the petition indicates that the colloquy between court and counsel lasted eight minutes. No evidence was presented, and no fact-finding resulted."<sup>308</sup> The judge "did not inquire as to whether [the child's] parents were served notice or if a diligent search was required and B.R.C.M.'s counsel was not given an opportunity to provide any diligent search affidavit regarding his mother's whereabouts."<sup>309</sup> The judge asked the lawyer three questions: how was this case distinguishable from *E.G.S.-H.*?; "[w]hen did [B.R.C.M.] arrive in Miami?"; and "who [wa]s he living with now?"<sup>310</sup> At the close of the colloquy, the judge announced to the child's counsel:

I'm going to deny the petition based on [E.G.S.-H]. And I assume someone's appealing this and we're waiting to hear what the answer is; am I correct? Someone must be appealing this. . . . So my position is that this is still the law of this Circuit until it's reversed. . . . I'm going to deny the petition. I'm waiting to see what the appellate court does.<sup>311</sup>

The trial court issued a three-sentence, one-page order denying the child's petition. The first two sentences identified the date of the arraignment hearing and the names of the parties that were in attendance. The last sentence of the order stated "[t]he petition for dependency is DENIED based on [E.G.S.-H.], case, by J. Hanzman, Case No: 14-16379."<sup>312</sup> The *E.G.S.-H* order, "written by a[] trial court judge in the same circuit court[,] ha[d] no binding or precedential effect."<sup>313</sup> "No finding[] of fact or express rationale was provided by the trial court in support of its denial of the [p]etition."<sup>314</sup>

As the doors to the dependency closed, advocates began to explore

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<sup>308</sup> *In re B.R.C.M. (B.R.C.M. I)*, 182 So. 3d 749, 755 (Fla. Dist. Ct. App. 2015) (Salter, J., dissenting).

<sup>309</sup> Initial Brief of Appellant at 6, *B.R.C.M. I*, 182 So. 3d 749 (No. 3D15-962).

<sup>310</sup> Trial Court Hearing Transcript at 5:14–15, 7:15–18, *B.R.C.M. I*, 182 So. 3d 749 (No. D15-015232).

<sup>311</sup> *Id.* at 7:21–24, 8:7–8, 9:13–14.

<sup>312</sup> Order Denying Private Petition for Dependency, *B.R.C.M. I*, 182 So. 3d 749 (No. D15-15232 D002) (emphasis added).

<sup>313</sup> Initial Brief of Appellant, *supra* note 309, at 7 n.6.

<sup>314</sup> *Id.* at 7.

other judicial forums and other forms of relief, such as petitions for temporary custody by extended family under chapter 751 or petitions for guardianship of a minor under chapter 744.<sup>315</sup> Summary denials of the children's dependency petitions sometimes came with suggestions tendered by the court to pursue the same allegations in another division of the circuit court, for example, probate, which hears guardianship cases.<sup>316</sup> It seemed absurd that the very allegations of abuse or neglect brought by an immigrant child could be barred by "case law" in dependency court, but allowed in another artificial administrative division of the same circuit. Several cases landed in the family court, which prompted some judges to follow the bad examples of the dependency judges.<sup>317</sup> A few summarily denied petitions by family members without conducting hearings, parroting in very simplistic terms the nuanced phrases and ideas in Hanzman's rulings.<sup>318</sup> One family court judge even refused to schedule the hearing in one of these cases, based on her blunt and unfounded accusation, expressed to the family member's *pro bono* counsel, that the case was "all about immigration."<sup>319</sup>

The migration of these cases from one branch of the court to another, with different results from different judges or branches of the same trial court, illustrates a common problem when judges do not have a clear understanding of their authority to make SIJS best interest findings and responses vary inconsistently from judge to

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<sup>315</sup> See FLA. STAT. §§ 751.01(3), 744.3021(1) (2019).

<sup>316</sup> See, e.g., *W.B.A.V. v. Dep't of Children & Families*, 229 So. 3d 850, 852 (Fla. Dist. Ct. App. 2016) (Salter, J., dissenting) ("The trial court ultimately concluded that 'you can go to probate court and get a legal custodian issued for the aunt or uncle,' and that an adjudication of dependency would be denied 'based on case law.'").

<sup>317</sup> See, e.g., *In re S.A.R.D.*, 182 So. 3d 897, 905 (Fla. Dist. Ct. App. 2016).

<sup>318</sup> See *B.R.C.M. I*, 182 So. 3d at 762, 763 (Salter, J., dissenting).

<sup>319</sup> In this case, a *pro bono* attorney from a prominent Miami law firm, recruited by Americans for Immigrant Justice, filed a chapter 751 temporary legal custody by extended family member petition on behalf of the adult sister of a Haitian child, shortly before the child's 18<sup>th</sup> birthday. The child's parents had abandoned her at a young age. The child had medical problems from injuries suffered in the 2010 earthquake in Haiti and her sister needed legal custody to consent to treatment and claim her as a dependent for insurance coverage. Moments before the hearing, the judge called the lawyer telling him, *ex parte*, that she was "knew" that this case was "all about immigration" and the best interest findings would not be issued. The judge then advised the attorney that the hearing would be postponed.

After considering his options, the lawyer asked the judge to recuse herself, she agreed, and the case was reassigned to another family court judge, who granted the petition before the child turned 18. The lawyer decided not to pursue judicial sanctions against the first judge. The child's SIJS petition and lawful permanent residence application are currently pending with USCIS. Telephone interview with *pro bono* lawyer (Jan. 9, 2019) (attorney's name withheld to protect identities of client and child); Email from Jennifer Anzardo Valdes, Ams. for Immigrant Justice (Jan. 23, 2018).

judge.<sup>320</sup> Clinical Professor Randi Mandelbaum and practitioner Elissa Steglich characterize this lack of understanding and inconsistency, resulting in “disparate outcomes” in the cases decided, as the “quagmire of family court.”<sup>321</sup> They urge legislative action to clarify state court authority so that judges more clearly understand their roles and responsibilities in family court SIJS cases, among other good suggestions.<sup>322</sup> But a well-intentioned legislative fix to a system rife with adverse or inconsistent rulings on immigrant children’s petitions may not be a strong enough remedy. This is particularly true when an undercurrent of fear of an influx of SIJS-dependency cases stokes reactions among judges, resulting in summary dismissals and a pattern of systematic denials of petitions.

A statutory guarantee of equal treatment may not provide adequate redress for patterns of judicial discrimination that treat immigrant children’s dependency petitions differently than those brought on behalf of citizen children, with unequal results based on the child’s alien or immigration status.<sup>323</sup> Grounding arguments in a state constitutional guarantee of equal access to the court may provide more robust protection for the immigrant child seeking an adjudication of dependency from the court.<sup>324</sup>

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<sup>320</sup> See, e.g., Theo S. Liebmann, *Keeping Promises to Immigrant Youth*, 29 PACE L. REV. 511, 512 (2009) (“Some judges have been very open to applying the law to youths in guardianship cases, while others have refused outright.”).

<sup>321</sup> See, e.g., Mandelbaum & Steglich, *supra* note 227, at 606, 608.

<sup>322</sup> See *id.* at 614.

<sup>323</sup> Compare FLA. STAT. § 39.5075(2) (2019) (“Services to children alleged to have been abused, neglected, or abandoned must be provided *without regard to the citizenship* of the child except where alienage or immigration status is explicitly set forth as a statutory condition of coverage or eligibility.”) (emphasis added), with *B.R.C.M. v. Fla. Dep’t of Children & Families (B.R.C.M. II)*, 215 So. 3d 1219, 1227 (Fla. 2017) (Canady, J., dissenting) (“Further, it is by no means clear that section 39.5075—which in subsection (4) authorizes Florida courts to issue orders ‘finding that [a dependent] child meets the criteria for special immigrant juvenile status’ under federal law—applies to private petitions seeking such a finding. Section 39.5075(4) refers specifically to petitions submitted by ‘the department or community-based care provider’ as distinct from private petitions.”).

The above-described exercise in statutory obfuscation, completely disregarding the directives of both section 39.5075(2) and 39.501(1) of the Florida Statutes (indicating that DCF or “any other person who has knowledge of the facts” may initiate a dependency petition), as a pretext for giving DCF dependent petitions *preferential* treatment over private dependent petitions, is an illustration why a state law alone may not fix systemic discrimination against immigrant children in violation of the statute’s equal treatment guarantee.

<sup>324</sup> The Florida Constitution explicitly guarantees a right of access to the courts “to every person for redress of any injury, and justice shall be administered without sale, denial or delay.” FLA. CONST. art I, § 21 (emphasis added). This constitutional right applies to *everyone* under the jurisdiction of Florida courts – including alien children seeking access to dependency court for protection from abandonment, abuse or neglect by parents and caregivers. See, e.g., FLA. STAT. §§ 39.301(1), 39.407(1), 39.4085.

A constitutional claim for equal *protection* from the court may be more tenuous. See generally

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VII. CLINICS FIGHTING BACK: LITIGATION, EDUCATION, MEDIA  
OUTREACH, AND CLIENT STORYTELLING

*Judge Shepherd's language shocked immigration lawyers. Angelina Castro, an immigration lawyer in Stuart, Florida who has been working on these types of cases for almost two decades, said she started to notice judges using pronouns like 'these' and 'those' in their rulings, which seemed to make a distinction between US kids and foreign kids.*

—Ashley Cleek, Investigative Reporter<sup>325</sup>

Throughout this Article, I have charted the evolution of legal doctrine in the Florida case law affecting immigrant children in dependency-SIJS cases. In this final part, I continue the discussion of the role of clinics in representing these clients that I began in Part III, giving examples of our clinic's roles in different court cases, and examples of how we affected change through teaching law students, judges, lawyers, and policymakers, collaborating with other advocates, reaching out to the media, and telling clients' stories to courts. This descriptive account is offered as a way to discuss what needs to be done to sustain the force and effect of the *B.R.C.M. II* decision. The multifaceted tasks ahead are grounded in a law school clinic's commitment to be a "provocateur for justice."<sup>326</sup>

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Ann Lacquer Estin, *Child Migrants and Child Welfare: Toward a Best Interests Approach*, 17 WASH. U. GLOBAL STUD. L. REV. 589, 592 (2018) (viewing *Plyler v. Doe*'s equal protection reasoning for undocumented children's public education rights as a "unique situation" not yet extended to other child welfare-related contexts). *But see* Rebecca A. Delfino, *The Equal Protection Doctrine in the Age of Trump: The Example of Undocumented Immigrant Children*, 84 BROOK. L. REV. 73, 99–112 (2018) ("SIJS' bifurcated, state-federal power-sharing framework, as well as the language of SIJS, [which] have given the states too much space to interpret the SIJS law and to create legal standards based on state interpretations of federal law, ultimately leading to the unequal application of federal law.").

<sup>325</sup> Cleek, *Florida Judges*, *supra* note 12.

<sup>326</sup> See Jane H. Aiken, *Provocateurs for Justice*, 7 CLINICAL L. REV. 287, 288 (2001). Professor Aiken's description of clinical legal education's role in instilling in students "an abiding desire to use their legal skills to remedy these injustices and the wisdom to know the limitations of the legal system in effectuating comprehensive change . . . [.]" is a lesson that I have tried to inculcate in my students as they have engaged in the advocacy that I describe in this Article:

Clinical legal education offers students direct experience as lawyers working for social justice. Students learn about justice through the practice of poverty law; they bring justice to under-served communities by meeting essential legal needs; they affect systemic justice through strategic use of civil rights actions. In short, students play significant roles in delivering justice.

*Id.* at 287, 289.

There remains a continuing need to educate judges about evolving legal standards. This is particularly necessary because the politics and rhetoric surrounding immigrants today, the churn of judges in and out of juvenile dependency court, their limited awareness of developing case law, and a dearth of institutional memory to guide them,<sup>327</sup> could lead to incorrect legal rulings tainted by partisan anti-immigrant views. Thus, the post-*B.R.C.M. II* regime requires continued monitoring and education by our clinic and others.

#### A. *Litigation*

Although *B.R.C.M. II* established due process rights under chapter 39, the decision did not address how to resolve the handling of abuse or neglect allegations initiated in other types of custody proceedings. Thus, temporary custody, guardianship, dissolution, delinquency, child support, or paternity actions could be susceptible to similar reactions by judges assigned to other administrative branches of the circuit court, inasmuch as federal law permits best interest orders to be issued by any of these courts.<sup>328</sup>

Our clinic represented a client in an appeal of a summary dismissal issued, without a hearing, by a family court judge on a petition for custody by extended family member.<sup>329</sup> This Guatemalan child experienced severe parental abuse in his home country for many years.<sup>330</sup> His adult brother filed the petition in the Miami-Dade family court, represented by the FIU clinic.<sup>331</sup>

Without a hearing, the judge issued a three-sentence order of dismissal with prejudice stating:

1. That almost identical allegations of abuse by the minor child's parents in the home country (Guatemala) have been seen previously in other similar Petitions.
2. That in each, the terribly abusive offenders have somehow been convinced to sign consents basically admitting to these terrible acts . . . .
3. That there are certain immigration benefits to these

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<sup>327</sup> See Edwards, *supra* note 274, at 36, 37; David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TEX. HISP. J.L. & POL'Y 45, 64 (2005).

<sup>328</sup> See 8 C.F.R. § 204.11(a), (c)(6) (2019).

<sup>329</sup> Mendez v. Lopez, 44 Fla. L. Weekly D387 (Fla. Dist. Ct. App. 2019).

<sup>330</sup> See *id.*

<sup>331</sup> See *id.*

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Petitions being granted in circumvention of existing immigration laws.<sup>332</sup>

This sweeping dismissal, none of it based on evidence and all of it based on vague generalities and risible allusions to unidentified “other similar Petitions,”<sup>333</sup> may have been influenced by Judge Hanzman, but it was little more than a parody of Hanzman’s rulings. It also flouted *B.R.C.M. II*. The Supreme Court’s *B.R.C.M. II* analysis of chapter 39 is equally applicable to chapter 751 proceedings. Nothing in chapter 751 permits a trial court to consider immigration consequences as a basis to deny a petition for relative custody.<sup>334</sup> Instead, the statute’s focus is on promoting the safety and best interests of children through relative custody.<sup>335</sup> Fortunately the appellate court agreed with these arguments and reversed the trial court’s summary dismissal of the custody petition.<sup>336</sup> The reversal, however, occurred eleven months after the appeal was fully briefed and two weeks after the child turned 18.<sup>337</sup> Winning the appeal on the merits just past the child’s age of majority may have undermined the trial court’s ability to render a child custody order, making this a pyrrhic victory. This litigation, handled in the trial phase by the FIU clinic and at the appeal by our clinic, is an example of the work that law schools do in SIJS cases. The available resources of the pro bono bar and legal aid organizations are limited.<sup>338</sup> Law school clinics add to the small cadre of lawyers handling this work.<sup>339</sup>

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<sup>332</sup> *Id.*; Order of Dismissal with Prejudice at 1, *Mendez v. Lopez*, 44 Fla. L. Weekly D387 (No. 2017-7005).

<sup>333</sup> *Mendez*, 44 Fla. L. Weekly at D387.

<sup>334</sup> See FLA. STAT. § 751.01 (2019).

<sup>335</sup> See § 751.01(1).

<sup>336</sup> See *Mendez*, 44 Fla. L. Weekly at D387.

<sup>337</sup> See *id.*; Original Record on Appeal at 9, *Mendez*, 44 Fla. L. Weekly at D387 (No. 3D17-1742); Appellant’s Initial Brief at 15, *Mendez*, 44 Fla. L. Weekly at D387 (No. 3D17-1742).

<sup>338</sup> See, e.g., Jan Pudlow, *Florida Lawyers Stand with Unaccompanied Minors: CABA, One Campaign Organize Effort to Represent Kids in Immigration and Dependency Courts*, FLA. BAR (Oct. 1, 2014), <https://www.floridabar.org/the-florida-bar-news/florida-lawyers-stand-with-unaccompanied-minors/> (“Regardless of your politics on immigration, I am sure everyone would agree these children should be afforded due process. The judges are very happy to have the organizations there,” said Lesley Mendoza, executive director of [the Cuban American Association’s] Pro Bono Project, adding that Americans for Immigrant Justice and Catholic Legal Services have stepped up to help.”).

<sup>339</sup> A recent thread in the law clinic listserv elicited a flurry of positive reactions to the announcement of a hard-fought win in a Queens, New York family court SIJS case for two El Salvadoran siblings by the St. Johns Law School Child Advocacy Clinic. The announcement observed: “Once routine, uncontested affairs, these hearings have morphed in recent years into hotly contested battles with an increasingly skeptical and reluctant family court bench.” Posting of Ann L. Goldweber, Dir. of Clinical Educ., [lawclinic-bounces@lists.washlaw.edu](mailto:lawclinic-bounces@lists.washlaw.edu), to [lawclinic@lists.washlaw.edu](mailto:lawclinic@lists.washlaw.edu) (July 5, 2017, 11:00 AM) (on file with author).

*B. Educating Students, Lawyers, Judges and Legislators*

Beyond the advocacy performed by clinics is its educational value to law students of representing these clients. After filing our clinic's first case for "Tyson" twenty-three years ago, students appeared at multiple hearings before the dependency judge, who would not accept the diligent search affidavits that they had prepared to substitute for personal service on our client's missing parents, due to her concern that did not satisfy the statutory requirements for proof of diligent search and constructive service. I recall the interns' impatience with the judge's demands, which were entirely consistent with the requirements of Florida dependency law.<sup>340</sup> There are no better lessons in civil procedure for law students than courtroom experiences like these.

Our students also explored the ethical dimensions of judicial conduct and misconduct. The students who helped me draft the Judge Colton letter discussed the possibility of pursuing judicial sanctions. The experience opened my students' eyes to frailties and imperfections of judges, even well-intentioned judges, not usually part of the law school curriculum.<sup>341</sup> Observing and studying instances—in real time—of judicial hostility and judicial "anger"

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The hearing was litigated by students in the St. John's clinic, not far from a Long Island community beset by violent Central American gang activity. This predisposed the judge to view the siblings as gang members and to disregard the evidence of their victimization by gangs. Fortunately, the vigorous advocacy performed by the clinic students persuaded the court to believe the children's testimony "despite the Court's vigorous efforts to discredit, in dozens of ways large and small, each of the witnesses." *Id.* After the clients "recounted their experiences . . . the Court ultimately sided with them, granting them the orders they needed to proceed with their immigration applications." *Id.*

Professor Susan Bryant, a clinical faculty member at CUNY Law School, added this gloss to the thread:

One thing this story makes me think of is all of the children who do not have the benefit of the excellent advocacy of the St. John's clinic. The bias and skepticism of the judge that required this high level of advocacy means that all of the children who do not have access to this level of advocacy are doomed.

Posting of Susan Bryant, lawclinic-bounces@lists.washlaw.edu, to lawclinic@lists.washlaw.edu (July 5, 2017, 12:17 PM) (on file with author).

<sup>340</sup> See FLA. STAT. § 39.502(10); FLA. R. JUV. P. 8.225(b).

<sup>341</sup> See Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 918 (1933). Clinic students experience the "human side of the administration of justice" and are exposed to judges with all of their strengths and fallibilities, thereby gaining a realistic outlook on how cases are decided by courts, going far beyond the exposition of appellate opinions excerpted in casebooks, including "[t]he effects of fatigue, alertness, political pull, graft, laziness, conscientiousness, patience, impatience, prejudice, and open-mindedness of judges." *Id.* Frank's early observation, imbued in the legal realism prevalent in the 1930s, is particularly prescient and apropos to what our students saw in judges in dependency-SIJS cases.

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exposed them to fallibilities of judges and gave them a real-world outlook on how to frame remedies above and beyond arguments made in court for an individual client.<sup>342</sup>

Indeed, a clinic should be a place where faculty and students critically examine the role of courts in the lives of their impoverished and marginalized clients and the power that courts and administrative agencies exert over them.<sup>343</sup> Their courtroom advocacy for immigrant children gave students many opportunities to reflect on the ethical dimensions,<sup>344</sup> the administration of justice, and lapses in dispensing justice in the juvenile courts.<sup>345</sup>

In our years of doing SIJS advocacy for individual clients, we shared our expertise and knowledge with judges, lawyers, and policy stakeholders. We published a guidebook on SIJS, which was used widely as a resource by judges, lawyers and immigrant children's advocates throughout the state.<sup>346</sup> We conducted many Continuing Legal Education trainings on dependency, family and guardianship law and their intersections with immigration law in the SIJS context. We spoke at conferences sponsored by the National Association of Counsel for Children and the National Council of Juvenile and Family Court Judges.

Leading up to *B.R.C.M. II*, we held strategy sessions, roundtables, conference calls, meetings, and workshops on our campus. We communicated frequently via email exchanges about troubling new developments in the trial and appellate courts and irksome judges.

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<sup>342</sup> Students contemplating bringing ethics or disciplinary remedies against a judge would also be governed by their duty to show respect to the court. See RULES REGULATING THE FLA. BAR pmbl., ch. 4 (FLA. BAR 2019) ("A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, lawyers, and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.").

<sup>343</sup> See Steven Keith Berenson, *Preparing Clinical Law Students for Advocacy in Poor People's Courts*, 43 N.M. L. REV. 363, 365 (2013); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 2-3 (1990).

<sup>344</sup> See Amy D. Ronner, *Some In-House Appellate Litigation Clinic's Lessons in Professional Responsibility: Musical Stories of Candor and the Sandbag*, 45 AM. U. L. REV. 859, 874 (1996) ("A clinic lends itself to the training of professional responsibility because it is elastic: it brings all kinds of experiences to the students that inevitably force them to explore their own judgments and values, the very ones that percolate within the decisions they do and must make as lawyers.").

<sup>345</sup> See Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 564 (1998) (questioning fairness and accuracy of fact-finding in juvenile court bench trials).

<sup>346</sup> WENDI J. ADELSON, SPECIAL IMMIGRANT JUVENILE STATUS IN FLORIDA: A GUIDE FOR JUDGES, LAWYERS, AND CHILD ADVOCATES 2 (2007), <https://media.law.miami.edu/clinics/childr-en-and-youth/pdf/2007/special-immigrant-juvenile-manual-2007.pdf>.

We trained Florida immigrant advocates on how to obtain best interest orders in temporary legal custody (chapter 751), paternity (chapter 742), adoption (chapter 63), and guardianship (chapter 744) actions. One of the first roundtables held on our campus in November 2016, with over four dozen advocates from around the state, gave updates on case law and efforts to reverse it in the Florida Supreme Court. We developed an agenda along various fronts to continue advocacy in the courts, before DCF and USCIS, and expand outreach and training to judges and lawyers. The “action items” included:

1. Participating in anticipated DCF rulemaking to update the latest version of the Alien Child Rule;<sup>347</sup>
2. Updating our clinic’s 2007 SIJS bench book;
3. Inviting USCIS policy specialists to train Florida dependency judges about the specific requirements of the SIJS statute and the federal government’s reliance on the state court for issuing the best interest order;
4. Reaching out to the Family Law Section of the Florida Bar, the Florida Bar Legal Needs of Children Committee, and the Inns of Court, to build broader support from the bar for our multi-pronged court advocacy and training;
5. Developing strategies and best practices for seeking best interest orders from the probate court; and continuing advocacy against the barriers or resistance from some family court judges refusing to issue “temporary custody” orders sought by family members of immigrant children; and
6. Drafting responses to USCIS questions regarding the validity of best interest orders issued by family court judges.<sup>348</sup>

Not all of these action steps were completed, but they did provide us with cohesion and unity around a common cause, reminiscent of similar coordinated advocacy and educational efforts, on a smaller scale, in the Judge Colton controversy years earlier. We maintained lines of communication not just inside our loose coalition, but communicated with USCIS and ORR staff and policy specialists about issues concerning individual clients in the federal detention

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<sup>347</sup> See FLA. ADMIN. CODE ANN. r. 10M-47.001, 10M-47.002, 10M-47.003 (1995) (recodified as 65C-9.001 (repealed 2015), 65C-9.002, 65C-9.003).

<sup>348</sup> See E-mail from Rebecca Sharpless, Dir., Immigration Clinic, Univ. of Miami Sch. of Law, to Roundtable Participants (Nov. 30, 2016, 1:29 PM) (on file with author).

and foster care systems whose access to the state courts had been thwarted by bad case law and judicial recalcitrance.

We also tried to reach out to the court and met with one of the newer dependency judges to discuss the growing tensions between children's advocates and the other judges. The judge expressed sympathy for our concerns, but also channeled views of his colleagues that they were being "overwhelmed" by private petitions filed by Central American children. He suggested we ask the Chief Judge of the Eleventh Judicial Circuit (Miami-Dade) to create a "specialized immigrant children's court." By this point, Third District Court of Appeal case law barred immigrant petitions from being heard by the dependency courts if determined to be "motivated" to seek SIJS.<sup>349</sup> We also had concerns about administrative costs of a circuit rule or order establishing such a specialized court. Moreover, the benefits of this court (*e.g.*, greater specialization resulting in quicker, more consistent and accurate adjudications) could carry detriments (*e.g.*, large caseloads and no demonstrable improvement in consistency or accuracy).<sup>350</sup>

As appeals began to be heard, we hosted moot court sessions to prepare other lawyers for oral argument.<sup>351</sup> The Miami Law clinics filed three briefs in the Florida Supreme Court, two in *B.R.C.M. II* and one in *O.I.C.L. I*. Our clinic filed two *amicus* briefs in other trial and appellate cases described in this Article.<sup>352</sup> Most judges were receptive to the perspectives of the *amici*.<sup>353</sup> We collaborated with *pro bono* lawyers, including several retired appellate judges from

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<sup>349</sup> See, *e.g.*, *In re B.Y.G.M.*, 176 So. 3d 290, 293 (Fla. Dist. Ct. App. 2015).

<sup>350</sup> See, *e.g.*, Michael Morley, *The Case Against a Specialized Court for Federal Benefits Appeals*, 17 FED. CIR. B.J. 379, 383 (2008) ("[D]espite the potential benefits of specialization, empirical evidence strongly suggests that specialized courts do not adjudicate cases more quickly or accurately than generalist judges.").

<sup>351</sup> This "SIJS coalition" consisted of some extraordinarily talented and dedicated children's advocates, among them: Jennifer Anzardo Valdes (Americans for Immigrant Justice); Angelina Castro (private immigration practitioner); Professor Mary Gundrum (FIU clinic); Maryam Kassae (Legal Aid Society of Palm Beach County); Kristie-Ann Padron (Catholic Charities Legal Services); Whitney Untiedt (*Pro Bono* partner at Akerman LLP); and Angela Vigil (*Pro Bono* partner at Baker McKenzie).

<sup>352</sup> See *In re B.Y.G.M.*, 176 So. 3d at 290; *In re M.A.S.-Q. & Y.E.S.-Q.*, 22 Fla. L. Weekly Supp. 213a (Fla. Cir. Ct. 2013).

<sup>353</sup> One notable exception was this *ad hominem* swipe at our clinic's *amicus* brief by the author of the special concurrence in the first appeal decided by the Third District Court of Appeal: "The term 'amicus curiae' means friend of the court, not friend of a party. Although we are beyond original meaning now . . . attorneys who file *amicus* briefs in this court labor under the same code of conduct as all other counsel who appear here, including the obligation to make the court aware of precedent that may be contrary to their interest. See R. Regulating Fla. Bar 4-3.3." *In re B.Y.G.M.*, 176 So. 3d at 295 n.7 (Shepherd, J., concurring) (citing *Ryan v. CFTC*, 125 F.3d 1062, 1063 (7th Cir. 1997)).

around the state, who helped us craft stronger arguments and advised us on how to respond to occasional unpleasant interactions with some judges.

The American Bar Association got wind of these developments and invited us to update its Working Group on Unaccompanied Minor Immigrants at a Roundtable Discussion held at the organization's annual meeting in Miami in early 2017. The working group, together with a cross-section of various ABA entities and other groups, ultimately drafted a resolution for the House of Delegates recommending the provision of counsel for children at government expense in immigration proceedings, child-friendly hearings in immigration court, and better coordination between immigration court and immigration agencies and state courts hearing SIJS-related petitions.<sup>354</sup> The Resolution called for state court judges and staff to “receive training to learn to effectively and timely hear and adjudicate petitions or motions on behalf of immigrant children, including for the purpose of making the predicate findings that are required for a child to obtain Special Immigrant Juvenile Status[,]”<sup>355</sup> supported by extensive findings in the accompanying Report which detailed needed improvements in state court SIJS cases.<sup>356</sup>

Our clinic already had a track record of SIJS-related advocacy in the years prior to *B.R.C.M. II*. We had filed *amicus* briefs, administrative appeals, and civil rights litigation in other jurisdictions, before other tribunals, and in other SIJS-related contexts.<sup>357</sup> We helped educate the Florida legislature in the 2005 law that it enacted,<sup>358</sup> obligating DCF to identify whether children

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<sup>354</sup> See *Immigrant Child Advocacy Network*, AM. B. ASS'N, [https://www.americanbar.org/groups/probono\\_public\\_service/projects\\_awards/unaccompanied\\_minors/](https://www.americanbar.org/groups/probono_public_service/projects_awards/unaccompanied_minors/) (last visited May 3, 2019).

<sup>355</sup> See Am. Bar Ass'n, Policy Resolution 115 Adopted by the House of Delegates (Feb. 9, 2015), [https://www.americanbar.org/groups/child\\_law/resources/attorneys/fair-treatment-and-access-to-justice-for-immigrant-children/](https://www.americanbar.org/groups/child_law/resources/attorneys/fair-treatment-and-access-to-justice-for-immigrant-children/).

<sup>356</sup> See Annie Chen, *An Urgent Need: Unaccompanied Children and Access to Counsel in Immigration Proceedings*, AM. B. ASS'N (July 14, 2014), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2014/urgent-need-unaccompanied-children-access-to-counsel-immigration-proceedings/> (“[T]he appropriate jurisdictional grounds for filing in state court are varied and depend on the individual state. . . . [T]he complexity of navigating these *pro se* is [virtually impossible] for an immigrant child. Even if a child knows that he is eligible for SIJS, questions abound—which court should he file in, and what kind of proceeding is most appropriate to bring? Should the child start the claim, or the adult caring for the child?”).

<sup>357</sup> See, e.g., *Joubert v. Barnhart*, 396 F. Supp. 2d 1320 (S.D. Fla. 2005); *Ocean v. Kearney*, 123 F. Supp. 2d 618 (S.D. Fla. 2000); *In re Juvenile* 2002-098, 813 A.2d 1197 (N.H. 2002); Brief of Amici Curiae on Behalf of Respondents at 1, *In re C.S.-L.*, No. A77-825-989 (BIA 2008) (unpublished decision).

<sup>358</sup> See FLA. STAT. § 39.5075 (2019) (“Citizenship or residency status for immigrant children

who have been adjudicated dependent are U.S. citizens, and if not, to evaluate whether they are eligible for SIJS and to provide a statutory mechanism for the children to obtain this immigration relief.<sup>359</sup> Clinic faculty provided education to practitioners and scholars through some of our published scholarship on SIJS law and policy.<sup>360</sup> I cite these examples of diverse forms of clinical education as suggestions about how the law school clinical community can combine its advocacy activity for these clients with the education of students, judges, lawyers, and policy stakeholders.

### C. Outreach to the Media

The cold reception that immigrant children's dependency petitions received from Florida judges began to attract attention from the media.<sup>361</sup> One report focused on Judge Shepherd in particular,

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who are dependents."); see also Laura K. Abel, *Keeping Families Together, Saving Money, and Other Motivations Behind New Civil Right to Counsel Laws*, 42 LOY. L.A. L. REV. 1087, 1097–98, 1099 n.72 (2009) (describing the enactment of counsel for children in Florida and the efforts of several individuals).

<sup>359</sup> Act of June 17, 2005, 2005 Fla. Laws ch. 2005-263. The Senate Staff Analysis and Economic Impact Statement highlighted several key benefits of the proposed legislation:

Benefits to children who are granted permanent residency include the rights to live and work permanently in the United States, to travel in and out of the country and, after five years, to apply for U.S. citizenship. In addition, Florida may be eligible for federal funds to support foster care for children who are permanent residents, while they cannot receive funds for them while they are undocumented.

CHILDREN & FAMILIES COMM., SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT: SB 498: IMMIGRANT CHILDREN/RESIDENCY STATUS 3 (2005). The number of new cases that the legislation would generate was estimated to be minimal (One outside estimate: "25 children per year will be eligible to apply for SIJS through the provisions of this bill." *Id.* at 5. DCF was "unable to estimate the number of children likely to be served but characterized the number as a 'small population.'" *Id.*).

<sup>360</sup> See, e.g., Wendi J. Adelson, *The Case of the Eroding Special Immigrant Juvenile Status*, 18 J. TRANSNAT'L L. & POL'Y 65, 70, 70 n.23 (2008); Meghan Johnson & Kele Stewart, *Unequal Access to Special Immigrant Juvenile Status: State Court Adjudication of One-Parent Cases*, AM. B. ASS'N (July 14, 2014), <http://apps.americanbar.org/litigation/committees/childrights/content/articles/summer2014-0714-unequal-access-special-immigrant-juvenile-status-state-court-adjudication-one-parent-cases.html>.

<sup>361</sup> Some local news coverage leaned in favor of the judges. *The Miami Herald's* venerable child welfare reporter portrayed some children less as victims of abuse than as abusers of the dependency court process to get coveted green cards. See, e.g., Carol Marbin Miller, *One Path to Green Card: Cite Child Abuse*, MIAMI HERALD (July 22, 2015), <https://www.miamiherald.com/news/local/community/miami-dade/article28368841.html> ("[T]he reluctance of child welfare judges to open 'a Pandora's box' by lifting 'the floodgates' to Central American children fleeing violence.").

Other South Florida coverage was more sympathetic to the children. See, e.g., Jane Musgrave, *Case of Lake Worth Immigrant Teen Heads to Florida Supreme Court*, PALM BEACH POST (Nov. 7, 2015), <https://www.palmbeachpost.com/news/crime-law/case-lake-worth-immigrant-teen-heads-florida-supreme-court/bpxf29aiEkGIDdKkTKxuxL/> ("When his mother

alarmed by his off-the-cuff comments in hearings and the seemingly partisan political views that he expressed in his opinions and special concurrences.<sup>362</sup> The reporter, Ashley Cleek, affiliated with the Center for Investigative Reporting and Freelance Investigative Reporters and Editors, broadcast a feature story on this topic on the NPR program *Reveal* in October 2017, as part of an hour-long broadcast on the Trump administration's crackdowns on immigrants.<sup>363</sup>

In her fifteen-minute segment, she examined the surge of unaccompanied minors escaping violence in Central America whose cases had been brought to Florida state courts and rebuffed by judges.<sup>364</sup> She interviewed advocates and one retired judge, and followed one case and observed a children's court hearing.<sup>365</sup> Her more in-depth analysis of this controversy in the January 22, 2018, online issue of *The Nation*, included public records data and details about several of the cases dismissed by judges.<sup>366</sup>

Both in the NPR broadcast and *The Nation* article, Cleek's coverage portrayed the growing tensions between advocates for young immigrants in family and juvenile courts, seeing their clients as absolutely needing court protection due to "obvious example[s] of parental neglect and abuse,"<sup>367</sup> only to be told no by a growing segment of the state judiciary, which she saw as punting its responsibility to care for these children to DHS as part of its plenary authority over immigration. The radio broadcast captured one child at the center of the debate: "Caught in the middle are kids like Isaias, a 17-year-old from Guatemala who fled gang violence in his tiny hometown."<sup>368</sup>

Judge Shepherd, interviewed at his Miami law firm after retiring

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kicked him out of her house because she was unable to provide him clean water to drink, much less food to eat, a 17-year-old Guatemalan youth set out on what became a 5,000-mile journey in search of a better life.").

<sup>362</sup> See, e.g., Cleek, *Florida Judges*, *supra* note 12 ("Judge Shepherd's language shocked immigration lawyers. Angelina Castro, an immigration lawyer in Stuart, Florida who has been working on these types of cases for almost two decades, said she started to notice judges using pronouns like 'these' and 'those' in their rulings, which seemed to make a distinction between US kids and foreign kids.").

<sup>363</sup> See *Inside Trump's Immigration Crackdown*, REVEAL (Oct. 28, 2017), <https://www.revealnews.org/episodes/inside-trumps-immigration-crackdown/> [hereinafter REVEAL, *Immigration Crackdown*].

<sup>364</sup> See *id.*

<sup>365</sup> See *id.*

<sup>366</sup> See Cleek, *Florida Judges*, *supra* note 12.

<sup>367</sup> *Id.*; see also REVEAL, *Immigration Crackdown*, *supra* note 363 (discussing examples of such neglect and abuse).

<sup>368</sup> REVEAL, *Immigration Crackdown*, *supra* note 363.

from the bench, maintained his steadfast skepticism and hostility toward these cases, largely repeating points made in his published opinions and *ad hoc* statements from the bench to advocates who appeared before him in oral arguments.<sup>369</sup> The advocates she interviewed rebutted his dismissive abstract generalities in passionate human terms about the children they represented.<sup>370</sup>

My clinic colleague Robert Latham assisted the reporter in procuring and analyzing public records and helping her to use case studies in the two stories that she produced on the different challenges facing Florida immigrant children and their lawyers. At various junctures they collaborated on the fact-finding and shared findings and results. The clinic-investigative reporting outreach and collaboration helped to bring to a national audience public attention to judicial biases against immigrant children and was a valuable tactic in our clinic's multi-pronged advocacy campaign to educate at least public radio listeners and liberal magazine readers in the court of public opinion about this growing problem.<sup>371</sup>

#### *D. Telling Clients' Stories*

A recurrent motif in court rulings and opinions discussed in this Article was their sweeping assumptions and stock stories about Central American children "flooding" the courts.<sup>372</sup> The judges did not recognize the individual immigrant children appearing before them and turned their claims of past abuse and maltreatment into

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<sup>369</sup> See Cleek, *Florida Judges*, *supra* note 12 ("The petitioners were seeking to rely upon alleged abuse, abandonment, or neglect in one of these countries, and sometimes not even that," Shepherd said. "And whether that's true or not is pretty hard to determine in El Salvador, and [the Florida Department of Children and Families] is unlikely to seek to make such a determination. They have enough problems, issues, and truly abused and abandoned children in this state to take care of.").

<sup>370</sup> See, e.g., *id.* ("I figured—this is a child. She was raped. . . . She's not in school. She has no one taking care of her. There's no way that you can say that this child was not neglected or abused or abandoned," [immigrant child's attorney Rina] Gil said. Despite acknowledging Lucia's father's mistreatment, the judge denied her dependency and, with it, her best shot at protection from abuse and deportation. "I just don't know what happened that day," Gil told me.").

<sup>371</sup> This collaboration happened serendipitously, but it helped our advocacy. See Sameer Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV. 355, 399 (2008) ("[M]ost public interest lawyers . . . develop campaigns on parallel tracks, including litigation, policy and legislative advocacy, community and public education, media advocacy, and international or transnational advocacy."); see also Scott L. Cummings, *Law in the Labor Movement's Challenge to Wal-Mart: A Case Study of the Inglewood Site Fight*, 95 CALIF. L. REV. 1927, 1932 (2007) ("[T]actical pluralism . . . use[s] traditional litigation alongside nontraditional skills such as drafting legislation and conducting public relations.").

<sup>372</sup> See *supra* note 140 and accompanying text.

bureaucratic generalities, labelling them “these cases.” When seen in the context of recent public discourse about immigrants, inflected with degrading slurs of them as rapists, predators, and MS-13 gang members, these generalities took on a more sinister tone.<sup>373</sup> Those of us who know these children, because we interview them, investigate their cases, learn about their histories and reasons for journeying to the U.S. and to courthouses in the U.S., knew that even the anodyne portrayals of them by courts were not telling the whole story.

“These cases” are about individual children each of whom has a deeply personal reason for seeking safety and protection in the U.S.<sup>374</sup> In one of two *amicus* briefs that I helped to prepare in *B.R.C.M. II*, the University of Miami Clinics brief, which my Immigration Clinic colleague Rebecca Sharpless took the lead in drafting, we delivered both a lawyerly exposition of pertinent state and federal laws and a “stories” brief.<sup>375</sup> The stories of our clients that we shared with the court (one from each clinic) were intended to illustrate how dependency courts had appropriately intervened in the lives of immigrant children in private dependency cases. Telling our clients’ individual stories countered narratives that the children sought only immigration relief from the court. Each of our illustrative stories proceeded from the premise that mere “acceptance of jurisdiction over the custody of a child by a juvenile court . . . makes the child dependent upon the juvenile court, whether the child is placed by the court in foster care or . . . in a guardianship situation.”<sup>376</sup> Some

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<sup>373</sup> See Scott Neuman, *During Roundtable, Trump Calls Some Unauthorized Immigrants ‘Animals’*, NAT’L PUB. RADIO (May 17, 2018), <https://www.npr.org/sections/thetwo-way/2018/05/17/611877563/during-roundtable-trump-calls-some-unauthorized-immigrants-animals>; Amber Phillips, *‘They’re Rapists.’ President Trump’s Campaign Launch Speech Two Years Later, Annotated*, WASH. POST (June 16, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/06/16/theyre-rapists-presidents-trump-campaign-launch-speech-two-years-later-annotated/>.

<sup>374</sup> See, e.g., SONIA NAZARIO, ENRIQUE’S JOURNEY (Random House ed. 2014) (following the path of a boy’s migration from Honduras to the United States); UNICEF, BROKEN DREAMS: CENTRAL AMERICAN CHILDREN’S DANGEROUS JOURNEY TO THE UNITED STATES 2, 4, 5 (2016), [https://www.unicef.org/media/files/UNICEF\\_Child\\_Alert\\_Central\\_America\\_2016\\_report\\_final\(1\).pdf](https://www.unicef.org/media/files/UNICEF_Child_Alert_Central_America_2016_report_final(1).pdf).

<sup>375</sup> See Brief of *Amicus Curiae*, *supra* note 149, at 5, 12. Telling client stories to courts and other tribunals has long been part of the public interest lawyer’s arsenal. Giving voice to the client’s real life-account of experiences in the courtroom or legislative arena strengthens the lawyer’s technical arguments regarding laws and policies that the lawyer seeks to challenge or enforce for the client. See, e.g., Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2109–10 (1991); Anthony G. Amsterdam, *Telling Stories and Stories About Them*, 1 CLINICAL L. REV. 9, 33 (1994); Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 763, 765–66 (1994); Bernard P. Perlmuter, *“Letting Kids Be Kids”: Youth Voice and Activism to Reform Foster Care and Promote “Normalcy”*, 72 STUD. L. POL. & SOC’Y 121, 123 (2017).

<sup>376</sup> *In re Menjivar*, 1995 WL 18235939, at \*2 (U.S. Dep’t of Justice Jan. 3, 1995); see also

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children required a full spectrum of services, while others did not.<sup>377</sup> When services were not needed, the judicial actions of establishing guardianships and monitoring the children's life situations and applications for SIJS status were often required to ensure their well-being and protection.<sup>378</sup>

"Maria," a Honduran child represented by the Immigration Clinic, was sexually assaulted in her hometown, abandoned by her mother, encouraged by her father to come to the U.S., and then forced by him to work full-time as an unpaid nanny.<sup>379</sup> She was declared dependent based on a private dependency petition, and her godmother, who had cared for her after her parents refused to take care of their daughter, was awarded legal custody by the court.<sup>380</sup> She applied for immigration status as a special immigrant juvenile and planned to go to college and study medicine.<sup>381</sup>

"Yesenia," a child born in Mexico was abandoned by her father at birth and neglected by her mother, who gave her to a criminal smuggling gang that held her for ransom.<sup>382</sup> When the Health Rights Clinic was contacted by her grandmother, with whom she was living in Miami, she had not seen her mother since she was nine months old.<sup>383</sup> The grandmother asked for the clinic's assistance since "she was having difficult[ies] enrolling Yesenia into a pre-kindergarten program without a custodial order."<sup>384</sup> The clinic filed a private dependency petition, which was granted by the court.<sup>385</sup> The grandmother was awarded legal custody, enabling her to enroll her in school, provide medical care, and obtain other support for the child.<sup>386</sup> The court continued to monitor the case for a few years, to ensure that Yesenia's needs were met.<sup>387</sup> Yesenia applied for SIJS and was flourishing in elementary school.<sup>388</sup>

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Memorandum from Donald Neufeld, Acting Assoc. Dir. of Domestic Operations, U.S. Citizenship & Immigration Servs. & Pearl Chang, Acting Chief of Office of Policy & Strategy, U.S. Citizenship & Immigration Servs. to Field Leadership, U.S. Citizenship & Immigration Servs. 2 (Mar. 24, 2009) (on file with author) (explaining changes to law that impacted aliens seeking orders from juvenile courts appointing guardians).

<sup>377</sup> See Brief of *Amicus Curiae*, *supra* note 149, at 15, 16, 17.

<sup>378</sup> See, e.g., *id.* at 16–17.

<sup>379</sup> See *id.* at 13, 14.

<sup>380</sup> See *id.* at 15.

<sup>381</sup> See *id.*

<sup>382</sup> See *id.* at 15–16.

<sup>383</sup> See *id.* at 16.

<sup>384</sup> *Id.*

<sup>385</sup> See *id.*

<sup>386</sup> See *id.*

<sup>387</sup> See *id.* at 17.

<sup>388</sup> See *id.* at 16–17.

“Daniel,” an orphaned teenager born in the Bahamas, came to the U.S. on a visa after the death of his mother.<sup>389</sup> He lived “with a series of temporary family and non-family caregivers.”<sup>390</sup> Despite the instability of his living arrangements, he did well in school but had no one taking care of him, no means of support, and no ability to attend post-secondary school.<sup>391</sup> The Children & Youth Law Clinic represented him in a private dependency petition, and the court placed him in foster care.<sup>392</sup> He applied for and received permanent residence as a special immigrant juvenile, and enrolled in college before turning 18.<sup>393</sup> He was a student leader both in his high school and college.<sup>394</sup>

The stories illustrated the grave impact that permitting *B.R.C.M. I* to stand would have had on their lives as abused, abandoned and neglected immigrant children.<sup>395</sup> They also showed why Florida dependency courts must adjudicate *all* dependency petitions on a case-by-case basis, issuing appropriate orders and holding hearings as the case required, regardless of the child’s alien or immigration status. Lastly, they served as a counter to some of the judges’ more disparaging and misleading narratives about immigrant children’s cases that this Article describes.<sup>396</sup>

#### VIII. CONCLUSION: JUDGES ASKING QUESTIONS—REDUX—IN THE AGE OF TRUMP

*The children will be taken care of—put into foster care or whatever.*

—Trump Chief of Staff John Kelly<sup>397</sup>

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<sup>389</sup> *See id.* at 17.

<sup>390</sup> *Id.*

<sup>391</sup> *See id.*

<sup>392</sup> *See id.* at 17–18.

<sup>393</sup> *See id.* at 19.

<sup>394</sup> *See id.* at 18, 19.

<sup>395</sup> *See, e.g.*, CTR. FOR THE STUDY OF SOC. POLICY, SPECIAL IMMIGRANT JUVENILE STATUS: A CRITICAL PATHWAY TO SAFETY AND PERMANENCE 1 (2016), <https://cssp.org/wp-content/uploads/2018/08/SIJS-Fed-States.pdf> (“[T]hese children and youth face unique challenges due to the trauma they may have experienced in their home country and through their migration. Many do not have an identified caregiver in the United States who can support their physical and emotional needs.”).

<sup>396</sup> Child advocates and children’s law scholars also have mined client narratives to lend greater force to the legal case. *See, e.g.*, Janet A. Chaplan, *Youth Perspectives on Lawyers’ Ethics: A Report on Seven Interviews*, 64 FORDHAM L. REV. 1763, 1765 (1996) (“Thus, listening to the details of the clients’ concerns is a better tool for understanding the preferences of powerless clients than are the classical ethical abstractions. . . . [T]he client’s story, rather than the structure of the lawyer’s case, is the primary focus.”).

<sup>397</sup> *Transcript: White House Chief of Staff John Kelly’s Interview with NPR*, NAT’L PUB.

After months of horrible news about the caravans of Central American children arriving with their families at the border, trying to enter the U.S., and then being separated from their parents by the Border Patrol and Immigration and Customs Enforcement, put into cages, confined in large detention centers, not released to sponsors, and the endless rampant immigrant-bashing by the president and his team,<sup>398</sup> I was exhausted and spent. I continued to hear reports from around the state about judges pushing these children out of their courtrooms. The national story and the state court story seemed to blend into each other.

But all hope was not lost. I took solace in Judge Salter's *B.R.C.M. I* dissent, which was both a scholarly dissection of the troubling trends in the Florida courts and a testament to his empathy and compassion for these children, in contrast to the interpretive violence evident in the lower court majority opinion.<sup>399</sup> I was also grateful for *B.R.C.M. II*, even though it did not directly confront the more troubling undercurrents in the lower court's opinion. Given the narrow scope of the plurality's opinion and evident fragmentation in the court, *B.R.C.M. II* also fell short of New Jersey's Supreme Court's more fulsome overview of federal and state SIJS law and its detailed guidance to trial courts, in *H.S.P. v. J.K.*<sup>400</sup> But *B.R.C.M. II* did forcefully admonish Florida courts to accord B.R.C.M. and other children like him a modicum of due process so that, as Judge Salter observed in his Third District Court of Appeal dissent, "immigrant children may obtain what other children in Florida routinely obtain in dependency cases—an investigation and individualized adjudication of their exigent circumstances."<sup>401</sup>

In August 2018 at the annual Circuit Judges conference held at a resort in Naples, Florida, I had a chance to revise some of my views and impressions of Florida's dependency and family court judges. I was invited to speak on a panel, together with Maryam Kassae, an attorney in the Palm Beach Legal Aid Immigrant Advocacy Project. We spoke about how to identify whether a non-citizen child's

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RADIO (May 11, 2018), <https://www.npr.org/2018/05/11/610116389/transcript-white-house-chief-of-staff-john-kellys-interview-with-npr>.

<sup>398</sup> See *US: Border Patrol: Hundreds of Children Kept in Cages at Facility in Texas*, ABC NEWS, <https://www.abc.net.au/news/2018-06-18/us-border-patrol-facility-in-texas-children-in-cages/9880192> (last updated June 18, 2018).

<sup>399</sup> See *In re B.R.C.M. (B.R.C.M. I)*, 182 So. 3d 749, 755 (Fla. Dist. Ct. App. 2015) (Salter, J., dissenting); Robert M. Cover, *Violence and the Word.*, 95 YALE L.J. 1601, 1613–14 (1986).

<sup>400</sup> See *H.S.P. v. J.K.*, 121 A.3d 849, 857 (N.J. 2015).

<sup>401</sup> *B.R.C.M. I*, 182 So. 3d at 766 (Salter, J., dissenting).

immigration status is a factor under chapter 39 (dependency) and chapter 751 (temporary legal custody); the criteria for SIJS and the distinct roles of the state courts and federal government in SIJS adjudications; and how to draft an order that serves the best interests of the non-citizen child and withstands state and federal scrutiny. We used some case examples to illustrate these learning goals.

I had some trepidation about doing this presentation, fearing that a judge might stand on a soap box and rail against immigrant hordes misusing our courts to get quick green cards. But none of the 60 or 70 judges in the room said anything like this. They mostly asked smart technical questions about how to fulfill their obligations to make abuse and neglect findings under state law so that their best interest orders would meet the legal sufficiency requirements of the SIJS statute. A few family court judges expressed discomfort about making abuse or neglect findings in temporary legal custody cases without the capacity to rely on investigations conducted by DCF that dependency judges typically utilize. One judge asked if any legislation had been introduced, as Justice Lawson urged in *B.R.C.M. II*.

This exchange gave me renewed faith in our state's judges, understanding their duty to follow the law, even if they do not personally agree with what the law requires them to do, even with all the polarized discourse over immigrants at our border and in our communities. Only one "political" question was asked. It came from a Miami-Dade judge sitting in the front row. He asked what would happen if several hundred children held at one of the largest private detention facilities in the country, in Homestead at the southern end of our county, were to be released to sponsors in Miami.<sup>402</sup> I sighed and quoted the president's chief of staff, and told these judges that they would have to do their jobs and help these kids complete their journeys to the courthouse.

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<sup>402</sup> See Miriam Jordan, *Trump Administration to Nearly Double Size of Detention Center for Migrant Teenagers*, N.Y. TIMES (Jan. 15, 2019), [https://www.nytimes.com/2019/01/15/us/migrant-children-shelter-tent-city-tornillo-homestead.html?fbclid=IwAR2BSOC9GWOF5V9Ea3K\\_HrACnFkZhdGQxRcGWLJcqIbj7Kqxdgl9tNN3I](https://www.nytimes.com/2019/01/15/us/migrant-children-shelter-tent-city-tornillo-homestead.html?fbclid=IwAR2BSOC9GWOF5V9Ea3K_HrACnFkZhdGQxRcGWLJcqIbj7Kqxdgl9tNN3I) ("The government plans to expand the number of children housed at a 'temporary shelter' in Homestead, Fla., from 1,350 to 2,350 in January, according to a Dec. 26 letter from the Department of Health and Human Services outlining the plan.").