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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

LUIS JAVIER PEREZ-OLANO;	)	Case No. CV 05-03604 DDP (RZx)
MANUEL GOMEZ; MICHAEL YUBAN	)	
OBANDO; CASA LIBRE YOUTH	)	<b>ORDER GRANTING IN PART AND</b>
SHELTER; LUCIA UREY; MAEJEAN	)	<b>DENYING IN PART PLAINTIFFS'</b>
ROBINSON; LUIS MIGUEL	)	<b>MOTION FOR CLASS CERTIFICATION</b>
MORALES; YAN JUN LI; FREDDY	)	<b>AND GRANTING IN PART AND DENYING</b>
GARRIDO-MARTINEZ,	)	<b>IN PART PLAINTIFFS' MOTION FOR</b>
	)	<b>PARTIAL SUMMARY ADJUDICATION</b>
Plaintiffs,	)	
	)	[Motion for Class Certification
v.	)	filed on May 30, 2007]
	)	
ALBERTO GONZALEZ, Attorney	)	[Motion for Partial Summary
General; <del>ROBERT S. MUELLER,</del>	)	Adjudication filed on October 1,
<del>Director Federal Bureau of</del>	)	2007]
<del>Investigation; MICHAEL</del>	)	
CHERTOFF, Secretary of	)	
Homeland Security; OFFICE OF	)	
REFUGEE RESETTLEMENT ,	)	
	)	
Defendants.	)	
_____	)	

This matter is before the Court on the Plaintiffs' motion for class certification, and Plaintiffs' motion for partial summary adjudication. Plaintiffs are immigrant youth that bring this action to challenge certain of Defendants' policies, practices, and regulations with respect to the special immigrant juvenile provisions of the Immigration and Nationality Act.

1 On September 10, 2007, the Court heard oral argument on  
2 Plaintiffs' motion for class certification. The Court deferred  
3 ruling on the motion for class certification and invited a motion  
4 for summary adjudication on questions of law raised by this action.  
5 On November 19, the Court heard oral argument on Plaintiffs' motion  
6 for summary adjudication, and Defendants' cross-motion for summary  
7 judgment.

8 The Court is prepared to rule on both motions and does not  
9 need additional oral argument. After reviewing the submissions of  
10 the parties and hearing oral argument on the motion for class  
11 certification, the Court grants the motion in part and denies the  
12 motion in part. After reviewing the submissions of the parties and  
13 hearing oral argument on Plaintiffs' motion for summary  
14 adjudication and Defendants' cross-motion for summary judgment, the  
15 Court grants the motions in part and denies the motions in part.

16

17 **I. BACKGROUND**

18 **A. The Special Immigrant Juvenile Provisions of the**  
19 **Immigration and Nationality Act**

20 In 1990, Congress enacted the special immigrant juvenile  
21 ("SIJ") provisions of the Immigration and Nationality Act ("INA").  
22 8 U.S.C. §§ 1101(a)(27)(J) & 1255(a). The SIJ provisions created a  
23 method for abused, neglected, and abandoned immigrant children to  
24 become lawful permanent residents of the United States.<sup>1</sup>

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26 <sup>1</sup> Section 1101(a)(27)(J) states:  
The term "special immigrant" means--  
27 (J) an immigrant who is present in the United States--  
(I) who has been declared dependent on a juvenile  
28 court located in the United States or whom such  
(continued...)

1 Pursuant to 8 U.S.C. § 1101(a)(27)(J), immigrant children may  
 2 petition the U.S. Immigration and Citizenship Services ("CIS"), a  
 3 bureau of the Department of Homeland Security ("DHS"), to be  
 4 recognized as special immigrant juveniles.<sup>2</sup> In order to be  
 5 eligible for SIJ classification, 8 U.S.C. § 1101(a)(27)(J) requires  
 6 that a state court make an SIJ-predicate order, finding 1) that the  
 7 child is dependent on the court or a state agency; 2) that the  
 8 child is eligible for long-term foster care due to abuse, neglect  
 9 or abandonment; and 3) that it would not be in the child's best

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10  
 11 <sup>1</sup>(...continued)

12 a court has legally committed to, or placed  
 13 under the custody of, an agency or department of  
 14 a State and who has been deemed eligible by that  
 15 court for long-term foster care due to abuse,  
 16 neglect, or abandonment;

17 (ii) for whom it has been determined in  
 18 administrative or judicial proceedings that it  
 19 would not be in the alien's best interest to be  
 20 returned to the alien's or parent's previous  
 21 country of nationality or country of last  
 22 habitual residence; and

23 (iii) in whose case the Attorney General expressly  
 24 consents to the dependency order serving as a  
 25 precondition to the grant of special immigrant  
 juvenile status; except that--

(I) no juvenile court has jurisdiction to  
 determine the custody status or placement  
 of an alien in the actual or constructive  
 custody of the Attorney General unless the  
 Attorney General specifically consents to  
 such jurisdiction; and

(II) no natural parent or prior adoptive parent  
 of any alien provided special immigrant  
 status under this subparagraph shall  
 thereafter, by virtue of such parentage, be  
 accorded any right, privilege, or status  
 under this Act;

8 U.S.C. § 1101(a)(27)(J).

26 <sup>2</sup> The Homeland Security Act of 2002 ("HSA"), Pub. L. No. 107-  
 27 296, 116 Stat. 2153 (Nov. 25, 2002), transferred authority to  
 28 implement the SIJ benefit provisions from the Attorney General to  
 the Secretary of Homeland Security. HSA §§ 471(a), 451(b), and  
 462(c); see also F.L. v. Thompson, 293 F. Supp. 2d 86 (D.D.C.  
 2003).

1 interest to be returned to his or her home country. 8 U.S.C. §  
2 1101(a)(27)(J)(I-ii). Once a state court makes an SIJ-predicate  
3 order, a child may file with CIS for SIJ-status using an I-360  
4 petition.<sup>3</sup> A child that is granted SIJ status may then apply for  
5 adjustment to lawful permanent resident status under 8 U.S.C. §  
6 1255.

7 However, the SIJ statute contains a provision that limits  
8 state court jurisdiction with respect to immigrant children in  
9 federal custody ("in-custody minors"). A state court may not  
10 "determine the custody status or placement" of in-custody minors  
11 unless Immigration and Customs Enforcement ("ICE"), a bureau of  
12 DHS, specifically consents to state court jurisdiction. 8 U.S.C. §  
13 1101(a)(27)(J)(iii)(I). Defendants' policy construes this  
14 provision to require that in-custody minors obtain ICE's specific  
15 consent before proceeding to state court for an SIJ-predicate  
16 order.<sup>4</sup>

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17  
18 <sup>3</sup> The statute provides that the Attorney General must  
19 expressly consent to a state court's SIJ-predicate order serving as  
20 a basis for the granting of SIJ status. 8 U.S.C. §  
21 1101(a)(27)(J)(iii). Since DHS has been transferred authority over  
22 the SIJ provisions, see supra footnote 2, it is DHS that determines  
23 grants of SIJ status.

24 <sup>4</sup> See Pls.' Ex. 21, Thomas E. Cook, Acting Assistant Director,  
25 Adjudications Division, Memorandum for Regional Directors, Special  
26 Immigrant Juveniles - Memorandum # 2: Clarification of Interim  
27 Field Guidance (July 9, 1999) ("In the case of juveniles in INS  
28 custody, the Attorney General's consent to the juvenile court's  
jurisdiction must be obtained before proceedings on issuing a  
dependency order for the juvenile are begun. Therefore, if a  
juvenile court issues a dependency order for a juvenile in INS  
custody without first obtaining the Attorney General's consent to  
the jurisdiction, the order is not valid."); Pls.' Ex. 22, William  
R. Yates, Associate Director for Operations, Memorandum #3 - Field  
Guidance on Special Immigrant Juvenile Status Petitions (May 27,  
2004) ("In the case of juveniles in custody due to their  
immigration status . . . , the specific consent must be obtained

(continued...)

1           There are also several regulations that govern SIJ  
2 classification and SIJ-based adjustment of status. After enactment  
3 of the SIJ statute, the Attorney General enacted "age-out"  
4 regulations. See 8 C.F.R. §§ 204.11(c)(1), 204.11(c)(5),  
5 205.1(a)(3)(iv)(A, C, & D). Under these regulations, a minor will  
6 "age-out" of eligibility if the child turns 21 years old before  
7 being granted SIJ status or SIJ-based adjustment, or if the child  
8 is no longer dependent on the state court or eligible for long-term  
9 foster care. 8 C.F.R. §§ 204.11(c)(1), 204.11(c)(5),  
10 205.1(a)(3)(iv)(A, C, & D).

11           A SIJ undergoing removal proceedings is subject to additional  
12 regulations. Once a SIJ is in removal proceedings, CIS no longer  
13 has authority to adjudicate SIJ-based adjustment applications. A  
14 SIJ in removal proceedings may only seek adjustment of status from  
15 a Board of Immigration Appeals ("BIA") or immigration judge, who  
16 have exclusive jurisdiction over persons in removal proceedings.  
17 See 8 C.F.R. 245.2(a)(1) & 1245.2(a)(1)(I). If a final order of  
18 removal is issued, a SIJ must make any motion to reopen removal  
19 proceedings within 90 days. 8 C.F.R. § 1003.23(b)(I).

20           **Plaintiffs' Challenges to Defendants' Interpretations**  
21           **of the SIJ Provisions**

22           Plaintiffs bring this action for declaratory, injunctive, and  
23 mandamus relief from certain policies, practices, and regulations,  
24 promulgated and followed by Defendants former Attorney General  
25 Alberto Gonzalez, Secretary of Homeland Security Michael Chertoff,

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26  
27           <sup>4</sup>(...continued)  
28 before the juvenile may enter juvenile court dependency  
proceedings; failure to do so will render invalid any order issued  
as a result of such proceedings." See also (Def.'s Opp'n 4.).

1 and the Office of Refugee Resettlement, that implement the SIJ  
2 provisions of the Immigration and Nationality Act. See 8 U.S.C. §§  
3 1101(a)(27)(J) & 1255(a). Plaintiffs are immigrant youth that have  
4 been denied specific consent to state court jurisdiction for an  
5 SIJ-predicate order, denied SIJ status or SIJ-based adjustment of  
6 status pursuant to the "age-out" regulations, and/or are unable to  
7 apply for SIJ status or SIJ-based adjustment of status pursuant to  
8 the removal regulations.

9 Plaintiffs challenge Defendants' policy requiring in-custody  
10 minors to obtain ICE's specific consent. Plaintiffs contend that 8  
11 U.S.C. § 1101(a)(27)(J) does not authorize Defendants to require  
12 specific consent for an SIJ-predicate order because such orders do  
13 not "determine the custody status or placement" of an in-custody  
14 minor. Defendants counter that a state court's SIJ-predicate order  
15 does alter "custody status or placement" and therefore, specific  
16 consent is required before an in-custody minor may seek an SIJ-  
17 predicate order in state court.

18 Plaintiffs also challenge the "age-out" regulations. See 8  
19 C.F.R. §§ 204.11(c)(1), 204.11(c)(5), 205.1(a)(3)(iv)(A, C, & D).  
20 Plaintiffs claim that the regulations impose ultra vires  
21 eligibility requirements that cause statutorily eligible youth to  
22 "age-out" of SIJ status or SIJ-based adjustment of status.  
23 Defendants counter that the "age-out" regulations are reasonable  
24 interpretations of the SIJ provisions of the Immigration and  
25 Nationality Act, entitled to deference under Chevron U.S.A., Inc.  
26 V. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

27 Finally, Plaintiffs challenge several regulations that apply  
28 to SIJs in removal proceedings. Plaintiffs argue that Defendants'

1 regulations unlawfully deny SIJs adjudication of their adjustment  
2 of status applications. 8 C.F.R. §§ 245.2(a)(1) & 1245.2(a)(i)(1).  
3 Defendants maintain that the INA authorizes the removal regulations  
4 and that SIJs are not denied adjudication as Plaintiffs allege.

5 **C. Plaintiffs' Motions**

6 On May 30, 2007, Plaintiffs moved for an order certifying the  
7 following classes under Federal Rule of Civil Procedure 23(b)(2):

8 All persons who are prima facie eligible for classification  
9 as SIJs pursuant to 8 U.S.C. § 1101(a)(27)(J) and:

- 10 (1) whose requests for specific consent to state court  
11 jurisdiction Defendants deny or fail to decide prior  
12 to their attaining 18 years of age;
- 13 (2) whose petitions for SIJ classification Defendants deny  
14 or revoke pursuant to 8 C.F.R. § 204.11(c)(1) or (5),  
15 or § 205.1(a)(3)(iv)(A), (C), or (D); or
- 16 (3) whose applications for SIJ-based adjustment of status  
17 Defendants refuse to adjudicate pursuant to 8 C.F.R.  
18 §§ 245.2(a)(1) and 1245.2(a)(i)(1), and 8 C.F.R. §§  
19 1003.2(c)(2) or 1003.23(b)(1).

20 At that time, the Court deferred ruling on the motion for class  
21 certification.

22 Plaintiffs now move for partial summary adjudication, and  
23 Defendants bring a cross-motion, to address the following issues:

- 24 (1) whether a state court order finding that an immigrant  
25 youth in federal custody is abused, neglected, or  
26 abandoned, and that it is not in the youth's best  
27 interest to return to their home country ("SIJ-predicate  
28 order"), alters the youth's "custody status or

1 placement," thereby requiring that the youth obtain the  
2 specific consent of ICE to invoke state court  
3 jurisdiction for the SIJ-predicate order;

4 (2) whether Defendants may lawfully deny SIJ classification  
5 and / or adjustment of status pursuant to 8 C.F.R. §§  
6 204.11(c)(1) or (5), and/ or 205.1(a)(3)(iv)(A),(C), or  
7 (D); and

8 (3) whether 8 C.F.R. §§ 245.2(a)(1) and 1245.2(a)(i)(1)  
9 violate 8 U.S.C. § 1101(a)(27)(J) or deny proposed class  
10 members due process as applied to SIJs who become  
11 eligible for adjustment of status more than 90 days after  
12 being ordered removed.

13 (Pls.' Mot. 5.)

14 The Court consolidates the motions to rule together on class  
15 certification and partial summary adjudication. The Court first  
16 considers the motion for class certification, and then turns to the  
17 Plaintiffs' motion for partial summary adjudication and Defendants  
18 cross-motion for summary judgment.

19

20 **II. PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

21 **A. Rule 23 Standard For Class Certification**

22 Federal Rules of Civil Procedure Rule 23 outlines a two-step  
23 process for determining whether class certification is appropriate.  
24 First, Rule 23(a) sets forth four prerequisites that must be met  
25 for any class: (1) the class is so numerous that joinder of all  
26 members is impracticable; (2) there are questions of law or fact  
27 common to the class; (3) the claims or defenses of the  
28 representative parties are typical of the claims or defenses of the



1 class; and (4) the representative parties will fairly and  
2 adequately protect the interests of the class. Fed. R. Civ. P.  
3 23(a); see Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir.  
4 1992). These four requirements are often referred to as  
5 numerosity, commonality, typicality, and adequacy. See General  
6 Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 156 (1982); In  
7 re Adobe Sys., Inc. Sec. Litig., 139 F.R.D. 150, 153 (N.D. Cal.  
8 1991).

9 Assuming the requirements of Rule 23(a) are satisfied, the  
10 party seeking class certification must also demonstrate that the  
11 action falls within one of the three kinds of actions permitted  
12 under Rule 23(b). See Fed. R. Civ. P. 23(b); In re Adobe Sys., 139  
13 F.R.D. at 153. An action is proper under Rule 23(b)(2) if the  
14 defendant "has acted (or refused to act) in a manner applicable to  
15 the class generally, thereby making injunctive or declaratory  
16 relief appropriate with respect to the class as a whole."  
17 Schwarzer, supra, at 10-63. Rule 23(b)(2) actions are proper when  
18 the class primarily seeks injunctive or declaratory relief. See  
19 id. ¶¶ 10:399-400 at 10-66. Recovery of damages is generally not  
20 available in a Rule 23(b)(2) class action. Id.

21 In evaluating a motion for class certification, "[t]he court  
22 is bound to take the substantive allegations of the complaint as  
23 true." In re Unioil Sec. Litig., 107 F.R.D. 615, 618 (C.D. Cal.  
24 1985) (internal quotations omitted). Moreover, "[i]n determining  
25 the propriety of a class action, the question is not whether the  
26 plaintiff or plaintiffs have stated a cause of action or will  
27 prevail on the merits, but rather whether the requirements of Rule  
28 23 are met." Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 178

1 (1974) (quoting Miller v. Mackey Int'l, 452 F.2d 424, 427 (5th Cir.  
2 1971)). Nonetheless, the plaintiffs bear the burden of  
3 establishing each of the required elements for class certification.  
4 See In re Unioil Sec. Litig., 107 F.R.D. at 617 (citing In re  
5 Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693  
6 F.2d 847, 854 (9th Cir. 1982)). At the class certification stage,  
7 the evidence only needs to enable the court to make a "reasonable  
8 judgment" that Rule 23 requirements have been met. Blackie v.  
9 Barrack, 524 F.2d 891, 901 n.17 (9th Cir. 1975) (holding that "so  
10 long as [a district judge] has sufficient material before him to  
11 determine the nature of the allegations, and rule on compliance  
12 with the Rule's requirements, and he bases his ruling on that  
13 material, his approach cannot be faulted because plaintiffs' proof  
14 may fail at trial").

15 **B. Analysis**

16 The proposed class definition consists of three subclasses:

- 17 (1) minors whose requests for specific consent to state court  
18 jurisdiction Defendants deny or fail to decide prior to  
19 their attaining 18 years of age ("specific consent  
20 subclass");
- 21 (2) youth whose petitions for SIJ classification Defendants  
22 deny or revoke pursuant to 8 C.F.R. §§ 204.11(c)(1) or  
23 (5), or 205.1(a)(3)(iv)(A), (C), or (D) ("age-out  
24 subclass"); and
- 25 (3) youth whose applications for SIJ-based adjustment of  
26 status Defendants refuse to adjudicate pursuant to 8  
27 C.F.R. §§ 245.2(a)(1) and 1245.2(a)(i)(1), and 8 C.F.R.

28

1            §§ 1003.2(c)(2) or 1003.23(b)(1) ("removal proceedings  
2            subclass").

3            The Court will address each of these proposed subclasses in turn.  
4            See Betts v. Reliable Collection Agency, Ltd., 659 F.2d 1000, 1005  
5            (9th Cir. 1981) (noting that "each subclass must independently meet  
6            the requirements of Rule 23 for the maintenance of a class  
7            action.")

8            **1.    Specific Consent Subclass**

9            The proposed class definition for the specific consent  
10           subclass is as follows: minors whose requests for specific consent  
11           to state court jurisdiction Defendants deny or fail to decide prior  
12           to the their attaining 18 years of age ("specific consent  
13           subclass").

14           **a.    Numerosity**

15           Plaintiffs must first demonstrate that "the class is so  
16           numerous that joinder of all members is impracticable." Fed. R.  
17           Civ. P. 23(a)(1). To establish numerosity, plaintiffs are not  
18           required to demonstrate the precise number of class members.  
19           Welling v. Alexy, 155 F.R.D. 654, 656 (N.D. Cal. 1994). Although  
20           plaintiffs need not allege the exact number or identity of class  
21           members to satisfy the numerosity requirement, mere speculation as  
22           to the number of parties involved is insufficient. Nguyen Da Yen  
23           v. Kissinger, 70 F.R.D. 656, 661 (N.D. Cal. 1976). However, where  
24           the exact size of the class is unknown, but general knowledge and  
25           common sense indicate that it is large, the numerosity requirement  
26           is satisfied." Orantes-Hernandez v. Smith, 541 F. Supp. 351, 371  
27           (C.D. Cal. 1982). When the class is not so numerous, courts should  
28           consider other factors such as "the geographical diversity of class

1 members, the ability of individual claimants to institute separate  
2 suits, and whether injunctive or declaratory relief is sought."  
3 Jordan v. Los Angeles County, 669 F.2d 1311, 1319 (9th Cir. 1982),  
4 vacated on other grounds, 459 U.S. 810 (1982).

5 Here, although they cannot provide the precise number of  
6 potential class members, Plaintiffs maintain that hundreds of  
7 individuals that sought specific consent, had ICE deny or fail to  
8 decide those requests by the time the individual turned 18 years  
9 old. (Pl.'s Mot. 11.) Defendants argue that Plaintiffs have only  
10 identified seven instances of individuals that turned 18 years old  
11 while their specific consent requests were pending. (Def.'s Opp.  
12 12-13.)

13 However, Plaintiffs counter with evidence that at least 164  
14 in-custody minors requested specific consent between January 1,  
15 2004 to October 2006. The Court notes that Plaintiffs' challenge  
16 includes a claim that the statute does not permit Defendants to  
17 require specific consent unless the state court will alter custody  
18 status or placement. As Defendants require specific consent of all  
19 in-custody minors seeking a state court's SIJ-predicate order, this  
20 claim would belong to any person that Defendants required to  
21 request specific consent. The 164 requests identified by  
22 Plaintiffs certainly satisfies numerosity.

23 Further, out of the 164 identified specific consent requests,  
24 Defendants denied at least 40 for unspecified reasons and closed at  
25 least another 7 because the applicant turned 18 years old before  
26 they decided on the consent request.<sup>5</sup> (Pl.'s Mot. 12.) At the

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27  
28 <sup>5</sup> In its reply brief, Plaintiffs maintain that ICE denied or  
(continued...)

1 very least, there are at least 47 members of this first subclass.  
2 The evidence provides the Court with a reasonable estimate of the  
3 class size for this subclass. The impracticability of joinder is  
4 further supported by the fact that members of the proposed class  
5 are geographically dispersed and many are now in foreign countries  
6 following deportation. Also, according to Plaintiffs, the class  
7 may expand because Defendants continue to insist that their  
8 specific consent is required before any in-custody minor may  
9 proceed to state court. On this basis, the Court believes that  
10 joinder is impracticable and that the specific consent subclass  
11 satisfies the numerosity requirement.

12 **b. Commonality**

13 Plaintiffs must also demonstrate "there are questions of law  
14 or fact common to the class." Fed. R. Civ. P. 23(a)(2).  
15 Commonality requires only that each class member be similarly  
16 situated in sharing common questions of law or fact. Sec. Harris  
17 v. Palm Spring Alpine Estates, Inc., 329 F.2d 909, 914 (9th Cir.  
18 1964). Individual variation among plaintiffs' questions of law and  
19 fact does not defeat underlying legal commonality: "[t]he existence  
20 of shared legal issues with divergent factual predicates is  
21 sufficient, as is a common core of salient facts coupled with  
22 disparate legal remedies within the class. Hanlon v. Chrysler  
23 Corp., 150 F.3d 1011, 1019 (9th Cir. 1998). Courts have found that  
24 a single common issue of law or fact is sufficient to satisfy the

25

26

27 <sup>5</sup>(...continued)  
28 failed to decide 58 requests for specific consent prior to the  
applicant's turning 18 years old. (See Pl.'s Ex. 29.)

1 commonality requirement. Id. at 1019-20; Slaven v. BP America,  
2 Inc., 190 F.R.D. 649, 655 (C.D. Cal. 2000).

3 Plaintiffs argue that the claims proposed for class  
4 certification clearly present shared legal issues regarding a  
5 common course of conduct. They identify four questions that are  
6 common to the subclass: (1) whether Defendants may lawfully demand  
7 that SIJ applicants obtain specific consent, even where a state  
8 court will not determine a minor's custody status or placement; (2)  
9 whether Defendants can determine that a minor requesting specific  
10 consent has been abused, abandoned or neglected within the meaning  
11 of state law; (3) whether Defendants may lawfully delay deciding a  
12 timely presented, and properly supported, request for specific  
13 consent, such that the minor turns 18 while his or her request of  
14 pending; and (4) whether Defendants' denial of requests for  
15 specific consent, without adherence to procedures comparable to  
16 those followed by a state juvenile court, violates due process.  
17 (Pl.'s Reply 5.)

18 Defendants counter that Plaintiffs have broadly challenged the  
19 specific consent procedures, but have failed to demonstrate the  
20 existence of a class of persons who share the same claims or  
21 suffered the same injury as the named Plaintiffs, "such that the  
22 [Plaintiffs'] claims and the class claims will share common  
23 questions of law or fact." (Def.'s Opp. 14-15, citing Gen. Tel. Co.  
24 v. Falcon, 457 U.S. 147, 157 (1982).) Defendants further argue  
25 that these legal claims lack commonality because of wide factual  
26 variation. (Id. 15.)

27 In this case, Plaintiffs raise several claims that challenge  
28 Defendants' policies and practices with respect to the specific

1 consent requirement. A common legal question is raised by  
2 Plaintiffs' claim that the SIJ statute does not permit application  
3 of the specific consent requirement if a state court's judgment  
4 will not alter the minor's "custody status or placement." This  
5 claim asks the Court to decide whether Defendants are acting  
6 outside their authority under the SIJ statute by requiring specific  
7 consent of in-custody minors under such circumstances, and whether  
8 a state court's dependency judgment alters the minor's custody or  
9 placement. Commonality is established because this claim  
10 challenges Defendants' statutory authority for requiring specific  
11 consent even if a state court dependency judgment does not alter  
12 custody status or placement. Similarly, claims of due process  
13 violations and unreasonable delay also are common legal claims  
14 directed at Defendants' specific consent policy. Where Plaintiffs  
15 raise a common questions of law, Defendants' concerns about  
16 multiple legal issues and factual variation do not defeat  
17 commonality. See Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019  
18 (9th Cir. 1998).

19 **c. Typicality**

20 Rule 23(a) also requires that Plaintiffs demonstrate that "the  
21 claims or defenses of the representative parties are typical of the  
22 claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). As  
23 Judge Rymer of the Central District of California explained:

24 A plaintiff's claim meets [the typicality] requirement  
25 if it arises from the same event or course of conduct  
26 that gives rise to claims of other class members and  
27 the claims are based on the same legal theory. The  
28 test generally is whether other members have the same  
or similar injury, whether the action is based on  
conduct which is not unique to the named plaintiffs,  
and whether other class members have been injured by  
the same course of conduct.

1 Schwartz, 108 F.R.D. at 282. Where an action challenges a policy  
2 or practice, named plaintiffs that suffer one specific injury from  
3 the practice may represent a class suffering additional injuries,  
4 so long as all the injuries are shown to result from the practice.  
5 General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 157-59  
6 (1982).

7 Defendants argue that Plaintiffs have failed to demonstrate  
8 which of the ten named Plaintiffs represent the proposed subclass  
9 of persons challenging Defendant's specific consent procedures.  
10 Defendants also argue that Plaintiffs have not shown how the  
11 representative Plaintiffs have the same claims or suffered the same  
12 injury as the members of the putative subclass. (Def.'s Opp. 16-  
13 17.)

14 Plaintiffs disagree with Defendants' contention that the  
15 proposed representatives of the class - Morales, Li and Casa Libre  
16 Youth Shelter - do not have claims typical of those of the class.  
17 Plaintiffs cite Smith v. Univ. of Wash. Law. Sch., 2 F. Supp.2d  
18 1324, 1342 (W.D. Wash 1998), for the proposition that "when it is  
19 alleged that the same unlawful conduct was directed at, or affected  
20 both, the named Plaintiff and the class to be represented, the  
21 typicality requirement is usually satisfied, irrespective of  
22 varying fact patterns which underlie individual claims." (Pl.  
23 Reply 10.)

24 Plaintiffs allege that ICE has adopted a common set of  
25 specific consent policies and practices that violate the  
26 Immigration and Nationality Act. Plaintiffs' statutory claim is  
27 that Defendants may not require specific consent if the state court  
28



1 does not alter "custody status or placement." Additionally,  
2 Plaintiffs raise due process and unreasonable delay claims.  
3 Typicality is established because these legal theories apply to all  
4 in-custody minors that sought and did not receive specific consent  
5 to obtain SIJ-predicate orders in state court. Also, Plaintiffs  
6 and class members share the specific injury of loss of SIJ  
7 eligibility. Thus, the typicality requirement is satisfied for the  
8 statutory claim.

9 **d. Adequacy**

10 Finally, Plaintiffs must demonstrate that "the representative  
11 parties will fairly and adequately protect the interests of the  
12 class." Fed. R. Civ. P. 23(a)(4). Adequacy of representation is  
13 necessary to provide due process of law to unnamed class members  
14 that will be bound by the judgment in the representative's action.  
15 Crawford v. Honig, 37 F.3d 485, 487 (9th Cir. 1994). "Parties are  
16 generally considered to be adequate class members if there are no  
17 conflicts of interest between the representatives and class members  
18 and if the Court is persuaded that counsel for the representatives  
19 will vigorously pursue the action." Burkhalter Travel Agency v.  
20 MacFarms Int'l, Inc., 141 F.R.D. 144, 153 (N.D. Cal. 1991) (citing  
21 Gen. Tel., 457 U.S. 147, 156 (1982)).

22 Defendants argue that named Plaintiffs will inadequately  
23 represent the class, as both Plaintiffs Morales and Li delayed  
24 seeking specific consent for several months after being placed in  
25 federal custody and obtaining counsel. Because named Plaintiffs  
26 only sought specific consent one month and three months before  
27 turning eighteen years old, this jeopardizes the subclass's chance  
28

1 of success on their claims, and prejudices the other class members.  
2 (Def.'s Opp. 17-19.)

3 Plaintiffs disagree. Plaintiffs reiterate that there is no  
4 evidence to show that there is any conflict between Plaintiffs and  
5 the other class members. The named Plaintiffs are seeking the same  
6 injunctive and declaratory relief for both the class and  
7 themselves, which proves that there is no conflict between named  
8 Plaintiffs and the other class members. Also, Plaintiffs argue  
9 that there is no evidence to suggest that Plaintiffs or their  
10 counsel will fail to vigorously prosecute this action on behalf of  
11 the class. (Pl.'s Mot. 18-19.)

12 The Court finds that this prong is satisfied. First,  
13 Plaintiffs' lead counsel are sufficiently qualified to pursue this  
14 action for all three subclasses. They are employed by a non-profit  
15 organization specializing in federal litigation on behalf of  
16 immigrants and refugees and have previously successfully litigated  
17 class actions. Second, Plaintiffs' statutory or due process claims  
18 to turn on factual differences the class representatives and class  
19 members share identical claims and an interest in class-wide relief  
20 from the allegedly unlawful requirement of specific consent.  
21 Defendants' assertion of factual differences in the timing of  
22 Plaintiffs' specific consent requests appears relevant only to  
23 Plaintiffs' unreasonable delay claim. Nevertheless, the Court does  
24 not consider these factual differences to indicate any inadequacy  
25 of the class representatives.

26 **e. 23(b)(2)**

27 In addition to satisfying the Rule 23(a) requirements, a  
28 certifiable class must also meet the requirements set out in Fed.

1 R. Civ. P. Rule 23(b). Plaintiffs maintain that this class action  
2 satisfies Rule 23 (b)(2) requirements: "the party opposing the  
3 class has acted (or refused to act) in a manner applicable to the  
4 class generally, thereby making injunctive or declaratory relief  
5 appropriate with respect to the class as a whole." Identification  
6 of all class members is not necessary under Rule 23 (b)(2). The  
7 rule is appropriate for cases where plaintiffs bring a class action  
8 on behalf of a "shifting population." Shook v. El Paso County, 386  
9 F.3d. 963, 972 (10th Cir. 2004).

10 Plaintiffs argue that Defendants have implemented policies and  
11 procedures that, *inter alia*, unlawfully require specific consent  
12 under circumstances when it is not statutorily required,  
13 unreasonably delay the adjudication of applications for SIJ status  
14 and adjustment of status, pre-judge an in-custody minor's  
15 underlying eligibility for dependency protection and SIJ  
16 classification, and do not provide due process. Plaintiffs  
17 maintain that its challenges to Defendants' policies and procedures  
18 are thus suitable for class-wide relief. (Pl.'s Mot. 20.)

19 Defendants, however, argue that the subclass is not  
20 maintainable under Rule 23(b)(2). Defendants contend that  
21 Plaintiffs' arguments raise a generic due process claim that will  
22 require individualized adjudications for each class member. As  
23 such, Defendants argue that its policies or practices are not  
24 "generally applicable" to the class as required by Rule 23(b)(2).  
25 (Def. Opp. )

26 The Court finds that Plaintiffs have met the requirements for  
27 a Rule 23(b)(2) class action. Plaintiffs' claims challenge  
28 Defendants' common set of policies and practices on specific

1 consent that are applied generally to SIJ-eligible in-custody  
2 minors. While Defendants contend that certification of the  
3 subclass is inappropriate because it will implicate individualized  
4 adjudications, the Court disagrees: Plaintiffs are claiming that  
5 Defendants' specific consent policy is impermissible under the  
6 statute, violates due process, and causes unreasonable delay. This  
7 is a complaint about the legality of Defendants' conduct with  
8 respect to the class of persons that they require to obtain  
9 specific consent. The claims will not turn on individualized  
10 adjudications. Because Plaintiffs' claim seeks injunctive relief  
11 that will change Defendants' policy applicable to the class as a  
12 whole, Plaintiffs have met their burden under Rule 23(b)(2).

## 13 **2. Age-out subclass**

14 The proposed subclass definition for the age-out subclass is  
15 as follows: youth whose petitions for SIJ classification Defendants  
16 deny or revoke pursuant to 8 C.F.R. §§ 204.11(c)(1) or (5), or  
17 205.1(a)(3)(iv)(A), (C), or (D) ("age-out subclass").

### 18 **a. Numerosity**

19 Plaintiffs indicate an inability to precisely identify the  
20 membership size of the age-out subclass because Defendants do not  
21 maintain records of the number of persons that submit SIJ  
22 applications and have those applications denied or left undecided  
23 when the applicant turns eighteen. (Pl. 16-17; see Pl.'s Ex. 24).  
24 Nevertheless, Plaintiffs interpret Defendants' estimates of 2,258  
25 SIJ applications between 2000 and 2006 to suggest approximately 375  
26 SIJ applications annually. (Pl. Mot. 16-17; Pl. Ex. 27.]  
27 Plaintiffs also point to statistics compiled in 1990 that the  
28 majority of detained alien juveniles are 16 or 17 years old, which

1 means on the verge of aging-out from SIJ eligibility. Further,  
2 Plaintiffs offer the declarations of immigration attorneys to show  
3 long delays in adjudication of SIJ applications and instances of  
4 SIJ-eligible youth that lost eligibility due to the age-out  
5 regulations. On this basis, Plaintiffs argue that "many hundreds  
6 of abused, abandoned, and neglected youth" are subject to the age-  
7 out regulations. (Pl.'s Mot. 13.)

8 Defendants argue that Plaintiffs speculate as to class  
9 numerosity. (Def.'s Opp. 22.) While Defendants are correct that  
10 Plaintiffs' statistics are imprecise, this shortcoming is not  
11 dispositive. Courts have found joinder impracticable when it was  
12 difficult to identify the proposed class members. See Phillips v.  
13 Joint Legislative Comm., 637 F.2d 1014, 1022 (5th Cir. 1981)  
14 (numerosity found in race discrimination suit where neither party  
15 could identify class members because defendant-employer did not  
16 track applicants' race); Israel v. Avis Rent-A-Car Sys., Inc., 185  
17 F.R.D. 372, 378 (S.D. Fla. 1999) (numerosity established where the  
18 necessary information to identify class members was within  
19 defendant's control).

20 Here, the government has represented to Plaintiffs that they  
21 have not tracked the number of persons denied SIJ classification or  
22 SIJ-based adjustment of status due to the age-out regulations. The  
23 inability to identify those individuals that have lost eligibility  
24 based on their age indicates the impracticability of joinder. The  
25 geographical dispersion of class members and the addition of class  
26 members in the future due to the continuing application of the age-  
27 out regulations further support impracticability of joinder.

28

1 Plaintiffs also offer additional evidence that supports a  
2 "reasonable judgment" that joinder is impracticable. Blackie v.  
3 Barrack, 524 F.2d 891, 901 n.17 (9th Cir. 1975). In particular,  
4 Plaintiffs' evidence of attorneys that have worked with immigrant  
5 children, many of whom sought SIJ classification and adjustment of  
6 status subject to the age-out regulations, suggests a sufficient  
7 number of class members to satisfy numerosity. Therefore, the  
8 Court finds sufficient evidence of numerosity.

9 **b. Commonality**

10 Plaintiffs maintain that common legal issues unite this  
11 subclass. It is alleged that Defendants have promulgated and  
12 adhered to the age-out regulations that are inconsistent with the  
13 SIJ statute. Further, Plaintiffs allege that Defendants  
14 unreasonably delay decisions on SIJ applications and adjustment of  
15 status, which causes class members to age-out from eligibility.  
16 (Pl.'s Reply 14-15.)

17 Defendants concede that Plaintiffs and class members share the  
18 outcome of lost eligibility. Even so, where the age-out outcome is  
19 not the result of a common policy or practice, but rather a diverse  
20 set of statutory requirements, regulations, and agency policies and  
21 practices, Defendants assert that Plaintiffs cannot establish  
22 commonality. (Def.'s Opp. 22-23.)

23 The Court, however, reads the Plaintiffs' claims to attack a  
24 set of common statutory requirements, regulations, and agency  
25 policies and practices that result in unreasonable delay. CIS's  
26 statutory authority to enact and follow the age-out regulations.  
27 (Pl.'s Reply 14.) Commonality is established as Plaintiffs present

28

1 common legal issues independent of class members' factual  
2 differences.

3 **c. Typicality**

4 Similarly, Plaintiffs' claims that Defendants lack statutory  
5 authority to enact and follow the age-out regulations, and of a  
6 common policy or practice of delaying adjudication of SIJ  
7 applications until youth age-out of eligibility, are typical of the  
8 class. Plaintiffs have the same claim, suffer the same injury, and  
9 have the same interest in seeking injunctive relief, factual  
10 differences notwithstanding.

11 **d. Adequacy**

12 The Court finds that Plaintiffs will adequately represent the  
13 age-out subclass. Where Plaintiffs challenge Defendants' authority  
14 to enact and implement the age-out regulations, and the application  
15 of those regulations, all class members that lost SIJ or SIJ-based  
16 adjustment of status eligibility are similarly situated with  
17 respect to those claims. There is no conflict between Plaintiffs  
18 and class members with respect to that claim. Further, Plaintiffs  
19 seek injunctive relief for the whole subclass. Thus, adequacy of  
20 representation is established.

21 **e. 23(b)(2)**

22 In this case, the age-out regulations are "generally  
23 applicable to the class." Plaintiffs' claims against those  
24 regulations challenge a generally applicable course of conduct  
25 directed at class members. Where Plaintiffs' claim challenge  
26 common policies or practices and seek generally applicable  
27 injunctive relief, this satisfies the requirements of Rule  
28 23(b)(2).

1                   **3.    Removal proceedings subclass**

2           The proposed class definition for the removal proceedings  
3 subclass is as follows: youth undergoing removal proceedings whose  
4 applications for SIJ-based adjustment of status Defendants refuse  
5 to adjudicate pursuant to 8 C.F.R. §§ 245.2(a)(1) and  
6 1245.2(a)(i)(1), and 8 C.F.R. §§ 1003.2(c)(2) or 1003.23(b)(1)  
7 ("removal proceedings subclass"). In challenging class  
8 certification for this subclass, Defendants raise an argument that  
9 Plaintiffs lack standing. The Court reviews the standing argument  
10 before turning to class certification standards.

11                   a.   Standing

12           In order to maintain a class action, named plaintiffs must  
13 demonstrate that they have personally sustained an injury which  
14 results from a challenged statute or government conduct. Armstrong  
15 v. Davis, 275 F.3d 849, 860 (9th Cir. 2001). To establish  
16 standing, the plaintiffs must show three elements: (1) injury (2) a  
17 causal connection between the injury and the challenged conduct;  
18 and (3) a likelihood that the injury will be redressed by a  
19 favorable decision. Bras v. Cal. Pub. Util. Comm., 59 F.3d 869,  
20 872 (9th Cir. 1995) (citing Lujan v. Defenders of Wildlife, 504  
21 U.S. 555, 559 (1992)). A plaintiff may establish standing by  
22 showing an injury traceable to a written policy or a pattern of  
23 official conduct. Armstrong, 275 F.3d at 860-61.

24           Defendants argue that Plaintiffs have failed to establish  
25 standing to sue on behalf of this subclass because they cannot  
26 trace an injury to the challenged regulations or conduct. They  
27 attribute the lack of standing to Plaintiffs' "misrepresentation"  
28 of the regulations that govern removal proceedings. (Def.'s Opp.



1 29). The misrepresentation in question is Plaintiffs' assertion  
2 that youth in removal proceedings cannot have their SIJ-based  
3 applications for adjustment of status heard 90 days after an order  
4 of removal.

5 Once youth are in removal proceedings, USCIS no longer has  
6 authority to adjudicate those applications because a BIA or  
7 immigration judge has exclusive jurisdiction. 8 C.F.R. §  
8 204.11(b)(2). An immigrant youth must make a motion to reopen  
9 removal proceedings within 90 days of the final order of removal.  
10 8 C.F.R. § 1003.23(b)(i). According to Plaintiffs' motion, youth  
11 that become eligible for SIJ-based adjustment of status more than  
12 90 days after a final removal order are barred from having SIJ-  
13 based adjustment of status applications heard because current  
14 regulations do not allow BIA or immigration judges to reopen  
15 proceedings 90 days after an order of removal. (Pl. Mot. 7-8.)

16 Defendants, however, are correct that current regulations  
17 provide a BIA or immigration judge with discretion to reopen a  
18 youth's case "at any time", which would include after the 90 day  
19 deadline set for youth to move for reopening of their removal  
20 proceedings. See 8 C.F.R. §§ 1003.2(a) and 1003.23(b)(1). Also, a  
21 case may be reopened when the motion is "agreed upon by all parties  
22 and jointly filed." 8 C.F.R. §§ 1003.2(a), 1003.23(b)(1),  
23 1003.23(c)(3)(iii), and 1003.23(b)(4)(iv).

24 In their motion, Plaintiffs seem to misstate the regulations  
25 when they argue that the BIA or an immigration judge may not reopen  
26 a youth's case 90 days after a removal order. In their reply,<sup>6</sup>

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27  
28 <sup>6</sup> Plaintiffs first respond that Defendants' standing argument  
(continued...)

1 however, Plaintiffs appear to accept Defendants' interpretation of  
2 the regulations. Plaintiffs then explain that they claim youth are  
3 entitled to adjudication of adjustment of status applications,  
4 whether or not Defendants join a motion to reopen in removal  
5 proceedings. Finally, Plaintiffs seem to argue that named  
6 plaintiff Garrido-Martinez, the sole named plaintiff for this  
7 subclass, has standing because Defendants refused to join a motion  
8 to reopen removal proceedings, resulting in the motion's rejection  
9 and plaintiff Garrido-Martinez's injury. (Pls.' Reply 19.)

10 The nature of Plaintiffs' claim is unclear, and this  
11 complicates the Court's ability to rule on the removal subclass.  
12 Nevertheless, the Court understands Plaintiffs to argue that  
13 Defendants' removal regulations prevent immigrant youth from  
14 obtaining SIJ-based adjustment of status, and therefore, are  
15 inconsistent with the SIJ statute. Plaintiffs challenge both the  
16 exclusive jurisdiction of BIA or immigration judges for the SIJ-  
17 based adjustment of status applications of youth in removal  
18 proceedings and the 90-day deadline for youth to move for reopening  
19 of their cases. Moreover, Plaintiffs appear to assert that  
20 Defendants have a common practice of refusal to join in reopening  
21 youth's cases 90 days after removal, that this refusal prevents  
22 youth from having their cases reopened, and that youth therefore do  
23 not have their SIJ-based adjustment of status applications heard.

24

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25 <sup>6</sup>(...continued)  
26 improperly addresses the merits of their claim. (Pl.'s Reply 19.)  
27 Contrary to Plaintiffs' contention, the Court is bound to ensure  
28 that a named Plaintiff has standing to sue. This inquiry requires  
the Court to determine whether a plaintiff has suffered an injury  
traceable to a defendants' conduct, not analysis of the merits of a  
claim.

1 Plaintiff Garrido-Martinez certainly suffered a personal  
2 injury because his SIJ-based adjustment of status application was  
3 not adjudicated. Here, the dispositive question on standing is  
4 whether that injury can be traced to Defendants' regulations,  
5 policies, or practices. Certainly, Garrido-Martinez has standing  
6 to challenge Defendants' statutory authority to apply the removal  
7 regulations to SIJ-eligible youth: if Defendants lack such  
8 authority, then the application of those regulations to Garrido-  
9 Martinez caused him injury in depriving him of adjudication of his  
10 SIJ-based adjustment application. Further, Garrido-Martinez has  
11 standing to challenge Defendants refusal to join his motion to  
12 reopen: if Defendants had joined in a motion to reopen, Garrido-  
13 Martinez's case would have been reopened. This would have allowed  
14 the BIA or immigration judge to adjudicate his SIJ-based adjustment  
15 of status application.<sup>7</sup>

16 On this interpretation of Plaintiffs' claims, the Court  
17 accepts that Plaintiff Garrido-Martinez has satisfied the  
18 requirement of standing by showing an injury traceable to the  
19 challenged government conduct. The Court now turns to the issue of  
20 class certification for this subclass.

21 **b. Rule 23(a) Requirements**

22 **i. Numerosity**

23  
24 

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<sup>7</sup> There is a counterargument not raised by Defendants that  
25 Garrido-Martinez's injury was not solely caused by Defendants'  
26 refusal to join the motion to reopen because the judge's refusal to  
27 reopen the case sua sponte could equally be the cause of the  
28 injury. However, based on the Court's reading of Plaintiffs'  
argument, once the Defendants refused to join the motion to reopen,  
it is common practice that the judge too will not move sua sponte  
to reopen the case despite their discretion to do so.

1           Although Plaintiffs need not identify a precise class size,  
2 especially when the number of class members may be unknown, they  
3 still must support a reasonable estimate of the class size or  
4 demonstrate the impracticability of joinder. Unlike in the  
5 previous subclasses where Plaintiffs provided a reasonable basis  
6 for the inference that numerosity was met, the only basis provided  
7 by Plaintiffs for the numerosity of this subclass is a declaration  
8 by Plaintiffs' counsel asserting that "hundreds" of immigrant youth  
9 subject to removal proceedings each year who may seek SIJ-based  
10 adjustment of status 90 days after a removal order. (Pl.'s Mot.  
11 16.) Also, Plaintiffs do not offer arguments to support the  
12 impracticability of joinder. Therefore, the Court finds that  
13 numerosity is not met.

14   **ii. Commonality**

15           In both their motion and reply, Plaintiffs are unclear as to  
16 the claims that would form the basis for establishment of  
17 commonality. In Plaintiffs' motion, they seem to challenge that  
18 the regulations give exclusive jurisdiction to the BIA or  
19 immigration judge to adjudicate SIJ-based adjustment applications,  
20 or that the regulations set a 90 day limit for youth to bring  
21 motions to reopen. In their reply, Plaintiffs focus on a policy or  
22 practice where Defendants refuse to join motions to reopen beyond  
23 the 90 day deadline.

24           Despite Plaintiffs' shifting conception of this subclass's  
25 claims, commonality is established. Plaintiffs' claim that  
26 Defendants' removal regulations, as applied to members of the  
27 class, deprive SIJ-eligible youth in removal of adjudication of  
28 their SIJ-based adjustment applications, is common to class.

1                                    **iii. Typicality**

2            Similarly, Plaintiffs are unclear as to the claims that would  
3 form the basis for establishment of typicality. The Court has  
4 difficulty in determining whether Plaintiffs' claims are typical  
5 when it is not precisely clear which claims Plaintiff raises for  
6 this class. It would be possible that a claim by Plaintiff that  
7 Defendants have a common policy of refusal to join motions to  
8 reopen could be typical of a class if Plaintiffs were to show the  
9 Court that other class members in fact have these claims. However,  
10 Plaintiffs have not made this showing. At this time, the Court is  
11 unable to find that Plaintiff has claims typical of this class.

12                                    **iv. Adequacy**

13            Plaintiff could be an adequate representative for a class  
14 asserting a claim against a common policy or practice by Defendants  
15 of refusing to join motions to reopen. Plaintiff likely would not  
16 have a conflict with this delimited group of class members.  
17 However, because other requirements have not been met, this is  
18 insufficient to meet the threshold Rule 23(a) requirements.  
19 Because at this time the Court is inclined to find that the removal  
20 subclass does not meet the Rule 23(a) requirements for class  
21 certification, the Court need not consider Rule 23(b) requirements.

22

23            **III. PLAINTIFFS' MOTION FOR PARTIAL SUMMARY ADJUDICATION AND**  
24            **DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT**

25            Summary adjudication, like summary judgment, is appropriate  
26 where "the pleadings, depositions, answers to interrogatories, and  
27 admissions on file, together with the affidavits, if any, show that  
28 there is no genuine issue as to any material fact and that the

1 moving party is entitled to a judgment as a matter of law." Fed.  
2 R. Civ. P. 56(c). A genuine issue of fact exists if "the evidence  
3 is such that a reasonable jury could return a verdict for the  
4 nonmoving party," and material facts are those "that might affect  
5 the outcome of the suit under the governing law." Anderson v.  
6 Liberty Lobby, Inc. , 477 U.S. 242, 248 (1986). On a motion for  
7 summary judgment or summary adjudication, a court must draw all  
8 reasonable inferences in favor of the nonmoving party. Id. at 253.

9 **A. Specific Consent**

10 Section 1101(a)(27)(J)(iii)(I) provides: "No juvenile court  
11 has jurisdiction to determine the custody status or placement of an  
12 alien in the actual or constructive custody of the Attorney General  
13 unless the Attorney General specifically consents to such  
14 jurisdiction." 8 U.S.C. § 1101(a)(27)(J)(iii)(I) (emphasis added).  
15 It is Defendants' undisputed policy to require that in-custody  
16 minors obtain ICE's specific consent to state court jurisdiction,  
17 prior to seeking an SIJ-predicate order in state court. (Defs.'  
18 Opp'n 4.)

19 **1. Statutory Interpretation of the Specific Consent**  
20 **Requirement**

21 **a. The Plain Language of 8 U.S.C. § 1101(a)(27)(J)**  
22 **Requires Specific Consent Only If a State Court**  
23 **Determines The Custody Status or Placement of a**  
24 **Minor in Federal Custody.**

25 When interpreting a statute, the Court must "look first to the  
26 plain language of the statute, construing the provisions of the  
27 entire law, including its object and policy, to ascertain the  
28 intent of Congress." United States v. Mohrbacher, 182 F.3d 1041,

1 1048 (9th Cir. 1999) (internal quotation and citation omitted).  
2 The Supreme Court has explained that "jurisdictional statutes [must  
3 not be given] a more expansive interpretation than their text  
4 warrants, but it is just as important not to adopt an artificial  
5 construction that is narrower than what the text provides." Exxon  
6 Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 558 (2005).

7 In this case, the Court is asked to interpret the scope of the  
8 SIJ specific consent requirement.<sup>8</sup> The specific consent  
9 requirement is unambiguously limited to instances when a state  
10 court will "determine . . . custody status or placement." 8 U.S.C.  
11 § 1101(a)(27)(J)(iii)(I). Yet the statute does not define "custody  
12 status or placement." Where a statutory term is not defined in the  
13 statute, a court should give the term its ordinary meaning.  
14 Mohrbacher, 182 F.3d at 1048. The term "custody" is defined as the  
15 "immediate care and control (as over a ward or a suspect) exercised  
16 by a person or an authority." Merriam-Webster Online Dictionary,  
17 available at <http://www.m-w.com>. The term "status" is defined as  
18 "the condition of a person or thing in the eyes of the law."<sup>9</sup> Id.

19  
20 <sup>8</sup> The Court notes at the outset that the Third Circuit's  
21 decision in Yeboah v. United States Dept' of Justice, 345 F.3d 216,  
22 221 (3d Cir. 2003), does not address the issue raised here. In  
23 Yeboah, the court reviewed ICE's denial of an in-custody minor's  
24 request for specific consent under an abuse of discretion standard.  
25 The court found no abuse of discretion where ICE followed agency  
26 policy. Id. at 223-25. However, the court was not presented with  
27 the question whether ICE policy's requirement of specific consent  
28 exceeded the requirement as written in the text of the statute.  
Where that is the question presented in this case, Yeboah is not on  
point.

26 <sup>9</sup> Merriam-Webster Online Dictionary, available at  
27 <http://www.m-w.com>. Congress likely considered "custody status"  
28 distinct from "placement" because some minors are in Defendants'  
custody, but Defendants then place minors with another entity, such  
as a foster home.

1 The term "placement" is defined as the "assignment of a person to  
2 a place." Id.

3 The logical reading of "custody status" is that it refers to  
4 whom has care or control of a person; in other words, who is the  
5 custodian. The federal government is itself custodian when a minor  
6 is in its actual, physical custody or in its constructive custody,  
7 which can only mean that the federal government has arranged for a  
8 third-party to care for a person, but itself maintains control.  
9 When the federal government is itself an immigrant minor's  
10 custodian, the statute is clear that a state court lacks  
11 jurisdiction to alter such custody absent the federal government's  
12 specific consent. Similarly, when the federal government is itself  
13 an immigrant minor's custodian, the statute does not provide state  
14 courts with jurisdiction to alter such custody by seeking to place  
15 an immigrant minor in a foster home or other location, absent the  
16 specific consent of the federal government which has custody and  
17 therefore makes placement decisions. See Deal v. United States,  
18 508 U.S. 129, 132 (1993) ("[T]he meaning of a word cannot be  
19 determined in isolation, but must be drawn from the context in  
20 which it is used.").

21 The specific consent requirement, however, does not apply to  
22 all SIJ-predicate orders, as is Defendants' policy. After all, a  
23 state court's SIJ-predicate order - that includes findings of  
24 dependency, abuse, neglect, and abandonment, and the child's best  
25 interests - does not alter a minor's custody status or placement,  
26 unless the state court additionally seeks to alter a particular  
27 child custody arrangement, assigns the child to a foster home, or  
28 takes some similar action. This reading is proper because state



1 courts routinely take actions with respect to minors that are  
2 unrelated to custody or placement decisions. Congress recognized  
3 as much in the statute's plain language by explicitly identifying  
4 dependency, commitment, and custody as distinct state court  
5 actions. See 8 U.S.C. § 1101(a)(27)(J)(i) (stating that an SIJ-  
6 predicate order may declare a minor dependent on the court, legally  
7 commit a minor to a state agency, or place the minor under the  
8 custody of a state agency). Basic principles of statutory  
9 construction, along with a common sense understanding of state  
10 court child welfare determinations, indicate that SIJ-predicate  
11 orders are not the same as orders determining custody status or  
12 placement. See, e.g., Bedroc Ltd. v. United States, 314 F.3d 1080,  
13 1088 (9th Cir. 2002) ("It is a cardinal principle of statutory  
14 construction that a statute ought, upon the whole, to be so  
15 construed that, if it can be prevented, no clause, sentence, or  
16 word shall be superfluous, void, or insignificant.") (internal  
17 quotation marks omitted).

18 The Court's reading also furthers several important  
19 Congressional objectives. Congress created SIJ classification to  
20 protect abused, neglected, and abandoned immigrant youth through a  
21 process allowing them to become legal permanent residents. When  
22 Congress amended the statute in 1997, it added the specific consent  
23 requirement. 8 U.S.C. § 1101(a)(27)(J)(iii)(I).<sup>10</sup> In doing so,

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24  
25 <sup>10</sup> In 1997, Congress became concerned that visiting students  
26 were abusing the SIJ process and amended the SIJ statute to "limit  
27 the beneficiaries of this provision to those juveniles for whom it  
28 was created, namely abandoned, neglected, or abused children. . .  
." H.R. Rep. No. 105-405, at 130 (1997). However, this rationale  
is only mentioned in connection with Congress's adoption of the 8  
U.S.C. § 1101(a)(27)(J)(iii) requirement that "the Attorney General  
(continued...)

1 Congress reasonably prohibited state courts from interfering with a  
2 minor in the actual or constructive custody of the federal  
3 government. This prohibition is logical because the federal  
4 government may have a minor in its custody as a witness to a crime,  
5 pursuant to a criminal investigation, or due to immigration status.  
6 In short, for minors in the actual or constructive custody of the  
7 federal government, the federal government appropriately maintains  
8 control over minors' custody or placement where important federal  
9 interests are at stake, and a state court may only alter that  
10 custodial status with the federal government's consent.<sup>11</sup>

11 At the same time, by limiting the specific consent requirement  
12 to custody and placement decisions, Congress appropriately reserved  
13 for state courts the power to make child welfare decisions, an area  
14 of traditional state concern and expertise. See Ankenbrandt v.  
15 Richards, 504 U.S. 689, 702 (1992) (recognizing that "the whole  
16 subject of domestic relations of husband and wife, parent and  
17 child, belongs to the laws of the States and not to the laws of the  
18 United States") (internal quotation and citation omitted). The SIJ  
19 statute affirms the institutional competence of state courts as the  
20 appropriate forum for child welfare determinations regarding abuse,  
21 neglect, or abandonment, and a child's best interests.

22

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23 <sup>10</sup>(...continued)  
24 [must] expressly consent[] to the dependency order serving as a  
25 precondition to the grant of special immigrant juvenile status. . .  
26 ." See id. The specific consent requirement appears to have been  
27 adopted for other, unstated reasons.

28 <sup>11</sup> Although an SIJ-predicate order makes an immigrant minor  
eligible for SIJ classification, the federal government maintains  
ultimate authority whether to grant SIJ status under the  
aforementioned express consent provision. 8 U.S.C. §  
1101(a)(27)(J)(iii).

1           Essentially, the specific consent requirement balances  
2 competing federal and state interests. Congress has plenary power  
3 over immigration. See, e.g., Fiallo v. Bell, 430 U.S. 787, 792  
4 (1977). State courts have general jurisdiction over child welfare  
5 matters. See Ankenbrandt, 504 U.S. at 702; see also Reno v.  
6 Flores, 507 U.S. 292, 312 n.7 (1993). The specific consent  
7 requirement accommodates this "dual sovereignty" of the federal  
8 government and states. See, e.g., Printz v. United States, 521  
9 U.S. 898, 918-19 (1996); Tafflin v. Levitt, 493 U.S. 455, 458-60  
10 (1990).<sup>12</sup> As state courts are bound to enforce state law in a  
11 fashion that does not conflict with federal law, Silkwood v.  
12 Kerr-McGee Corp., 464 U.S. 238, 248 (1984), it places limits on the  
13 scope of state court actions that may be taken, absent specific  
14 consent, with respect to immigrant minors in federal custody.

15           Ultimately, Defendants' reading of the statute, always  
16 prohibiting an in-custody minor from seeking an SIJ-predicate order  
17 unless he or she obtains ICE's specific consent, is inconsistent  
18 with the plain language of the statute. By explicitly adopting  
19 language that limited the specific consent requirement, Congress  
20 expressed a preference to exclude Defendants' overbroad

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21  
22           <sup>12</sup> Since the Court finds the statute to limit the specific  
23 consent requirement, the Court does not address the constitutional  
24 implications of a statutory provision that would always require  
25 specific when a minor sought state court jurisdiction for an SIJ-  
26 predicate order. Although Congress may be entitled to enact a  
27 requirement of Defendants' specific consent for a minor in federal  
28 custody to invoke state juvenile court jurisdiction, the Court need  
not consider the issue because the statute as written does not  
wholly condition state juvenile court jurisdiction on Defendants'  
specific consent. See Bates v. Dow Agrosciences L.L.C., 544 U.S.  
431, 449 (2005) ("In areas of traditional state regulation, [the  
Supreme Court] assume[s] that a federal statute has not supplanted  
state law unless Congress has made such an intention 'clear and  
manifest.'").

1 interpretation. See TRW Inc. v. Andrews, 534 U.S. 19, 28 (2001)  
2 (holding against judicial implication of an exception more  
3 expansive than the text of the statute). Had Congress intended to  
4 adopt Defendants' construction, Congress had the option to  
5 effectuate such intent by a clear statement that no juvenile court  
6 has jurisdiction over an alien in the actual or constructive  
7 custody of the Attorney General unless the Attorney General  
8 specifically consents to such jurisdiction. Congress did not adopt  
9 such broad language. Instead, Congress adopted language that  
10 limits Defendants' authority to require specific consent, granting  
11 the power for instances when a state court will alter custody  
12 status or placement.

13 The Court notes that its reading avoids the significant due  
14 process concerns implicated by Defendants' blanket policy of  
15 requiring specific consent. See Edward J. DeBartolo Corp. v.  
16 Florida Gulf Coast Building & Constr. Trades Council, 485 U.S. 568,  
17 575 (1988) (indicating that a court's reasonable interpretation of  
18 a statute that avoids constitutional problems is appropriate, even  
19 though an alternative construction is possible). Due process  
20 protections apply to determinations of benefits. Goldberg v.  
21 Kelly, 397 U.S. 254 (1970). Congress has conferred the opportunity  
22 to apply for SIJ status on immigrant youth deemed eligible by state  
23 court order. It is Defendants' policy to review specific consent  
24 requests based upon whether a child has been abused, neglected, or  
25 abandoned. (Pl.'s Ex. 38, Deposition of Mary Y. Evans, August 30,  
26 2007, at 22.). The undisputed evidence raises questions whether  
27 Defendants provide adequate procedural due process protections to  
28

1 in-custody minors that seek specific consent.<sup>13</sup> The Court's  
2 interpretation alleviates the need to address Plaintiffs' due  
3 process and unreasonable delay claims.

4 **b. The Legislative History is Not Controlling And**  
5 **is Ambiguous.**

6 Because the Court finds the statutory text to clearly limit  
7 the specific consent requirement as articulated above, "legislative  
8 history is irrelevant to interpretation of [this] unambiguous  
9 statute." Davis v. Michigan Dept. Of Treasury, 489 U.S. 803, 808  
10 n.3 (1989). Nevertheless, the Court notes that the legislative  
11 history relied upon by Defendants conflicts with the statutory  
12 language. See Exxon Mobil Corp., 545 U.S. at 568-71 (2005)  
13 (finding legislative history problematic as a tool of statutory  
14 interpretation where it expresses intent contrary to plain language  
15 of the statute).

16 To argue for its reading of the specific consent requirement,  
17 Defendants focus on a single statement from the House Report on the  
18 1997 amendments: "[I]n order to preclude State juvenile courts from  
19 issuing dependency orders for juveniles in the actual or  
20 constructive custody of the INS, the modified provision removes  
21 jurisdiction from juvenile courts to consider the custody status or  
22 placement of such aliens unless the Attorney General specifically  
23 consents to such jurisdiction." H.R. Rep. No. 105-405, at 130  
24 (1997).

25 \_\_\_\_\_  
26 <sup>13</sup> The ICE officer responsible for deciding specific consent  
27 requests admitted that she did not know of standards articulating  
28 abuse, neglect, or abandonment; that there is no standard of proof  
for granting requests; and that denials of specific consent may not  
be appealed. (Pl.'s Ex. 38, Deposition of Mary Y. Evans, August 30,  
2007, at 18, 20-22, 65.)

1 In the face of clear statutory language to the contrary, the  
2 Court finds the legislative history unreliable. The House Report  
3 statement relied upon by Defendants is ambiguous in suggesting that  
4 a removal of state juvenile court jurisdiction for dependency  
5 orders would be effected by statutory language that clearly does  
6 not accomplish such a broad legislative objective. In accordance  
7 with the canons of statutory interpretation, the Court will not  
8 allow an isolated statement in the House Report to undermine the  
9 legislative intent unambiguously expressed by the statute's plain  
10 language. See Exxon, 545 U.S. at 57 (expressing skepticism about  
11 giving weight to committee reports when interpreting a statute).

## 12 2. Permanent Injunction

13 The Court holds that the SIJ statute does not require specific  
14 consent when a state court's SIJ-predicate order will not determine  
15 custody status or placement. The Court has certified a nationwide  
16 class of persons that had requests for specific consent denied, or  
17 did not have such requests adjudicated, by Defendants. In  
18 accordance with this holding, the Court finds that the class is  
19 entitled to class-wide injunctive and declaratory relief.

20 A permanent injunction is appropriate to remedy (1) the  
21 likelihood of substantial and immediate irreparable injury, and (2)  
22 the inadequacy of remedies at law. G.C. & K.B. Invs., Inc. v.  
23 Wilson, 326 F.3d 1096, 1107 (9th Cir. 2003). "System-wide relief  
24 is required if the injury is the result of violations of a statute  
25 or the constitution that are attributable to policies or practices  
26 pervading the whole system. . . ." Armstrong v. Davis, 275 F.3d  
27 849, 870 (9th Cir. 2001).

28

1 Here, Defendants' application of the specific consent  
2 requirement, under circumstances not provided for by the statute,  
3 deprives immigrant minors in federal custody of the SIJ protection  
4 prescribed by Congress. This deprivation has and will occur if  
5 Defendants unlawfully deny specific consent, as such denial  
6 prohibits an immigrant minor from seeking a SIJ-predicate order in  
7 state court. Or, if Defendants delay making the specific consent  
8 decision, an immigrant minor may run up against the age-out  
9 regulations. As a result of Defendants' unlawful application of  
10 the specific consent requirement, Plaintiffs have and will suffer  
11 substantial and immediate irreparable injury in losing eligibility  
12 for SIJ status and SIJ-based adjustment.

13 In the absence of a class-wide injunction, immigrant minors  
14 would be forced to relitigate challenges to Defendants' specific  
15 consent policy. Immigrant minors seeking SIJ protection are  
16 vulnerable, are without parental support, and are unfamiliar with  
17 the legal system; thus, they are unable to bring challenges to  
18 Defendants' policy. No adequate remedy at law is available, and  
19 declaratory and injunctive relief is necessary.

20 The Court, therefore, orders a permanent injunction that  
21 requires Defendants to apply the specific consent requirement  
22 according to the plain language of the statute, as interpreted  
23 here. Defendants are enjoined from requiring specific consent  
24 before an immigrant minor may seek a SIJ-predicate order in state  
25 court. Defendants may not require specific consent when a state  
26 court's SIJ-predicate order will not determine custody status or  
27 placement. The injunction places no limit on Defendants other than  
28 the limit intended by Congress; therefore, "[t]he scope of

1 injunctive relief is dictated by the extent of the violation  
2 established." See Lewis v. Casey, 518 U.S. 343, 359 (1996).

3 **B. "Age-Out" Regulations**

4 Several "age-out" regulations are at issue in the case. 8  
5 C.F.R. § 204.11(c)(1) precludes SIJ classification once a youth is  
6 no longer "under twenty-one years of age." 8 C.F.R. § 204.11(c)(5)  
7 requires that a youth seeking SIJ status "[c]ontinue to be  
8 dependent upon the juvenile court and eligible for long-term foster  
9 care, such declaration, dependency or eligibility not having been  
10 vacated, terminated, or otherwise ended. . . ." Similarly for  
11 SIJ-based adjustment of status, 8 C.F.R. §§ 205.1(a)(3)(iv)(A, C, &  
12 D) revoke a youth's SIJ classification "[u]pon the beneficiary  
13 reaching the age of 21; . . . the termination of the beneficiary's  
14 dependency upon the juvenile court; . . . [or] the termination of  
15 the [youth's] eligibility for long-term foster care."

16 **1. Chevron Deference Standard**

17 After the SIJ statute's enactment in 1990, the Attorney  
18 General adopted the "age-out" regulations. 58 Fed. Reg. 42,850  
19 (August 12, 1993) (codified at 8 C.F.R. § 204.11); 58 Fed. Reg.  
20 42,848 (August 12, 1993) (codified at 8 C.F.R. §§ 205.11). The  
21 Attorney General was authorized to establish regulations that  
22 govern administration of the immigration system. 8 U.S.C. 1103(a)  
23 (1993). Given this general grant of regulatory authority, the  
24 Court's analysis of Defendants' "age-out" regulations proceeds  
25 under Chevron, 467 U.S. at 842-43.

26 In Chevron, the Supreme Court adopted a two-step test for  
27 judicial review of administrative agency regulations that interpret  
28 federal statutes. The first step is to consider whether Congress



1 speaks directly in the statute to the particular issue: "If the  
2 intent of Congress is clear, that is the end of the matter; for the  
3 court, as well as the agency, must give effect to the unambiguously  
4 expressed intent of Congress." Chevron, 467 U.S. at 842-43. Where  
5 a statute is ambiguous or silent with respect to the issue, a court  
6 proceeds to the second step: "the question for the court is whether  
7 the agency's answer is based on a permissible construction of the  
8 statute." Id. at 843. Agency regulations will be permissible,  
9 unless "arbitrary, capricious, or manifestly contrary to the  
10 statute." Id. at 844.

## 11 **2. Statutory Analysis of "Age-Out" Regulations**

12 Under the Chevron test, "Congressional intent may be  
13 determined by 'traditional tools of statutory construction,' and if  
14 a court using these tools ascertains that Congress had a clear  
15 intent on the question at issue, that intent must be given effect  
16 as law." Wilderness Soc'y v. U.S. Fish & Wildlife Serv., 353 F.3d  
17 1051, 1059 (9th Cir. 2003).

18 The Court looks first to 8 U.S.C. § 1101(a)(27)(J) itself.  
19 The SIJ statute provides eligibility to a child who "has been  
20 declared dependent on a juvenile court . . . has been deemed  
21 eligible by that court for long-term foster care due to abuse,  
22 neglect, or abandonment . . . [and when it] has been determined . .  
23 . that it would not be in the alien' best interest [to be returned  
24 to their home country]." 8 U.S.C. § 1101(a)(27)(J).

25 Plaintiffs stress that the statute is written in the past  
26 perfect tense. They argue this grammatical construction indicates  
27 that SIJ eligibility is not conditional on a child's age, continued  
28 dependency on a juvenile court, or continued eligibility for long-

1 term foster care. Plaintiffs argue, therefore, that the  
2 regulations impose additional eligibility requirements unauthorized  
3 by the statute. On Plaintiffs' reading of the statute, an SIJ-  
4 predicate order establishes SIJ eligibility, and Defendants must  
5 then decide whether to grant SIJ status.

6 Defendants respond that the SIJ statute does not provide for  
7 "infinite eligibility." (Defs.' Opp'n 18.). Defendants argue that  
8 the statute only speaks to the criteria that establishes SIJ  
9 eligibility, not the duration of that eligibility. Defendants  
10 further emphasize that the Attorney General was delegated authority  
11 to grant SIJ status based upon an SIJ-predicate order. See 8  
12 U.S.C. § 1101(a)(27)(J)(iii) (SIJ status granted only if the  
13 "Attorney General expressly consents to the dependency order  
14 serving as a precondition to the grant of special immigrant  
15 juvenile status"). On Defendants' reading, the statute permits  
16 "age-out" regulations.

17 The Court agrees that the text of the statute clearly provides  
18 for a child's SIJ-eligibility once a state court makes the  
19 requisite findings in an SIJ-predicate order. While Congress  
20 defined SIJ eligibility in terms of state court findings made in  
21 the past, however, see Gwaltney of Smithfield v. Chesapeake Bay  
22 Foundation, 484 U.S. 49, 57 (1987), the statute does not speak  
23 directly to the issue of "age-out" limitations on eligibility.  
24 Because the text of the statute does not address Congress's intent  
25 with respect to the age-out issue, the Court must "look to the  
26 congressional intent revealed in the history and purposes of the  
27 statutory scheme." See United States v. Buckland, 289 F.3d 558,  
28 565 (9th Cir. 2002) (en banc).

1 As already stated, the SIJ provisions were enacted to protect  
2 abused, neglected, and abandoned immigrant youth by providing a  
3 method for adjustment to legal permanent resident status. The  
4 "age-out" regulations were enacted in 1993, a few years after  
5 passage of the SIJ statute. 58 Fed. Reg. 42,850 (August 12, 1993)  
6 (codified at 8 C.F.R. § 204.11); 58 Fed. Reg. 42,848 (August 12,  
7 1993) (codified at 8 C.F.R. §§ 205.11). When Congress amended the  
8 SIJ statute in 1997, it did not disturb the "age-out" regulations.  
9 Furthermore, Congress chose to exclude SIJ applicants from the  
10 Child Status Protection Act of 2002, Pub. L. No. 107-208, 116 Stat.  
11 927, which amended the INA to provide "age-out" protection for  
12 certain immigrant children that filed for permanent resident  
13 status. See Padash v. Immigration & Naturalization Serv., 358 F.3d  
14 1161, 1167 (9th Cir. 2004). This history suggests that Congress  
15 condones the age-out regulations with respect to SIJ eligibility.

16 When Congress does not speak directly on an issue and has  
17 delegated rulemaking authority to an agency, a court considers  
18 whether the agency interpretation is based on a permissible  
19 construction of the statute. See Chevron, 467 U.S. at 843. Since  
20 the SIJ statute intended to protect immigrant children from abuse,  
21 neglect, and abandonment, it is reasonable that eligibility for SIJ  
22 status or SIJ-based adjustment of status would be limited to  
23 immigrant children, as opposed to adults or individuals no longer  
24 dependent on a state court. The regulations, as written, are  
25 consistent with Congress's goal of protecting abused, neglected,  
26 and abandoned immigrant children, and therefore, the Court finds  
27 the adoption of those regulations was not arbitrary and capricious.

28

1 The Court does not find the USCIS Administrative Appeals  
2 Office opinion, A89 580 183, presented by Plaintiffs at oral  
3 argument, to change the analysis. The opinion does not question  
4 Defendants' authority to adopt the "age-out" regulations; rather,  
5 it declares that being in the continued legal custody of the state  
6 or a state agency, in addition to continued dependency, allows a  
7 person to maintain SIJ eligibility. Additionally, the Court does  
8 not consider the "age-out" regulations to have no rational basis.<sup>14</sup>  
9 The Court, therefore, finds the "age-out" regulations permissible  
10 under Chevron.

### 11 3. Plaintiffs' Unreasonable Delay Claim

12 Whether Defendants have a policy or practice of delaying SIJ  
13 adjudication so that the "age-out" regulations render immigrant  
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15 <sup>14</sup> Plaintiffs argue that the "age-out" regulations lack a  
16 rational basis, where aliens are protected by the Due Process  
17 Clause of the U.S. Constitution, which incorporates the guarantees  
18 of equal protection. Garberding v. INS, 30 F.3d 1187, (9th Cir.  
19 1994). Plaintiffs rely on Garberding, 30 F.3d at 1190-91, where  
20 the Ninth Circuit found no rational basis for deportation of an  
21 alien that obtained expungement of a drug offense under a broad  
22 state expungement law. The INS did not deport aliens that obtained  
23 expungement of drug offenses under narrower state expungement laws  
24 that were the counterpart to the Federal First Offender Act. Id.  
25 Plaintiffs argue that Defendants similarly have no rational basis  
26 for conditioning SIJ eligibility on continuing dependency on a  
27 state court, where states differ with respect to the age when a  
28 person is no longer dependent on the court. (Pls.' Mot. 17-19.)

22 Plaintiffs' argument is misplaced because Garberding is  
23 distinguishable. In Garberding, the petitioner had obtained  
24 expungement of a drug offense, like similarly situated persons in  
25 other states. The federal government lacked a rational basis for  
26 its action in treating petitioner differently because the state  
27 expungement law was different from the federal law. Here, the  
28 "age-out" regulations uniformly require a person's continued  
dependency on a state court to maintain SIJ eligibility.  
Defendants have a rational basis because continued dependency  
indicates that a youth still needs the protection afforded by the  
SIJ statute. Although state laws vary as to age for termination of  
dependency, Defendants are not engaged in differential treatment  
according to state law's lack of conformity to federal law, as was  
the case in Garberding.

1 youth ineligible for SIJ benefits is a separate matter. Although  
2 the Court holds that the "age-out" regulations are not invalid as a  
3 matter of law, the Court notes that Defendants cannot use the "age-  
4 out" regulations to deny SIJ benefits by unreasonably delaying  
5 adjudication. A significant delay will be less reasonable in light  
6 of the "age-out" regulations and threat of losing SIJ eligibility.  
7 However, the Court cannot decide the question of unreasonable delay  
8 as a matter of law because it raises disputed factual issues. The  
9 Court nevertheless recognizes that Plaintiffs still have a claim,  
10 in light of the "age-out" regulations, that Defendants abuse their  
11 discretion by unreasonably delaying SIJ adjudications.

12 **C. Regulations Related to SIJ-Eligible Youth in Removal**  
13 **Proceedings**

14 Plaintiffs<sup>15</sup> argue that Defendants' regulations with respect  
15 to removal proceedings unlawfully deny adjudication of minors' SIJ-  
16 based adjustment of status applications. Plaintiffs must show that  
17 8 U.S.C. 1255 does not authorize these regulations.<sup>16</sup>

18 The Court first looks to the INA. 8 U.S.C. 1255(a) declares  
19 that "the status of an alien who was inspected and admitted or  
20 paroled into the United States . . . may be adjusted by the  
21 Attorney General, in his discretion and under such regulations as  
22

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23 <sup>15</sup> As the Court denied class certification for a subclass of  
24 persons undergoing removal proceedings, the Court treats  
25 Plaintiffs' challenge to Defendants' removal regulations under  
26 joinder principles. The Court notes that Plaintiff Freddy Garrido-  
Martinez is the only individual plaintiff in this action that was  
subject to the removal regulations.

27 <sup>16</sup> Although neither party addresses their arguments to the  
28 Chevron standard articulated above, see Chevron USA, Inc., 467 U.S.  
at 842, Plaintiffs' challenge raises the issue whether the  
regulations are permissible under Chevron.

1 he may prescribe, to that of an alien lawfully admitted for  
2 permanent residence." 8 U.S.C. 1255(h) provides that special  
3 immigrant juveniles "shall be deemed . . . to have been paroled  
4 into the United States." See also 8 C.F.R. 245.1(a). Under the  
5 INA, SIJs are clearly eligible for adjustment of status. 8 U.S.C.  
6 §§ 1101(a)(27)(J) and 1255(a & h). The Attorney General clearly  
7 has been delegated authority to make regulations with respect to  
8 adjustment of status. 8 U.S.C. 1255(a).

9       According to the regulations relevant here, USCIS is  
10 responsible for adjudication of an SIJ-based adjustment of status  
11 applications unless a SIJ is in removal proceedings. See 8 C.F.R.  
12 § 245.2(a)(1) ("USCIS has jurisdiction to adjudicate an application  
13 for adjustment of status filed by any alien, unless the immigration  
14 judge has jurisdiction to adjudicate any application under 8 C.F.R.  
15 § 1245.2(a)(1).") Once removal proceedings are commenced, the  
16 immigration judge is vested with exclusive jurisdiction to  
17 adjudicate SIJ-based adjustment applications. See 8 C.F.R. §  
18 1245.2(a)(1) ("In the case of any alien who has been placed in  
19 deportation proceedings or in removal proceedings (other than as an  
20 arriving alien), the immigration judge hearing the proceeding has  
21 exclusive jurisdiction to adjudicate any application for adjustment  
22 of status the alien may file.")

23       Plaintiffs argue that the regulations are inconsistent with  
24 the INA because the statute specifically provides for SIJ-based  
25 adjustment of status, yet the regulations preclude adjudication of  
26 adjustment applications. Pointing to the Ninth Circuit's decision  
27 in Bona v. Gonzales, 425 F.3d 663 (9th Cir. 2005), Plaintiffs argue  
28 Bona stands for the proposition that Defendants' regulations "may

1 not deny a statutorily eligible alien adjudication of their  
2 application for adjustment of status." (Pls.' Mot. 24.). While  
3 this is a proper reading of the Bona holding, the regulations at  
4 issue here do not categorically deny eligible aliens from  
5 adjudication of adjustment applications, which was the basis for  
6 invalidity in Bona.

7 In Bona, the Ninth Circuit considered the validity of a  
8 regulation that did not allow paroled aliens to seek adjustment of  
9 status in a removal proceeding, despite the INA's provision that  
10 paroled aliens were eligible to apply for adjustment of status.  
11 Bona, 425 F.3d at 665. The Ninth Circuit held that the regulation  
12 was invalid because it "redefines certain aliens as ineligible to  
13 apply for adjustment of status, . . . whom a statute, 8 U.S.C.  
14 1255(a), defines as eligible to apply." Id. at 668, quoting Succar  
15 v. Ashcroft 394 F.3d 8 (1st Cir. 2005) (internal quotations  
16 omitted). The regulation "entirely exclud[ed] a category of aliens  
17 from the ability to apply for adjustment, who by statute are  
18 eligible to apply for such relief." Id. at 670.

19 Bona is inapplicable here because the regulations at issue do  
20 not categorically deny SIJs the opportunity to apply for adjustment  
21 of status. Unlike the paroled aliens in Bona, SIJs in removal  
22 proceedings are eligible for adjudication of their adjustment of  
23 status applications by the immigration judge, who has exclusive  
24 jurisdiction over adjustment applications for persons in removal  
25 proceedings. 8 C.F.R. §§ 245.2(a)(1) & 1245.2(a)(1). Plaintiffs  
26 does not otherwise challenge these regulations under Chevron.  
27 Accordingly, the Court finds that the regulations are not clearly  
28 contrary to the INA, or that the regulations are an arbitrary or

1 capricious exercise of Defendants' authority to prescribe  
2 regulations with respect to adjustment of status.

3 Plaintiffs alternatively challenge the ninety day time limit  
4 on motions to reopen removal proceedings. Where the Board of  
5 Immigration Appeals or an immigration judge issues a removal order,  
6 a SIJ must make a motion to reopen removal proceedings within 90  
7 days of the final order of removal. 8 U.S.C. 1229a(c)(c)(7)(C)(j);  
8 see also 8 C.F.R. §§ 1003.2(c)(2); 1003.23(b)(I). Plaintiffs argue  
9 that SIJs are deprived of adjudication of their SIJ-based  
10 adjustment applications by the time limitation on filing motions to  
11 reopen removal proceedings.

12 Plaintiffs cannot show that the ninety day time limit in 8  
13 C.F.R. §§ 1003.2(c)(2) and 1003.23(b)(I) is invalid, as the INA  
14 specifically provides for the ninety day limit. The regulations  
15 track that language. See 8 U.S.C. 1229a(c)(c)(7)(C)(j) ("Except as  
16 provided for in this subparagraph, the motion to reopen shall be  
17 filed within 90 days of the date of entry of a final administrative  
18 order of removal.").<sup>17</sup>

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25 <sup>17</sup> Plaintiffs suggest that Defendants typically refuse to join  
26 SIJs motions to reopen. See 8 C.F.R. § 1003.23(b)(4)(iv).  
27 Plaintiffs also have argued that the BIA typically refuses to  
28 exercise their power reopen removal proceedings sua sponte. See 8  
C.F.R. §§ 1003.2(a). The parties' have not fully briefed any  
issues with respect to these allegations; the Court, therefore,  
will not consider such issues in connection with this set of  
motions.



1 **IV. CONCLUSION**

2 **A. Motion for Class Certification**

3 For the foregoing reasons, the Court GRANTS in part and DENIES  
4 in part Plaintiffs' motion for class certification:

5 1. The Court GRANTS certification of the specific consent  
6 subclass.

7 2. The Court GRANTS certification of the age-out sub-class.

8 3. The Court DENIES certification of the removal sub-class.

9 **B. Plaintiffs' Motion for Partial Summary Adjudication and**  
10 **Defendants' Cross-Motion for Summary Judgment**

11 For the foregoing reasons, the Court GRANTS in part and DENIES  
12 in part Plaintiffs' motion for partial summary adjudication, and  
13 Defendants' cross-motion for summary judgment:

14 1. The Court GRANTS summary adjudication to Plaintiffs on their  
15 claim regarding the specific consent requirement. Defendants'  
16 motion is DENIED on this claim. As explained in this Order,  
17 Defendants are enjoined from requiring specific consent when a  
18 minor only seeks state court jurisdiction for an SIJ-predicate  
19 order.

20 2. The Court DENIES summary adjudication to Plaintiffs on their  
21 claim that Defendants' age-out regulations imposed ultra vires  
22 eligibility requirements. As explained in this Order,  
23 Defendants' motion for summary adjudication on this claim is  
24 GRANTED. Plaintiffs' age-out subclass may still raise the  
25 claim that Defendants unreasonably delay adjudication of the  
26 SIJ applications of immigrant minors subject to the age-out  
27 regulations.

28

1 3. The Court DENIES summary adjudication to Plaintiffs on their  
2 claim regarding Defendants' removal regulations. Defendants  
3 are GRANTED summary adjudication on this claim. Plaintiffs  
4 may still raise a claim of abuse of discretion in application  
5 of the removal regulations.

6  
7 IT IS SO ORDERED.

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9 Dated: January 8, 2008



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DEAN D. PREGERSON  
United States District Judge

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