UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOSE L. VELESACA and ABRAHAM CARLO UZATEGUI NAVARRO, on their own behalf and on behalf of others similarly situated,

Petitioners-Plaintiffs,

v.

THOMAS R. DECKER, in his official capacity as New York Field Office Director for U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; MATTHEW ALBENCE, in his official capacity as the Acting Director for U.S. Immigration and Customs Enforcement; UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT; CHAD WOLF, in his official capacity as Secretary of the U.S. Department of Homeland Security; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; CARL E. DUBOIS, in his official capacity as the Sheriff of Orange County,

Respondents-Defendants.

Case No. 1:20-cv-1803

PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO ENFORCE THE PRELIMINARY INJUNCTION

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Dated: December 18, 2020
New York, NY

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INTRODUCTION

The petitioners, a class of people detained by ICE in the midst of an ongoing pandemic, are entitled under this Court's preliminary injunction to custody determinations during the pendency of this litigation that apply policies or practices no more stringent or onerous than those in place pre-June 2017. Despite this, over eight months after the preliminary injunction issued on March 30, 2020, and over six months after this Court issued a subsequent order denying ICE's attempt to modify that injunction, ICE is still not providing such determinations. Accordingly, the petitioners move to enforce this Court's preliminary injunction so that they do not continue to suffer irreparable harm—that is, erroneous detention—while the parties engage in discovery and complete the litigation of this matter.

The petitioners make this motion now after learning during a recent compliance deposition that ICE is violating the Court's order. ICE's Rule 30(b)(6) deponent testified that ICE has not even identified, much less changed, *any* substantive policy or practice relating to custody determinations to come into compliance with the Court's order. Most notably, ICE continues to use the same risk classification assessment tool ("RCA") it modified in June 2017 to prohibit the tool from recommending release and to categorize significantly more people as risks. The limited actions that ICE has taken since the preliminary injunction—the creation of a form, a single guidance email, and two short trainings—have done nothing to implement the substance of the Court's order. This is in large part because ICE continues to interpret the order as requiring no more than generic "individualized custody determinations," despite the fact that this formulation was explicitly rejected as "useless" by the Court in denying ICE's prior motion to modify. *See* July 6 Order (ECF 91) at 7.

This Court has given ICE multiple chances to come into compliance with the March 30 injunction. ICE has not done so. In light of the continued irreparable harm that the petitioners

suffer while detained, the petitioners ask the Court to take "reasonable action . . . to secure compliance with its orders." *Berger v. Heckler*, 771 F.2d 1556, 1568 (2d Cir. 1985). Specifically, they request that the Court order that ICE's New York Field Office ("NYFO") set aside a clear shift in the stringency of custody determination policies and practices that took place on June 6, 2017. On that date, ICE sent an email to the field offices announcing the changes to the RCA and stating that it had been modified to comply with new policy directives which discourage release. *See* Broadcast Message: RCA Update (attached as Ex. 9 to Declaration of Amy Belsher ("Belsher Decl.")). Given ICE's continued use of these policies and practices in defiance of the Court's order, the petitioners respectfully request that the Court further order the NYFO to (1) return to using its pre-June 2017 version of the RCA and (2) disregard the 2017 policy directives to the extent they affect the custody determination process.

BACKGROUND

A. The Court Issues the Preliminary Injunction

The petitioners brought this lawsuit against the respondents (collectively "ICE") on behalf of a class of people in immigration detention arrested by the NYFO, detained pursuant to Section 1226(a) of Title 8 of the United States Code, and denied release pursuant to ICE's No-Release Policy. On March 16, 2020, the petitioners filed a motion for a classwide preliminary injunction. Pet'rs' Mot. for Prelim. Inj. (ECF 40). In support of their motion, they submitted data and declarations showing that ICE had implemented a blanket policy in June 2017 of denying bond or release without an individualized assessment of whether further detention was justified by a risk of flight or danger, *see* Pet'rs' Mem. in Support of Prelim. Inj. ("PI Mem.") (ECF 41) at 3-8, including unrefuted evidence that, as of June of 2017, the RCA's algorithm was altered so that it could no longer recommend any form of release or bond, *id.* at 6. The petitioners argued that ICE's policy violated multiple federal statutes, regulations, and the United States

Constitution. *Id.* at 18-35 (describing violations of the APA, the INA, the Due Process Clause, and ICE's own regulations).

After a hearing on March 30, 2020, this Court granted the petitioners' motion. *See* March 30 Tr. ("March 30 Order") (ECF 68) at 45-53. The Court held the petitioners had shown a likelihood of success on their claims and issued a classwide injunction. *Id.* at 51:8-9. Specifically, in order to set aside ICE's No-Release Policy and ensure a return to the status quo that had existed prior to the implementation of that unlawful policy on or around June 6, 2017, the injunction prohibited ICE from "using or applying practices or policies" relating to custody determinations under Section 1226(a) "in any manner, more stringent or onerous than those used or applied prior to June 6, 2017." March 30 Order at 52:18-53:1; *see also* Opinion at 28 (May 4, 2020) (ECF 78).

As required by the Court's order, March 30 Order at 53:5-9, ICE submitted a report regarding compliance on April 17, 2020, describing steps the agency had taken to comply with the injunction. ICE Letter (Apr. 17, 2020) (ECF 70). These included a training, guidance, and the introduction of a worksheet on which ICE officers record their custody determinations. *Id.*

B. The Court Denies ICE's Motion to Modify and Clarify the Preliminary Injunction

On May 1, ICE filed a motion "to modify and clarify the Court's March 31 preliminary injunction order." Resp'ts' Mot. to Modify and Clarify (May 1, 2020) (ECF 74). ICE argued that the Court should modify the specific language of its injunction to eliminate reference to any changes in policies or practices in mid-2017, proposing instead that the Court enjoin a "policy or practice of denying release as a blanket matter without making individualized determinations on a case by case basis." Resp'ts' Mem. in Supp. of Mot. to Modify and Clarify (May 1, 2020) (ECF 75) at 9.

The Court rejected ICE's claim that the order was imprecise, dismissing ICE's assertion that it did not know what the order enjoined as based on its "persistent denial of" and "refusal to explain" its change in custody determination practice in or about June of 2017—a change the Court repeatedly found had occurred. July 6 Order at 6; *see also id.* ("The inference is compelling that a change in ICE's practices, before and after June 2017, explains the dramatic change in statistics of detention."). In so ruling, the Court explicitly rejected ICE's proposed modification of the order, reasoning that ICE's proposed alternative language "says nothing about the conduct, violative of the law, that is to be enjoined. The government's formulation is useless." *Id.* at 7.

C. The Court Orders Limited Compliance-Related Discovery

Concerned about the vanishingly low release rate of individuals who received custody determinations pursuant to the Court's injunction—as well as worksheets reflecting detention decisions based on factual errors or unspecified charges, or failing entirely to consider any potential equities—the petitioners sought limited discovery on ICE's compliance. *See* Letter of Aug. 20, 2020 (ECF 93). During the August 25 status conference, the Court stated it did not "think there has been good compliance by the government," and granted limited discovery, ordering ICE to produce documents related to ICE's guidance and training on the preliminary injunction and a rolling production of worksheets ICE created to document each class member's custody determination. Aug. 25 Tr. (ECF 98) at 11:3, 11:7-8. In response, ICE produced heavily redacted emails along with a statement that no scripts, transcripts, or other materials exist describing any training that ICE provided officers regarding compliance. *See* ICE Letter of Sept. 9, 2020 (ECF 97). In light of this incomplete record, the Court ordered a limited Rule 30(b)(6) deposition concerning ICE's compliance with the preliminary injunction. Order of Sept. 21, 2020 (ECF 102).

D. The Rule 30(b)(6) Deposition

The petitioners took the deposition of Acting Assistant Field Office Director Judith Almodovar on November 18, 2020. Dep. of Judith Almodovar ("Almodovar Dep.") (relevant excerpts attached as Ex. 1 to Belsher Decl.). ICE provided Almodovar as a Rule 30(b)(6) witness with knowledge of, *inter alia*, "[s]teps taken to comply with the March 30 Preliminary Injunction, as well as information and instructions relating to such steps." 30(b)(6) Notice ¶ 1 (attached as Ex. 2 to Belsher Decl.).

When asked during the deposition whether the "New York Field Office attempt[ed] to identify any policies or practices that might be more stringent than those in place prior to June 2017," ICE's deponent responded, "No. Not that I know of." Almodovar Dep. 42:3-7. When asked "did the procedures and practices at the New York Field Office relating to initial custody determinations change after the preliminary injunction?" Almodovar answered: "No. Just in that we were now doing the worksheets where we were actually documenting our reasoning behind our decision." *Id*. at 59:16-23; *see also id.* at 163:2-3 ("[W]e didn't change any practices. We only added the worksheet."); 164:24-165:7 ("Q: So . . . the New York Field Office did not make any changes to the actual—to the substance of how custody determinations are made at the New York Field Office in response to the Court's Preliminary Injunction Order; is that right? A: No."); 181:12-19.

Almodovar also testified that the NYFO's two trainings related to compliance with the preliminary injunction contained no guidance as to what the Court's order prohibited beyond an instruction that the NYFO could not have "a no release policy." *Id.* at 181:8-11. Almodovar further asserted that, because "we don't have a no release policy," there was no substantive change in the way determinations were conducted in response to the Court's injunction. *Id.* at 181:10-19.

Finally, Almodovar testified that the NYFO continues to use the post-June-2017 modified RCA—which can no longer recommend release—and takes its recommendation into consideration when making custody determinations. *Id*. at 151:18-152:6; 155:21-156:9

ARGUMENT

ICE's non-compliance with the Court's order and its refusal to make meaningful attempts to come into compliance justify "reasonable action" by this Court "to secure compliance with its orders." *See Berger*, 771 F.2d at 1568 (affirming a district court's modification of a consent decree to rectify a party's non-compliance). A court issuing an injunction "does so with the backing of its full coercive powers."[1] *Nken v. Holder*, 556 U.S. 418, 428 (2009). The "injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers . . . on behalf of the party who obtained that equitable relief." *Benjamin v. Jacobson*, 172 F.3d 144, 161–62 (2d Cir. 1999) (quoting *Sys. Fed'n No. 91, Ry. Emp. Dep't AFL-CIO v. Wright*, 364 U.S. 642, 647 (1961)). "Federal courts have broad discretion to fashion remedies as equity requires, to ensure compliance with their orders." *Cordius Tr. v. Kummerfeld Assocs., Inc*., 658 F. Supp. 2d 512, 524 (S.D.N.Y. 2009) (citing *United States v. Visa U.S.A., Inc.*, No. 98-CV-7076, 2007 WL 1741885, at *3 (S.D.N.Y. June 15, 2007)). This includes crafting supplementary remedies. *See, e.g.*, *Berger*, 771 F.2d at 1568, 1569 & n.19; *see also Benjamin v. Kerik*, No. 75-CV-3073, 1998 WL 799161, at *5–6 (S.D.N.Y. Nov. 13, 1998) (requiring further specific remedies to ensure compliance).

Here, ICE has twice been given the opportunity to comply with this Court's order—once after the injunction was issued and again after this Court denied ICE's motion to modify and clarify the injunction. It has twice failed to do so, leaving the petitioners to languish in detention,

[1] Further, "[e]nsuring compliance with a prior order is an equitable goal which a court is empowered to pursue even absent a finding of contempt." *Berger*, 771 F.2d at 1569.

separated from their families, without the lawful custody determinations they were entitled to as of March 30. Accordingly, the petitioners respectfully request that this Court order ICE to comply with its injunction by setting aside the June 2017 changes in the RCA algorithm and disregarding directives issued in 2017 to the extent those directives affect custody determinations. As set forth below, this relief is necessary to prevent ICE from continuing to violate the Court's order.

A. ICE IS VIOLATING THE PRELIMINARY INJUNCTION.

The petitioners' review of the compliance-related discovery produced by ICE, clarified and supplemented by the deposition testimony of ICE's Rule 30(b)(6) deponent, has revealed that ICE is in violation of this Court's preliminary injunction. ICE has not changed *any* substantive policy or practice in response to this Court's order. Instead, despite this Court's repeated findings to the contrary, ICE has maintained its "persistent denial of" and "refusal to explain" its change in custody determination practices. July 6 Order at 7; *see, e.g.*, Almodovar Dep. 181:10-11 ("we don't have a no release policy"). As Almodovar testified, the NYFO did not even try to determine what policies or practices changed around mid-2017—despite the Court specifically prohibiting any that were "more stringent or more onerous than those used or applied prior to June 6, 2017"—and it did not make any substantive changes to the manner in which it conducted custody determinations post-injunction. Almodovar Dep. 42:3-7; 59:16-23; 164:24-165:7; 181:11-182:4.

Critically, ICE has not reversed the changes made to the RCA even though it is undisputed that the tool was altered in June of 2017 so that it could not recommend any form of release. *Id.* 155:21-156:9; *see also* Declaration of Jesse Barber ("Barber Decl.") ¶¶ 9-12. This alteration of the tool plainly rendered ICE's custody determination practices "more stringent" than they were pre-June 2017. Further, the tool's current scoring matrix, produced in discovery

by ICE, reveals that additional changes were made to the tool that make its risk designation scoring—not just its ultimate recommendation regarding detention—more stringent as well. *See* Barber Decl. ¶¶ 13-15; *see generally* ATP Rules Supporting RCA Point based Scoring Rules Matrix ("RCA Matrix") (attached as Ex. 5 to Belsher Decl.). As part of the same June 2017 changes, ICE altered the RCA's algorithm to make it more difficult for certain individuals assessed by the tool to receive a low risk designation. *See* Barber Decl. ¶¶ 13-15. The RCA operates by assigning risk points for various categories of information, such as how someone entered the country. *Id*. ¶ 5. Prior to the change to the tool in June of 2017, only people who entered the country unlawfully *after* 2014 were assigned 14 risk points for their manner of entry—those who entered prior to 2014 or whose entry date was unknown were assigned 0 and 1 risk points respectively. *Id.* ¶ 13. However, the June 2017 change to the RCA appears to have collapsed these three categories, assigning 14 points towards the risk score of everyone who entered the country without inspection or whose entry date is unknown. *Id.* ¶ 14. Because a total score of 10 places someone in the "high risk" category, *see id.* ¶¶ 7-8, this change alone has likely had a significant impact on custody decisions for this large group of individuals.

ICE made these changes to the RCA for the express purpose of implementing policy directives that, among other things, discouraged release. The RCA changes were announced to the NYFO via a broadcast email message which noted that the changes to the tool, including the removal of the release recommendation, would ensure that "[a]ll recommendations provided by RCA will now be compliant" with 2017 executive orders from the Trump Administration calling for harsher enforcement of immigration laws. Broadcast Message: RCA Update. Other ICE guidance further clarified that these executive orders should "inform detention decisions."

Memorandum from Sec. of Homeland Security John Kelly to U.S. Immigration Officials ("DHS Mem.") (Feb. 17, 2017) at 1 (attached as Ex. 7 to Belsher Decl.).

ICE's sole post-injunction change to the custody determination process—the worksheet—serves only a record-keeping purpose, has no substantive effect on ICE's custody determinations, *see* Almodovar Dep. 164:8-165:7, and, in any event, is largely duplicative of the pre-injunction procedures for documenting determinations, *see id.* at 164:15-23. The addition of this type of documentation alone cannot satisfy ICE's obligations under the Court's order. *See Ramirez v. U.S. Immigration & Customs Enf't*, 471 F. Supp. 3d 88 (D.D.C. 2020) (finding insufficient ICE form created to comply with order enjoining unlawful ICE custody determination practices). The worksheets—which Almodovar testified contain incomplete reasoning[2]—amount to a "checked box" exercise providing no insight into whether the ICE officer made a considered evaluation consistent with the Court's preliminary injunction. *See id.* Moreover, the worksheets reveal factual errors, facial inconsistencies, and detention decisions that ignore mitigating factors and are premised on criminal charges alone. *See* Belsher Decl. ¶ 2. No one is tasked with reviewing the completed worksheets. Almodovar Dep. 218:14-16.

B. ICE HAS MADE NO MEANINGFUL EFFORT TO COME INTO COMPLIANCE WITH THE PRELIMINARY INJUNCTION.

None of the limited steps that ICE has taken since the preliminary injunction was entered remotely satisfies its obligations under the Court's order. This is in no small part because the guidance and trainings ICE has provided rely on an interpretation of the injunction that this Court rejected, namely that the injunction requires nothing more than "individualized custody

[2] Even as a record-keeping tool, the worksheets appear to be of limited value. When questioned regarding what specific completed worksheets revealed about the underlying custody determinations to which they referred, ICE's deponent repeatedly stated that the worksheets do not purport to include a complete record of the reasoning behind a denial of release. *See* Almodovar Dep. 221:21-25 ("[J]ust because he only wrote this one factor, that doesn't mean that he didn't take other factors into consideration as well. It's just he -- all those other factors he didn't document here."); 222:16-19; 228:4-15.

determinations," without reference to any changes in policies or practices in mid-2017. Almodovar Dep. 40:10-15 ("New York Field Office understands that complying with this Order would mean that immigration officers should be conducting individualized custody determinations relating to whether the person is a danger to the community or a flight risk."). This formulation, virtually identical to the one rejected by the Court, "says nothing about the conduct, violative of the law, that is to be enjoined." *See* July 6 Order at 7.

The sole piece of written guidance provided to NYFO employees—issued one month after the Court denied ICE's motion to modify—adopts this rejected interpretation of the order. In an email purporting to contain "legal guidance" on the injunction, Deputy Field Office Director ("DFOD") William Joyce quotes from the Court's order prohibiting policies or practices more stringent or onerous than those pre-June 2017, but then goes on to say that "ICE understands this injunction to mean that officers are to conduct individualized custody determinations, and more specifically, ICE's New York Field Office cannot have a 'No Release' policy or practice for aliens it apprehends." Client Legal Update Regarding Velesaca v. Decker ("Guidance Email") (June 11, 2020) at 1 (attached as Ex. 10 to Belsher Decl.). The email identifies no policies or practices "more stringent or onerous" than those in place pre-2017 that the NYFO would need to change in order to comply with the Court's order. In fact, DFOD Joyce directly contradicts the Court's findings, stating "we understand that ICE's New York Field Office has never had such a policy or practice." *Id*. As a result, this "guidance" tells ICE officials that they need not change any policy or practice related to custody determinations whatsoever. Like ICE's proposed modification to the preliminary injunction, it is "useless." *See* July 6 Order at 7.

ICE did not issue any other written guidance to the NYFO related to the injunction,[3] Almodovar Dep. 165:8-166:13, and did not inform employees that the Court had already rejected an interpretation of the injunction that merely required them to "conduct individualized determinations," *id*. at 195:2-11. To the contrary, the NYFO affirmatively changed the worksheet its officers use to record custody determinations to *remove* quoted language from this Court's order enjoining policies or practices more stringent or onerous than those in place pre-2017, replacing it with the language of ICE's rejected formulation that requires only an otherwise undefined "individualized custody determination." *Compare* Preliminary Injunction Compliance Memo to File (April 15, 2020) n.1 (attached as Ex. 3 to Belsher Decl.) *with* Preliminary Injunction Compliance Memo to File (May 14, 2020) n. 1 (attached as Ex. 4 to Belsher Decl.). Almodovar had no explanation for why this change was made. Almodovar Dep. 232:2-13. Thus, it continues to be ICE's position that it need not acknowledge, interpret, or follow this Court's specific order to stop using practices more onerous or stringent than those in place prior to June 2017.

Taken together, all of the compliance-related discovery that ICE has provided to date confirms that ICE continues to apply policies or practices more stringent or onerous than those in place pre-June 2017. Accordingly, without intervention by this Court, ICE will continue to violate the terms of the Court's March order.

[3] ICE also held two approximately 30-minute trainings where officers were given substantially the same instruction—that ICE officers need only conduct individualized trainings to comply with the Court's order. Almodovar Dep. 160:25-161:9; 173:25-174:11; 180:10-182:10; 191:4-192:10. Deportation officers who conduct the custody determination interviews on which final custody determinations are based were not required to attend. *Id*. 174:16-19.

C. THE COURT SHOULD TAKE APPROPRIATE STEPS TO ENSURE COMPLIANCE WITH ITS ORDERS.

In light of ICE's ongoing violations, the petitioners request that the Court enforce compliance by ordering the following relief.

1. *Order ICE to set aside the June 2017 changes to the RCA when conducting class members' custody determinations.*

It is undisputed that ICE changed its risk classification assessment tool in June 2017 so that it can *never recommend any form of release*, rendering its custody determination practices more stringent from that point forward. This tool is central to the custody determination process, and it is programmed to issue a classification (low, medium, or high) relating to someone's risk of flight and risk to public safety as well as an ultimate custody recommendation. Declaration of David Hausman ¶¶ 8-9 (ECF 12). NYFO officers take the RCA's recommendation into account when deciding whether or not to detain an individual. Almodovar Dep. 151:18-152:6. In June of 2017, the RCA's algorithm was changed so that it could only make one substantive recommendation: detain. *Id.* at 155:21-156:9. There is no factual dispute that this change occurred. *See Velesaca v. Wolf*, 458 F. Supp. 3d 224, 228 (S.D.N.Y. 2020). Further, the separate change in the RCA's scoring matrix to substantially increase the risk score of individuals who entered the country unlawfully prior to 2014 or whose entry date is unknown plainly qualifies as a change rendering custody determinations more stringent or onerous. *See* Barber Decl. ¶¶ 13-15.

Accordingly, the Court should enforce its preliminary injunction by ordering ICE to set aside the June 2017 changes to its risk classification tool, including that version's inability to recommend release.

2. *Order the NYFO to disregard certain 2017 directives, to the extent that those directives affect custody determination decisions.*

ICE expressly changed the risk classification algorithm and tool to ensure compliance with the 2017 directives instructing ICE to increase immigration enforcement and prioritize detention over release. In January of 2017, President Trump issued an executive order stating that federal immigration agencies should no longer "exempt classes or categories of removable aliens from potential enforcement" and directing officers to "employ all lawful means to ensure the faithful execution of the immigration laws of the United States against all removable aliens." Enhancing Public Safety in the Interior of the United States, Jan. 25, 2017, Executive Order No. 13768 at 3 (attached as Ex. 6 to Belsher Decl.). Shortly thereafter, DHS and ICE issued memoranda implementing the executive order. *See* DHS Mem.; Memorandum from Mathew Albence to ICE ERO Employees (Feb. 21, 2017) ("ICE Mem.") (attached as Ex. 8 to Belsher Decl.). These memoranda noted that the executive order should "inform . . . detention decisions," DHS Mem. at 1, and instructed ICE to "work to detain aliens pending a final determination of whether they will be removed from the United States, including a determination regarding eligibility for immigration relief and protection," ICE Mem. at 2. ICE's memorandum specifically noted that ICE officers should grant "parole or other release sparingly." *Id*. at 3. As noted above, ICE's June 2017 removal of the release recommendation and increase to the risk level assessments in the RCA was explicitly part of this change in custody determination policy. *See* Broadcast Message: RCA Update.

Because these directives also render ICE's policies more stringent, this Court should enforce its preliminary injunction by ordering the NYFO to disregard these 2017 policy directives to the extent that they affect custody determination decisions.

3. *Order ICE to issue revised guidance to the NYFO informing employees of the specific policies and practices enjoined by the preliminary injunction and this Court's order.*

Finally, as part of any relief, the Court should order ICE to meet and confer with the petitioners to develop revised guidance and training materials for the NYFO describing the specific policies and practices enjoined by the preliminary injunction, subject to the Court's approval. This relief is especially necessary in light of ICE's ongoing failure to provide accurate instruction to the NYFO about the terms of this Court's order.

CONCLUSION

In sum, ICE has made no meaningful attempts to come into compliance with this Court's preliminary injunction. Consequently, the petitioners respectfully request that the Court order the requested relief to ensure ICE complies with the preliminary injunction.

Dated: December 18, 2020
New York, N.Y.

Respectfully Submitted,

/s/ Amy Belsher

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