

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

LILIAN PAHOLA CALDERON JIMENEZ)	
and LUIS GORDILLO, et al.,)	
Individually and on behalf of)	
all others similarly situated.)	
)	Civil Action
Plaintiffs-Petitioners,)	No. 18-10225-MLW
)	
v.)	
)	
KEVIN McALEENAN, et al.,)	
)	
Defendants-Respondents.)	
)	

BEFORE THE HONORABLE MARK L. WOLF
UNITED STATES DISTRICT JUDGE

MOTION HEARING

* * * * * R E D A C T E D * * * * *

October 11, 2019

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Courtroom No. 10
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Boston, Massachusetts 02210

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19
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21
22
23
24
25

INDEX

WITNESS PAGE

MICHAEL BERNACKE

<u>Direct Examination By Ms. Cantin</u>	<u>13</u>
<u>Cross-Examination By Ms. Larakers</u>	<u>71</u>
<u>Redirect Examination By Ms. Cantin</u>	<u>73</u>

ELTON MONIZ

<u>Direct Examination By Mr. Rubin</u>	<u>84</u>
<u>Cross-Examination By Ms. Larakers</u>	<u>92</u>
<u>Redirect Examination By Mr. Rubin</u>	<u>96</u>

TAYLOR MONIZ

<u>Direct Examination By Ms. Cantin</u>	<u>100</u>
<u>Cross-Examination By Ms. Larakers</u>	<u>103</u>

ROMILSON FERREIRA

<u>Direct Examination By Mr. Pomerleau</u>	<u>106</u>
<u>Cross-Examination By Ms. Larakers</u>	<u>113</u>
<u>Redirect Examination By Mr. Pomerleau</u>	<u>122</u>

RACHEL GREGOIRE, Sworn

Direct Examination By Ms. McCullough	124
Cross-Examination By Ms. Larakers	130

E X H I B I T S

<u>Exhibit No.</u>	<u>Page</u>
7	36
8	118

P R O C E E D I N G S

1
2 THE COURT: Good morning. Would counsel please
3 identify themselves for the court and for the record.

4 MS. LAFAILLE: Good morning, Your Honor. Adriana
5 Lafaille for the petitioners.

6 MS. CANTIN: Shirley Cantin for the petitioners.

7 MS. McCULLOUGH: Colleen McCullough for the
8 petitioners.

9 MR. SEGAL: Good morning, Your Honor. Matthew Segal
10 for the petitioners.

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

13 MR. WEINTRAUB: Good morning, Your Honor. Max
14 Weintraub on behalf of the United States.

15 THE COURT: Okay. Do we have Mr. Moniz, Mr. Ferreira,
16 and Ms. Rodriguez present?

17 MS. LARAKERS: Yes, Your Honor.

18 THE COURT: They're seated in the jury box. There
19 were some complications or imperfections in the communication
20 between ICE and the marshals service in getting them here and
21 into the courtroom. However, with his usual consummate
22 professionalism, Deputy Marshal Kevin Neal navigated that. So,
23 as I ordered on Monday, those individuals are here.

24 Today happens to be Mr. Neal's last day as a deputy
25 marshal in the District of Massachusetts, hopefully only for a

1 while. He has received what is at least nominally
2 characterized as a promotion that will take him to Rhode
3 Island. He will be much missed personally as well as
4 professionally. He represents the best traditions of the
5 United States Marshals Service, which does provide exceptional
6 service to the judges in the administration of justice and the
7 public in this district.

8 So it's a happy coincidence that I have this
9 opportunity to mark this milestone in his 18-year career as a
10 marshal in this district and to say we all wish him well and
11 look forward hopefully to his return. Thank you very much.

12 And the stenographer will prepare that for the records
13 of the court. Maybe a copy for Mr. Neal as well. All right?

14 All right. On my agenda as of now for today, I have
15 hearing from Mr. Bernacke regarding the decision to continue
16 the detention of Mr. Moniz. Then I think there's a question of
17 whether I should take testimony from or regarding the three
18 aliens who are still detained as the relief or one form of
19 relief, alternative relief that the petitioners are seeking or
20 a decision by me as to whether they should be released pending
21 possible removal, removal. And then I realized in preparing
22 for today that at the August 27 hearing and in the August 28
23 order I directed the parties to report whether ICE should be
24 allowed to remove any class member who is released from
25 detention, although they're still in custody for habeas

1 purposes as a result of the conditions on their release.

2 The parties didn't address that issue in their recent
3 submissions because none of the six aliens had been released.
4 But now three of them are being released. So I think I want to
5 hear from you at least preliminarily on that issue, if it's
6 ICE's desire to remove individuals who have been released from
7 detention.

8 Is there anything else that ought to be on the agenda?

9 MS. LARAKERS: Your Honor, I do have just two
10 housekeeping matters and points of clarification. Mr. Charles
11 may have testified yesterday about an interview that was done
12 for Mr. Ferreira.

13 THE COURT: Actually, is Mr. Charles in the courtroom?

14 MS. LARAKERS: He is not, Your Honor.

15 THE COURT: Let's bring him in. I'd like him to hear
16 this, I think.

17 MS. LARAKERS: This is clarification about his
18 testimony.

19 THE COURT: Go ahead. Tell me that.

20 MS. LARAKERS: Right. So he may have testified about
21 the interview that was done for Mr. Ferreira, and he was unsure
22 about when the interview was done, whether it was before his
23 decision to continue detention or after. It was indeed after
24 his decision to continue detention because it was not until
25 that time that he came into compliance with obtaining a travel

1 document, and then was therefore entitled to a true 180-day
2 review.

3 THE COURT: Excuse me. We discussed interviews as I
4 recall that at the August 27 hearing.

5 MS. LARAKERS: He was not one of the individuals who
6 we were discussing who was already scheduled for an interview
7 at that time. The individuals we were discussing were other
8 individuals who were already scheduled for an interview.
9 Mr. Ferreira had not yet been scheduled for an interview
10 because he had not yet been scheduled for an interview --

11 THE COURT: Hold on just one second. Don't we have
12 interpreters for these people? Are there interpreters for the
13 aliens?

14 MS. LAFAILLE: Yes, Your Honor. We were -- we have
15 one interpreter here today who speaks both Portuguese and
16 Spanish.

17 THE COURT: Not simultaneously, probably.

18 MS. LAFAILLE: Correct. So our intention -- we
19 unfortunately were not able on the timeline to find any
20 federally-certified interpreters in Portuguese or Spanish,
21 unfortunately, for today, so our intention was to have her
22 translate the testimony.

23 THE COURT: Okay. Just the testimony?

24 MS. LAFAILLE: Yes, Your Honor.

25 THE COURT: All right. The interpreter can be seated

1 then.

2 MS. LAFAILLE: I'm sorry, Your Honor. Could I have a
3 moment?

4 THE COURT: Why don't you go ahead.

5 MS. LARAKERS: So Mr. Ferreira was not one of the
6 individuals on August 27 who ICE had agreed was entitled to a
7 interview at the time pursuant to his 180-day review.
8 Subsequently he did become eligible for an interview, his
9 180-day review, after coming into compliance with his travel
10 document. And then he was subsequently scheduled for an
11 interview. That interview was done and taken into
12 consideration later by Mr. Charles but not prior to his initial
13 decision to continue detention on September 19 because I don't
14 believe the interview had happened yet. And I think there was
15 some -- Mr. Charles was unclear about when that interview may
16 have taken place, whether it was before then, before his
17 decision, or after.

18 THE COURT: How did he consider it?

19 MS. LARAKERS: Your Honor, he can certainly testify to
20 that and explain that to you, but the interview had simply not
21 been done prior to the 19th, I do not believe. And he was
22 unclear. He knew that the interview had taken place. He just
23 couldn't remember whether it was done before or after.

24 The second point of clarification.

25 THE COURT: Well, let's go one at a time.

1 MS. LARAKERS: Sure.

2 THE COURT: Had the petitioners been informed of this
3 previously?

4 MS. LAFAILLE: Well, Your Honor, I think Ms. Larakers
5 is -- this is essentially testimony here. We have not received
6 any notices of interview for Mr. Ferreira. I understand from
7 his counsel that he was interviewed after the review, the
8 September reviews took place. But I think these are facts that
9 are relevant to November that are certainly documents that we
10 should receive.

11 THE COURT: Are there any implications for today?

12 MS. LAFAILLE: Today I think, on the subject of
13 interim release, Your Honor, I think it's not disputed that he
14 was not interviewed as part of his custody review, you know, so
15 I appreciate that Ms. Larakers doesn't dispute that. And, you
16 know, I don't think he's -- I don't think the exact -- you
17 know, there are obviously a lot of underlying facts that we
18 need to get clarification on before November that I don't think
19 are central to the question of interim release today.

20 MS. LARAKERS: Your Honor, it's undisputed between the
21 parties that we have a fundamental disagreement about when his
22 180-day review was supposed to be done. ICE felt that he was
23 not eligible to receive a 180-day review and therefore even --
24 if petitioners agreed with us, which they do not, that he was
25 ineligible, then he would not be entitled to an interview. So

1 it's tied up with issues that are going to be addressed at the
2 November hearing.

3 I think the parties agree that, assuming that he was
4 not eligible for 180-day review, there's no reason why an
5 interview should have been done prior to the 19th. So I think
6 that's something that could be taken up in November. It's
7 just, Mr. Charles obviously couldn't remember when that
8 interview was done yesterday, and I wanted to clarify that
9 point.

10 THE COURT: All right. And what's the second point?

11 MS. LARAKERS: The second point is that there was
12 testimony about when Mr. Charles decided to remove the
13 petitioners as opposed to continue their detention. And I
14 think there was some equivocation in between those decisions,
15 in part because as Your Honor may imagine, when he's deciding
16 whether to continue their detention, he's also simultaneously
17 deciding whether to remove them, because that's an essential
18 part.

19 However, the initial decision to remove petitioners
20 was done in July on or about the date that they were detained
21 or the date that they have a final order. And petitioners
22 don't dispute that that decision to remove was made because
23 they received the justifications from Mr. Charles which was
24 from DOJ counsel that was sent to us from Mr. Charles that had
25 the short paragraph Your Honor ordered about why he decided to

1 move forward with the removal despite being eligible to pursue
2 a provisional waiver.

3 Those justifications were sent to petitioners' counsel
4 in July. And that's when Mr. Charles made the initial decision
5 to move forward with their removal even though he may have made
6 another decision to move forward with removal and detention on
7 September 19 as this court ordered. And I just think that
8 there was some equivocation between decision to remove,
9 decision to detain. And I wanted to clarify that point. But
10 certainly if Your Honor would like to examine at what point he
11 made the initial decision to move forward with removal, we can
12 certainly do that today.

13 THE COURT: Well, do the petitioners think in view of
14 this information there's a need to have further testimony now
15 from Mr. Charles?

16 MS. LAFAILLE: Your Honor, perhaps we could confer on
17 that between Mr. Bernacke's testimony -- after Mr. Bernacke's
18 testimony. But I do want to emphasize all of these are, you
19 know, facts that are not fully -- you know, in petitioners'
20 possession, and I think it highlights the need for us, for
21 petitioners to be given access to some of these records that
22 keep being mentioned between now and the November hearing.

23 MS. LARAKERS: Your Honor, I don't know what records
24 she's referring to. There's one record of removal that was
25 provided to them in July pursuant to this court's order about

1 the removal of the aliens. That's the record I'm talking
2 about. If the court would like a copy of those, we can
3 certainly do that. But it is undisputed that they received
4 those justifications by email in accordance with this court's
5 order, so I don't know what documents --

6 THE COURT: Well, I scheduled an emergency hearing on
7 these detention issues. I didn't know there were continued
8 discovery disputes, and I don't even know if you've conferred
9 about the disputes that seem to be emerging, but you need to.
10 As I understand, the plaintiffs are not asking -- the
11 petitioners are not asking now for further testimony of
12 Mr. Charles. We'll see where we are later today. That's one.

13 And two, is there any objection to Mr. Charles being
14 in here? I think it would be useful for him, particularly if
15 the detainees testified, to hear it. And is there a reason he
16 shouldn't hear Mr. Bernacke, too?

17 MS. LAFAILLE: Your Honor, I think for the same
18 reasons that Your Honor issued the initial sequestration order,
19 we object to him being here for Mr. Bernacke's testimony.

20 THE COURT: Okay. We'll leave him outside for now,
21 but it's not -- I haven't decided that I'm going to hear any
22 testimony, although you said yesterday you would like me to.
23 We'll go one step at a time.

24 MS. LAFAILLE: Your Honor, there are some housekeeping
25 matters with regards to the potential testimony. I could cover

1 those --

2 THE COURT: Cover them later. If they're not going to
3 testify, those issues are moot. So let's get Mr. Bernacke,
4 please. Right there. Why don't you leave your water bottle
5 somewhere else.

6 THE WITNESS: Is this okay?

7 THE COURT: Not really.

8 MICHAEL BERNACKE, Sworn

9 THE COURT: You may proceed.

10 MS. CANTIN: Thank you, Your Honor.

11 DIRECT EXAMINATION BY MS. CANTIN:

12 Q. Good morning, Mr. Bernacke.

13 A. Good morning.

14 Q. My name is Shirley Cantin, and I have a couple of
15 questions for you today.

16 Mr. Bernacke, you were in the courthouse yesterday,
17 correct?

18 A. Yes, ma'am.

19 Q. Between yesterday and this morning have you discussed this
20 case with any other ICE witnesses?

21 A. No.

22 Q. Okay. You are currently HQ RIO chief, correct?

23 A. Yes, ma'am.

24 Q. And what does HQ RIO chief stand for?

25 A. Headquarters removal and international operations.

1 Q. How long have you held this position?

2 A. About two years.

3 Q. And what are your duties and your responsibilities as HQ
4 RIO chief?

5 A. I am responsible for supervising a staff who liaisons with
6 various embassies and consulates in Washington, D.C. and
7 outside of area to obtain travel documents. I'm also
8 responsible for reviewing Post-Order Custody Review
9 recommendations.

10 Q. Okay. Are you in charge of the Boston ERO custody
11 recommendations?

12 A. I am in charge of 44 countries. Those countries have
13 cases that span throughout all 24 field offices in the United
14 States. That includes Boston.

15 Q. Who do you report to?

16 A. I report to Nicole Wright, who is my deputy assistant
17 director.

18 Q. And who reports to you?

19 A. I have a number of staff, about eight detention and
20 deportation officers that I can think of offhand.

21 Q. Does Mr. Marco Charles report to you?

22 A. No, he does not.

23 Q. Mr. Greenbaum?

24 A. No, he does not.

25 Q. Mr. Simon?

1 A. No, he does not.

2 Q. Does anybody at the Boston ERO report to you?

3 A. No. They have a different reporting chain.

4 Q. Now, as HQ RIO chief, you're familiar with the Post-Order
5 Custody Review regulations, correct?

6 A. Yes, ma'am.

7 Q. And would you understand that if I referred to that as the
8 POCR regulations?

9 A. Yes, ma'am.

10 Q. As HQ RIO chief are you responsible for ensuring ICE's
11 compliance with Section 241.4?

12 A. Yes, ma'am.

13 Q. When was the last time you reviewed Section 241.4?

14 A. Yesterday.

15 Q. What's your understanding of the requirements of Section
16 241.4?

17 A. 241.4 outlines sort of the structure in which Post-Order
18 Custody Reviews are conducted.

19 Q. How do you ensure compliance by ICE with Section 241.4?

20 A. I review cases, Post-Order Custody Review cases. I make
21 decisions in compliance with the regulations. I weigh the
22 facts of each case in accordance with the regs.

23 Q. And so we're clear, in your position you conduct the
24 180-day custody reviews, correct?

25 A. Yes, ma'am.

1 Q. How often do you conduct these 180-day custody reviews in
2 your position?

3 A. Weekly.

4 Q. And what percent of your time would you attribute to doing
5 the 180-day custody reviews?

6 A. Anywhere from 10 to 20, 25 percent, rough estimate.

7 Q. Approximately how many 180-day post custody reviews have
8 you conducted during your two years as HQ RIO chief?

9 A. I don't know. Many.

10 Q. More than 25?

11 A. Yes.

12 Q. More than 100?

13 A. Potentially.

14 Q. How much -- how many would you say you conduct on average
15 per week?

16 A. Five to ten, perhaps, less. It depends.

17 Q. Mr. Bernacke, what's your understanding of how the 180-day
18 post custody review process works?

19 A. The field offices have deference in terms of conducting
20 field reviews up to, you know, 90 days to 180 days. After that
21 the case is transferred over to headquarters. We conduct a
22 review based on the equities of the case, the immigration
23 history, criminal history, and render a decision at the 180-day
24 mark and any subsequent reviews that occur thereafter.

25 Q. Who makes the ultimate decision on these 180-day custody

1 reviews?

2 A. I do.

3 Q. Mr. Bernacke, are you familiar with the title executive
4 associate commissioner?

5 A. I am aware of that term.

6 Q. Who is that person?

7 A. This is a legacy INS term. I believe the interpretation
8 of that is the executive associate director for enforcement and
9 removal operations these days. However, I'm not sure.

10 Q. Okay. So is that person you?

11 A. No.

12 Q. Who is that person currently at headquarters?

13 A. I believe, if my interpretation is correct, that is Tim
14 Robbins. He's the acting executive director.

15 Q. Could you spell that person's last name?

16 A. R-o-b-b-i-n-s.

17 Q. And he is also conducting these 180-day reviews?

18 A. I believe that authority is delegated down to my level.

19 Q. Okay. Is he your superior?

20 A. He is the director of ERO. He is the person in charge of
21 enforcement and removal operations.

22 Q. In doing these reviews, by the time it gets to you, do you
23 receive a recommendation on whether to continue detaining a
24 person?

25 A. Can you repeat that?

1 Q. Yes. When you receive a custody review file, is there a
2 recommendation made to you as to whether that person's
3 detention should continue?

4 A. Yes, ma'am.

5 Q. Who do you receive that recommendation from?

6 A. The detention and deportation officer who serves as the
7 case officer for that case.

8 Q. Is it a single person or do you receive that
9 recommendation from a panel of people?

10 A. I receive it from a number of personnel on my team, but it
11 is a single person who is handling the case at that time.

12 Q. So for example, do you receive those recommendations from
13 Mr. Charles?

14 A. That case, the 180-day transfers are transferred up to
15 headquarters. There's not necessarily a recommendation. It is
16 a transfer that occurs from the field office. A headquarters
17 officer, a detention and deportation officer who is assigned to
18 ICE headquarters, to my unit, reviews that case and makes a
19 recommendation.

20 Q. So somebody in your unit makes the preliminary
21 recommendation on detention?

22 A. Yes, ma'am.

23 Q. It's not somebody from Boston who's making that
24 recommendation to you?

25 A. Generally, no.

1 Q. Are you familiar with the title or role HQPDU director?

2 A. I am.

3 Q. What does that stand for?

4 A. I don't know what the acronym stands for. I think it is
5 the post order detention unit. And what was the subsequent
6 part of that question?

7 Q. That was the question.

8 A. Okay.

9 Q. Are you that person?

10 A. Again, it's one of those legacy INS terms that exists
11 within the regulations that I am unsure of the definition or
12 who that title is delegated to.

13 THE COURT: So just to clarify, when you're talking
14 about legacy INS term, are you referring to the fact that
15 before there was a Department of Homeland Security, there was
16 an Immigration and Naturalization Service --

17 THE WITNESS: Yes, sir.

18 THE COURT: -- in the Department of Justice?

19 THE WITNESS: Yes, sir.

20 THE COURT: And at the time this regulation was
21 promulgated, as you understand it, was the Immigration and
22 Naturalization Service or INS structure being referenced in
23 these regulations?

24 THE WITNESS: Yes, sir.

25 THE COURT: Okay.

1 BY MS. CANTIN:

2 Q. Mr. Bernacke, how are detainees notified of their 180-day
3 custody review?

4 A. I am aware that they are given written notice and then the
5 case is transferred up to ICE headquarters. After that occurs
6 that's when we render the decision and the decision is
7 communicated to the detainee.

8 THE COURT: Excuse me. So the written notice is given
9 before the case is transferred?

10 THE WITNESS: I believe so. I believe so.

11 BY MS. CANTIN:

12 Q. In connection with the 180-day review, are detainees
13 entitled to an interview?

14 A. Pursuant to the regulations, I'm aware that they are.

15 Q. So to be clear, the regulations require an interview in
16 connection with the 180-day review, correct?

17 A. To my understand, yes.

18 Q. How often does ICE conduct these 180-day interviews?

19 A. Not often from what I'm aware of.

20 Q. Why not?

21 A. It's something that we have not done to my knowledge. I
22 don't know why.

23 Q. When was the first time ICE realized that pursuant to the
24 regulations these detainees were entitled to a 180-day custody
25 interview?

1 A. I don't know. For these particular detainees or just in
2 general?

3 Q. Generally.

4 A. Generally, I don't know.

5 Q. When did you become or when did ICE become aware that the
6 detainees at issue here in this case should have received
7 180-day interviews?

8 A. When did I or when did ICE? Can you clarify that, please.

9 Q. We can take that one at a time. When did ICE realize?

10 A. I don't know when ICE realized. I realized that, I was
11 informed of that last month in September.

12 Q. So you were informed for the first time in September 2019
13 that detainees under the regulations were entitled to a 180-day
14 interview?

15 A. Correct.

16 Q. Mr. Bernacke, are interviews important to the Post-Order
17 Custody Review framework?

18 A. I believe that compliance with the regulations is
19 necessary.

20 Q. My question is are interviews important to this process.

21 A. Again, I believe that the compliance with the regulations
22 is necessary.

23 Q. Based on an interview does ICE sometimes make a different
24 decision than it otherwise might make?

25 A. Can you repeat that again.

1 Q. Sure. Based on an interview would ICE sometimes come to a
2 different decision with respect to that particular detainee in
3 terms of whether to release or to continue detention?

4 A. I think it would depend if there are variances with the
5 history and the facts that are provided in the case.

6 Q. So you would agree that an interview allows a detainee to
7 give more facts in the circumstances of their case, correct?

8 A. I think it depends on what they attest to and whether or
9 not there is any truthfulness to what they attest to.

10 THE COURT: Here. I think something needs to be
11 clarified, and that is whether this is hypothetical or real.

12 Prior to whatever date in September you learned that
13 an interview was required, had you ever conducted a detention
14 review of a detainee who had been interviewed?

15 THE WITNESS: Prior to these cases, no.

16 THE COURT: So all of this is hypothetical.

17 BY MS. CANTIN:

18 Q. Mr. Bernacke, in connection with the 180-day review, do
19 the detainees have an opportunity to submit documents in
20 support of release?

21 A. They do.

22 Q. What training have you received on the POCR regulations?

23 A. I have received training that was provided by my division.

24 Q. And what does that training entail?

25 MS. LARAKERS: Objection. Your Honor, that could

1 potentially call for attorney-client privileged information if
2 those trainings were provided by the Office of Chief Counsel
3 from ICE.

4 THE COURT: Is training legal advice?

5 MS. LARAKERS: Yes, Your Honor.

6 THE COURT: Well, lay a foundation. Who did he
7 receive the training from, and we'll see if the requirements of
8 the privilege are -- we'll see if the privilege is implicated
9 and if the requirements are satisfied or met.

10 THE WITNESS: Yes, it is conducted by ICE attorneys.

11 THE COURT: You got this training?

12 THE WITNESS: Yes, sir.

13 THE COURT: When did you first get it?

14 THE WITNESS: I believe back in 2009 when I became a
15 deportation officer.

16 THE COURT: 2009?

17 THE WITNESS: Yes, sir.

18 THE COURT: Who gave you the training?

19 THE WITNESS: I don't recall the person's name.

20 THE COURT: Do you know whether or not the person was
21 a lawyer?

22 THE WITNESS: I do believe so. Again, it was ten
23 years ago.

24 THE COURT: Were you given anything to read?

25 THE WITNESS: We were given binders of material,

1 training material.

2 THE COURT: What was in the binders?

3 THE WITNESS: Various materials all the way from bond
4 management to detention management, a plethora of topics that
5 are covered and executed by deportation officers in the field.

6 THE COURT: Did you read everything that was in there?

7 THE WITNESS: I did.

8 THE COURT: And when is the last time you got any
9 training, or how often did you get training on the POCR
10 regulations?

11 THE WITNESS: The POCR regulation training is not
12 recurring. I have not had it. It is something that we have --
13 we have made a recurring training for field personnel.

14 THE COURT: I'm sorry. Could you say that again?

15 THE WITNESS: We haven't made that training subsequent
16 to my initial training a recurring training for field
17 personnel.

18 THE COURT: I guess --

19 THE WITNESS: I've only received that training once.

20 THE COURT: In 2009?

21 THE WITNESS: Yes, sir.

22 THE COURT: But I thought you said it's now recurring.

23 THE WITNESS: It is now for field personnel.

24 THE COURT: As of when?

25 THE WITNESS: As of when? I believe within the past

1 three years. I'm not sure, though.

2 THE COURT: But you didn't get it?

3 THE WITNESS: No, sir. I've been at headquarters for
4 the past two years, and I have not -- I did not receive that
5 training in my last stint in the field.

6 THE COURT: Do people in headquarters get any
7 training?

8 THE WITNESS: Not in terms of this particular
9 training. Our staff executes that training, along with ICE
10 counsel.

11 THE COURT: What do you mean you execute the training?

12 THE WITNESS: We send our personnel out to the field
13 to conduct the training.

14 THE COURT: So your people conduct the training?

15 THE WITNESS: Yes, sir.

16 THE COURT: Are they all lawyers?

17 THE WITNESS: So they go in tandem with ICE attorneys.

18 THE COURT: Okay. But nobody trains the trainers on a
19 recurring basis?

20 THE WITNESS: Correct.

21 THE COURT: And you're ultimately in charge?

22 THE WITNESS: Correct.

23 THE COURT: And you didn't know until this case a
24 month ago that the regulations require interviews of detainees?

25 THE WITNESS: No, sir.

1 THE COURT: What's that?

2 THE WITNESS: No, sir, I was not aware.

3 THE COURT: Why not? Why not?

4 THE WITNESS: I was just not aware. It's something
5 that was not trained to me. I had not been instructed of that.

6 THE COURT: What's the provision of the regulation
7 that requires, provides for interviews?

8 MS. CANTIN: I believe it's Section 241.4(i)(3), and
9 it's got the header "Personal Interview."

10 THE COURT: I'm sorry. It's (i)(3)?

11 MS. CANTIN: (i)(3).

12 THE COURT: 3 looks to me to be talking about, "shall
13 advise the alien of the notice to comply." Can you read me the
14 language?

15 MS. CANTIN: Yes, if the HQ -- I can put it up.

16 THE COURT: Please do.

17 MS. CANTIN: It's my marked-up copy.

18 THE COURT: That's all right.

19 Are we looking at 241.4?

20 MS. CANTIN: Yes, Your Honor. Yes. And if I may
21 approach, I can bring up a copy.

22 THE COURT: Okay. I found it.

23 MS. CANTIN: Okay.

24 THE COURT: But you should put it up, please.

25 All right. Why don't you go ahead.

1 MS. CANTIN: Okay.

2 BY MS. CANTIN:

3 Q. Mr. Bernacke, do you see on the screen the personal
4 interview provision of 241.4?

5 A. Yes, ma'am.

6 Q. Do you see the mention of a review panel? Do you see
7 that?

8 A. I do.

9 Q. I asked you about that earlier. Who is the review panel?

10 A. I believe it's a constitute of field personnel.

11 Q. Excuse me?

12 A. A constitute of field personnel.

13 Q. Field personal?

14 A. Field.

15 Q. So there are people whose job titles are review panelist
16 who do the job of the review panel?

17 A. No. I believe they are field deportation officers who
18 constitute that review panel. That's my understanding.

19 Q. So they are the folks who are supposedly tasked with
20 interviewing the detainee?

21 A. Among other things.

22 Q. Okay. Mr. Bernacke, I'd like to turn your attention to
23 Mr. Elton Moniz.

24 THE COURT: Actually, just before you do that, I'm
25 sorry to interrupt, but I'm trying to understand this. So this

1 section that says "Personal Interview," that's in 8 C.F.R.
2 Section 241.4, correct?

3 THE WITNESS: Yes, sir.

4 THE COURT: And was it your testimony that you're in
5 charge of assuring compliance for ICE with Section 241.4?

6 THE WITNESS: Yes, sir.

7 THE COURT: Nationally?

8 THE WITNESS: Yes, sir.

9 THE COURT: And you weren't aware that there was a
10 requirement in certain circumstances that the detainee be
11 interviewed?

12 THE WITNESS: No, sir.

13 THE COURT: Have you ever -- did you ever read these
14 regulations before they came to your attention in this case?

15 THE WITNESS: Yes, I have read them. I wish I could
16 commit all provisions of law to memory. I did not have these
17 committed to memory.

18 THE COURT: Do you have a handbook or something, a
19 manual that provides guidance?

20 THE WITNESS: I do.

21 THE COURT: And when is the last time you read that
22 it?

23 THE WITNESS: I read it yesterday, as I mentioned.

24 THE COURT: And before this case when is the last time
25 you read it?

1 THE WITNESS: Last month when this was raised to my
2 attention.

3 THE COURT: That's what I meant. But before that, had
4 you read it before this all came to your attention in this
5 case?

6 THE WITNESS: I generally read the INA, the
7 Immigration and Nationality Act, when certain -- pursuant to
8 certain circumstances and cases. That occurs probably about
9 monthly.

10 THE COURT: But that's the statute.

11 THE WITNESS: Correct, in addition to 8 C.F.R. I'm
12 subsuming both sections.

13 THE COURT: I was asking you a different question. Is
14 there some kind of manual that ICE produces that discusses and
15 advises on obligations under the regulations?

16 THE WITNESS: To my awareness, no.

17 THE COURT: There's no manual.

18 THE WITNESS: To my awareness, no.

19 THE COURT: Do you have any legal training?

20 THE WITNESS: I do.

21 THE COURT: What's your legal training?

22 THE WITNESS: What I experienced in my basic training
23 with ERO and also in the Border Patrol Academy.

24 THE COURT: I'm sorry. Where?

25 THE WITNESS: In the Border Patrol Academy.

1 THE COURT: Okay. But you hadn't gone to law school?

2 THE WITNESS: No, no, sir. I didn't realize that's
3 what you meant.

4 THE COURT: I need to be more precise. So there's no
5 manual that provides guidance on 241.4 for you?

6 THE WITNESS: Not that I'm aware. There are
7 individualized policy memos within ICE but no manual per se.

8 THE COURT: There's individual policy guidance?

9 THE WITNESS: To my awareness, yes.

10 THE COURT: Where is that found?

11 THE WITNESS: On our internal intranet.

12 THE COURT: Have you looked to see if there's any
13 internal guidance about personal interviews?

14 THE WITNESS: To my awareness there is not.

15 THE COURT: Okay. Go ahead.

16 BY MS. CANTIN:

17 Q. Mr. Bernacke, for the 180-day custody review when do the
18 regulations require that ICE send notice of this review?

19 A. Send notice to the alien prior to the review occurring or
20 afterward?

21 Q. Well, first, are the detainees entitled to a notice of
22 their 180-day review?

23 A. I believe so, I believe it occurs 30 days prior.

24 Q. And does ICE always follow the 30-day notice procedure?

25 A. That is something that the field generally conducts. I'm

1 not involved in that procedure.

2 Q. Okay. I'd like to turn to Mr. Elton Moniz. Mr. Bernacke,
3 you conducted a POCR review for Mr. Moniz in September of 2019?

4 A. Yes, ma'am.

5 Q. Is that right. That was a 180-day custody review,
6 correct?

7 A. I believe it was beyond the 180-day mark at that point.

8 Q. Why were you tasked with conducting Mr. Moniz's review?

9 A. He is a citizen national of Cape Verde as it has been
10 communicated to my unit. I am responsible for conducting those
11 sorts of reviews for that country.

12 Q. You're responsible for all Cape Verde detainees?

13 A. Correct.

14 Q. Who informed you that you would be conducting the
15 September 2019 custody review?

16 A. I believe my staff did.

17 Q. Who is your staff?

18 A. Detention and deportation officer on my team.

19 Q. And do you know who informed them?

20 A. The field refers those cases at the 180-day or beyond
21 mark. And we have an administrative assistant on my team who I
22 know takes those cases and assigns them out to the team.

23 Q. This September 2019 180-day review of Mr. Moniz, you
24 understand that wasn't his first 180-day review, correct?

25 A. Correct.

1 Q. In fact, you conducted two prior 180-day reviews, correct?

2 A. Yes, ma'am.

3 Q. You conducted a 180-day review in June of 2019 this year,
4 correct?

5 A. Yes, ma'am.

6 Q. Did you conduct the March 2019 review?

7 A. I'm sorry?

8 Q. There was also a March 2019 review --

9 A. Okay.

10 Q. -- for Mr. Moniz. Did you conduct that review?

11 A. I believe so.

12 Q. When did you learn that you would conduct the third
13 180-day review for Mr. Moniz?

14 A. Last month, September 2019.

15 Q. What was your understanding of the purpose of this review,
16 given that he had already had two prior 180-day reviews?

17 A. Another 90 days had elapsed. It was the next cadence in
18 terms of conducting the review, and it was to ascertain whether
19 or not he was amenable to release or continued detention.

20 Q. Who if anyone did you discuss this review with?

21 A. I discussed it with my staff.

22 Q. Did you discuss it with Mr. Charles?

23 A. I did not.

24 Q. Mr. Lyons?

25 A. I did not.

1 Q. Anybody from the Boston ERO?

2 A. No, ma'am.

3 Q. Who on your staff did you discuss this review with?

4 A. Detention and deportation officer.

5 Q. The folks assigned to Mr. Moniz's case?

6 A. Yes.

7 Q. What were their names?

8 A. Jody Scott.

9 Q. Jody Scott?

10 A. Jody Scott.

11 Q. Any others?

12 A. No -- ICE counsel, I believe.

13 THE COURT: What was ICE counsel's name?

14 THE WITNESS: Joan Lieberman and Krista Lesh and
15 Monica Burke as well.

16 THE COURT: What's that?

17 THE WITNESS: Monica Burke, the third individual.

18 THE COURT: Who was the second one?

19 THE WITNESS: Krista Lesh.

20 THE COURT: How do you spell Lesh.

21 THE WITNESS: L-e-s-h.

22 THE COURT: Was it -- at what point in the process did
23 you talk to the lawyers?

24 THE WITNESS: At the last month, last month prior to
25 conducting the latest custody determination.

1 THE COURT: Prior to it?

2 THE WITNESS: Yes, sir.

3 BY MS. CANTIN:

4 Q. You just testified you talked to Jody Scott about the
5 September 2019 custody review?

6 A. Yes, ma'am.

7 Q. How long was that discussion?

8 A. It was incremental. It occurred over several days. I
9 would have to say in total probably about 45 minutes to an
10 hour.

11 Q. And this was after you received notice you would be
12 conducting the September 2019 review?

13 A. Correct.

14 Q. Where did you have these conversations?

15 A. At ICE headquarters.

16 Q. What did you two discuss?

17 A. Equities, immigration, criminal history and the ability
18 for us to obtain a travel document.

19 Do you mind if I pour some water?

20 Q. That's fine.

21 THE COURT: That's fine. We supply the water.

22 THE WITNESS: Appreciate it.

23 Q. Are you ready?

24 A. I'm ready.

25 Q. Did you understand this review was being conducted as part

1 of this ongoing litigation?

2 A. Yes.

3 Q. What did you understand about how this review was related
4 to this ongoing litigation?

5 A. Can you specify a little bit?

6 Q. Did you understand that as a result of an August 2019
7 hearing that this court had asked whether ICE would conduct
8 with an open mind this 180-day custody review hearing?

9 A. Yes.

10 Q. Mr. Bernacke, when was the first time you heard about the
11 Calderon class action litigation?

12 A. I believe last month, September 2019.

13 Q. You were not aware of this ongoing litigation prior to
14 September 2019?

15 A. It could have been August. However, it was just within
16 the very recent past.

17 Q. Are you aware if anybody else at ICE headquarters was
18 aware of this ongoing class action litigation?

19 A. My division had been informed of it. Those include the
20 other HQ RIO chiefs from RIO and our superiors as well.

21 Q. Mr. Bernacke, you were conducting 180-day custody reviews
22 before August and September 2019 of this year, correct?

23 A. Yes, ma'am.

24 Q. But you had no idea that the Calderon class action
25 litigation had been pending in this court before August or

1 September 2019, correct?

2 A. I was not aware of that.

3 Q. What was your understanding of when Mr. Moniz's September
4 2019 custody review had to be completed by?

5 A. September 19 I believe was the date that we had to
6 ascertain whether or not there was the ability to remove him.

7 MS. CANTIN: Okay. I'd like to introduce as Exhibit 7
8 Mr. Moniz's decision to continue detention which is dated
9 September 24, 2019.

10 THE COURT: This is admitted.

11 (Exhibit 7 admitted into evidence.)

12 MS. CANTIN: Your Honor, may I approach?

13 THE COURT: Yes.

14 MR. WEINTRAUB: What exhibit number are we counting
15 this?

16 THE COURT: 7. That's the right number isn't it?

17 BY MS. CANTIN:

18 Q. Mr. Bernacke, do you recognize this document?

19 A. Yes, ma'am.

20 Q. Okay. What is it?

21 A. It is a continued detention letter.

22 Q. I'm going to turn to page 2 of this document, which is
23 also on the screen. Is that your signature?

24 A. Yes, ma'am.

25 Q. Okay. And you signed that document on September 24, 2019,

1 correct?

2 A. Yes, ma'am.

3 Q. Did any attorneys review this document before you signed
4 it?

5 A. Yes, ma'am, the first two pages that we're looking at.

6 Q. Who are those attorneys?

7 A. Mark Sauter and I believe others from the ICE legal team.
8 I am unsure of the names right now. I don't know everybody
9 that was involved.

10 Q. You made the decision to continue Mr. Moniz's detention,
11 correct?

12 THE COURT: Well, all right. You can ask it whatever
13 way you want, but I am interested in knowing who made the
14 decision. Who made the decision?

15 THE WITNESS: To?

16 THE COURT: To continue detention.

17 THE WITNESS: I did.

18 BY MS. CANTIN:

19 Q. You made the decision to continue Mr. Moniz's detention in
20 September 2019?

21 A. Yes, ma'am. Yes, ma'am.

22 Q. When did you make that decision?

23 A. Initially September 19.

24 Q. You made that decision on September 19, 2019?

25 A. I issued the continued detention letter on September 24.

1 Q. Okay. So you made that about five days before you signed
2 this document?

3 A. Yes, ma'am.

4 Q. How long did you spend making the decision?

5 A. Again, I had discussed this with my staff for about 45
6 minutes to an hour discussing the criminal history of the
7 alien, the immigration history and equities.

8 THE COURT: Where was Mr. Moniz when you were making
9 this decision?

10 THE WITNESS: His physical location?

11 THE COURT: Yes.

12 THE WITNESS: I know that he was detained within the
13 custodial purview of the Boston field office. I don't know his
14 exact location.

15 BY MS. CANTIN:

16 Q. How did you make your decision?

17 A. Again, I weighed all the equities in his case. He has a
18 family here in the United States. He has expressed indicia of
19 wanting to rehabilitate himself. I also took into
20 consideration things such as the availability of his travel
21 document and the fact that he has a very serious criminal
22 history. He attempted to -- he assaulted somebody with the
23 intent to murder a person, destruction of property, et cetera.

24 Q. We'll get to all of those factors. Mr. Bernacke, what if
25 anything did you review in making your decision?

1 A. I reviewed a case file that included an overview from the
2 Boston field office, a summary of his immigration and criminal
3 history in addition to equities here in the United States.

4 Q. So you reviewed his case file. Did you go into the ICE
5 database?

6 A. I did not.

7 Q. Other than his case file did you receive any other
8 documents?

9 A. No, ma'am.

10 Q. Did you review his POCR submissions?

11 A. That is included in his case file.

12 Q. Do you know when those POCR submissions were made, the
13 date of those?

14 A. I don't recall offhand.

15 Q. All right. Who did you receive the case file or the
16 documents you received from, you reviewed from?

17 A. From my staff.

18 Q. From your staff. Did anybody else review these documents?

19 A. Yes. My staff did in addition to personnel from the
20 Boston field office.

21 Q. Who is your staff, Jody Scott?

22 A. Yes, ma'am.

23 Q. Who are the folks from the Boston field office that
24 reviewed the documents?

25 A. The upper management chain, to include Marcos Charles.

1 Q. Did Ms. Scott make a recommendation to you based on the
2 file she had reviewed?

3 A. She did.

4 Q. Did Mr. Charles make a recommendation?

5 A. He did.

6 Q. Mr. Bernacke, who drafted this notice that we have here?

7 A. ICE counsel and my staff.

8 Q. So you did not draft this notice?

9 A. No, ma'am.

10 Q. Was this notice drafted before or after you made your
11 determination on September 19?

12 A. I believe it was after.

13 THE COURT: You say you believe it was after.

14 THE WITNESS: Yes, sir.

15 THE COURT: Do you have a memory?

16 THE WITNESS: I'm confident that it was after.

17 BY MS. CANTIN:

18 Q. Did Ms. Scott draft this notice?

19 A. Her and ICE counsel.

20 Q. Is this typical practice, that others draft the notice for
21 you?

22 A. Yes, ma'am.

23 Q. Do you know if this draft notice or the notice is off a
24 template that ICE has?

25 A. Not this particular -- not this particular notice. Again,

1 this was individualized for this person. However, I do want to
2 note that all cases are individually reviewed and the facts of
3 their cases are provided within the context of the notices.

4 Q. Were there prior versions of this notice?

5 A. I believe so.

6 Q. How many prior versions of this notice for Mr. Moniz?

7 A. I don't know.

8 Q. Did you revise or edit this decision to continue detention
9 after you received a draft?

10 A. No, ma'am.

11 Q. So what if any input did you have into this document?

12 A. I reviewed it for accuracy and signed it. If there was an
13 issue with it, I would have flagged it and ensured corrections
14 were made.

15 Q. I'd like to walk through this notice. In the middle of
16 this notice, the decision to continue detention, it states
17 that, "Pursuant to 8 C.F.R. 241(i)(6), a 180-day interview was
18 conducted." Is that right?

19 A. Yes, ma'am.

20 Q. Is this the first time that ICE conducted an interview for
21 Mr. Moniz in connection with his 180-day reviews?

22 A. To my knowledge, yes.

23 Q. Who conducted that interview?

24 A. Personnel from the Boston field office.

25 Q. Do you know who?

1 A. I believe -- I know it was a deportation officer, female
2 deportation officer. I don't remember her name.

3 Q. Do you remember how many people were there?

4 A. I believe two, however many the regulations provide for.

5 Q. Do you know how long the interview was?

6 A. I don't know.

7 Q. Did you receive a summary of the interview?

8 A. I did.

9 Q. Did you review that?

10 A. I did.

11 Q. What did you understand the purpose of this interview to
12 be?

13 A. To ascertain any equities, any favorable factors that
14 would provide for Mr. Moniz to stay in the United States, or to
15 be released from custody, I should say.

16 Q. Was your decision to continue detention based on that
17 interview?

18 A. It was based on a number of factors. Again, it's a
19 holistic case review. That includes immigration history, his
20 criminal history and any equities in the United States to
21 include those that were communicated orally through the
22 interview.

23 Q. Okay. This written notice accurately conveys the reasons
24 for your decision to continue detention; is that correct?

25 A. Yes, ma'am.

1 Q. And it reflects all of the factors that you considered in
2 making that decision?

3 A. I feel it does.

4 Q. Okay. The notice states that "ICE acknowledges favorable
5 factors you present in favor of release." Do you see that?

6 A. Yes, ma'am.

7 Q. What factors were those, the favorable factors?

8 A. Again, the family members that he has in the United
9 States, ties to the community, his church membership, his
10 provisional waiver. That was one thing that was in the
11 forefront of my mind, et cetera.

12 Q. We'll get to the provisional waiver. So in making your
13 decision, you're aware that Mr. Moniz has a U.S. citizen
14 spouse?

15 A. Yes, ma'am.

16 Q. For the record, she's here, Ms. Moniz is in the courtroom
17 today. And you considered that U.S. citizen spouse, correct?

18 A. Yes, ma'am.

19 Q. Do you know that Mr. Moniz has a five-year-old
20 stepdaughter?

21 A. I do.

22 Q. And you know that Mr. Moniz is the only father this little
23 girl has ever known?

24 A. I do.

25 Q. Do you consider that factor?

1 A. I did.

2 Q. Were you aware that as a result of Mr. Moniz's detention
3 Mrs. Moniz currently has no permanent home?

4 A. I don't recall that. However, I am sensitive to the facts
5 of every single case I review --

6 Q. But you didn't know that fact?

7 THE COURT: You've got to let him finish the answer,
8 please.

9 A. I'm sensitive to the impact of all my decisions in terms
10 of any case that I review. Again, as I mentioned before, it is
11 a holistic case review that weighs equities, public interest
12 factors, criminal history, immigration history, availability of
13 a travel document. You know, these decisions are not taken
14 lightly and are taken very seriously.

15 Q. But were you aware of the fact that Mrs. Moniz and their
16 five-year-old daughter --

17 A. Not that I recall offhand.

18 Q. Were you aware that Mr. Moniz has an ailing mother?

19 A. I do, I am aware of that.

20 Q. And you considered her medical records that were submitted
21 that showed that she's struggling with depression?

22 A. Yes, I was aware.

23 Q. And other mental health conditions?

24 A. Yes, I was aware she had depression.

25 Q. Mr. Bernacke, you stated that you considered serious

1 negative factors; is that right?

2 A. Yes, ma'am.

3 Q. One of the factors is Mr. Moniz's criminal convictions?

4 A. Yes, ma'am.

5 Q. These four criminal convictions listed here, you
6 understood that was all part of one incident, correct?

7 A. Yes, ma'am.

8 Q. Do you know when Mr. Moniz was convicted of those crimes?

9 A. I believe it was in December of 2016.

10 Q. You understand that was more than four and a half years
11 ago, right, four and a half years ago?

12 A. 2016?

13 Q. I have a different understanding of when he was -- but you
14 understand Mr. Moniz was convicted of those crimes when he was
15 19 or 20 years old; do you know that?

16 A. I -- I wasn't aware of that offhand. I did not recall
17 that. I don't recall his age at this point in time.

18 Q. Okay. In making your decision did you consider that he is
19 in the process of appealing those convictions?

20 A. I wasn't aware of that.

21 THE COURT: Excuse me, Ms. Lafaille. Put the
22 interpreter back where he was. It's a distraction. If you
23 want to be in this courtroom, just sit quietly and listen.

24 MS. LAFAILLE: I'm sorry. I apologize, Your Honor.
25 It's just to clarify. This is Mr. Moniz's attorney.

1 THE COURT: I'm sorry. Whoever it is, you can sit
2 within the rail, but you can't be bouncing around because I'm
3 trying to listen to the testimony and you're very distracting,
4 so go back.

5 BY MS. CANTIN:

6 Q. Mr. Bernacke, were you aware that Mr. Moniz served
7 approximately four years for those previous convictions?

8 A. He served four years?

9 Q. Correct.

10 A. My understanding is that he was convicted in December of
11 2016 and was released to ICE custody in 2017.

12 Q. If I can represent to you that he served four years for
13 those convictions, did you consider that fact?

14 A. The records that were presented to me did not indicate
15 that.

16 Q. Were you aware that while serving four years in prison
17 Mr. Moniz never got into any trouble?

18 A. Again, I am unaware of how much time he served in custody.

19 Q. That he never got into an altercation?

20 A. Again, you know, the question is predicated upon him
21 serving a four-year sentence, and to my knowledge he was
22 convicted in late 2016 and released to ICE custody in 2017.

23 Q. So you then did not consider that while serving time
24 Mr. Moniz regularly attended church?

25 A. I don't know the relevancy of that question, to be honest,

1 because, again, it is predicated upon a four-year sentence.

2 Q. So you did not know or consider that while he was serving
3 time, he got baptized?

4 A. I was aware that he had been baptized, but again, this is
5 all predicated on a four-year sentence, and I don't know the
6 accuracy of that. And I couldn't speak to any behavior that he
7 had in terms of his time serving a four-year sentence.

8 Q. So you did not know that Mr. Moniz, while he was serving
9 time, worked while he was in prison?

10 A. I am aware that, while in custody, he generally exhibited
11 good behavior, and I'm again going off the time in custody that
12 I am aware of, that he exhibited good behavior. Again, he has
13 serious criminal history where he intended to kill somebody,
14 destroy property, had I believe a firearms offense, which also
15 weighed in my mind when making a custodial decision.

16 Q. Were you aware that while in prison he received a
17 certificate of achievement for participation in the Beacon
18 program?

19 A. I was aware of that.

20 Q. Okay. And you know that Beacon is a 12-session program in
21 emotional literacy that explores human behavior and choice.
22 Did you know that?

23 A. Yes, ma'am. However, I was not aware that -- I'm just
24 acknowledging your question. I was not aware of the contents
25 of that course. However, again, he is a serious criminal

1 alien, convicted of violent crimes, something that was at the
2 forefront of my mind when making a custodial decision. I am
3 aware of his equities to include that.

4 Q. But you were not aware of the fact that Mr. Moniz served
5 time for the convictions?

6 A. I am aware that he served time. It's just not the
7 four-year sentence that you represented.

8 Q. Were you aware that while serving time Mr. Moniz also
9 completed the Correctional Recovery Academy program?

10 A. I don't recall.

11 Q. You've reviewed his POCR submissions, correct?

12 A. I did, but I don't recall that offhand.

13 Q. But you don't recall that, okay. You understand that the
14 Correctional Recovery Academy is geared toward reducing
15 recidivism.

16 A. I'm not aware of that.

17 Q. Did you consider that fact in your decision that Mr. Moniz
18 is trying to rehabilitate?

19 A. Again, I don't recall him taking that course. It's not
20 something that I committed to memory. However, I can say that
21 I considered the positive factors in his case when making a
22 decision.

23 Q. You're aware that Mr. Moniz has been detained with ICE
24 since December of 2018, correct?

25 A. Yes. I believe actually it was 2017 that he was released

1 to our custody.

2 Q. You believe it was December 2017 that he's been in ICE
3 custody?

4 A. I don't know the month. I just know that he came into ICE
5 custody in December of 2017 per the records that I can recall
6 offhand.

7 Q. Are you sure that he was -- is that your testimony, that
8 he was released to ICE?

9 A. I believe so, but again, again I'm not entirely 100
10 percent sure.

11 Q. So you don't know one way or the other?

12 A. As I mentioned before, my recollection of the record is
13 that he was convicted in December of 2016 and was released to
14 ICE custody in 2017. I think I mentioned that previously in
15 response to your questions.

16 Q. Since being in ICE detention, have you considered Mr.
17 Moniz's good behavior in detention?

18 A. Like I mentioned, I have considered all the positive
19 equities in his case.

20 Q. So you understand that he has cooking responsibilities in
21 detention?

22 A. I don't recall that offhand. I don't have that committed
23 to memory at this time.

24 Q. You understand that he has cleaning responsibilities while
25 he's in detention?

1 A. I don't have that committed to memory.

2 Q. You understand that due to his good behavior that he has
3 his own cell; he doesn't have to share a cell?

4 A. Again, I don't have that committed to memory, and I
5 considered all the positive equities in this case.

6 Q. You understand that the correctional facility that he was
7 serving his time in, Mr. Moniz was released a few months early
8 due to good behavior. Did you consider that?

9 A. Again, I considered all the positive equities in his case
10 that I was aware of.

11 Q. In this notice, this paragraph that says, "In addition
12 to," talks about the travel document. This statement says, "In
13 addition to determining that your release would pose a danger
14 to the community and the safety of others, ICE has determined
15 that you are not suitable for release because ICE is currently
16 working with the government of Cape Verde to secure a travel
17 document." Did you write this sentence?

18 A. I did not write that sentence.

19 Q. What does "not suitable for release" mean?

20 A. He is not, in ICE's opinion, amenable to being released
21 because he presents a danger to the community.

22 Q. Focusing on just the travel document, so you didn't have
23 the authority to release Mr. Moniz, right, because of the
24 likelihood of the travel document?

25 A. Both factors. Again, you know, it's a holistic approach

1 to case management in making a custody determination. We take
2 a look at the positive equities, whether or not there is a
3 public interest for this individual to be released, the
4 availability of a travel document and his criminal history.

5 Q. Mr. Bernacke, in making your decision you never spoke to
6 Mr. Moniz, correct?

7 A. No.

8 Q. Never spoke to Mrs. Moniz, correct?

9 A. No, ma'am.

10 Q. You never spoke to anybody from Mr. Moniz's family before
11 about the case, correct?

12 A. No, ma'am.

13 Q. All right. Mr. Bernacke, you mentioned the provisional
14 waiver process. Do you recall that?

15 A. I think I mentioned the provisional waiver but not the
16 process.

17 Q. Okay. Are you familiar with the provisional waiver
18 process?

19 A. In a rudimentary sense.

20 Q. What's your understanding of what that process is?

21 A. It is contingent upon the filing of an I-130, I believe
22 also an I-601 or I-212, whether or not the individual has been
23 selected for a diversity visa, the amount of time they've
24 accrued with the unlawful presence here in the United States,
25 and some other factors that I'm not aware of offhand.

1 THE COURT: Excuse me. Is that -- when did you
2 develop that understanding of the provisional waiver process,
3 before you became alerted to this case or since?

4 THE WITNESS: Since I became alerted to it. I've
5 known about I-601s and I-212s in the past as that is a question
6 that frequently comes up with individuals who are subject to
7 removal. So I had a very nascent understanding of the process
8 but a little bit more fidelity at this point in time.

9 THE COURT: Well, you may want to pursue that. Go
10 ahead, or not.

11 BY MS. CANTIN:

12 Q. What's your understanding of the purpose of the
13 provisional waiver process?

14 A. It's to waive the removability of an individual so they
15 could re-enter the United States or potentially stay here if
16 they're currently present. Also to ensure family unification
17 during the pendency of an immigrant visa. That way consulate
18 processing is no longer necessary.

19 Q. Could you remind me, what did you just testify to, when
20 was the first time you heard about the provisional waiver
21 process?

22 A. When I first became a deportation officer. I would have
23 to say around 2009.

24 Q. And when did you hear about it again in connection with
25 this litigation?

1 A. Last month.

2 Q. You testified earlier that you considered Mr. Moniz's
3 pursuit of the provisional waiver process in making this
4 decision to continue detention; is that right?

5 A. Correct.

6 Q. Where is that consideration reflected in your decision to
7 continue detention?

8 A. I would say -- if you can move the paperwork up a little
9 bit. It would be in the paragraph that starts with, "ICE
10 acknowledges the favorable factors present in favor of your
11 release." I think that's subsumed in that paragraph.

12 Q. Do you know if Mr. Moniz has applied for an I-130?

13 A. I am aware of that.

14 Q. Did you consider that?

15 A. Yes.

16 Q. Do you know if Mr. Moniz's I-130 has been approved?

17 A. I don't know the status of the I-130 at this point in
18 time.

19 Q. You don't know that?

20 A. No, ma'am.

21 Q. You don't understand that I-130 is the first step in the
22 provisional waiver process?

23 A. Yes, ma'am.

24 Q. Do you know whether Mr. Moniz has applied for an I-212?

25 A. I don't know that.

1 Q. Do you know whether Mr. Moniz has an approved I-212?

2 A. I don't know.

3 Q. Do you know whether Mr. Moniz has applied for an I-601A?

4 A. I don't know.

5 Q. So you don't know whether he has an approved I-601A?

6 A. No, ma'am.

7 Q. You say you considered the provisional waiver process that
8 Mr. Moniz is embarking on.

9 A. Yes, ma'am.

10 Q. But you don't know what stage of the provisional waiver
11 process he's at, correct?

12 A. I do not. I do know that he is seeking one.

13 Q. Mr. Bernacke, what training if any have you received on
14 the provisional waiver process?

15 A. None.

16 Q. What training have you provided on the provisional waiver
17 process?

18 A. None. It's something that's adjudicated by USCIS and
19 tangentially associated with ICE, which is why there is a lack
20 of availability of training.

21 Q. Mr. Bernacke, did Mr. Moniz receive a 90-day review?

22 A. I believe so.

23 Q. Did ICE give Mr. Moniz notice of that review?

24 A. That's something within the jurisdiction of the Boston
25 field office. That's something that I don't control or manage,

1 so I'm unaware.

2 Q. So you do not know?

3 A. Yes.

4 Q. So you're not aware that Mr. Moniz was given notice of his
5 90-day review nearly 90 days before the review occurred?

6 A. I was unaware of that.

7 Q. As you sit here today, do you have the authority to
8 release Mr. Moniz?

9 A. Yes.

10 Q. Mr. Bernacke, are you aware that last year this court,
11 Judge Wolf, concluded that there were systemic violations of
12 Section 241.4 by ICE?

13 A. I am aware. I think those were within the scope of the
14 Boston field office.

15 Q. What is your understanding of the violations that this
16 court found last year?

17 A. My understanding is that there were late notices to the
18 individuals, to the detainees, that the 90-day notices were
19 also I believe issued late as well.

20 Q. Did you read this court's June 11, 2018 order regarding
21 the violations of the POOCR regulations?

22 A. Yes, ma'am. Yes, ma'am.

23 Q. You read it?

24 A. Yes, ma'am.

25 Q. When did you read that order?

1 A. Yesterday.

2 Q. Before yesterday had you ever read that order?

3 A. No, ma'am.

4 Q. Were you involved in the decision last summer to release
5 dozens of people who were deprived of the reviews required by
6 241.4?

7 A. If I could, I just want to indicate, for the order that
8 you just mentioned, the June 2018, I'm unsure of the month. I
9 do want to clarify that. I don't recall when the order was
10 issued.

11 Q. Do you recall reading an order about violations of POCR
12 regulations?

13 A. I do, with a Brazilian national who was arrested at the
14 USCIS office, if that's the same one that you're referring to.

15 THE COURT: I believe it is.

16 Q. I apologize. Did you answer the question, were you
17 involved in the decision last summer to release dozens of
18 people who were deprived of the reviews guaranteed by 241.4?

19 A. Not that I recall.

20 Q. Is it appropriate for ICE to take action in response to
21 violations of 241.4?

22 A. I believe it is ICE's obligation to correct actions where
23 some level of impropriety was found, or I guess erroneous
24 application of law.

25 Q. After the court found those violations in June 2018, what

1 corrective action if any did ICE take to rectify those
2 violations?

3 MS. LARAKERS: Objection. There has not been a
4 foundation laid for that because he didn't testify about even
5 knowing or being involved in any process after those POCR --
6 after this court's order.

7 THE COURT: I thought his testimony was that he's
8 responsible within ICE for assuring compliance of 241.4.

9 MS. LARAKERS: Yes, he is, Your Honor, but he didn't
10 testify -- I think her question assumes that he knew about this
11 court's order prior to when he stated he did.

12 THE COURT: Why don't you amplify the foundation,
13 please.

14 BY MS. CANTIN:

15 Q. Mr. Bernacke, you testified earlier that you're the person
16 at ICE headquarters responsible for ensuring compliance with
17 241.4, correct?

18 A. I am one of the people, again, as I mentioned prior, in
19 prior questions, I am responsible for 44 countries, for removal
20 responsibilities and case management responsibilities for 44
21 countries. I don't recall the nationals subject to that order
22 being within my custodial purview at ICE. I think they were
23 all handled at the Boston field office level. So no, I was not
24 involved in that to my recollection.

25 Q. Since then you've become aware that that court found

1 violations of 241.4 last summer?

2 A. Yes, ma'am.

3 Q. Are you aware of any corrective action that ICE has
4 undertaken to remedy those violations?

5 A. Again, that was within the purview of the Boston field
6 office. I do not work for the Boston field office, so I am
7 unaware.

8 Q. So you were unaware?

9 A. Yes, ma'am.

10 Q. So headquarters did not do anything in response to the
11 court's order finding violations of 241.4?

12 A. I couldn't tell you. Again, it was within the Boston
13 field office. I don't manage the Boston field office. So if
14 any remediative actions were taken at ICE headquarters, I was
15 not involved.

16 Q. Who at the Boston ERO, if anybody, would have been
17 responsible for rectifying those violations?

18 A. I have to imagine the chain of command at the management
19 team at the Boston field office.

20 Q. Is that Mr. Charles?

21 A. He is one of those individuals.

22 Q. Is it Mr. Lyons?

23 A. He is one of those individuals as well.

24 Q. Is there anybody above Mr. Charles that would have been
25 responsible for taking corrective action?

1 A. Not at the Boston field office, no.

2 Q. Are you aware that other judges in the District of
3 Massachusetts have found that violations have occurred with
4 respect to 241.4?

5 A. I was unaware of that.

6 Q. Has anybody -- have you ever been reprimanded or
7 disciplined in connection with these findings of violations?

8 A. No, ma'am.

9 Q. Are you aware of anybody else at ICE headquarters that has
10 been reprimanded or disciplined in connection with these POCR
11 violations?

12 A. I'm unaware.

13 Q. Are you aware that there is a present show cause motion
14 pending that the petitioners have filed?

15 A. I'm unaware of that.

16 Q. Are you aware that one year later petitioners allege that
17 ICE continues to systematically violate Section 241.4?

18 A. Yes.

19 Q. When did you become aware of petitioners' contentions that
20 ICE continues to systematically violate Section 241.4?

21 A. September 2019.

22 Q. When you were ordered to redo the custody review of
23 Mr. Moniz?

24 A. When I -- when I became aware of the litigation that he is
25 involved in.

1 Q. What's your understanding of the violations that
2 petitioners are currently alleging to have occurred with
3 respect to the six detainees?

4 A. As far as I know -- I am unaware of the specifics right
5 now. I really couldn't tell you with any degree of certainty.
6 I know the interview process is involved with that, but I don't
7 know the specifics of the other allegations at this point in
8 time --

9 Q. But you understand -- I apologize. Please continue.

10 A. No. I just don't have them committed to memory.

11 Q. So you understand ICE violated the interview requirement
12 in connection with the 180-day custody review?

13 A. I am aware that is an allegation.

14 Q. No interviews occurred, right?

15 A. To my knowledge, no.

16 Q. After receiving notice that petitioners have alleged
17 systematic violations, did you investigate any of petitioners'
18 claims?

19 A. Can you specify a little bit, please?

20 Q. Sure. After you became aware that petitioners have
21 alleged ICE is systematically violating the 180-day custody
22 review process, did you investigate any of petitioners' claims?

23 A. If there's an allegation of wrongdoing, it's not within my
24 jurisdiction to do that. We have an Office of Professional
25 Responsibility internal affairs department that addresses those

1 sorts of violations.

2 Q. Even though you're the person responsible for ensuring
3 that ICE is complying with these POOCR regulations?

4 A. Again, this is a -- can you specify a little bit before I
5 answer that?

6 Q. Sure. You said there is somebody else at ICE whose
7 responsibility it is to deal with these contentions, but you
8 also testified that you're the person at ICE headquarters that
9 is responsible for ensuring that ICE is complying with the POOCR
10 regulations.

11 A. Right. I believe these are allegations at this point in
12 time. There hasn't been a finding of any wrongdoing, so I
13 don't believe that corrective action has been taken as a result
14 of that.

15 Q. Are you aware of anybody at ICE headquarters that is
16 looking into whether these violations have been regulated?

17 A. I'm not aware, no.

18 THE COURT: Can I get something clarified? You
19 mentioned an Office of Professional Responsibility, right?

20 THE WITNESS: Yes, sir.

21 THE COURT: Is it the duty of the Office of
22 Professional Responsibility to decide whether a particular
23 officer or employee of ICE engaged in some misconduct and then
24 decide what sanction if any should be imposed?

25 THE WITNESS: Correct. That's my understanding.

1 THE COURT: And is it called OPR?

2 THE WITNESS: Yes, sir.

3 THE COURT: Okay. So is OPR's -- does OPR focus on
4 discrete possible violations by individuals?

5 THE WITNESS: That is my understanding, yes.

6 THE COURT: Okay. But with regard to whether there
7 should be training or additional training, is that the
8 responsibility of OPR?

9 THE WITNESS: I'm sure that could be a finding that
10 results from one of their investigations.

11 THE COURT: Additional training for a particular
12 individual?

13 THE WITNESS: Yes, sir.

14 THE COURT: But what about systemic improved training;
15 is that OPR's responsibility?

16 THE WITNESS: I think it depends on the scope, if it's
17 a team of employees, small team of employees, or if it's bigger
18 than that.

19 THE COURT: And if it's bigger than that, whose
20 responsibility is it to train officers to comply with the law?

21 THE WITNESS: I don't know if I understand your
22 question, sir.

23 THE COURT: Well, let me make it a little more
24 concrete. Do you understand a regulation is a law?

25 THE WITNESS: It is a regulation derived from statute.

1 THE COURT: I'm telling you.

2 THE WITNESS: Yes.

3 THE COURT: I'll help you.

4 THE WITNESS: Okay. Thank you.

5 THE COURT: Did you also read my September 2018
6 decision in this case?

7 THE WITNESS: Was that a verbal decision, oral
8 decision?

9 THE COURT: It was verbal, then it was written.

10 THE WITNESS: Okay. Yes, I did.

11 THE COURT: And do you remember I reiterated the fact
12 that a regulation is a law?

13 THE WITNESS: Correct.

14 THE COURT: So if a person violated a regulation, he
15 violated the law. Do you understand that?

16 THE WITNESS: Yes, sir.

17 THE COURT: And if -- and do you understand that
18 Section (i) (3) (1) requires a personal interview in certain
19 circumstances?

20 THE WITNESS: I do understand that.

21 THE COURT: And it was your testimony that until this
22 case came to your attention about a month ago, no such
23 interviews were conducted by ICE?

24 THE WITNESS: Correct.

25 THE COURT: And whose responsibility at ICE is it to

1 rectify that?

2 THE WITNESS: The management leadership team at ICE,
3 director on down.

4 THE COURT: Do you have responsibility for that?

5 THE WITNESS: I do.

6 THE COURT: Have you initiated any action to keep the
7 people under your supervision from repeatedly violating the
8 law?

9 THE WITNESS: I have discussed potential policy
10 rectifications issues with counsel. Those are currently a
11 deliberative process at this point in time.

12 THE COURT: But you haven't done anything -- have you
13 done anything else?

14 THE WITNESS: Not yet, no.

15 THE COURT: So as far as you know, everybody under
16 your supervision continues to violate the law by not giving
17 these personal interviews when the regulation requires them?

18 THE WITNESS: We are continuing with past practice at
19 this point in time.

20 THE COURT: You made a decision to detain -- to detain
21 some of the aliens in this case and other aliens over the years
22 because they broke the law, correct?

23 THE WITNESS: Correct.

24 THE COURT: And you read my June 2018 decision where I
25 found that ICE in Boston was ignorant of the requirements of

1 the POCR regulation and violating the law repeatedly, correct?

2 THE WITNESS: Correct.

3 THE COURT: And do you understand that my
4 understanding of your testimony today is that you and everybody
5 you're responsible for supervising has been violating this law
6 that requires personal interviews in certain circumstances?

7 THE WITNESS: As I mentioned, we are taking steps to
8 rectify the issue.

9 THE COURT: Well, actually you didn't say that. You
10 said you spoke to counsel.

11 THE WITNESS: Again, to initiate a process to rectify
12 the issue.

13 THE COURT: Have you sent a notice out to all of your
14 people saying that if an alien is not recommended for relief, a
15 relief panel should personally interview the detainee?

16 THE WITNESS: At this point in time, no. Again, I
17 mentioned that we are taking steps to rectify the issue.

18 THE COURT: What steps?

19 THE WITNESS: We're taking steps to take another look
20 at the regulation. Again, I don't know how much I can mention,
21 as it's all deliberative at this point in time.

22 THE COURT: Well, talking to lawyers is not a step to
23 rectify it.

24 THE WITNESS: There are implementation procedures that
25 we have to go about. That includes training, that includes

1 guidance to the field, guidance to headquarters, et cetera.

2 THE COURT: You haven't provided any guidance to the
3 field?

4 THE WITNESS: Not yet, no.

5 THE COURT: So you've read this regulation now.

6 THE WITNESS: Yes, sir.

7 THE COURT: And have you discussed it with counsel?

8 THE WITNESS: Yes, sir.

9 THE COURT: And do you think you have an understanding
10 of it now?

11 THE WITNESS: Yes, sir.

12 THE COURT: And about how many detainees a week or a
13 month would you say are entitled to interviews under the
14 regulation, roughly?

15 THE WITNESS: It would be a shot in the dark if I were
16 to estimate that number, sir.

17 THE COURT: Why?

18 THE WITNESS: Again, I only handle 44 countries.
19 There's about 200 countries on the planet.

20 THE COURT: So for your 44 countries, about how many a
21 week or a month would it be?

22 THE WITNESS: I believe I mentioned earlier anywhere
23 from less than five to ten a week.

24 THE COURT: Okay. So let's say it's five a week,
25 minimum. So that's at least 20 a month, right?

1 THE WITNESS: I believe so.

2 THE COURT: And you learned about this regulation
3 about a month ago, right?

4 THE WITNESS: Yes, sir.

5 THE COURT: So is it essentially correct for me to
6 understand there are probably at least 20 people whose legal
7 rights have been violated in the last month and you haven't yet
8 taken any steps to stop that?

9 THE WITNESS: I believe I mentioned that we -- I have
10 taken steps to ameliorate that situation.

11 THE COURT: Well, have you communicated -- you've had
12 discussions that should lead to a process to send -- you know,
13 to provide the interviews. Is that what I should understand?

14 THE WITNESS: I don't know how much specificity I can
15 get into --

16 THE COURT: Look, if your lawyers want to assert a
17 deliberative process privilege, I know what a deliberative
18 process privilege is. I'm not asking you what your
19 communications were to lawyers or others at ICE. I'm asking
20 about what's been done.

21 THE WITNESS: We have not effectuated any change at
22 this point in time.

23 THE COURT: And I think you may have been asked this
24 before. It says, "If the HQPDU director does not accept the
25 panel's recommendation to grant release after a records review

1 or if the alien is not recommended for release, a review panel
2 shall personally interview the detainee." Who is the HQPDU
3 director?

4 THE WITNESS: Again, I think I mentioned that that was
5 a legacy INS term. In this case I made the custody decision
6 for Mr. Moniz.

7 THE COURT: Okay. So is it your understanding that
8 for the purposes of this regulation you're the HQPDU?

9 THE WITNESS: For the purposes of this case, yes.

10 THE COURT: And is there a review panel to personally
11 interview detainees?

12 THE WITNESS: I believe the regulation states that
13 it's professional members of the service. So I believe those
14 can be identified amongst any ICE personnel who is involved and
15 has the legal authority to conduct these sorts of reviews.

16 THE COURT: You think there's another part of the
17 regulation that defines the review panel?

18 THE WITNESS: I think it's part of the same sentence
19 in that particular section of the regulations.

20 THE COURT: You may continue.

21 BY MS. CANTIN:

22 Q. Picking up where the court left off, I had a few more
23 questions just about the review panel. Is the review panel
24 consistent -- should it consist of people at the Boston ERO or
25 people at headquarters?

1 A. I don't believe that I'm in a position to recommend who
2 the personnel are. Regulations provide for professional staff
3 of the service. I think that is the verbiage in the
4 regulation. I don't know if I'm in a position to make a policy
5 call on that.

6 Q. So you don't know who the review panel is; is that right?

7 A. For purpose of this case or in general?

8 Q. For the purposes of the regulations.

9 A. Again, it's professional staff of the service. That's
10 what the regulation provides for.

11 Q. Is it your position that ICE hasn't complied with Section
12 241.4?

13 A. I believe that is the allegation. Again, as I mentioned
14 earlier in testimony, I think federal agencies are subject and
15 should comply with regulations.

16 Q. Has ICE complied with Section 241.4?

17 A. I believe that is currently being litigated in court, so
18 I'm not really in a position to make that determination.

19 Q. ICE doesn't have the ability to comply with Section 241.4,
20 correct?

21 A. Again, again, that is something that we are taking steps
22 to ameliorate. That's my answer.

23 Q. Are you aware the court held an August 27, 2019 hearing in
24 this case?

25 A. I'm unaware of that.

1 Q. So you're not aware that after that hearing the court
2 expressed a tentative view that ICE had in fact committed
3 violations of the POOCR regulations?

4 A. Again, I don't recall that offhand. I may have read it
5 somewhere, but I don't recall that offhand.

6 Q. So you were not disciplined or reprimanded at any point in
7 connection with those tentative findings from August 2019,
8 correct?

9 A. No.

10 Q. Just two final questions, Mr. Bernacke. What is Heath
11 Simon's position at the Boston ERO? Excuse me, headquarters.

12 A. He's unit chief.

13 Q. What does that mean?

14 A. Supervisor to detention and deportation officers. He
15 holds the same position I do.

16 Q. So he's your counterpart?

17 A. He is.

18 Q. And Mr. Greenbaum's position?

19 A. He is -- at the time he rendered the decision in this case
20 he was acting unit chief. Again, one of my counterparts.

21 MS. CANTIN: Pass the witness.

22 THE COURT: Okay. It's 12:45. Would counsel like to
23 at least begin examining? Do you have any questions?

24 MS. LARAKERS: Yes, Your Honor. Just a few. I think
25 we can wrap it up.

1 THE COURT: Okay.

2 CROSS-EXAMINATION BY MS. LARAKERS:

3 Q. Okay. Mr. Bernacke, you're seeing what's been marked as
4 Exhibit 7. If you see in the paragraph that starts, "However,"
5 it says that "ICE also notes the serious negative factors that
6 weigh in favor of continued detention and demonstrate that your
7 release would pose a danger to the community and to the safety
8 of others."

9 A. Yes, ma'am.

10 Q. Is that a determination that you made?

11 A. It is.

12 Q. And why did you make that determination?

13 A. Due to his criminal record. He was convicted of, as it
14 states in the paragraph, armed assault with intent to murder,
15 assault with a dangerous weapon, two counts, possession of a
16 firearm without an FID card.

17 THE COURT: Here. This all has to be written down, so
18 speak more slowly and more clearly, please.

19 THE WITNESS: Yes, sir. Will do.

20 A. So the paragraph which I concurred with states that the
21 individual, that Mr. Moniz has a criminal record that includes
22 convictions for armed assault with the intent to murder,
23 assault with a dangerous weapon, which is two counts,
24 possession of a firearm without an FID card and malicious
25 destruction of property.

1 Q. Do the regulations permit you to release someone if you
2 believe they are likely to pose a threat to the community
3 following release?

4 A. No. And it also bars me from releasing individuals who
5 are violent, and I would say that in my judgment that these are
6 violent crimes.

7 Q. Do you know if Mr. Moniz had a pending Form I-130
8 application when you were making the decision to detain him?

9 A. Yes, I was aware that he had a provisional waiver pending.

10 Q. Does the fact that he had a pending I-130 reflect a
11 manifestation of the public interest in your opinion?

12 A. It does.

13 Q. Then did you consider the public interest when deciding
14 whether to detain Mr. Moniz?

15 A. I did. Again, as I mentioned before, I considered the
16 fact that he has an ailing mother, he has a U.S. citizen
17 spouse, child, that he has been baptized into a church and is
18 attending church, a number of factors that were elaborated
19 upon.

20 I feel that public interest is sort of a two-way street in
21 that the public interest would not be served if a violent
22 criminal was released pending removal from the United States.

23 Q. Does the stage in Mr. Moniz's provisional waiver process,
24 would that have impacted your decision to detain him?

25 A. Again, I take a holistic approach towards these decisions

1 where I'm looking at all the facts of the case. That includes,
2 you know, the presence of a provisional waiver. If the waiver
3 had been granted and posed to be an impediment to removal,
4 obviously I would have released that person, allowed that
5 person to adjust status.

6 MS. LARAKERS: Okay. That's all I have, Your Honor.

7 THE COURT: Is there any further direct?

8 MS. CANTIN: Very few short questions, Your Honor.

9 REDIRECT EXAMINATION BY MS. CANTIN:

10 Q. Mr. Bernacke, you think that Mr. Moniz poses a danger to
11 the community, correct?

12 A. Yes.

13 Q. You understand he served time for his convictions,
14 correct?

15 A. I do.

16 Q. You understand that our state prison system released
17 Mr. Moniz, correct?

18 A. I do.

19 Q. You understand that he was released one to two months
20 early, in advance of when he was supposed to be released, for
21 good behavior, correct?

22 A. I do. However, the regulations do not permit me to
23 release a violent individual, and I do believe that he does
24 pose a danger to the community. These convictions occurred
25 less than three years ago.

1 Q. You testified that you considered the provisional waiver
2 process in your decision to continue detention, correct?

3 A. Yes, ma'am.

4 Q. You knew that the completeness of your custody review
5 would be at issue today, correct?

6 A. Correct.

7 Q. You knew you would be testifying about whether you took a
8 holistic approach to that review, correct?

9 A. Correct.

10 Q. You studied Mr. Moniz's file yesterday, correct?

11 A. I reviewed it during the custody decision that I made at
12 the time.

13 Q. Did you study his file yesterday?

14 A. I reviewed it.

15 Q. You looked at your decision again, correct?

16 A. Yes, ma'am.

17 Q. You assessed where the provisional waiver would fit into
18 that letter, correct?

19 A. I did, at the time that I made the custody determination.

20 Q. At the time you made the custody review determination, you
21 considered the provisional waiver?

22 A. Yes. I also considered his criminal history, which is
23 very serious.

24 MS. CANTIN: No further questions, Your Honor.

25 THE COURT: All right. Thank you. Your testimony is

1 complete. You're excused from the courtroom, but you shouldn't
2 leave. And you're still subject to the sequestration order,
3 the order I issued that directed you not to tell anybody what
4 you were asked or what you answered in this testimony. Okay?

5 THE WITNESS: Sounds good. Thank you.

6 THE COURT: All right. How do the parties each
7 propose we proceed from here after lunch?

8 MS. LARAKERS: So Your Honor, I think we've now heard
9 from two witnesses who have established at this juncture that
10 the threshold question that you had yesterday about whether
11 they considered the public interest about whether they made
12 their decision in good faith on September 19 to continue the
13 detention, we've heard testimony about that and the answer to
14 that question --

15 THE COURT: There's also another issue that I hadn't
16 been aware that has been emerged, and that is, if they didn't
17 follow the right process, the legally required process -- and I
18 don't know how this applies to any particular person, but if
19 you consider the right fact -- the findings of fact and
20 conclusions of law and if you don't follow the law that's
21 intended to generate information so a properly informed
22 decision can be made and then a court can defer to the
23 decision, that's an issue to be dealt with. And I didn't
24 anticipate it, so I haven't thought it through, but anyway, go
25 ahead.

1 MS. LARAKERS: So Your Honor, with regard to that
2 question, that is a question that needs to be addressed at the
3 November hearing because it goes to whether the right remedy is
4 release at that November hearing.

5 But here, where this particular motion is about
6 whether ICE did the process that this court ordered it to do on
7 September 19, which included, in Mr. Moniz's case, an interview
8 since ICE had failed to provide that before, you just heard
9 testimony that ICE did provide that interview. ICE did
10 consider the public interest in deciding to detain him. ICE
11 did consider that he had a pending I-130 as part of a
12 provisional waiver process. And ICE determined that it could
13 not release him based on the fact that it determined that he
14 was a threat to public safety. And based on that testimony,
15 that threshold question that this court had yesterday is
16 satisfied: ICE did conduct the review with regard to Mr. Moniz
17 in good faith, with regard to Ms. Rodriguez in good faith, with
18 regard to all of the individuals that ICE decided not to
19 release.

20 THE COURT: Okay. So you think I should not hear any
21 testimony from the detainees?

22 MS. LARAKERS: No, Your Honor. Not only do I think
23 that that's not appropriate at this stage because petitioners'
24 allegation here is that ICE didn't conduct a good faith review
25 that this court ordered and their second allegation being that

1 they are likely to succeed on the merits of their claim that
2 the remedy is release and because they would have to meet that
3 burden.

4 THE COURT: I think they're discrete issues. They
5 would have to show there's a reasonable -- if we put this in
6 the preliminary injunction/temporary restraining order
7 framework, they'd have to show there's a reasonable likelihood
8 they'll succeed on the merits of their claim that for a
9 particular detainee there's been a violation of the POCR
10 regulations and there's the threat of imminent irreparable
11 harm. And then I have to consider the public interest, which
12 -- the public interest, but if there's a reasonable likelihood
13 of success on the merits -- well, a balance of hardships, the
14 conventional factors. If there's a reasonable likelihood of
15 success on the merits and a threat of imminent or ongoing
16 irreparable harm, then I would have to decide what is the
17 equitable remedy. And I think one of the things they're asking
18 for is release, and another thing they're asking for is that I
19 conduct the bail -- the detention decision de novo myself.

20 So let me see what the petitioners -- how the
21 petitioners think we ought to proceed in the circumstances.
22 Well, go ahead.

23 MS. LARAKERS: So in that context, in that framework
24 that you're looking at, you're right; they not only would have
25 to show that they're likely to succeed on the merits of their

1 claim that there's been a violation of the POCR regulations but
2 also that the proper remedy for these three individuals here
3 would be release or bail hearing. And what this court has just
4 heard in the testimony is that even if there were public
5 interest present in their cases that ICE, under the
6 regulations, was not permitted to remove -- to release them
7 once they determined that they were a danger to the community
8 and of flight.

9 THE COURT: I'd have to look at that. But I will say
10 that it's axiomatic that it's in the public interest that the
11 government follow the law. And the whole idea of due process
12 is, procedural due process is if people are given an
13 opportunity and the opportunity to be heard provided by the
14 law, you know, they get a chance to present information and in
15 this case be interviewed, that the decision might be different
16 than it would be if the law were not violated. Anyway, let me
17 see how the petitioners propose we proceed today at this point.

18 MS. LAFAILLE: Your Honor, the testimony has confirmed
19 what we've been saying since we filed this motion. The
20 Post-Order Custody Regulations are being systematically
21 violated. The question of whether the reviews that were done
22 in September as an attempt to, you know, resolve issues in
23 litigation complied with the Post-Order Custody Regulations, of
24 course they didn't. ICE is not minimally set up, as we've just
25 heard, to conduct proper reviews. Mr. Bernacke doesn't even

1 know who is on the review panel, and, you know, talked about
2 how he -- he wouldn't be in a position to recommend who should
3 be on the panel.

4 THE COURT: Okay. It's very close to 1:00. What do
5 you propose, that I hear from the detainees today?

6 MS. LAFAILLE: Yes, I think we've demonstrated --

7 THE COURT: Okay, okay. That's what I'm going to do.
8 Because I don't know where this is going. We're here. There's
9 the threat of irreparable harm. I now have an issue that I
10 didn't foresee about, and it may just relate to Mr. Moniz. I
11 don't -- this has got to be sorted out. But we're here,
12 they're here. I'll permit questioning and cross-examination of
13 the detainees so the record will be complete, and then I'll
14 listen to you and probably have to take some time to think
15 about it to see where we are and where we're going. Okay?

16 MS. LAFAILLE: Your Honor --

17 THE COURT: And in what order would you like to hear
18 the detainees?

19 MS. LAFAILLE: Can I make a couple of points?

20 THE COURT: Yes, if they're housekeeping issues.

21 MS. LAFAILLE: Yes. So the attorney that represents
22 Mr. Moniz and Mr. Ferreira, two attorneys are here, and I think
23 it would make sense for them to handle the direct of their
24 clients.

25 THE COURT: I don't have a problem with that. Does

1 the government?

2 MS. LARAKERS: No, Your Honor.

3 THE COURT: That's fine.

4 MS. LAFAILLE: Okay. The other point I wanted to make
5 is just that the spouses of these three detainees are also here
6 and I think could also provide helpful testimony as to whether
7 they --

8 THE COURT: Yeah. I may --

9 MS. LAFAILLE: -- pose a danger of flight risk during
10 this interim period.

11 THE COURT: I might permit it. There's a limited
12 amount of time. And Monday is a holiday, I'm not going to be
13 back in the courthouse until Thursday. I've literally dropped
14 everything and rearranged my schedule for this week for this,
15 but it's going to have to be done quite efficiently, focused,
16 after lunch. I'll hear from the detainees, and if there's some
17 brief testimony from their spouses that is relevant and may be
18 helpful, if time permits, I'll do it. In what order do you
19 propose that the detainees be questioned?

20 MS. LAFAILLE: I propose that we start with
21 Mr. Ferreira.

22 THE COURT: Then who?

23 MS. LAFAILLE: Then perhaps Mr. Moniz, because their
24 counsel is here.

25 THE COURT: Then Ms. Rodriguez?

1 MS. LAFAILLE: Yes.

2 THE COURT: And do each have spouses that you propose
3 testify?

4 MS. LAFAILLE: Yes, Your Honor.

5 THE COURT: It's going to have to be very efficient,
6 like no more than 15 minutes a witness.

7 MS. LAFAILLE: Okay.

8 THE COURT: All right. It's 1:00. We'll resume at
9 2:00. Court is in recess.

10 Actually, I'm sorry to do this. I think it would be
11 useful for Mr. Charles and Mr. Bernacke to hear that testimony.
12 Is there any objection to that?

13 MS. LAFAILLE: No, Your Honor.

14 MS. LARAKERS: No, Your Honor.

15 THE COURT: Okay. They should be present in the
16 courtroom for that. Court is in recess.

17 (Recess taken 1:01 p.m. - 1:57 p.m.)

18 THE COURT: It's 2:00. We seem to be missing the
19 detainees. Why is that?

20 Hold on a second. Here they come. In the jury box,
21 please. Wait a second. I need all three of them.

22 All right. I had understood we were going to start
23 with Mr. Ferreira and then Mr. Moniz and then Ms. Rodriguez.
24 But is there a request to alter that?

25 MS. LAFAILLE: Yes, Your Honor, there is a request by

1 his counsel to start with Mr. Moniz.

2 THE COURT: Why is that?

3 MR. RUBIN: Good afternoon. May I approach the court?
4 My name is Jeff Rubin. I represent Elton Moniz. Basically he
5 speaks perfect English, Your Honor. I thought that maybe --
6 with the interpreter, to the extent that Mr. Ferreira and the
7 other detainees need an interpreter for the purpose of flow to
8 the court, but I will defer to Your Honor who you want to hear
9 from in any order.

10 THE COURT: Just a minute.

11 All right. I really do want to get through this, but
12 okay. If you'd like to start with Mr. Moniz, you may. Is
13 there another witness relating to him you would like to call?

14 MR. RUBIN: Your Honor, my partner Todd Pomerleau is
15 here. He's entered his appearance and he will directly --

16 THE COURT: No, no. Is there a Mrs. Moniz that you
17 want to present?

18 MR. RUBIN: Yes, please.

19 THE COURT: But, both sides, you're going to have to
20 be quite efficient, okay? Mr. Moniz, you should approach the
21 witness stand and be sworn.

22 MR. WEINTRAUB: Your Honor, before -- I apologize and
23 I realize that I run the risk of Your Honor's wrath, but could
24 I just be heard very briefly before we start?

25 THE COURT: Go ahead.

1 MR. WEINTRAUB: Your Honor, the purpose of this
2 hearing was to determine whether ICE complied with the court's
3 August 27 order to reexamine the individual's detention with an
4 open mind in considering the newly submitted material.

5 The court heard an awful lot today that relates to
6 matters that are more properly heard for November 4. The
7 testimony in this case, despite what else the court heard, in
8 all three instances the court heard that the ICE officer who
9 issued the decision considered the newly submitted material,
10 considered the equities and made the decision.

11 THE COURT: This is fine. You're reiterating.

12 MR. WEINTRAUB: What --

13 THE COURT: What's new? I heard that before, and I'm
14 not hearing argument on the merits today as to whether there
15 should be a remedy. I want a record that will permit me to
16 make all the decisions I need to make if I get to that decision
17 point. And quite frankly, we're going to have to examine in
18 careful detail the testimony I heard from Mr. Bernacke because
19 a process conducted by the person in Washington ultimately
20 responsible for the POCR reviews who doesn't know that there's
21 an obligation to give an interview raises a question about
22 whether the process leading up to the decision is correct and
23 whether the information required was available.

24 MR. WEINTRAUB: I will raise a new issue just to
25 clarify because I know Your Honor is interested in only new

1 items.

2 THE COURT: I'm interested in hearing the testimony.
3 Because I'm going out of the country on Sunday and every -- and
4 I want to have all the information necessary to make whatever
5 decisions I may need to make, and I may not need to rely on --

6 MR. WEINTRAUB: Your Honor, two of these individuals
7 have already had their interviews. It's undisputed that
8 Mr. Ferreira had an interview October 2. He wasn't eligible
9 prior because of his failure to comply, and Mr. Moniz had his
10 interview on September 9, and Ms. Rodriguez was never eligible.

11 THE COURT: Look, I appreciate this. It's an
12 amplification of what I considered before, and I don't
13 frankly -- you're saying maybe I should hear this on November
14 4th. I'm going to hear it now. You can be seated.

15 MR. WEINTRAUB: Thank you, Your Honor.

16 ELTON MONIZ, Sworn

17 THE COURT: Go ahead.

18 DIRECT EXAMINATION BY MR. RUBIN:

19 Q. Good afternoon, Mr. Moniz. Could you just tell the court
20 your name and how old you are.

21 A. Elton (inaudible) Moniz, and I'm 25 years old.

22 Q. And how long have you lived in the United States?

23 A. Since I was very young, five years old.

24 Q. And since you've been in the United States, have you gone
25 to school or had employment?

1 with regard to what I've heard today, yesterday and today?

2 MS. LAFAILLE: We're prepared to make argument in
3 support of interim release, Your Honor.

4 THE COURT: All right.

5 MS. LARAKERS: Your Honor, I'd just like to briefly
6 address the possibility of removing the individuals who have
7 been released. We've conferred about this issue quite a bit.
8 We've been unable to come to an agreement on it. ICE may very
9 well decide to release the individuals even after the November
10 4 hearing if they can take steps to remove them from the United
11 States.

12 THE COURT: Say this --

13 MS. LARAKERS: It is very -- it is important for ICE
14 to know this court's position with regard to removal.

15 THE COURT: With regard to who?

16 MS. LARAKERS: The three individuals who have been
17 released. ICE may -- if ICE had the green light from this
18 court to remove those individuals, ICE, even if that removal
19 didn't happen until after the November 4 hearing, ICE may
20 continue to release them, I guess is what I'm saying. So it's
21 very important for ICE to know the court's position with regard
22 to that.

23 THE COURT: And I mean, I heard you. You raised the
24 issue. I haven't -- the adversary process hasn't operated on
25 it, with regard to it, but that's a possibility.

1 MS. LARAKERS: Right. And of course, as you know, our
2 legal position is that we should be able to remove them since
3 they are released.

4 THE COURT: The issue, though -- and how many of those
5 that were released were eligible or received last month 180-day
6 reviews, two of them?

7 MS. LARAKERS: All three, Your Honor.

8 THE COURT: All three.

9 MS. LARAKERS: But one of those individuals, one of
10 those individuals was not provided -- in ICE's view was
11 provided the interview on time.

12 THE COURT: I mean, this is just thinking out loud.
13 If the process of determining that they should be removed was
14 flawed in some material way, that may be an impediment to their
15 removal. But I think this is an issue that needs some work.

16 MS. LARAKERS: Sure, Your Honor. I think our -- we
17 can certainly brief this, but our argument would look something
18 like this. That regardless of what's happened in the past,
19 regardless of their allegation that they didn't receive a
20 proper interview the first time around, ICE then conducted the
21 interview, the court heard evidence and extensive evidence
22 about what was considered when conducting that interview and
23 that decision to continue detention. And I think it's going to
24 be very hard for petitioners to argue that the right things
25 weren't considered prior to that detention decision.

1 And now that they're released, because that
2 consideration has been done more than once now, ICE should be
3 able to effectuate their removal. And removal in the case of
4 these aliens, it may look different. Some of them may want to
5 purchase their own plane tickets. Some of them may not want to
6 purchase their own plane tickets but would want to come into
7 ICE's custody for a short period of time in order to just put
8 them on a plane and remove them. But we would start from our
9 position that the court doesn't have jurisdiction to stay the
10 removal and then later that they're already released, they've
11 already gotten the ultimate relief they wanted --

12 THE COURT: So I mean, that's a preview of your
13 argument. Do the petitioners have any immediate reaction?

14 MS. LAFAILLE: Sure. So we actually haven't conferred
15 on this issue. At our September 10 status report we agreed to
16 defer the issue to see whether ICE released anyone. And then
17 in our subsequent status report we didn't confer about it
18 because ICE hadn't released anyone.

19 Our position is this is interim release, you know, so
20 these individuals are in custody. Their fate is to be decided
21 at the November 4 hearing along with the other individuals.
22 I'm not sure that it makes sense to tee this issue up now
23 separately from the others.

24 THE COURT: Well, I think the colloquy we just had
25 with Ms. Rodriguez also may be relevant. I think you need to

1 go back and talk to the petitioners.

2 First of all, you do need to confer. Second of all,
3 you know, it's possible that some of the petitioners having
4 been released and having a period of time with their families
5 and not seeing a path to avoid removal eventually would want to
6 go in an orderly way.

7 And I think -- the case is full of surprises. I'm
8 very surprised Mr. Bernacke didn't know that the regulations
9 that he's in charge of implementing nationwide required
10 interviews. It means that in the ten years he's been an
11 immigration officer, ICE has been violating the law, and these
12 people are getting removed or detained in part because they
13 violated the law.

14 But again, this is an equitable proceedings, clean
15 hands. But I don't know what the implications of that are, so
16 we're going to pause on that. Now, people have been released,
17 and that's a good thing. I, in the last year and a half,
18 discerned improvement in the performance of the Boston ICE
19 office. Now there are issues on a larger scale.

20 All right. I don't know that anything is going to get
21 decided today. It's 4:15. But I would like to hear your
22 argument with regard to this interim relief. It's possible
23 there will be some issues that require some further work by you
24 and then by me. But go ahead.

25 MS. LAFAILLE: So Your Honor, our primary argument is

1 that release is the equitable solution here. These
2 individuals, as I mentioned, have been detained for
3 extraordinarily long periods of time. Between the six
4 individuals who were in front of the court yesterday, in their
5 five years plus of detention, you know, putting aside these
6 reviews however we characterize them, they had received one --
7 between them all, one arguably appropriate custody review
8 between all of them.

9 THE COURT: Who got that?

10 MS. LAFAILLE: I believe that was Mr. Moniz's 90-day
11 review. The violations that we've seen in the face of the
12 government repeatedly saying to the court that it was complying
13 with the Post-Order Custody Regulations, what we've actually
14 seen are egregious violations being systematically repeated at
15 every stage of the process.

16 THE COURT: For example, what?

17 MS. LAFAILLE: For example, notice requirements not
18 being met at all.

19 THE COURT: Because they were giving notice in Boston
20 too soon?

21 MS. LAFAILLE: Of the 90-day reviews. Of the 180-day
22 reviews simply not sending notices.

23 THE COURT: They didn't send notices?

24 MS. LAFAILLE: No.

25 THE COURT: All right. This is useful. Go ahead.

1 Well, they didn't receive notices, so they didn't have
2 opportunities to present information until after the August 27
3 hearing.

4 MS. LAFAILLE: That's correct, Your Honor. Now, the
5 government argues that a sentence, when they are denied release
6 at the 90-day review, there is a sentence indicating that the
7 case will go to headquarters at 180 days. And the government
8 argues that that provides notice, but not all of them even
9 received that sentence in their 90-day reviews.

10 The requirements for revocations of release are
11 specific. They're not being followed systematically. They
12 require --

13 THE COURT: What specifically?

14 MS. LAFAILLE: So those are at 241.4(1), and a person
15 whose release is revoked three months after their detention is
16 supposed to have an interview. Again, these interviews aren't
17 happening.

18 And then the 90-day review, Your Honor, despite
19 everything we went through with Ms. De Souza last year having
20 had her review conducted before the opportunity, before the
21 deadline to submit documents, it's been a systematic practice
22 of ICE Boston to conduct reviews before the opportunities to
23 submit documents.

24 These violations are incredibly egregious, and I think
25 we'll have a lot to talk about in November. In the meantime, I

1 think release is equitable because this proceeding has been --
2 this motion for order to show cause has been ongoing since
3 July. It's complex. There are documents that I think we
4 should probably review before the November hearing. And, you
5 know, in the meantime, these families are separated. They've
6 been separated for an extraordinarily long time. And, you
7 know, I think if the court finds that there are conditions,
8 which I believe there are, that can safely release these
9 individuals --

10 THE COURT: Have you proposed conditions?

11 MS. LAFAILLE: I don't believe we've proposed specific
12 conditions. We did mention, with regards to -- I think our
13 last filing mentions the possibility with regards to Mr. Moniz
14 acknowledging his record being the most serious, despite all of
15 the growth that he's demonstrated, even something like house
16 arrest, Your Honor, would be incredibly meaningful to these
17 families.

18 THE COURT: If this were a criminal case and I were
19 making a decision under the bail statute, I'd have to decide
20 whether there were reasonable conditions proposed. Reasonable,
21 feasible conditions which would reasonably assure that the
22 defendant in that case would not be dangerous or flee in
23 essence. But it's done in the concrete context of specific
24 proposed conditions. Where will they live? Will they have
25 electronic monitoring? Will they be allowed to go out to work?

1 And yesterday, commendably, there was an agreement to
2 release three on what I was told were the standard conditions,
3 except the person didn't have to stay home a day a week, but
4 they were going to wear electronic monitoring devices, GPS
5 devices. But I don't know what the standard conditions are
6 myself. I know what they are in a criminal case but not in an
7 immigration case.

8 MS. LAFAILLE: This being --

9 THE COURT: I'm sorry. Go ahead.

10 MS. LAFAILLE: This being an equitable proceeding,
11 Your Honor, I think the court could impose those conditions
12 that it thinks are sufficient to protect the community and
13 prevent flight in this case.

14 THE COURT: I'd want to hear from the parties on the
15 conditions. You know, the government is going to argue that
16 whatever procedural defects, and there have been certainly some
17 glaring ones at the 180-day stage, they're cured because after
18 August 26, ICE received what the detainees wanted to submit,
19 and the decisionmaker consulted their lawyers, among others,
20 and they say considered everything in good faith that they
21 should have considered and decided to detain all six initially,
22 and now there are three left. So how do you respond to that?

23 MS. LAFAILLE: Well, I think there are several things
24 that make it clear that these reviews were not meaningful or
25 compliant with the law. The first is Mr. Bernacke's testimony

1 here today really makes clear that ICE is not even equipped to
2 comply with 241.4, Your Honor. They don't have review panels.
3 They're just simply not set up to comply with these
4 requirements. And, you know, the reviews that occurred could
5 not possibly have complied.

6 The second thing is the government's own submission in
7 this case. The government's submission indicates that the
8 reason for continuing the detention of these individuals was
9 the travel document.

10 THE COURT: Well, in fairness, that was part of it.

11 MS. LAFAILLE: Well, let me read to you from the
12 government's brief, Your Honor. "ICE's multiple reviews in
13 each of the detainee's cases confirmed its ability to
14 effectuate removal and by extension the detainee's
15 ineligibility for release."

16 THE COURT: What document are you reading?

17 MS. LAFAILLE: This is the most recent submission.

18 THE COURT: The one made Monday?

19 MS. LAFAILLE: I'm sorry, not the most recent one.

20 Docket 377 at page 14.

21 THE COURT: See if you can find that in here, please.
22 What date was that filed?

23 MS. LAFAILLE: I believe October 1.

24 THE COURT: October 1. Where were you reading?

25 MS. LAFAILLE: The top of page 14.

1 THE COURT: Where it says, "ICE's multiple reviews in
2 each of the detainee's cases confirmed its ability to
3 effectuate removal and by extension the detainee's
4 ineligibility for release."

5 MS. LAFAILLE: I mean, to put a finer point on this,
6 ICE just found that three of the individuals that just a couple
7 of weeks ago it thought were ineligible for release, in fact,
8 you know, posed no flight risk or danger and could be released.
9 That itself is a testament to the fact that they didn't really
10 conduct meaningful reviews.

11 THE COURT: Well, I said yesterday that that was not
12 going to be considered a waiver of any of their positions, and
13 I doubt it would be fair for me to rely on the argument you
14 just made.

15 MS. LAFAILLE: Very well. Then let me point to
16 something interesting that Mr. Bernacke said when asked -- you
17 know, of course they know they're here to testify to the
18 completeness of their reviews.

19 THE COURT: Hold on a second. What number?

20 MS. LAFAILLE: 377, Your Honor. I think the
21 unredacted versions have been getting docketed as essentially
22 exhibits --

23 THE COURT: I can't hear you.

24 MS. LAFAILLE: I think the unredacted versions have
25 been getting documented essentially as exhibits under the

1 same --

2 THE COURT: Like 377-1?

3 MS. LAFAILLE: I think that's right.

4 THE COURT: Go ahead.

5 MS. LAFAILLE: Again, I really don't think the
6 legitimacy of the September reviews is by any means the key to
7 our argument here. You know, I really rest on the underlying
8 year of --

9 THE COURT: I thought you were going to tell me that
10 Mr. Bernacke said something really interesting.

11 MS. LAFAILLE: Yes. You know, when he wasn't focusing
12 on the fact that he knew that he had to testify to the
13 completeness of his review, when he was just asked what was the
14 deadline to complete your review, he said September 19; that
15 was the date that we had to ascertain whether or not there was
16 ability to remove.

17 That's what this review was. There was nothing these
18 petitioners could have submitted, Your Honor. This was a
19 review based on ability to remove. And the government only
20 began saying otherwise after we filed our motion for interim
21 release.

22 THE COURT: And ability to remove means ability to
23 either have documents or get them soon.

24 MS. LAFAILLE: Right.

25 THE COURT: As you understand it.

1 MS. LAFAILLE: Right, perceived ability at least. But
2 even putting that aside, Your Honor, I don't think -- the
3 September reviews were a chance for the government to narrow
4 the issues in dispute, not a chance for them to overcome the
5 merits of our legal arguments, and you know, I think the
6 pattern here is of systemic violations. Even given the chance
7 to do it right, they didn't.

8 But we're talking here about interim release. This is
9 a complex set of issues. I think the court has given it a lot
10 of attention, and I think there will be further proceedings.
11 And in the meantime, we have three families that, you know,
12 just need to catch a break and have a moment to be together and
13 even to do some of the things that they've been prevented from
14 doing while in ICE custody to strengthen their immigration
15 cases, such as being able to work on their immigration
16 petitions and things like that that might ultimately help
17 persuade the government not to remove them.

18 THE COURT: I just want to think this through. So if
19 they're released on an interim basis, then their hearing is
20 scheduled for November 4 and 5. I think you have a fuller,
21 more detailed sense of what the agenda for that should be than
22 I do at the moment, and then what relief are you seeking at
23 that hearing?

24 MS. LAFAILLE: At that hearing we're seeking their
25 release.

1 THE COURT: From detention.

2 MS. LAFAILLE: Yes, Your Honor.

3 THE COURT: And you keep saying you're not seeking an
4 order barring their removal.

5 MS. LAFAILLE: We're not at this time seeking that. I
6 do think, though, that some consideration has to be given to
7 the remedy to prevent essentially retaliatory or a re-detention
8 that would really vitiate the relief given. So, you know, I
9 don't think it would be appropriate for ICE to re-detain them
10 the next day for removal. I think that kind of thing would,
11 you know, clearly deprive them of the equitable remedy to which
12 they're entitled.

13 THE COURT: Well --

14 MS. LAFAILLE: I see that more as perhaps a condition
15 of release, a report date given or something in that.

16 THE COURT: So they would be released -- I mean, this
17 is of substantial practical as well as legal importance. So
18 they get released. Let's say you prevail. Because there
19 appeared to me, based on what I heard, to be more defects in
20 the process than I anticipated or recognized. But the idea
21 would be, your argument I think essentially is, whether it's
22 today or November 4, there are conditions on which each of the
23 now three but all six can be detained pending -- I'm sorry --
24 can be released pending some reasonable date in the future for
25 their removal?

1 MS. LAFAILLE: Yes, Your Honor. And understanding
2 that --

3 THE COURT: But that's what this is about, right?

4 MS. LAFAILLE: Yes.

5 THE COURT: Did I understand you correctly? You think
6 basically these people should be released until their removal
7 can be scheduled -- not tomorrow, and I don't know how I might
8 define reasonable -- and then they could be removed.

9 MS. LAFAILLE: Right, Your Honor. And I say that
10 without giving up any challenges to their removal that they
11 might have or that we might have but simply as a matter of how
12 -- the resolution of this motion.

13 THE COURT: Well, challenges to removal they may have
14 they wouldn't be bringing in this case in this court, correct?
15 You said they may have or you as class counsel may have. So
16 I'm trying to understand where all of this is going, what's at
17 stake. So they could pursue remedies in the -- well, what does
18 it mean --

19 MS. LAFAILLE: Right. The same remedies they might
20 otherwise have been able to pursue as three Calderon class
21 members being subjected to removal. You know, if they think
22 that the provisional waiver regulations are not being complied
23 with or if we think they're not or if they wish to apply to ICE
24 's discretion for stays of removal or, you know, avail
25 themselves of other legal remedies, I think that's separate and

1 apart from this motion.

2 THE COURT: The motion for interim relief or the
3 motion for relief --

4 MS. LAFAILLE: Both, Your Honor.

5 THE COURT: Both. So you would be preserving
6 arguments you may have that either there's a systematic failure
7 to follow 241.4, if it's the applicable regulation, which I'm
8 skeptical about, but that issue -- well, anyway -- or in some
9 individual case there was proper basis to argue that the
10 provisional waiver provision wasn't considered or process
11 wasn't considered.

12 MS. LAFAILLE: Correct, Your Honor.

13 THE COURT: Let me hear from the government.

14 MS. LARAKERS: So I want to put this in the context of
15 what this motion really is. It's a motion for temporary
16 injunctive relief. Petitioners asked this court to issue that
17 interim relief without the government having any opportunity to
18 put on their own witnesses to explain the flight risk and
19 dangerousness from their own point of view. And therefore we
20 would object to this court ordering release prior to the
21 government having the opportunity to do that.

22 THE COURT: And I'll say the following. The reason,
23 prime reason at least that I wanted to hear from the spouses
24 is, again, we do this if it were a criminal case in the bail
25 context. If you're thinking of releasing somebody into the

1 custody, usually we release somebody into the custody of
2 somebody else. And you want to be assured that's a responsible
3 person. So it's a little -- I mean, you've got the
4 convictions. But anyway, go ahead. I just wanted to clarify
5 that.

6 MS. LARAKERS: So Your Honor, in any normal bond or
7 bail proceeding, the government would be allowed to submit our
8 own witnesses, including but not limited to the arresting
9 officers, the victims of the individuals' crimes and perhaps
10 other individuals. The government has not been allowed to do
11 that.

12 THE COURT: I didn't say you couldn't do it. You
13 didn't ask me to.

14 MS. LARAKERS: Your Honor, we have had a very limited
15 amount of time. We obviously filled up the entire time today
16 with their witnesses. We could come back Monday and do our
17 witnesses. But certainly it should not -- these individuals
18 should not be released without the government having an
19 opportunity to do that.

20 But even separate and apart from that basic objection
21 is that this is a motion for temporary injunctive relief. And
22 regardless of the allegations of the POCR violations,
23 petitioners have to show that they're likely to succeed on the
24 merits of their claim that these three individuals sitting
25 here, not the three individuals that were released, but these

1 three individuals are entitled to release as a result of the
2 alleged violations in their cases.

3 THE COURT: I've said this over and over, I think. I
4 don't think that's the right way to frame the question. I
5 think they have to show there's a reasonable likelihood that
6 the law, the regulations have been violated and there's an
7 imminent threat of irreparable harm. And neither the balance
8 of hardships nor the public interest are sufficiently in the
9 government's favor that they shouldn't get some relief.
10 However, the relief is not necessarily release. The relief
11 could be a decision by me, by the court, as to whether they
12 should be released. And that could involve weighing the
13 relevant factors.

14 MS. LARAKERS: And neither -- the government has legal
15 arguments why petitioners have failed to meet their burden that
16 even that is the proper remedy here for these three
17 individuals.

18 So focusing on the allegations of these three
19 individuals, Ms. Rodriguez, her only allegations are with
20 regard to the 90-day review. And her only allegation with
21 regard to the 90-day review is that she received that notice
22 too early to be meaningful. She received that notice about 60
23 days prior to that review.

24 MS. LAFAILLE: I'm sorry, Your Honor. I just want to
25 clarify that she also -- the review was conducted --

1 THE COURT: What's that?

2 MS. LAFAILLE: I also want to clarify that her review
3 was conducted about two weeks I believe before the deadline to
4 submit documents.

5 MS. LARAKERS: Which is directly related to the
6 allegedly faulty notice. So her allegation is that "ICE
7 violated the regulations because I didn't have an opportunity
8 to submit documents," despite the fact that she had at least 30
9 days and despite the fact that in her declaration she does not
10 state that she --

11 THE COURT: Excuse me. Let me have the declaration.

12 MS. LARAKERS: The declaration is ECF 355, and it's
13 Exhibit 5.

14 THE COURT: Exhibit 5?

15 MS. LARAKERS: Yes.

16 THE COURT: I'm looking at -- This is not right.
17 There's something wrong here.

18 MS. LARAKERS: Your Honor, while they find that, I may
19 back up a little bit.

20 THE COURT: No, don't. Okay. Exhibit 5 in the binder
21 I have is the notice to the alien.

22 MS. LARAKERS: I think there is also a declaration in
23 that same exhibit.

24 MS. LAFAILLE: I think it's Exhibit 6, Your Honor.

25 MS. LARAKERS: Maybe Exhibit 6.

1 THE COURT: Exhibit 6. All right. All right. I've
2 looked at the declaration.

3 MS. LARAKERS: So she does not allege in that
4 declaration that she was gathering documents, that she was
5 planning on submitting documents. She only states in that
6 allegation that she didn't understand the notice and therefore
7 she didn't submit documents.

8 And the reason why she didn't understand that notice
9 is not because of anything that I put in the notice. It's
10 because it was in English. And while petitioners may say that
11 this is something that goes to the fact that they don't have to
12 show prejudice, it doesn't. It goes to whether release is an
13 equitable remedy at all or whether a bail hearing is an
14 equitable remedy at all for someone whose only allegation has
15 to do with a notice that their declaration essentially admits
16 the fact that they submitted documents -- the fact that they
17 didn't submit documents didn't have anything to do with the
18 fact that it came late or early, that it had to do with the
19 fact that it was in English, which petitioners have not
20 contested --

21 THE COURT: Where is that in here?

22 MS. LARAKERS: It says she would have submitted
23 documents.

24 THE COURT: Hold on a second. I see, paragraph 13.

25 MS. LARAKERS: Yes. That's the reason why she didn't

1 understand the notice. It's not an equitable remedy.

2 THE COURT: In this case I've required, actually, I
3 think with your agreement, notice in various languages. I
4 mean, this is another --

5 MS. LARAKERS: Your Honor, petitioners don't challenge
6 the fact that it comes in English. There are plenty of legal
7 arguments why documents provided by ICE outside of litigation,
8 NTAs forward are all provided in English, Your Honor. So when
9 we look at that --

10 THE COURT: And the courts used to do this, too. And
11 you're from Texas. When I was on the Judicial Conference of
12 the United States -- I don't want to get into confidential
13 discussions. But all forms, like in criminal cases, were in
14 English. And although there was, to my surprise, some debate,
15 now the forms are also available in Spanish at least.

16 You're right. It hasn't been raised that this is an
17 issue in this case. But by definition, people who are here --
18 the people who are going to get these notices are
19 overwhelmingly people who don't have English as their native
20 language, and they may not speak it at all. So it wouldn't be
21 that hard for the United States government to print the notices
22 in languages that people can understand.

23 MS. LARAKERS: And deportation officers are very
24 frequently fluent in Spanish and can translate notices for
25 detainees if asked. It's not an allegation in this case. And

1 it's not the equitable remedy for an individual who states that
2 the allegation was that she received the notice too early.

3 And then when we look at their motion for interim
4 relief, their motion for interim relief is focused on whether
5 since then ICE has conducted a good faith review. They state
6 that the interim relief should be issued because ICE has failed
7 to conduct a good faith review.

8 Marcos Charles just testified that he did conduct that
9 good faith review in her Post-Order Custody Review decision and
10 prior to that in her removal decision, in his decision to
11 continue forward with removal. And when we look at those
12 factors, even if we're just looking at equity here, faced with
13 her criminal history, the fact that ICE can immediately remove
14 her, even if we're just looking at equity, release is not the
15 equitable -- or even the bail hearing that this court conducted
16 is not the equitable remedy there. It's not the equitable
17 remedy either for Mr. Ferreira. Again, it's the same --

18 THE COURT: Okay. Go ahead.

19 MS. LARAKERS: Your Honor, my argument is essentially
20 the same for all three of them. But we need to focus not on
21 these allegedly systemic violations of ICE but what the
22 violations were in the specific cases. Mr. Ferreira was not in
23 our view entitled to an interview until he received one.
24 Therefore that's not something that this court --

25 THE COURT: Is that issue briefed?

1 MS. LARAKERS: Yes, that issue is briefed. But it's
2 not one of these situations where Mr. Bernacke on the stand
3 would admit that an interview should have been done. Now, an
4 interview should have been done in Mr. Moniz's case. However,
5 he did have a significant --

6 THE COURT: An interview should have been done in Mr.
7 Moniz's case. At what point are we talking?

8 MS. LARAKERS: At his 180-day review, but the fact
9 that it wasn't done --

10 THE COURT: What day was his review done? When was
11 his review done, in September?

12 MS. LARAKERS: His 180-day review, I don't know when
13 it was conducted, Your Honor. It was conducted timely. I
14 think that this may be the individual where petitioners can
15 concede that the review was conducted on day 182.

16 THE COURT: Did he get notice of the review?

17 MS. LARAKERS: I'm sorry?

18 THE COURT: Did he get notice that the review was
19 going to be conducted?

20 MS. LARAKERS: In ICE's interpretation, yes. But
21 again, this is focusing on -- the issues here in these cases
22 are substantially legal ones. Questions that this court has
23 not yet determined. So even if there have been violations
24 here, it's not an equitable remedy to order the release or a
25 bail hearing of someone where the majority of the issues are

1 purely legal and where none of them --

2 THE COURT: I don't think it's purely legal. To the
3 extent it's legal, part of it is obvious. There's a
4 regulation. It's a law. Mr. Bernacke has been violating the
5 law every time he has detained somebody in his supervisory
6 position because he didn't know about the existence of the law
7 that requires giving an interview. And, you know, it's about
8 5:00 on Friday afternoon. But I just can't let that go. We're
9 talking about an equitable proceeding. It's equitable for the
10 United States, the formidable United States to violate the law
11 in every single case, and a federal judge should just
12 say that's not something to be concerned about? Because that's
13 essentially your argument. You say we have legal arguments.

14 Do you have a legal argument that the government
15 doesn't have to follow Section (h)?

16 MS. LARAKERS: No, Your Honor, and that is not my
17 argument at all. My argument is that release is not the
18 equitable remedy here facing the allegations with these
19 specific individuals.

20 THE COURT: Well, and that, I've repeatedly said, may
21 be right. I'm not saying if I made the decision based on what
22 I know I would release any or all of them. On the other hand,
23 and this is where I started in May of 2017, the government
24 decided to release the petitioner in that case and actually,
25 rather than remove him, let him stay until the provisional

1 waiver process was complete.

2 MS. LARAKERS: Your Honor, we're here today on their
3 motion, on their allegation that ICE failed even after this
4 court ordered to consider in good faith the equities in these
5 individuals' cases. And we've heard a lot of evidence
6 yesterday and today that that's clearly not the case.

7 And faced with that, this court should not order the
8 release of three individuals who have significant criminal
9 history and who in the determination of the Department of
10 Homeland Security poses a risk to public safety. And even if
11 we look at the Supreme Court's opinion in Zadvydas, where it
12 was talking about the court's habeas jurisdiction and how this
13 court certainly has habeas jurisdiction and can certainly
14 review allegations of POCR noncompliance, even in Zadvydas the
15 Supreme Court said that there has to be a balancing between the
16 court's equitable power in a habeas and deference to the
17 Department of Homeland Security.

18 THE COURT: The court doesn't defer to violations of
19 the law. Again, this is going to have to get into back where
20 we were in June of 2018. Zadvydas, it's procedural due
21 process. And as I said, I haven't regarded all of this as
22 futile with regard to the Boston ERO office.

23 Here is what we're going to do. I'm not going to
24 decide this matter this afternoon. And I think there are some
25 things of really practical significance. And it may cut

1 through some of these. Because, you know, when I sit down to
2 write about this, whether it's before November 4 or afterwards,
3 there will be a written record that ICE has no idea of its
4 legal obligations to give an interview. And it might -- you'll
5 get a chance to brief this. The court can't -- I've written
6 this, and you've argued it, it can't decide whether it agrees
7 that ICE made the right decision when it balanced the factors.
8 But, you know, I said previously and I'm encouraged that ICE
9 Boston apparently takes it into account, has to consider, among
10 other things, that the alien is pursuing a provisional waiver.
11 And some people get removed and I think some people don't get
12 removed, which is the way one would -- what the scorecard
13 should look like if impartial decisions are being made.

14 But if the proper process isn't being followed, it
15 might be reasonable to detain somebody, but it also might be
16 reasonable to release them. For example, there are legions of
17 people out there who haven't got an interview. And it's
18 possible, unless ICE locks up everybody and -- just like
19 lawyers, it used to be you leave the courtroom and you wish you
20 asked another question. I wished I asked Mr. Bernacke if he
21 ever reversed a recommendation to detain somebody.

22 But this is a major concern. How it gets addressed in
23 this case, I don't know. I didn't understand coming in here
24 today that this is an issue. But it's really, it's legally
25 necessary and in human terms extremely important that the

1 proper process be followed. And if the proper process isn't
2 followed, then that's what courts are constituted to do, to
3 hold among, other things, government officials accountable to
4 their duty to obey the law. What that means in this case is an
5 open question.

6 I'll see you and your clients. It's going to have to
7 be expedited, but there are a couple of things I that need to
8 be scheduled. I need to know on what conditions it's proposed
9 that each of these people be released. And I think that I'm
10 going to give you a time to confer about removal. We're
11 talking about detention now. But if somebody is released from
12 detention, they're still in custody for habeas purposes. But,
13 unless the process by which their removal decision, the
14 decision to remove them is tainted, maybe ICE should be allowed
15 to remove them.

16 And we started yesterday, we were focused on six
17 people, and ICE agreed to release three of them. And they're
18 not going to be prejudiced for having agreed to release three
19 of them.

20 MS. LARAKERS: Thank you, Your Honor. I just would
21 like to leave you with one note. The government does take
22 these allegations very seriously and DOJ takes them seriously
23 when advising our client as well. And our primary argument
24 here is with regard to remedies. And our argument with regard
25 to what those remedies should be for these specific individuals

1 is set forth both in the supplemental briefing and in the
2 opposition to our motion for interim relief, which I think
3 explains in a different way that may be more helpful for the
4 court. Thank you, Your Honor.

5 THE COURT: I'm not sure what brief you're talking
6 about. But that's the third thing, you're going to have to
7 develop a proposed agenda for November 4. And let me say the
8 following because, you know, we're in a colloquy. I have
9 things to decide. But I'm very concerned, you know, that a
10 month ago ICE realized that it was violating the legal rights
11 of everybody who got to 180 days, and it hasn't done anything
12 except talk among themselves to cure that.

13 And if I recall correctly, in the spring of 2018, ICE
14 produced a manual that addressed the POCR regulations that the
15 people here in Boston administering the POCR regulations
16 evidently had never seen. That's my memory. And Mr. Bernacke
17 testifies there's no manual, there's no guidance. I'm ordering
18 you by next Wednesday to tell me if such a document exists.
19 And somebody should look at it and see if it discusses the
20 requirements of 241.4(h)(3), or whatever the personal interview
21 thing is. Because I don't -- I would prefer not to have
22 somebody come in here and file a suit seeking certification of
23 a nationwide class.

24 MS. LARAKERS: I wouldn't like to see that, Your
25 Honor, either.

1 THE COURT: Okay. Look, we're having this discussion,
2 and we're having it publicly because I believe you. But, you
3 know, you're the Department of Justice, and when the government
4 behaves illegally, it results in many cases in injustice.

5 Court is in recess.

6 (Recess, 4:56 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 the foregoing transcript is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter to the best of my skill and ability.

Dated this 14th day of October, 2019.

/s/ Kelly Mortellite

Kelly Mortellite, RMR, CRR

Official Court Reporter