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19 IN THE UNITED STATES DISTRICT COURT
 20 FOR THE CENTRAL DISTRICT OF CALIFORNIA

19	LUIS JAVIER PEREZ-OLANO, <i>ET AL.</i>,	)	Case No. CV 05-3604 DDP (RZx)
20)	
21	Plaintiffs,	)	NOTICE OF MOTION AND MOTION
22	- vs -	)	FOR CLASS-WIDE ENFORCEMENT OF
23		)	SETTLEMENT.
24	JEH JOHNSON, SECRETARY, U.S.)	
25	DEPARTMENT OF HOMELAND SECURITY,)	
26	<i>ET AL.</i> ,)	
27		)	Hearing: August 25, 2014.
28	Defendants.	)	Time: 10:00 a.m.
	_____	)	Hon. Dean D. Pregerson

1 To defendants and their attorneys of record:

2 PLEASE TAKE NOTICE that on August 25, 2014, at 10:00 a. m., or as soon
3
4 thereafter as counsel may be heard, plaintiffs will and do hereby move the Court for
5 an order enforcing the settlement approved in this action on December 15, 2010
6 (Dkt. 166) —

- 7
- 8 1) enjoining defendants from denying or revoking Special Immigrant Juvenile
9 (SIJ) classification and/or SIJ-based adjustment of status on the ground that
10 state court jurisdiction over class members, or their dependency on a juvenile
11 court, terminates on account of age prior to their filing Form I-360; and
 - 12 2) enjoining defendants to identify, re-open and re-adjudicate the applications of
13 class members denied SIJ classification and/or SIJ-based adjustment of status,
14 or whose SIJ classification and/or SIJ-based adjustment of status has been
15 revoked, on the ground, in whole or in part, that that state court jurisdiction
16 over them, or their dependency on a juvenile court, terminated on account of
17 age prior to their filing Form I-360.
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This motion is based upon the annexed memorandum of points and authorities and exhibits filed concurrently herewith, and upon all other matters of record.

Dated: July 21, 2014.

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19	LUIS JAVIER PEREZ-OLANO, <i>ET AL.</i> ,)	Case No. CV 05-3604 DDP (RZx)
20)	
21	Plaintiffs,)	MEMORANDUM OF POINTS &
22		)	AUTHORITIES IN SUPPORT OF MOTION FOR
23	- vs -	)	CLASS-WIDE ENFORCEMENT OF
24		)	SETTLEMENT.
25	JEH JOHNSON, SECRETARY, U.S.)	
26	DEPARTMENT OF HOMELAND SECURITY,)	
27	<i>ET AL.</i> ,)	Hearing: August 25, 2014.
28)	Time: 10:00 a.m.
	Defendants.)	Hon. Dean D. Pregerson
	_____)	

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TABLE OF AUTHORITIES

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14 *Defenders of Wildlife v. Norton*, 258 F.3d 1136 (9th Cir. 2001) 21

15 *Flanegan v. Arizona*, 143 F.3d 540 (9th Cir. 1998) 8

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17 *Hagestad v. Tragesser*, 49 F.3d 1430 (9th Cir. 1995)..... 8

18 *International Asso. of Firefighters, etc. v. Cleveland*, 478 U.S. 501; 106 S.

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2 *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir.

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5 *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552; 110 S.

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7 *Perez-Olano v. Gonzalez*, 248 F.R.D. 248 (C.D. Cal. 2008)*passim*

8 *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367; 112 S. Ct. 748; 116 L.

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10 *Sacora v. Thomas*, 628 F.3d 1059 (9th Cir. 2010).....23

11 *TWA v. Franklin Mint Corp.*, 466 U.S. 243; 104 S. Ct. 1776; 80 L. Ed. 2d

12 273 (1984).....22

13 *United States v. Armour & Co.*, 402 U.S. 673; 91 S. Ct. 1752; 29 L. Ed. 2d

14 256 (1971)..... 10

15 *United States v. Atlantic Refining Co.*, 360 U.S. 19; 79 S. Ct. 944; 3 L. Ed.

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1 INTRODUCTION

2 This action is a class-wide challenge to certain administrative policies and
3 practices that blocked abused, abandoned, and neglected youth from receiving lawful
4 immigration status as “special immigrant juveniles” (SIJs).
5

6 Pursuant to 8 U.S.C. § 1101(a)(27)(J),¹ youth whom a state juvenile court
7 declares dependent on account of abuse, abandonment, or neglect may petition the U.S.
8 Immigration & Citizenship Services (CIS)—a bureau of the Department of Homeland
9 Security (DHS)—to classify them as SIJs. If so classified, they are eligible to become
10 lawful permanent residents (LPRs) of the United States. 8 U.S.C. § 1255. These
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12

13
14 ¹ As amended subsequent to the Court’s summary judgment of January 8, 2008 (Dkt.
15 121), *reported at Perez-Olano v. Gonzalez*, 248 F.R.D. 248 (C.D. Cal. 2008), §
16 1101(a)(27)(J) currently provides in pertinent part:

17 The term “special immigrant” means—

18 (J) an immigrant who is present in the United States—

19 (i) who has been declared dependent on a juvenile court located in
20 the United States or whom such a court has legally committed to, or
21 placed under the custody of, an agency or department of a State, or
22 an individual or entity appointed by a State or juvenile court located
23 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;... and

24 (iii) in whose case the Secretary of Homeland Security consents to
25 the grant of special immigrant juvenile status, except that—

26 (I) no juvenile court has jurisdiction to determine the custody
27 status or placement of an alien in the custody of the Secretary
28 of Health and Human Services unless the Secretary of Health
and Human Services specifically consents to such jurisdiction;

1 provisions give effect to Congress’s determination that abused, abandoned or neglected
2 youth who have no parents fit and available to care for them should be given a chance
3 to live safe and productive lives in the United States.²
4

5 On December 15, 2010, this Court approved a comprehensive class-wide
6 settlement of this action. Dkt. 199. The settlement confers specified protections upon a
7 nationwide class comprising “all aliens ... who, on or after May 13, 2005, apply or
8 applied for SIJ status or SIJ-based adjustment of status based upon their alleged SIJ
9 eligibility.” Settlement Agreement, Dkt. 159-1, at 4 (“Settlement”).
10
11

12 Among the Settlement’s benefits is protection against applicants’ “aging-out” of
13 eligibility for the SIJ benefit. In ¶ 23 of the Settlement the parties agreed as follows:

14 Defendant USCIS shall not deny a class member’s application for SIJ
15 classification or SIJ-based adjustment of status on account of age or dependency
16 status, if, at the time the class member files or filed a complete application for SIJ
17 classification, he or she was under 21 years of age *or* was the subject of a valid
18 dependency order that was subsequently terminated based on age. ...
19
20

21 Settlement at 7-8 (emphasis added); *see also id.* at ¶ 24 (same re: revocation of
22 approved SIJ classification).
23

24 For the first two and one-half years following approval of the Settlement, CIS
25 practice conformed with the above provisions: *i.e.*, the agency regularly granted class
26

27 _____
28 ² The Court discusses plaintiffs’ claims in detail in its order granting in part and denying in part plaintiffs’ motions for class certification and partial summary adjudication. *Perez-Olano v. Gonzalez, supra*, 248 F.R.D. 248.

1 members SIJ benefits even if they were no longer subjects of valid dependency orders
2 at the time they filed Form I-360 SIJ applications provided they were under 21.

3
4 Recently, however, CIS changed course; the agency now demands that class
5 members be *both* under 21 years of age *and* the subject of valid dependency orders at
6 the time they apply for SIJ benefits.

7
8 In imposing these conjunctive SIJ eligibility requirements, CIS has unilaterally
9 jettisoned the disjunctive the Settlement posits, and in so doing clearly breaches the
10 agreement. By this motion, plaintiffs seek class-wide relief enjoining CIS to resume
11 complying with ¶¶ 23 and 24 of Settlement and to make whole class members
12 aggrieved by past violations of those provisions.

13
14 STATEMENT OF FACTS

15
16 Defendants do not dispute the sole dispositive fact: CIS's policy and practice are
17 now to deny or revoke SIJ benefits where class members' dependency orders lapse
18 solely due to age prior to their filing Form I-360 even if they remain under 21 at the
19 time of application. On April 4, 2011, CIS issued a policy memorandum that in
20 pertinent part instructed its adjudicators as follows:

21
22 In accordance with the Settlement Agreement, USCIS will not, based on age or
23 dependency status, deny or revoke any SIJ petition if, at the time the class
24 member files or filed the petition, the class member was under 21 years of age
25 *and* was the subject of a valid dependency order that was later terminated based
26 on age. Similarly, USCIS may not, based on age or dependency status, deny an
27
28

1 SIJ-based application for adjustment of status if, the class member files or filed
2 the application when he or she was under 21 *and* was the subject of a valid
3 dependency order.
4

5 Plaintiffs' Exhibit 1 at 2 (emphasis added).³

6 Yet despite the April 4, 2011, memorandum, over the ensuing two and one-half
7 years, CIS regularly—and properly—granted SIJ benefits to class members
8 notwithstanding that their dependency orders had lapsed due to age prior to their filing
9 Forms I-360. In mid-2013, however, the agency has begun enforcing the 2011
10 memorandum:
11

12
13 CIS's denying ... SIJS on this basis was a sudden and stark about-face from the
14 agency's prior practice. Prior to late summer 2013, USCIS's Field Offices
15 regularly approved petitions for SIJS even when filed after the applicant had
16 ceased to be the subject of a valid dependency order on account of age. I am
17
18

19
20 ³ Shortly after CIS had issued its 2011 memorandum the parties exchanged
21 correspondence and conferred in an attempt to resolve their disagreement over the
22 conjunctive requirement announced in the memorandum. *See* Declaration of Carlos
23 Holguín, July 15, 2014, Plaintiffs' Exhibits in Support of Motion to Enforce Settlement
24 ("Plaintiffs' Exhibits"), Plaintiffs' Exhibit 7.

25 Although the parties failed to resolve their differences, for the next two and one-half
26 years, CIS ignored the 2011 memorandum. As far as class counsel have been able to
27 determine, CIS's nominal conjunctive requirement injured no known class member
28 until mid-2013.

Upon CIS's beginning to follow the 2011 memorandum, plaintiffs again urged
defendants to recede from that policy, both via written correspondence and during
formal mediation under the auspices of the Ninth Circuit's Mediation Office, to no
avail. *Id.* at ¶ 3.

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advised that other CIS field offices likewise routinely granted SIJS to petitioners whose dependency orders had lapsed due to age prior to their filing for SIJS. Since then, however, USCIS's policy and practice have been to deny SIJS to applicants who are not the subject of a valid dependency order at the time of filing Form I-360, even if they age-out of juvenile court jurisdiction due to no fault of their own. The Charlotte Field Office is going so far as to revoke SIJS approvals, whether issued by itself or the Nebraska Service Center, issued prior to the recent change in practice.

To the best of my knowledge and belief, CIS gave lawyers, advocates for SIJS applicants, or the general public no prior notice of this change in practice.

Instead, the agency simply began denying and revoking SIJS to the complete surprise of applicants and their representatives.

Declaration of Julie Spahn, June 23, 2014, Plaintiffs' Exhibit 8 at ¶¶ 19-21 (emphasis added).

Numerous lawyers for scores of abused, abandoned and neglected youth report being similarly ambushed by CIS's about-face. See Declaration of Sharika Richardson, June 27, 2014, Plaintiffs' Exhibit 9 at ¶ 4; Declaration of Robert Ley, July 7, 2014, Plaintiffs' Exhibit 10 at ¶¶ 14-15; Declaration of Jennifer Schamel, June 25, 2014, Plaintiffs' Exhibit 13 at ¶ 6; Declaration of Jennifer Rikoski, June 26, 2014, Plaintiffs' Exhibit 14 at ¶ 5; Declaration of Anne Mackin, July 9, 2014, Plaintiffs' Exhibit 11 at ¶¶

1 18-19; Declaration of Timothy Paicopolos, July 10, 2014, Plaintiffs' Exhibit 15 at ¶¶ 4-
2 5; Declaration of Jerome McManus, July 18, 2014, Plaintiffs' Exhibit 19 at ¶¶ 12-14.
3

4 CIS has now denied numerous class members' SIJ classification—and revoked
5 SIJ classification it had previously *granted* to many more—on the ground that their
6 dependency orders lapsed solely on account of age prior to their having applied for SIJ
7 benefits. *See, e.g.*, Declaration of Anne Mackin, *supra*, Plaintiffs' Exhibit 11 at ¶ 14 and
8 exhibit C (listing 15 clients aggrieved by change to conjunctive requirements);
9 Declaration of Sharika Richardson, *supra*, Plaintiffs' Exhibit 9 at ¶ 7 (listing eight
10 clients denied SIJ benefits because dependency orders lapsed solely on account of
11 age).⁴
12

13
14 Plaintiffs' evidence in support of the instant motion is replete with examples of
15 class members blind-sided by CIS's precipitous jettisoning of the Settlement's age-out
16 protections. Class member Schiammerelly Pinckert Nieme is a young Bolivian woman
17 whose parents neglected and then abandoned her. Declaration of Julie Spahn, *supra*,
18 Plaintiffs' Exhibit 8 at ¶ 2. When Schiammarelly was 11, her mother sent her to the
19 United States, where she was raised by a cousin and his wife. *Id.* at ¶ 3. In February
20 2012, Schiammarelly returned to Bolivia, but after a few months her mother ordered her
21 back to the United States. *Id.* at ¶ 4.
22
23
24

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26 _____
27 ⁴ The class members identified in plaintiffs' evidence are clearly a fraction of much
28 larger class denied SIJ benefits for the same reason, as CIS now appears to be applying
its conjunctive requirement nationwide. *See* Decision of CIS Administrative Appeals
Office, April 29, 2013, Plaintiffs' Exhibit 16 (decision of national administrative
appellate board approving CIS's dependency + under 21 requirement).

1 On April 1, 2013, four days before Schiammarelly's 18th birthday, the
2 Mecklenburg County District Court placed her under the custody of an aunt. *Id.* at ¶ 5.
3
4 On May 21, 2013, Schiammarelly formally applied SIJ benefits. *Id.* On January 28,
5 2014, CIS denied Schiammarelly SIJ benefits on the ground she was not *both* the
6 subject of a valid dependency order *and* under 21 at the time she had filed Form I-360.
7
8 *Id.* at ¶ 8. Schiammarelly's lawyer attests, "CIS gave ... no prior notice of this change
9 in practice. Instead, the agency simply began denying and revoking SIJS to the
10 complete surprise of applicants and their representatives." *Id.* at ¶ 21.
11

12 Schiammarelly's case is no aberration. Legal services lawyer Anne Mackin has
13 represented some 120 SIJ applicants. Declaration of Anne Mackin, *supra*, Plaintiffs'
14 Exhibit 11 at ¶ 1. She declares, "Approximately one third of my clients over the last few
15 years obtained the SIJ predicate order ... prior to the eighteenth birthdays but filed their
16 I-360 Special Immigrant Petition after their eighteenth birthdays." *Id.* at ¶ 13.
17

18 Though this was no barrier to attorney Mackin's clients' obtaining SIJ benefits in
19 the past, she currently represents 15 class members whose I-360s were filed "on or after
20 the youth's 18th birthday and [who were] no longer the subject of a valid dependency
21 order, having aged out of the court's jurisdiction." *Id.* at ¶ 14.⁵
22
23

24
25 ⁵ Short of resuming discovery, class counsel have no way of determining precisely how
26 many class members have been injured by CIS's conjunctive continuing dependency
27 requirement, but they are undoubtedly already numerous, more join the ranks of the
28 aggrieved daily, and affected class members are geographically dispersed. *See e.g.*,
Plaintiffs' Exhibit 9 (identifying class members denied SIJ benefits by Charlotte, NC,
Field Office); Exhibit 15 (same; San Francisco Field Office), Exhibit 16 (same; Boston
Memorandum Supporting Motion to Enforce Settlement

1 ARGUMENT

2 I THIS COURT SHOULD ENJOIN CLASS-WIDE VIOLATIONS OF THE SETTLEMENT.

3
4 **A This Court has jurisdiction to remedy violations of the Settlement.**

5 In *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375; 114 S. Ct. 1673; 128 L. Ed.
6 2d 391 (1994), the Supreme Court held that a proceeding to enforce a settlement
7 requires its own basis of jurisdiction. *Id.* at 378; *see also Hagestad v. Tragesser*, 49
8 F.3d 1430, 1433 (9th Cir. 1995). “Such a basis for jurisdiction may be furnished by
9 separate provision (such as a provision retaining jurisdiction over the settlement
10 agreement) or by incorporating the terms of the settlement agreement in the order.”
11
12 *Flanegan v. Arizona*, 143 F.3d 540, 544 (9th Cir. 1998).

13
14 Here, both the Settlement and this Court’s order approving it,⁶ reserve
15 jurisdiction in this Court to enforce the agreement. Settlement ¶ 43 (“...complaining
16 class member(s) may move to enforce the Agreement on a class-wide basis in the
17 Central District of California ...”); Order (Dkt. 166) at 3 (“The Court shall retain
18 jurisdiction over this matter as provided in Sections IX and XI of the Settlement
19 Agreement.”).

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25 _____
26 Field Office). Class-wide relief enforcing the settlement is accordingly appropriate. *Cf.*
27 *Perez-Olano, supra*, 248 F.R.D. at 256-57 (expanding, geographically dispersed class
28 suitable for Rule 23 certification).

⁶ The Settlement resolves a certified class action, and under Rule 23, Fed. R. Civ. Proc.,
the Court accordingly examined and formally approved the accord as being consistent
with law and the public interest. Rule 23(e)(1)(A), Fed. R. Civ. Proc.

1 “according to the plain meaning of its terms.” *Nodine v. Shiley Inc.*, 240 F.3d 1149,
2 1154 (9th Cir. 2001); *Vaillette v. Fireman's Fund Ins. Co.*, 18 Cal.App.4th 680, 686; 22
3 Cal. Rptr. 2d 807 (1993) (“words of the document are to be given their plain meaning
4 and understood in their common sense; the parties’ expressed objective intent, not their
5 unexpressed subjective intent, governs.” (citations omitted)); *see also United States v.*
6
7 *Armour & Co.*, 402 U.S. 673, 682; 91 S. Ct. 1752; 29 L. Ed. 2d 256 (1971)
8 (settlement’s meaning “must be discerned within its four corners, ... not by reference to
9 what might satisfy the purposes of one of the parties to it.”); *County of San Diego v. Ace*
10 *Property & Cas. Ins. Co.*, 37 Cal. 4th 406, 415; 33 Cal. Rptr. 3d 583 (2005) (“If
11 contractual language is clear and explicit, it governs.” (internal quotation marks
12 omitted)); Cal. Civ. Code § 1638 (same).⁸

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15
16 Applying the foregoing to the case at bar, defendants, it will be seen, are
17 manifestly in breach of the Settlement.

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22 _____
23 United States is a party.” *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018,
1032 (9th Cir. 1989).

24 Here, the federal government is a party to a settlement which resolves disputes over
25 federal law. Were state and federal law to differ, federal law would provide the rule of
26 decision; here, however, there is no conflict of law.

27 ⁸ Construing a settlement according to its plain meaning is particularly important in
28 class actions such as the instant case, “because a member of the class who was not
present at any negotiations would be at a disadvantage in presenting extrinsic evidence
of the meaning of the consent decree.” *Molski v. Gleich*, 318 F.3d 937, 946 (9th Cir.
2003).

1 II DEFENDANTS' BELATED DEMAND THAT CLASS MEMBERS REMAIN DEPENDENTS AT
2 THE TIME OF FILING VIOLATES THE PLAIN LANGUAGE OF THE SETTLEMENT.

3
4 **A Background to the "age-out" provisions of the Settlement.**

5 In this action plaintiffs challenged, *inter alia*, two substantive requirements,
6 which they contended unlawfully denied statutorily eligible youth SIJ benefits:

7
8 (1) "Specific" consent. 8 U.S.C. § 1101(a)(27)(J)(iii)(I) bars state courts from
9 determining the "custody status or placement" of a minor in immigration custody unless
10 federal authorities consent to their doing so. The statute does not, however, prohibit
11 state courts from declaring such minors dependents or from issuing other orders not
12 determinative of custody or placement.

13
14 Defendants nevertheless uniformly required that minors in immigration custody
15 get specific consent *before* invoking the jurisdiction of a state court regardless of
16 whether that court determined custody or placement. The uncontroverted evidence
17 showed that defendants denied specific consent nearly 90 percent of the time.
18 Deposition of Mary Y. Evans, August 30, 2007, Plaintiffs' Seventh Set of Exhibits
19 (Dkt. 97), Exhibit 38 at 9.

20
21 Granting judgment for plaintiffs the Court held, "the SIJ statute does not require
22 specific consent when a state court's SIJ-predicate order will not determine custody
23 status or placement. ..." and issued "class-wide injunctive and declaratory relief"
24 barring defendants from denying applications for SIJ benefits because the applicant
25
26
27
28

1 failed to obtain specific consent prior to invoking a state juvenile court’s jurisdiction.
2 *Perez-Olano v. Gonzalez, supra*, 248 F.R.D. at 267.

3
4 (2) Age-out. Plaintiffs also challenged defendants’ requiring that applicants
5 remain dependents until their SIJ petitions and applications for permanent residence
6 were formally approved. Pursuant to regulation,⁹ SIJ applicants “aged-out” of eligibility
7 if they ceased to dependents before CIS granted them lawful permanent residence.

8
9 Most state statutes terminate jurisdiction over dependent minors upon their
10 turning 18; no state authorizes its juvenile courts to exercise jurisdiction over a youth 21

11
12
13
14 _____
15 ⁹ Despite being largely superseded by the Settlement and the Wilberforce Trafficking
16 Victims Protection Reauthorization Act of 2008, Pub. L. 110-457, 122 Stat. 5044
17 (2008) (“TVPRA”), discussed *post*, 8 C.F.R. § 204.11(c) (2014) still provides in
18 pertinent part as follows:

19 An alien is eligible for classification as a special immigrant under section
20 101(a)(27)(J) of the Act if the alien:

21 (1) Is under twenty-one years of age; [and] ...

22 (5) Continues to be dependent upon the juvenile court and eligible for
23 long-term foster care, such declaration, dependency or eligibility not
24 having been vacated, terminated, or otherwise ended; ...

25 Similarly, 8 C.F.R. § 205.1(a)(3)(iv) (2014), provides for the automatic revocation of
26 approved SIJ classification —

27 (A) Upon the beneficiary reaching the age of 21; ...

28 (C) Upon the termination of the beneficiary's dependency upon the
juvenile court; [or]

(D) Upon the termination of the beneficiary's eligibility for long-term
foster care; or

1 or older.¹⁰ Thus in most states, unless CIS granted a youth’s petition for SIJ
2 classification *and* application for adjustment of status, he or she became permanently
3 ineligible for the SIJ benefit upon turning 18.
4

5 Plaintiffs challenged defendants’ age-out regulations on the grounds they denied
6 statutorily eligible youth the benefits Congress sought to confer upon them. On this
7 claim, the Court upheld defendants’ regulations as a *permissible*—though *not* a
8 required—construction of the SIJ statute:
9

10 While Congress defined SIJ eligibility in terms of state court findings made in the
11 past, ... *the statute does not speak directly to the issue of ‘age-out’ limitations on*
12 *eligibility...* When Congress does not speak directly on an issue ... a court
13 considers whether the agency interpretation is based on a *permissible*
14 *construction* of the statute. ... Since the SIJ statute intended to protect immigrant
15 children from abuse, neglect, and abandonment, it is reasonable that eligibility for
16 SIJ status or SIJ-based adjustment of status would be limited to ... individuals no
17 longer dependent on a state court.
18
19
20

21 *Perez-Olano, supra*, 248 F.R.D. at 268-69 (emphasis added).
22
23
24

25 ¹⁰ See Defendants USCIS’ and ICE’s Responses to Plaintiffs’ First Set of Requests for
26 Admissions to Defendant Secretary of Homeland Security, Exhibit 25, Plaintiffs’
27 Fourth Set of Exhibits, May 30, 2007, Dkt. 83, at ¶ 20 (“ICE is unaware of a
28 jurisdiction in which state law permits a person 18 years of age or older to commence
dependency proceedings for purposes of being placed in long-term foster care due to
abuse, neglect, or abandonment...”).

1 The parties thereafter entered into settlement talks. Their divergent reasons for
2 doing so: plaintiffs wished some relief for class members aggrieved by the age-out
3 regulations; defendants wanted relief from the permanent injunction against their
4 specific consent requirement for in-custody class members.
5

6 In the resulting Settlement, CIS pledged, *inter alia*, that it would no longer deny
7 or revoke SIJ applications on account of age or dependency status so long as an
8 applicant is *either* under 21 *or* the subject of a valid dependency order at the time of
9 application. Settlement ¶¶ 23 and 24. In exchange, plaintiffs agreed, *inter alia*, to
10 “dismiss this action, with prejudice, and dissolve the nationwide permanent injunction
11 entered by the District Court ...” *Id.* at ¶ 34.¹¹
12
13

14 **B Defendants’ requiring that class members be both under 21 and the**
15 **subjects of valid dependency orders at the time of application violates**
16 **the plain language of the Settlement.**
17

18 The uncontroverted evidence shows that during the first two and one-half years
19 after entering into the Settlement, defendants’ practice conformed to the plain language
20 of the agreement. The Court need look no further than the clear text of the agreement
21 itself to disapprove defendants’ subsequent about-face. *United States v. Armour & Co.*,
22 *supra*, 402 U.S. at 681-82.
23
24

25 Laboring to excuse their change in practice, defendants offer that the “disjunctive
26 from ¶ 23 of the settlement is unchanged in the April 4, 2011 policy memorandum.”
27
28

¹¹ Plaintiffs further agreed that the Settlement would “sunset” after six years. *Id.* ¶ 41.
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1 Letter dated May 5, 2011, Plaintiffs’ Exhibit 4 at 3. That is simply not true, as side-by-
 2 side comparison of the Settlement’s text with that of defendants’ 2011 memorandum
 3 makes abundantly clear:
 4

Settlement ¶ 23	2011 Policy Memorandum
5 6 Defendant USCIS shall not deny a class 7 member’s application for SIJ 8 classification or SIJ-based adjustment of 9 status on account of age or dependency 10 status, if, at the time the class member 11 files or filed a complete application for 12 SIJ classification, he or she was under 21 years of age or was the subject of a valid dependency order that was subsequently terminated based on age.	In accordance with the Settlement Agreement, USCIS will not, based on age or dependency status, deny or revoke any SIJ petition if, at the time the class member files or filed the petition, the class member was under 21 years of age and was the subject of a valid dependency order that was later terminated based on age.

15 The substitution of the conjunctive for the disjunctive in the last clause of CIS’s
 16 policy memorandum could not be plainer. In unilaterally changing the disjunctive “or”
 17 of the Settlement to the conjunctive “and,” CIS creates a requirement for SIJ
 18 classification—that an applicant be *both* under 21 *and* the subject of a valid dependency
 19 order at the time he or she files Form I-360—wholly at odds with the plain language of
 20 the Settlement. Nor is such a substitution lawful. *Brinderson-Newberg Joint Venture v.*
 21 *Pac. Erectors, Inc.*, 971 F.2d 272, 278 (9th Cir. 1992), *cert denied*, 507 U.S. 914, 113
 22 S. Ct. 1267, 122 L. Ed. 2d 663 (1993) (contract “phrased in the disjunctive ... requires
 23 Pacific to perform work inferred by the specifications ‘or’ work inferred by customary
 24 practices To limit the scope of work to jobs Pacific customarily performed, article
 25 33 would have to be phrased in the conjunctive...”).
 26
 27
 28

1 III DEFENDANTS’ UNILATERAL RE-INTERPRETATION OF THE SETTLEMENT IS NOWISE
2 REQUIRED BY THE SIJ STATUTE.
3

4 Given the weakness of their textual position, defendants have also suggested that
5 interpreting the Settlement according to its plain meaning would bring the agreement
6 into conflict with the SIJ statute. It would not.
7

8 **A Nothing in the pre-TVPRA SIJ statute required SIJ applicants remain**
9 **the subjects of valid dependency orders at the time of application.**

10 At the time of this Court’s summary judgment, the SIJ statute read in pertinent
11 part as follows:
12

13 The term “special immigrant” means—

14 (J) an immigrant who is present in the United States—

15 (I) who has been declared dependent on a juvenile court located in
16 the United States or whom such a court has legally committed to, or
17 placed under the custody of, an agency or department of a State and
18 who has been deemed eligible by that court for long-term foster care
19 due to abuse, neglect, or abandonment; ...
20
21

22 *Perez-Olano, supra*, 248 F.R.D. at 252.
23

24 As has been seen, the Court held that the above statutory text “does not speak
25 directly to the issue of ‘age-out’ limitations on eligibility.” *Id.* at 268. The Court instead
26 held CIS’s age-out regulations “a *permissible* construction of the statute.” *Id.* at 269
27 (emphasis added).
28

1 Defendants' insisting that § 1101(a)(27)(J) *requires* their current age-out policy
2 cannot be squared with this Court's contrary construction of the SIJ statute. As far as
3 the pre-TVPRRA statutory text is concerned, class members' remaining dependents at the
4 time of application was neither more nor less "required" than was their remaining
5 dependent through final adjudication of their SIJ petitions.
6

7
8 In settling, defendants were accordingly free to waive all "continuing
9 dependency" requirements. *See International Asso. of Firefighters, etc. v. Cleveland*,
10 478 U.S. 501, 522-23; 106 S. Ct. 3063; 92 L. Ed. 2d 405 (1986) ("[W]hatever the
11 limitations ... on the power of federal courts to impose obligations ... to remedy
12 violations of Title VII, these simply do not apply when the obligations are created by a
13 consent decree."). That defendants did so is plain from the text of the Settlement
14 itself.¹²
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23 ¹² Even assuming, *arguendo*, the Settlement's disjunctive were inconsistent with the SIJ
24 statute, defendants' remedy would be to ask the Court to reform the agreement, not re-
25 write it unilaterally. *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236-37;
95 S. Ct. 926; 43 L. Ed. 2d 148 (1975).

26 In *United States v. Atlantic Refining Co.*, 360 U.S. 19; 79 S. Ct. 944; 3 L. Ed. 2d 1054
27 (1959), for example, the Court agreed that the interpretation offered by the Government
28 might better accord with the apposite statutes, but held this would "not warrant our
substantially changing the terms of a decree to which the parties consented without any
adjudication of the issues." 360 U.S. at 23.

1 the TVPRA’s uniform age limit for SIJ eligibility. The *only* age requirement Congress
2 has authorized—“notwithstanding any other provision of law,” be it state or federal—is
3 that SIJ applicants be under 21.
4

5 Nothing in the SIJ statute or elsewhere disqualifies an applicant merely because
6 he or she is over 18, yet this is precisely what defendants are now doing via back door
7 artifice. Defendants’ construction of the Settlement—and not plaintiffs’—is clearly at
8 odds with the apposite statutes.
9

10 **2 CIS’s construction of the Settlement nullifies Congress’s**
11 **preserving SIJ eligibility for applicants placed with individual**
12 **custodians.**
13

14 The amended statute also directs CIS to confer SIJ benefits not only upon an
15 applicant “who has been declared dependent,” but upon one whom a state court “has ...
16 placed under the custody of ... an individual ...” The statute thus specifically posits a
17 state court’s placing a SIJ applicant “under the custody of” relatives or other custodians
18 as an alternative to their remaining dependent.¹³
19
20

21 As defendants’ construe the Settlement, however, class members must *always* be
22 dependents at the time of application regardless of whether a state court places them
23
24

25 ¹³ Congress also deleted the requirement that SIJ applicants be deemed eligible for
26 long-term foster care. CIS regulations, which defendants rely on to declare class
27 members ineligible for SIJ on dependency grounds, *e.g.*, Plaintiffs’ Exhibit 16 at 3,
28 anachronistically continue to require that SIJ applicants be “eligible for long-term foster
care...” 8 C.F.R. § 204.11(c) (2014).

1 under the custody of relatives. *See, e.g.*, Declaration of Anne Mackin, *supra*, Plaintiffs’
2 Exhibits 11 at ¶¶ 6-12 and 11-A (class member Salvador Arias placed under custody of
3 mother); Declaration of Julie Spahn, Plaintiffs’ Exhibit 8 at ¶ 16 and 8-B and 8-C (class
4 member Schiammarelly Pinckert placed under custody of aunt); *id.* at 8-D (class
5 member Jose Salamanca placed under custody of brother); *id.* at 8-E and 8-F (class
6 member Kevin Rosales placed under custody of mother). In effect, defendants simply
7 ignore Congress’s declaring placement an alternative to dependency as a basis for SIJ
8 eligibility.
9
10

11
12 It is axiomatic that statutes should not be interpreted so as to reduce their terms to
13 surplusage. *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 562; 110
14 S. Ct. 2126; 109 L. Ed. 2d 588 (1990) (“Our cases express a deep reluctance to interpret
15 a statutory provision so as to render superfluous other provisions in the same
16 enactment”). Defendants’ current policy and practice do just that to Congress’s
17 amending § 1101(a)(27)(J) to afford SIJ applicants an alternative to dependency: *i.e.*,
18 being placed under the custody of relative and other individual custodians.
19
20

21 In sum, defendants’ notion that 8 U.S.C. § 1101(a)(27)(J) *requires* their current
22 policy and practice cannot be squared with (1) the plain text of the Settlement; (2) this
23 Court’s construction of the pre-TVPRA SIJ statutory text; (3) Congress’s fixing a
24 uniform age limit for SIJ eligibility;¹⁴ (4) Congress’s subsequently making placement
25
26

27
28 ¹⁴ Nor does defendants’ current practice restrict the SIJ benefit to juveniles. CIS grants individuals who are a day short of 21 SIJ benefits notwithstanding that they have been

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1 with an individual an alternative to dependency; or (5) as will be seen next, CIS’s
2 having regularly *granted* SIJ benefits to non-dependent applicants for the better part of
3 three years after the Settlement was finalized.
4

5 IV DEFENDANTS’ UNANNOUNCED SHIFT TO REQUIRING CONTINUING DEPENDENCY IS
6 ARBITRARY, CAPRICIOUS, AND ANYTHING BUT A REASONABLE RE-INTERPRETATION
7 OF THE SETTLEMENT.
8

9 Even assuming, *arguendo*, that ¶¶ 23 and 24 of the Settlement were not clear, any
10 ambiguity in those provisions should be resolved against defendants’ mid-2013 shift in
11 substantive SIJ eligibility requirements.
12

13 As has been seen, numerous lawyers who regularly represent SIJ applicants attest
14 that for the nearly three years after entering into the Settlement, CIS routinely granted
15 SIJ benefits to applicants who had aged-out of dependency at the time of application.
16

17 It is axiomatic that an “agency’s own actions are relevant to ... interpretation of”
18 a Settlement. *Freeman v. Gonzales*, *Freeman v. Gonzales*, 444 F.3d 1031, 1036 (9th
19 Cir. 2006); *see also Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1146 n.11 (9th Cir.
20 2001) (“Nor do we owe deference to the interpretation of the statute now advocated by
21 the Secretary’s counsel—newly minted, it seems, for this lawsuit, and inconsistent with
22 prior agency actions—as we ordinarily will not defer to agency litigating positions that
23
24
25

26
27 adults for nearly three years (provided they remain dependents). In contrast, defendants
28 deny SIJ to class members from states that decline to extend dependency beyond 18 if
they apply one day after turning 18. Defendants’ policy and practice *du jour*, therefore,
deny SIJ benefits on the happenstance of the state in which a class member resides.

1 are wholly unsupported by regulations, rulings, or administrative practice.”) (internal
2 quotation marks and citation omitted)); *cf.*, *TWA v. Franklin Mint Corp.*, 466 U.S. 243,
3 259-60; 104 S. Ct. 1776; 80 L. Ed. 2d 273 (1984) (“We may not ignore the actual,
4 reasonably harmonious practice adopted by the United States and other signatories in
5 the first 40 years of the Convention's existence. In determining whether the Executive
6 Branch's domestic implementation of the Convention is consistent with the
7 Convention's terms, our task is to construe a ‘contract’ among nations. The conduct of
8 the contracting parties in implementing that contract in the first 50 years of its operation
9 cannot be ignored.” (citations omitted)).

13 The agency’s pulling the rug out from under class members who relied on CIS’s
14 earlier practice is also palpably unjust. The agency’s about-face clearly effects a change
15 in substantive adjudicative standards without pretense of complying with the notice-
16 and-comment requirements of the Administrative Procedure Act, 5 U.S.C. §§ 551 *et*
17 *seq.* (APA).
18

20 The APA—and fundamental fairness—require federal agencies to publish notice
21 of proposed rules and a final version of the rule at least 30 days before it becomes
22 effective. *Id.*¹⁵ The APA defines “rulemaking” to include not only the original
23
24

26 ¹⁵ Although 5 U.S.C. § 553 exempts “interpretive rules, general statements of policy, or
27 rules of agency organization, procedure or practice” from the notice requirement, an
28 agency may not, “under the guise of interpreting a regulation... create *de facto* a new
regulation.” *Christensen v. Harris County*, 529 U.S. 576, 588; 120 S. Ct. 1655; 146 L.
Ed. 2d 621 (2000).

1 formulation, but also modification, of a rule. 5 U.S.C. § 551(5); *Paralyzed Veterans of*
2 *Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997), *cert. denied*, 523 U.S.
3 1003, 118 S. Ct. 1184, 140 L. Ed. 2d 315 (1998) (agency’s “fundamental change in its
4 interpretation of a substantive regulation without notice and comment” violates APA).
5

6 Defendants have not, and cannot, justify stripping unsuspecting class members of
7 SIJ eligibility via a shifting and contrived “interpretation” of the Settlement. *See Nat’l*
8 *Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981; 125 S. Ct.
9 2688; 162 L. Ed. 2d 820 (2005) (“Unexplained inconsistency is ... a reason for holding
10 an interpretation to be an arbitrary and capricious change from agency practice under
11 the Administrative Procedure Act.”), *citing Motor Vehicle Mfrs. Ass’n v. State Farm*
12 *Mut. Auto. Ins. Co.*, 463 U.S. 29, 46-57, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983).
13
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26 An “interpretive” rule “merely provides guidance to agency officials in exercising their
27 discretionary power, ...” *Sacora v. Thomas*, 628 F.3d 1059, 1069 (9th Cir. 2010),
28 whereas a substantive rule “establishes a binding norm.” *Id.* The numerous decisions
filed herewith denying class members SIJ benefits admit of no doubt that CIS’s
“continuing dependency” requirement is substantive and not discretionary.

1 VII CONCLUSION

2 For the foregoing reasons, the Court should grant this motion to enforce and issue
3 relief in the form proposed in the order lodged in connection herewith.
4

5 Dated: July 21, 2014.

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