IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILMER GARCIA RAMIREZ, SULMA HERNANDEZ ALFARO, on behalf of themselves and others similarly situated, *Plaintiffs,* v. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE), *et al.*, *Defendants.*	)	Case No. 1:18-cv-00508-RC Class Action

REDACTED

PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Stephen R. Patton
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, IL 60654
Telephone: (312) 862-2000
Facsimile: (312) 862-2200
stephen.patton@kirkland.com

Katherine Melloy Goettel
NATIONAL IMMIGRANT JUSTICE CENTER
208 South LaSalle, Suite 1300
Chicago, IL 60604
Telephone: (312) 660-1335
Facsimile: (312) 660-1505
kgoettel@heartlandalliance.org

Patrick Haney
D.C. Bar No. 1005326
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
Telephone: (202) 389-5000
Facsimile: (202) 389-5200
patrick.haney@kirkland.com

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INTRODUCTION

Defendants' Motion for Partial Summary Judgment ("Motion") suffers from multiple, fatal legal flaws.

First, Defendants' admission that disputed issues of fact foreclose summary judgment on Count II of Plaintiffs' complaint applies equally to Count I, which is based on identical factual allegations and alleges the exact same wrongdoing. *See infra*, at 17-18.

Second, completion of ICE's worksheet alone does not, and cannot, establish compliance with the statute because it was not intended to, and does not, change how ICE actually makes custody decisions, it is completed after-the-fact to document decisions that have already been made, and substantive review of the completed forms themselves demonstrates that ICE is *not* complying with the statute. *See infra*, at 18-21.

Third, even if a worksheet alone could establish statutory compliance, ICE's worksheet would not because it is contrary to the language of the statute and this Court's prior decisions interpreting the statute. *See infra*, at 21-23.

Fourth, even if compliance with ICE's documentation system could establish compliance with the statute, it would not do so here because it is undisputed that ICE did not even comply with its own documentation system, failing to complete and upload worksheets for hundreds of Age-Outs. *See infra*, at 23.

Fifth, even if the worksheet did evidence compliance with the statute, it would be substantially outweighed by largely undisputed evidence that ICE is *not* complying with the statute. *See infra*, at 23-56.

Finally, even if ICE were complying with the statute now (which it is not), its past non-compliance alone would require judgment for Plaintiffs and entry of an injunction. *See infra,* at 56-58.

Two related themes pervade all of these defects in Defendants' Motion. The first is the elevation of form over substance. Defendants argue that mere completion of a form alone, and without any analysis of the substance of the response, establishes compliance with the statute as a matter of fact and law. This is notwithstanding that: the form was not intended to, and did not, change how custody decisions were made; the form is completed after-the-fact, to simply "document" a decision that has already been made; an analysis of the *responses* to the form demonstrates that field officers are *not* complying with the statute; a comparison of the form with the language of the statute and this Court's prior decisions establishes that it misstates the requirements of the statute; and even if ICE's form did constitute evidence of compliance, it would be substantially outweighed by a mountain of largely undisputed evidence demonstrating that ICE has not complied, and is not complying, with the statute.

The second theme that pervades Defendants' motion is that it simply ignores all of this contrary evidence. This is particularly remarkable since little of this evidence is new. Indeed, most of it was previously set forth in Plaintiffs' May 15, 2019 Opposition to Defendants' Motion to Decertify the Class. Defendants did not even attempt to rebut this evidence then. And they take the same approach here.

For all of these reasons, Defendants' Motion should be denied.

BACKGROUND

I. Plaintiffs' Complaint and Request for Injunctive Relief

Plaintiffs filed suit on March 5, 2018, and immediately sought an injunction. ECF 1 (Compl.); ECF 2 (P.I. Mot.). Plaintiffs alleged they had been in the custody of ORR, transferred to ICE on their eighteenth birthdays, and sent to adult detention without consideration of less restrictive alternatives to detention as required by Section 1232(c)(2)(B). ECF 21 (Am. Compl.) ¶ 39. Plaintiffs also explained that their individual circumstances illustrated a greater problem:

ICE was not complying with Section 1232(c)(2)(B) on a systemic basis across the country. *Id.* ¶ 82. Plaintiffs alleged that "to the extent [ICE had] policies or procedures requiring such compliance, those policies and procedures are not being consistently enforced and followed." *Id.* Finally, Plaintiffs alleged that, "while ICE's current practices appear to differ by office," "in the majority of cases, unaccompanied children are automatically sent to adult detention and left there until their removal cases are resolved or they are released by the immigration court." *Id.* ¶ 83.

II. The Court's April 18, 2018 Order Granting a Preliminary Injunction

On April 18, 2018, the Court granted Plaintiffs' Motion for Preliminary Injunction. *See* ECF 27 (P.I. Order); ECF 28 (P.I. Op.). In holding that Plaintiffs were "likely to succeed in showing that DHS did not comply with" the statute, the Court made a number of findings that are directly relevant to Defendants' Motion:

First, the Court recognized that Section 1232(c)(2)(B) provides special protections to Age-Outs that adult immigrants do not receive, and imposes special obligations on ICE. Thus, Congress "extend[ed] certain protections" that it had previously created with respect to unaccompanied alien children ("UAC") "to newly adult immigrants who were formerly in the care and custody of HHS" after they turn 18 and are transferred to the custody of DHS and ICE. ECF 28 (P.I. Op.) at 2-3. Under Section 1232(c)(2)(B), "DHS must tak[e] into account specified statutory factors and must 'consider' placement in the least restrictive setting." *Id.*

Second, the Court made clear that Section 1232(c)(2)(B) requires more than simply approving or rejecting sponsors or other alternatives to detention proposed by ORR or other third parties. To satisfy its statutory obligations to consider placement in the least restrictive alternative available, ICE must identify what the available alternatives are. Simply rejecting the alternative proposed by one of the named Plaintiff's counsel did "not show that ICE consider[ed] placement in the least restrictive setting available." *Id.* at 34. "Section 1232(c)(2)(B) requires affirmative

action of DHS in the form of consideration of the least restrictive options available for placement of former unaccompanied alien children . . . ." *Id.* at 25.

Third, and relatedly, the Court found "no indication that Defendants considered . . . any alternative to detention programs or that they even mentioned such options to counsel." *Id.* at 34. "The Court agrees with Plaintiffs that Defendants 'appear to view its [§ 1232(c)(2)(B)] decision-making as a binary choice between detention and release'"; "Defendants offer no indication that they considered requiring, for example, ankle monitoring or any other option to reduce Ms. Hernandez Alfaro's risk of flight to render her eligible for a placement less restrictive than an adult detention facility." *Id.* at 35. Ankle bracelet and other forms of monitoring pursuant to ICE's Alternative To Detention (ATD) program, the Court held, is one of the alternatives ICE is required to consider under Section 1232(c)(2)(B).

Fourth, ICE cannot satisfy *its* obligations under the statute by relying on *ORR's* efforts (or lack of effort) in placing an unaccompanied child, or failing to approve a sponsor, before the child turns 18. Thus, the Court dismissed ICE's argument that "ORR's consideration of sponsors under its standards might show that ICE had complied with its statutory obligations," noting that, among other things, "ORR sponsorship requirements are presumably more onerous than ICE sponsorship requirements." *Id.* at 30-31; *see also id.* at 35 ("ICE does not explain why ORR's consideration of certain proposed sponsors might suffice to meet ICE's statutory mandate.").

Finally, ICE's mere "bald assertion that Plaintiff did not have a suitable sponsor" was insufficient to show compliance. *Id.* at 35. Moreover, "[t]o the extent that ICE relied solely on the fact that Plaintiff had no immediate family in the United States and had not resided at a permanent address for more than six months" – factors that apply to most Age-Outs – ICE "failed

to explain how these factors account for all of the required considerations set forth in 8 U.S.C. § 1232(c)(2)(B)." *Id.*

In short, the Court's preliminary injunction decision rejects, on numerous grounds, the legal premise for Defendants' argument that they are complying with the statute, *viz.*, that all the statute requires ICE to do is passively "consider" *(i.e.,* think about) the alternatives to detention provided by others. Defendants take a single word from the statute – "consider" – and construe it narrowly and in a vacuum, without regard to the context in which it appears and the rest of the statute. ECF 209 (Defs.' Mem. In Supp. of Mot. for Summ. J. ("Mem.")) at 8; ECF 140 (Defs.' Mot. to Decertify) at 8-9, 10. Not only is this contrary to this Court's prior holdings, it is contrary to the statute's plain language, purpose, structure, and settled rules of construction. *See, e.g.,* ECF 28 (P.I. Op.) at 2; ECF 50 (Class Cert. Op.) at 3; *Williams* v. *Taylor,* 529 U.S. 362, 364 (2000) (a "cardinal principle of statutory construction [is] that courts must give effect, if possible, to every clause and word in a statute"); *Am. Scholastic TV Programming Found.* v. *F.C.C.*, 46 F.3d 1173, 1178 (D.C. Cir. 1995) (same).

III. The Court's August 30, 2018 Decision Denying Defendants' Motion to Dismiss and Certifying The Class

On August 30, 2018, the Court denied Defendants' motion to dismiss and granted Plaintiffs' motion for class certification. *See* ECF 49 ("Class Cert. Order"); ECF 50 (Class Cert. Op.). In its decision, the Court again made clear that the statute requires an analysis as to each Age-Out which considers danger to self or others and flight risk as part of a single, integrated determination of what is the least restrictive alternative available. Thus, the statute "calls for an individualized assessment of the proper placement for each former unaccompanied minor in light of DHS's assessment of his or her danger to self, danger to the community, and risk of flight. It includes no provision permitting DHS to short-circuit this inquiry based on finding that a former

unaccompanied alien poses some risk of flight." ECF 50 (Class Cert. Op.) at 40-41. The Court, therefore, rejected Defendants' argument that the statute permits a two-step, sequential analysis in which ICE first determines whether the Age-Out is a danger to self or others or flight risk, and then considers the least restrictive alternative to detention only for those Age-Outs not deemed to pose a danger or a flight risk. Calling this the "plain-as-day meaning of the provision," the Court held that *all* Age-Outs – "regardless of the agency's flight risk or dangerousness determination" – "are entitled to consideration. Full stop." *Id.* at 31.

Similarly, in certifying the class, the Court emphasized that Section 1232(c)(2)(B) imposes substantive requirements on Defendants and that "Congress provided meaningful standards against which to judge whether DHS has complied with" them. *Id.* at 48. The Court also rejected Defendants' claim that to comply with the statute, ICE only needed to better document its Age-Out decisions, as well as Defendants' related argument that the proposed class had "zero members" because "the only alleged injury capable of redress is one regarding documentation." *Id.* at 35-36.

IV. Defendants' New Worksheet and SharePoint Documentation System

On October 17, 2018, Defendants unveiled a new worksheet and SharePoint system. *See* ECF 109-4. This system was designed to document custody decisions that had already been made, and was introduced with a message that it should *not* change the decision-making process officers were already using to make Age-Out decisions. This was apparently due to ICE's stubborn view that it was already complying with the statute and the only problem was a lack of documentation. As Ms. Harper claimed in response to inquiries from her superiors about this Court's preliminary injunction opinion: [redacted] this lawsuit merely raises [redacted] Ex. 1 (Ravenell Dep. Ex. 31) at 1.

First, the worksheet and SharePoint site were *not* intended to change how officers made custody determinations or to ensure that those decisions were made in compliance with the statute.

The memorandum announcing them made this clear: JFRMU "has developed new procedures for *documenting and tracking custody determinations* for unaccompanied alien children (UAC) who turn 18 while in ORR custody, commonly referred to as 'Age-Outs.' *The new process merely helps document the work that officers already do regarding custody determination*." *See* ECF 109-4 (emphasis added). As Mellissa Harper, Defendants' 30(b)(6) witness concerning the new documentation system and JFRMU's unit chief confirmed, the purpose of the worksheet was simply to "ensure that the documentation is in place to support *a process that we've always done*":

> Q: So the process didn't change with this new tracking system, just the documentation, correct?
>
> A: There is no change in the process.

Ex. 2 (Harper 30(b)(6) Dep. Tr.) at 11:17-12:5. *See also id.* at 18:13-16 ("Q. And, again, to be clear, there was no change in policy that accompanied this new documentation, correct? A. No.")

And, this is how officers in the field understood the new system: it did *not* change how they were to make placement determinations, but was rather only a new way to document the decisions they were already making. *See, e.g.,* Ex. 3 (Barnes Dep. Tr.) at 57:2-9 ("Q. . . . [The Age-Out worksheets] don't change the way you make your determinations, correct? A. No, sir. Q. They just document . . . the determinations you were already making? A. Correct.");[1] Ex. 4 (Munguia Dep. Tr. 36:19-37:3) ("Q: And [the worksheet] is . . . simply a new way to document the same custody determinations that ICE was already making; correct? A: Correct."); Ex. 5 (Ravenell Dep. Tr.) at 73:9-73:13 ("Q. Was this new system, this documentation system, accompanied by any change in how FOJCs determined whether to detain or release Age-Outs? A. No."); Ex. 6 (Galvez Dep. Tr.) at 149:21-150:21; Ex. 7 (Hyde Dep. Tr.) at 102:13-103:9.

[1] Plaintiffs have omitted objections in this and subsequent quotations of deposition testimony.

Second, the worksheet is completed *after* custody has been determined, to document a decision that has already been made. Once again, ICE's October 17, 2018 memorandum makes this clear: "[i]t is imperative that FOJCs ensure that all Age-Outs, and the considerations in their custody determinations for each Age-Out, are *documented* in the SharePoint site *within 24 hours of the transfer or release from ORR custody*," ECF 109-4 (emphasis added). ICE's more recent communications to the field similarly direct FOJCs to make the decision first, and fill out the form last. *See* Ex. 9 (Ravenell Dep. Ex. 12) at ICE-0031225 (12/21/18 email from Harper attaching one-page flow chart entitled [redacted] which shows that the worksheet is to be completed as the last step in the process, *after* the custody decision has been made); Ex. 10 (Ravenell Dep. Ex. 21) at ICE-00041431-33 (same guidance repeated at ICE's annual training meeting in April 2019). ICE has never advised FOJCs that the worksheet is to be completed "before making a custody determination" or "contemporaneously" with the decision-making process, as Defendants have recently asserted. *See* ECF 140 (Mot. to Decert.) at 8.

And, once again, this is what officers in the field understand the timing to be. They testified, without exception, that they complete the worksheet after the custody determination has been made. *See*, *e.g.*, Ex. 8 (Venegas Dep. Tr.) at 52:15-25 ("Q. You agree that this statement contemplates that the form will be completed sometimes after the custody determination is made? A. I can see that on the – to what you're referring to, yes. Q. And is that your practice? A. Yes, it is. Q. And to your knowledge, is that the practice of other deportation officers in the Harlingen Juvenile Unit? A. To my knowledge, yes."); Ex. 4 (Munguia Dep. Tr.) at 44:7-45:15 ("Q. And then after you make that determination, at some point after that, but typically before you do the release paperwork, you'll sit down and you'll complete the form? A. Correct."); Ex. 3 (Barnes Dep. Tr.) at 155:10-13.

Third, the worksheet does not, and cannot, demonstrate compliance. It does not even address the central question posed by the statute: what is "the least restrictive setting available after taking into account the alien's danger to self, danger to the community, and risk of flight?" As the Court made clear in its prior decisions, the statute does *not* provide for a piecemeal approach in which danger to self, danger to the community, and risk of flight are considered separately, untethered to an evaluation of the least restrictive alternative available. Nor does the statute contemplate reducing danger to self or others or risk of flight to a single "yes" or "no" answer, without any consideration of the specific nature and degree of the danger or risk or ways in which that risk could be mitigated in order to place an Age-Out in the least restrictive placement available. Yet, that is exactly the approach taken by ICE's worksheet. ECF 109-4 at ICE-0005090-92. Danger to self, danger to the community, and flight risk (Item 8) are considered independently from the least restrictive placement (Item 15). Moreover, officers' remarks in that separate item (Item 8) almost never provide an explanation of the nature or extent of the risk or danger and the effect of that specific risk on potential placements. Instead, Item 8 asks a single yes/no question followed by a series of possible reasons that almost never apply, and a "remarks" section that, when it is filled in at all, is almost always limited to a bare assertion of "flight risk" or "no viable sponsor." *See* Ex. 27 (R. Forrestal Decl.).

The form is equally deficient with respect to the key predicate question to determining "the least restrictive alternative available": what less restrictive alternatives are available? Once again, the form (Item 12) asks a yes/no question: "are any individual or organizational sponsors or supervised group homes available to this Age-Out for placement?" And, once again, while there is a space for remarks to explain "which of these options were evaluated and why they were not used," when remarks are even provided, they are almost always limited to a bare assertion of "flight

risk" or "no viable sponsor." *See* Ex. 27 (R. Forrestal Decl.). Other alternatives that might facilitate release, such as a bond or ankle bracelet monitoring, are addressed separately and independently, in Item 14 as "Discretionary Release Actions." Moreover, the completed forms show that FOJCs almost never consider all of the four "discretionary release actions" Item 14 identifies, and that in a majority of cases, *none* of the four options were considered. *Id.*

Finally, the only Item that references the statute's ultimate objective of determining "the least restrictive alternative available" – Item 15 – is entirely conclusory. It asks: "Detention Decision, Considering Least Restrictive Setting Available: Detain/Not Detain." The form does not ask, or provide space, for any explanation; it only permits checking one of two boxes, "☐ Detain" or "☐ Not Detain." Simply including the words "considering least restrictive setting available" into a question with a binary answer does *not* show that less restrictive alternatives were actually identified and considered, let alone that detention was "the least restrictive alternative available after taking into account the alien's danger to self, danger to community, and risk of flight." In fact, this Court has already rejected Defendants' assertions that such conclusory statements can demonstrate compliance with the statute. *See* ECF 28 (P.I. Op.) at 35.

V. ICE's Belated Discovery of Hundreds of "Missing" Age-Outs for Which Worksheets Were Not Completed

After ICE's documentation system was implemented, ICE repeatedly represented that a worksheet was being completed and uploaded to the SharePoint site for every Age-Out. *See*, *e.g.*, Ex. 2 (Harper 30(b)(6) Dep. Tr.) at 231:10-22; Ex. 11 (Harper Dep. Tr.) at 273:15-274:17; Ex. 12 (Sanchez-Zimak Dep. Tr.) at 10:16-18, 16:7-8, 159:1-19. Indeed, ICE even filed a Motion to Decertify the Class that was expressly premised on this representation. ECF 140 (Mot. to Decert.) at 2. However, after the close of briefing on that motion, ICE disclosed that it had "discovered" hundreds of "missing" Age-Outs for whom worksheets had not been completed and uploaded.

See, *e.g.*, ECF 198 (Aug. 9, 2019 Status Report) at 2. ICE claimed that it discovered these "missing" Age-Outs when it compared its list of Age-Outs with a list produced by ORR and discovered the ORR list contained several hundred Age-Outs for which worksheets had not been completed and uploaded. ECF 203 (Aug. 30, 2019 Status Report) at 2.

In fact, ICE had been on notice since at least October 2018 – almost eight months earlier – that ORR's list of Age-Outs contained hundreds of Age-Outs who were not included in ICE's records. Thus, on October 24, 2018, Plaintiffs provided ICE with FOIA responses from ORR which showed, among other things, that in FY 2017 ORR reported 1,091 Age-Outs, while ICE's monthly Age-Out reports included only 744, an under-reporting gap of 347, or more than one-third. *Compare* Ex. 13 (ICE FOIA Response) at RAMIREZ 00000001 *with* Ex. 14 (ORR FOIA Response) at RAMIREZ 00000741-2. Thereafter, the field offices' underreporting of Age-Outs came up in discovery on numerous occasions. *See*, *e.g.*, Ex. 15 (Reardon Dep. Tr.) at 281:11-25. Indeed, on April 26, 2019, ICE produced, in response to Plaintiffs' discovery requests, an ORR spreadsheet that listed every Age-Out since 2016. Ex. 16 (ORR Spreadsheet). As this point, ICE could – and should – have compared this spreadsheet with its list of Age-Outs for whom worksheets had been completed, particularly since it had been aware since at least October 2018 (and probably much earlier) that field offices were failing to report large numbers of Age-Outs. Such a comparison would have shown that ICE field offices failed to report hundreds of Age-Outs both before and after the new SharePoint system was implemented.

Nevertheless, it was not until July 8, 2019, that Defendants first informed the Court, in their Motion to Hold Defendants' Motion to Decertify the Class in Abeyance, that "there may be a significant number [of] persons who aged-out of ORR custody who were not reported to [JFRMU] on a monthly report, or via an age-out review worksheet." ECF 192 at 1. In Status

Reports filed in August 2019, Defendants reported the total numbers of "missing" Age-Outs: 316 Age-Outs for whom worksheets were not completed and/or uploaded from October 17, 2018 to May 24, 2019; an additional 180 Age-Outs who were not reported from August 30, 2018 to October 16, 2018; and 1,064 Age-Outs who were not reported from April 1, 2016 to August 29, 2018. ECF 197 (Aug. 2, 2019 Status Report) at 2; ECF 203 (Aug. 30, 2019 Status Report) at 2.

In a September 3, 2019 filing, Ms. Harper and Sanchez-Zimak submitted declarations that suggested that ICE did not have access to the ORR data that disclosed this "data discrepancy" until it was produced by ORR in response to Plaintiffs' subpoena on April 26, 2019. ECF 204-1 (Harper Decl.) ¶ 3; ECF 204-3 (Sanchez-Zimak Decl.) ¶ 3. This suggestion is simply not accurate. In fact, ICE had real-time access to this same data through ORR's "UAC portal" during the entire period in question, and FOJCs testified they consult this online database daily to determine which UACs are about to age-out of ORR custody. *See*, *e.g.*, Ex. 18 (Sullivan Dep. Tr.) at 19:2-12, 19:24-20:15 (primary FOJC at Phoenix checks the portal "every day."). Ex. 4 (Munguia Dep. Tr.) at 68:5-17, 68:22-69:21, 70:12-16 ("A. I'm always going onto the ORR – the UAC portal, and I compare it with – their list with my list"); Ex. 19 (Black Dep. Tr.) 14:24-15:20 (Seattle FOJC "will frequently, as much as three or four times a week, go onto the UAC portal"; "I use the UAC portal to make sure my roster [of Age-Outs] is correct.").

In sum, the evidence shows that: for years, JFRMU's records did not include hundreds of Age-Outs; this included at least 316 Age-Outs during the period October 17, 2018, when its new SharePoint system was implemented, through the close of discovery on May 24, 2019, or 23% – nearly one in four – of the Age-Outs during that period; JFRMU either was not aware of ORR's UAC portal, or did not bother to check it, before representing that worksheets were being prepared and uploaded for every Age-Out on or shortly after they age-out of ORR custody; and JFRMU

failed to do so despite being on notice, since at least last October and likely long before that, that field offices were significantly under-reporting Age-Outs.

VI. Defendants' "Updated" Worksheet Does Not Fix the Deficiencies in Its Original Worksheet, It Compounds Them.

After repeatedly stating that it was going to issue a revised worksheet and even training field officers in April 2019 on a new worksheet that was never implemented Ex. 2 (Harper 30(b)(6) Tr.) at 152:6-159:18; Ex. 11 (Harper Dep. Tr.) at 96:15-22, 98:11-16, 108:8-109-109:3, 176:4-8, 177:11-12), on August 23, 2019, ICE announced an "updated" worksheet that field officers were required to use starting September 1, 2019. *See* ECF 203-1 at 2. This worksheet does not address, let alone fix, the deficiencies discussed above with respect to the original worksheet. Instead, it compounds them. Among other changes, it eliminates the only portions of the form that previously provided some evidence whether the field officer was, in fact, complying with the statute – Items 12 and 14. *See* ECF 203-2 at 3-4; ECF 174-1 (Opp'n to Mot. to Decertify) at 36-37; discussion, *infra*, at 36-37.

The "updated" form made four principal revisions. *First*, it eliminated Item 12, which asked, "Are any individual or organizational sponsors or supervised group available to this age-out for placement? ☐ Yes ☐ No." It then directed that, "If No, briefly explain in the Remarks which of these options were evaluated and why they were not used." Item 12, therefore, required that the FOJC identify any individual or organizational sponsors or group homes that were considered and, if they were not used, explain why not. The "updated" form completely eliminates this Item.

Second, the updated form also eliminates Item 14, "Discretionary Release Action(s)," which required that the FOJC provide similar information with respect to other alternatives to detention. Item 14 listed four alternatives to detention (release on an order of supervision (OSUP), release on the Age-Out's own recognizance (OREC), release on an ICE bond, and release under

ICE's ATD program), and required that the FOJC "check all of the options that were evaluated," and "if any options were not evaluated, or were evaluated and not used, briefly explain why in the Remarks." As Plaintiffs previously explained, the responses to Item 14 demonstrated that FOJCs failed to evaluate any of these options as to approximately 60% of detained Age-Outs, and that the required "Remarks" were either blank or provided only a conclusory statements for 90% of the Age-Outs detained. ECF 174-1 (Opp'n to Mot. to Decert.) at 37; *see infra*, at 36-37.

In lieu of Items 12 and 14, the "updated" worksheet adds two new, conclusory "yes/no" questions immediately *after* the FOJC makes his custody recommendation: (1) "Were all options/settings considered when making this recommendation? ☐ Yes ☐ No"; and (2) "Are any alternatives to detention available for this age-out? ☐ Yes ☐ No." ECF 203-2 at 3-4. As in the original form, this recommendation continues to be a conclusory question which calls for only a "detain" or "non-detained" decision, and continues to be worded in a way that creates a superficial record that the FOJC "considered the least restrictive setting available" whether or not that was, in fact, the case: "FOJC Recommendation, Considering Least Restrictive Setting Available (Choose One): ☐ Detained ☐ Non-Detained." *Id.* at 3. The question, therefore, primes the FOJC to provide answers to the two questions added immediately below it ("Were all options/settings considered when making this recommendation? ☐ Yes ☐ No?"; and "Are any alternatives to detention available for this Age-Out? ☐ Yes ☐ No") that are consistent with the FOJC's custody recommendations. *Id*. at 3. Moreover, the questions are limited to a binary yes/no response and worded in a way that eliminates any possibility for a "wrong" answer that is inconsistent with the recommendation that immediately precedes them. Finally, the checkboxes for the various

alternatives to detention are now checked only if the Age-Out is *not* detained and one of the alternatives has been ordered: "If non-detained, please check one:

☐ OREC	☐ OREC/ATD	☐ Parole
☐ OSUP	☐ OSUP/ATD	☐ Bond."

Id. at 4.

At bottom, the revised form is engineered to eliminate answers that might evidence non-compliance and/or contradict the FOJC's required answer that his custody recommendation was made "considering least restrictive setting available." *Id.* at 4. It also eliminates the only items in the original form (Items 12 and 14) that required that FOJCs identify and consider the alternatives to detention that were available and, if they were not used, explain why.

Third, the "updated" form breaks former Item 8 ("Is this Age-Out a flight risk danger to the community, or danger to themselves? ☐ Yes ☐ No") into three subparts (8a, 8b, and 8c) corresponding to each of the three statutory factors. It also adds a list of "yes/no" checkboxes under each, suggesting several potential grounds for finding the risk factor in question present. This includes under 8c relating to flight risk an item that will apply to all, or almost all, Age-Outs: "Lacks fixed address in the United States: ☐ Yes ☐ No."

More fundamentally, this disaggregated Item 8 still treats the determination as to the three statutory risk factors as separate and distinct from, and untethered to, the determination of "the least restrictive setting available." As discussed above, this is contrary to the statute's express language and this Court's prior holding that danger to self or others and risk of flight are to be considered *as part of* the analysis and determination of what is "the least restrictive setting available." Instead, the new form continues to adopt a sequential, two-step approach where a determination that an Age-Out is a danger or flight risk is determined first, as a "justification" for a subsequent determination that the Age-Out will be detained, and alternatives to detention are

considered subsequently and only where the FOJC has determined *not* to detain the Age-Out. *See* discussion, *supra*, at 9-10. Similarly, the updated worksheet continues to reduce danger to self or others or flight risk to "yes" or "no" answers, without any consideration or explanation of the specific nature and degree of the danger or risk or ways in which that risk could be mitigated, for example, by ankle bracelet or some other form of monitoring. *See* discussion, *supra*, at 9. In fact, this deficiency is exacerbated by the "updated" form, which references alternatives to detention only after the detention decision has been made, and as checkboxes that are checked only if the Age-Out is not detained and an alternative has been ordered.

Fourth, the "updated form" adds a new paragraph to the introduction to the form which re-emphasizes that "[t]he purpose of this worksheet is to *document* that ICE considered the least restrictive setting." ECF 203-2 at 1 (emphasis added). The cover email accompanying the "updated" form further drives this point home: "On October 17, 2018, the Juvenile and Family Residential Management Unit (JFRMU) . . . implemented new procedures for *documenting and tracking ICE's custody determinations . . . . These procedures help ICE document the work its officers do every day in making custody determinations for Age-Outs pursuant to* 8 U.S.C. § 1232(a)(2)(B)." ECF 203-1 at 2 (emphasis added).

Like ICE's original, October 17, 2018 memorandum announcing the worksheet (*see supra*, at 7), there is no suggestion that the form represents any change with respect to *how* ICE makes custody decisions. To the contrary, it again makes clear that ICE is in compliance and that the purpose of the form is merely to document the same decisions ICE has previously been making. *Id.* Nor is there any suggestion that the form should be used as a guide in making the custody decision or any requirement that it be completed *before* or *while* the detention decision is made.

ARGUMENT

I. Defendants' Motion Is Refuted by Their Admission That Whether ICE Field Officers Are Complying with The Statute Is a Disputed Issue of Fact.

Defendants concede that Count II of Plaintiffs' complaint raises disputed issues of fact that foreclose summary judgment and, therefore, seek summary judgment only as to Count I. Mem. 1, 8 n.3. But both Counts are expressly grounded on the exact same factual allegations and allege the exact same wrongdoing – ICE's violation of, and failure to comply with, Section 1232 (c)(2)(B). *See* ECF 21 (Am. Compl.) ¶¶ 98-100, 106, 110. They simply allege that wrongdoing violates two separate provisions of the APA. Accordingly, Defendants' motion is refuted by their own admission that Count II raises disputed issues of fact that foreclose summary judgment. Mem. 8 n.3. As the unambiguous allegations of Plaintiffs' complaint make clear, that admission applies equally to Count I.

Defendants apparently contend that the fact issues raised by Count I are different than those raised by Count II, such that ICE's mere adoption of the worksheet and SharePoint system somehow entitles them to judgment as a matter of law as to Count I, but not Count II. But they never clearly explain why this is so. *See* Mem. 8-11. They seem to assume that Count I challenges ICE's lack of a *policy* of complying with the statute, whereas Count II alleges that ICE has not complied with the statute in *practice*, and argue that since the worksheet constitutes such a policy, they are entitled to summary judgment on Count I. *See* Mem. 9-11. But Count I does not even refer to the absence of a *policy* to comply with the statute. And even if it did, the worksheet is, at most, a policy requiring that FOJCs complete a *form*, *not* that they change their decision-making to comply with the *statute*. *See supra*, at 7-8. Regardless, Count I, like Count II, complains about ICE's "*practice*" of not complying with the statute and its "*failure*" to comply with the statue in making Age-Out custody determinations, not the absence of a policy. *See* ECF 21 (Am. Compl.)

¶¶ 99, 102, 103, 104, 105. Both counts are premised on the exact same fact allegations. *See, e.g., id*. ¶¶ 98, 107. And, both complain about the same legal wrong: Defendants' "failure to consider the least restrictive setting" and "to make alternatives to detention programs available" in violation of Section 1232(c)(2)(B). *See*, *e.g.*, *id.* ¶¶ 99-100, 109-110.

Accordingly, ICE's admission that Count II "involves disputed issues of fact – essentially whether ICE officers in the field are indeed considering the least restrictive setting available" requiring that the Court "judge the credibility of all witnesses and resolve disputed factual contentions," Mem. 8 n.3, applies with equal force to Count I. This alone requires denial of Defendants' motion.

II. ICE Conflates Compliance with Its *Worksheet* with Its Obligation to Comply with the *Statute*; Completion of Its Worksheet Does Not, and Cannot, Prove Compliance with the Statute.

ICE's motion also misunderstands Plaintiffs' claims in another, even more fundamental respect. Plaintiffs are not complaining about the absence of a worksheet or system in which ICE "documents" its custody decisions. *See* Mem. 1. Count I addresses ICE's decision-making, *not* its record-keeping: "ICE has failed to consider [Plaintiffs] for placement in the least restrictive setting available and to provide them with meaningful alternatives to detention, as required by [8 U.S.C. 1232(c)(2)(B)]." *See* ECF 21 (Am. Compl.) ¶¶ 1-2, 80-84. Thus, Plaintiffs seek a declaration "that ICE is failing to comply with Section 1232(c)(2)(B)," and an injunction "barring ICE from continuing to violate Section 1232(c)(2)(B)." *Id.* ¶ 93. While ICE's documentation system (along with its flaws and ICE's failure to consistently use it) may be relevant evidence, it does not – and cannot – alone establish that the government is complying with the statute and provides no basis to dismiss Count I on summary judgment.

Section 1232(c)(2)(B) requires that ICE actually and substantively consider the least restrictive setting for every Age-Out *and* make alternative to detention programs available to each

Age-Out. Defendants offer no evidence that ICE actually does that (and in fact the evidence is clear that it does not). And, as we discuss below, the evidence shows that completion of the worksheet does not, and cannot, provide such proof.

A. Because the Worksheet Changed Nothing About ICE's Decision-Making, It Cannot Prove Statutory Compliance.

The government's theory that ICE's adoption of the worksheet fixed any issue with statutory compliance defies ICE's position throughout the course of this case. As discussed above, the purpose of the worksheet was *not* to change how custody determinations were made, but simply to "ensure that the documentation is in place to support a process we've always done." Ex. 2 (Harper 30(b)(6) Dep. Tr.) at 11:19-12:5. "There was no change in policy that accompanied this new documentation," *id.* at 18:13-16, "just additional documentation." Ex. 11 (Harper Dep. Tr.) at 292:1-6. *See also* discussion, *supra*, at 6-7. And, Defendants' factual showing, such as it is, focuses almost exclusively on their alleged compliance with their documentation system – not Section 1232(c)(2)(B). *See*, *e.g.*, Mem. 17, 19.

Since nothing about ICE's actual decision-making has changed, ICE's worksheet cannot provide a basis for summary judgment, as ICE's actual decision-making (not documentation) is what is on trial here. ICE does not even try to establish the absence of a genuine issue of material fact on whether its *substantive decisions* comply with the statute. Instead, it *simply* assumes that completing a worksheet is conclusive proof that the statute was complied with. Defendants do not offer any evidence in support of that assumption because there is none.

B. The Worksheets Do Not Evidence Compliance Because They Are Completed After-The-Fact to Document Decisions That Have Already Been Made.

The evidence is also undisputed that FOJCs fill out the worksheet *after* they have already made a decision on whether to release or detain an Age-Out. *See supra*, at 8. Accordingly, the government's unsupported assertion that the worksheet "takes the FOJC step-by-step through the

relevant information they should consider when making a custody determination" (Mem. 16) would be irrelevant even if it was accurate (which it is not). The undisputed evidence is that FOJCs make custody decisions *before they fill out the form*. Filling out a form after the custody decision is already made cannot demonstrate that FOJCs walked through what ICE claims are "step-by-step" instructions when they made the custody decision. This is particularly true as to the approximately 25 percent of forms that ICE now concedes were completed and uploaded weeks or months later, in many, if not most, cases by someone other than the field officer who made the custody determination. *See supra*, at 10-12.

C. Only a Substantive Review of Completed Worksheets Could Provide Evidence of Compliance (Or Non-Compliance) and ICE Has Not Performed Such a Substantive Review.

The evidence is likewise undisputed that JFRMU's focus with respect to the SharePoint system is solely on process – whether a worksheet has been completed for each Age-Out. Although the system has now been in place for almost a year, Defendants have made no effort to review the worksheets substantively, to determine whether they reflect compliance with Section 1232(c)(2)(B). Ex. 11 (Harper Dep. Tr.) at 273:15-274:11; 275:12-19; 276:4-278:3; 282:9-283:18, 286:10-287:4. *See* Ex. 12 (Sanchez-Zimak Dep. Tr.) at 107:19-109:20, 123:11-124:11. As the National Juvenile Coordinator "in charge of the Age-Out Review Worksheet process" testified, ICE's sole focus has been ensuring that a form is completed for every Age-Out and is uploaded to SharePoint along with the required documentation. *Id*. at 10:10-22. ("Q. And what do you do with regard to the Age-Out Review Worksheet process? A. Well, I just make sure that all the cases are all loaded to the SharePoint and that the supporting documents are attached. Q. Do you do anything else with regard to the Age-Out Review Worksheets? A. I look at it and make sure that all the – the questions are answered."). Defendants simply *assume* that field officers complied with the statute in making each decision the system

subsequently "documents." *See* Mem. 9-10; ECF 140 (Mot. to Decert.) at 10. They offer no substantive analysis of the completed worksheets or other proof to demonstrate that assumption is correct. Nor could they. As we discuss below, the evidence is to the contrary.

In sum, the evidence is clear that the worksheet and SharePoint system were a litigation-driven attempt to create documentation ICE could point to as evidence of "compliance," but without actually changing its decision-making to comply with the statute in practice.

III. Even if the Completion of a Worksheet Alone Could Prove Compliance (Which It Cannot), *This* Worksheet Would Not, Because It Is Contrary to the Statute.

Even if the completion of a worksheet alone could constitute conclusive proof of compliance (which it cannot), the worksheet here would not, because it is contrary to the statute. As discussed above, the worksheet, both in its original and "updated" forms, does not and cannot demonstrate compliance with Section 1232(c)(2)(B). *See supra*, at 7-10, 13-17. *First*, it does not even address the central question posed by the statute: what is "the least restrictive setting available after taking into account the [Age-Out's] danger to self, danger to community, and risk of flight?" Instead, it provides for a piecemeal approach in which danger to self, danger to community and risk of flight are considered separately and unrelated to an evaluation of the least restrictive alternative. Even worse, the worksheet treats the determination whether the Age-Out is a danger to self or others or flight risk as a predicate to, and justification for, a determination that the Age-Out should be detained. Alternatives to detention are considered only *after* this threshold determination has been made and, under the "updated" form, only if the FOJC has determined *not* to detain. In addition, the form reduces danger to self or others and flight risk to "yes" or "no" answers, without any consideration of the specific nature and degree of the danger or risk or ways in which that risk could be mitigated by a less restrictive alternative, such as release with an ankle bracelet or other form of monitoring pursuant to ICE's ATD program.

All of this is contrary to the express language of the statute and this Court's prior decisions. By its terms, the statute contemplates a single, integrated analysis in which the danger to self or the community and flight risk are considered in determining what is the least restrictive alternative available. The statute does *not* contemplate a two-step analysis in which the field officer first determines whether the Age-Out is a danger to self or others or risk of flight, and if so, then makes a binary decision whether to detain or release the Age-Out, and considers alternatives to detention only if the decision is to release. As discussed below (*see infra*, at 33-34), this error is compounded by ICE's training, which expressly directs field officers to adopt this two-step approach.

Second, the only question that references the statute's ultimate objective of determining "the least restrictive alternative available" is entirely conclusory and limited to a binary choice of "detain" or "non-detained": "FOJC Recommendation, Considering Least Restrictive Setting Available (Choose One); ☐ Detained ☐ Non-Detained." ECF 203-2 at 3. The question is thus worded so that the field officer has no alternative but to "affirm" that "the least restrictive alternative" was "considered," whether or not that was, in fact, the case. FOJC answer to this loaded question does not provide *any* evidence of compliance with the statute. Yet, that is the assumption on which Defendants' entire summary judgment argument rests: that a field officer's answer to this question, which is the only question in the worksheet that addresses the statute's requirement that ICE "shall consider the least restrictive setting available," constitutes conclusive proof that the statute was complied with as a matter of law.

As discussed previously (*supra*, at 13-16), the "updated" worksheet does not cure these defects, it compounds them. It eliminates the only items in the original form that previously provided some (albeit incomplete) evidence whether the field officer was, in fact, considering less restrictive alternatives (Items 12 and 14). In the "updated" form these items were replaced with

conclusory questions limited to "yes/no" answers, which appear only *after* the officer's recommendation whether to detain. This is the exact opposite of what Congress intended. And, the form as updated provides for the consideration and choice of an alternative to detention only if the field officer has determined not to detain.

IV. Even if Compliance with ICE's SharePoint System Could Establish Compliance with Section 1232(c)(2)(B), the Record Shows That ICE Did Not Even Comply with Its Own Documentation System.

Next, even if the Court could ignore the rest of the record and consider only the worksheet and SharePoint system, summary judgment would still be inappropriate because ICE did not even comply with its own SharePoint system. As discussed previously, after its worksheet was implemented, ICE repeatedly represented that worksheets were being completed and uploaded to the SharePoint site for every Age-Out. *See supra*, at 11-12. However, after the close of discovery, ICE disclosed that, in fact, worksheets had not been completed and uploaded for 316, or one in four, of the Age-Outs during the period for whom information was provided.

As a result, even if compliance with ICE's "documentation" system could establish that Defendants complied with the statute, the evidence is undisputed that it would not do so here because ICE did not comply with its own documentation system. Moreover, this non-compliance was not limited to a few, isolated lapses. It extended to several hundred Age-Outs and nearly 25% of all Age-Outs during the period for which ICE provided information.

V. Even if ICE's Documentation System Could Provide Some Evidence of Compliance with the Statute, It Would Be Completely Outweighed Here by the Overwhelming and Largely Undisputed Evidence That ICE Is Not Complying with the Statute.

Even if ICE's documentation system could provide some evidence that ICE has complied with the statute, it would be overwhelmingly outweighed here by largely undisputed evidence that ICE is *not* complying with the statute. It is settled law that a court must consider all of the evidence relevant to statutory compliance, not just the evidence Defendants prefer, and must consider it in

the light most favorable to Plaintiffs. *E.g., United States v. Project on Gov't Oversight*, 839 F. Supp. 2d 330, 341 (D.D.C. 2012), *aff'd*, 766 F.3d 9 (D.C. Cir. 2014); *Arrington v. United States*, 473 F.3d 329, 333 (D.C. Cir. 2006). Defendants do not even purport to do that here. To the contrary, they simply ignore the evidence that ICE is not complying with the statute.

A. Defendants' Non-Compliance Is Established by the Testimony of JFRMU Officials and the Field Office Personnel Primarily Responsible for Age-Out Custody Determinations.

If there were any question about ICE's non-compliance, it would be eliminated by the deposition testimony of Ms. Harper and the National Juvenile Coordinators who have primary responsibility with respect to Age-Out determinations, Eric Ravenell and Ana Sanchez-Zimak. Their testimony (ECFs 174-12, -6, and -15, respectively) makes clear that ICE is *not* complying with the statute in numerous, fundamental respects and that it has promoted and/or sanctioned a number of practices that directly conflict with the statute and completely undermine its purpose and intended effect. This includes:

Directing Officers To Use the Same Standard For Age-Outs That ICE Uses For Adults. ICE directs officers to base their Age-Out custody decisions on "the totality of the circumstances," a standard that is not found in the statute and the same standard ICE has long applied in making all adult custody decisions. *See*, *e.g.*, Ex. 5 (Ravenell Dep. Tr.) at 59:9-14 ("Q. In making custody determinations, are Age-Outs entitled to any special protections that would not apply to other adults? . . . A. No."); Ex. 11 (Harper Dep. Tr.) at 9:10-10:13 ("[T]otality of the circumstances" is the standard ICE uses in making "all custody decisions . . . regardless of who is being – the determination is being made for"); Ex. 12 (Sanchez-Zimak Dep. Tr.) at 236:8-17. This effectively eliminates the special protections the statute affords from the custody determination. It is also directly contrary to this Court's prior holding that the statute extends special protection, and imposes special requirements on ICE, with respect to Age-Outs, which do not apply to other adult

immigrants. *See* ECF 28 (P.I. Op.) at 2-3; *see also Lopez v. Sessions*, 18 Civ. 4189 (RWS), 2018 WL 2932726, at *5, 8 (S.D.N.Y. June 12, 2018). Notwithstanding this Court's prior rulings and the statute's language, the adult [redacted] standard was repeatedly emphasized at JFRMU's 2019 annual training session. *See*, *e.g.*, Ex. 10 (Ravenell Dep. Ex. 21) at ICE-0041427 [redacted] (emphasis in original); *id.* at ICE-0041433 (same).

Worse still, Harper and Ravenell admit they have never "seen any guidance or standards in terms of what totality of circumstances means." Ex. 11 (Harper Dep. Tr.) at 10:14-17; Ex. 5 (Ravenell Dep. Tr.) at 144:1-4). The standard, therefore, leaves the decision whether to detain totally up to the discretion of the officer and permits the officer to detain an Age-Out for any reason, whether or not it has any relationship to the factors in Section 1232(c)(2)(B). Ex. 11 (Harper Dep. Tr.) at 57:5-17; Ex. 5 (Ravenell Dep. Tr.) at 47:8-13. Indeed, ICE instructs officers that, in applying the "totality of circumstances" standard, they must consider a list of 18 factors, in which the three statutory factors are given equal weight with a potpourri of considerations not found in the statute. *See* Ex. 10 (Ravenell Dep. Ex. 21) at ICE-0041427-28; Ex. 11 (Harper Dep. Tr.) at 184:3-185:20; Ex. 5 (Ravenell Dep. Tr.) at 190:9-16; Ex. 12 (Sanchez-Zimak Dep. Tr.) at 288:8-15, 289:15-19. This practice defies this Court's holding that Section 1232(c)(2)(B) provides "meaningful standards against which to judge whether DHS has complied with the statute," ECF 50 (Class Cert. Op.) at 48, and that "compliance with 8 U.S.C. § 1232(c)(2)(B) is mandated by statute and therefore not discretionary." ECF 28 (P.I. Op.) at 32.

Requiring Officers To Perform a Risk Classification Assessment That Never Recommends Release. ICE continues to require that, as part of the custody determination, officers must perform and consider the custody recommendation of ICE's Risk Classification Assessment

(RCA) tool, even though ICE revised that tool in August 2017 to eliminate the recommendation of [redacted] so that it will only recommend [redacted] or [redacted] Ex. 20 (Gibney Dep. Tr.) at 58:22-60:7. Although Ms. Harper initially claimed that, when she learned of this change, she issued [redacted] that the RCA recommendation should no longer be relied on or should receive only [redacted] weight, Ex. 2 (Harper 30(b)(6) Dep. Tr.) at 176:4-12, ICE was unable to find any such [redacted] and numerous FOJCs testified that they were not aware of one. *See*, *e.g.*, Ex. 3 (Barnes Dep. Tr.) at 76:20-77:12; Ex. 6 (Galvez Dep. Tr.) at 90:8-15; Ex. 7 (Hyde Dep. Tr.) at 131:16-132:5; Ex. 8 (Venegas Dep. Tr.) at 72:5-18. And at its 2019 annual training session, ICE instructed officers that [redacted] was the required first step in the Age-Out custody determination process. *See* Ex. 10 (Ravenell Dep. Ex. 21) at ICE-0041429-53; Ex. 11 (Harper Dep. Tr.) at 193:4-194:11. Moreover, in a session that focused on the [redacted] of Age-Out custody determinations, Ex. 21 (Harper Dep. Ex. 10), JFRMU ended the session with three examples of [redacted] one of which was [redacted] *Id*. at ICE-0041501. The accompanying [redacted] directed officers that [redacted] *Id.* In short, ICE is requiring that officers begin their custody determination by performing an analysis that never recommends release.

Directing Sequential Decision-Making. ICE continues to provide training and policy guidance that require the sequential decision-making process this Court specifically rejected, ECF 50 (Class Cert. Op.) at 40-41, in which an officer first determines whether the Age-Out is a danger or flight risk, and then considers alternatives to detention only if they are not. *See, e.g.,* Ex. 11 (Harper Dep. Tr.) at 204:21-206:19; Ex. 5 (Ravenell Dep. Tr.) at 108:11-108:21; Ex. 10 (Ravenell Dep. Ex. 21) at ICE-0041433; Ex. 9 (Ravenell Dep. Ex. 12).

Declaring All Age-Outs To Presumptively Be "Flight Risks." ICE automatically deems Age-Outs flight risks based on factors, such as lack of a permanent address and community ties, which apply to almost all Age-Outs, and then relies on that determination to detain the Age-Out or justify a requirement that the Age-Out may only be released to a sponsor. Ex. 11 (Harper Dep. Tr.) at 28:13-29:8. Once again, this is directly contrary to this Court's finding that, "[t]o the extent that ICE relied solely on the fact that Plaintiff had no immediate family in the United States and had not resided at a permanent address for more than six months, Defendants have failed to explain how these factors account for all of the required considerations set forth in 8 U.S.C. 1232(c)(2)(B)." ECF 28 (P.I. Op.) at 35.

Arbitrarily Limiting The Universe Of Potential Sponsors. ICE requires that Age-Outs only be released to a "viable" sponsor, without providing any guidance, standards, or training as to what makes a sponsor "viable," and leaving that determination totally up to the discretion of the officer and his supervisor. Ex. 11 (Harper Dep. Tr.) at 22:1-23:3, 36:7-11, 37:13-19, 34:8-20. ICE concedes that there is no viability requirement in the statute and that the only requirement in the statute is that a less restrictive placement is "available." *Id.* at 73:2-18, 78:2-12.

Refusing To Make Any Efforts To Find Available Sponsors. ICE limits the sponsors and other alternatives officers are required to consider to those provided by ORR or some other third party, and excuses officers from any attempt, let alone obligation, to identify the alternatives that are "available" within the meaning of the statute. As Ms. Harper testified:

> Q. So the officer's only obligation is just to consider what somebody else provides him or her, correct?
>
> A. Right, as a law enforcement agency, it is not our job to seek out social programming. That responsibility belongs to ORR.
>
> Q. So ORR is responsible for identifying potential sponsors, correct?
>
> A. Yes.

Q. That's not ICE's responsibility?

A. It is not our responsibility.

Ex. 11 (Harper Dep. Tr.) at 43:7-17. *See also* Ex. 5 (Ravenell Dep. Tr.) at 58:13-18) ("If you're an adult, you're an adult . . . [W]e don't go out looking for sponsors, we don't go out checking to see what type of individuals they are."). This practice defies this Court's prior finding that simply rejecting the sponsors proposed by others, without attempting to identify any other alternatives available, does *not* "meet Defendants' statutory obligation." ECF 28 (P.I. Op.) at 34.

Relying Wholly On ORR's Failure To Approve A Sponsor. Similarly, ICE continues to treat ORR's failure to approve a sponsor as a presumption that the sponsor was not viable and its failure to place a UAC with a sponsor as a presumption that the UAC was unsuitable for release, permitting this presumption to be overcome only with new information unavailable to ORR. *See, e.g.*, Ex. 22 (Harper Dep. Ex. 11) (Harper questioning release of an Age-Out to his sister-in-law; [redacted]

Ex. 11 (Harper Dep. Tr.) at 308:8-310:4; Ex. 23 (Ravenell Dep. Ex. 32) at ICE-00003022-23 (Harper email explaining high detention rates; [redacted]. Once again, this Court rejected this same argument in its decision granting a preliminary injunction: *ORR's* failure to approve a sponsor or place an Age-Out does not "suffice to meet ICE's statutory mandate." ECF 28 (P.I. Op.) at 35; *see also id.* at 31.

ICE's brazen and defiant non-compliance with the statute and this Court's prior decisions is further confirmed by the testimony of the FOJCs responsible for making custody determinations at the field offices with the largest numbers of Age-Outs. The discussion below provides a few examples of this extensive body of testimony:

First, most FOJCs make no attempt to identify sponsors or other alternatives to detention. Instead, they simply accept or reject alternatives proposed by others. ICE's Houston field office is a good example of this pervasive failure. Its primary FOJC testified as follows:

> Q. . . . Are you aware of any situation where an Age-Out was released to a less-restrictive setting, whether it was a shelter or group home or a sponsor, that was identified and/or arranged for by ICE?
>
> A. No, sir, not to my knowledge.
>
> Q. Would you agree with me that's not something that ICE views as part of its responsibilities with respect to Age-Outs?
>
> A. It's something we normally don't do . . . .
>
> Q. Have you ever tried to identify a potential individual or organizational sponsor or group home or shelter that would take one of your Age-Outs?
>
> A. No, sir.
>
> Q. Are you aware of anyone else in the juvenile unit ever doing that?
>
> A. Not to my knowledge, sir . . . .
>
> Q. Do you believe that it is part of your role as an FOJC to go out and try to identify or arrange for less alternative placements for Age-Outs?
>
> A. No, sir.

Ex. 3 (Barnes Dep. Tr.) at 44:11-45:11, 48:18-22. *See also*, *e.g.*, Ex. 6 (Galvez Dep. Tr.) at 68:2-6 ("Q. So in your experience, in those cases where a potential sponsor is identified or arranged for, it has always been by the ORR case manager, fair? A. Yes."); Ex. 7 (Hyde Dep. Tr.) at 55:20-24 ("Q. But you and the juvenile unit don't go out and attempt to identify places where that Age-Out, on your own, where that Age-Out could live, correct? A. No.").

Miami's primary FOJC testified not only that is it not ICE's responsibility to identify potential sponsors, but that Miami was instructed that ICE is not permitted to identify such sponsors. *See* Ex. 18 (Reardon Dep. Tr.) at 59:2-11, 114:17-115:04. This refusal to identify

potential sponsors has no basis in law; ICE cannot possibly consider less restrictive alternatives when it does not first try to determine what those alternatives are.

Similarly, despite this Court's guidance that simply rejecting the sponsor or other alternative proposed by ORR or the Age-Out's attorney "does not show that ICE considered placement in the least restrictive setting available," ECF 28 (P.I. Op.) at 34, that is precisely what many FOJCs do. Miami is an extreme example. Its primary FOJC testified that the Miami office automatically rejects almost all proposed sponsors, citing as an excuse [redacted] *See*, *e.g.*, Ex. 15 (Reardon Dep. Tr.) at 96:20-98:8, 126:18-128:10, 129:22-131:16, 142:18-143:5, 143:15-144:6, 149:23-150:7. This is hardly surprising, since the Miami office does nothing with respect to the placement of Age-Outs prior to their eighteenth birthday, leaving at most a single day to fulfill its statutory obligations. *See id.* at 119:19-22 ("Q. So whatever it is that you do with respect to the placement of age-outs occurs on that day, that 24-hour period on which they turn 18, correct? A. Correct."). That is not what Congress intended.

Second, in direct contradiction of this Court's finding that the mere "bald assertion that [an Age-Out] did not have a suitable sponsor" cannot "suffice to meet ICE's statutory mandate," ECF 28 (P.I. Op.) at 35, such assertions are the only explanation FOJCs typically provide in the worksheet for detaining Age-Outs, where they provide an explanation at all. For example, the El Paso office provided only [redacted] as its [redacted] for detaining every Age-Out detained during the period from October 17, 2018-January 31, 2019. *See* Ex. 6 (Galvez Dep. Tr.) at 288:6-295:22. In fact, El Paso FOJCs justified their detention decisions with such conclusory assertions even where potential sponsors were clearly available and they had made no attempt to contact them. *See*, *e.g.*, *id*. at 218:21-220:1.

Third, notwithstanding this Court's determination that an Age-Out's lack of "immediate family in the United States" or "a permanent address" is not dispositive, and does not foreclose the consideration of less restrictive alternatives, ECF 28 (P.I. Op.) at 35, field offices often automatically deem Age-Outs without a sponsor or an address flight risks, and then detain them based on that determination alone. Once again, El Paso is an example. Its lead FOJC testified that, absent a sponsor and an address, an Age-Out is automatically deemed a flight risk. *See* Ex. 6 (Galvez Dep. Tr.) at 241:9-13, 291:12-17. Indeed, several FOJCs testified that their office considered most, if not all, Age-Outs to be flight risks. *See* Ex. 24 (Pepple Dep. Tr.) at 175:22-176:10; Ex. 19 (Black Dep. Tr.) at 24:10-12.

Fourth, although this Court specifically found that ORR's failure to approve a sponsor cannot satisfy or excuse ICE's obligation to consider that sponsor under § 1232(c)(2)(B), ECF 28 (P.I. Op.) at 35, once again, that is exactly what many FOJCs do. *See*, *e.g.*, Ex. 6 (Galvez Dep. Tr.) at 312:6-314:13; Ex. 15 (Reardon Dep. Tr.) at 86:10-87:17.

Fifth, despite this Court's holding that even where ICE considers an Age-Out a flight risk it must consider release options like ankle bracelet monitoring, ECF 28 (P.I. Op.) at 34-35, ICE officers routinely fail to consider such alternatives. *See*, *e.g.*, Ex. 8 (Venegas Dep. Tr.) at 74:12-76:4 (admitting that he does not consider ICE bonds or ATD because Harlingen does not employ such alternatives); Ex. 3 (Barnes Dep. Tr.) at 40:6-15 (admitting that he is not aware of any Age-Outs from Houston ever participating in the ATD program); Ex. 24 (Pepple Dep. Tr.) at 22:13-16; 172:10-173:9 (admitting he has never utilized ICE's ATD program for an Age-Out).

Indeed, several FOJCs were not aware that the ATD program is even an option for Age-Outs. *See*, *e.g.*, Ex. 3 (Barnes Dep. Tr.) at 40:16-22 ("Q. Are you aware that that's an option that you, as an FOJC, have, which is to release an Age-Out on their own recognizance but with an

ankle bracelet monitoring or some other form of ATD? A. No, sir."); Ex. 19 (Black Dep. Tr.) at 180:23-181:9 (admitting that she does not consider ankle bracelet monitoring because she "did not know that was an available option."). This combination of unwillingness to consider ICE's ATD program and lack of knowledge that it is even an option has resulted in only a small number of Age-Outs being released with ankle bracelet or other monitoring. *See infra*, 54-55.

This Court has already found that each of these practices fails to comply with the statute. Nevertheless, the evidence shows that each has continued, both as official policy and in practice, including after the introduction of Defendants' new documentation system.

B. Defendants' Policy Guidance And Training Are Both Incorrect And Woefully Inadequate.

ICE's non-compliance with Section 1232(c)(2)(B) is also evident in the guidance and training that Defendants provide field officers regarding Age-Out placement determinations, which is inadequate at best, and in many instances, simply incorrect. The evidence demonstrates that field officers are not, and have never been, properly trained on how to make Age-Out custody determinations that comply with Section 1232(c)(2)(B).

Policy Guidance. Official ICE guidance concerning Section 1232(c)(2)(B) is both inadequate to inform field officers of their obligations under the statute and reflects ICE's fundamental misunderstanding of its statutory obligations. According to Ms. Harper, ICE issued only three directives regarding Age-Outs between the 2013 enactment of Section 1232(c)(2)(B) and March 2018. A single-page memorandum issued in May 2013 references the statute, but does not list the statutory factors, and incorrectly states that the statute did *not* require ICE to change its custody determination practices as to Age-Outs. *See* ECF 20-3 (Harper Decl.) at Ex. 1. A second single-page memorandum, issued in November 2013, does refer to the three statutory factors, but only in passing. And, it provides no guidance on how to assess or apply them or, more importantly,

how to determine where an Age-Out should be placed in conformity with the statute. *Id.* at Ex. 2. The third memorandum, dated January 13, 2016, devotes only a single paragraph to Section 1232(c)(2)(B), which simply paraphrases the statutory language. *Id.* at Ex. 3, at 5.

Ms. Harper's March 27, 2018 declaration also cited ICE's FOJC handbook, but it is similarly cursory and equally problematic. *See id.* at Ex. 6 (Sept. 2017 Handbook); Ex. 25 (Apr. 2018 Handbook). Only three of its 77 pages reference Section 1232(c)(2)(B). The first is a single paragraph which simply paraphrases the statute's provisions. ECF 20-3 (Harper Decl.) at Ex. 6, at 18; Ex. 25 (Apr. 2018 Handbook) at ICE01-00007607-08. And, while ICE's ATD program is subsequently referenced, there is no reference to the statute's requirement that Age-Outs shall be eligible to participate in "a continuum of alternatives" and the manual appears to confuse ICE's ATD program with the lower case and much broader "alternative to detention programs" referenced in the statute. *See* ECF 20-3 (Harper Decl.) at Ex. 6, at 43-45; Ex. 25 (Apr. 2018 Handbook) at ICE01-00007636-37. Once again, the handbook provides no guidance as to how an FOJC should determine an Age-Out's placement in compliance with the statute.

The only written policy guidance ICE has provided since Ms. Harper's March 29, 2018 declaration is a one-page "Guidance on Age-Outs." Ms. Harper sent this [redacted] to all FOJCs on December 21, 2018, with a brief cover email stating, [redacted] Ex. 9 (Ravenell Dep. Ex. 12) at ICE-0031224. The guidance is problematic on multiple fronts. First, it begins by directing that [redacted] *Id*. at ICE-0031225. Second, the guidance depicts the placement decision process sequentially, directing that field officers first [redacted] the three statutory factors, then [redacted] and then, [redacted] consider alternatives to detention programs.

Id.; see also Ex. 26 (ICE-0000565). This suggests that consideration of the least restrictive alternative should only occur if the field officer decides *not* to detain an Age-Out based on assessment of the statutory factors, in contravention of this Court's preliminary injunction decision. *See* ECF 50 at 40. Ms. Harper confirmed this was how she understood the chart. Ex. 11 (Harper Dep. Tr.) at 204:21-206:10.

Training. ICE's training suffers from the same problems. At its annual training meetings in 2016 and 2018, JFRMU only presented a single slide on Age-Out placement decisions. ECF 20-3 (Harper Decl.) at Exs. 4-5. Neither even mentioned the statutory factors. Field officers were directed to "seek an ORR post-18 plan," but received no guidance on what they should do to obtain the information needed to make an Age-Out decision in the absence of such a plan and/or to identify potential sponsors and other alternatives to detention. *Id.* Both presentations direct field officers to run the RCA tool as a component of their Age-Out placement determination, even though that tool is configured to provide only a recommendation to detain or speak to a supervisor, and *not* to release. *Id.;* Ex. 2 (Harper 30(b)(6) Dep. Tr.) at 168:5-169:4. Perhaps most problematic, the slides direct field officers merely to "consider VAWA" in their decision-making process. ECF 20-3 (Harper Decl.) at Exs. 4-5. Not only is this inadequate to inform a field officer what compliance requires, but it implies that compliance is optional.

JFRMU's April 2019 annual training meeting devoted more time to Age-Outs than the two previous trainings, but the information provided was even more flawed. In a presentation regarding this lawsuit and Age-Outs, Ms. Sanchez-Zimak presented slides that again directed field officers to make placement decisions based on the [redacted] *See* Ex. 10 (Ravenell Dep. Ex. 21) at ICE-0041427; Ex. 11 (Harper Dep. Tr.) at 9:10-11:13. The slides also directed field officers to first run the RCA tool (which cannot recommend release), and then

[redacted] and [redacted] Ex. 10 (Ravenell Dep. Ex. 21) at ICE-0041429. As discussed above, the statutorily-mandated analysis is not optional, and it does not provide that placement should be based on [redacted]

Ms. Sanchez-Zimak's presentation culminated in a discussion of three Age-Out scenarios. *Id.* at ICE-0041434-52. In two, the "right" answer presented was detention. *Id.* at ICE-0041440-52. Both set up a binary choice between adult detention and an unsatisfactory placement identified by ORR. The slides imbue this choice with moral overtones: should ICE release a mother and baby to a human trafficker? Should ICE release a young man with mental health needs to a temporary shelter that cannot ensure he gets adequate treatment? *Id.* In neither are officers instructed to consider *any* non-custodial placements other than the inadequate option identified by ORR. And while the scenarios state that ICE detention is the "safest" option, there is no indication that officers should consider the ways in which detention will negatively impact the Age-Outs: the mother and baby will be separated; the young man might not get treatment in prison and detention might exacerbate his condition. The speaker notes annotating both scenarios stress that [redacted] *Id.* at ICE-0041452. Sanchez-Zimak testified as much: JFRMU's training focuses on process and paperwork, and does not concern substance, which is wholly at the discretion of the field. Ex. 12 (Sanchez-Zimak Dep. Tr.) at 18:1-7; 20:17-21:13.

This emphasis on documentation over substantively correct decision-making was also the theme of another session at the April 2019 training, in which officers were given a sample Age-Out file and asked to make a custody determination and complete a revised version of ICE's worksheet.

See Ex. 21 (Harper Dep. Ex. 10). Incredibly, officers were told that in making the decision whether to detain an Age-Out [redacted] *Id.* at ICE-0041496. In other words, the substantive decision itself is discretionary, what is key is [redacted] In the sample, because ORR had not identified a [redacted] sponsor or post-18 program for the Age-Out, [redacted] *Id.* at ICE-0041498. In other words, ICE is explicitly training officers that ORR's efforts to identify sponsors satisfy ICE's obligations under Section 1232, an approach that this Court specifically rejected before this training took place. ECF 28 (P.I. Op.) at 30-31.

Worse still, these materials indicate that in the absence of an appropriate ORR-identified sponsor, officers are not to *consider* releasing an Age-Out. Ex. 21 (Harper Dep. Ex. 10) at ICE-0041498. This is the definition of an improper "default to detention" policy. ICE's most recent training materials thus provide significant – and disturbing – evidence of ICE's fundamental misunderstanding of its statutory obligations. Defendants are not complying with the statute, and they do not provide adequate or accurate training to decision-makers on *how* to comply.

C. Analysis of ICE's Worksheets Themselves Demonstrates That ICE Is Not Complying with the Statute.

A review of the 581 worksheets relating to Age-Outs during the period October 17, 2018 through January 30, 2019, which Defendants relied on in support of their motion to decertify, paint a clear picture of ICE officers' failure to comply with their statutory obligations in making Age-Out placement decisions. Far from proving compliance, the completed worksheets actually show that ICE is *not* complying with Section 1232(c)(2)(B). *See* Ex. 27 (R. Forrestal Decl.).

For example, the worksheets almost never reflect any evaluation or analysis of flight risk, danger to self, or danger to the community. Of the 153 worksheets relating to Age-Outs who were

detained, 128 had a "yes" response for Question 8. Of those 128, 7, or 5%, provided no explanation of any sort. Another 102, or 80%, included only conclusory statements like "flight risk" or "no sponsor." For only 9 of those 128 Age-Outs, or 7%, were substantive remarks provided to show why an officer viewed that individual as a flight risk or danger. *See id*. Accordingly, the vast majority of the worksheets provided no explanation or only the type of bare assertion this Court previously found inadequate. ECF 28 (P.I. Op.) at 34-35. Moreover, 24, or 16%, of the Age-Outs were detained despite the fact that ICE deemed them *not* to present a risk of flight or danger to themselves or others. That is, on each of these 24 worksheets, Question 8 is answered "no," but the Age-Out was nevertheless detained. *See* Ex. 27 (R. Forrestal Decl.). In these cases, which constitute 1 in 6 Age-Outs detained, ICE's decision to detain the Age-Out was evidently based on factors other than those ICE is statutorily required to consider.

The completed worksheets also demonstrate that ICE rarely, if ever, considers the full range of potential alternatives to detention. For instance, Item 14 identifies four alternatives to detention recognized by ICE. Of the worksheets for the 153 detained Age-Outs, 88, or 57.5%, indicated that *none* of the four options was considered. Nor was this failure remedied by the officers' remarks. *Id.* In 70 of those 88 worksheets, or 79.5%, the "remarks" section was either blank or provided only conclusory statements indicating that the Age-Out had "no viable sponsor," was a flight risk, or that ORR had not provided a Post- 18 Plan. *Id.* Moreover, as to the remaining 65, or 42% of the 153 worksheets – where one or more (but not all) of the options were "evaluated" – 56, or 86%, were either blank or provided only bare assertions. *Id.* In total, therefore, 135, or 88%, of the worksheets for detained Age-Outs either (1) indicated that none of the alternatives was considered, or (2) provided no explanation or only bare, conclusory assertions explaining why the

ICE officer failed to consider one or more of the alternatives to detention and why they rejected those alternative(s) they did consider. *Id.*

D. ICE's Own Data Demonstrate That It Is Not Complying with the Statute.

An analysis of ICE's data with respect to the percentage of Age-Outs detained by individual field offices further demonstrates that ICE is not complying with the statute. This data shows that the detention rate varies dramatically among offices, and in some cases, within the same office over time. This evidence demonstrates that:

- In the two field offices where ICE appears to be making attempts to comply with the statute (San Antonio and, since September 2018, Chicago), 90% or more of Age-Outs are released. This is powerful evidence that the remaining field offices, which have materially lower release rates, are not complying. At offices where ICE is not making *any* effort to comply with the statute, 90% or more of all Age-Outs are detained.

- In some offices, there have been abrupt shifts from almost 100% detention to almost 100% release, and vice versa. This strongly suggests that custody determinations in these offices are not the result of compliance with the statute, but rather other factors, such as the availability of bed space at local ICE detention facilities.

First, ICE's non-compliance is shown by a comparison of the detention rates at San Antonio, the one field office that appears to have made a consistent effort to comply with the statute, and the much higher detention rates at other offices, such as Houston and Miami, that clearly do not. An Age-Out at San Antonio office is 20 times more likely to be released on his own recognizance than an Age-Out at Houston or Miami. Unlike Houston or Miami, San Antonio identifies individual sponsors for almost all Age-Outs, and in those rare cases where an individual sponsor is unavailable, it is regularly able to place Age-Outs in local shelters. *See* Ex. 4 (Munguia Dep. Tr.) at 38:5-19. As a result, almost all of its Age-Outs are released to a sponsor on their own recognizance. For example, between April 2016 and April 2018, San Antonio released 136 of 142, or 96%, of its Age-Outs. *See id.* at 196:18-197:5; Ex. 28 (San Antonio Historical Summary Chart); Ex. 29 (San Antonio Recent Summary Chart).

The Chicago field office is an even more dramatic example of the effect of efforts to comply on detention rates. Before September 2018, Chicago limited its release of Age-Outs to sponsors identified by ORR or others, and imposed conditions on release that were contrary to the statute. For example, in August 2018, Chicago responded to a pro bono attorney's request that her client be released by explaining that, "[i]n order to simplify this, no more Post 18 releases will be authorized. The only cases that will be RORd [released on their own recognizance] will be pregnant females or adult mother and child. All of my juvenile cases will be taken into adult custody and housed in the least restrictive setting that is available for adults." *See* Ex. 24 (Pepple Dep. Tr.) at 211:24-212:6; Ex. 30 (Pepple Dep. Ex. 20) at 2. Such a sweeping policy, where the only Age-Outs considered for release are pregnant women or mothers with infants, clearly violates Section 1232(c)(2)(B). *See* Ex. 24 (Pepple Dep. Tr.) at 215:3-8 (admitting there was no legal basis for this policy). Chicago FOJCs also sent a series of emails in the summer of 2018 stating that ICE would only release Age-Outs if they consented to the addition of an unrelated immigration charge to the Notice to Appear ("NTA") filed against them, which could result in their removal if they subsequently accepted public aid. *See id.* at 75:8-80:16; 84:18-85:18; 167:12-16; Ex. 31 (Pepple Dep. Ex. 2) at 3, 4; Ex. 32 (Pepple Dep. Ex. 16) at 1. More generally, Chicago FOJCs denied requests that Age-Outs be released to proposed sponsors on the ground that [redacted] *See* Ex. 33 (Pepple Dep. Ex. 14); Ex. 24 (Pepple Dep. Tr.) at 139:2-143:13, 147:21-149:16; Ex. 34 (Pepple Dep. Ex. 15); Ex. 24 (Pepple Dep. Tr.) at 153:6-158:15, 159:3-160:1; Ex. 32 (Pepple Dep. Ex. 16); Ex. 24 (Pepple Dep. Tr.) at 164:15-168:12. Unsurprisingly, the result of these practices was that almost all of Chicago's Age-Outs were detained.

Starting in approximately September 2018, however, Chicago began taking affirmative steps to identify potential sponsors and other alternatives to detention. This included identifying local shelters that would serve as sponsors in those cases where an individual sponsor was not available. *See id.* at 15:14-16:5. The effect on Chicago's detention rates appears to have been immediate and dramatic. From October 17, 2018 through January 31, 2019, it released 44 of 50, or 88%, of its Age-Outs. *Compare* Ex. 35 (Chicago Historical Summary Chart) *to* Ex. 36 (Chicago Recent Summary Chart). In fact, in December 2018 and January 2019, the Chicago field office only detained 1 of 26 Age-Outs, a release rate of 96%. Ex. 36 (Chicago Recent Summary Chart). When asked the reason for this abrupt reversal, the primary FOJC there responded that "it was . . . motivated by your lawsuit." *See* Ex. 24 (Pepple Dep. Tr.) at 203:8-23.

San Antonio and Chicago demonstrate that ICE is able to comply with the statute, with little or no additional burden, and that when it does so, most Age-Outs are released to a less restrictive alternative, usually an individual or organizational sponsor on their own recognizance.

But San Antonio and Chicago are exceptions. They stand in stark contrast to other field offices, which clearly do not comply with the statute. Houston is an example. The only circumstances in which it will release an Age-Out are where the Age-Out (1) is in an advanced stage of pregnancy or has a young child, or (2) has a serious health problem, such as cancer. *See* Ex. 3 (Barnes Dep. Tr.) at 103:8-17, 121:20-122:15, 128:22-129:20. Thus, during the same period San Antonio was *releasing* nearly all of its Age-Outs (April 2016-April 2018), Houston *detained* 270 of 277, or 97%, of its Age-Outs. *See* Ex. 37 (Houston Historical Summary Chart). And contrary to ICE's unsupported claims that its new documentation system has resulted in increased compliance, Houston has continued to detain almost all of its Age-Outs since that system took effect. Thus, from October 17, 2018 to January 31, 2019, Houston detained 37 of 39, or 95%, of

its Age-Outs. *See* Ex. 3 (Barnes Dep. Tr.) at 102:11-21. The only exceptions were a young woman who was eight months pregnant and another young woman with a rare form of cancer that required surgery. *See* Exs. 38, 39 (Barnes Dep. Exs. 4, 5).

Miami is another example of pervasive non-compliance. It does not make any attempt to identify or consider alternatives to detention. Indeed, it does not do anything with respect to Age-Outs until the day they turn 18, and even then, its efforts are limited to arranging transportation and the transfer of the Age-Out's files to an adult detention facility. *See* discussion, *supra*, at 30. Thus, from October 17, 2018 to January 31, 2019, Miami detained 26 of 27, or 96%, of its Age-Outs. *See* Ex. 15 (Reardon Dep. Tr.) at 161:5-9. The lone exception was a young mother with a two-year-old child. *See id.* at 161:10-12.

ICE's non-compliance is further demonstrated by abrupt changes in the detention rate within the same field office over time. These dramatic reversals, from almost 100% detention to almost 100% release and *vice versa,* demonstrate that whether an Age-Out is detained or released does *not* depend on the statutory factors or required analysis under Section 1232(c)(2)(B), but rather other factors, such as the availability of bed space at nearby ICE detention facilities. *See* Ex. 11 (Harper Dep. Tr.) at 300:5-9. El Paso is an example. It experienced a 180-degree reversal from releasing 100% of its Age-Outs during the period April-November 2016, to detaining almost 100% of its Age-Outs between February 2017 and August 2018. *See* Ex. 40 (El Paso Historical Summary Chart). El Paso's primary FOJC acknowledged this abrupt reversal, but could not offer any explanation or cause. *See* Ex. 6 (Galvez Dep. Tr.) at 118:10-18.

Similarly, the Harlingen office has a history of abrupt swings in detention rates over time. The following chart illustrates Harlingen's history:

Time frame	Age-Out Experience
April-September 2016	89/100 (89%) ***detained***
November 2016-February 2017	88/94 (94%) ***released***
March 2017-August 2018	361/417 (87%) ***detained***
October 2018-January 2019	266/267 (99.6%) ***released***

See Ex. 41 (Harlingen Historical Summary Chart); Ex. 42 (Harlingen Recent Summary Chart). Harlingen's primary FOJC was unable (or unwilling) to provide *any* explanation for these repeated, abrupt, and complete reversals. *See* Ex. 8 (Venegas Dep. Tr.) at 144:20-145:3 ("I don't know what caused the change. I don't know.").

All told, Defendants' own data indicates widespread and systemic non-compliance. Yet, these examples also show that two ICE offices have understood that compliance with the statute is not only possible, but can be effected with basic diligence and moderate effort. ICE's own data show that such efforts result in very low detention rates. The largely contrary statistics at other ICE offices strongly suggests that they are not following the statutory mandate.

E. Both Sides' Expert Statistical Analyses Demonstrate That ICE Is Not Complying with the Statute.

The foregoing conclusions, which are drawn from a simple comparison of detention rates among field offices, are further confirmed by both sides' expert statistical analyses. Those analyses show: that one variable dominates the question of which Age-Outs are detained and which are not – the field office making the Age-Out decision; that even after controlling for evidence of the "risk factors" specified in the statute, field offices "var[y] considerably in their propensity to detain Age-Outs"; and that six of ICE's largest field offices "have significantly higher propensities to detain [Age-Outs]." Ex. 43 (Lenzo Report) ¶¶ 12, 87 & Ex. 7.

Dr. Justin Lenzo is an expert in statistics, econometrics, and data compilation, who was engaged by Plaintiffs to provide expert analysis with respect to various information produced by ICE, including Age-Out Review Worksheets (AORWs) and other materials with respect to

individual Age-Outs. *Id.* ¶¶ 7-8. He compiled data from the AORWs and SharePoint materials for all 581 Age-Outs identified by ICE during the period for which such information was then available, October 17, 2018 to January 31, 2019 (the "Review Period"). *Id.* ¶¶ 8-9, 26-52. Dr. Lenzo and his team reviewed these materials for each Age-Out to determine if there was *any* evidence of the three statutory risk factors (danger to self or to the community or risk of flight), as well as a fourth factor imposed by ICE – absence of a sponsor ("Risk Factors"). *Id.* ¶¶ 8-9, 40-42. The purpose of this review was to identify, with respect to each Age-Out during the Review Period, "every item in the worksheet and every type of information and document on the SharePoint site that might potentially provide evidence of one of the Risk Factors." *Id.* ¶¶ 33-34.

In conducting this review, Dr. Lenzo and his team followed a "Review Form" that listed, for each risk Factor, each of the questions in the AORW and each type of information included in the SharePoint materials that might potentially provide evidence of that Risk Factor. *Id.* ¶ 34 & Ex. 3. Accordingly, Dr. Lenzo's conducted an objective review of the worksheet and SharePoint materials for *any* information that "might potentially provide evidence of one of the Risk Factors." *Id.* ¶ 33; *see also id.* ¶¶ 34, 40. Based on this review, Dr. Lenzo found that, as to 123, or 82%, of the 150 Age-Outs detained during the Review Period, there was no evidence of any Risk Factor. *Id.* ¶¶ 63, 72 & Table 1. "[O]nly 18.0 percent of detained Age-Outs had any evidence that might indicate danger to the community or self, lacked a potential sponsor, or for whom there was any evidence that might indicate a flight risk that would not be addressed by release to [a] sponsor." *Id.* ¶ 72.[2] The fact that ICE's own worksheets and SharePoint materials show that there was *no*

[2] This 18% figure was "likely an overstatement of the true share of detained Age-Outs for which there was any evidence that might indicate" a Risk Factor for two reasons. First, Ankura adopted "a broadly inclusive view of what materials might indicate evidence of" a danger to community or self. Ex. 43 (Lenzo Report) ¶ 66; *see* ¶ 35. Second, Ankura did not take into account "other mitigating factors that might address" flight risk, such as a claim for asylum or

evidence of any of the Risk Factors for 123 of the 150 (82% or more than 4 out of 5) Age-Outs ICE detained during the Review Period alone is powerful evidence that ICE is *not* complying with the statute.

Dr. Lenzo also performed a series of statistical analyses to "test whether some field offices are more likely to detain Age-Outs even when the Age-Outs exhibit the same evidence (or lack of evidence) of the Risk Factors" and "whether the Risk Factors or other factors," including the Field Office making the detention decision, "drive the decision to detain Age-Outs or to utilize an alternative to detention." *Id.* ¶¶ 9, 78-92. Dr. Lenzo began by comparing Field Office detention rates:

Exhibit 5:
Detention Rates by Field Office
October 17, 2018 to January 31, 2019

Field Office	Total Age-Outs	Detained Age-Outs	Percentage Detained	Detention Percentage Statistically Higher than SNA?[1]
Harlingen	265	2	0.8%	No
Phoenix	52	28	53.8%	Yes
Chicago	49	6	12.2%	No
San Antonio	49	2	4.1%	No
Houston	40	38	95.0%	Yes
Miami	36	34	94.4%	Yes
El Paso	20	13	65.0%	Yes
Philadelphia	14	0	0.0%	No
Los Angeles	12	11	91.7%	Yes
New York	11	8	72.7%	Yes
Washington, DC	10	3	30.0%	Yes[2]
San Francisco	5	0	0.0%	No
San Diego	4	1	25.0%	No
Seattle	4	4	100.0%	Yes
Baltimore	2	0	0.0%	No
Detroit	2	0	0.0%	No
Newark	1	0	0.0%	No
Total	**576**	**150**	**26.0%**	

Source: Age-Out Review Forms, October 17, 2018 to January 31, 2019.

Id. ¶ 74 & Ex. 5. These detention rates range from less than 5% (Harlingen and San Antonio) to 95% or more (Houston and Miami). *Id.* The fifth column shows whether these rates are statistically higher than the rate at San Antonio, which was used as the benchmark based on Plaintiffs' counsel view that it "made the most consistent effort to comply with [the statute]." *Id.*

other relief, or ankle bracelet monitoring or "other alternatives to detention that might be available to the Age-Out." *Id.* ¶ 71.

¶ 75. This comparison showed that, of the four field offices other than San Antonio that have a least 30 observations, "three of these [field] offices had statistically higher detention rates: Phoenix at 53.8 percent, Houston at 95.0 percent, and Miami at 94.4 percent." *Id.* ¶ 75 & Ex. 5. Five offices with fewer observations also had statistically significant higher detention rates: El Paso at 68.4 percent; Los Angeles at 91.7 percent; New York at 72.7 percent; Washington, D.C. at 30 percent; and Seattle at 100 percent.

Dr. Lenzo next analyzed whether these varying detention rates were due to differences in the prevalence of Age-Outs with evidence of Risk Factors. *Id.* ¶¶ 76-77. He did this by repeating the calculation and comparison of detention rates among field offices above, but limited to the subpopulation of Age-Outs with no evidence of any of the Risk Factors:

Exhibit 6:
Detention Rates by Field Office
Among Age-Outs with No Evident Risk Factors
October 17, 2018 to January 31, 2019

Field Office	Total Age-Outs	Detained Age-Outs	Percentage Detained (%)	Detention Percentage Statistically Higher than SNA?[1]
Harlingen	262	2	0.8%	No
Phoenix	52	28	53.8%	Yes
Chicago	44	3	6.8%	No
San Antonio	44	0	0.0%	No
Houston	40	38	95.0%	Yes
Miami	34	33	97.1%	Yes
El Paso	19	13	68.4%	Yes
Philadelphia	13	0	0.0%	No
Washington, DC	7	0	0.0%	No
New York	7	4	57.1%	Yes
San Diego	3	0	0.0%	No
Detroit	2	0	0.0%	No
Los Angeles	2	1	50.0%	No
San Francisco	2	0	0.0%	No
Baltimore	1	0	0.0%	No
Newark	1	0	0.0%	No
Seattle	1	1	100.0%	No
Total	**534**	**123**	**23.0%**	

Source: Age-Out Review Forms, October 17, 2018 to January 31, 2019.

Notes:
[1] Statistical significance of difference determined from an exact binomial test at the 95-percent confidence level against a detention rate of 6.6 percent, which is the 95-percent upper confidence limit of the San Antonio detention rate.

Id. This analysis "shows that significant variation in detention rates across field offices exists even among this subpopulation." *Id.* ¶ 77. The San Antonio office released all of its Age-Outs with no risk factors, while three of the remaining four offices with 30 or more observations had statistically significant, higher detention rates: Phoenix at 53.8%, Houston at 78%, and Miami at 97.1%. *Id.*

¶ 77 & Ex. 6. Two offices with fewer than 30 observations also had statistically significant, higher detention rates: El Paso at 68.4%, and New York at 57.1%. *Id.*

Dr. Lenzo next conducted a series of statistical analyses in which the dependent variable was whether the Age-Out was detained or released and the independent, or explanatory, variables included whether the Age-Out exhibited evidence of any of the four Risk Factors. In those analyses, the basis for comparison was a combination of smaller field offices with too few observations to be analyzed separately. *Id.* ¶¶ 87, 78-85 & Ex. 7. This analysis demonstrated that "even when controlling for evidence of the Risk Factors, there are significant differences in the propensities across field offices to detain Age-Outs." Specifically, "six of the field offices are associated with significantly higher propensities to detain Age-Outs even when controlling for evidence of the Risk Factors": El Paso, Houston, Los Angeles, Miami, New York, and Phoenix. *Id.* ¶ 87 & Ex. 7.

Finally, Dr. Lenzo conducted a statistical analysis that estimated the relative effects of field office location and evidence of one of the Risk Factors on the probability that an Age-Out is detained. *Id.* ¶¶ 89-91 & Ex. 8. This analysis showed that an Age-Out "for whom there is potential evidence of at least one Risk Factor has a probability of being detained that is about 20.4 percentage points higher on average than that of a similar Age-Out without evidence of any of the Risk Factors." *Id.* ¶ 90. On the other hand, "an Age-Out assigned to Houston has a probability of being detained that is on average about 92.8 percentage points higher than a similar Age-Out assigned to San Antonio." *Id.* This is more than 4 ½ times the increase from having a Risk Factor. The same thing is true as to Miami, with a 92.7% increase in the probability of being detained, and to a lesser extent El Paso, with a 66.3% increase in the probability of being detained, Los Angeles, with a 69.3% increase, New York, with a 57.6% increase, and Phoenix, with a 54.4%

increase. *Id.* at Ex. 8. In other words, being assigned to one of these field offices increases an Age-Out's probability of being detained by 2 ½ to 3 times the increase from having evidence of a Risk Factor.

On July 31, 2019, Defendants served a "Rebuttal Report" to Dr. Lenzo's report authored by Defendants' statistical experts, Professors Qing Pan and Joseph Gastwirth (ECF 214-2). After performing their own statistical analyses, Pan and Gastwirth largely *agree* with, and confirm, Lenzo's findings. Gastwirth and Pan purported to "replicate" Lenzo's analyses, but using their own, very different, data set. Among other things, they changed the criteria used to determine danger to community, danger to self, and flight risk. *See id*. at 49-54. But the "most significant difference" between their dataset and Dr. Lenzo's was their addition of a new factor not referenced in the statute – whether a sponsor is not only "available," but also "viable." *See id.* at 1, 55, 59. Professor Pan conceded that their determination of [redacted] was based on her and her assistant's [redacted] with respect to individual Age-Outs, and that there is no written record that would show the reason they deemed a potential sponsor [redacted] *See*, *e.g.*, Ex. 45 (Pan Dep. Tr.) at 123:13-125:22, 191:7-193:2, 266:14-267.7. As a result of these judgment calls, Professors Pan and Gastwirth concluded that only 10, or 7%, of the 152 Age-Outs detained during the Review Period "were non-dangerous and had a viable sponsor." Ex. 44 (Pan/Gastwirth Report) at 1, 71.

Despite this small sample size, Gastwirth and Pan's statistical results confirmed Dr. Lenzo's. Their statistical analysis of Age-Outs with no risk factors and a "viable" sponsor showed "that the detention rates of [Age-Outs] without a risk factor differ among the Field Offices." *Id.* at 64, 74. The field offices from which 9 of these 10 Age-Outs came (Miami and Houston) each had a materially higher detention rate from the benchmark: Miami with an 88%

detention rate; and Houston with a 67% detention rate. *Id.* at 74; *see also* Ex. 45 (Pan Dep. Tr.) at 352:13-354:4.

Similarly, Gastwirth and Pan's statistical analyses of the propensity of different field offices to detain Age-Outs after controlling for risk factors showed that five field offices "had significantly higher detention rates . . . after adjusting for the risk factors." Ex. 44 (Pan/Gastwirth Report) at 66. As Professors Gastwirth and Pan admitted in their Report:

> Dr. Lenzo found that six Field Offices, El Paso, Houston, Los Angeles, Miami, New York City and Phoenix had significantly higher detention rates than the reference group of the six small Field Offices . . . after adjusting for the risk factors. The results in Replicate Exhibit 7, indicate that, with the exception of New York, the same Field Offices had significantly higher detention rates in our analysis.

Id. *See also* Ex. 46 (Gastwirth Dep. Tr.) at 184:20-185:8, Ex. 45 (Pan Dep. Tr.) at 359:2-360:11. And even as to New York, Gastwirth and Pan found that "[t]he estimated effect of being assigned to New York City [was] positive, indicating an increased probability of being detained . . . [h]owever, the effect does not reach quite statistical significance." Ex. 44 (Pan/Gastwirth Report) at 66 n.13. As Professor Gastwirth testified, these field offices [redacted] Ex. 46 (Gastwirth Dep. Tr.) at 197:7-19. Thus, despite their differences in data sets and methodology, both Lenzo's and Pan and Gastwirth's analyses [redacted] *Id.* 208:13-209:3; *see also id.* at 215:3-216:11.

Finally, Professors Pan and Gastwirth's statistical analysis confirmed Dr. Lenzo's conclusions that being assigned to the Miami or Houston offices increased an Age-Out's probability of being detained by 83% and 55% that of being assigned to San Antonio, respectively, and that this was approximately 3 ½ to 5 times greater than the effect of having evidence of a Risk Factor (16%). *See id.* at 76 (Replicate Ex. 8). As Professors Pan and Gastwirth concede, "[o]ur

findings are similar to Dr. Lenzo's Exhibit 8 in the sense that the predicted probability of detention of some Field Offices differ from that of San Antonio. Five Field Offices have a statistically significantly higher probability of detention [than] San Antonio." *Id.* at 68.

In sum, both sides' statistical analyses confirm that: the field offices differed significantly in their propensity to detain Age-Outs, even after controlling for the presence or absence of Risk Factors; across a series of analyses, one factor had, by a large margin, the greatest statistically significant effect on whether an Age-Out was detained: the field office making the detention decision; that the "problem" offices with a statistically significant, increased probability of detention were Houston, Miami, El Paso, Los Angeles, and Phoenix; and that the relative effect of being assigned to one of these "problem" offices on the probability of being detained was 3 ½ to 5 times greater than the effect of having evidence of a Risk Factor. This evidence, by both sides' statistical experts, further demonstrates that ICE is not complying with the statute.

F. The Subsequent Release of the Majority of Detained Age-Outs on Bond, Their Own Recognizance, or Parole Is Further Evidence That ICE Is Not Complying with the Statute.

The fact that more than 60% of the Age-Outs detained by ICE are subsequently released on bond, their own recognizance, or parole – all of which require ICE or the Immigration Court to find that the Age-Out is not a danger to the community or a flight risk – further demonstrates that ICE is not complying with the statute and that, if it was, most, if not all, of these Age-Outs would never have been detained. Information produced by ICE establishes that between January 1, 2018 and May 24, 2019, approximately 60% of the Age-Outs detained by ICE were subsequently released on bond, an order of recognizance, or parole. *See* Ex. 47 (Vinikoor Supp. Report) at 1; Ex. 48 (Lenzo Supp. Report) at 4-5. Specifically, 306, or approximately one third, of the Age-Outs detained during this period for which information was provided, were released on an Immigration

Court bond. *See* Ex. 47 (Vinikoor Supp. Report) at 2-3. Another 200, or 22%, were subsequently released on their own recognizance. *See id.* And, 20, or 2.2%, were released on parole. *Id.*[3] As explained below, each of these forms of release requires a determination that the Age-Out is not a danger to the community or flight risk and, therefore, is compelling evidence that the Age-Outs were neither a danger to the community nor a significant flight risk at the time ICE detained them. This common sense interpretation of ICE's release data is supported by the expert opinion of Judge Robert D. Vinikoor, who served as an immigration judge for 33 years. *See* Ex. 50 (Vinikoor Report) at 2-3, 7; Ex. 47 (Vinikoor Supp. Report) at 1.

Release on Bond. "Because immigration judges must evaluate dangerousness and flight risk in custody proceedings, an immigration judge's decision to release an Age-Out on bond is compelling evidence that the Age-Out did not pose a danger or serious risk of flight at the time ICE transferred the Age-Out to adult custody." Ex. 50 (Vinikoor Report) at 11, 9-12; Ex. 51 (Vinikoor Dep. Tr.) at 97:7-13. Indeed, both sides' experts agree [redacted] and [redacted] Ex. 52 (Ford Dep. Tr.) at 80:22-81:4, 81:6-12; Ex. 50 (Vinikoor Report) at 11; Ex. 51 (Vinikoor Dep. Tr.) at 100:23-101:12.

Accordingly, it is undisputed that more than one-third of the Age-Outs detained by ICE were subsequently released on bond by the immigration court, and in each of these cases, an immigration judge determined the Age-Out was not a danger to the community or a significant

[3] These statistics are derived from data Defendants produced in response to Plaintiffs' Request for Production ("RFP") No. 18. *See* Ex. 49 (Defs.' Resp. to Pls.' RFP No. 18).

flight risk. This is compelling evidence that these Age-Outs were not a danger to the community or significant flight risk at the time they were detained by ICE and that ICE, therefore, did not "consider the lease restrictive alternative available after taking into account their danger to the community, danger to self and risk of flight" when it detained them.[4]

Release on Recognizance. ICE's subsequent release of almost 1 in 4 Age-Outs on their own recognizance constitutes even more compelling evidence that it is not complying with the statute. These Age-Outs are released by ICE pursuant to *its own* determination that they are not a danger to themselves or others or a risk of flight. *See* Ex. 47 (Vinikoor Supp. Report) at 2-3; Ex. 48 (Lenzo Supp. Report) ¶ 10. ICE's subsequent release of these Age-Outs creates a presumption that they were not a danger or a flight risk at the time they were detained, and that they would not have been detained if ICE had complied with the statute.

Release on Parole. The same is true for Age-Outs subsequently released by ICE on parole. "Conditional parole is a type of release in which ICE (or an immigration judge) releases an individual from immigration custody without a monetary bond, and instead requires that individual to comply with certain conditions, including attendance at immigration court hearings." Ex. 47 (Vinikoor Supp. Report) at 3. It, too, constitutes a determination that the Age-Out is not a danger to the community or a flight risk, and therefore constitutes powerful evidence that these Age-Outs

[4] The fact that Age-Outs released by an immigration judge must post a bond of at least $1,500 does not change this conclusion. Immigration judges are statutorily required to set a bond of at least $1,500 and lack authority to release an immigrant without one. *See* Ex. 50 (Vinikoor Report) at 13; Ex. 51 (Vinikoor Dep. Tr.) at 114:19-23, 116:23-117:2. Consequently, an immigration court's release on bond does not mean that the Age-Out was a flight risk and that a bond was necessary to mitigate that risk. Ex. 51 (Vinikoor Dep. Tr.) at 115:4-7. But to the extent that was the case, ICE, too, has authority to release on a cash bond, although as discussed, *infra*, at 52, it rarely uses that authority as to Age-Outs.

would not have been detained if ICE had complied with the statute. *See* Ex. 47 (Vinikoor Supp. Report) at 3.

G. Undisputed Evidence Shows That ICE Fails to Make a Continuum of Alternatives to Detention Available to Age-Outs.

Finally, Defendants ignore the evidence concerning Section 1232(c)(2)(B)'s related requirement that Age-Outs "shall be eligible to participate in alternative to detention programs, utilizing a continuum of alternatives based on the alien's need for supervision, which may include placement of the alien with an individual or an organizational sponsor, or in a supervised group home." For good reason. The evidence is overwhelming that at many, if not most, field offices, Age-Outs are *not* able to participate in alternative to detention programs.

At the threshold, an analysis of the 581 worksheets offered as support for ICE's prior Motion to Decertify the Class demonstrates that ICE field offices rarely, if ever, consider the full range of potential alternatives to detention. *See supra*, at 37-38. But ICE's failure to make alternatives to detention available to Age-Outs is further demonstrated by the testimony of field officers and information produced by ICE in discovery:

ICE Bonds. FOJCs in Houston, Washington, D.C., Harlingen, Chicago, Seattle, Phoenix, and El Paso each testified that they have never released an Age-Out on an ICE bond. *See* Ex. 3 (Barnes Dep. Tr.) at 79:9-15; Ex. 53 (Jones Dep. Tr.) at 228:1-3; Ex. 8 (Venegas Dep. Tr.) at 74:12-24; Ex. 24 (Pepple Dep. Tr.) at 46:23-47:5; Ex. 19 (Black Dep. Tr.) at 46:20-24; Ex. 18 (Sullivan Dep. Tr.) at 136:1-9; Ex. 6 (Galvez Dep. Tr.) at 80:18-82:2. These admissions are confirmed by information produced by ICE: during the period August 30, 2018 to May 24, 2019, only 75 of 1,801 Age-Outs, or less than 7 percent, were released on an ICE bond. Ex. 54 (Defs. Am. Resp. to Interrog. No. 11). Tellingly, a single field office – San Antonio – accounted for 57, or 76%, of these Age-Outs. *Id.* A handful of other offices accounted for the rest. *Id.* The evidence

concerning San Antonio and, to a lesser extent, these other offices, shows that when ICE bonds *are* considered, they can provide a practical and, apparently, effective alternative to detention.

ICE's Alternatives to Detention (ATD) Program. ICE's ATD program includes a variety of options for releasing detainees on their own recognizance, subject to various forms of monitoring, including ankle bracelets, telephonic reporting, and tracking via a smart phone application. *See* Ex. 55 (Carbonneau Dep. Tr.) at 7:17-9:10. More than 16 months ago, in granting Plaintiffs' motion for a preliminary injunction, the Court found that ICE had failed to consider such alternatives with respect to the named Plaintiffs. ECF 28 (P.I. Op.) at 35. Notwithstanding this finding, the evidence shows that most field offices continue to consider Age-Outs for participation in ICE's ATD program only rarely, if at all. And this is despite ICE's own recognition that the ATD program is effective in mitigating flight risk. Ex. 55 (Carbonneau Dep. Tr.) at 27:11-13, 119:17-19. As discussed above, several FOJCs were not even aware the ATD program was available to Age-Outs, and even those who were, rarely, if ever, used it.

These deposition admissions are also confirmed by the data. As Defendants concede in their Motion, during the Review Period (October 17, 2018 through January 30, 2019), only 16 of 742 Age-Outs, or 2%, were released on ATD. Mem. 22. And, during the period from October 17, 2018 through the close of discovery (May 24, 2019), only 34 of 1,360 Age-Outs, or 2% were released on ATD. *Id.* at 22-23.

Release to Shelters, Group Homes, and Other Organizational Sponsors. The statute expressly lists "supervised group homes" and "organizational sponsors" as alternatives to detention in which Age-Outs should be "eligible to participate." Nevertheless, many, if not most, field offices do not consider release of Age-Outs to such organizational sponsors. *See*, *e.g.*, Ex. 3 (Barnes Dep. Tr.) at 44:4-10, 45:4-8; Ex. 6 (Galvez Dep. Tr.) at 63:18-64:4. And those that do,

do so only when such sponsors are arranged for by ORR or others. They do not believe that they have any obligation to know, let alone develop a relationship with, the organizational sponsors in their areas. *See*, *e.g.*, Ex. 15 (Reardon Dep. Tr.) at 49:2-6; Ex. 6 (Galvez Dep. Tr.) at 66:10-14; Ex. 7 (Hyde Dep. Tr.) at 319:16-320:5.

Once again, two exceptions are San Antonio and, recently, Chicago. The long-time FOJC at San Antonio testified that, when an individual sponsor is not available, he will place the Age-Out with one of two Texas shelters, and that this has been key to his ability to place almost all San Antonio Age-Outs with a sponsor since 2012. Ex. 4 (Munguia Dep. Tr.) at 38:5-39:8. Chicago began taking a similar approach starting last fall. By the time of his deposition in December 2018, the primary FOJC there had reached out to a shelter in two cases where an individual sponsor was not available. In both, a call "was successful in placing the age-out." Ex. 24 (Pepple Dep. Tr.) at 21:5-10, 24:9-13.

Once again, Defendants simply ignore this evidence. Instead, they respond with a series of *non-sequiturs* that, even if true, have nothing to do with whether ICE is, in fact, making alternatives to detention available to Age-Outs. Thus, Defendants assert that "the statistics provided by Chief Harper's declaration demonstrate that," during the Review Period (October 17, 2018-January 30, 2019), "most Age-Outs [were] released on their own recognizance." Mem. 22. But the fact that ICE is currently detaining "only" 35% of the UACs who age-out of ORR's custody does *not* show that ICE has "a uniform practice of complying with the statute." *See* ECF 21 (Am. Compl.) at ¶¶ 102-103. In fact, it shows the exact opposite, particularly when it is considered with the other evidence in this case. Moreover, the overwhelming bulk of the Age-Outs released during this period (353 of 478, or 83%), were processed by only three field offices: San Antonio, the only office that appears to have consistently complied with the statute, *see* discussion; Chicago, which

abruptly went from detaining about 100% of its Age-Outs to releasing almost 100% when it began taking steps to comply with the statute; and Harlingen, which abruptly shifted from detaining all of its Age-Outs to releasing all of them starting in September 2018 for reasons that its primary FOJC claimed not to know, but which is consistent with several similar shifts in the past. Moreover, ICE's current detention rate is less than one-half the 75% detention rate that existed when this suit was filed – and the rate to which the evidence suggests the detention rate would return if this lawsuit were terminated without the entry of a permanent injunction. *See* Ex. 17 (Defs.' September 11, 2019 Am. Resp. to RFP No. 21) (showing in March 2018, 118 children aged out of ORR custody and 89 were detained by ICE).

Defendants' related assertion that "Plaintiffs *admit* that ICE does release age-outs on their own recognizance, that ICE does release age-outs to sponsors, and that 'certain field offices within ICE release age-outs to adult shelters, an ICE's ATD program, and on ICE bonds,'" Mem. 23 (emphasis in original), fails for the same reasons. That some field offices, on some occasions, release some Age-Outs does not prove that ICE has a uniform practice, across all field offices, of complying with the statute. What it does show is that all field offices could comply with the statute, *if* they received policy guidance and training that clearly and accurately set forth the statute's requirements and were adequately supervised, and that if they did so, almost all Age-Outs would be released and/or placed in a less restrictive alternative to detention.

Next, the fact that several FOJCs testified "that each age-out receives a case-by-case consideration by ICE with regards to their placement and that these placement considerations are documented using the AORW" (Mem. 23), does not even reference compliance with the statute, let alone provide "indisputable evidence" that ICE is complying with the statute. *Id.* Once again,

Defendants simply ignore the testimony of these (and other) witnesses that they are not aware of or do not use alternatives to detention.

Finally, even Defendants' conclusion that the "indisputable facts are clear that ICE has a uniform, nationwide *policy* of making such age-outs 'eligible to participate in alternative to detention programs, utilizing a continuum of alternatives,'" *id*. at 24 (emphasis added), is a *non-sequitur*. After repeatedly acknowledging that Plaintiffs allege that ICE in *practice* does not comply with the statute, (*id*. at 8, 11, 23), Defendants can only assert that ICE has a "policy" to comply with the statute. *Id. See also id.*, at 1, 10, 20. Even if that were true (which it is not – at most, ICE has a policy of completing a *worksheet* that is *contrary* to the statute, *not* a policy of complying with the *statute*), having a *policy* to comply with a statute does not mean that in *practice* Defendants complied with that policy. Here, the evidence is overwhelming that ICE did not have either a *policy* requiring compliance or a uniform, nationwide *practice* of complying.

VI. Even If Defendants' Documentation System Alone Showed Compliance, the Voluntary Cessation Doctrine Would Entitle Plaintiffs To Judgment and a Permanent Injunction.

Finally, citing *Farmer v. Brennan*, 511 U.S. 825 (1994), Defendants contend that the Court must ignore their past violations and only enter an injunction if Plaintiffs prove they are violating the statute today. *See* Mem. 7-8. As described above, Plaintiffs clearly meet this burden. Regardless, this is a massive over-read of *Farmer* (in which the government omits key words from the Supreme Court's opinion) defying decades of settled law.

Farmer was a single-plaintiff Eighth Amendment case; a transsexual prisoner claimed prison officials were deliberately indifferent to his safety by forcing the prisoner (who identified as female) to live in the general male prison population. The Supreme Court's holding is seminal Eighth Amendment law: officials are "deliberately indifferent" only if they know that inmates face substantial risk of serious harm and disregard that risk by failing to take reasonable measures

to abate it. *Farmer*, 511 U.S. at 830-32. The Court then addressed the prisoner's claim that this standard was too high and prohibited him from filing suit until he was actually injured. *Id.* at 845. What the Supreme Court actually said was:

> ***In a suit such as petitioner's***, insofar as it seeks injunctive relief to prevent a substantial risk of serious injury from ripening into actual harm, "the subjective factor, deliberate indifference, should be determined in light of the prison authorities' current attitudes and conduct," their attitudes and conduct at the time suit is brought and persisting thereafter. ***An inmate*** seeking an injunction on the ground that there is "a contemporary violation of a nature likely to continue," must adequately plead such a violation; to survive summary judgment, he must come forward with evidence from which it can be inferred that the defendant-officials were at the time suit was filed, and are at the time of summary judgment, knowingly and unreasonably disregarding an objectively intolerable risk of harm, and that they will continue to do so; and finally to establish eligibility for an injunction, the inmate must demonstrate the continuance of that disregard during the remainder of the litigation and into the future. In so doing, ***the inmate*** may rely, in the district court's discretion, on developments that postdate the pleadings and pretrial motions, as the defendants may rely on such developments to establish that the inmate is not entitled to an injunction.

Id. at 845-46 (emphasis added, internal citations omitted).

Remarkably, Defendants replace the Supreme Court's word "inmate" with "Plaintiffs" on two separate occasions, and omit the Court's precatory language ("in a suit such as petitioner's") to suggest a Supreme Court rule of general applicability to all injunction requests. That is clearly wrong. Defendants cite no court that has ever suggested this part of *Farmer* extends beyond the Eighth Amendment deliberate indifference context, and Plaintiffs have not located any such authority. Instead, it is settled law that defendants generally *cannot* moot requests for injunctive relief by changing their behavior mid-suit. *See*, *e.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000) ("It is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'"); *United States v. W.T. Grant Co.,* 345 U.S. 629, 633 (1953) ("Along with its power to hear the case, the court's power to grant injunctive relief survives discontinuance of the illegal conduct."); *Hardaway v. D.C. Housing Auth.*, 843 F.3d 973, 979 (D.C. Cir. 2016). Where (as

here) Defendants argue that summary judgment should be granted because they have changed their ways to comply with the law since the complaint was filed, *Defendants* have a "heavy burden" of showing that the offending conduct is not likely to recur. *Hardway*, 843 F.3d at 980; *see also Jackson v. U.S. Parole Comm'n*, 806 F. Supp. 2d 201, 205 (D.D.C. 2011) (same). Dismissal is appropriate only if it is "absolutely clear" that the violations "could not reasonably be expected to recur." *Laidlaw*, 528 U.S. at 190.

Defendants have not met and cannot meet this heavy burden here. Defendants' violations of 8 U.S.C. § 1232(c)(2)(B) have been consistent and pervasive for years, and the evidence shows those violations are extremely unlikely to cease absent an injunction.

CONCLUSION

For all of the foregoing reasons, Defendants' Motion should be denied.

Dated: October 4, 2019

/s/ Stephen R. Patton

Stephen R. Patton
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, IL 60654
Telephone: (312) 862-2000
Facsimile: (312) 862-2200
stephen.patton@kirkland.com

Patrick Haney
D.C. Bar No. 1005326
KIRKLAND & ELLIS LLP
1301 Pennsylvania Avenue, NW
Washington, DC 20004
Telephone: (202) 389-5000
Facsimile: (202) 389-5200
patrick.haney@kirkland.com

Katherine Melloy Goettel
NATIONAL IMMIGRANT JUSTICE CENTER
208 South LaSalle Street, Suite 1300
Chicago, IL 60604
Telephone: (312) 660-1335

Facsimile: (312) 660-1505
kgoettel@heartlandalliance.org

CERTIFICATE OF SERVICE

The undersigned certifies that on this 4th day of October, 2019, a true and correct copy of the foregoing was served via ECF upon counsel of record.

/s/ Stephen R. Patton
Stephen R. Patton