

UNITED STATES DISTRICT COURT
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; TAE D. JOHNSON, in his
official capacity as the Acting Director for U.S.
Immigration and Customs Enforcement; UNITED
STATES IMMIGRATION AND CUSTOMS
ENFORCEMENT; ALEJANDRO MAYORKAS, 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,¹

Respondents-Defendants.

Case No. 20 Civ. 1803 (AKH)

**STIPULATION AND ORDER OF
DISMISSAL AND SETTLEMENT**

This Stipulation and Order of Dismissal and Settlement (“Stipulation and Order”) is entered into by and between the Petitioners-Plaintiffs and the Respondents-Defendants to the above-captioned action by and through their attorneys (collectively, the “parties”).

WHEREAS, in February 2020, the petitioners commenced this action, and subsequently filed an amended complaint in March 2020, seeking declaratory and injunctive relief based on claims pertaining to a “No Release Policy” allegedly implemented by U.S. Immigration and Customs Enforcement’s (“ICE”) New York City Field Office in 2017;

WHEREAS, ICE’s New York City Field Office disputes the allegations in the amended complaint and does not concede that it ever had a “No Release Policy”;

¹ Tae D. Johnson and Alejandro Mayorkas are automatically substituted for Mathew Albence and Chad Wolf, respectively, pursuant to Fed. R. Civ. P. 25(d).

WHEREAS, on March 31, 2020, the District Court for the Southern District of New York granted the petitioners' motion for a class-wide preliminary injunction;

WHEREAS, while there are open legal issues and factual disputes, including, in the government's view, with respect to subject matter jurisdiction and the merits of the case, the parties wish to resolve this action without further litigation and pursuant to the terms and conditions contained herein;

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED, by and between the parties, that the action shall be resolved between them as follows:

1. This Action is hereby dismissed with prejudice.
2. This Stipulation and Order, including the terms and conditions set forth below, is the result of the parties compromising and settling disputed claims. Neither this Stipulation and Order nor any representations made by either party in the course of negotiating this Stipulation and Order shall constitute or be construed as any admission of liability or wrongdoing by either party, or by their present or former officers, employees, agents, successors, assigns, or representatives, related to any claims or defenses that were raised (or could have been raised) with regard to this Action.
3. The terms and conditions discussed below are not applicable to Respondent Sheriff Carl Dubois or Orange County, New York.²
4. The terms and conditions discussed below are not applicable to any field office other than the New York City Field Office of ICE's Enforcement and Removal Operations ("ERO-NY"), unless otherwise specified in this Stipulation and Order. Such terms and conditions shall remain in effect for three years following the date that the Court approves and enters the Stipulation and Order on the docket, subject to any tolling of the three-year duration due to a finding of non-compliance as set forth herein.

² Sheriff Dubois was named as a respondent in his official capacity as the immediate physical custodian of the two named petitioners who were detained at the Orange County Jail at the time this action was filed.

Initial Custody Determinations

5. For purposes of this Stipulation and Order, the parties' agreement applies only to noncitizens initially arrested and detained under 8 U.S.C. § 1226(a) by ERO-NY who have not yet received a bond hearing before an immigration judge, with the exception of noncitizens covered under the *Flores* Settlement Agreement and former unaccompanied noncitizen children who are transferred from the custody of the Department of Health and Human Services to ICE when they turn eighteen years of age (defined as "covered noncitizens").
6. ERO-NY agrees that it is required to provide individualized initial custody determinations to covered noncitizens.
7. The parties agree that initial custody determinations are discretionary, and covered noncitizens are not guaranteed any particular outcome.
8. ERO-NY agrees that, consistent with applicable law and regulations, a covered noncitizen should be released (whether on recognizance, bond, or other conditions) if he or she establishes, on a case-by-case basis, to the officer's satisfaction that he or she does not present a danger to the community or a flight risk, including whether if one or more special vulnerabilities warrant release as a matter of discretion in light of the individual circumstances.
9. ERO-NY agrees that it will conduct individualized initial custody determinations for each covered noncitizen in accordance with applicable statutory and regulatory requirements, as well as any applicable policy guidance in effect at the time of the initial custody determination.
10. ERO-NY agrees that it will not adopt a blanket "no-release" policy, *i.e.*, a policy of denying release to covered noncitizens without considering the individual circumstances in each case.
11. ERO-NY agrees that it will conduct initial custody determinations within 48 hours of the covered noncitizen's arrest by ERO-NY unless there is an exigent circumstance that

impedes the determination, in which case a determination will be made as soon as practicable.

12. ERO-NY agrees that, consistent with existing rules and regulations, communications with covered noncitizens during the initial custody determination process will be conducted in a language that the person understands.
13. ERO-NY agrees that, at the time that an initial custody determination is made, ERO-NY will provide oral and written notification of the decision to the covered noncitizen.
14. Receipt of an initial custody determination will not prejudice a covered noncitizen's ability to make any future request to ERO-NY for release, nor to seek release at a custody redetermination hearing (*i.e.*, a bond hearing) before an immigration judge.

Ability to Pay

15. ERO-NY agrees that, during the initial custody determination, its officers will consider, among other things, a covered noncitizen's financial ability to pay when assessing a bond amount. This consideration may include, but is not limited to, asking the covered noncitizen how much they believe they would be able to post, whether they are presently employed and the length of that employment, and whether they have family or friends that would be able to assist them with posting bond. ERO-NY officers should consider the totality of the circumstances presented when determining the amount of bond or other conditions of release.
16. ERO-NY is not required to set a bond that a covered noncitizen can afford in every case.
17. If ERO-NY sets a bond, with or without alternative conditions of release, the minimum amount of bond remains the amount set by statute at 8 U.S.C. § 1226(a)(2), which is currently \$1,500.
18. ERO-NY is not required to release any covered noncitizen for whom it has determined that no bond or alternative conditions of release would be sufficient to ensure the person's appearance if such detention is otherwise permissible by law.

Disability

19. ERO-NY agrees that its officers will consider whether a covered noncitizen has a disability as part of the initial custody determination.
20. In conducting this assessment, ERO-NY agrees to instruct its officers to employ the Americans with Disabilities Act's definition of disability: "a physical or mental impairment that substantially limits one or more major life activities."
21. For covered noncitizens, ERO-NY officers will consider an identified disability under the totality of the circumstances when making initial custody determinations. When determining whether to release or detain a covered noncitizen, ERO-NY officers will consider whether a detention facility that can reasonably accommodate the disability is available.
22. ERO-NY is not required to release a covered noncitizen with a disability in any case if such detention is otherwise permissible by law, for example, if the individual's disability can otherwise be accommodated within a facility.

Initial Custody Determination Worksheet

23. ERO-NY agrees to use the Initial Custody Determination Worksheet (attached as Exhibit A) when conducting initial custody determinations for all covered noncitizens.
24. ERO-NY agrees that its officers will complete the entire worksheet, except that officers will not be required to complete the flight risk section if the covered noncitizen has been determined to be a danger to property or persons. Completing this worksheet includes marking applicable check boxes, signing and dating the worksheet with the completion time noted, and noting the primary considerations affecting the officer's analysis in the "discussion" space on the worksheet. Officers are not required to list on the worksheet all considerations or factors that were considered or affected the initial custody determination.

Advisal Notice

25. ERO-NY agrees to provide an Advisal Notice (attached as Exhibit B) to each covered noncitizen at the beginning of processing and before commencing an initial custody determination.
26. ERO-NY agrees to communicate with the covered noncitizen in a language they understand, including providing them with a translated version of the Advisal Notice in that language or arranging for an interpreter to read the form to them.
27. ERO-NY agrees to keep translated copies of the Advisal Notice on file at the New York City Field Office in the following languages: English, Spanish, Mandarin, Russian, Punjabi, Portuguese, Haitian Creole, Arabic, French, Hindi, and Bengali.
28. ERO-NY agrees to provide the covered noncitizen with reasonable time to review the Advisal Notice and complete the certification at the bottom of the notice prior to the initial custody determination.
29. ERO-NY will not require the covered noncitizen to sign the Advisal Notice if they decline to do so. In that circumstance, ERO-NY will note on the form that the covered noncitizen “Refused to Sign.”
30. ERO-NY agrees to continue to provide each covered noncitizen with a list of free or low-cost legal service providers (*i.e.*, the approved list of legal service providers prepared by the Executive Office for Immigration Review).

Training

31. ERO-NY agrees that it will provide training on the terms of this Stipulation and Order to all of its officers (*i.e.*, to ERO officers within the ERO New York City Field Office) who conduct or directly supervise initial custody determinations for covered noncitizens at any point during the pendency of this Stipulation and Order. The first

of such trainings will be conducted within 40 days following the date the Court approves and enters the Stipulation and Order on the docket.

32. Consistent with the terms of this agreement, the substance of the training shall be in the sole discretion of ICE and ERO-NY.
33. ERO-NY agrees to provide petitioners' counsel with a copy of the PowerPoint training slides that will be used at the trainings related to this Stipulation and Order, and such slides will be provided within 5 calendar days of the first training session. If the training slides are modified any time during this agreement, ERO-NY agrees to provide petitioners' counsel with a copy of the modified PowerPoint training slides within 5 calendar days of the first training session where such modified training slides were used.
34. ERO-NY agrees to provide petitioners' counsel with quarterly reports of the dates of any trainings related to this Stipulation and Order and the number of officers that attended each training, and will also specify how many Deportation Officers (DOs), Supervisory Detention and Deportation Officers (SDDOs), Assistant Field Office Directors (AFODs), and Deputy Field Office Directors (DFODs) attended each training.
35. The above-referenced training slides and quarterly reports will be produced to petitioners' counsel subject to the stipulated protective order (ECF No. 90).

Reporting

36. ERO-NY agrees to provide petitioners' counsel with ongoing, timely, and accurate reporting, as described in the paragraphs immediately below, for the three-year duration of the terms and conditions of this Stipulation and Order, subject to any tolling of that period.
37. ERO-NY agrees to provide petitioners' counsel with the Initial Custody Determination Worksheets for all covered noncitizens on a monthly basis. The worksheets will be

provided to petitioners' counsel within the first ten calendar days of each month, and such production will be subject to the stipulated protective order (ECF No. 90).

38. ERO-NY agrees to provide petitioners' counsel with quarterly reports (every three months), tracking the fiscal year, containing certain data from the Risk Classification Assessment ("RCA") module (set forth in the next paragraph), in excel format, as it pertains to each covered noncitizen. Each quarterly report will be provided to petitioners' counsel within 30 days of each covered three-month reporting period, and such production will be subject to the stipulated protective order (ECF No. 90). For example, the report for the second quarter of Fiscal Year 2022 is due July 30, 2022.

39. ERO-NY agrees that the quarterly reports referenced immediately above will contain the following information for each covered noncitizen, subject to the limitations contained in the next paragraph:

- a. name;
- b. A-number;
- c. RCA public safety risk score;
- d. RCA flight risk score;
- e. RCA special vulnerabilities³;
- f. RCA mandatory detention per statutes and allegations;
- g. RCA decision type;
- h. RCA recommendation;
- i. RCA recommended bond amount;
- j. RCA officer agree/disagree;
- k. RCA supervisor agree/disagree;
- l. RCA final decision;
- m. RCA final bond amount;
- n. RCA decision date;
- o. ICE book-in date;
- p. RCA encounter date;
- q. gender;
- r. country of citizenship;
- s. age at time of RCA decision;
- t. pending charges & convictions at time of RCA decision;⁴ and
- u. INA charges at time of RCA decision.

³ This data field includes, where appropriate, a specific reference to the type of special vulnerability.

⁴ This data field includes, where appropriate, a specific reference to the pending charge or conviction.

40. As noted immediately above, ERO-NY agrees to provide quarterly reports containing the above data for covered noncitizens, but only to the extent that such fields are in use at the time that the initial custody determination is made by ERO-NY. Nothing herein shall restrict ICE from making changes to the RCA platform. If ICE modifies the RCA in a way that removes or renders a data field void, ERO-NY will notify petitioners' counsel if a data field listed above is no longer available or active in the RCA platform during the quarterly production in which the data field is removed from the report.
41. ERO-NY agrees to provide the following instruction concerning the RCA to its officers conducting initial custody determinations: "As currently programmed, the Risk Classification Assessment (RCA) tool issues the following recommendations: 'Detain by the Department of Homeland Security' or 'Supervisor to Determine-Detain or Release on Community Supervision.' Because the RCA may not recommend solely 'Release' or 'Release With Bond,' it is important that you remember that these options are always available on a case-by-case basis for those detained under 8 U.S.C. § 1226(a). The RCA is **not** the final decisionmaker. Instead, you should conduct an individualized custody determination in accordance with agency guidance, policies, and relevant trainings."

Attorneys' Fees, Costs, and Expenses

42. ICE agrees to pay petitioners' counsel the amount of \$75,000 in full satisfaction of any claim against any Defendant for attorneys' fees, costs, and expenses in this Action. Such payment will be made within 90 days following the date the Court approves and enters the Stipulation and Order on the docket.
43. The parties mutually agree to waive any additional claims either party may have against the other party for any additional fees, costs, or expenses related to this Action.
44. This Stipulation and Order shall not be construed as a determination, admission, or concession that either party is a prevailing party or substantially prevailed in any respect of events or matters that are at issue in this Action.

Implementation

45. ERO-NY will implement the terms laid out in this Stipulation and Order within thirty calendar days following the date that the Court approves and enters this Stipulation and Order on the docket (the “Implementation Date”), unless otherwise specified within this Stipulation and Order.
46. Within 10 calendar days of the Implementation Date, ERO-NY will provide petitioners’ counsel with a copy of any written broadcasts instructing ERO-NY officers to begin utilizing the Initial Custody Determination Worksheet and Advisal Notice, subject to the stipulated protective order (ECF No. 90), and will confirm that all ERO-NY officers who are currently conducting initial custody determinations have received the relevant training.

Enforcement and Compliance

47. The Court will retain jurisdiction to enforce the terms of this Stipulation and Order for its duration. Consistent with the terms of this agreement, such retention does not extend to or provide for challenges to ERO-NY’s individual discretionary determinations as memorialized on the Initial Custody Determination Worksheets, although such worksheets may be evidence of noncompliance with the terms and conditions of this Stipulation and Order.
48. As third-party beneficiaries, covered noncitizens will have standing to enforce the terms of this agreement. The petitioners will also have standing to enforce the terms of the agreement. Defendants agree not to contest their standing to enforce the terms and conditions of the Stipulation and Order.
49. The parties commit to work in good faith to resolve any disputes concerning compliance with the Stipulation and Order prior to bringing such disputes to the Court.
50. If either party has a good faith belief that the other party is not in compliance with the terms of this Stipulation and Order, counsel for the complaining party shall promptly notify counsel for the other party, in writing, of the specific grounds upon which such

- noncompliance is alleged (the “Notice of Dispute”). Notice shall be provided to counsel of record as noted on the district court docket sheet.
51. The parties shall promptly meet and confer in a good faith effort to informally resolve the dispute no more than 14 calendar days after the service of the Notice of Dispute, unless the parties agree otherwise.
52. If the dispute cannot be resolved within 21 calendar days of the meet and confer, then either party may move to enforce the Stipulation and Order with the Court.
53. If the Court finds that Defendants are out of compliance with the Stipulation and Order, other than with respect to the Reporting terms, and that such noncompliance was material, the period of such noncompliance will not accrue towards the three-year duration. Absent an explicit finding to the contrary, the presumed period to be tolled runs from the date the Notice of Dispute was received by the opposing party until the defect has been cured.
54. A finding of noncompliance with respect to the Reporting terms shall not provide a basis to toll or extend the three-year duration.

Entirety of Agreement

55. The parties understand and agree that this Stipulation and Order, including the attached exhibits, contains the entire agreement between them, and that no statements, representations, promises, agreements, or negotiations, oral or otherwise, between the parties or their counsel that are not included herein shall be of any force or effect.
56. No amendment, change, or modification to this Stipulation and Order shall be valid unless in writing and signed by counsel for all parties.
57. For purposes of construing this Stipulation and Order, this Stipulation and Order shall be deemed to have been drafted by all parties to this Stipulation and Order and shall not, therefore, be construed against any party for that reason in any subsequent dispute.

New York, New York
March 10, 2022

/s/ Amy Belsher
AMY BELSHER
New York Civil Liberties Foundation
125 Broad Street, 19th Floor
New York, N.Y. 10004
Tel: (212) 607-3300
abelsher@nyclu.org

/s/ Jenn Rolnick Borchetta
JENN ROLNICK BORCHETTA
The Bronx Defenders
360 E. 161st Street
Bronx, N.Y. 10451
Tel: (718) 838-7878
jennb@bronxdefenders.org

Counsel for Petitioners-Plaintiffs

New York, New York
March 10, 2022

DAMIAN WILLIAMS
United States Attorney for the
Southern District of New York



BRANDON M. WATERMAN
Assistant United States Attorney
86 Chambers Street, 3rd Floor
New York, New York 10007
Tel: (212) 637-2741
brandon.waterman@usdoj.gov

Counsel for Respondents-Defendants

SO ORDERED:

HON. ALVIN K. HELLERSTEIN
United States District Judge