

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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 LILIAN PAHOLA CALDERON JIMENEZ,)
 and LUIS GORDILLO, et al.,)
)
)
) Petitioners,)
) Civil Action
 vs.) No. 18-10225-MLW
)
)
 KIRSTJEN M. NIELSEN, et al.,)
)
)
) Defendants-Respondents.)
)

BEFORE THE HONORABLE MARK L. WOLF
UNITED STATES DISTRICT JUDGE

MOTION HEARING

August 21, 2018
10:09 a.m.

John J. Moakley United States Courthouse
Courtroom No. 10
One Courthouse Way
Boston, Massachusetts 02210

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P R O C E E D I N G S

1
2 (The following proceedings were held in open court
3 before the Honorable Mark L. Wolf, United States
4 District Judge, United States District Court, District of
5 Massachusetts, at the John J. Moakley United States Courthouse,
6 One Courthouse Way, Courtroom 10, Boston, Massachusetts, on
7 August 21, 2018.)

8 THE COURT: Good morning. Would counsel please
9 identify themselves for the court and for the record.

10 MR. PRUSSIA: Good morning, Your Honor. Kevin Prussia
11 from Wilmer Hale on behalf of the petitioners.

12 MS. LAFAILLE: Good morning, Your Honor. Adriana
13 Lafaille, also here for the petitioners.

14 MR. PROVAZZA: Good morning, Your Honor. Stephen
15 Provazza on behalf of petitioners.

16 MS. GILLESPIE: Good morning, Your Honor. Kathleen
17 Gillespie on behalf of petitioners.

18 MS SEWALL: Good morning. Michaela Sewall from Wilmer
19 Hale on behalf of petitioners.

20 MS. LARAKERS: Good morning, Your Honor. Mary
21 Larakers on behalf of the United States.

22 MR. WEILAND: Good morning, Your Honor. Wil Weiland
23 on behalf of the United States.

24 THE COURT: Before we get to the issues of the
25 preliminary injunction and class certification, I want to go

1 back a bit. Yesterday the respondents argued with regard to
2 the motion to dismiss that if any of the petitioners or members
3 of the putative class had a right to have the fact they were
4 pursuing a provisional waiver considered, it was only aliens
5 for whom an I-212 had already been granted?

6 MS. LARAKERS: Yes, Your Honor. That's the point at
7 which we think that it should begin.

8 THE COURT: All right. Where do I find -- and I
9 didn't anticipate that argument, and I have a feeling the
10 petitioners didn't. Where do I find that in your written
11 submissions?

12 MS. LARAKERS: Your Honor, our position has always
13 been that there is no right to seek relief, and so this is an
14 alternative argument that we didn't make because we simply
15 don't think that the right exists.

16 THE COURT: Well, there's a rule in the First Circuit
17 and also in this District Court that if you don't make an
18 argument and develop it, essentially -- the First Circuit says
19 issues adverted to in a perfunctory manner, unaccompanied by
20 some effort in development of argumentation, are deemed waived.
21 That's Zannino, 895 F.2d 1, 17. I discuss this and cite a
22 number of District Court cases in the First Circuit that assert
23 the same principle. In De Giovanni, 968 F.Supp.2d 447, 450.

24 It's a particular problem in this case. It may be
25 waived for the purposes of the motion to dismiss, but it could

1 make a real difference on the motion. And it may be -- well,
2 it could make a difference with regard to class certification,
3 for example.

4 I mean, that argument, if it's meritorious, would have
5 a meaningful effect on the definition of any class. But you
6 know, it's my goal to decide these matters orally the way I did
7 on May 8. The petitioners didn't have fair -- or any notice of
8 the issue or a chance to address it in writing or consider it,
9 so it's a problem.

10 Do the petitioners want a chance to submit something,
11 although it would have to be on an expedited basis, on this
12 issue?

13 MR. PRUSSIA: Your Honor, on this issue I don't think
14 it's relevant to the Rule 12 motion or preliminary injunction
15 motion. I do agree that if there is any relevance, it would be
16 relevant to the class certification issue. I think we're
17 prepared to address generally why in our view our proposed
18 class is correct. I think it does address this specific issue.

19 However, we are also happy to provide additional
20 briefing. We could do so on an expedited basis. But I do
21 think during the course of the day today, during our oral
22 argument explaining why our proposed class is appropriate,
23 we'll address this issue. But if Your Honor would appreciate
24 additional briefing, we're happy to provide it.

25 THE COURT: Well, I think yesterday, you know, I had

1 analyzed how the provisional waiver regulations seemed to me to
2 provide an obligation, create an obligation on the Department
3 of Homeland Security to let people apply and to adjudicate the
4 request for a provisional waiver, but I hadn't thought about
5 whether there's a right to apply for an I-130 that would be
6 frustrated by arrests at CIS offices and a right to apply for
7 an I-212.

8 MR. PRUSSIA: That's exactly right, Your Honor, and I
9 think we'll hear a little bit more today. You don't even get
10 to the 212 process if they're arresting you.

11 THE COURT: I am directing that you file something to
12 address this issue, and the government can, too, say by noon
13 tomorrow. Because I'm going to be working on this.

14 MR. PRUSSIA: Just to clarify, Your Honor, our paper
15 by noon tomorrow?

16 THE COURT: Right.

17 MR. PRUSSIA: Yes, sir, we'll do that.

18 THE COURT: I mean, is there a text -- petitioners
19 presented me with information and I studied it as to why the,
20 what I'm calling the provisional waiver regulations, 2013, 2016
21 regulations provide them a right to have their request
22 adjudicated if they get that far. I'm particularly interested
23 in whether there's anything in the I-130 or the I-212
24 regulations. There are a couple -- there's one paragraph on
25 this that I found in the government's response to the motion

1 for preliminary injunction. It's docket number 78 at page 22.
2 And they say there's no right to remain in the United States to
3 pursue two purely discretionary forms of relief, the I-130 and
4 the I-212. And I just don't think anybody has provided me any
5 briefing on what the regulations say.

6 MS. LARAKERS: Your Honor, I think when I was making
7 that argument also I was bleeding in a little bit to the class
8 cert argument. I apologize if it's not clear, but I certainly
9 make the argument that there's not commonality precisely
10 because there are steps in this process. So I think it was
11 wading in a little bit to that, at what point should it end.

12 THE COURT: Well, look, the point has engaged my
13 attention. I do want to get this right. I don't think it's
14 necessarily material to the outcome of the motion to dismiss,
15 but it could affect the scope of any putative class. It could
16 affect the scope of any injunction.

17 MS. LARAKERS: Absolutely. Your Honor, to be clear,
18 if you'd like, I can certainly submit a brief by 12:00 noon
19 tomorrow as well.

20 THE COURT: Yes, assuming we finish enough here so
21 you're not here then.

22 MS. LARAKERS: Thank you, Your Honor.

23 MR. PRUSSIA: Your Honor, may I ask until 3:00 p.m.
24 tomorrow?

25 THE COURT: Okay, okay.

1 MR. PRUSSIA: Thank you, sir.

2 MS. LARAKERS: Thank you, Your Honor.

3 THE COURT: All right. Now, with regard to the motion
4 for preliminary injunction, I guess there's a threshold issue.
5 The standards are familiar. Judge Saris in an analogous
6 immigration context or in an immigration context addressed them
7 in Devitri, 289 F.Supp.3d at 292, among other things, and the
8 petitioners have to demonstrate a reasonable likelihood of
9 success on the merits. Petitioners also have to demonstrate
10 that they will likely suffer irreparable harm in the absence of
11 a preliminary injunction.

12 So as I said yesterday, I would like to hear some
13 testimony from Ms. Calderon and Ms. De Souza about what impact,
14 you know, being separated from their citizen spouses and
15 children, I believe, would have on them. I have the
16 declarations, and I've made the finding I made on June 11. But
17 it would be helpful in this process to hear some testimony from
18 them addressing that.

19 Is there any -- I do have the sequestration order in
20 place, but is there any objection to Ms. Adducci and Mr. Lyons
21 being here for that testimony?

22 MR. PRUSSIA: No objection to that, Your Honor. I
23 don't know if now is the right time, but I would like to be
24 heard on their testimony prior to it occurring. I know there's
25 a lot to do today.

1 THE COURT: The testimony of who?

2 MR. PRUSSIA: Of Ms. Calderon and De Souza, our
3 petitioners. I don't know if now is the time to do it.

4 THE COURT: Okay. So, yes, now is the time.

5 MR. PRUSSIA: Okay. Your Honor, certainly we
6 understand they've submitted declarations in this case in
7 support of our irreparable harm arguments. And as yesterday, I
8 explained while I appreciate the court has an obligation and
9 duty to make certain factfinding, there's no challenge on
10 respondents' side with respect to our irreparable harm
11 arguments.

12 And I raise this because I do have concern about our
13 non-citizen petitioners testifying, being cross-examined by the
14 government in open court. As Your Honor knows, they've been
15 targeted by ICE for enforcement. They're under protection
16 under the court's jurisdictional stay order, but they are also
17 in the process of applying for immigration benefits. I am not
18 their counsel in connection with those applications.

19 And while we've attempted to coordinate with their
20 counsel between yesterday afternoon and today, we really
21 haven't had an opportunity to do so. And I have discomfort
22 with them being on the stand and being open to
23 cross-examination on matters that may implicate their pending
24 immigration benefits.

25 THE COURT: Well, I was anticipating pretty focused

1 and limited testimony on what the impact of having been
2 separated, I've found unlawfully, from their U.S. citizen
3 spouses and children were; and, you know, if they're required
4 to leave the country, what effect they anticipate that will
5 have on them and their families. I actually thought it would
6 be relatively brief as well as targeted. If there's something
7 that goes beyond that -- because that's what's relevant to the
8 preliminary injunction -- you could object. And I don't know
9 if the government would intend to --

10 MS. LARAKERS: Your Honor, as much as he doesn't know
11 about what their applications say at USCIS, I certainly do not
12 either. I think I can't at this point say that I won't have
13 any questions, but I can at this point say it would be
14 unlikely. Because as I said yesterday, the government
15 recognizes that being separated from a U.S. citizen child is
16 certainly harm. It's just our position that the likelihood of
17 that harm is questionable since they have the relief, since
18 certainly Ms. Calderon has a stay of removal. And that's
19 really the questioning that's not relevant to them but possibly
20 relevant to the government witnesses.

21 MR. PRUSSIA: Your Honor, certainly what you described
22 is what I expected from the court, and that's within my zone of
23 comfort. What I would suggest, Your Honor, as a potential path
24 forward, if the court is interested in having testimony on
25 this, there is the possibility, I believe, of having testimony

1 from the citizen petitioner, for example, Ms. Calderon's
2 husband. I'd feel more comfortable and I think he's able to
3 testify to those issues. He didn't submit an affidavit, but I
4 think the matters to which he'd testify, he's equally able to
5 provide testimony about, considering he's her husband. And I
6 would have more comfort if he was able to do that in court in
7 her stead, just given that I haven't really had an opportunity
8 to coordinate with her immigration counsel.

9 THE COURT: Well, I might hear from him as well, but
10 she's the party.

11 MR. PRUSSIA: They are both parties, Your Honor.

12 THE COURT: They're both parties.

13 MS. LARAKERS: Your Honor, our position on that is the
14 right that you tentatively recognized yesterday would only be
15 her right, not her U.S. citizen husband's right, because she's
16 the one that has the right to seek relief. She's the one
17 applying for the 212 waiver and 601 waiver.

18 MR. PRUSSIA: I think as the I-130 is filed by the
19 citizen petitioner, the benefit flows to the married unit. The
20 harm is experienced by the married unit and their children.

21 MS. LARAKERS: Your Honor, the government defers to
22 your judgment on this.

23 THE COURT: Let me be as transparent as reasonable. I
24 want -- I'm going to hear from Ms. Adducci and Mr. Lyons, who
25 as I understand at the moment is the acting interim director of

1 the field office, right? And in connection with the
2 likelihood -- petitioner has to have likelihood of irreparable
3 harm in the absence of preliminary injunction. It actually has
4 two dimensions. So I need to determine whether they've been
5 violating their obligations if I conclude, as I indicated
6 yesterday tentatively I probably would, that they in the past
7 had not been taking into account that somebody was pursuing the
8 provisional waiver process.

9 Then, though, if they've been violating in the past
10 but they've convincingly demonstrated they were going to stop,
11 you know, it would have to be persuasive, there wouldn't be
12 irreparable harm. And maybe that if these officials hear this
13 testimony, it will influence their voluntary behavior in the
14 future. And this is Farmer v. Brennan, for example, 511 U.S.
15 845 at 847. I discussed it in my decision in Kosilek v.
16 Spencer, 889 F.Supp.2d 190, which was reversed on other
17 grounds. So that's what all this is in my view both relevant
18 to but important to. Because District Courts are encouraged to
19 be cautious and careful in determining whether it's necessary
20 to issue an injunction to the government. There are issues of
21 comity, things like that.

22 But on the other hand, as I said yesterday, if I issue
23 an injunction, it will be clear, it will be defined, and I'm
24 going to expect it to be followed. So I'm willing to hear from
25 Ms. Calderon's spouse, too, if he's a party, but I'd like to

1 hear from her. And as I said, if there's something that you
2 think could compromise or complicate immigration proceedings,
3 raise it. But it doesn't sound like the government -- they may
4 have no questions or let alone questions that are going to
5 create those complications. But what I'm interested in is
6 relevant to the issues I need to decide.

7 MR. PRUSSIA: I understand, Your Honor. Thank you
8 very much. I appreciate your consideration.

9 THE COURT: All right. Who would the petitioners like
10 to call first?

11 MR. PRUSSIA: Ms. Adducci.

12 THE COURT: No, no. We're going to start with your
13 clients first.

14 MR. PRUSSIA: Okay. Can I have a moment to confer
15 with my team?

16 THE COURT: Sure.

17 (Discussion off the record.)

18 THE COURT: Here, do you want to administer the oath?
19 Actually, although this is a civil proceeding, it might be
20 prudent to administer the oath to the interpreter.

21 (Interpreter duly sworn.)

22 INTERPRETER: Certified Portuguese interpreter. Good
23 morning, Your Honor.

24 THE COURT: Good morning.

25 LUCIMAR De SOUZA, having been duly sworn by the clerk,

1 was examined and testified as follows:

2 THE COURT: And this witness is who?

3 MR. PRUSSIA: Lucimar De Souza. If it pleases the
4 court, I'm ready to proceed.

5 THE COURT: Yes.

6 DIRECT EXAMINATION BY MR. PRUSSIA:

7 Q. Good morning, Ms. Lucimar.

8 A. Good morning.

9 Q. How are you?

10 A. Good.

11 Q. Please state your name for the court, please.

12 A. Lucimar De Souza.

13 Q. Are you married?

14 A. Yes.

15 Q. Who is your husband?

16 A. Sergio Francisco.

17 Q. When were you and Sergio married?

18 A. Should I say it in English?

19 THE COURT: If you're able, if you're able to
20 understand the question and answer in English, please do. If
21 you're at all confused by the question or how to state your
22 answer, consult the interpreter and she can interpret it for
23 you, okay?

24 THE WITNESS: Okay. Thank you.

25 A. August 22, 2006.

1 Q. So you've been married for about 12 years; is that right?

2 A. Yes.

3 Q. Do you have children?

4 A. Yes.

5 Q. How many children?

6 A. Three.

7 Q. When were your children born?

8 A. My first one born January 26, 1988. The second one born
9 August 6, 19 -- 2001. And the third one born September 13,
10 2007.

11 Q. Were all of your children born in the United States?

12 A. No.

13 Q. Which ones were born in the United States?

14 A. The last one, Anthony Francisco.

15 Q. And Anthony is about 16 years old; is that right?

16 A. No. Ten.

17 Q. Ten. He was born in 2008?

18 A. 2007.

19 Q. 2007. Is Anthony in school?

20 A. Yes.

21 Q. Where does he go to school?

22 A. Everett. Everett.

23 Q. In Everett?

24 A. Mm-hmm.

25 Q. Which grade is he in?

1 A. Fifth.

2 Q. Are you familiar with an I-130 application?

3 A. Yes.

4 Q. Have you submitted an I-130 application?

5 A. Yes.

6 Q. Approximately when did you submit an I-130 application?

7 A. I don't remember.

8 Q. At some point did you appear at Customs and Immigration
9 Services offices for an I-130 interview?

10 A. Yes.

11 Q. CIS?

12 A. Yes.

13 Q. Around when did that occur?

14 A. January 3.

15 Q. Of 2018?

16 A. 2018.

17 Q. What happened during that interview?

18 A. He made questions about the marriage, about my life.

19 Q. This is the CIS officer?

20 A. Yes.

21 Q. What did you tell the CIS officer about your marriage and
22 your life?

23 A. I answer the questions about my son. He asked about my
24 son, what kind of sport he likes, and when I married, and I
25 answer the questions.

1 Q. How did the CIS officer respond to your answers?

2 A. It was good. The application was approved.

3 Q. So the CIS officer approved your I-130 application. Is
4 that your understanding?

5 A. Yes, yes.

6 Q. What happened after the interview?

7 A. When we finish the interview, me and my husband and my
8 lawyer went outside from the office. When you get out, five
9 ICE officers was waiting for me outside.

10 Q. You said five ICE officers?

11 A. Yes.

12 Q. At the time did you know that they were ICE officers?

13 A. No.

14 Q. They didn't identify themselves as ICE officers?

15 A. Yes, they did.

16 Q. And then what happened next?

17 A. I went to Burlington to have the fingerprints and the
18 paperworks. But in front of my lawyer, the officer said I
19 should be in Burlington because they need to do the paperworks,
20 but I probably not going to be there.

21 Q. Did you go to Burlington voluntarily?

22 A. I had to.

23 Q. What do you mean when you say you had to?

24 A. I had to go. I was under arrest.

25 Q. So they arrested you outside of the CIS office after your

1 I-130 interview?

2 A. Inside the immigration.

3 Q. Did they explain to you why?

4 A. No.

5 Q. How did that make you feel?

6 A. Afraid.

7 Q. Your husband was present when you were arrested?

8 A. Yes.

9 Q. What was your husband's reaction as you were being
10 arrested?

11 A. Surprised.

12 Q. You mentioned that he was surprised. Did you have an
13 expectation that by applying for I-130 benefits that you would
14 be arrested by the United States government?

15 A. No, not expectation.

16 Q. Why did you apply for the I-130?

17 A. Because my lawyer said that would be best.

18 Q. Did you consider it a pathway to legalizing your status in
19 the United States?

20 A. Yes.

21 Q. How did you learn about an I-130 application?

22 A. Through my lawyer.

23 Q. Are you familiar with the term "provisional unlawful
24 presence waiver"?

25 A. When you say like "familiar" --

1 THE COURT: He wants to know if you had heard that
2 term before.

3 A. No.

4 Q. Did you understand that by filing -- strike that. At some
5 point you were transferred to the Suffolk County House of
6 Corrections; is that right?

7 A. They transferred me at the same day, afternoon.

8 Q. How long were you there for?

9 A. At Suffolk?

10 Q. At Suffolk, yes.

11 A. 99 days.

12 Q. Was your husband and your children able to visit you?

13 A. Yes.

14 Q. How often could they visit you?

15 A. Once a week.

16 Q. How did you feel being separated from your husband and
17 your children?

18 A. How can I say it? Devastated.

19 Q. Can you explain why?

20 A. Because my son, he's very close to me. And every single
21 day I had to put him in bed, read with him, talk to him. So
22 for him, this was very hard. Why I was in detention when it
23 was bedtime? He kissed my photo. He told me he said to the
24 picture that he missed me and he ask God to bring me home.

25 THE COURT: I don't think you interpreted the end of

1 that.

2 INTERPRETER: It was all in English, Your Honor.
3 That's why the interpreter didn't say anything. Would you like
4 the interpreter to repeat?

5 THE COURT: Well, I see, he said to the picture that
6 he missed me and he asked dad to bring me home.

7 INTERPRETER: He asked God to bring me home.

8 A. He asked to God to bring me home because he was missing
9 me. And every night I used to stay with him before he's
10 sleeping. And when he went to the prison to see me, he always
11 ask me, Mom, when you go back home? And I never had an answer
12 to him.

13 Q. Did you tell him why you were at Suffolk County Jail?

14 A. Yes.

15 Q. What was his reaction?

16 A. He didn't understand because he's too young.

17 Q. How did it make you feel to see the pain in Anthony as you
18 were held in Suffolk County Jail?

19 A. Because when I was -- when I were at the room waiting for
20 him and then I saw the elevator open, he came to me crying,
21 crying, desperate. And he hug me, and he didn't want to stay,
22 hug me all the time.

23 Q. How did your detention in Suffolk County Jail affect your
24 husband, Sergio?

25 A. Because he never -- he was never alone with Anthony, and

1 he was not able to manage this trauma that he was suffering.

2 Q. Who was at home with the children while you were in
3 Suffolk County Jail?

4 A. My husband.

5 Q. Did he have -- strike that. Was it just your husband?

6 A. Only my husband.

7 Q. Does your husband work?

8 A. No. He is retired.

9 Q. And who had responsibility for preparing the meals for the
10 family?

11 A. Sergio.

12 Q. Is it fair to say that with you being in Suffolk County
13 Jail, all of the responsibilities of taking care of your family
14 fell to your husband, Sergio?

15 A. Yes, yes.

16 Q. At some point you were released from Suffolk County Jail;
17 is that right?

18 A. Yes.

19 Q. It was after a hearing in this very courtroom, right?

20 A. Yes.

21 Q. How did you feel when you heard that you were going to be
22 released from jail?

23 A. Relieved.

24 Q. Can you explain why?

25 A. Because I knew from that day on I would be able to take

1 care of my child.

2 Q. What happened when you came -- strike that. How did your
3 children react when you arrived at home?

4 A. My son -- my son cried a lot. Hugged me and asked me for
5 never more to get away or leave him.

6 Q. Today you're under supervised release; is that right?

7 A. Yes.

8 Q. What are some of the conditions of your release?

9 A. I have the bracelet.

10 Q. You have a bracelet?

11 A. (Nods).

12 Q. Where is the bracelet?

13 A. My leg.

14 Q. What is the purpose of the bracelet?

15 A. To supervise me.

16 Q. How does it feel to have to wear an ankle bracelet?

17 A. Bad because I can't go with my son, like, to the beach. I
18 always have to be covering it up, hiding it, because I feel
19 very ashamed. And at night I feel a lot of pain on my foot
20 because of the bracelet.

21 Q. Has anyone from ICE explained to you why you need to wear
22 an ankle bracelet?

23 A. No.

24 Q. Now, you understand that the court has issued an order
25 precluding ICE from removing you from this country, right?

1 A. Yes.

2 Q. And as part of your supervised release, you need to check
3 in with ICE on a regular basis, right?

4 A. Yes.

5 Q. And you appeared for your regular check-in on June 12 of
6 this year; is that right?

7 A. Yes, yes.

8 Q. What happened when you checked in with ICE on June 12?

9 A. They asked me to buy a ticket until August 12 so I could
10 show the ticket on August 12.

11 Q. Buy a ticket to where?

12 A. To Brazil.

13 Q. They asked you to buy a ticket to leave the United States?

14 A. Yes.

15 Q. Even though this court has an order in place precluding
16 them from removing you from this country?

17 A. Yes.

18 Q. How did that make you feel?

19 A. I got so scared. I called Adriana to find out what I
20 should do, if I should buy the ticket or not.

21 Q. So it's only because of your lawyer that you're able --
22 strike that. It's only because of your lawyers that you're
23 still here today; is that right?

24 MS. LARAKERS: Objection, Your Honor.

25 THE COURT: There's an objection. So please don't

1 interpret. I'll sustain that objection. She may not know all
2 the reasons she's still here.

3 Q. What would happen if you had bought that ticket and you
4 were deported to Brazil?

5 A. My life would be ruined.

6 Q. How?

7 A. Because I would have to bring my son with me. My husband,
8 he's not Brazilian.

9 Q. What effect would that have on your children?

10 A. The effect would be very bad because he doesn't speak
11 fluent Portuguese. He would not have the same opportunities
12 that he has here.

13 Q. He would have to leave his school here in the United
14 States, right?

15 A. He would have to leave the school, and the school in
16 Brazil doesn't have the same conditions as the school here.

17 Q. Why did you leave Brazil to begin with?

18 A. To have a better life situation here in the United States.

19 Q. Now, you mentioned that you would have to bring your
20 children and your family to Brazil. But they could stay in the
21 United States. Isn't that an option?

22 A. No, they wouldn't be away from me.

23 Q. And why is that?

24 A. My husband needs me, my son needs me. It wouldn't be like
25 a short stay in Brazil. I would have had to stay for a long

1 time, and my son couldn't be away from me for that long
2 anymore.

3 Q. Have you thought about what will happen to you if you lose
4 this lawsuit?

5 A. Yes.

6 Q. What do you think will happen to you?

7 A. I think they might want to deport me.

8 MR. PRUSSIA: Excuse me one second.

9 (Discussion off the record.)

10 Q. So if you are deported and if you had to be separated from
11 your family and your U.S. citizen child, what would it be like
12 for them?

13 A. Their lives would be very complicated. Because my husband
14 needs medical assistance, and in Brazil he wouldn't have the
15 same treatment as he has here. My son wouldn't have the
16 opportunities that he has. He's now in fifth grade. He would
17 have to go back to, like, third grade so he could learn
18 Portuguese. So their lives would be very much affected. And
19 the quality of life financially speaking would be very affected
20 in Brazil.

21 Q. And so if your husband wanted to come to Brazil, are you
22 even sure that he can do so?

23 A. No, because he would be an immigrant, so he would have to
24 go through the process of becoming legal.

25 MR. PRUSSIA: I have no further questions, Your Honor.

1 THE COURT: Would the respondents like to
2 cross-examine?

3 MS. LARAKERS: Your Honor, I do have one question --
4 three questions that relate to whether she's a class member.
5 They don't relate to harm, and I don't want to ask if this is
6 solely related to harm.

7 THE COURT: What specifically are the questions?

8 MS. LARAKERS: Just have you ever left -- when did you
9 come to the United States and have you ever left the United
10 States since coming here.

11 MR. PRUSSIA: Your Honor, I object to that as outside
12 the scope.

13 THE COURT: Since I ordered this -- I ordered this to
14 be limited to irreparable harm, I think if I had anticipated
15 that, maybe I would have made somewhat different judgments.

16 MS. LARAKERS: Absolutely.

17 THE COURT: I'm excluding those as essentially beyond
18 the scope, but thank you for raising it.

19 MR. PRUSSIA: Thank you, Your Honor.

20 THE COURT: All right. Your testimony is complete.
21 You may be seated.

22 THE WITNESS: Thank you.

23 THE COURT: Who would the petitioners like to call
24 next?

25 MR. PRUSSIA: One moment, Your Honor, please.

1 THE COURT: Hold on just a second.

2 (Discussion off the record.)

3 MR. PRUSSIA: Your Honor, is it all right if I ask if
4 we can take a short recess? Just to give you my thinking, Your
5 Honor, I would like to, if possible, call Luis Calderon, but I
6 want to go back and talk to my --

7 THE COURT: That's fine. I think Mr. Lyons may have
8 left the courtroom, too. And I don't know if that's temporary
9 or permanent, but it's my intention that he be here. So sure.
10 It's 11:00. Would about ten minutes be sufficient?

11 MR. PRUSSIA: That would be just fine. Thank you.

12 MS. LARAKERS: And I will get him back in the room,
13 Your Honor.

14 THE COURT: Court is in recess.

15 (Recess taken 11:02 a.m. - 11:20 a.m.)

16 THE COURT: Who would the petitioners like to call
17 next?

18 MR. PRUSSIA: Luis Gordillo, Your Honor.

19 THE COURT: Who is that?

20 MR. PRUSSIA: Luis Gordillo, Lily Calderon's husband.
21 Two housekeeping matters. The first, for Lucimar's
22 interpreter, do you anticipate further questioning of her? Can
23 we release the interpreter for the day?

24 THE COURT: I don't anticipate any further questioning
25 of Ms. De Souza.

1 MR. PRUSSIA: Okay. Thank you very much, Your Honor.
2 And second, even though Your Honor didn't direct it, we had
3 Lilian and her husband go in the back room during Lucimar's
4 testimony. We're going to have Luis come forward now. Would
5 you like Lilian to stay in the back room, or is it okay she
6 join in the courtroom?

7 THE COURT: She's a party. She's entitled under the
8 sequestration order to be here if she wants to be.

9 MR. PRUSSIA: Thank you very much, Your Honor, for
10 that clarification. We call Luis Gordillo.

11 MR. COX: Your Honor, Jonathan Cox from Wilmer Hale,
12 attorney on behalf of petitioners.

13 LUIS GORDILLO, having been duly sworn by the clerk,
14 was examined and testified as follows:

15 DIRECT EXAMINATION BY MR. PRUSSIA:

16 Q. Good morning.

17 A. Good morning.

18 Q. Could you please state your name for the record.

19 A. Luis Gordillo.

20 Q. Luis, do you have a wife?

21 A. Yes, I do.

22 Q. Who is your wife?

23 A. Lilian Calderon.

24 Q. Where were you and Lilian married?

25 A. We got married in September 2016.

1 Q. How long have you known each other?

2 A. Since 2002.

3 Q. Do you have children?

4 A. Yes, we do.

5 Q. How many children?

6 A. We have two.

7 Q. When were your children born?

8 A. Natalie was born on July 13, 2013. Noah was born March --
9 sorry -- 2016.

10 Q. Where were they born?

11 A. In Warwick, in Providence.

12 Q. In the United States?

13 A. Yes, in the United States. Sorry.

14 Q. And you are a United States citizen?

15 A. Yes, I am.

16 Q. Where do you and your family live?

17 A. We live in Providence.

18 Q. Can you describe just generally what your family life is
19 like?

20 A. Currently?

21 Q. Yes.

22 A. I have a full-time job. I work on average between 50 or
23 65 hours a week. Lilian takes care of the kids. I drop
24 Natalie off at school. My mother picks her up from school,
25 drops her off at home. When I come back home, it's usually

1 between 8:30 and 9:00.

2 Q. Lilian is not a United States citizen, right?

3 A. No, she's not.

4 Q. At some point -- are you familiar with an I-130
5 application?

6 A. Yes, I am.

7 Q. And at some point did you file an I-130 application?

8 A. Yes, we did.

9 Q. What was the purpose of you filing an I-130 application?

10 A. To get her on the path of becoming a lawful resident.

11 Q. At some point did you have an interview at United States
12 CIS with respect to your I-130 application?

13 A. Yes.

14 Q. Approximately when was that interview?

15 A. January 17 of this year.

16 Q. And what happened during that interview?

17 A. When we arrived to the interview, I went in first. My
18 interview was a matter of five minutes. I wasn't really asked
19 much. I wasn't asked if I was married to Lilian. I wasn't
20 asked if my name was Luis. I wasn't asked any personal
21 information on either my behalf or hers. The gentleman at the
22 interview, he just went on the sheet of paper he had in front
23 of him.

24 I showed him the photo album we had, bank statements and
25 our marriage license, any forms that we had to prove that we

1 were a legitimate couple. Then he told me everything seemed
2 fine, that he just needed to speak to Lilian, and he was going
3 to approve the I-130.

4 Q. So the CIS officer told you that your I-130 application
5 was approved; is that right?

6 A. Yes.

7 Q. What happened after the interview?

8 A. After the interview, once I stepped out, Lilian went in.
9 Within maybe five minutes or so two agents came over to me and
10 asked me if I was Luis. I responded, Yes, I am. They told me
11 they were detaining my wife Lilian, and when I asked why, they
12 wouldn't give me a reason. They handed me back the album, the
13 albums we brought, and they told me I was all set to leave.

14 Q. So at that point was she arrested?

15 A. I assume. I never got to see her once she went for her
16 interview.

17 Q. When did you next see Lilian?

18 A. Not until three weeks after, I was allowed to see her in
19 Suffolk County Jail.

20 Q. So you were not able to see your wife for three weeks?

21 A. No, I wasn't.

22 Q. And where was she located?

23 A. In Suffolk County prison. Sorry -- I don't know if --

24 Q. How did it make you feel when you saw the ICE agents
25 appear after your CIS interview?

1 A. I was shocked. I wasn't expecting something like that to
2 happen.

3 Q. Why didn't you expect that there would be ICE agents at
4 your CIS interview?

5 A. I just, from hearing from other couples doing the same
6 process and them going for an interview and just coming out
7 fine, I guess I felt comfortable going in. I was nervous but I
8 was comfortable. I wasn't expecting anything like this to
9 happen.

10 Q. What did you do in the three-week period before you were
11 able to see Lilian when she was in jail?

12 A. Well, life got a little difficult. We had a routine. I
13 would come home. We'd eat dinner. I would spend time with her
14 and the kids. We had a routine, structure. The kids would be
15 in bed by 8:30. We would read to them, put them to bed. Wake
16 up, go to work.

17 When she was away, I would wake up at 7:00 to get the kids
18 ready, go to work. I wouldn't pick them up until between
19 10:00, 11:00 at night, sometimes even midnight, because I was
20 trying to do what I could to try to help Lilian be released.
21 So there was no structure. I wasn't able to spend time with
22 the kids. So now mommy wasn't around. But I couldn't spend
23 time with them like we used to.

24 Q. And how did that make you feel?

25 A. It just made me feel sad.

1 Q. What about your children; what did this do to your
2 children?

3 A. They were traumatized. There was nights that Natalie,
4 being the oldest, she was four at the time, she would wake up
5 in the middle of the night screaming, asking where mommy was.
6 She would just cry. And I would just stay up until I was able
7 to calm her down and put her back to bed. They used to sleep
8 in their own bedrooms in their own beds. After this they just
9 wanted to stay with me every night, so I let them sleep in my
10 own bedroom I guess to make them feel as comfortable as I
11 could.

12 After a few days she was detained, she wasn't home,
13 Natalie asked me, How come my friends have a mom and I don't?
14 I just didn't know what to respond.

15 Q. How long was Lilian detained?

16 A. Shy of a month.

17 Q. How often could you visit her during that time?

18 A. I was only able to visit her once, because the way the
19 process works, you have to get a background check. There's a
20 process. The initial process takes two weeks. And then to set
21 a schedule, you have to set the schedule in advance a week.
22 That's the reason I was only able to see her once during her
23 being detained.

24 Q. What was that visit like?

25 A. I mean, it felt good to see her after a few weeks not

1 being able to see her or talk to her. We just tried to stay --
2 I tried to just -- we just tried to talk about positive things
3 and things the kids were doing, just trying to distract each
4 other from what was actually going on around us. She was in a
5 jumpsuit with other inmate detainees. I think it was for 30
6 minutes or 45 minutes if I recall right.

7 Q. At some point Lilian was released from jail, right?

8 A. Yes.

9 Q. And how did you feel when you heard that Lilian was going
10 to be released?

11 A. I felt happy. I mean, I was excited to finally have
12 Lilian back at home.

13 Q. And how did your children react seeing your wife at home?

14 A. I remember driving back with Lilian, and I opened the door
15 and I told them I had a surprise for them, and that's when
16 mommy walked in. They were very excited, happy. They were
17 showing mommy what they -- Noah, being the little one, he was
18 showing that he could jump, and just being a kid. And Natalie
19 was showing her what she knew, she read other books at school
20 or just things that kids do.

21 Q. What would happen if Lilian was deported to Guatemala?

22 A. I don't know because we don't know that country. We
23 don't -- I personally don't speak the language. I'm not
24 Guatemalan myself. I don't know how we'd be able to support my
25 family over here and her over there, her safety. I don't know

1 how things would work out.

2 Q. Do you even know that you could emigrate to Guatemala if
3 you wanted to?

4 A. I don't even know if I would be able to get a job. How
5 would I be able to support our family?

6 Q. If you were to move to Guatemala -- strike that. If your
7 family were to move to Guatemala, what effect would that have
8 on your children?

9 A. Natalie doesn't even speak Spanish. My little one doesn't
10 either. I'm sure it would be a shock to them going to a
11 different environment. We don't know anything about Guatemala.
12 We don't have any family, we don't have any roots over there,
13 so we would just be in a country that we don't know how normal
14 life is I guess I would say over there.

15 Q. What would happen to all your assets in the United States?

16 A. I would have to sell my property that we have. If not,
17 we'll probably have to let it go. Depending on how the market
18 is, you can't sell property right away. So I would have to
19 probably make a decision on what to do with the properties.

20 Q. Now, if Lilian was deported, you could just stay here,
21 couldn't you?

22 A. I could, but I don't know how traumatic that would be for
23 our kids to be separated from their mom. Our kids are very
24 close to us, and we spend all the time we can with them. We
25 are very involved with them. Just the three weeks -- I mean,

1 the four weeks she was detained, that was very harmful to them.

2 Q. Have you thought about what will happen to you and Lilian
3 and your family if you lose this lawsuit?

4 A. We thought about it, but we are very hopeful, and we stay
5 positive that the outcome ends in a positive way. We were
6 separated once, and we don't want to be separated again.

7 MR. PRUSSIA: One moment.

8 (Discussion off the record.)

9 MR. PRUSSIA: I don't have any further questions, Your
10 Honor.

11 THE COURT: Is there any cross-examination?

12 MS. LARAKERS: Not on irreparable harm, Your Honor.

13 THE COURT: Your testimony is complete. You may take
14 your seat.

15 THE WITNESS: Thank you.

16 THE COURT: Who would petitioners like to call next?

17 MR. PRUSSIA: On the irreparable harm issue, we don't
18 have any other witnesses, Your Honor.

19 THE COURT: You don't intend to call Ms. Calderon?

20 MR. PRUSSIA: No, we do not, Your Honor. If Your
21 Honor would like to hear from her, we'd be happy to put her on.
22 I just thought between Ms. De Souza, you have the perspective
23 of the harm to non-citizen petitioner, and --

24 THE COURT: Well, I think I would like to hear from
25 her.

1 MR. PRUSSIA: Okay. Lilian.

2 LILIAN CALDERON, having been duly sworn by the clerk,
3 was examined and testified as follows:

4 DIRECT EXAMINATION BY MR. PRUSSIA:

5 Q. Good morning.

6 A. Hi, good morning.

7 Q. Would you please state your name for the court.

8 A. My name is Lilian Calderon.

9 Q. Lilian, your husband is Luis, right?

10 A. Yes.

11 Q. How long have you known Luis?

12 A. I have known Luis more than half of my life now. Luis and
13 I have known each other since 2002.

14 Q. And you have children, right?

15 A. We do. We have Natalie who is five and Noah who is two.

16 Q. And where were they born?

17 A. They were born here in Rhode Island. Well, not
18 Massachusetts. Rhode Island.

19 Q. So they're United States citizens?

20 A. They are.

21 Q. As is your husband, right?

22 A. Yes.

23 Q. Could you describe your family life today?

24 A. At the moment?

25 Q. Yes.

1 A. At the moment our family life is a little -- it's a little
2 hectic. So Luis works long weeks, and I take care of our kids,
3 and he comes home at night and we, you know, do our routine.
4 We have dinner. We have play time. We have story time,
5 kisses, and we continue the day and so forth. Natalie is going
6 to be starting -- she's in preschool at the moment. She's
7 going to be starting kindergarten in a couple of weeks, and
8 Noah is my baby.

9 Q. So Luis is the breadwinner; is that right?

10 A. Yes.

11 Q. Now, at some point -- are you familiar with an I-130
12 application?

13 A. Yes, I am.

14 Q. At some point you and your husband submitted an I-130
15 application?

16 A. Yes, we did.

17 Q. Why did you submit an I-130 application?

18 A. We submitted an I-130 in the hopes to legalize my status.

19 Q. And approximately when was your -- strike that. At some
20 point you appeared for an interview on your I-130 application
21 at CIS; is that right?

22 A. We did. We were scheduled for our interview on January
23 17, 2018.

24 Q. And what happened during that interview?

25 A. During that interview, Luis went in first for an

1 interview. He came out shortly, and then I went in for an
2 interview after that.

3 Q. What happened during your portion of the interview?

4 A. During my portion of the interview, I was interviewed by
5 two -- I guess two officers. And one of them was training and
6 the other one did the actual interview. It was maybe a
7 five-minute interview. But during that interview I wasn't
8 asked anything that pertained to our marriage specifically. I
9 was never asked if I was married to Luis, if we had children
10 together. All the officer said to me was, It appears that your
11 marriage is a legitimate marriage. I am going to go ahead and
12 approve your I-130. And, you know, the other thing is there
13 are two officers here that want to speak to you.

14 Then as soon as he did that, two ICE agents came in and
15 proceeded to detain me. I was handcuffed around my -- I was
16 handcuffed. I was shackled. And the only reason why they
17 didn't shackle my ankles was because I was wearing winter boots
18 because we were in the middle of winter.

19 THE COURT: Excuse me. Here, try to slow down and
20 speak loudly and clearly into the microphone.

21 THE WITNESS: Okay.

22 A. And they said that they were going to detain me while I
23 was being processed, while everything was being processed.

24 Q. So your I-130 application was approved at CIS?

25 A. Yes.

1 Q. But then you were detained by ICE?

2 A. Yes.

3 Q. Did they tell you why?

4 A. No.

5 Q. How did that make you feel?

6 A. I was shocked because at the moment I asked if I could see
7 my husband, and they said no. And I asked to speak to my
8 lawyer, and they also said no. And I was taken in a van, taken
9 to an office in Warwick, Rhode Island and processed there.

10 Q. Your husband was at the interview with you, right?

11 A. Yes.

12 Q. And at the time you were arrested, you were not able to
13 say goodbye to your husband?

14 A. No. I wasn't even allowed to give him a hug. I didn't
15 know I was going to be taken and detained for three weeks and
16 not be allowed to see him. I didn't even know it was the last
17 morning I would see my kids for three weeks. If I would have
18 known, I would have given them the biggest hug I could have.
19 You know, I just said, We'll see you later.

20 Q. When you appeared for your I-130 interview, did any part
21 of you expect that the result of that interview would be that
22 you would be detained by ICE?

23 A. No.

24 Q. Why is that?

25 A. I mean, we were optimistic that we were just going to go

1 in for a routine interview because this is the first step in
2 the process of what we were trying to do. So we thought it was
3 just going to be going for an interview, approve the interview
4 and then go on to step two, which is trying to file the rest of
5 the waivers.

6 Q. You mentioned that you went to an office in Rhode Island;
7 is that right?

8 A. Yes.

9 Q. And what happened next?

10 A. When I went to the field office in Johnston or when they
11 transferred me to Warwick?

12 Q. Let's go from Warwick to Johnston.

13 A. So I was detained in USCIS in Johnston, Rhode Island, then
14 I was transferred to Warwick, and then I was taken to Suffolk
15 House of Corrections in Boston.

16 Q. You were shackled when you were taken to the field office
17 in Warwick, right?

18 A. Correct.

19 Q. Is that the only point in time during your custody of ICE
20 that you were in shackles?

21 A. No. I was shackled when I was taken from Warwick to
22 Suffolk House of Corrections also.

23 Q. How did that make you feel to be in shackles?

24 A. I was really -- I was sad because I had never been in a
25 situation at all even close to something like that where I had

1 been just, you know, handcuffed and shackled and put in the
2 back seat of a van, taken to a prison. You know, I had never
3 been put through something like that.

4 Q. How long were you in ICE's detention?

5 A. Just shy of a month. It was three weeks.

6 Q. What did that do to your kids?

7 A. So, you know, we've always tried to do the best that we
8 could for our kids. We had a very set routine from the moment
9 they wake up until the moment they go to bed. And it just --
10 it highly traumatized Natalie and Noah. Natalie, even when I
11 was released, she still had nightmares. Natalie had nightmares
12 of mommy not being there and just screaming out for mommy and
13 wondering why all of her schoolmates have a mommy and she
14 doesn't have a mommy anymore.

15 And Noah, who is an amazing little boy, just suffered from
16 separation anxiety. You know, I couldn't even -- when I was
17 released, when I would be with him, he was great, but if I had
18 to step away to go to the bathroom, it would take me a solid
19 20, 30 minutes to calm him down before I could set him down to
20 use the bathroom. He developed separation anxiety, which he
21 didn't have before. And it was just -- it was horrible for
22 them and for my husband.

23 Q. What are you doing to respond to the separation anxiety?

24 A. So our kids are currently in therapy, and we have been
25 working with them to ease the nightmares. I remember when I

1 came home, when I was released from detention, Luis said to me,
2 Honey, I'm sorry, but we're all sleeping in the same bed.
3 We're co-sleeping. And I said to him, There's nothing to be
4 sorry about. You did the best that you could. If this means
5 that we're all squished in the bed, it's okay. Eventually
6 we'll get back to where we were.

7 And we eventually, working with them and working with the
8 therapist, have gotten them back on their routine where we can
9 safely turn off the lights and they don't have to worry that
10 mommy is not going to be there when the lights turn on. So
11 we're still working with that.

12 Q. What was the month like for your husband when you were
13 away from your family?

14 A. It was horrible. My husband is one of the strongest men I
15 know. From the moment I met him, I knew he was a great man,
16 and I knew he was going to be eventually a great dad. And he
17 developed anxiety and depression and things that he never
18 suffered from before. So it's hard for me to see this man
19 that's always taken care of us, you know, have a moment where
20 he breaks down because a court date is looming or a pending
21 approval is looming or something is happening. Something as
22 simple as if I don't reply to a phone call or a text, he thinks
23 the worst. It's -- you know, it's done damage to him in a
24 sense that he's now on medication, and he is in therapy also
25 trying to, you know, grasp the situation that we're in.

1 Q. How often could you see your husband when you were
2 detained?

3 A. I saw him once.

4 Q. What was that visit like for you?

5 A. Sorry?

6 Q. What was that visit like for you?

7 A. At that moment it was the best thing because I hadn't seen
8 him in three weeks. Even when I asked to just -- you know,
9 when I was being detained, I asked to give him a hug or say
10 goodbye and I was denied, you know, just -- I was denied. I
11 couldn't even give him a hug. I couldn't even say goodbye. So
12 seeing him that day had just -- you know, I was just hoping
13 that it wasn't the last day that I saw him.

14 Q. Now, at some point you were released from detention,
15 correct?

16 A. Yes.

17 Q. How did that make you feel?

18 A. When I was released from detention, I was -- I was happy.
19 I was shocked and I was happy, and I was nervous because the
20 way I was released was, you know, I wasn't given an explanation
21 or anything. I was just -- the officers just came to my cell
22 at Suffolk and told me to pack up my things because I was being
23 moved. And automatically I thought that -- I didn't know what
24 to think. And then when we were transferred to Burlington, I
25 was put in a cell and wasn't given an explanation, wasn't told

1 what was going on. And then another officer came in and just
2 said I was all set, I was being released. And I couldn't
3 believe it. It was surreal. I was released. I walked out,
4 and I saw my husband, and I gave him the biggest hug that I
5 could, like, give him because it was -- I almost didn't
6 recognize him at the moment.

7 Q. At some point you saw your kids for the first time?

8 A. Yeah.

9 Q. Can you describe that experience, please?

10 A. Natalie was so happy to see me, and Noah was showing me
11 everything that he had learned in that month. He showed me how
12 he could now jump on a bed and do flips. And Natalie was just
13 hugging me and hugging me, Mommy, why did you leave me? Don't
14 leave us again. And it was just the biggest -- the biggest
15 embrace I ever got from them. It was amazing to see them
16 again.

17 Q. Have you thought about what may happen to you if you lose
18 the litigation?

19 A. Honestly, no.

20 Q. Why not?

21 A. I mean, we haven't -- we haven't thought of it, we just
22 haven't. At the moment we're living day to day right now and
23 just enjoying our life together, our time together.

24 Q. What would happen if you were ordered to return to
25 Guatemala?

1 A. I don't know. Guatemala is not a country that I remember.
2 It's not the country of origin of my husband. My children
3 don't speak Spanish. My husband's Spanish isn't that great,
4 although he'd like to believe it is. I don't know.

5 Q. What effect would that have on your children?

6 A. I think it -- I think it would be a traumatic effect for
7 them in the sense of here we are the only home they've ever
8 known, the only place they've ever known. All of a sudden now
9 we're all uprooted and we move to a country that they know
10 nothing of. They don't even speak the language. She's away
11 from her friends, her security, her safe zone, everything she's
12 known, everything that's Natalie, and now we're in a country
13 that we don't know anything of. I think it would be very
14 extremely hard to try to explain that to a five-year-old and to
15 a toddler -- well, two-year-old.

16 Q. And my earlier questions assumed that they would come with
17 you to Guatemala, but they could just stay here, couldn't they?

18 A. They could, yeah.

19 Q. What would happen if that choice was made?

20 A. I don't know. I mean, I don't want to think that we would
21 be separated again. It's not something that we've -- we
22 haven't discussed that.

23 Q. How would it make you feel if you were separated from your
24 husband and your kids again?

25 A. I would be -- I would be extremely heartbroken because

1 when you start a family, you know, you don't think of what if
2 one day I no longer see them, you know, what if I'm forced to
3 not be with them. I don't think of that. And it would sadden
4 me to know that my kids are here and that my husband is here
5 and I won't be able to see all of the things that he sees with
6 them. I wouldn't be there for her first day of kindergarten,
7 their first father/daughter dance. I don't know.

8 MR. PRUSSIA: Thank you very much.

9 THE WITNESS: Thank you.

10 MR. PRUSSIA: I don't have any further questions, Your
11 Honor.

12 THE COURT: Is there any cross-examination?

13 MS. LARAKERS: Not on irreparable harm, Your Honor.

14 THE COURT: Okay. Thank you. You're excused.

15 THE WITNESS: Thank you.

16 THE COURT: Okay. Would petitioners like to call
17 Ms. Adducci?

18 MR. PRUSSIA: Correct, Your Honor.

19 THE COURT: Okay. She should approach the witness
20 stand and be sworn.

21 And just to confirm or clarify -- no. Mr. Lyons,
22 wait. Okay. Mr. Lyons is subject to a sequestration order.
23 He probably should step out. Unless he's the designated
24 representative of the government, then he could stay.

25 MS. LARAKERS: No, Your Honor, he's not.

1 THE COURT: Okay. Why don't you step out then.

2 REBECCA ADDUCCI, having been duly sworn by the clerk,
3 was examined and testified as follows:

4 DIRECT EXAMINATION BY MR. PRUSSIA:

5 Q. Good morning.

6 A. Good morning.

7 Q. Would you please state your name for the court.

8 A. It's Rebecca Adducci.

9 Q. Ms. Adducci, who is your employer?

10 A. Immigration and Customs Enforcement.

11 Q. What is your title?

12 A. I'm a field office director.

13 Q. Where are you located?

14 A. I'm field office director for Detroit, Michigan.

15 Q. At some point you were a field office director, interim
16 field office director presiding over the Boston ERO; is that
17 right?

18 A. Yes.

19 Q. When did that end?

20 A. Technically it ended on August 18.

21 Q. When did that begin?

22 A. June -- I came here on June 7, but on paper it actually
23 started on June 10. But I was here June 7.

24 Q. And in your position as the interim field office director,
25 it's your view that under the President's 2017 Executive Order

1 no classes of aliens are exempt from enforcement action; is
2 that right?

3 A. That's correct.

4 Q. So in your view there are no classes of aliens who are
5 exempt from arrest, detention or removal, correct?

6 A. That's correct.

7 Q. So that includes persons whom are pursuing a provisional
8 waiver, right?

9 A. That's correct.

10 Q. So any removable alien may be arrested and detained,
11 regardless of whether they are pursuing a provisional waiver,
12 correct?

13 A. That's correct.

14 Q. So it doesn't matter to ICE that the non-citizen is
15 legitimately married to a U.S. citizen, correct?

16 A. No, I wouldn't say it doesn't matter to ICE.

17 Q. Well, those persons are subject to arrest, detention and
18 removal by ICE regardless of whether they are legitimately
19 married to a U.S. citizen, right?

20 A. They're subject to, yes.

21 Q. In fact, a removable alien's pursuit of a provisional
22 waiver isn't even a factor that is considered in deciding
23 whether to take enforcement action, correct?

24 A. I haven't seen an instance where -- it hasn't been
25 presented to me in my experience as a field office director

1 that someone is pursuing a provisional waiver, so it hasn't
2 been something that I have been able to consider.

3 Q. Now, you were deposed in this case, right?

4 A. Correct.

5 Q. Around the end of July, right?

6 A. Yes.

7 Q. And it's true that until that deposition, you did not know
8 that individuals with final orders of removal are eligible to
9 pursue provisional waivers, correct?

10 A. That's correct.

11 Q. So until you were deposed in this case, the interim field
12 office director in Boston did not know that the laws of this
13 country permit people with final orders of removal to pursue
14 provisional waivers, isn't that right?

15 A. Yes, that's correct.

16 Q. And by the time of your deposition in July, you had served
17 in this role as interim field office director for two months,
18 correct?

19 A. Not quite two months. Six weeks.

20 Q. Fair. And you had reviewed papers related to this
21 litigation, right?

22 A. Yes.

23 Q. In fact, the court ordered you to do so, right?

24 A. Correct.

25 Q. And you swore under oath that you had, right?

1 A. Yes.

2 Q. But you still did not know six weeks into that term that
3 individuals with final orders of removal were eligible to
4 pursue provisional waivers, right?

5 A. I guess I would say, I guess I did know that. When I
6 think about reviewing the June -- I think it was a June 8
7 document, I had to have because we just -- it indicated some of
8 the individuals, some of the plaintiffs in this case.

9 So I understand the concept of the fact that waivers are
10 eligible for people, but I don't have a lot of experience in
11 the provisional waiver because I had never seen a case that I
12 was reviewing. All of the cases that we were looking at were
13 cases that had occurred in the past, and I was very much
14 focused on the Post-Order Custody Review end of issues.

15 Q. When you came to Boston you became aware of this case,
16 right?

17 A. Yes, I did.

18 Q. That's the reason why you were brought to Boston, right?

19 A. Well, I was brought to Boston because I was a field office
20 director and my boss asked me if I would come and cover the
21 Boston ERO.

22 Q. Before you were appointed as interim field office
23 director, that was Mr. Lyons's position, right?

24 A. For a short timeframe.

25 Q. In fact, you were replacing him, right?

1 A. Yes. Well, I really replaced Mr. Brophy. I got the call
2 to replace Mr. Brophy. However, in the timeframe that it took
3 me to get here, there had to be someone covering the office.

4 Q. Prior to coming to Boston, had you worked in the Boston
5 field office?

6 A. No.

7 Q. Had you ever been to Boston at all?

8 A. I had been here one time prior.

9 Q. Did you live here?

10 A. Never.

11 Q. Any family ties here?

12 A. No.

13 Q. So why were you brought to Boston?

14 A. I would have to speculate. My bosses called me and asked
15 me to come to Boston.

16 Q. Isn't it true the reason you were brought to Boston was
17 because you were willing to initiate enforcement activities
18 against anyone with a final order of removal regardless of what
19 immigration benefits they were availing themselves of?

20 A. No.

21 Q. And isn't the reason why Mr. Lyons was released from his
22 duties because he told this court he was not going to do that
23 any longer?

24 A. I don't believe so, no.

25 Q. Well, it's your belief that your field office needs to

1 follow the President's Executive Order, right?

2 A. Yes.

3 Q. And the implementation from Secretary Kelly, right?

4 A. Yes.

5 Q. In your view those documents require -- strike that. In
6 your view those documents say that no removable alien is exempt
7 from enforcement action, right?

8 A. Yes, that's correct.

9 Q. And you're going to enforce the President's Executive
10 Order, right?

11 A. I'm going to enforce the implementation --

12 Q. To the letter, right?

13 A. Yes.

14 Q. Because of the policy, it would be a policy violation for
15 you not to, right?

16 A. Yeah.

17 Q. You would be disciplined for not following it, right?

18 A. Well, I can't speculate to that.

19 Q. You were deposed in this case, right?

20 A. Yes.

21 Q. You provided testimony under oath, right?

22 A. I did.

23 MR. PRUSSIA: Your Honor, I'm just going to show her
24 her prior deposition testimony. I have provided courtesy
25 copies to the Court.

1 THE COURT: Can you put it up on the monitor?

2 MR. PRUSSIA: Yes, sir.

3 THE COURT: This is her deposition.

4 MR. PRUSSIA: It is.

5 THE COURT: What page?

6 MR. PRUSSIA: 71.

7 Q. I'm going to start at the bottom of 70, line 23, and the
8 question, Ms. Adducci, is: Are there consequences for not
9 following the President's Executive Order?

10 Do you see that?

11 A. Yes.

12 Q. And your response: I'm sure that it would be some type of
13 policy violation and it could be -- policy violations are on
14 the table of penalties. So I would say there could be some
15 type of discipline.

16 Did I read that correctly?

17 A. Yes.

18 Q. And that was true testimony at the time you gave it,
19 correct?

20 A. Yes.

21 Q. And so there could be discipline for you in not following
22 the President's Executive Order, correct?

23 A. There could be. There would have to be a determination if
24 it was misconduct, if it was performance-based. Discipline
25 usually -- discipline comes into misconduct, whereas a

1 performance-based issue would be something more relating to
2 your review of your performance at the end of the year.

3 Q. Isn't that what happened to Mr. Lyons? Wasn't Mr. Lyons
4 disciplined for not following the President's Executive Order
5 and that's the reason why you replaced him as interim field
6 office director?

7 A. No, not to my knowledge.

8 Q. Now, you read the court's June 11 order in this case,
9 right?

10 A. I believe, if that was the 62-page document.

11 Q. That's right.

12 A. Yes.

13 Q. The court held that ICE broke the law by violating the
14 POCR regulations, correct?

15 A. That's correct.

16 Q. And you told the court you would make compliance with the
17 POCR regulations one of your priorities, right?

18 A. Yes, among my priorities.

19 Q. Among your priorities, fair enough. True?

20 A. Yes.

21 Q. But you haven't done that, have you?

22 A. Oh, no. I think I have.

23 Q. You haven't instituted any training on the POCR process,
24 right?

25 A. Not formal training, no.

1 Q. And formal training on the POCR process has not even been
2 scheduled in the Boston field office, right?

3 A. The formal training in the Boston field office occurred
4 actually in April so shortly, a month or so before I got here.
5 So while I think there's always benefits to training, I feel
6 like the training and the interaction that the employees have
7 had here is actually probably superior to what they would have
8 gotten in the PowerPoint training that is provided by
9 headquarters.

10 Q. So you believe that training happened in April, right?

11 A. I believe it did, yeah. I believe, to the best of my
12 recollection, I believe they came here in April. I mean, I
13 wasn't here, but I think that I was told that, yes.

14 Q. Fair enough. Either way it occurred before the court's
15 June 11 order, right?

16 A. That's correct.

17 Q. And it occurred before the hearing in early May where this
18 court announced orally that ICE had broken the law, right?

19 A. Well, it occurred -- if it occurred in April, yes, it
20 occurred before that.

21 Q. And since then there have been no formal trainings in ICE
22 Boston of the process, right?

23 A. There have been no formal trainings.

24 Q. And how many people in ICE Boston work on or have
25 responsibility for implementation of the POCR process?

1 A. Well, I mean, there's 12 officers. It's something that
2 falls within the detain docket. So at present there are 12
3 officers assigned to the detain docket. There are two
4 supervisory detention and deportation officers, so I guess that
5 would be part of their responsibility. There are currently
6 three enforcement and removal assistants, which are sort of
7 like clerks that are assigned to the detain docket, and then
8 there's an assistant field office director and then a deputy,
9 et cetera.

10 Q. Ma'am, can you aver under oath to this court that each one
11 of those 12 individuals are properly trained in the POCR
12 process?

13 A. I feel like they have had -- yeah, I feel very confident
14 that they are in very good shape compared to what was going on
15 before I got here.

16 Q. Well, that's not my question, Ms. Adducci, respectfully.
17 My question is, can you state under oath to this court that
18 each one of those individuals with responsibility for the
19 detain docket are properly trained in the POCR process?

20 A. I have -- I believe they are, yes.

21 Q. Now, when you arrived in the office, you instructed the
22 detain docket officers to serve POCR notices immediately upon
23 intake, right?

24 A. The I-229 and the notice of file custody review I did,
25 because it appeared through some of the things that I had seen

1 that one of the bigger concerns was the notice of file custody
2 review.

3 Q. And so your way to remedy that was to say immediately on
4 intake issue the notice?

5 A. Yeah, that's more -- yes.

6 Q. But that's not the appropriate procedure under the POCR
7 regulations, is it, ma'am?

8 A. It -- yes, it's appropriate to do it that way.

9 Q. Well, the POCR regulations state that written notice
10 should be provided approximately 30 days in advance of the
11 pending records review, right?

12 A. No later than 30 days -- no. It says no later than 60
13 days.

14 MR. PRUSSIA: May we approach, Your Honor?

15 THE COURT: Yes.

16 MR. PRUSSIA: Thank you.

17 Q. Okay. Ms. Adducci, you have in front of you 8 CFR 241.4,
18 correct?

19 A. Yes.

20 Q. Are you familiar with that?

21 A. Yes.

22 Q. 241.4?

23 A. Yes.

24 Q. What is 241.4?

25 A. It relates to the continued detention of aliens in

1 custody.

2 Q. And I'm going to direct your attention, as I have on the
3 ELMO, to Section (h)(2), Notice to Alien. Do you see that?

4 A. Yeah, yes, I do.

5 Q. Okay. And it states, The district director or director of
6 the detention and removal field office will provide written
7 notice to the detainee approximately 30 days in advance of the
8 pending records review so that the alien may submit information
9 in writing in support of his or her beliefs. Do you see that?

10 A. Yes.

11 Q. What do you understand the purpose of that regulation to
12 be?

13 A. It allows the opportunity for people to provide
14 information prior to a custody review taking place.

15 Q. And the law states that the notice should be given
16 approximately 30 days in advance of the pending records review,
17 right?

18 A. Yes.

19 Q. Now, on intake there's no records review pending, right?

20 A. No. There is a records review pending ultimately.

21 Q. At the time of intake there's no records review that's
22 been scheduled, correct?

23 A. Well, it's part of the POCR process that a records review
24 will take place 90 days --

25 Q. At some point in the future. But at the moment of intake

1 there's no records review that has been scheduled and is
2 pending, correct?

3 A. It is inherent in the process that a records review will
4 take place no later than 90 days and in this instance 80 days
5 because in order for it to be done by 90 days, it has to go
6 through a chain of command.

7 Q. Well, if there's no records review that's pending at the
8 time the notice is given, you're not complying with the law,
9 correct?

10 A. I'm sorry. Can you say that again.

11 Q. The law requires that the notice 30 days approximately --
12 strike that. The law requires they're to be given 30 days'
13 notice in advance of the pending records review, right?

14 A. Yes.

15 Q. And if there's no pending records review at the time of
16 intake and that's when you provide notice, you're not complying
17 with the law, correct?

18 A. I -- no. I believe we are trying our best to comply with
19 the POCR regulations and afford people opportunities to give
20 any information that they have. So for all intents and
21 purposes, we're giving them more than what the regs are giving
22 them.

23 Q. Aren't you really just taking a shortcut? You're just
24 giving out notice on intake just so that you can cover your
25 ground and tell the court you gave notice?

1 A. No. I'm aware of what the court found as it relates to
2 the POCR timeline violations. And I take it very, very
3 seriously. And with that, we have been trying our very, very
4 best to comply with and make sure there are no violations or
5 occurrences again.

6 Q. In your experience about when does the records review
7 occur, generally speaking?

8 A. Well, at about 80 days now. 80 days post-detention.

9 Q. So it's not 30 days from intake; it's longer than that,
10 right?

11 A. That's correct.

12 Q. Okay. And at the time of intake, a detainee may not have
13 any representation yet, correct?

14 A. That is correct.

15 Q. The detainee may need time to find representation, right?

16 A. That's correct.

17 Q. So this notice, if it's given out at the time of intake
18 and the detainee does not yet have representation, counsel may
19 not receive the notice, right?

20 A. Well, if they didn't have representation, there would be
21 no one to give the representation to. However, if they
22 subsequently had representation, we would then give it to
23 counsel.

24 In instances such as this, if it was not going to allow
25 for 30 days for the counsel to review, we would communicate

1 with the counsel and see if they wanted to use an exception or
2 if they wanted us to conduct it in 80 days. But this would be
3 one --

4 Q. Well -- I'm sorry. Go ahead, please. I didn't want to
5 interrupt you. Please finish.

6 A. This would be one instance where we would probably make an
7 exception if counsel asked us to because they wanted a full 30
8 days. So it may push that 90-day window a little bit if
9 counsel actually asked to have the full 30 days' timeframe to
10 give evidence of why someone should not be continued or
11 continued detention should not occur.

12 Q. So let me understand this. Is it your testimony that ICE
13 Boston, after giving out this notice on intake, will
14 subsequently send out a second notice once they learn about
15 counsel for the detainee?

16 A. Absolutely.

17 Q. And that's your testimony as to what happens in ICE
18 Boston?

19 A. Yeah, it is.

20 Q. Now, you ordered a review of the detain docket during your
21 time at ICE Boston, right?

22 A. Yes, I did.

23 Q. And the review was finished on July 25, right,
24 thereabouts?

25 A. 25th or 26th, yeah, thereabouts.

1 Q. Was a report generated summarizing the report?

2 A. There was no formal report, no.

3 Q. How were the conclusions of the report communicated?

4 A. Report is a term that I know I used in my deposition, but
5 it was technically I asked one of my assistant field office
6 directors from Detroit to come to Boston to do a top-to-bottom
7 review of the detain docket and to work with the SDDOs, the
8 supervisory detention and deportation officers, the deportation
9 officers and the assistant field office director here to help
10 them -- help them with the challenges that they were facing
11 because it was clear that they were having some challenges on
12 the detain docket.

13 He was communicating throughout his timeframe here with
14 those individuals, and then at the end he sat down with the
15 assistant field office director and gave him some information
16 to work with the supervisory detention and deportation
17 officers.

18 Q. So how were his findings going to be communicated to the
19 current field office director?

20 A. After my deposition, because I believe my deposition was
21 actually the day that he left, my employee I have in Detroit, I
22 believe it was -- shortly after he left, I met with the
23 assistant field office director, the two supervisory detention
24 and deportation officers and Deputy Field Office Director Lyons
25 to sort of go through the process of -- we all met.

1 THE COURT: Wait a minute. I'm the one that needs to
2 understand this. I'm not clear. Did you bring somebody in
3 from Detroit to review the detention docket to see if what you
4 call the POCR regulations were being followed as you understood
5 them?

6 THE WITNESS: Yes. A full review.

7 THE COURT: What's that?

8 THE WITNESS: Yes, and a full review of the detain
9 docket. So some of the cases would not be subject to POCRs
10 because if they're not -- if they are pre-order cases, he would
11 have been looking at pre-order cases as well.

12 THE COURT: Okay. And what's the name of the person
13 who did the review?

14 THE WITNESS: His name is Kevin Raycraft. He's an
15 assistant field office director in Detroit.

16 THE COURT: How do you spell his last name?

17 THE WITNESS: R-a-y-c-r-a-f-t.

18 THE COURT: And did he finish that review?

19 THE WITNESS: He did.

20 THE COURT: When?

21 THE WITNESS: That would have been the end of, I
22 believe it was July 25.

23 THE COURT: And did he write a report?

24 THE WITNESS: He did not write a report. He took
25 notes through the process and he gave the information to -- he

1 worked -- as it was sort of a living report, so he was working
2 with the supervisory detention and deportation officers. I
3 asked him to work with the staff here.

4 THE COURT: Did he give you a report?

5 THE WITNESS: He did not.

6 THE COURT: You don't know what he found?

7 THE WITNESS: Well, I know that he found a -- he found
8 that there were some data quality issues, and he was working
9 with the staff on data quality issues, and he found, as he
10 worked through the process, he found cases that may or may not
11 have had some POCR or timeline issues.

12 THE COURT: POCR or timeline issues, you mean people
13 who didn't get reviews at 90 days?

14 THE WITNESS: No, I don't believe he found any cases.
15 I think -- and I didn't see every case that he reviewed. I
16 relied on him to coordinate with the people here because I'm
17 going to be leaving, and I wanted -- he was here for a finite
18 period of time, and he needed to work with the people who are
19 still going to be here.

20 But the biggest concern that I understand that he
21 found was the situation with the lack of service of the notice
22 of file custody review on attorneys or the delayed service.

23 THE COURT: So there were people, there were detainees
24 whose attorneys weren't given notice about or at least 30 days
25 before the document review to determine whether they should be

1 detained?

2 THE WITNESS: That's correct.

3 THE COURT: How many?

4 THE WITNESS: I'm aware of three for certain. These
5 are cases that were --

6 THE COURT: How do you know about those?

7 THE WITNESS: Because I asked them. When I brought
8 Deputy Field Office Director Lyons in to talk to the assistant
9 field officer director and the SDDOs, I asked them, you've had
10 a chance to look at the information that AFOD Raycraft had gone
11 through. What did he uncover?

12 And there were -- let me take that back a little bit.
13 Initially when Kevin was first there a case came to my
14 attention that involved what I'm speaking to as it relates to
15 the lack of or the late -- lack of service on an attorney. And
16 I believe he brought that case to my attention early on in his
17 tenure here.

18 THE COURT: And what did you do?

19 THE WITNESS: I spoke with our counsel as to whether
20 or not it appeared to have not -- you know, to be in violation,
21 or it looked like the only remedy would be release, and we in
22 fact released the individual. Again, these were cases that
23 were pre my tenure here. These were cases from --

24 THE COURT: Well, that was one case you just --

25 THE WITNESS: That's correct.

1 THE COURT: Then there were two more.

2 THE WITNESS: So at the end, at the end, two more
3 cases were brought to my attention again.

4 THE COURT: The end was about July 25.

5 THE WITNESS: Yes, 26th, 27th. I don't know what day
6 I sat down, but it was after Kevin's departure. And there were
7 two additional cases that had very complicated procedural
8 histories. Again, these cases were things that occurred prior
9 to my tenure here where the -- I can't remember the specifics
10 of each case, but I asked the assistant field officer director
11 to work with chief counsel's office to make a determination as
12 to whether or not this would require a release again. And
13 there were two more cases. Again, these are all cases that
14 were kind of pre my arrival.

15 THE COURT: Has anybody -- so let's see. How long was
16 your appointment for, 60 days?

17 THE WITNESS: It was supposed to be for 60. It turned
18 out to be closer to 70.

19 THE COURT: So three people have been released since
20 you became interim director?

21 THE WITNESS: Three people that I'm aware of.

22 THE COURT: Did you ask your subordinates to tell you
23 if there were other apparent POCR violations the way ICE
24 interprets the regulation?

25 THE WITNESS: I did. I did. I stressed

1 communication. I think that was one of the problems here. And
2 I stressed communication within the field office -- within the
3 ER office itself. I made a significant increase in the
4 communication with our Office of Chief Counsel.

5 And when I first got here, I think that the office was
6 very shaken, and I spent a great deal -- I spent time talking
7 to them, to specifically the detain docket and the chain up the
8 detain docket to me, telling them that they need -- trying to
9 get people to grab on to a solid piece of ground because people
10 were shaken and they needed to be able to get their confidence
11 back.

12 THE COURT: What were they shaken by?

13 THE WITNESS: By the fact that there were statements
14 that they had violated the law by not conducting POOCR reviews
15 properly.

16 THE COURT: Do you think court orders should be taken
17 seriously?

18 THE WITNESS: Yes.

19 THE COURT: And followed?

20 THE WITNESS: Yes.

21 THE COURT: Do you remember when you took office you
22 filed a declaration and affidavit with me telling me what
23 documents you had read?

24 THE WITNESS: Yes.

25 THE COURT: And do you remember that I issued an order

1 noting that it appeared you hadn't been given and read my June
2 11 decision, I think you said 62-page decision?

3 THE WITNESS: Yes.

4 THE COURT: Did you ask anybody why they didn't give
5 you that to read with everything else they gave you to read?

6 THE WITNESS: No. I know that when I first -- no. I
7 didn't ask. I assumed it was maybe because they thought it was
8 part of the sequestration.

9 THE COURT: Was part of what?

10 THE WITNESS: The sequestration order. I know there
11 were some concerns about documents and me seeing things because
12 of the sequestration order when I first came. I didn't ask
13 anyone why I didn't get that document, no.

14 THE COURT: You knew that people were shaken by the
15 statements I made in my 62-page decision and perhaps also that
16 I made orally on May 8. Did you know that?

17 THE WITNESS: In the process of Mr. Brophy's departure
18 I believe the office was made aware of the concerns with the
19 POCR violations.

20 THE COURT: But you thought maybe I had issued an
21 order that prohibited the interim field director from reading
22 my 62-page decision about the unlawful conduct of the office of
23 ICE that you were heading?

24 THE WITNESS: No, sir. I don't know what -- I don't
25 know what -- I didn't know necessarily that the 62-page

1 document existed. I was relying on counsel.

2 THE COURT: When you said you were relying on
3 counsel --

4 THE WITNESS: To give me the appropriate documents.

5 THE COURT: What counsel?

6 THE WITNESS: The Office of Immigration Litigation and
7 our chief counsel.

8 THE COURT: In Washington?

9 THE WITNESS: No. The local office.

10 THE COURT: But you didn't ask anybody, Why didn't you
11 give me the court's order?

12 THE WITNESS: Well, when I initially got here I don't
13 think the order had been completed.

14 THE COURT: No. After I ordered you to read my
15 decision.

16 THE WITNESS: I'm sorry. No.

17 THE COURT: Did you ask anybody, When you gave me all
18 of those other things to read, why didn't you give me this?

19 THE WITNESS: No, I didn't ask.

20 THE COURT: And you thought maybe it was subject to
21 some sequestration order and you were prohibited from reading
22 it?

23 THE WITNESS: Honestly, I didn't think about that. I
24 had been reading a lot of things.

25 THE COURT: And so I ordered you to read it and to

1 file a declaration and affidavit saying that you had read it,
2 correct?

3 THE WITNESS: Yes.

4 THE COURT: Did you read it?

5 THE WITNESS: I did.

6 THE COURT: Carefully?

7 THE WITNESS: I did.

8 THE COURT: And could you please show her page --
9 well, start with page 111 of her deposition. Do you have a
10 copy of your deposition?

11 THE WITNESS: Yes, I do.

12 THE COURT: So look at page 11, line 20. It says --
13 or does it say: Are you familiar with the regulations that
14 make somebody with a final order of removal eligible to pursue
15 the provisional waiver process?

16 And would you read your answer to that, please.

17 THE WITNESS: I said: Very vaguely. I think because
18 I was into the field office director job when the -- I think
19 was the comment period was out, and my exposure to it was
20 people asking questions about it at an advocacy and
21 non-government organizational meeting to the CIS director, so
22 he would speak to it and I knew there was going to be an
23 ability for people to kind of wait to get a waiver, but I'm not
24 versed with it.

25 THE COURT: And then look at page 113. There's a

1 question at line 21. It says: Did you know that the
2 regulations in 2016 specifically made non-citizens with final
3 orders of removal who are married to U.S. citizens eligible for
4 the provisional waiver process?

5 Do you see that question?

6 THE WITNESS: I do.

7 THE COURT: And would you read your answer, please?

8 THE WITNESS: I said: No.

9 THE COURT: So you said -- and then the question was:
10 Are you aware that they did that to minimize the hardship that
11 would result to U.S. citizen families if they were separated
12 from their spouse?

13 And your answer was what?

14 THE WITNESS: Well, I wasn't aware that they did that,
15 so I could not be aware of that.

16 THE COURT: So your deposition was on July 26, right?

17 THE WITNESS: Yes.

18 THE COURT: And as of that time you were not aware
19 that individuals with final removal orders who are married to
20 U.S. citizens were eligible for the provisional waiver process?

21 THE WITNESS: I don't believe I was aware that final
22 orders were.

23 THE COURT: But you read my 62-page decision?

24 THE WITNESS: Yes, I did.

25 THE COURT: Have you ever read it a second or

1 additional times?

2 THE WITNESS: I did read it a few times. I haven't
3 read it since my deposition.

4 THE COURT: You haven't?

5 THE WITNESS: No.

6 THE COURT: So you read it more than once before July
7 27?

8 THE WITNESS: I did.

9 THE COURT: Does somebody have a copy of that decision
10 here? I just have one. I have the Westlaw version. What do
11 you have?

12 MR. PRUSSIA: I've got the ECF version.

13 THE COURT: Good.

14 MR. PRUSSIA: Would you like me to give one to the
15 witness?

16 THE COURT: Yeah.

17 MR. PRUSSIA: Thank you.

18 THE COURT: But why don't you go through it, Mr.
19 Prussia. You'll see about halfway there's a suggestion that
20 says: D. The provisional waiver process. See if you can find
21 that and put it up on the machine.

22 MR. PRUSSIA: Not too hard for me to find, Your Honor.

23 THE COURT: Do you see that? What page is that so she
24 can --

25 MR. PRUSSIA: It's page 24 of the opinion and also

1 ECF, which is docket 95 for the record.

2 THE COURT: Ms. Adducci, do you see Section D --

3 THE WITNESS: I do.

4 THE COURT: -- captioned and underlined: The
5 Provisional Waiver Process?

6 THE WITNESS: I do.

7 THE COURT: The first sentence says: Federal
8 immigration laws permit an undocumented alien who has been
9 ordered removed from the United States and is married to a U.S.
10 citizen to seek to become a lawful permanent resident.

11 THE WITNESS: Yes.

12 THE COURT: And then there are a couple paragraphs
13 explaining that process.

14 THE WITNESS: Yes.

15 THE COURT: So if you read the decision several times
16 and took it seriously, why did you say under oath on July 27
17 that you didn't know about these regulations?

18 THE WITNESS: I just didn't recall this -- I was very,
19 very focused on the Post-Order Custody Review process, and I
20 just didn't recall this from reading it.

21 THE COURT: Did you know what this lawsuit is about?

22 THE WITNESS: I do.

23 THE COURT: Did you know on July 26 what this lawsuit
24 was about?

25 THE WITNESS: Yes.

1 THE COURT: And did you know that the petitioners are
2 claiming that the Department of Homeland Security has a duty to
3 consider the provisional waiver process in deciding whether to
4 remove, deport somebody who is pursuing that process?

5 THE WITNESS: I do.

6 THE COURT: Did you know that at the time of your
7 deposition?

8 THE WITNESS: I did.

9 THE COURT: And you didn't ask anybody: What's the
10 provisional waiver process?

11 THE WITNESS: Again, I was very focused on the -- I
12 was focused on the Post-Order Custody Review issue. I wasn't
13 as focused on the waiver. I know that -- I know what an I-130
14 is, and I know that there are waivers that are attached to
15 I-130s, but I don't know the level of detail.

16 THE COURT: Well, did you know what I wrote in my
17 decision? You read that. I'm repeating myself.

18 THE WITNESS: I did read it. I did read it.

19 THE COURT: You took it --

20 THE WITNESS: I just didn't recall. There's 62 pages
21 and there's details within it that I would refer back to it if
22 I needed to. If the issue was in front of me for a decision, I
23 would have asked someone about it.

24 THE COURT: You would refer back to it if you needed
25 to?

1 THE WITNESS: Right, if I was facing an issue as it
2 related to --

3 THE COURT: Okay.

4 THE WITNESS: -- if I was facing -- if someone was
5 presenting that to me as a concept as it related to their case.
6 But I had no cases that --

7 THE COURT: You knew I required that you be here to be
8 available to testify in these hearings, right --

9 THE WITNESS: Yes.

10 THE COURT: -- this week?

11 THE WITNESS: Yes.

12 THE COURT: Did you know that the hearings were in
13 part on a motion to dismiss the claim that the Department of
14 Homeland Security is required to consider somebody who had
15 initiated the provisional waiver process before removing them?

16 THE WITNESS: I know that there were supposed to be
17 hearings on the motions; I did know that.

18 THE COURT: And that they involved the -- did you know
19 they involved the provisional waiver process and the legal
20 effect of them?

21 THE WITNESS: I knew they involved the I-130 process
22 and the ability for someone to get a waiver, yes.

23 THE COURT: A waiver that would do what?

24 THE WITNESS: A waiver that would -- well, I don't
25 know. What I knew because I sat in court all day yesterday,

1 but I believe I knew before I came, a waiver that would allow
2 someone to not be separated from their family, that would allow
3 them to go foreign for a shorter period of time and not have
4 the time bar to coming back to the United States.

5 THE COURT: Well, you didn't know that on July 26, you
6 testified, correct?

7 THE WITNESS: I believe -- I think I later -- that's
8 correct.

9 THE COURT: Okay. You didn't know it on July 26, and
10 you didn't read my decision again after July 26, correct?

11 THE WITNESS: I did not.

12 THE COURT: So what information -- did you read -- how
13 did you learn about this provisional waiver process that
14 arguably starts with the I-130 between July 26 and the time you
15 came to court yesterday?

16 THE WITNESS: Well, I reread my deposition. And it's
17 difficult when you have to admit not knowing something, so I
18 think I -- I'm sure I did some discussions -- I don't exactly
19 remember because I can't exactly pin down when I learned what.
20 I sat in court all day yesterday and listened to talk about it.

21 THE COURT: That's part of the reason I wanted you
22 here, that everybody would learn.

23 THE WITNESS: It was very informative.

24 THE COURT: But do you understand you're under oath
25 now?

1 THE WITNESS: I do.

2 THE COURT: Did you have any discussions -- so you
3 didn't know about the provisional waiver process on July 26,
4 2018 and you didn't read my decision, and I asked you -- you
5 know, I could break it down. Is there anything you read that
6 informed you of the provisional waiver process before you came
7 to court yesterday?

8 THE WITNESS: Nothing that I read.

9 THE COURT: Okay.

10 THE WITNESS: And to clarify, I was aware of the
11 provisional waiver process. I just didn't know the level of
12 detail and who it applied to.

13 THE COURT: Well, did you tell the truth on July 26
14 when you were asked: Did you know that the regulations in 2016
15 specifically made non-citizens with final orders of removal who
16 are married to U.S. citizens eligible for the provisional
17 waiver process? Your answer was no. So is that true?

18 THE WITNESS: Because they were final orders of
19 removal, correct.

20 THE COURT: July 26. And before you came to court
21 yesterday, did you learn that the 2016 regulations did make
22 non-citizens with final orders of removal who are married to
23 U.S. citizens eligible for the provisional waiver process?

24 THE WITNESS: I believe I did in discussions with
25 counsel.

1 THE COURT: How, how?

2 THE WITNESS: In discussions with counsel.

3 THE COURT: All right. It's 1:45. We'll take a break
4 and resume at -- oh, it's 12:45. It's not 1:45. It's 12:45.
5 Come back at 1:45. Court is in recess.

6 (Recess taken 12:44 p.m. - 1:41 p.m.)

7 THE COURT: Let me I think reiterate and if necessary
8 refine something I said this morning. The issue of when any
9 entitlement to consideration that somebody has initiated the
10 process to get a provisional waiver would begin isn't an issue
11 that was briefed and presented to me.

12 As I think I said this morning, I'm regarding it as
13 deeming it waived for the purposes of the motion to dismiss.
14 But it will be in the case later if I don't dismiss the case.
15 And while I'll be interested in the briefing you're going to
16 submit tomorrow by 3:00, by that time I may have reached my
17 decision. And basically I'm not reopening the issue. But the
18 government in its briefing essentially took an all-or-nothing
19 position, and I'll decide that issue.

20 All right. Mr. Prussia, would you like to resume?

21 MR. PRUSSIA: Yes, Your Honor. If it pleases the
22 court, I'm ready.

23 THE COURT: You may.

24 BY MR. PRUSSIA:

25 Q. Ms. Adducci, are you familiar that around April 2018 the

1 court issued an order preventing ICE and the other respondents
2 in this case from removing Lucimar De Souza from the District
3 of Massachusetts and the United States?

4 A. Yes.

5 Q. So under that order it's your understanding that she is
6 not -- that ICE Boston is not permitted to remove her from the
7 United States, correct?

8 A. Correct.

9 Q. And she's under supervised release, right?

10 A. Yeah, an order of supervision, yes.

11 Q. And that requires her to check in on a regular basis,
12 correct?

13 A. Yes.

14 Q. And she did so on June 12 of this year, correct?

15 A. Yes.

16 Q. And isn't it true that on that check-in, officers from
17 your field office under your supervision told her to buy a
18 ticket to leave the country?

19 A. Actually not officers but employees.

20 Q. Employees?

21 A. Correct.

22 Q. Who were they?

23 A. It was an enforcement and removal assistant.

24 Q. What's an enforcement and removal assistant?

25 A. For lack of a better term it would be -- it's basically a

1 clerk. It's someone that works with the deportation officers
2 in more of a clerk-type fashion.

3 Q. And this clerk told Ms. De Souza that she needed to buy a
4 ticket to leave the country, correct?

5 A. That's my understanding, yes.

6 Q. Now, if she had done so, that would have been a violation
7 of the court's order, right?

8 A. Yes.

9 Q. And in fact, her being told to buy a ticket to depart the
10 country was a violation of the court's order, correct?

11 A. I think removing her would have been a violation of the
12 court's order. I'm not sure if actually -- it was a mistake.
13 I know it's discussed in my deposition that a mistake occurred.
14 I don't know if -- she wasn't to be removed from the country.
15 Telling her to buy a ticket certainly wasn't an appropriate
16 instruction.

17 Q. You expect that she would have complied with that
18 instruction, correct?

19 A. I would -- I would hope that she would communicate and her
20 counsel did communicate I believe through our counsel that this
21 occurred, and it was remedied the same day.

22 Q. And you did not discipline this clerk who told Ms. De
23 Souza to leave the country, right?

24 A. No, I did not.

25 Q. Did you conduct any investigation to understand how

1 something like this could have happened on your watch?

2 A. Clearly, I told the staff it should not happen. It was my
3 third day in the office. And I said: Why is an enforcement
4 and removal assistant giving instruction to a reporting alien?

5 Q. Well, the judge issued his order in April 2018. I
6 understand you weren't there, but that was two months before
7 she was directed by an employee at your office to leave the
8 country, right?

9 A. That's correct.

10 Q. And in those two months, had there been any attempt to
11 educate the employees in the office and the officers of ICE
12 Boston that this court, a Federal Court, had issued an order
13 precluding them from removing her from this country?

14 MS. LARAKERS: Objection to the extent she has
15 knowledge. He's asking about a time before she was there.

16 MR. PRUSSIA: It includes a period she was there, Your
17 Honor.

18 THE COURT: What's that?

19 MR. PRUSSIA: It includes a period she was there, and
20 if she knows, she can answer.

21 THE COURT: It's based on your knowledge. The
22 objection is overruled.

23 A. I have no knowledge as to whether or not --

24 Q. Well, you certainly didn't order folks working in ICE
25 Boston to read the judge's order precluding them from removing

1 Ms. De Souza, right?

2 A. No.

3 Q. And to the best of your knowledge, neither Mr. Lyons nor
4 Mr. Brophy did so either, right?

5 A. I have no idea.

6 Q. And you didn't bother to investigate?

7 A. No, I did not.

8 Q. Did you know of the existence of the order at the time you
9 took over the field office?

10 A. I don't think I knew it on the day I took over, no.

11 Q. Do you recall the circumstances under which you learned of
12 the judge's order precluding ICE Boston from removing Ms. De
13 Souza from the United States?

14 A. I think it was probably that day, the day she came in to
15 report and that unfortunate incident occurred.

16 Q. After her counsel had contacted counsel for the government
17 to notify them of what happened, right?

18 A. That's correct.

19 Q. Because you learned through your lawyers, right?

20 A. That's correct.

21 Q. So absent that intervention by counsel, Ms. De Souza would
22 have departed the United States, right?

23 A. I don't know if she would have or not. I don't know if --
24 it happened immediately, the intervention. But I don't know, I
25 can't say if she would have actually left the United States.

1 Q. Well -- sorry. Are you finished with the answer?

2 A. Yes.

3 Q. After an individual is told to depart the United States,
4 what happens next?

5 A. A multitude of things could happen. They could abscond.
6 They could file a stay of removal. Hopefully they're
7 communicating with their deportation officer. In this case --
8 I mean, part of an order of supervision is communication.
9 Cases are evolving and things are happening, and things are
10 happening on the individual who is on an order of supervision's
11 cases and situation in life, and hopefully there's an ongoing
12 communication so that if they have any information that is
13 crucial, beneficial to them, it could be considered in a
14 favorable factor.

15 Q. You'd agree with me the only reason why Ms. De Souza is
16 still here in the United States today is because of the court's
17 order?

18 A. I can't say.

19 Q. But for the court's order, ICE Boston would have removed
20 her from the United States, right? That's what you told her on
21 June 12?

22 A. I'm sorry. I'm sorry.

23 Q. But for the court's order, ICE would have removed her from
24 the United States, right?

25 A. I don't know. I mean, she may have -- she may have filed

1 a stay of removal. I don't know. That case was before I was
2 here. But for the June 12 issue --

3 Q. You've mentioned now a few times now a stay of removal.
4 What is that?

5 A. It's an administrative stay of removal. It's an I-246.
6 Something that is statutorily available to people who have
7 final orders of removal.

8 Q. So what's the effect of an I-246 if it's granted?

9 A. It stays the person's removal.

10 Q. And the person is not supposed to be removed from the
11 United States, right?

12 A. That's correct.

13 THE COURT: If someone applies for a stay of removal,
14 are there regulations that state factors to be considered in
15 deciding -- in ICE deciding whether to grant the stay?

16 THE WITNESS: I can't speak to -- there are factors
17 that are considered every time someone files a stay of removal.
18 All the factors related to the case are -- in most instances
19 there's a volume of documents that are attached to stays of
20 removal. That's the opportunity that --

21 THE COURT: My question is different. Does ICE have
22 regulations telling employees what to consider in deciding
23 whether to grant a stay of removal? Are there regulations?

24 THE WITNESS: I don't know if they specifically say
25 what to consider.

1 THE COURT: Anyway. Is ICE required to consider
2 community ties, including family ties, in deciding whether to
3 grant a stay of removal?

4 THE WITNESS: I wouldn't -- that would be something
5 that would be considered required to consider -- we consider
6 all the facts of the case that we're aware of when we
7 adjudicate stays.

8 THE COURT: So you're saying you're not required to
9 consider it, but you would consider community ties, including
10 family ties?

11 THE WITNESS: I would.

12 THE COURT: Hold on just one second. Why don't you go
13 ahead, Mr. Prussia.

14 MR. PRUSSIA: Thank you, Your Honor.

15 BY MR. PRUSSIA:

16 Q. If the stay of removal, the I-246 is granted, the
17 non-citizen is able to remain in the United States for some
18 period of time, correct?

19 A. Correct.

20 Q. ICE nevertheless retains some discretion to remove the
21 individual if they commit a crime or something else like that
22 occurs, correct?

23 A. That's correct.

24 Q. Short of that, it would be improper --

25 THE COURT: Excuse me just a second. Here, we're

1 going to be in recess for about five minutes.

2 (Recess taken 2:00 p.m. - 2:07 p.m.)

3 THE COURT: You may resume.

4 MR. PRUSSIA: Thank you, Your Honor.

5 Q. Before the recess, Ms. Adducci, we were discussing the
6 I-246 process. Do you remember that?

7 A. Yes.

8 Q. And the grant of the I-246 stay of removal protects the
9 non-citizen from removal absent some other reason for
10 enforcement, correct?

11 A. Yes.

12 Q. And short of the occurrence of these other reasons that
13 may occur for enforcement, whatever they may be, it would be
14 improper to remove someone with a stay of removal, right?

15 A. Yes.

16 Q. Are you familiar with the Rutkowskis?

17 THE COURT: Could you spell that, please.

18 MR. PRUSSIA: For the record it's R-u-t-k-o-w-s-k-i.

19 A. Only in name. I heard that name shortly -- from counsel
20 shortly before I left, I believe it was last week, shortly
21 before I left to return to Detroit.

22 Q. Piotr Rutkowski was a non-citizen or is a non-citizen who
23 was detained despite having a pending I-130, correct?

24 A. I don't know.

25 Q. Well, he filed a lawsuit in this court, correct?

1 A. I'm not aware.

2 MR. PRUSSIA: May I approach, Your Honor?

3 THE COURT: Yes.

4 THE WITNESS: Thank you.

5 Q. Ms. Adducci, you've been handed a document filed in the
6 District of Massachusetts titled Stipulation of Settlement in
7 Civil Action 18-10953-MLW. Is that a document that's in front
8 of you?

9 A. Yes.

10 Q. And the document is dated June 6, 2018, correct? Look at
11 the last page.

12 A. Yes.

13 Q. And the petitioner that's identified in the document is --
14 I may have mispronounced it. I said Peter, but it's P-i-o-t-r.
15 Do you see that?

16 A. I do.

17 Q. And if you turn to paragraph 3 of the stipulation of
18 settlement, it states: Upon the filing of an application for
19 administrative stay of removal with ICE, Form I-246, petitioner
20 will be granted, in the exercise of administrative discretion,
21 a stay of removal for one year in order to pursue whatever
22 administrative remedies or waivers for which he believes
23 himself to be eligible. Prior to the expiration of the
24 authorized administrative stay period, petitioner may apply for
25 any additional period of discretionary stay he believes to be

1 necessary for resolution of any pending administrative waivers
2 or other pending administrative matters upon a showing of due
3 diligent prosecution of the same.

4 Did I read that correctly?

5 A. Yes.

6 Q. So according to this, Mr. Rutkowski, upon the filing of a
7 stay of removal, he should not be removed from the United
8 States, right?

9 A. Yeah, it would be a logical -- no, he shouldn't. Yes,
10 because he was going to be granted. Yes, that's what it says.

11 Q. Is says: Petitioner will be granted?

12 A. Right.

13 Q. For a period of a year, right?

14 A. Correct.

15 Q. And isn't it true, Ms. Adducci, that he appeared at your
16 office for a check-in, according to the conditions of his
17 supervised release, on June 25 of 2018, and he was directed to
18 buy tickets to depart the United States?

19 A. I don't have any knowledge of him appearing.

20 MR. PRUSSIA: May I approach, Your Honor?

21 THE COURT: Yes. And I'll make the stipulation of
22 settlement Exhibit 1 of today's date.

23 MR. PRUSSIA: Thank you, Your Honor. I'm not going to
24 put this on the ELMO because it has personal information on it,
25 Your Honor.

1 THE COURT: We'll make this Exhibit 2.

2 MR. PRUSSIA: Thank you, Your Honor.

3 Q. Ms. Adducci, can you identify the document, Exhibit 2?

4 A. Yes.

5 Q. Please identify it for the record.

6 A. It's an order of supervision chronology page.

7 Q. And what does it identify -- is the subject of the
8 chronology Mr. Rutkowski?

9 A. Yes.

10 Q. And what does it state with respect to him?

11 A. The whole thing or just in the comments?

12 Q. Well, let's focus on -- I misspoke earlier. I said June
13 25, but the August 14 entry, the one he appeared for a
14 check-in.

15 A. August 14. It says: Reported. Then there's something
16 scratched out. You must provide an itinerary to depart the
17 United States by 9/28 with a departure date of 10/3, Monday
18 through Friday, direct flights out of JFK Airport in New York
19 City only.

20 Q. So Mr. Rutkowski was directed to depart the United States,
21 correct?

22 A. Well, it's crossed out, so it appears as though he must
23 have been, and then it's crossed out.

24 Q. And do you have an understanding as to why it was crossed
25 out?

1 A. Probably because -- I'm going to make an assumption that
2 he -- for some reason that was changed.

3 Q. Because his counsel intervened, right?

4 A. I don't know.

5 Q. So short of his counsel intervening, he would have left
6 the United States, right?

7 A. If -- I don't know if he would have left, but he was being
8 instructed to buy a ticket.

9 Q. Now, who gave him that instruction?

10 A. I don't know who this person is. There's an officer SP.
11 I don't know who that is.

12 Q. You don't know who SP is?

13 A. No. Looking at this, it says: Your next appointment --
14 above that it says: Your next appointment is at ERO Hartford.
15 And I didn't have -- in the short time I was here, I didn't
16 have an opportunity to go to the sub-offices.

17 Q. The officer that's identified next to the June 25 entry,
18 who is that?

19 A. I do.

20 Q. Who is that?

21 A. J. Parland. He is an employee in the Burlington office.

22 Q. Now, Ms. De Souza was told to depart, notwithstanding the
23 court's order in this case precluding ICE from doing so, as we
24 discussed, right?

25 A. Yes.

1 Q. And how do you think that made her feel?

2 A. I would imagine it didn't make her feel good.

3 Q. You called it a mistake earlier, right?

4 A. Yes.

5 Q. It's a serious mistake, right?

6 A. It's -- yes.

7 Q. But not only that, it would be a violation of this court's
8 order, right?

9 A. It would be a violation for us to remove her.

10 Q. And Mr. Rutkowski was told to depart notwithstanding a
11 stipulation filed in this court by ICE that he would have a
12 stay of removal, correct?

13 A. Upon filing of a stay, of a 246 -- I'm not aware -- I'm
14 not aware of the case, so I don't --

15 THE COURT: Mr. Prussia, I think I've got this point.

16 MR. PRUSSIA: Thank you, Your Honor. Just give me one
17 minute, Your Honor, to confer with my co-counsel.

18 (Discussion off the record.)

19 MR. PRUSSIA: I pass the witness, Your Honor. I'm
20 finished. Nothing further.

21 THE COURT: Nothing further? Is there
22 cross-examination?

23 MS. LARAKERS: Just briefly, Your Honor.

24 THE COURT: Sure.

25 CROSS-EXAMINATION BY MS. LARAKERS:

1 Q. Good afternoon, Ms. Adducci.

2 A. Good afternoon.

3 Q. You testified earlier that you're familiar with the I-246
4 process?

5 A. Yes. Although I don't -- I haven't done a 246
6 adjudication in quite a while until I came here to Boston
7 because I delegate that responsibility to my deputies.

8 Q. What is your understanding of how that works?

9 A. An individual that wants to stay in the United States
10 files an I-246, files it in the field office in person and
11 usually attaches a significant amount -- in many instances
12 there's a significant amount of paperwork attached or sort of
13 the equities that they have and the reason for the stay.

14 Q. When you've adjudicated I-246s in the past, what factors
15 have you considered?

16 A. Everything that's in front of me. I usually have the A
17 file. Well, I should say 50 percent of the time I have the A
18 file because half of my office is remote in Ohio. I would have
19 all of the attachments that are filed with the 246, the
20 supporting documents. I'm sorry. I don't know if I completed
21 the answer.

22 Q. That's fine. If an I-130 is included in that stack of
23 documents, is that considered?

24 A. Yes. Everything in the stack of documents is considered.

25 Q. If someone has a pending -- shows proof that they have a

1 pending or approved I-212, is that considered a positive factor
2 or a negative factor?

3 A. I can't recall seeing that. But if I did, I would say it
4 would be a positive factor, hypothetically. I don't recall
5 ever having that as a consideration. But I've adjudicated a
6 lot of stays in my time as field office director.

7 Q. Have you instructed employees in the past and in the
8 present how to adjudicate stays of removal?

9 A. Well, employees don't -- I should say line officers don't
10 adjudicate them. Deputy field office directors and assistant
11 field office directors adjudicate them. My instructions would
12 be to consider all the case equities and procedural history and
13 everything related to the case, both the positive and negative
14 issues.

15 Q. Would a pending or approved provisional unlawful presence
16 waiver be considered?

17 A. Yes.

18 Q. How do you --

19 A. Again, prior to this experience, I haven't considered one,
20 but -- and not, you know, not being aware of the process, not
21 being -- not knowing what -- how the provisional waiver process
22 worked doesn't mean I wouldn't consider it, certainly. I would
23 generally go talk to someone who did. I'd either talk to my
24 local chief counsel or potentially call the CIS director, the
25 field office director at CIS in Detroit. I mean, there's a lot

1 of times things that I don't understand that are part of stay
2 applications. There's oftentimes medical conditions that I
3 don't know what they are so I might, you know, communicate with
4 our health service core individuals to see what exactly that
5 is.

6 Q. So if you don't know -- just to be clear, if you don't
7 know what an application is or what a medical condition is, do
8 you go and ask someone to find out what it is?

9 A. Yes.

10 Q. Do you go ask what the significance of an application is?

11 A. I mean, I would ask the entirety of what it involved.

12 Q. Now, you're a field office director in Detroit, correct?

13 A. Yes.

14 Q. Are you aware of the factors that are considered when an
15 enforcement action is taken?

16 MR. PRUSSIA: I'm just going to object to the leading
17 nature of the series of questions. I've refrained, but I think
18 it would be appropriate for counsel to ask some direct
19 questions.

20 THE COURT: Well, I don't know that it's irrelevant or
21 beyond the scope of what you asked, but I do think there needs
22 to be some foundation because that question assumes that
23 there's some factors that have to be considered for an
24 enforcement action to be taken. So the objection is overruled,
25 but why don't you go back and try to lay a foundation.

1 MS. LARAKERS: Certainly, Your Honor.

2 Q. What are your responsibilities as a field office director
3 with regard to instructing officers how to conduct enforcement
4 operations?

5 A. Well, I mean, I have a subordinate staff. I am a field
6 office director, so I rely on my supervisory and detention and
7 deportation officers, my assistant field officer directors and
8 my deputy field office directors to instruct individuals. I
9 expect them to take all case factors into consideration, but I
10 expect them to follow the executive orders and the
11 implementation memo of Secretary Kelly.

12 Q. Now, you testified previously that there was training on
13 the POCR -- the Post-Order Custody Review process prior to you
14 getting to Boston, correct?

15 A. Yeah. I understand that to be the case. I wasn't here,
16 but I believe there was. I don't know who all attended because
17 I wasn't here yet.

18 Q. How have you ensured -- have you ensured that the people
19 in the Boston field office understand how the Post-Order
20 Custody Review process works?

21 A. Well, I gave them access to an incredible amount of
22 knowledge from an assistant field office director out of
23 Detroit, and he worked I know with many people on a daily
24 basis. I can't take credit for much of the things that have
25 occurred because a lot of things were implemented before I got

1 here. For example, this item to enhance the staff and adding
2 senior experienced officers to sort of mentor the current --
3 the less experienced officers. I know that there have been a
4 resource -- sort of a resource library added to the detain
5 docket Sharepoint site that has just an incredible volume of
6 information for people to reference in the event that they
7 don't have access maybe to their supervisor or to one of the
8 mentors. There's been some hard work put into some of those
9 processes by both my assistant field office director and one of
10 the more senior tech-savvy deportation officers.

11 Q. You testified earlier that you instructed your employees
12 in Boston to serve the notice that the Post-Order Custody
13 Review was going to be done immediately, right?

14 A. Yes.

15 Q. And why did you do that?

16 A. Well, I wanted to make sure that we were affording the
17 30-day opportunity. I didn't want people to miss it. I didn't
18 want to, you know, have an issue with POCR timelines, but I
19 wanted to ensure that people were getting the most amount of
20 time they could to provide any documents that they thought were
21 relevant to be considered during the process.

22 Q. Did you do that because you were under the impression that
23 it was required by law to serve it right away?

24 A. No. I did it because I thought it would be a best
25 practice and I know that we do that in Detroit.

1 MS. LARAKERS: No further questions, Your Honor.

2 THE COURT: Is there any redirect?

3 MR. PRUSSIA: No, Your Honor.

4 THE COURT: I have a few questions, and if you think
5 they're objectionable, you shouldn't be timid about expressing
6 your objection.

7 Let me go back, please, to something I was asking you
8 before. So if somebody files for an administrative stay of
9 removal, are they filing an I-246?

10 THE WITNESS: Yes.

11 THE COURT: And does the Department of Homeland
12 Security have any regulations describing what should be
13 considered when ICE decides whether to grant an I-246 request
14 for stay of removal?

15 THE WITNESS: I believe that the 246 is statutorily
16 based, and I would -- I would not be surprised if there were
17 regulations that say what to consider.

18 THE COURT: Have you ever read regulations as to what
19 you're to consider, what one under your supervision perhaps is
20 to consider in deciding whether to grant an I-246?

21 THE WITNESS: No.

22 THE COURT: Let me take a step back. What is your
23 education?

24 THE WITNESS: I graduated from Michigan State. I have
25 a bachelor's degree from Michigan State University.

1 THE COURT: I'm sorry, I'm having a little trouble
2 hearing.

3 THE WITNESS: I have a bachelor's degree from Michigan
4 State University.

5 THE COURT: All right. And what year?

6 THE WITNESS: 1987.

7 THE COURT: And when did you go to work for what is
8 now ICE?

9 THE WITNESS: 1987.

10 THE COURT: And did you have training?

11 THE WITNESS: I did.

12 THE COURT: What did that consist of?

13 THE WITNESS: I went to the Federal Law Enforcement
14 Training Center in Georgia.

15 THE COURT: And have you worked for what is now ICE
16 ever since 1987?

17 THE WITNESS: I have. But just to clarify, for the
18 first 20 years of my career, I did not work in this division of
19 ICE.

20 THE COURT: Okay. And you don't know whether or not
21 there are regulations that describe what should be considered
22 in determining whether to grant an I-246 stay of removal?

23 THE WITNESS: I would be -- I believe there probably
24 are. I just don't know for certain.

25 THE COURT: Do you remember ever reading them?

1 THE WITNESS: No.

2 THE COURT: Do you know whether there's a
3 responsibility to consider community ties, including family
4 ties, that someone applying for I-246 stay of removal should
5 consider?

6 THE WITNESS: Whether -- I don't know if there's a
7 responsibility, but I certainly would consider it.

8 THE COURT: And you were here when Ms. Calderon
9 testified this morning, correct?

10 THE WITNESS: Yes, I was.

11 THE COURT: And you were here when Ms. De Souza
12 testified?

13 THE WITNESS: Yes, I was.

14 THE COURT: Are they eligible, are either or both of
15 them eligible for stays of removal from ICE?

16 THE WITNESS: Yes.

17 THE COURT: Does it sound like they have compelling
18 family ties?

19 THE WITNESS: Yes.

20 THE COURT: And would those ties weigh in favor of
21 granting them a stay of removal?

22 THE WITNESS: Absolutely.

23 THE COURT: Why do you say absolutely?

24 THE WITNESS: Because family ties -- I guess based on
25 the facts I know, I suppose it would depend on what the family

1 ties were. But yes, the family ties presented in their cases
2 would -- there are immediate family ties, they have approved
3 I-130s, that would definitely weigh in their favor.

4 THE COURT: And do you know whether or not ICE would,
5 as a practical matter, consider those factors that there is an
6 approved I-130 and somebody has compelling immediate family
7 ties would be -- actually, let me take a step back because
8 you've answered that immediate question.

9 You've referenced an Executive Order. Is that
10 President Trump's January 25, 2017 Executive Order enhancing
11 public safety in the interior of the United States?

12 THE WITNESS: Yes.

13 THE COURT: And then you mentioned I think a
14 memorandum from the then Secretary of Homeland Security John
15 Kelly?

16 THE WITNESS: Yes, the implementation memo.

17 THE COURT: Is that a memorandum dated February 20,
18 2017?

19 THE WITNESS: That sounds correct.

20 THE COURT: Under the -- and what is your
21 understanding of the Executive Order and the memorandum of then
22 Secretary Kelly regarding what's to be done with aliens who
23 have final orders of removal?

24 THE WITNESS: They are -- aliens who have final orders
25 of removal who have not complied with the judge's orders are

1 technically -- are priorities under Secretary Kelly's memo. I
2 think fifth or sixth priority.

3 THE COURT: All right. And does Secretary Kelly's
4 memo give you and your subordinates when you were a field
5 officer any discretion not to remove somebody with a final
6 order of removal?

7 THE WITNESS: There is a section within the memo that
8 talks about prosecutorial discretion, yes, and sort of does
9 specify that it needs to be forwarded up the chain of command.
10 But it also specifies that there are no class -- you can't
11 exercise prosecutorial discretion in a specific class of
12 individuals.

13 THE COURT: And I'm trying to figure out what that
14 means. But does that mean that, for example, you are not
15 supposed to, as a field office director, say that we won't
16 arrest or detain and remove anyone with a final order of
17 removal who is married to a U.S. citizen? That would be
18 prohibited by the Kelly memorandum?

19 THE WITNESS: I'm sorry. Would you -- could you help
20 clarify that. I just want to make sure I understand.

21 THE COURT: Do you understand the Kelly memorandum to
22 mean that, for example, you are not supposed to, as a field
23 officer director, say to your subordinates: We won't arrest or
24 detain anyone with a final order of removal who is married to a
25 U.S. citizen?

1 THE WITNESS: Yes.

2 THE COURT: Does ICE have unlimited resources?

3 THE WITNESS: No.

4 THE COURT: Does ICE have enough resources to arrest,
5 detain and remove everybody in the United States unlawfully?

6 THE WITNESS: No.

7 THE COURT: Does ICE have sufficient resources to
8 arrest, detain and remove everyone with a final order of
9 removal?

10 THE WITNESS: I would speculate no. I wouldn't --
11 that would be an opinion.

12 THE COURT: And did Secretary Kelly's memo create
13 seven priority areas, priorities or -- did it instruct that
14 department personnel should prioritize removable aliens who
15 fall into one of seven categories?

16 THE WITNESS: Yes.

17 THE COURT: And having a final order of removal is one
18 of the seven?

19 THE WITNESS: Yes. Well, final orders that aren't
20 compliant with the judge's order, so that would be fugitives.

21 THE COURT: And they haven't left?

22 THE WITNESS: Right.

23 THE COURT: But others are somebody who has been
24 convicted of a criminal offense?

25 THE WITNESS: Yes.

1 THE COURT: Is that one of the priorities?

2 THE WITNESS: Yes.

3 THE COURT: And there's another one. Somebody who has
4 been charged with a criminal offense?

5 THE WITNESS: Yes.

6 THE COURT: Or committed acts which could be charged
7 as a criminal offense?

8 THE WITNESS: Yes.

9 THE COURT: Does Secretary Kelly's memorandum provide
10 guidance on how to prioritize within the categories?

11 THE WITNESS: No, I don't believe it does.

12 THE COURT: Does Secretary Kelly's memorandum direct
13 the director of ICE to, if they determine appropriate, issue
14 further guidance on how to prioritize within the priorities?

15 THE WITNESS: I believe so.

16 THE COURT: Does it say the director of ICE, the
17 commissioner of CBP and the director of USCIS may, as they
18 determine is appropriate, issue further guidance to allocate
19 appropriate resources to prioritize enforcement activities
20 within these categories, for example, by prioritizing
21 enforcement activities against removable aliens who are
22 convicted felons or who are involved in gang activity or drug
23 trafficking?

24 THE WITNESS: Yes, I believe it does.

25 THE COURT: And has the director of ICE done that?

1 THE WITNESS: I do not believe so, no.

2 THE COURT: Have you while you've been in
3 Massachusetts set any priorities for enforcement activities
4 against removable aliens?

5 THE WITNESS: I don't think I enumerated priorities,
6 but I've always prioritized criminal aliens over non-criminal
7 aliens, and there were discussions that took place.

8 THE COURT: Is arresting people at CIS offices when
9 they're applying for I-130s as the first step in seeking to
10 stay with their families giving priority to enforcement
11 activities concerning criminal aliens?

12 THE WITNESS: No. Well, unless --

13 THE COURT: Unless they were a criminal.

14 THE WITNESS: Unless they're a criminal.

15 THE COURT: But just generally --

16 THE WITNESS: Right, no.

17 THE COURT: If somebody is one of these priorities
18 because they were ordered to deport, to leave, and they didn't
19 leave but they're not otherwise criminals, they wouldn't be in
20 the highest priority?

21 THE WITNESS: Not for me, no.

22 THE COURT: And you sent me a statement in June saying
23 that, you know, to the extent Mr. Brophy may have said that
24 arrests wouldn't be made at CIS offices of people seeking
25 I-130s, I shouldn't rely on that any longer --

1 THE WITNESS: Correct.

2 THE COURT: But in your tenure, has anybody been
3 arrested at a CIS office?

4 THE WITNESS: In Boston?

5 THE COURT: In Boston.

6 THE WITNESS: Not to my knowledge.

7 THE COURT: Okay. I think you'd know about it.

8 THE WITNESS: I better.

9 THE COURT: And in fact, in the district?

10 THE WITNESS: Yeah. I instructed that if they were
11 going to conduct an arrest at CIS, it needed to come up the
12 chain to me.

13 THE COURT: Why did you give that instruction?

14 THE WITNESS: Because of the sensitivity involved,
15 and, you know, I wanted to ensure we were utilizing our
16 resources appropriately.

17 THE COURT: I think you mentioned that Secretary
18 Kelly's memorandum had made some reference to prosecutorial
19 discretion.

20 THE WITNESS: Yes, it does.

21 THE COURT: I couldn't hear you.

22 THE WITNESS: Yes, it does.

23 THE COURT: What did it say?

24 THE WITNESS: Prosecutorial discretion is still
25 available to exercise. It's not gone away. However, it does

1 also say you can't create -- you can't create a class of aliens
2 within a prosecutorial discretion I guess arena.

3 THE COURT: Did they communicate to you that
4 prosecutorial discretion should be exercised on an individual
5 case-by-case basis?

6 THE WITNESS: Yes.

7 THE COURT: But not on a whole category of removable
8 aliens?

9 THE WITNESS: Yes.

10 THE COURT: And in your roughly 60-day tenure, has
11 that been done?

12 THE WITNESS: Has --

13 THE COURT: Has prosecutorial discretion -- well, the
14 memo -- I'll read you the memo. We can make it Exhibit 3 if
15 somebody has a clean copy.

16 The exercise of prosecutorial discretion with regard
17 to any alien who is subject to arrest, criminal prosecution or
18 removal in accordance with the law shall be made on a
19 case-by-case basis in consultation with the head of the field
20 office component, where appropriate, of ICE if it initiated or
21 will initiate the enforcement action.

22 So who is the head of the field office component?

23 THE WITNESS: That would be me in the ERO.

24 THE COURT: What does ERO stand for?

25 THE WITNESS: Enforcement and removal operations.

1 THE COURT: So that's you. In the time you've been
2 here has anybody come to you and said: We found a removable
3 alien, but we need to make an individual decision whether to
4 arrest, detain and remove her, or him?

5 THE WITNESS: There was at least one instance that
6 there was a CIS referral. There was only one instance that
7 something was referred to me as a CIS arrest. So yes.

8 THE COURT: And what did you decide to do?

9 THE WITNESS: I decided not to have them conduct the
10 arrest.

11 THE COURT: Why was that?

12 THE WITNESS: In this instance it had a little bit to
13 do with timeliness. I didn't feel like I had enough time to
14 review the facts because it was I think 20 minutes until the
15 person was supposed to show up for their appointment, and I
16 wanted to have an opportunity to sort of, to review the facts
17 with counsel as well. And in this instance the individual
18 didn't show up for his appointment, so it became moot, but I
19 had just decided not to conduct -- I wanted more time to
20 explore the specific fact pattern.

21 THE COURT: Was that person going to CIS for an I-130
22 interview?

23 THE WITNESS: I believe so.

24 THE COURT: Earlier on you mentioned the sensitivity
25 of these cases. What did you mean -- these matters. What did

1 you mean by the sensitivity of them?

2 THE WITNESS: Well, it's sort of this, obviously
3 partly --

4 THE COURT: What do you mean -- you have to spell it
5 out.

6 THE WITNESS: The litigation involved with arrests
7 occurring at CIS. I wanted to have some visibility to make
8 sure we were utilizing our resources appropriately.

9 THE COURT: Does the media attention in this case and
10 matters relating to it contribute to the sensitivity?

11 THE WITNESS: Media attention is a factor, but I don't
12 think media attention would be a reason I would shy away from
13 an enforcement action.

14 THE COURT: So you were asked by somebody to come to
15 the Boston office for 60 days?

16 THE WITNESS: Yes.

17 THE COURT: And were you told why?

18 THE WITNESS: It's really difficult for me to -- at
19 some point I believe I was told that there was some issues with
20 the POCR process. I just can't remember when I was told that.
21 The initial phone call I got, I wasn't told anything because I
22 was standing outside of a baseball stadium. I didn't --

23 THE COURT: Who told you?

24 THE WITNESS: That was my acting assistant director
25 for field operations. It was a pretty quick phone call.

1 THE COURT: Was that somebody in Detroit?

2 THE WITNESS: No. In headquarters, in Washington,
3 D.C.

4 THE COURT: What is that person's name?

5 THE WITNESS: Dave Jennings.

6 THE COURT: Jennings?

7 THE WITNESS: Yes.

8 THE COURT: Were you told whether or not you would be
9 asked to stay for more than 60 days?

10 THE WITNESS: No. He just said -- I said: For how
11 long? And he said: Can you do 60 days? That was the extent
12 of it. As a matter of fact, I think he told me: You're going
13 to see the paperwork and it's going to be cut for 120 days,
14 because that's the way they do it, but you'll only be there for
15 60.

16 THE COURT: And what do you understand is going to
17 happen after you leave?

18 THE WITNESS: Mr. Lyons will be acting field office
19 director.

20 THE COURT: For how long?

21 THE WITNESS: I believe 240 days. That's the maximum
22 that he would be allowed to be in I think a 365-day -- I'm not
23 exactly sure how it works, but I think he's only allowed to do
24 240 days. Again, they do them in 120-day increments. So I
25 don't have any --

1 THE COURT: Did anybody tell you how long he's
2 expected to serve?

3 THE WITNESS: I believe I saw an email because I asked
4 to see when my interim actually ended because I wanted to make
5 sure it was factually accurate. So I saw the email asking him
6 or forwarding up to our human capital people, because there's
7 paperwork that has to be done, and I think within that email it
8 said: Please do it for 120 days with a likely extension, I
9 believe.

10 THE COURT: Did you see the Boston Globe editorial on
11 about July 1 that reported that when you were in Detroit, you
12 directed that aliens with orders of removal be arrested and
13 detained when they were dropping their children off at Head
14 Start programs?

15 THE WITNESS: I did not. Just this July?

16 THE COURT: Yes.

17 THE WITNESS: No, I didn't.

18 THE COURT: Did you do that?

19 THE WITNESS: No.

20 THE COURT: You're smiling. Why are you shaking your
21 head?

22 THE WITNESS: I just -- I did not do it. It's just
23 funny to me how the media reports things or where they get
24 their sources; I don't know.

25 THE COURT: But when you were the field office

1 director in Detroit, were arrests made of aliens dropping their
2 children off at Head Start programs?

3 THE WITNESS: Ever? That may have happened in nine
4 years that I've been there.

5 THE COURT: Do you remember that ever happening?

6 THE WITNESS: At Head Start specifically -- there were
7 allegations that people were being arrested when they were
8 taking their kids to school.

9 THE COURT: And did that occur, essentially?

10 THE WITNESS: I believe someone was arrested taking
11 their child to school.

12 THE COURT: Was that one of your policies?

13 THE WITNESS: No.

14 THE COURT: You have to speak --

15 THE WITNESS: No. I'm sorry. I said no.

16 THE COURT: You wouldn't do that? Ordinarily, if
17 somebody had an order of removal but no other evidence of being
18 a dangerous person -- you were smiling so --

19 THE WITNESS: No. It's very difficult for officers.
20 They don't want to upset children. Many, many have families
21 and children, and it's not an ideal place to conduct an
22 enforcement action.

23 THE COURT: All right. Do my questions suggest --
24 hold on a second.

25 Under the Executive Order and then Secretary Kelly's

1 memorandum, as you understand it, would it be permissible for
2 an ICE field office director to say, you know, aliens with
3 final orders of removal are not all exempt from removal, but
4 generally we won't arrest and detain and remove them unless
5 there's some evidence that they're a danger to public safety or
6 national security or there's some other reason not to remove
7 them? Would that be permissible?

8 THE WITNESS: Can you -- not to remove them?

9 THE COURT: In fact, actually, I'll change it and
10 maybe focus it a little more on the allegations of this case.
11 I understand that you interpret Secretary Kelly's memo to say
12 that -- and contrary to the directions perhaps in the previous
13 administration -- that there's no category of removable aliens
14 that should be treated as categorically or completely exempt
15 from removal, correct?

16 THE WITNESS: Yes.

17 THE COURT: But would it be -- and there's also an
18 instruction to exercise prosecutorial discretion case by case?

19 THE WITNESS: Yes.

20 THE COURT: And there are limited resources that each
21 ICE office has, right?

22 THE WITNESS: Yes.

23 THE COURT: Would it be consistent with Secretary
24 Kelly's directions, as you understand it, for an ICE director
25 to say that if somebody is pursuing an I-130 with a view to

1 seeking to stay with -- to get a provisional waiver and
2 someplace in that process that, absent some additional
3 circumstance that is additional to the final order of removal,
4 we're not going to arrest, detain and remove that person;
5 instead we're going to look for people who have committed
6 crimes, been convicted of crimes, who are dangerous. Would
7 that be permissible?

8 THE WITNESS: I -- I feel like that would be creating
9 a class.

10 THE COURT: Okay.

11 THE WITNESS: I would always focus on criminal aliens
12 and national security threats and have for my 31 years doing
13 this. And given a document that says you can't -- it wouldn't
14 be case by case if I said anyone with this situation. Because
15 the cases get so complicated, and it's hard to say the fact
16 patterns are even the same in any two cases.

17 THE COURT: But basically, did you testify earlier
18 that if somebody requested a stay of removal, you or you would
19 expect your subordinates would look at the file, and if the
20 file showed that person applied for or had an I-130, the person
21 applied for or had an I-212, the person was married to a U.S.
22 citizen and was pursuing a legally available path to stay in
23 the country with her spouse and perhaps her U.S. citizen
24 children, you would consider that?

25 THE WITNESS: Absolutely. I just -- yes, I would.

1 THE COURT: And what if they didn't for some reason
2 file the request for a stay but that was one of the
3 circumstances?

4 THE WITNESS: I think I would be more comfortable with
5 a stay if they were on the docket that was being managed by the
6 non-detained officers. If they have a stay, that would -- it's
7 a statutorily-based remedy that I feel more comfortable than
8 just sort of having nothing.

9 THE COURT: I want to take you back to the POCR
10 regulations. So you read my June 11 decision several times
11 after I ordered you to read it, correct?

12 THE WITNESS: Yes, and clearly I didn't catch every --

13 THE COURT: Do you remember and is it your
14 understanding -- well, do you remember I wrote about how the
15 regulation at issue described what was supposed to happen in
16 the initial 90-day removal period?

17 THE WITNESS: Yes.

18 THE COURT: And do you remember that all of the people
19 involved in this case that 90 days expired a long time ago?

20 THE WITNESS: Yes.

21 THE COURT: So the regulation doesn't directly
22 describe what to do with these people, right?

23 THE WITNESS: Yes.

24 THE COURT: And ICE's interpretation, the most recent
25 one, when I was deciding it, was that ICE had 90 days to hold

1 people and then it had to by 60 days give their attorney
2 notice, there would be a document review in about 90 days, and
3 then it had to make a decision. That was ICE's interpretation.
4 Do you remember that?

5 THE WITNESS: Yes.

6 THE COURT: And do you remember that I said, I wrote
7 that might be too generous to ICE, that ICE in my view might
8 not have the authority to hold everybody for 90 days, but
9 assuming without finding that they had 90 days, they were
10 violating it for the people I was addressing?

11 THE WITNESS: Yes.

12 THE COURT: All right.

13 THE WITNESS: If I recall, you talked about 30 days
14 might be better for people.

15 THE COURT: Right, right. And you give a notice, it's
16 your practice to have notices given as soon as somebody is
17 arrested and detained, right?

18 THE WITNESS: As soon as possible, within a very short
19 window.

20 THE COURT: Sure, short window. And you heard
21 Ms. Calderon and Ms. De Souza this morning, correct?

22 THE WITNESS: Yes.

23 THE COURT: And if their lawyers -- if there was a
24 review after 30 days or say 45 days and their lawyers came in
25 with the information you heard this morning, would you have

1 decided at that 30- to 45-day mark that they should continue to
2 be detained?

3 THE WITNESS: I don't know all of the facts on the
4 non-equity side of the case, but I would have to probably know
5 if there were any flight risk issues, but not -- I'm not
6 feeling -- in many instances, I think alternatives to detention
7 which I believe Ms. De Souza sounds like she's on now would
8 have been appropriate.

9 THE COURT: These are people who want to get out and
10 be with their families, right?

11 THE WITNESS: Yes.

12 THE COURT: And they have roots in the community,
13 correct?

14 THE WITNESS: Yes.

15 THE COURT: Jobs, correct?

16 THE WITNESS: Yes.

17 THE COURT: Homes?

18 THE WITNESS: Yes. Well --

19 THE COURT: And some children?

20 THE WITNESS: I don't think they had jobs. I didn't
21 know if either of the ladies had --

22 THE COURT: Families?

23 THE WITNESS: Yes.

24 THE COURT: And they desperately don't want to leave
25 their spouses and children based on what we heard this morning.

1 You can leave out "desperately." They don't want to leave
2 their spouses and children, right?

3 THE WITNESS: I would say desperately, yes.

4 THE COURT: Yeah, I would say desperately, too. I
5 have to make judgments like this. I make bail decisions, is
6 somebody like that likely to flee. You're not going to find
7 them in Providence or wherever they live.

8 THE WITNESS: On the fact patterns that I have, I just
9 don't have any -- I don't have the whole case background.

10 THE COURT: But based on what you heard --

11 THE WITNESS: Yes. I wouldn't say they would be -- it
12 doesn't sound like they would be a flight risk.

13 THE COURT: And, you know, since you give notice at
14 about the time that somebody is arrested and detained, if that
15 notice said not that you're going to be reviewed at 90 days but
16 you're going to be reviewed at 45 days, you know, give us
17 information before that if you want to be considered, is there
18 any reason why that wouldn't be feasible?

19 THE WITNESS: It would depend. That's a little
20 complicated because it would depend on the country that they
21 were from. Because obviously in their two specific instances
22 that might be, but for just a general concept as to a 45 days,
23 if 45 days would be enough to conduct an appropriate Post-Order
24 Custody Review, I don't know if I would say that to be the case
25 in part because a lot of the reasons we're looking at -- when

1 we're looking at -- one of the factors we're considering is
2 whether or not they were going to obtain a travel document.
3 And depending on what country you're from, it could take -- it
4 could be that we would continue to detain because we
5 wouldn't -- I don't feel like we would have enough information
6 to make a decision in that short timeframe. Maybe in some
7 cases you could but not all.

8 THE COURT: If somebody's not a flight risk, why
9 should they be locked up --

10 THE WITNESS: They shouldn't.

11 THE COURT: -- while you're waiting to get a travel
12 document?

13 THE WITNESS: They maybe shouldn't.

14 THE COURT: So why does it matter what country they're
15 from?

16 THE WITNESS: I thought we were talking about people
17 that were in custody. So somebody in custody should be locked
18 up. If you're not a flight risk, you shouldn't be in custody
19 in the first place.

20 THE COURT: All right. Do my questions suggest any
21 further questions to counsel?

22 MR. PRUSSIA: Nothing further from petitioners, Your
23 Honor.

24 MS. LARAKERS: Nothing from us, Your Honor.

25 THE COURT: All right. Okay. Thank you. That's

1 helpful. You're excused, but you have to wait outside. Please
2 don't leave the courthouse. Okay? It's possible there could
3 be more questions, but I think there's a hope you're going to
4 be able to get back to see the Detroit Tigers rather than the
5 Boston Red Sox.

6 THE WITNESS: I don't know about that. They're not
7 doing so great. I did go to a Red Sox game.

8 THE COURT: You did go to a Red Sox game?

9 THE WITNESS: I did.

10 THE COURT: So you're here during a historic season.
11 It hasn't been all bad.

12 THE WITNESS: It hasn't been bad. Do I --

13 THE COURT: Just leave those there. We'll take a
14 brief break for the court reporter, who doesn't need it and
15 deserves it, and we'll be back at about 4:15 with Mr. Brophy.
16 Okay? We'll be back at about 4:15 with Mr. Brophy. Oh, it's
17 3:08. Okay. Be back at 3:15. Court is in recess.

18 (Recess taken 3:09 p.m. - 3:24 p.m.)

19 THE COURT: Is there anything before we hear from
20 Mr. Brophy -- Mr. Lyons? Excuse me. Okay. You should get Mr.
21 Lyons on the stand.

22 MR. PRUSSIA: Would you like me to start, Your Honor?

23 THE COURT: Yes.

24 MS. LARAKERS: Your Honor, I was just informed by
25 opposing counsel that they have some of the confidential

1 documents that are part of the protective order that they plan
2 to use, and ICE hasn't looked at those documents to make sure
3 they're okay for the public record to see at this point in time
4 because we didn't have prior notice of it. We're certainly
5 okay with them using them for questioning, but we can't have a
6 public -- we can't have those documents on the record at this
7 time.

8 THE COURT: What's the nature of the documents?

9 MS. LARAKERS: I haven't even had time to look at
10 them.

11 THE COURT: What's the nature of the documents,
12 Mr. Prussia?

13 MR. PRUSSIA: Your Honor, these are emails, one of
14 which is an email that was produced after the court's deadline
15 that we did not have an opportunity to examine Mr. Lyons on,
16 and there are related emails that were timely produced but sort
17 of relate to that late-produced email.

18 THE COURT: And why are they subject to the protective
19 order?

20 MS. LARAKERS: Your Honor, because all the documents
21 that we produced in connection to the expedited discovery in
22 this case are subject to the protective order, and we had
23 agreed in the protective order that if the petitioners were
24 going to use those documents, that ICE would look at them to
25 make sure that they redacted anything else that wasn't

1 available in the public record, such as any numbers, that sort
2 of thing. We haven't had the opportunity to look at those.

3 THE COURT: All right. Do you have the protective
4 order? The protective order -- documents in discovery that
5 aren't provided to the court to make a judicial decision are
6 not presumptively public. Documents used in court that become
7 judicial records are actuality presumptively public. KHECK I
8 have in my Arkansas Teacher case a long decision on this in
9 June. But redactions may be appropriate, limited redactions
10 may be appropriate, and we need to proceed.

11 Does somebody have -- so I'll put the documents
12 temporarily under seal. They can be shown, and I'll give you
13 time to look at them to see if you want to propose any
14 redactions.

15 MS. LARAKERS: And Your Honor, I just learned of this,
16 and it would make me much more comfortable if I could just have
17 five minutes to speak to my ICE counsel about it to make sure
18 there's not anything I'm missing?

19 THE COURT: All right. Is there any objection to
20 that?

21 MR. PRUSSIA: No objection, Your Honor.

22 THE COURT: What's the docket number of the protective
23 order, though? I want to look at it.

24 COURTROOM CLERK: 119.

25 MS. LARAKERS: 119 sounds right, yes, Your Honor. And

1 I think the provision we're talking about here is they were
2 supposed to give prior notice of any documents.

3 THE COURT: I'll find it. You can take five or so
4 minutes. Print me out the protective order. Court is in
5 recess.

6 (Recess taken 3:26 p.m. - 3:37 p.m.)

7 THE COURT: Are we set?

8 MR. WEILAND: Yes, Your Honor, we are set. We have
9 had an opportunity to review the documents and also speak with
10 petitioners' counsel. I think there's going to be a way
11 they're able to present them here in the courtroom in such a
12 way that doesn't disclose some of those PII sensitive matters.
13 And as you said before the break, we will certainly avail
14 ourselves of the opportunity to redact the public record.

15 THE COURT: What's a PII sensitive matter?

16 MR. WEILAND: Personally identifiable information, the
17 alien's name and A file number, email address.

18 THE COURT: That's fine. Okay. Let's see. I think
19 Mr. Lyons needs to be sworn.

20 COURTROOM CLERK: He was.

21 THE COURT: If he's been sworn, we'll go ahead.

22 TODD LYONS, having been duly sworn by the clerk, was
23 examined and testified as follows:

24 DIRECT EXAMINATION BY MR. PRUSSIA:

25 Q. Mr. Lyons, you understand you're under oath, correct?

1 A. Yes.

2 Q. Can you please state your name for the record.

3 A. Todd Michael Lyons.

4 Q. Who is your employer?

5 A. Department of Homeland Security, specifically Immigration
6 and Customs Enforcement.

7 Q. What is your title?

8 A. I am the acting field office director.

9 Q. And where are you located?

10 A. Burlington, Massachusetts.

11 Q. How long have you been serving as acting field office
12 director?

13 A. Two days.

14 Q. This is not your first time as acting field office
15 director, correct?

16 A. No, sir.

17 Q. When were you first installed as acting field office
18 director?

19 A. June 1 of 2018.

20 Q. And how long did that term last?

21 A. Approximately four days.

22 Q. Do you have an understanding as to why you were removed?

23 A. I was advised by the executive associate director of the
24 agency, Mr. Matt Albans, that they were bringing in a more
25 seasoned field office director for an unnamed period of time.

1 Q. What did you understand a more seasoned field office
2 director to mean?

3 A. Somebody that had been a serving field office director,
4 someone that had been at the executive level for some period of
5 time.

6 Q. What is your understanding as to why it was determined
7 that a more seasoned field office director was needed?

8 A. They felt that the continuous turnover of senior
9 leadership at the Boston field office was detrimental to
10 operations. And while federal litigation was going on along
11 with the realignment of units and duties of officers within the
12 field office that someone more seasoned should be there.

13 Q. And who was that person that was installed as the more
14 seasoned field office director?

15 A. Rebecca Adducci.

16 Q. How long was her term?

17 A. 60 days, almost 70.

18 Q. So notwithstanding the fact that one of the reasons
19 headquarters determined that a more seasoned field office
20 director was appropriate is because of the extensive turnover
21 in the office, her term was only for two months?

22 A. Yes. It was explained to me that they were bringing in a
23 more seasoned field office director to mentor me prior to
24 taking over.

25 Q. You mentioned, you referred to some realignment within the

1 field office. What did you have in mind?

2 A. We realigned officers and resources to better address some
3 of the issues that Judge Wolf brought up with his June 11 order
4 and findings.

5 Q. How so?

6 A. Well, one area in particular was we noticed and we
7 discovered they we didn't have -- we had a lack of resources
8 within the detain unit, which is the custody case management
9 unit, which, for I guess lack of better terms, for this setting
10 was the POCR situation.

11 Historically, Boston only had anywhere between four to
12 five officers, which made their caseload anywhere from 150 to
13 200 cases sometimes on their docket, which didn't properly
14 allow for officers to properly maintain and observe and track
15 cases that they needed to diligently.

16 Q. So aside from this realignment, were any other actions
17 taken in the Boston field office in response to Judge Wolf's
18 order?

19 A. Yes, we went ahead and we also, with Ms. Adducci's help,
20 brought in another assistant field office director, that was,
21 his area of his expertise was case management, which did a
22 complete overview of all the cases we had, identified any
23 shortcomings, pitfalls.

24 So during that time it was his recommendation and, you
25 know, through what we found is that we lacked the officers, so

1 we went from five to 12. During that time we also implemented
2 a more hands-on approach to case management which the field
3 office lacked in terms of day-to-day contact with individuals
4 on their dockets and more along the lines of what Judge Wolf
5 found in his findings both in written and oral.

6 Q. No additional training was done for the staff in the
7 detain unit side of the field office, direct?

8 A. No. What we did was we made sure that through the one
9 seasoned assistant field office director of case management
10 that Ms. Adducci brought in, he went down individually and he
11 gave OJT mentorship to each one of the detain supervisors as
12 well as went through each one of the detain officers' dockets,
13 where he did train, as well as we brought in three seasoned
14 officers from other units which had an area of expertise and
15 which served as a mentor role for the brand-new eight which
16 were assigned.

17 Q. In your view, any alien with a final order of removal is
18 subject to arrest, detention and removal, correct?

19 A. As I stated, the first time when I appeared before Judge
20 Wolf, under Executive Order 17368, subsection (e), an alien
21 with an unexecuted final order is open for an enforcement
22 action.

23 Q. And there is no exception for any class of individuals
24 with final orders who are diligently pursuing provisional
25 waivers, right?

1 A. Well, as Judge Wolf had in his finding and also that we
2 discussed during my deposition, we do evaluate cases on a
3 case-by-case basis. And as discussed, there are avenues for
4 individuals that do have a final order of removal or someone
5 who has been lawfully removed from the United States previously
6 to seek a benefit or provision under the provisional waiver
7 program.

8 Q. There's nothing in the Executive Order and it's your
9 understanding that it is not consistent with the Executive
10 Order to exempt as a class individuals with final orders who
11 are pursuing provisional waivers, correct?

12 A. Correct. That's -- with the provisional waivers, much
13 like myself and Mr. Brophy said before, we had to prioritize
14 arrests, which we mainly were focused on subsections A through
15 C and D, which were criminal history and national security
16 threats.

17 Q. So as acting field office director in the four days that
18 you've been serving this current term --

19 A. Three days.

20 Q. Three days, sorry -- you have made no exception for a
21 class of individuals with final orders who are diligently
22 pursuing provisional waivers, correct?

23 A. No. I think the way moving forward with the Boston field
24 office is the way -- both what Ms. Adducci had in place and the
25 intent that Mr. Brophy had when he testified in front of Judge

1 Wolf, in that using the limited amount of resources within the
2 Boston field office, we'll be prioritizing cases that have
3 criminal history, significant public safety threat, fraud,
4 national security aspect.

5 Each case, to include the ones under subsection (e) and
6 (f), which do have executed final orders, will be reviewed on a
7 case-by-case basis for the merits of their case. And I think
8 also through our legal counsel, through our chief counsel's
9 training and talking with supervisors, you know, more merit,
10 weight, examination will be given to those who are pursuing
11 avenues such as the 212, 601A, U visa, T visa, VAWA.

12 Q. So the fact that a person who has been arrested has an
13 approved I-130 application would not override the decision to
14 detain the person, correct?

15 A. That's correct. To even go to an open source public site,
16 on CIS' own website, in the steps for lawful permanent
17 residency, the examples and instructions for the I-130 as well
18 as for the provisional waiver, it states that the I-130 is the
19 first step, but it gives specific instructions on someone in
20 current removal proceedings, someone that currently has an
21 unexecuted final order of removal, steps they need to take in
22 addition to that I-130.

23 Q. So these persons that have pending I-130s or approved
24 I-130s are still subject to enforcement action by the Boston
25 field office, correct?

1 A. Correct. Again, each case is looked at on the merits.
2 You know, specifically to what myself and Mr. Brophy testified
3 in front of Judge Wolf back in May, in regards to cases that
4 were, you know, arrested at CIS, we do look at each one, case
5 by case, on the merits.

6 And I think, you know, through our actions from the time
7 that we spoke in front of Judge Wolf until now that, although
8 we continue to receive CIS leads and lists of individuals that
9 have either applied or are pending an I-130, we have not taken
10 any action on any individual that's applying for a benefit.

11 Q. And that's because of this litigation, right?

12 A. Well, it was -- well, because of this litigation and
13 because of Judge Wolf's findings and research into the case, we
14 identified pitfalls in areas that we were lacking in the way
15 that we handled immigration arrests and enforcement.

16 Q. You agree that the -- strike that. You would agree that
17 the existence of an approved I-130 suggests ties to the
18 community by the non-citizen, correct?

19 A. Yes. By definition alone, it's a member of a family
20 that's applying on behalf of someone, whether it be a
21 non-immigrant, someone who entered without inspection, or
22 someone that's still currently overseas.

23 Q. It expresses, it's evidence of an intention to come out of
24 the shadows and address the non-citizen status, correct?

25 A. Yes.

1 Q. Prior to this litigation, ICE Boston used the mere fact of
2 the I-130 application as a way to identify and detain and
3 initiate enforcement actions against persons with final orders
4 of removal, correct?

5 A. Yes.

6 Q. Do you find that a little ironic?

7 A. If I could, I was going to expand. Also, as I said in my
8 deposition, you know, if someone was pending a 212, a 601 or
9 what was commonly referred to as a consular process back prior
10 to the provisional waiver, we would adjudicate that favorably.
11 However, just as I said in my deposition, the standalone I-130
12 doesn't vacate the final order of removal.

13 To take it a step further and to speak to Ms. Calderon's
14 case, which is the one that I'm most familiar with, she applied
15 for an I-130 and which was approved on January 18, but she
16 didn't apply for the I-212 waiver, which was required on the
17 CIS public website under the frequently asked questions, until
18 January 30, after she was released. Had she had that 212
19 waiver at the same time as the I-130, I truly believe that
20 enforcement action would have been adjudicated better.

21 Q. So Ms. Calderon was detained solely on the basis of her
22 final order of removal, correct?

23 A. She was -- the supervisor on the case made the assumption
24 to detain based upon the final order of removal and the flight
25 risk factors which were factored in that I spoke to in my

1 declaration.

2 Q. She had an approved I-130, correct?

3 A. It was approved that day.

4 Q. Just a minute ago you testified that an I-130 -- you agree
5 with me that the I-130, the existence of an approved I-130
6 suggests ties to the community, right?

7 A. Correct.

8 Q. So that's not flight risk, right?

9 A. Yes. But in Ms. Calderon's case, the reason why the
10 supervisor made the decision to detain, which they came to the
11 conclusion as a flight risk was, I believe truly not
12 Ms. Calderon's fault, but not to have someone be a recipient of
13 an action because of their parents, but she was a rider on her
14 parents' case, which also went in front of the First Circuit.
15 And the attorney of record submitted a sworn affidavit that the
16 family unit had left the United States and did not want to move
17 forward with the PFR.

18 Q. So let me get this straight. The sole basis of the
19 finding that Ms. Calderon was a flight risk was the fact that
20 she didn't comply with her final order of removal, correct?

21 A. Yes, sir, the three previous times of compliance, yes.

22 Q. So prior to the initiation of this lawsuit, it was
23 sufficient to initiate enforcement activities against anyone
24 with a final order of removal notwithstanding the fact that
25 they had an approved I-130, correct?

1 A. Yes, sir.

2 Q. And but for this litigation, that would still be the case,
3 correct?

4 A. Yes, sir.

5 Q. And in fact, under the President's Executive Order, that
6 would still be appropriate in terms of enforcement priorities,
7 correct?

8 A. Yes, sir, because nothing has ever been stated that the
9 I-130 would preclude or vacate a final order of removal.

10 Q. And in fact, prior to 2017, you can't recall any specific
11 instance where the Boston field office, at ICE, had arrested an
12 individual at CIS at or after an I-130 interview, correct?

13 MS. LARAKERS: Objection. Lack of knowledge.

14 THE COURT: Well, we'll see if he knows. If you know,
15 you may answer.

16 A. No, sir. I can't speak to anything prior to my arrival on
17 September 19 of 2017. I can only speak to my experiences in
18 other field offices.

19 Q. Now, you've seen documents -- strike that. You're aware
20 the court has ordered some discovery in this case, correct?

21 A. Yes, sir.

22 Q. And as part of that discovery, you investigated arrests at
23 CIS since 2017, correct?

24 A. Yes, sir.

25 Q. I think at all, right? I don't think it was limited to

1 time; is that right?

2 A. One of the emails that you have in discovery that we
3 produced was that I reached out to one of the acting assistant
4 field office directors to explain to me how the process was
5 handled here, which was different than what I had been used to
6 some other.

7 Q. According to your investigation, there had been no arrests
8 at CIS offices by the Boston field office prior to 2017,
9 correct?

10 A. I believe the first time I discovered or was kind of
11 alluded to arrests was November when the first set of referrals
12 came in, I believe. But prior to that -- originally I asked
13 from July 2017 back.

14 Q. I'm going to show you a document and see if that refreshes
15 your recollection.

16 A. Sure.

17 MR. PRUSSIA: May I approach, Your Honor?

18 THE COURT: Yes.

19 Q. Mr. Lyons, can you please identify the document that's
20 been handed in front of you?

21 A. It is a document that was sent out to the assistant field
22 office director in Connecticut where I asked for more
23 information as far as CIS arrests throughout the AOR, and there
24 are five listed. And that's from Ms. Aldean Beaumont. She's
25 the assistant field office director over the state of

1 Connecticut.

2 Q. The document includes a cover email as well as what
3 appears to be an attachment to that email, correct?

4 A. Yes, yes. So what I did was --

5 Q. Let me ask the question. Sorry. And the document starts
6 at Bates ICE 2068, correct?

7 A. I guess I already lost you.

8 Q. The document, the first page of the document, the Bates
9 number --

10 A. The one from July 17, 2018?

11 Q. That's right.

12 A. Mm-hmm.

13 Q. At the very bottom, ICE 2068, correct?

14 A. On mine it's government, but yes. GOV 2068.

15 Q. Okay. GOV 2068, and the last number is GOV 2094, correct?

16 A. Yes, sir.

17 Q. And the cover document is an email from you, right?

18 A. Yes.

19 Q. To Rebecca Adducci, right?

20 A. Yes.

21 Q. And the subject is: A File Locations For the Arrested
22 Aliens. Do you see that?

23 A. Yes.

24 Q. And it includes an attachment. Do you see that?

25 THE COURT: Let me ask you this. I thought you were

1 using this to refresh his recollection.

2 MR. PRUSSIA: Now I actually want to put it into
3 evidence, Your Honor.

4 THE COURT: Because if you just wanted to refresh his
5 recollection, the substance of it shouldn't be disclosed. So
6 do you want to move this into evidence? Is there an objection?
7 It will be under seal at the moment so you can make redactions.

8 MS. LARAKERS: No, Your Honor.

9 THE COURT: So this will be Exhibit 4 under seal.

10 Q. Now we can cut to the chase. If you could turn to page
11 GOV 2071.

12 A. Yes.

13 Q. And what's your understanding as to what this portion of
14 Exhibit 3 is?

15 A. It would be better if I could break up the exhibit and
16 spread it out as a spreadsheet, as it is, it's the first set of
17 columns on a spreadsheet. It's this way, not each page.

18 Q. The left-hand column refers to date of referrals?

19 A. Yes.

20 Q. Do you see that?

21 A. Yes.

22 Q. What's that in reference to?

23 A. That's the task I provided all the field office directors
24 to provide any documentation or spreadsheets, information that
25 they had received for any CIS removals from July of 2017 until

1 the date of my email.

2 Q. So is it your understanding that the first -- this
3 document suggests or establishes that the first arrest by
4 Boston ICE field office at a CIS office was on or about July
5 2017?

6 A. I would -- you have to go to page GOV 2080 to reach the
7 arrest tab. The arrest tab states: Arrested 1/24 of 2018.
8 And that referral was received July 21 of 2017.

9 Q. And then right below that you see a reference to an arrest
10 of July 31, 2017, correct?

11 A. Yes, that goes to the July 13, second one on the sheet.

12 Q. Okay. So my only question is is it fair -- strike this.
13 Does this document establish that the first arrest at CIS by
14 Boston field office was around July of 2017?

15 A. Yes. But again, they went back to what I asked for.
16 There could be ones prior to July 2017. I only asked for July.

17 THE COURT: And we know there was. Arriaga was
18 arrested prior to July 2017, along with four others. I'm not
19 quite sure what the purpose of this is, but his qualification
20 about how limited his request was may be material or important
21 because --

22 THE WITNESS: If I could clarify my reasoning for --
23 go ahead.

24 MR. PRUSSIA: I was going to move on.

25 THE COURT: All right. Go ahead.

1 Q. Based on your investigation, is it fair to say that the
2 practice of arresting individuals at CIS offices by the Boston
3 field office began in 2017 after the Executive Order?

4 A. Yes.

5 Q. And the practice began at the specific request of CIS,
6 correct?

7 A. Yes.

8 MR. PRUSSIA: May I approach, Your Honor?

9 THE COURT: Yes.

10 Q. Mr. Lyons, you've been handed a document that is
11 identified at GOV 2917 ending at GOV 2921. Is that the
12 document in front of you?

13 A. Yes, sir.

14 Q. And it's an email from Cronen, CM. Who is that?

15 A. That's Christopher Cronen, the former field office
16 director.

17 Q. And the email is addressed to Lyons, Todd M. Is that you?

18 A. Yes, sir.

19 Q. And the email is dated January 30 of 2018, correct?

20 A. Yes, sir.

21 Q. Is this an email that you received on that date?

22 A. Yes, sir.

23 MR. PRUSSIA: Your Honor, I'd like to mark this as
24 Exhibit 4.

25 COURTROOM CLERK: 5.

1 THE COURT: Is there any objection? And does this
2 need to be under seal? Are there potential redactions to this
3 one?

4 MS. LARAKERS: Yes, Your Honor.

5 THE COURT: All right. This will be Exhibit 5
6 temporarily under seal. And we'll see how many of these there
7 are, but I'm ordering that redacted versions be filed for the
8 public record by 6:00 tomorrow, August 22.

9 Q. Mr. Lyons, the second email in the chain is from you to
10 David Jennings. Do you see that?

11 A. Yes, sir.

12 Q. And a C. Cronen?

13 A. Yes, sir.

14 Q. Who is David Jennings?

15 A. David Jennings was the acting assistant director of field
16 operations, which is the supervisor of all the field office
17 directors for ERO.

18 Q. And copied on the email is James Rutherford. Do you see
19 that?

20 A. Yes.

21 Q. Who is that?

22 A. He was the deputy field office director for ERO Boston
23 case management.

24 Q. And the subject line, it's a forward: Standalone I-130
25 Visa Petitions Pending At USCIS Law Field Office. Do you see

1 that?

2 A. Yes.

3 Q. What is "Law field office"?

4 A. It's an acronym for Lawrence.

5 Q. Is this an email that you sent to Mr. Cronen?

6 A. It's an email I sent to Mr. Cronen and Mr. Jennings.

7 Q. In the email you sent you write: Good morning, sir. More
8 background on The Herald story that the EAD inquired about for
9 Mr. Homan. Do you see that?

10 A. Yes.

11 Q. What is the EAD?

12 A. The EAD is the executive associate director, which at the
13 time was Matt Albans.

14 Q. And who is Mr. Homan?

15 A. Mr. Homan was the director of ICE.

16 Q. What is The Herald story that's referenced in your email?

17 A. Without the actual story line in front me, it was more
18 likely arrests which took place at CIS.

19 Q. What is the purpose of your email?

20 A. To give them background, as the email says, on the request
21 for where the arrests came from. Do you want me to read the
22 email?

23 Q. That's sufficient. You wrote in the second sentence:

24 These arrests have been at the request of the new FOD for CIS
25 Boston, correct?

1 A. Yes.

2 Q. And that was a true statement at the time you made it,
3 right?

4 A. That was the information that was given to me in the email
5 which is referenced below the last portion of 2917.

6 Q. Who was the new FOD for CIS Boston in January 2018?

7 A. I don't know, sir.

8 Q. Turn to the page ending in 2920.

9 A. Yes.

10 Q. There's an email from Tiberi Mirella. Do you see that?

11 A. Yes.

12 Q. Who is that?

13 A. That is from my investigation -- section chief at the
14 USCIS Lawrence office.

15 Q. You mentioned, and I made reference earlier, and you just
16 made reference to an investigation. What was your
17 investigation?

18 A. They wanted to know specifics to why subjects were
19 targeted at or arrests made at the Lawrence field office.

20 THE COURT: Sorry. Who wanted to know?

21 THE WITNESS: The leadership at ERO, sir.

22 THE COURT: In Washington?

23 THE WITNESS: Yes, sir.

24 BY MR. PRUSSIA:

25 Q. And that's because of media attention on the topic?

1 A. Yes.

2 Q. The other individuals to whom the email from Mirella is
3 addressed to, are they all ICE employees?

4 A. For the email at the very bottom of 2922, the cc for
5 Kirsten Smith -- or Kristen Smith, I'm not familiar with that
6 employee.

7 Q. Okay. But the other two individuals are --

8 A. Yes. And Andrew Graham and Stephen Wells are both --

9 Q. Okay. You don't have the benefit of this discussion with
10 counsel. I'm avoiding names at the request of counsel.

11 A. That's fine.

12 Q. Okay. In an email CIS is passing on to ICE a list of
13 individuals with I-130 applications pending at the CIS field
14 office in Lawrence that appear to have final orders of removal,
15 correct?

16 A. Yes.

17 Q. And Ms. Tiberi is specifically stating that her FOD asked
18 that she reach out to ICE with this information and, if need
19 be, coordinate the interviewing scheduling so they are not all
20 scheduled at once, correct?

21 A. Yes.

22 THE COURT: I'm sorry. Ms. Tiberi works for what
23 agency?

24 THE WITNESS: USCIS.

25 THE COURT: Go ahead.

1 Q. Now, if you would turn to the prior page, the one ending
2 in 2919, please, sir.

3 A. Yes.

4 Q. I'm focused on the second half of the email, of the
5 document. It's the email from Ms. Tiberi from October 18, 2017
6 at 2:23 p.m. Are you with me?

7 A. Yes.

8 Q. And it's addressed to the same individuals as the prior
9 email, correct?

10 A. Yes.

11 Q. And it's marked with: Importance high, right?

12 A. Yes.

13 Q. In the third paragraph she states: We need to know if any
14 interest exists in any of these cases as we will need to plan
15 out the scheduling. If no interest exists, the issue of
16 scheduling all them in one day will not be an issue for us.
17 But if we know that you might be interested in any of them, we
18 will spread out the scheduling. Please let us know. That way
19 we can proceed with interview scheduling.

20 Do you see that?

21 A. Yes.

22 Q. Turn to the prior page, 2918. And I'm focused on the
23 bottom portion of the document. It's the email from Andrew
24 Graham. Do you see that?

25 A. Yes.

1 Q. Who is that?

2 A. He's a supervisory deportation agent -- officer. I'm
3 sorry.

4 Q. And it's addressed to Ms. Tiberi, correct?

5 A. Yes.

6 Q. At CIS, right?

7 A. Yes.

8 Q. The first line of the email states: I have reviewed each
9 of the cases for criminality and updated the spreadsheet with a
10 column titled ERO Response, which indicates our level of
11 interest in each case.

12 Do you see that?

13 A. Yes.

14 Q. If you turn to the next page.

15 A. 2917 or 2919?

16 Q. 2919, sir. As the email continues, the paragraph starts:
17 As far as scheduling goes.

18 A. Yes.

19 Q. It's redacted partially in that sentence, right?

20 A. Yes, it is.

21 Q. It states: It also has the potential to be a trigger for
22 negative media interest as we have seen in the past.

23 Do you see that?

24 A. Yes.

25 Q. And then he states: If you have ability to schedule one

1 or two at a time and schedule them apart, that would work best
2 for us.

3 Do you see that?

4 A. Yes.

5 Q. So ICE Boston is telling CIS: Hey, we're interested in
6 these individuals. We're interested in initiating enforcement
7 activities against them. Correct?

8 A. Yes. Mr. Graham in the first paragraph breaks down the
9 priority followed by the case nexus and then the final order
10 outcome if it was a non-criminal.

11 Q. So as to avoid negative media interests, we ask that you
12 spread them apart. Right?

13 A. I can't speak to his intent. I would be speculating.
14 Sorry. He does mention that. I also do believe when -- his
15 intent to have it scheduled as one or two at a time is the fact
16 that most of those referrals that I've seen, emails that we
17 provided in discovery come in large batches like the
18 spreadsheet you had, whereas there's not enough resources at
19 ERO Boston to handle one whole day of scheduling, which was
20 sometimes 12 to 13.

21 Q. So by spreading them apart -- well, take a step back. The
22 purpose of this is to effect arrests at CIS, right?

23 A. Yes.

24 Q. And by spreading the arrests apart, you decrease the
25 chance that they come to light in the public through media

1 attention, right?

2 A. Yes. Historically, any time a large amount of
3 individuals, whether it be arrests at a CIS, at a worksite,
4 during a fugitive operation, it triggers a negative media
5 interest.

6 MR. PRUSSIA: May I approach, Your Honor?

7 THE COURT: Yes.

8 Are you seeking to have this admitted?

9 MR. PRUSSIA: Yes, Your Honor.

10 THE COURT: So the prior document will be admitted as
11 Exhibit 5. I believe it is under seal.

12 MR. PRUSSIA: That's right.

13 THE COURT: And this one will be Exhibit 6, unless
14 there's an objection.

15 MS. LARAKERS: No objection, Your Honor.

16 Q. Mr. Lyons, you've been handed what's been marked as
17 Exhibit 6. It's a document starting at GOV 1641 and ending at
18 1644, correct?

19 A. Correct.

20 Q. And the top email is from Andrew Graham, correct?

21 A. Yes.

22 Q. Who is an ICE employee, right?

23 A. Yes.

24 Q. And the To line includes yourself and James Rutherford,
25 right?

1 A. Yes.

2 Q. And this is an email that you received January 30, 2018,
3 right?

4 A. Yes.

5 Q. If I could direct you to the third email in the chain, the
6 email from Mr. Graham to you and Mr. Rutherford at 10:06 a.m.,
7 January 30. Are you with me?

8 A. Still on 1641?

9 Q. That's correct.

10 A. Okay.

11 Q. The first sentence states: James, Todd, just to help you
12 guys answer any questions on this CIS arrest topic, here is a
13 brief overview of how we handle these cases.

14 Did I read that correctly?

15 A. Yes.

16 Q. What is your understanding of what Mr. Graham was
17 referring to when he says: Just to help you guys answer any
18 questions on this CIS arrest topic?

19 A. Because to go back to 2017, I was being asked questions
20 from headquarters about arrests at CIS which were in the media.
21 And also, I had asked the assistant directors in the local
22 office to brief me on just how exactly we were getting the
23 information.

24 Q. Okay. Do you have an understanding as to how Mr. Graham
25 identified -- strike that. What was the basis of the overview

1 as provided by Mr. Graham in this email?

2 A. The basis is that CIS sends a list of pending I-130s to
3 ERO, a list which has subjects with an active final order.

4 THE COURT: Mr. Prussia, what's the point of all of
5 this? It seems pretty clear that up to a certain point at
6 least CIS was informing ICE of when aliens with final orders of
7 removal were coming in for I-130 interviews, and ICE was
8 letting CIS know which of them it wanted to arrest and detain.
9 Is there more to this than that?

10 MR. PRUSSIA: That's exactly it, Your Honor.

11 THE COURT: I've got the point then.

12 MR. PRUSSIA: Okay.

13 (Discussion off the record.)

14 MR. PRUSSIA: Almost done, Your Honor. May I
15 approach?

16 THE COURT: Yes.

17 Q. Mr. Lyons, you've been handed a document that's been
18 marked, that's identified GOV 2883 to GOV 2885. Do you see
19 that?

20 A. Yes.

21 Q. And it's an email from an individual whose name I don't
22 want to put on the public record. But do you know who that
23 individual is?

24 A. Yes.

25 Q. Where is he employed?

1 A. ERO Boston.

2 Q. And on the address line, it includes Ms. Tiberi as well as
3 Mr. Graham. Ms. Tiberi you've identified as being a CIS
4 employee and Mr. Graham as being an ICE employee, right?

5 A. Yes.

6 MR. PRUSSIA: I'd like to offer this into evidence,
7 Your Honor, as Exhibit --

8 THE COURT: It's admitted as Exhibit 7 under seal.

9 Q. At the bottom of page 2883 there's an email from an
10 individual to Ms. Tiberi at CIS. Do you see that?

11 A. Yes.

12 Q. Do you know where that individual is employed from whom
13 the email was sent?

14 A. He's not employed with ERO or an ICE employee.

15 Q. And the email states: Hi Mirella. Two more cases were
16 added to the spreadsheet, making it a total of 23. Do you see
17 that?

18 A. Yes.

19 Q. Now, there's a spreadsheet that's attached here. Can you
20 generally describe what it identifies?

21 A. It's broken down by columns where it has receipt numbers,
22 A numbers, names, addresses, I-130 status, address, and then
23 there's a comments section as well as an expedited removal
24 section.

25 Q. Okay. In the 11:56 a.m. email from Ms. Tiberi, she

1 states: Law keeps getting more I-130s that have final orders.
2 Attached are the newest we have received and have added them to
3 spreadsheet, name, number -- three?

4 A. Yes.

5 Q. Do you see that?

6 A. Yes.

7 Q. Does that accurately describe the spreadsheet that she
8 just identified?

9 A. Yes.

10 Q. And the top email is from the individual employed at ICE,
11 correct?

12 A. Yes.

13 Q. It states: We are interested in all but two cases, right?

14 A. Yes.

15 Q. So ICE is interested in 21 of the cases, right?

16 A. It would appear so, yes.

17 Q. And then this email is dated February 14, 2018, right?

18 A. Yes.

19 Q. And a few weeks later is when this lawsuit happened,
20 right?

21 A. Yes.

22 Q. So but for this lawsuit, these 21 individuals would have
23 been subject to enforcement by ICE, correct?

24 A. Yes, but I can't speak to -- that ERO officer wrote: See
25 attached. The attached isn't an ERO spreadsheet. This is a

1 CIS spreadsheet. So I'm not sure what he sent back as far as
2 the reasons why we're interested.

3 MR. PRUSSIA: I don't have any further questions, Your
4 Honor.

5 THE COURT: Actually, I thought you were going to ask
6 Mr. Lyons about what's going to happen in the future. In other
7 words, whether there's an imminent threat of irreparable harm
8 depends somewhat on his intentions as the interim field office
9 director.

10 MR. PRUSSIA: I thought I did cover that at the
11 beginning when he testified, I thought, that the way he
12 interprets the Executive Order, no class of aliens are exempt,
13 and that's how he will enforce it on a going-forward basis.

14 THE COURT: He also said he was going to have certain
15 priorities.

16 Has anybody been arrested by ICE at a CIS office in
17 the jurisdiction of the ERO you now had since this lawsuit was
18 filed in about February 2018?

19 THE WITNESS: No, sir, not since myself and Mr. Brophy
20 have been in front of you or since Mr. Brophy gave his
21 directions has any action been taken at a CIS office. To date,
22 to go back to my previous testimony to counsel's questions, we
23 continue to receive CIS referrals, but each case is reviewed on
24 a case-by-case basis. And even with Ms. Adducci's guidance, no
25 action has been taken.

1 As I stated, going forward, everyone will still be
2 prioritized or every arrest that the Boston field office
3 conducts will be based upon public safety threat, criminality,
4 national security threat as long as the key point for most of
5 the enforcement activities, which happen in New England, are
6 resources. In every case, specifically the CIS cases, my point
7 is to still continue on as Ms. Adducci did, which is to review
8 every case on the merits of its case and the factors that I
9 laid out as well as any enforcement action at CIS has to be
10 approved by myself.

11 THE COURT: Just one second. And assume
12 hypothetically that CIS tells you that someone with a final
13 order of removal has asked for an I-130 appointment and there's
14 no evidence that that person, other than being in the country
15 unlawfully and not leaving when ordered to do so, has done
16 anything unlawful as a threat to public safety, national
17 security or engaged in criminal activity. Do you expect that
18 you would have that person arrested and detained?

19 THE WITNESS: No, sir. And I can unequivocally say in
20 front of you that based on even current media in the positive
21 light for ICE, the amount of individuals that are public safety
22 threats that are in the area of New England far outweighs the
23 resource allocation that I would have to devote to any type of
24 class of alien which falls under subsection (e) or (f).

25 The priorities of the Boston field office still remain

1 the top four priorities of the Executive Order. We still are
2 following the Executive Order, but I have the daunting task of
3 still trying to do it with the resources that I have, and the
4 public safety aspect far outweighs devoting resources to it.

5 THE COURT: Basically is it your understanding that's
6 consistent with then Secretary Kelly's February 20, 2017 order
7 that said that the director of ICE, among others, may issue
8 further guidance to allocate appropriate resources to
9 prioritize enforcement activities within these categories, the
10 seven categories that include aliens subject to a final order
11 of removal. And the memorandum says: For example, by
12 prioritizing enforcement activities against removable aliens
13 who are convicted felons or who are involved in gang activity
14 or drug trafficking.

15 Is that in essence what you're doing and intend to do?

16 THE WITNESS: Yes, sir. And that was the intent, I
17 believe, of what Mr. Brophy related to you as well as I. And I
18 do believe that after Ms. Adducci came and saw how we conduct
19 operations at ERO Boston, she came to see that, although her
20 first view was that we were excluding class, we weren't
21 excluding class. We were prioritizing.

22 THE COURT: And what's the title of the officers who
23 go and actually arrest somebody?

24 THE WITNESS: A deportation officer.

25 THE COURT: Deportation officer?

1 THE WITNESS: Yes, sir.

2 THE COURT: How many deportation officers are in the
3 ERO you have?

4 THE WITNESS: Currently under me, sir, I have 202 ICE
5 employees, which approximately 187 of those at any given time
6 are on duty, deportation officers.

7 THE COURT: Okay. And did you hear Ms. De Souza say
8 she was arrested by five deportation officers at the CIS
9 office?

10 THE WITNESS: Yes, sir.

11 THE COURT: And about how much of a day does it take
12 for a deportation officer to effect an arrest and everything
13 that follows that?

14 THE WITNESS: A minimum, sir, eight hours.

15 THE COURT: Eight hours. So basically five eight-hour
16 days were devoted to arrest -- should I understand -- were
17 devoted to arresting Ms. De Souza?

18 THE WITNESS: Yes, sir.

19 THE COURT: And those were five eight-hour days that
20 couldn't be used looking for somebody who was unlawfully in the
21 country selling drugs?

22 THE WITNESS: Yes, sir. And I believe that that line
23 of thinking, sir, that you have is what Mr. Brophy shared.

24 THE COURT: And what you share, correct?

25 THE WITNESS: Yes, sir.

1 THE COURT: Thank you.

2 MR. PRUSSIA: If I may, Your Honor, just a few
3 follow-ups off of that.

4 BY MR. PRUSSIA:

5 Q. Mr. Lyons, you still, ICE Boston is still receiving lists
6 from CIS of individuals with pending I-130s, right?

7 A. Yes, sir.

8 Q. We talked a lot about the reluctance of effecting those
9 arrests at CIS in part because of this litigation and in part
10 because of the media attention, right?

11 A. Yes, sir.

12 Q. Those arrests are still occurring outside of CIS, right?

13 A. Do you mean subjects that currently do not -- current
14 people that have a final order?

15 Q. That's right.

16 A. Without a criminality?

17 Q. That's right?

18 A. I can't give you a breakdown. I'm sure arrests have
19 occurred, but I can't give you the amount of numbers.

20 Q. Are you familiar with the case of Mr. Kutkowski [sic]?

21 A. No, sir.

22 Q. An individual that was arrested by the ICE field office of
23 Boston with a pending I-130, I believe it was at his home?

24 A. I'm unfamiliar, sir.

25 Q. And that his wife appeared for her I-130 interview

1 thereafter and it was approved?

2 A. The more you bring it up, I still don't know what it is.

3 Q. You're not familiar with that?

4 A. No.

5 Q. Well, that is right. The court has -- the court can take
6 judicial notice of it as I believe there's a pending case.

7 That would suggest that this field office is still conducting
8 arrests of individuals with pending I-130s solely based on
9 their final order of removal, correct?

10 A. Correct.

11 MS. LARAKERS: Objection. Calls for speculation.

12 THE COURT: I'm sorry. The question is -- I'm not
13 sure I have anything I can take judicial notice of before me.

14 He's asking if it would suggest. So if Mr. Rutkowski
15 was arrested at home while he had a impending I-130 and if
16 there were no other indicia of criminal activity, it would
17 suggest that ICE is still arresting people solely based on a
18 final order of removal. That's the question?

19 MR. PRUSSIA: That is, Your Honor.

20 THE WITNESS: But to go to the scope of what we're
21 here for was, sir, was a CIS arrest. That's what I
22 specifically answered for you. And to speak to a case that I
23 don't know the circumstances behind it, I can't speak to it.
24 There's over 17,000 fugitive cases on the Boston docket right
25 now.

1 Q. Fair enough. That is my point. First, I apologize. The
2 name is Rutkowski, not Kutkowski, so my apologies.

3 A. Sorry, that still doesn't help.

4 Q. The focus has been, as I hear your testimony, on arrests
5 at CIS, and I take your testimony that that practice is
6 undesirable now. But folks that have pending I-130s with final
7 orders of removal are still subject to enforcement by this
8 field office, right?

9 A. They could be, yes, sir.

10 Q. And folks who are under supervised release can still be
11 given instructions to depart the United States solely based on
12 the fact that they have a final order of removal,
13 notwithstanding their pending or approved I-130, correct?

14 A. Yes, that's true. Well, yes, they can be ordered or asked
15 to provide tickets, as you would. But those cases, still to
16 include the I-246, stays are adjudicated case by case on the
17 merits of each one.

18 Q. In fact, there have been -- since this lawsuit has been
19 initiated, there have been examples of individuals who have
20 been directed by officers in the Boston field office to buy
21 tickets and depart the United States solely because they have a
22 final order of removal?

23 A. Yes, sir.

24 Q. And Mr. Rutkowski is an example of that, right?

25 MS. LARAKERS: Objection. Lack of knowledge.

1 THE COURT: He lacks knowledge. Sustained.

2 MR. PRUSSIA: I don't have any further questions, Your
3 Honor.

4 THE COURT: Is there cross-examination?

5 MS. LARAKERS: Very brief, Your Honor.

6 CROSS-EXAMINATION BY MS. LARAKERS:

7 Q. You testified that it's your -- it's going to be your
8 directive to spend ICE Boston's resources primarily on criminal
9 aliens, right?

10 A. Correct.

11 Q. Does that directive just apply to USCIS arrests?

12 A. No. It applies overall. In regards to the specific
13 questioning as far as counsel had for people that report into
14 the office, that's not an expenditure of resources. Boston ERO
15 is one of the few field offices that do not automatic detain
16 individuals that do report in that have I-130s -- I'm sorry --
17 that have final orders of removal. We afford those people
18 opportunities on their own that Mr. Cronen had initiated,
19 what's known as a 30 and 30, where, when the Executive Orders
20 first came out, other field officers took action and
21 immediately detained individuals, where we didn't.

22 Q. Do the resources that you've spoken about earlier include
23 people checking in, people checking in to ICE?

24 A. Yes. Every day there's an on-duty officer for cases on
25 the non-detain docket that check in.

1 Q. Are there limited resources to have people check in?

2 A. Extremely.

3 Q. Who was the field office director at the time Ms. De Souza
4 was arrested and detained?

5 A. I'm sorry. Do we have a date, the timeframe? Mr. Cronen
6 was primarily the field office director until up around January
7 30 and there was a time of flux before Mr. Brophy arrived. But
8 there's only been three field office directors since I've been
9 at ERO Boston.

10 MS. LARAKERS: No further questions, Your Honor.

11 THE COURT: Is there any redirect?

12 MR. PRUSSIA: No, Your Honor.

13 THE COURT: Okay. I've got a few questions, and the
14 attorneys know they can object.

15 Am I correct you testified that you read my June 11,
16 2018 decision in this case?

17 THE WITNESS: Yes, sir. I even had look up what Wing
18 Wong was from 1896.

19 THE COURT: You looked up the case?

20 THE WITNESS: Yes, sir.

21 THE COURT: Did you read the decision once or more
22 than once?

23 THE WITNESS: I've reviewed it several times on the
24 notes which I made on here.

25 THE COURT: Do you recall that -- I assume -- here.

1 Do you understand that the regulation that was being
2 interpreted and applied by its literal terms applies to aliens
3 in the 90-day removal period which generally begins running
4 after they have a final order of deportation?

5 THE WITNESS: Yes, sir.

6 THE COURT: And do you understand that all of the
7 aliens who are petitioners of this case had that 90-day removal
8 period run for them years ago?

9 THE WITNESS: Yes, sir. I understand as far as when
10 you referenced Nelson v. INS from 2000 as far as -- and its
11 relation to Zadvydas.

12 THE COURT: All right. I was asking a more factual
13 question.

14 Do you remember that I found that ICE was assuming
15 nevertheless that the regulation applied to people after the
16 removal period and that they could be detained for 90 days
17 before they were entitled under the regulation to a document
18 review concerning whether their detention should continue?

19 THE WITNESS: Yes, sir.

20 THE COURT: And do you remember I explained that that
21 interpretation might be wrong, and that since the removal
22 period expired, ICE might have less time to make a detention
23 decision under the regulation?

24 THE WITNESS: Yes, sir.

25 THE COURT: And do you understand that I found that,

1 assuming without finding that ICE's interpretation was correct,
2 it was still violating the regulation?

3 THE WITNESS: Yes, sir. We've acknowledged and saw
4 that's your recommendation and findings as far as violations
5 that we made in the POCR process.

6 THE COURT: And do you recall that I said although I
7 didn't have to decide it in June, it appeared to me that the
8 proper interpretation of the regulation might be that ICE is
9 required, for somebody after the 90-day removal period, to give
10 prompt notice of a detention review and conduct that review
11 perhaps 30 days or a little more than 30 days after the
12 detention?

13 THE WITNESS: Yes, sir.

14 THE COURT: And has it been the practice at least
15 since Ms. Adducci came to the Boston ERO to give notice of a
16 detention review when somebody is arrested and detained?

17 THE WITNESS: Yes, sir. Well, as you know, throughout
18 the findings, through the previous training that you alluded to
19 the officers received in February, then again in April, and
20 then again in May, we were working to make, you know, strict
21 adherence to especially notifications to legal counsel.

22 THE COURT: Okay. But I was trying to lay a
23 foundation.

24 THE WITNESS: Sure.

25 THE COURT: So Ms. Adducci -- since Ms. Adducci came,

1 the ICE office has been giving notice when somebody is
2 detained, arrested and detained, that there would be a document
3 review concerning detention in about 80 days; is that right?

4 THE WITNESS: Yes, sir. Her goal in transforming or
5 bringing the thing up to process is not to even deal with set
6 timelines as to do stuff as quickly and effectively as
7 possible.

8 THE COURT: All right. But it's possible to give
9 notice that there's going to be a detention review at about the
10 time somebody is arrested and detained; and indeed that's being
11 done now, correct?

12 THE WITNESS: To my knowledge, yes, sir.

13 THE COURT: And it would also be -- well, would it
14 also be possible to say that detention review will be conducted
15 at least initially in, say, 40 days, not 80 days?

16 THE WITNESS: They can begin their review earlier,
17 especially with making sure counsel has that notice to submit
18 proper documentation or any type of benefit request prior to or
19 earlier in the process.

20 THE COURT: And you were here this morning when Ms. De
21 Souza and Ms. Calderon testified, correct?

22 THE WITNESS: Yes, sir.

23 THE COURT: And Ms. Calderon actually was released I
24 think about three weeks after she was detained, correct?

25 THE WITNESS: I believe so, sir.

1 THE COURT: All right. I think that was her
2 testimony.

3 MR. PRUSSIA: 30 days.

4 THE COURT: Within a month?

5 MR. PRUSSIA: Yeah.

6 THE COURT: So it was possible for ICE to determine
7 that her detention, further detention wasn't justified within
8 three or four weeks, correct?

9 THE WITNESS: Yes, sir.

10 THE COURT: And having heard her testimony this
11 morning, as far as you know, was it correct to conclude that
12 she wasn't a flight risk?

13 THE WITNESS: Yes, sir.

14 THE COURT: What are some of the things that cause you
15 to agree that she wasn't a flight risk?

16 THE WITNESS: What I said earlier, too, in my
17 testimony to counsel, and actually it's in an email in one of
18 the exhibits, is that I believe that the whole process is
19 convoluted, whereas it's conflicting information on CIS's own
20 website, whereas Ms. Calderon was actually trying to move ahead
21 with a benefit, yet I find it very misleading that no one at
22 CIS advised her that she should possibly go ahead and pursue
23 the 212 that's on their own website prior to, which, that was
24 her goal all along. And it could have been done, January 18
25 when it was approved, that same paperwork for the 212 waiver

1 could have been done instead of waiting until February 2 when
2 it was adjudicated.

3 THE COURT: I may be confused as to when she was
4 arrested. I thought she was arrested at the CIS office.

5 THE WITNESS: Yes. No. But my point, sir, is the day
6 that she had the approved I-130, she could have applied for
7 that 212. And it's very -- I was just going to say it's very
8 misleading, even on CIS' own website.

9 THE COURT: So basically are you saying that once she
10 got the I-130, the regulations -- the three-part process, you
11 have to apply for and get an I-130, and then you apply for and
12 get an I-212, and then you apply to get a --

13 THE WITNESS: 601A.

14 THE COURT: -- waiver, which is an I-601A.

15 THE WITNESS: 601A.

16 THE COURT: 601A. And you're saying, in your view,
17 once she had the approved I-130 and she wasn't a flight risk,
18 she should have been allowed to file the I-212?

19 THE WITNESS: Yes, sir. In my declaration where I
20 outlined the information that was relayed by the supervising
21 officer for the reason for the flight risk, it did lay out
22 certain factors of that. However, going back to testimony that
23 I gave to counsel, we never even knew of the 212 waiver. Had
24 we known that, I'm confident enough to say that Ms. Calderon
25 wouldn't have been separated from her children.

1 THE COURT: She wouldn't have been?

2 THE WITNESS: No. And even in my email, sir, that
3 counsel entered into evidence, I specifically state that these
4 type of stories will keep those away who may be truly trying to
5 adjust that have an actual path to a benefit. I said that back
6 in January.

7 THE COURT: What's the date of that email?

8 THE WITNESS: January 30.

9 THE COURT: So basically, are you telling me that you
10 believe that in making its case-by-case determinations as to
11 whether somebody who has a final order of removal should be
12 removed, arrested, detained and removed, you believe the office
13 you now head should consider whether that person has applied
14 for an I-130, had an approved I-130, applied for an I-212?

15 THE WITNESS: Yes, sir.

16 THE COURT: And is that what you intend your office to
17 do as long as you're the acting or permanent director?

18 THE WITNESS: Yes, sir. I've instructed supervisors
19 and officers to make sure they reach out to our Office of Chief
20 Counsel to make sure that they have all the facts on a
21 case-by-case basis. Whether they're looking at an arrest that
22 may take place, an enforcement action of somebody seeking a
23 benefit or even someone who is already in the removal
24 proceedings that's filing for an I-246 stay of removal, all
25 factors should be considered.

1 And just to go a little bit farther into it, I think
2 that since our last time when I was here in May, we've taken
3 positive steps to make sure that each case is properly seen as
4 well as educating more the community. I was responsible -- we
5 established a round table with U.S. Senate members and their
6 Congressional staff for constituent services, which we brought
7 them into the Boston field office. And we were able to sit
8 down and tell them exactly positive benefits to each case.
9 Because there was often times that someone may have had a
10 positive benefit outcome, but we weren't notified or privy to
11 it in any of the original documentation.

12 THE COURT: I think you said a little earlier with
13 regard to Ms. Calderon, you didn't know about the I-212?

14 THE WITNESS: No, sir.

15 THE COURT: Were you saying that you didn't know about
16 the existence of the possibility of an I-212?

17 THE WITNESS: Yes, sir. What I was kind of going to
18 in that aspect was through discovery I think counsel saw that
19 there was no -- any time we received a referral from CIS, there
20 was no indication that that individual was seeking some type of
21 other benefit besides having an I-130 with an outstanding order
22 of removal.

23 THE COURT: But had you heard of an I-212 before this
24 case?

25 THE WITNESS: Yes, sir.

1 THE COURT: So you knew of the existence of the
2 possibility of an I-212?

3 THE WITNESS: Yes, sir. In my previous --

4 THE COURT: I'm sorry.

5 THE WITNESS: I'm sorry.

6 THE COURT: Did you know of the existence of the
7 possibility of a provisional waiver for somebody who had a
8 final removal order?

9 THE WITNESS: Yes, sir. And in my previous position
10 in Dallas, my experience has always been that counsel worked
11 with our chief counsel in either opening -- having a motion to
12 reopen a case for someone that has prior -- that's going
13 through removal or coming forward. So the existence has always
14 been there where we were notified prior to that there was more
15 to the story than that.

16 In these CIS referrals that we received from the
17 Lawrence office specifically, I can only speak to that because
18 these are the ones that are here, there is no mention of any
19 other type of benefit going forward; whereas the environment I
20 came from before, there was a more of a hand-in-hand
21 cooperation.

22 THE COURT: All right. And did ICE ask: Do any of
23 these people have petitions for I-212s or approved I-212s?

24 THE WITNESS: No, sir.

25 THE COURT: And in the future, do you intend to ask

1 CIS that?

2 THE WITNESS: Yes, sir. Because we do have the
3 ability and access to a system where officers do look for any
4 type of pending benefits. And in Ms. Calderon's case, had they
5 seen there was a pending 212 or approved 212 with a pending
6 601, that would have been brought to our chief counsel and no
7 action would have been taken. But even in CIS' own system,
8 there was no record of a 212 being filed or being pursued.

9 THE COURT: But that might have been because she was
10 arrested -- is getting an I-130 a prerequisite for applying for
11 an I-212?

12 THE WITNESS: Yes, sir. And that was the point I was
13 trying to make to counsel, is that even through CIS' own
14 convoluted website, while it is the first step and they
15 specifically state it doesn't vacate or preclude any
16 enforcement action, that I-130 does eventually lead to a 212
17 once the established bona fides and prima facie eligibility are
18 there.

19 THE COURT: Do most people who get an I-130 later get
20 an I-212 in your experience?

21 THE WITNESS: An I-212, sir, is mostly for ones who
22 have either been previously deported and returned or pending an
23 unexecuted order. I've seen a lot of I-130s in my experience
24 where people have just entered the United States illegally or
25 without inspection, which later married a U.S. citizen, which

1 later led down to the adjudication of a 485 for a lawful
2 permanent resident, things like that, yes, sir.

3 THE COURT: So basically should I understand that it's
4 your intention that the Boston ERO will not arrest people with
5 final orders solely because they have the final orders,
6 particularly if they are seeking or have an approved I-130 and
7 are seeking or have an I-212?

8 THE WITNESS: Definitely, sir. As far as having a --
9 as I said, having an approved I-130 or pending I-130, I guess
10 you could say is the launching point, but it doesn't preclude
11 any action going forward. I think every one of my officers
12 knows that if someone sees an I-130 to make sure they
13 investigate further to make sure there's no other pending
14 either litigation, pending benefit claim, things of that, every
15 case going forward on a case-by-case.

16 THE COURT: And if you see -- so you're going to look
17 at every case case by case, because is it your understanding
18 that then Secretary Kelly's memorandum also reminded you and
19 your colleagues that you have prosecutorial discretion to be
20 exercised in individual cases?

21 THE WITNESS: I think that the prosecutorial
22 discretion, sir, we have the ability to look at each case case
23 by case when we're prioritizing how we're going to utilize our
24 resources in an enforcement action.

25 THE COURT: I think you said if you knew there was a

1 pending or approved I-130 or pending or approved I-212, you
2 would look to see what the other circumstances were.

3 THE WITNESS: Yes, sir.

4 THE COURT: And if you -- okay. So you heard
5 Ms. Calderon this morning?

6 THE WITNESS: Yes, sir.

7 THE COURT: And you learned she is married to an
8 American citizen, right?

9 THE WITNESS: Yes, sir.

10 THE COURT: And you learned that she had children who
11 were American citizens, correct?

12 THE WITNESS: Yes, sir.

13 THE COURT: And you learned that they have a home and
14 her husband works, and somebody asked her, she would say I
15 don't want to do anything but stay right where I am.

16 THE WITNESS: Yes, sir.

17 THE COURT: So she wouldn't have been a flight risk I
18 think you told me before in your judgment?

19 THE WITNESS: Yes, sir.

20 THE COURT: And would you have -- you learned that she
21 was seeking -- you now know there's a possibility to get a
22 provisional waiver, somebody who gets an I-130 that's married
23 to a U.S. citizen gets an I-212, is eligible to apply for a
24 provisional waiver, which means they can stay in the United
25 States until it's determined whether they'll get a permanent

1 waiver and only have to leave for a couple of weeks?

2 THE WITNESS: Yes, sir.

3 THE COURT: And would you have considered all of that
4 if you had that information?

5 THE WITNESS: Yes, sir, all of that would be factored
6 in.

7 THE COURT: And in those circumstances would she have
8 been arrested and detained?

9 THE WITNESS: No. I believe that after consultation
10 with our chief counsel that, while there may have been an
11 enforcement action as far as an interview done with us, a more
12 exploratory investigation done with CIS finding the roots of
13 the benefit claim, I believe our chief counsel would advise us
14 that Ms. Calderon does have a path to a benefit and that we
15 wouldn't take an enforcement action.

16 THE COURT: You would let her pursue that path and see
17 whether CIS determined essentially that the public interest
18 manifest in the INA as well as in the regulations in keeping
19 families of American citizens together outweighed the also
20 legitimate public interest of not rewarding and discouraging
21 people from coming into the country unlawfully; but you'd let
22 CIS make that decision?

23 THE WITNESS: Yes, sir. And we have, through our
24 chief counsel, adjudicated or approved stays for individuals
25 that are in the process that have a bona fide claim where it

1 looks like they are going to receive a benefit.

2 THE COURT: So a stay -- to apply for a stay, somebody
3 has to file an I-246?

4 THE WITNESS: Yes.

5 THE COURT: That's a discretionary decision that ICE
6 makes as to whether to grant a stay? Do you understand that?

7 THE WITNESS: Yes.

8 THE COURT: And are there regulations that apply to
9 requests for stays?

10 THE WITNESS: Yes. The stay guidelines are set forth.
11 However, it does give the field office director the discretion
12 to grant or deny.

13 THE COURT: Right. But do you know whether there are
14 regulations?

15 THE WITNESS: Yes, sir. All of our documents are
16 governed by regulation.

17 THE COURT: And do the regulations describe what
18 should be considered as ICE exercises its discretion whether or
19 not to grant a requested stay?

20 THE WITNESS: To speak off the top of head, sir,
21 that's why I usually keep my law book on my desk or I consult
22 with chief counsel. I would just be --

23 THE COURT: Well, do you have a pencil there?

24 THE WITNESS: No, sir.

25 THE COURT: Somebody will write it down and give it to

1 you. Take a look at 8 CFR Section 241.6 that sends you to 8
2 CFR Section 212.5. If you received a request for a stay, is
3 one of the things you would always consider community ties such
4 as close relatives with known addresses?

5 THE WITNESS: Yes. Usually people do submit stuff
6 such as utility bills, photos, things like that.

7 THE COURT: And if somebody had strong community ties,
8 such as a husband and known home address and children who were
9 going to school in that area, would that weigh in favor of
10 granting the stay?

11 THE WITNESS: Yes, that could be one of the mitigating
12 factors in the stay.

13 THE COURT: Based on what you heard this morning, that
14 Ms. Calderon has a final order of removal, Ms. De Souza has a
15 final order of removal, but they have strong family ties and
16 well-known addresses where they want to remain, continue to
17 live, do you believe you would have granted the stay?

18 THE WITNESS: Had I had -- excuse me -- all the
19 evidence which we now have in front of us, yes, I would have,
20 especially since in Ms. Calderon's case she has an approved 212
21 and she also did her biometrics in July for a 601A.

22 THE COURT: Is it your understanding that to get a
23 601A, you have to have biometrics done in the United States?

24 THE WITNESS: It can be done in the United States with
25 the provisional waiver or it could be done overseas in the

1 consular process through the Department of State.

2 THE COURT: I guess that's a legal question I'll have
3 to check. It's different than my understanding.

4 But as a practical matter, do you understand that if
5 somebody is pursuing a 601A and is at some stage in the
6 process, if you have them removed before CIS gets to decide the
7 merits, ICE will have, as a practical matter, decided the
8 merits and preempted CIS' opportunity to do so?

9 THE WITNESS: Yes, sir.

10 THE COURT: And do you understand that the regulations
11 give that authority to decide whether to grant a provisional
12 waiver to CIS, not ICE?

13 THE WITNESS: Yes, sir.

14 THE COURT: But basically, all of this is the
15 authority of the Secretary of Homeland Security, and somehow
16 these two powers need to be coordinated or harmonized?

17 THE WITNESS: To actually make matters worse, actually
18 three. Because you have to factor in Customs and Border
19 Protection as well, which have their own interpretations of the
20 Executive Order.

21 THE COURT: Okay. So you've been appointed interim
22 director again?

23 THE WITNESS: Well, I'm the acting field office
24 director. The interim for Ms. Adducci was because she's an
25 actual field office director.

1 THE COURT: I see. So you're acting?

2 THE WITNESS: Yes, sir.

3 THE COURT: Am I correct that one can serve in an
4 acting capacity for up to 240 days?

5 THE WITNESS: Yes, that's what I told you before.

6 THE COURT: And last time you were only about four
7 days in that role?

8 THE WITNESS: Yes, sir.

9 THE COURT: Has anybody told you how long you should
10 expect to be in that role this time?

11 THE WITNESS: I was advised to treat the Boston AOR as
12 my own, that this is now my office and that I was the anchor of
13 senior leadership going forward.

14 THE COURT: Were you led to expect that you'd be made
15 the permanent director at some point?

16 THE WITNESS: No, sir. I think even -- within our
17 ranks, at the deputy level, which is still a senior management
18 position, there's been a lot of turnover. As an example, my
19 counterpart who testified in front of you is no longer with
20 the Boston Field Office.

21 THE COURT: Mr. Rutherford?

22 THE WITNESS: Yes, sir.

23 THE COURT: Where is he?

24 THE WITNESS: He's assigned to headquarters,
25 enforcement removal operations in D.C.

1 THE COURT: He's not doing training, is he?

2 THE WITNESS: He's the unit chief over firearms and
3 tactical training.

4 THE COURT: All right. Do my questions suggest any
5 further questions to counsel?

6 MR. PRUSSIA: Briefly, yes, Your Honor, about seven or
7 so questions.

8 BY MR. PRUSSIA:

9 Q. Mr. Lyons, if I understand your testimony to the judge,
10 had Ms. Calderon had a pending I-212, in your view, no
11 detention action would have been -- she would not have been
12 detained by the Boston field office of ICE, right?

13 A. It definitely would have been a positive factor when it
14 comes down to it. Since the basis of this is speaking to the
15 provisional waiver process and since we already discussed about
16 how the I-130 is just the first step but the main portion is
17 someone that does have an unexecuted final order is the 212, if
18 she had that approved 212, that would have definitely weighed
19 more favorably than the I-130.

20 Q. Is the same true for Ms. De Souza?

21 A. I would be speculating just because I'm not that familiar
22 with her case. I was only assigned a declaration on
23 Ms. Calderon's case.

24 Q. In fact, Ms. De Souza had an I-212 pending as of April 2,
25 2018, right?

1 A. Again, I don't know Ms. De Souza's case.

2 Q. And on April 27 of this year, Mr. Brophy issued a decision
3 to continue detention notwithstanding that pending I-212,
4 right?

5 MS. LARAKERS: Lack of knowledge.

6 THE COURT: I'm sorry. What's that?

7 MS. LARAKERS: Objection. Lack of knowledge.

8 THE COURT: Well, he may know. You should testify
9 based on what you know.

10 A. No, sir. I was still a deputy of enforcement. I wasn't
11 the deputy over custody management. That would have been
12 Mr. Rutherford and Mr. Brophy.

13 Q. And on May 2 the ICE Boston field office denied Ms. De
14 Souza's application for a stay, notwithstanding the fact that
15 she had a pending I-212; is that right?

16 A. Again, I don't know Ms. De Souza's case.

17 Q. Now, assuming I'm right for the moment that she had a
18 pending I-212 before those two decisions, was Mr. Brophy's
19 decision to continue her detention, notwithstanding the I-212,
20 incorrect in your view?

21 THE COURT: You're asking him whether it would have
22 been incorrect?

23 MR. PRUSSIA: Yes, sir.

24 MS. LARAKERS: Objection, Your Honor. Speculation and
25 the basis.

1 MR. PRUSSIA: I don't think it's much speculation. He
2 just speculated that they wouldn't have detained Ms. Calderon
3 had she had a 212. Why can't he offer the same testimony with
4 Ms. De Souza? And the record establishes that there was a 212
5 pending at the time this field office decided to deny her -- to
6 continue her arrest and deny her stay application.

7 THE COURT: I think you've got the evidence to make
8 that argument. My memory is that Mr. Rutherford signed that
9 document on April 27.

10 MR. PRUSSIA: That is correct, Your Honor, on behalf
11 of Mr. Brophy.

12 THE COURT: On behalf of Mr. Brophy, who told me in a
13 declaration that the decision had been made about April 30.
14 But anyway, I think you've got that, if you want to argue it.
15 But as I said earlier, I think from my perspective Mr. Lyons's
16 testimony is valuable on what's happened historically but most
17 relevant if I want to get to a decision on the motion for
18 preliminary injunction, whether the court would have to order
19 that certain things be considered or whether they're going to
20 be considered anyway. I'm sorry. Go ahead, if there was more.

21 MR. PRUSSIA: Just a few more.

22 BY MR. PRUSSIA:

23 Q. Ms. Calderon couldn't have applied for a I-212 when her
24 I-130 was approved, right, because she was detained by ICE?

25 A. Yes.

1 Q. On the day her I-130 was approved, she was detained,
2 right?

3 A. Yes.

4 Q. Okay. Would you look at Exhibit 6, please, Mr. Lyons.

5 A. They're not numbered.

6 Q. I'll identify it by the Bates number. It's the one that
7 starts at 1641, sir.

8 A. Yes, sir.

9 Q. The top email is from Andrew Graham to you and
10 Mr. Rutherford from January 30, 2018. Do you have that?

11 A. Yes.

12 Q. I'm focusing on the page ending on 1642.

13 A. Yes.

14 Q. And it's an email from you to Mr. Rutherford and others
15 from January 30 at 8:55 a.m. Do you see that?

16 A. Yes.

17 Q. Can you read that email into the record, please?

18 A. Sure.

19 Guys, see below. The subject had an active deportation
20 order which will be acted upon --

21 THE COURT: Not too fast.

22 A. Sorry. We did not target the subject because he was --
23 forgive my horrible English -- illegally. He was ordered by
24 immigration judge to be removed from the U.S. for sure. This
25 type of story will keep those away who may be truly trying to

1 adjust (that have an actual path to a benefit). This subject's
2 attorney should have never advised him to attend this meeting.
3 He has no path unless he leaves the country. Below is the PAO
4 synopsis from the officer.

5 Q. And the meeting for which you say his attorneys should
6 have never advised him to attend was an I-130 interview at CIS,
7 right?

8 A. Yes.

9 Q. And he was arrested the same day that his I-130 was
10 approved by CIS, right?

11 A. Yes.

12 Q. So this individual would have had no opportunity to file
13 an I-212, right?

14 A. No, because his attorney didn't follow the CIS
15 instructions that we talked about earlier.

16 THE COURT: What instructions were those?

17 THE WITNESS: Sir, I alluded to the open source CIS
18 public website that has the frequently asked questions, and
19 specifically on the provisional waiver, it states not to
20 contact CIS until they have an approved I-212.

21 THE COURT: Well, what was the meeting this alien was
22 going for?

23 THE WITNESS: Like I stated, it was -- before he was
24 going for an I-130 interview, but now I'm not sure if it's an
25 ineffective counsel or someone that doesn't know immigration

1 law, that they could have applied for an I-130 and I-212 prior
2 to going there. And that information is public source for
3 someone that doesn't have an attorney of record.

4 THE COURT: I thought you said earlier -- I have to
5 decide what the law is -- that you couldn't apply for an I-212
6 unless you had an approved I-130.

7 THE WITNESS: Yes, sir. And that's the point I was
8 making. When stories like this get out that people are being
9 arrested at CIS going for interviews, because as I stated
10 before in my testimony that even CIS' own instructions are so
11 convoluted, that it would dissuade people from coming out of
12 the shadows and applying for a benefit.

13 THE COURT: In your view is it positive for people to
14 come out of the shadows and try to take advantage of the legal
15 means to be allowed to stay here with their U.S. citizen
16 spouses and children?

17 THE WITNESS: Yes, sir.

18 THE COURT: All right. When I alluded to this
19 yesterday when I said the subject's attorney should never have
20 advised him to attend this meeting, I was quoting you. I
21 wasn't expressing my view. Go ahead.

22 MR. PRUSSIA: Your Honor, I said I had about seven
23 questions. I think I asked seven questions. I'm all done.

24 THE COURT: Is there any further cross-examination?

25 MS. LARAKERS: No, Your Honor.

1 THE COURT: All right. Mr. Lyons, your testimony is
2 complete, but I don't want you to leave the courthouse. All
3 right. So you can step down.

4 THE WITNESS: Thank you, sir.

5 THE COURT: I wanted to do this as efficiently as
6 possible, and the testimony today has been helpful. But as I
7 said yesterday, I believe I need to decide the motion to
8 dismiss. And I intend to do that before I hear you on the
9 motion for preliminary injunction. We have the evidence.

10 But if I dismiss the case, there's no need to hear the
11 motion for preliminary injunction. I told you my tentative
12 view late yesterday was that I have jurisdiction and a
13 plausible claim has been granted, but until I start outlining
14 that and give you a decision, that's not a final decision. And
15 I told you that the belated argument that there's a duty to
16 consider only somebody with an approved 212 I deem waived for
17 the purposes of the motion to dismiss, but it can still be
18 later in a case if the case isn't dismissed, say in a motion
19 for summary judgment. And this is potentially fluid as well.
20 It might have to be considered earlier for some other purpose.

21 I heard extensive argument yesterday on the motion to
22 dismiss. Is there anything further that counsel feel needs to
23 be said on that?

24 MS. LARAKERS: Your Honor, I can go first since it's
25 my motion. And I think it will help with regard to the

1 confusion about which step in the process comes first. I've
2 been doing some research on it, and it's certainly complicated.
3 But statutorily speaking, the I-130 and I-212 can be filed
4 concurrently.

5 Now, there may be practical reasons why one wouldn't
6 do so. Petitioners have one. But my understanding from the
7 statutes, the regulations and the USCIS website is that the
8 I-130 and the I-212 can be filed concurrently, but in order to
9 get a 601A, both of those have to be approved. And then
10 finally, the basis of beginning the right to seek relief at the
11 212 point is based on the Federal Register. Sorry. I can find
12 it.

13 THE COURT: Are you saying right to seek relief after
14 you get a 212 or before?

15 MS. LARAKERS: At least at the point where the 212 is
16 pending, Your Honor. Certainly we would like to limit -- it's
17 on page of the Federal Register 50256.

18 THE COURT: Hold on just one second, please.

19 MS. LARAKERS: Sure.

20 THE COURT: What document --

21 MS. LARAKERS: This is the Federal Register.

22 THE COURT: The 2013 reg?

23 MS. LARAKERS: 2016. So volume 81, number 146, page
24 50256.

25 THE COURT: 50256.

1 MR. PRUSSIA: Sorry to interrupt. Isn't this directed
2 to the issue that is waived?

3 THE COURT: It is, but let's listen to it. It might
4 facilitate what you're going to be doing. Because actually I
5 think the government just moved this back a step, which is good
6 for you. So just see what you have to address. Hold on a
7 second. 50256. I've got it.

8 MS. LARAKERS: So our position is that it would start
9 at the point the I-212 is approved based on the middle column
10 at the very top.

11 THE COURT: That's different than what I thought you
12 just told me.

13 MS. LARAKERS: I apologize, Your Honor. I'm reading
14 the regulation again, and I can collect my thoughts. It says:
15 The department believes the goals of the provisional waiver
16 process are supported by making it available to those with
17 final orders only if they have conditionally approved a form
18 I-212 application.

19 THE COURT: Where are you reading that?

20 MS. LARAKERS: It's at the top of the middle column.

21 THE COURT: We must have it printed differently.

22 MS. LARAKERS: It's on page 50256.

23 THE COURT: I've got 50256. It's under: Individuals
24 Subject to Final Orders of Removal, Deportation or Exclusion.

25 MS. LARAKERS: Yes, Your Honor, yes.

1 THE COURT: How many paragraphs under that?

2 MS. LARAKERS: It's the fifth paragraph, Your Honor.
3 It's right before a very long footnote.

4 THE COURT: We have them printed different ways. I
5 found what you're talking about.

6 MS. LARAKERS: Right. So even the comments themselves
7 reference the I-212. They don't reference the I-130. And
8 certainly it references an approved I-212. And certainly I
9 think the DHS could have made it available to those who have a
10 pending I-130, but they didn't. They put it here at the Form
11 I-212, an approved Form I-212, Your Honor.

12 And then my last -- and Your Honor, that's the point
13 I'm going to bring up in the briefing tomorrow. I think
14 that's --

15 THE COURT: All right. Well, as I said, it wasn't
16 brought up earlier. There's urgency to deciding this, so it's
17 in my view waived for the purpose of the motion to dismiss.
18 But it's necessary to talk about it. It has other
19 implications.

20 MS. LARAKERS: And on that last point, Your Honor, on
21 the motion to dismiss, on page 50258.

22 THE COURT: Sorry. What page?

23 MS. LARAKERS: 50258, and it's under the Adjudication
24 title. There's a 1 and then there's a 2. Under 2, Motions to
25 Reopen, Motions to Reconsider, and Administrative Appeals.

1 THE COURT: Okay.

2 MS. LARAKERS: It's the second paragraph that starts
3 with: DHS declines to allow.

4 THE COURT: Right.

5 MS. LARAKERS: So it says: As a preliminary matter,
6 DHS disagrees that there is a legal due process interest in
7 access to or eligibility for discretionary provisional waivers
8 of inadmissibility.

9 And while the second part doesn't speak directly to --
10 eligibility is, as Your Honor said, distinct from the right to
11 seek relief -- access to, DHS speaks directly to that right to
12 seek relief. And I think in this sentence, they're making it
13 clear that they did not intend to create that right through
14 this regulation. And that's the part that's relevant to my
15 motion to dismiss. And that's all I have, Your Honor.

16 THE COURT: All right. Well, this motion has been
17 pending since April, I think.

18 MS. LARAKERS: I understand. I apologize, Your Honor.

19 THE COURT: And this is nothing new. This is an
20 argument that could have been made. Petitioners could have
21 addressed it. I could have spent all last weekend studying it.
22 All right. Not all last weekend, part of last weekend.

23 Okay. Is there anything more the petitioners would
24 like to say?

25 MS. LAFAILLE: Just a couple short points, Your Honor.

1 There's been some confusion about the I-130 and the I-212 and
2 the order of things. They can be filed concurrently. The
3 I-212 can be filed whenever. As a practical matter, the I-212
4 is a discretionary -- the grant of an I-212 is discretionary.
5 And applicants often and their attorneys often feel that the
6 application is stronger when there's an approved I-130.

7 The passage that Ms. Larakers cites here merely
8 acknowledges that the regulation made a sequence of the I-130
9 and I-212 followed by the 601A and that they were not allowing
10 them to be filed at the same time.

11 I did want to address the -- well, briefly this
12 language. And the relevant question isn't whether DHS took the
13 legal position that they were creating a due process interest.
14 Obviously, they take the legal position that they didn't. The
15 relevant question is whether they did and also whether there
16 was an existing -- whether the regulation creates one but also
17 whether there was an existing one that we think our clients
18 already had because of their strong liberty interests in their
19 marriage.

20 THE COURT: So that argument is, even if the
21 regulations do not create a liberty interest, the marriages do.
22 And that hasn't been argued. It's sort of the corollary of the
23 substantive due process argument that I think you told me we
24 didn't have to get into for these purposes. So it could be --
25 I mean, this is a good reason for this not to be decided

1 hurriedly. If I deny the motion to dismiss, the case is going
2 to go on for somebody. So the marriage creates a liberty
3 interest that generates or creates a right to procedural due
4 process.

5 MS. LAFAILLE: Right. And we think it does so on its
6 own, but we also think that the combination of the two, the
7 regulation that is specifically designed to further and protect
8 that very strong interest in the marriage and in family unity,
9 that that's enough to create a liberty interest.

10 THE COURT: And what are some of the cases which you
11 would primarily rely for the marriage creating a liberty
12 interest?

13 MS. LAFAILLE: Your Honor, they're cited in our brief.
14 The Supreme Court obviously decided on this issue in the Kerry
15 v. Din case where the three-justice plurality thought that
16 there was no liberty interest created. The four-justice
17 dissent thought that there was. And two justices in the
18 concurrence assumed that there was but didn't decide.

19 So I think we'd point to the cases cited in the Kerry
20 v. Din dissent as the most instructive. And the cases in our
21 brief -- we do cite a line of cases recognizing the fundamental
22 nature of marriage.

23 I also just wanted to address one small point. We
24 discussed arbitrary and capriciousness yesterday. And it's our
25 position that that standard applies -- that the application of

1 that standard is not limited to decisions that are
2 discretionary but that that standard is used as a -- in other
3 words, that standard is different than an abuse of discretion
4 standard or at least that it has application beyond instances
5 of abuse of discretion.

6 THE COURT: And what case or cases would you point me
7 to on that?

8 MS. LAFAILLE: We have cited the Judulang case.

9 THE COURT: What's the case?

10 MS. LAFAILLE: Judulang, the Supreme Court's --

11 THE COURT: How do you spell it?

12 MS. LAFAILLE: J-u-d-u-l-a-n-g, is I think the leading
13 case on the arbitrary and capricious review in the immigration
14 context. And I'll certainly have a look and see if there's
15 anything directly addressing this question.

16 THE COURT: All right. Well, I'm going to take the
17 motion to dismiss under advisement. I'm tentatively -- I'm
18 ordering you to come back at 11:00 a.m. on Thursday, the day
19 after tomorrow. I'm going to aim to have an oral decision for
20 you then. If I'm not able to meet that deadline, we'll tell
21 you when to come back, that afternoon or Friday morning.

22 MS. LARAKERS: Your Honor, just one thing. I know she
23 touched on the substantive due process, and I don't want to get
24 into it. I just wanted to state the cases we have.

25 THE COURT: Go ahead.

1 MS. LARAKERS: Certainly we have the plurality opinion
2 in Din. Silverman v. Rogers, that's a First Circuit case.
3 Smith v. INS, and that's a District of Massachusetts case. And
4 perhaps most important, Aguilar v. ICE. There's a quote and I
5 have it in my -- I have it right here. I don't have the pin
6 cite. But they state that: We've scoured case law for any
7 authority suggesting that claims similar to those -- they're
8 speaking about family unity claims -- are actionable under
9 substantive due process and found none.

10 And they said that that's important because given the
11 scarcity of the guideposts for responsible decisionmaking in an
12 unchartered area, courts must be reluctant to expand the
13 concepts of substantive due process. Of course they're saying
14 it's a liberty interest, but our view is that it falls better
15 under a substantive due process claim and not a procedural
16 claim.

17 THE COURT: Well, now we all know a lot more, or at
18 least I do, about the difference between substantive and
19 procedural due process, making the distinctions. I want to see
20 counsel in the lobby, and Mr. Lyons is invited, too.
21 Ms. Adducci is not excluded, but she doesn't have continuing
22 responsibilities for the office. So I think it would be
23 valuable if Mr. Lyons at least heard this. So we'll take a
24 short break and reassemble. Court is in recess.

25 (Adjourned, 5:25 p.m.)

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CERTIFICATE OF OFFICIAL REPORTER

I, Kelly Mortellite, Registered Merit Reporter and Certified Realtime Reporter, in and for the United States District Court for the District of Massachusetts, do hereby certify that pursuant to Section 753, Title 28, United States Code that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 24th day of August, 2018.

/s/ Kelly Mortellite

Kelly Mortellite, RMR, CRR

Official Court Reporter