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2 Florida v. US

3 Jury trial - day 2

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1 than the last gentleman that I crossed, 35, 45 minutes, maybe  
2 longer.

3 THE COURT: I would rather try to push through because  
4 I'm sure he has better places to be than here.

5 MS. RYAN: He's available tomorrow. We made sure that  
6 his schedule is ^they so he is able to come back first thing in  
7 the morning.

8 MR. GUARD: I'm ready to go, but I can wait.

9 THE COURT: I would rather just try to get through it.  
10 And if it gets to 6:00 o'clock, we can have another discussion,  
11 but I think we can --

12 MS. RYAN: Yes.

13 THE COURT: And I think we can get through it. But I  
14 think Mr. Guard, just to your point, I know there's a conflict  
15 in the evidence. Ms. Ryan suggested maybe there's a reasonable  
16 explanation. Maybe there is, maybe there isn't, but you got a  
17 witness you can cross-examine and raise these issues with him.

18 MR. GUARD: Okay.

19 THE COURT: I'll weigh the evidence when it comes  
20 time.

21 MR. GUARD: Okay.

22 **CROSS-EXAMINATION**

23 BY MR. GUARD:

24 Q. Good afternoon again, Chief Ortiz. Good to see you again.

25 A. Good to see you again.

1 Q. Now, I want to first go over some of the things you  
2 testified here today about. You were asked about credible fear.  
3 Do you recall that?

4 A. Yes, sir.

5 Q. All right. Aliens currently being released by Border  
6 Patrol at the border are not being interviewed currently for  
7 credible fear before release, right?

8 A. So if they make a claim for credible fear to a Border  
9 Patrol agent, then they will be processed and they will  
10 ultimately wind up going before an asylum officer, a CIS  
11 officer, who will hear their credible fear claim.

12 Q. But they will go in front of an asylum officer after  
13 they've been released, correct?

14 A. Yes.

15 Q. All right. Under the Trump Administration, you mentioned  
16 Border Patrol agents were able to do credible -- to serve as  
17 asylum officers, right?

18 A. Say the question again. I'm sorry.

19 Q. Under the Trump Administration, Border Patrol officers were  
20 able to serve as asylum officers, right?

21 A. That's correct.

22 Q. All right. And the Biden Administration ceased that  
23 practice, correct?

24 A. It -- yeah, it was no longer being exercised under the  
25 Biden Administration.

1 Q. Okay.

2 A. But I will tell you, it's not something I ever supported.  
3 To me Border Patrol agents should be out there doing border  
4 patrol work. I think asylum officers, they're the ones that are  
5 trained to hear credible fear claims.

6 Q. Okay. The Biden Administration ended that practice?

7 A. That's correct.

8 Q. All right. And since the Biden Administration has taken  
9 over, you mentioned in your testimony expedited removal, right?

10 A. That's correct.

11 Q. And they've contracted that pathway as well?

12 A. We still are able to remove folks via expedited removal,  
13 but it isn't at the same levels that it has been in the past.

14 Q. Okay. And under the Trump Administration expedited removal  
15 was more expansive?

16 A. That's correct.

17 Q. Okay. And that's what changed since the Biden  
18 Administration took over, right?

19 A. That's correct.

20 Q. All right. You mentioned and talked a lot about parole,  
21 right? And parole under the Trump Administration was limited to  
22 exigent circumstances, right?

23 A. That's correct.

24 Q. All right. And now parole decisions are being made in  
25 large part based on ICE's detention capacity, right?

1 A. It's being made on a couple of basis. One, our level of  
2 activity is much higher and then certainly our ability to  
3 maintain individuals in detention via ICRO is limited, yes.

4 Q. Okay. And you also mentioned MPP, correct?

5 A. That's correct.

6 Q. All right. And the Migrant Protection Protocols were  
7 terminated under the Biden Administration, right?

8 A. That's correct.

9 Q. All right. You mentioned the May 2020 date, May 2020 date  
10 where MPP was suspended. Was that because of the time the Trump  
11 Administration was not allowing people to enter the country?

12 A. I don't know that not allowing people to enter the country.  
13 I'm not -- I'm not sure what -- maybe the question -- maybe I'm  
14 not understanding the question correctly.

15 Q. Okay. Was there a time period during COVID where  
16 restrictions on entry were more so than they are even now?

17 A. That's correct.

18 Q. Okay. That may be phrased a little bit better.

19 A. Sorry about that.

20 Q. I apologize about my inartful asking.

21 MR. GUARD: Now, I'm going to ask Ms. Gerdtz if we can  
22 have the screen. I'm going to ask her to put up what is  
23 admitted as Florida's Exhibit 18.

24 BY MR. GUARD:

25 Q. And this is an email I believe you've seen before, right?

1 A. That's correct.

2 Q. And the chief of Border Patrol who's copied on this email  
3 was Chief Scott, right?

4 A. That's correct.

5 Q. And this email is from February 16th, 2021, correct?

6 A. Yes, sir.

7 Q. And that's 26 days after President Biden was inaugurated,  
8 right?

9 A. Yes, sir.

10 Q. And this email is being sent and circulated internally to  
11 the highest leaders at Border Patrol, right?

12 A. It was the top three on the email string so -- that I can  
13 see, yes.

14 Q. Okay. And we've talked about and I'm not going to ask you  
15 because I am going to try real hard not to have you repeat  
16 anything that you said in your deposition but if we can look at  
17 the second page of this email. And this is from your chief of  
18 law enforcement operations, right?

19 A. That's correct.

20 Q. And that's your -- at the time was he a direct report to  
21 you?

22 A. He was the third in the chain of command.

23 Q. Okay. All right. And he writes because we don't -- we  
24 obviously it's blacked out. I think I know who it is based on  
25 other emails but I am going to respect the PII. It says:

1 "Thanks. Many rapid changes happening."

2 Do you see that?

3 A. I do.

4 Q. Would you agree, Chief Ortiz, that there were many rapid  
5 changes happening that affected are the Border Patrol right  
6 after President Biden was inaugurated?

7 A. Yes.

8 Q. And would you agree, Chief Ortiz, that the many rapid  
9 changes that were happening were substantial changes?

10 MS. RYAN: Objection.

11 THE COURT: Overruled.

12 THE WITNESS: Yes.

13 BY MR. GUARD:

14 Q. And ERO, according to this email, was ending family  
15 detention, correct? If you go back to page 1.

16 A. Yes.

17 Q. And DHS had paused or suspended multiple processing  
18 pathways, right?

19 A. That's correct.

20 Q. And those were not small matters, those were matters that  
21 had profound effects on Border Patrol's operations, right?

22 MS. RYAN: Objection.

23 THE COURT: On what basis?

24 MS. RYAN: The adjective use, profound impacts and  
25 effects.

1 THE COURT: He can either agree or not. Overruled.

2 THE WITNESS: It had an impact.

3 BY MR. GUARD:

4 Q. Okay. And it was not an insubstantial impact, right?

5 A. Any impact to our operations to me is a significant impact.

6 Q. Okay. And those impacts -- or strike that.

7 Those substantial rapid changes were occurring as a  
8 new border surge was just beginning, right?

9 A. I don't know about a new border surge. It's been -- like I  
10 say, we've been busy for a while. I felt like since 2013 we  
11 have steadily increased the levels of encounters that we've seen  
12 across the southwest border. So I'm not so sure I would  
13 characterize it as a new border surge but we are busy.

14 Q. All right. Now, that increase, or however you want to  
15 phrase it if you don't want to call it a new surge, was  
16 occurring during a pandemic as well, right?

17 A. That's correct.

18 Q. All right. Now, Chief Ortiz, would you agree that  
19 consequences can deter migrant flows?

20 A. Yes.

21 Q. And consequences that can deter migrant flows from coming  
22 to the United States include the detention of aliens attempting  
23 to illegally enter the United States, right?

24 A. Yes.

25 Q. And a consequence that can deter migrant flows from coming



1 to the United States is expedited removal, right?

2 A. Yes.

3 Q. And if you do not have consequences that deter migrant  
4 flows illegal immigration is going to increase, right?

5 A. That's an assumption, yes.

6 Q. From your experience, from 31 years in Border Patrol, is  
7 that assumption correct?

8 A. Yes.

9 Q. And if you reduce consequences that deter migrant flows  
10 illegal immigration is going to increase in the United States,  
11 right?

12 A. Yes.

13 Q. And at the beginning of the Biden Administration, the Biden  
14 Administration reduced the potential consequences facing  
15 migrants traveling to the border, right?

16 A. Yes.

17 Q. At the beginning of the Biden Administration, the Biden  
18 Administration reduced the potential consequences facing  
19 migrants and that increased flows to the border, right?

20 A. I would imagine that it had an impact on the flows that we  
21 were experiencing, yes.

22 Q. Okay. And during the Trump Administration, did some aliens  
23 not flow to the border because of the policies that were enacted  
24 by that Trump Administration?

25 A. I believe there was a perception that there were potential

1 consequences, so there were -- I'm assuming migrants that made  
2 the decision not to travel to the U.S., yes.

3 Q. Okay. I want to know look at what is Florida Exhibit 98.  
4 That was the email you were just looking at with Ms. Ryan.

5 MR. GUARD: If we can flip to I think the first page  
6 of the email which I think is on page 3 -- no, page 3 of 6.  
7 Thank you, Ms. Gerdts, I appreciate it.

8 BY MR. GUARD:

9 Q. You were talking about this email. This is an email on  
10 January 28, 2021, right?

11 A. Yeah.

12 Q. And that is eight days after President Biden's  
13 inauguration, correct?

14 A. Yes.

15 Q. And if you look down on this first page, you weren't asked  
16 about this email, there is an email from Ms. Clavel to you. You  
17 see that?

18 A. I do.

19 Q. All right. And she asked -- or she states: "Thanks,  
20 Deputy Chief. Are you the best person to be asked to added to  
21 the 2:00 p.m. with the AS?"

22 Do you see that statement?

23 A. I do.

24 Q. Who was the AS?

25 A. Assistant secretary.

1 Q. Assistant secretary of the Department of Homeland Security.

2 A. Yes.

3 Q. Do you know that individual's name at the time? Are you  
4 sure it wasn't the acting secretary?

5 MS. RYAN: Objection.

6 THE WITNESS: I would have assumed --

7 THE COURT: Overruled.

8 THE WITNESS: -- it was the assistant secretary.

9 BY MR. GUARD:

10 Q. Okay. And you don't recall who that was?

11 A. No.

12 Q. Okay. And the other people copied on this email -- first,  
13 Ms. Clavel, she's an employee of Customs and Border Protection,  
14 right?

15 A. At the time she was the acting chief of staff.

16 Q. Okay. So she's the chief of staff who works for the  
17 commissioner?

18 A. That's correct.

19 Q. And the acting commissioner at that time was Mr. Miller  
20 who's also copied on this email, right?

21 A. That's -- yes.

22 Q. And then Mr. Quinn who's copied on this email as well, his  
23 title was the executive director, Office of Intergovernmental  
24 Public Liaison for Customs and Border Protection, right?

25 A. That's correct.

1 Q. All right. And so this is not just an email with Border  
2 Patrol this is an email with Customs and Border Protection?

3 A. A lot of the CBP leadership, yes.

4 Q. Okay. And in this email at different times it refers to  
5 BP. That's Border Patrol, correct?

6 A. That's correct.

7 Q. All right. Now, the last email if we can go to the -- I  
8 guess it's page 5 of Exhibit 98. You were talking before about  
9 this series of bullet points.

10 Who had asked Chief Padilla to prepare the bullet  
11 points in Florida Exhibit 98?

12 A. I'm assuming from Lise Clavel had sent a request for  
13 information through our chief of staff office who would  
14 ultimately end up tasking one of the directorate chief to put  
15 together the information.

16 Q. And why was Chief Padilla being asked to prepare this  
17 bullet point list?

18 A. Because he was the chief of operations at the time.

19 Q. Okay. And you reviewed this bullet point list?

20 A. I did.

21 Q. Okay. You didn't make any changes to this bullet point  
22 list, did you?

23 A. I don't believe so.

24 Q. Did you at the time agree with the information reflected in  
25 the bullet points in Florida Exhibit 98?

1 A. Yes.

2 Q. All right. If we could direct your attention down to the  
3 fourth bullet point. So it starts off with "The pause in  
4 processing pathways."

5 A. Yes, sir.

6 Q. I think we're in -- we were trying to enlarge it to make it  
7 easier for you and I because we now need to make it bigger. It  
8 reads: "The pause on processing pathways," and it says "MPP,  
9 ACA, PACR in recent policy changes have also impacted USBP's  
10 ability to expeditiously process and remove those encountered,  
11 including jail releases that do not fit into the civil  
12 enforcement priorities."

13 All right. The civil enforcement priorities that are  
14 referenced there, what were those?

15 A. Individuals that had an extensive criminal history, folks  
16 that were a public threat. The secretary had issued I think --  
17 or the department had issued a list of four or five criteria  
18 where folks would fall into mandatory detention or enforcement  
19 priorities for us.

20 Q. Is that a document that was created on January -- or  
21 executed on January 20th, 2021 by acting secretary Pekoske?

22 A. I'm not sure about the date but it probably would have been  
23 around that time frame.

24 Q. Okay. And so from your perspective, in your belief, that  
25 document set out the policies and practices of the United States

1 as far as detention?

2 A. Yes.

3 Q. And detention by the Border Patrol for aliens that had been  
4 encountered?

5 A. I think detention for the whole department not just the  
6 Border Patrol.

7 Q. And so from your perspective, those civil enforcement  
8 priorities formed the basis of what you then believed -- or the  
9 individuals you believed should be detained on a mandatory  
10 basis; is that correct?

11 A. That drove part of decision-making and then, of course,  
12 obviously COVID and the ability of ICE to detain individuals was  
13 a factor that was considered.

14 Q. So you as the deputy chief of Border Patrol, when you got  
15 the Pecoske memo, thought that you should detain on a mandatory  
16 basis only those individuals listed within those priorities,  
17 correct?

18 A. That's correct.

19 Q. Okay. Now, if we can take that enlargement down for a  
20 second.

21 If you would look down to the second-to-last bullet  
22 points I think it's the one, two, three, four, five, six,  
23 seventh bullet point, this bullet point reads: "The U.S. Border  
24 Patrol will be required to promptly process and release family  
25 units and single adults due to the lack of adjudication pathways

1 and the necessity to maintain the health and safety of the  
2 workforce and those in detention during the pandemic."

3 So the policy changes and the processing pathways that  
4 have been restricted by the Biden Administration were going to  
5 cause the Border Patrol to have to release single adults and  
6 family units; is that correct?

7 A. That coupled with the reduced processing space or detention  
8 capacity within our facilities, and the increases in encounters  
9 that we were experiencing at the time all were part of that  
10 decision, yes.

11 Q. Okay. And if ICE either doesn't respond to your detention  
12 request or one of your officer's detention requests or tells you  
13 no, Border Patrol just doesn't have anything to do other than to  
14 release?

15 A. We don't have a choice, you're right.

16 Q. Okay. And was it common at that time period for either ICE  
17 to be nonresponsive or be telling you no?

18 A. I don't know about nonresponsive but yeah, there was quite  
19 a few times where they weren't able to take people into custody  
20 that we were processing.

21 Q. Okay. If you look at the next bullet point down, I guess  
22 it's the eighth bullet point on this email, it reads: "These  
23 releases are sought to mitigate risks experienced from  
24 overcrowding at U.S. Border Patrol facilities to maintain  
25 COVID-19 mitigation protocols and due to U.S. Border Patrol's

1 inability to turn the detained migrants over to partner  
2 agencies."

3 Are the partner agencies that are referred to in this  
4 bullet point ICE?

5 A. Yes.

6 Q. Okay. Are there any other partner agencies that Border  
7 Patrol has that it turns over detained migrants for custody?

8 A. We -- if -- during the time if we were to prosecute  
9 somebody, we also experienced a reduced number of individuals  
10 that we could place on a -- our court dockets. And so, no,  
11 different than ICE, we hold people in custody in local detention  
12 facilities, local jails, and they were no longer accepting some  
13 of those transferees at the time also.

14 Q. Okay. And for the last two bullet points, with this email  
15 for sure, the acting commissioner of CBP was aware that the  
16 policy changes were going to cause releases?

17 MS. RYAN: Objection.

18 THE COURT: All right. You'll have to rephrase that.

19 MR. GUARD: Okay.

20 BY MR. GUARD:

21 Q. Do you know whether these bullet points were presented to  
22 the -- strike that.

23 These bullet points were emailed to the acting  
24 commissioner?

25 A. That's correct.



1 Q. And they were emailed to his chief of staff, right?

2 A. That's correct.

3 Q. And the chief of staff actually responded to you?

4 A. That's correct.

5 Q. All right. And so they -- Customs and Border Protection  
6 was aware that you were going to have to release because of the  
7 recent policy changes and the processing pathways, right?

8 A. That's correct.

9 Q. All right. Did you take part in the call with the AS?

10 A. Typically I would participate in conference calls. At the  
11 time once again we were in a COVID environment so almost  
12 everything was virtual. And so if the assistant secretary  
13 wanted to have a call reference the information in this I  
14 probably would have participated in it, yes.

15 Q. Do you recall participating in it?

16 A. I participate in a lot of meetings and a lot of calls, so  
17 this specific call just doesn't stand out.

18 Q. Okay. All right. Do you have reason to think that you did  
19 not sit on that call?

20 A. No.

21 Q. Now, in response -- well, one more thing, if we can go down  
22 to the -- I think it's the ninth bullet points. There's a  
23 bullet point about family residential centers, top of the page.

24 A. Okay.

25 Q. All right this one reads: "USBP works in close

1 coordination with ICE ERO to transfer family units to family  
2 residential centers but placement to these facilities is limited  
3 and criteria/family demographic precludes many from being  
4 placed. EOR has already communicated that FRCs are near maximum  
5 capacity."

6 Now -- do you see that?

7 A. I do.

8 Q. All right. Would you have, as deputy chief of Border  
9 Patrol, any way to know whether that were true or not, that FRCs  
10 were at maximum capacity or not?

11 A. We communicated quite regularly with our ICE partners, so  
12 if my chief of operations was indicating or describing the  
13 conditions over one of their facilities, I have to assume that  
14 it was true.

15 Q. Okay. And so if in reality there's evidence in the record  
16 that suggests that there are at a capacity of less than a  
17 hundred percent, would that have made a difference to what was  
18 being communicated to your superiors?

19 A. If it was less than a 100 percent?

20 Q. Yes, that these facilities actually were at a capacity of  
21 like 18 percent?

22 A. Oh certainly.

23 Q. All right. Now --

24 MR. GUARD: We can take this document down.

25 ///

1 BY MR. GUARD:

2 Q. In response to the Biden Administration changes and the  
3 difficulties that it was causing to the Border Patrol's  
4 operations, Border Patrol rolled out a policy called  
5 prosecutorial discretion, correct?

6 A. That's correct.

7 Q. I'm going to show you what is marked as Court Exhibit 20.

8 You talked about this on direct. Was Exhibit 20 the  
9 document that you were talking about you and Chief Scott came up  
10 with?

11 A. Well, I think we were specifically talking about the 385,  
12 but this sort of drove the conversation about the I-385, the  
13 Notice to Report.

14 Q. Okay. And, you know, the date on this memorandum is  
15 March 19, 2021, correct?

16 A. That's correct.

17 Q. And it's less than two months after President Biden was  
18 inaugurated, right?

19 A. That's correct.

20 Q. And again this memorandum was sent to the acting  
21 commissioner of CBP, right?

22 A. That's correct.

23 Q. And so Customs and Border Patrol would have been aware of  
24 it, right?

25 A. Yes, sir.

1 Q. You've heard of the term "Notice to Report" before. I  
2 think you testified about it earlier, right?

3 A. I did.

4 Q. How does Notice to Report and -- there is called  
5 prosecutorial discretion. How do they differ?

6 A. So the Notice to Report was the actual document that was  
7 issued to the migrant explaining to them that there was an  
8 expectation that they were to report to an immigration facility.  
9 And so it was the processing tool that the Border Patrol agents  
10 were going to utilize out in the field.

11 Q. Okay. And so the policy or guidance, or however you want  
12 to call it, was called prosecutorial discretion but the form  
13 itself was called Notice to Report?

14 A. That's correct.

15 Q. Okay. Now, we've seen from OFO written policies that  
16 predate the Biden Administration allowing for limited parole.  
17 On direct, you didn't not offer any written policies for Border  
18 Patrol allowing for release or parole predating the Biden  
19 Administration, correct?

20 MS. RYAN: Objection.

21 THE COURT: Overruled.

22 THE WITNESS: No.

23 BY MR. GUARD:

24 Q. Okay. On direct you didn't offer any written memorandum  
25 asserting that Border Patrol prior to the Biden Administration,

1 quote, already retained the discretion to not place a removal  
2 alien into proceedings, correct?

3 A. Correct.

4 Q. What did you believe Border Patrol's authority was to  
5 simply not do a Notice to Appear for an inadmissible alien?

6 A. Can you ask me the question again? Sorry.

7 Q. Sure.

8 What did you believe your authority, your legal  
9 authority was to simply not do a Notice to Appear for an  
10 inadmissible alien?

11 MS. RYAN: Objection.

12 THE COURT: On what basis?

13 MS. RYAN: It calls for a legal conclusion.

14 THE COURT: Overruled. You can testify from an  
15 operational standpoint.

16 THE WITNESS: So I'm taking you're asking what was our  
17 authority to use the NTR as opposed to issuing an NTA?

18 BY MR. GUARD:

19 Q. Sure.

20 A. I'm assuming that's the question.

21 Q. Sure, yes.

22 A. So for us, there were operational considerations that we  
23 took as part of our decision matrix. One, the conditions of our  
24 facilities; two, the conditions of the communities that we were  
25 seeing significant increases in migrant populations; three, the

1 conditions of our workforce; and then, four, the conditions  
2 that -- or the potential risk to the migrant populations.

3 And so knowing that we were going to leverage  
4 prosecutorial discretion, we set forth the criteria, we were  
5 going to run records checks on these individuals and as long as  
6 they did not meet the criteria for mandatory detention and they  
7 were not a health risk or a potential public safety risk, then  
8 we were going to process them with a Notice to Report.

9 Q. Can you cite either a statute or a regulatory basis that  
10 supported the prosecutorial discretion memoranda?

11 MS. RYAN: Objection.

12 THE COURT: I'll sustain that.

13 MR. GUARD: I'll move on, Your Honor. I think that  
14 point has already been made.

15 BY MR. GUARD:

16 Q. Were aliens subject to this policy released by Border  
17 Patrol itself or by ICE?

18 A. They -- so we had ICE officers in many of our facilities so  
19 it was a coordinated effort.

20 Q. All right. And aliens that were released under this policy  
21 were both parts of family units and single adults, correct?

22 A. That's correct.

23 Q. All right. Looking at the bottom of page 1 of Florida  
24 Exhibit 20, the reasons given in this memorandum for the  
25 policies are first COVID-19, correct?

1 A. Yes.

2 Q. Second, unaccompanied minor encounters, right?

3 A. Yes.

4 Q. And third, it lists custody challenges and finite  
5 resources, right?

6 A. That's correct.

7 Q. The custody challenges would relate again to ICE either  
8 telling you no or not accepting transfers, right?

9 A. Yeah, inability to transfer. Yes.

10 Q. Okay. I'm going to show you now what has been admitted  
11 into evidence as Plaintiff's Exhibit 22. This is a string of  
12 emails that we'll -- if you look at the last page of the  
13 document -- well, let's go back to page 3, I'm sorry I thought  
14 was the last page, I didn't realize there was these.

15 This is not the...

16 *(Off-the-record discussion.)*

17 BY MR. GUARD:

18 Q. We're looking at 21. I apologize. We had the wrong email  
19 up.

20 A. That's all right.

21 Q. I believe this -- if you'll look at the top of this chain,  
22 this is an email that copies you, right?

23 A. Yes.

24 Q. And it's right after the -- that memo that we just looked  
25 at came out, right?

1 A. That's correct.

2 Q. And so this is communicating this out to the field, right,  
3 communicating the policy out to the field?

4 MS. RYAN: Your Honor, I just ask that the witness  
5 have a chance to read the entire document.

6 THE COURT: Okay. I saw him nod. I thought he  
7 answered. But when you're ready, sir, if you'll answer the  
8 question.

9 THE WITNESS: I'm assuming it's going out to the  
10 field, yes.

11 BY MR. GUARD:

12 Q. Okay. And the reason you don't know that is because all  
13 the addresses have PII on them?

14 A. It's redacted, yeah.

15 Q. Okay. If you look down at the bottom of the first page of  
16 Florida Exhibit 21, the email reads: "As you can imagine, there  
17 are a ton of moving parts as we mature and refine prosecutorial  
18 discretion."

19 Did I read that right?

20 A. Yes.

21 Q. And you were also copied on that email, correct?

22 A. I am.

23 Q. All right. The policy enacted in Florida Exhibit 20 and  
24 implemented by the emails in Exhibit 21 needed to be matured and  
25 refined because Border Patrol had never had a policy like that



1 before, correct?

2 MS. RYAN: Objection.

3 THE COURT: Overruled.

4 THE WITNESS: Correct.

5 BY MR. GUARD:

6 Q. The policy enacted in Florida Exhibit 20 and implemented by  
7 the emails in Florida Exhibit 21 was needed because there was a  
8 lack of adjudication pathways and no detention capacity, right?

9 A. And the COVID situation, yes.

10 Q. Okay. When was the policy in Exhibit 20 rescinded?

11 A. I don't know about the exact date.

12 Q. Okay. You were the one who rescinded it?

13 A. Yes.

14 Q. Because by that point in time, you were the actual chief,  
15 right?

16 A. That's correct.

17 Q. I'm going to show you what has been admitted as Florida  
18 Exhibit 59.

19 All right. This email -- or this memoranda is  
20 undated. Did you have -- did you ever review this memorandum?

21 A. I probably reviewed it, yes.

22 Q. Okay. And -- it's undated but if you look at the first  
23 paragraph it reports some statistics from today's early morning  
24 report on June 15th of 2021.

25 A. Yes, sir.

1 Q. And if you look at the first two paragraphs there's no  
2 mention of COVID-19 at all, is there?

3 A. No, sir.

4 Q. This memorandum is all about capacity and operational  
5 issues, right?

6 A. Tempo, yeah, that's correct. Operational tempo, yes.

7 Q. All right. If we go to the second page of Plaintiff's  
8 Exhibit 59, there's a reference here again to the -- what is  
9 known as the Pecoske memo; is that correct?

10 A. Yes, sir.

11 Q. And so the authority that at least is being -- that is  
12 cited here is it that memo, correct?

13 A. Correct.

14 Q. All right. If we can turn now to Florida Exhibit 30.

15 All right. This email is an email dated from May 15,  
16 2022, correct?

17 A. May 14th, yes.

18 Q. I think it's the 15th, actually, sir.

19 A. Huh?

20 Q. I think the last email in the chain is from May 15th?

21 A. Okay. Yes.

22 Q. Okay. And that was approximately eight days before  
23 Title 42 was originally going to end at the southwest border,  
24 right?

25 A. Correct.

1 Q. Okay. And this email was about an exercise that Border  
2 Patrol took part in, correct?

3 A. Yes.

4 Q. Okay. And FEMA ran that exercise, correct?

5 A. That's correct.

6 Q. And FEMA is the federal agency that responds to disasters,  
7 right?

8 A. That's correct.

9 Q. Did Border Patrol expect the rescission of Title 42 would  
10 be a disaster?

11 A. I don't know that I would characterize it as a disaster but  
12 we did expect an influx and higher numbers.

13 Q. All right. And was the -- was some document going to  
14 result from that exercise?

15 A. Typically after a exercise like that is conducted there  
16 would be an after action report.

17 Q. Okay. And there's a reference to something that's called  
18 an SOC. Do you know what an SOC is?

19 A. I'm trying to think of the acronym but I'm drawing a blank.  
20 Sorry.

21 Q. That's okay. And the top email deals with an email from  
22 Mr. Barker. Is that correct?

23 A. That's correct.

24 Q. All right. And Mr. Barker at that point in time was in the  
25 law enforcement operations job; is that correct?

1 A. That's correct.

2 Q. So he was the Number 3 at Border Patrol, right?

3 A. Yes, sir.

4 Q. All right. And he's talking about trying to get into a  
5 policy section of a document, a quote from the deputy  
6 commissioner. Is that fair?

7 A. Yes.

8 Q. Okay. And who was the deputy commissioner at the time?

9 A. I believe it was Carry Huffman.

10 Q. Have flows compounded at the southwest border because until  
11 at least this past week the United States under the Biden  
12 Administration was not detaining and removing demographics that  
13 are amenable?

14 A. So ask me the question again. I'm sorry.

15 Q. Sure.

16 You see there is a quote in this document. It says:  
17 "We must ensure that we are detaining and removing the  
18 demographics that are amenable or else the flows will only  
19 compound more."

20 A. Okay.

21 Q. Have the flows compounded at the southwest border until  
22 this past week because there was a new policy rolled out under  
23 the Biden Administration because the United States was not  
24 detaining and removing demographics that were amenable?

25 A. I think we've seen increases for a variety of reasons, both

1 part of what you described but also we've seen unrest in a lot  
2 of different countries. I mean, Brazil is going through some  
3 tremendous challenges. So I wouldn't -- it wouldn't surprise me  
4 one bit if we start to see a spike in encounters from migrants  
5 from Brazil.

6 Q. All right. And after NTR, PD or however you want to  
7 describe it, we then had Parole Plus ATD, correct?

8 A. That's correct.

9 Q. And then we had Parole Plus ATD for both CBP and ICE,  
10 right?

11 A. That's correct.

12 Q. All right. And so we've seen multiple written policies  
13 after -- for the Border Patrol or governing the Border Patrol  
14 after President Biden took office allowing for the release of  
15 inadmissible aliens, right?

16 A. That's correct.

17 Q. All right. And all those written policies were  
18 disseminated by the Border Patrol to its agents, correct?

19 A. Yes, sir.

20 Q. We haven't seen a single written policy or a single email  
21 prior to the Biden Administration allowing for the discretionary  
22 release of inadmissible aliens --

23 MS. RYAN: Objection.

24 BY MR. GUARD:

25 Q. -- correct? During your testimony.

1 THE COURT: All right. What's your basis?

2 MS. RYAN: He asked ever before the Biden  
3 Administration. That's beyond the scope of this witness's  
4 knowledge.

5 THE COURT: If it is he can tell us. Overruled.

6 THE WITNESS: So prior to me becoming the chief of the  
7 deputy is that what you're asking?

8 BY MR. GUARD:

9 Q. No, what I'm asking is during your direct testimony you  
10 were shown a series of policies, right?

11 A. Uh-huh.

12 Q. And we haven't seen -- during that testimony we didn't see  
13 a single written policy prior to the Biden Administration  
14 allowing for the discretionary release of inadmissible aliens,  
15 right?

16 A. That's correct.

17 Q. Okay. Now, you testified on be direct about warrants. Do  
18 you recall that?

19 A. I do.

20 Q. All right. Mr. Barker was the Department of Homeland  
21 Security's 30(b)(6) witness which means that he spoke on behalf  
22 of the agency. Does Border Patrol obtain a warrant for an  
23 individual -- strike that.

24 Under the Notice to Appear/Own Recognizance that I  
25 think we've spoken about today that has been talked about

1 throughout this case, is a warrant obtained for arrest?

2 A. The warrant is issued into the A file jacket and is  
3 administered to the migrant when they are proposed by the Border  
4 Patrol agent, that's correct.

5 Q. Okay. And if -- now, if on behalf of the agency Mr. Barker  
6 testified that no, he did not believe a warrant for arrest is in  
7 the NTA packet, he would have been wrong?

8 A. In the what packet?

9 Q. In an NTA packet.

10 A. Yes.

11 MR. GUARD: May I have a minute, Your Honor?

12 THE COURT: Sure.

13 MR. GUARD: I'm going to pass the witness, Your Honor.

14 THE COURT: All right. Ms. Ryan.

15 MS. RYAN: One moment, Your Honor.

16 **REDIRECT EXAMINATION**

17 BY MS. RYAN:

18 Q. Hello there, Chief.

19 You were just asked about some testimony from  
20 Mr. Barker. To be clear, you were Mr. Barker's supervisor,  
21 correct?

22 A. That's correct.

23 Q. You also said on cross that expedited removal was not at  
24 the same level as in the past. Why is that?

25 A. Our ability to process migrants in the coordination with --

1 in the other agencies and the Government of Mexico has been  
2 challenged.

3 Q. And why is that?

4 A. Just capacity.

5 Q. And does your ability to use expedited removal depend on  
6 other countries agreeing to take those immigrants back?

7 A. That's correct.

8 Q. So if expedited removal is being used at a lower level it  
9 may be from outside forces and not because of choices within the  
10 Border Patrol?

11 A. That's correct. We have to be able to repatriate them back  
12 to the country that they came from.

13 Q. Okay. You were also just asked about warrants. And you  
14 said on direct that notices to appear, they're issued by Border  
15 Patrol, are accompanied by an administrative warrant, correct?

16 A. That is correct.

17 Q. How is that different from a regular warrant?

18 A. A regular warrant would be, you know, if somebody fails to  
19 show up to a court hearing, we would execute or administer a  
20 warrant trying to obtain custody of that individual. And  
21 typically it would be multiple agents. ICRO has a fugitive  
22 component that actually serves those warrants for individuals  
23 who fail to show up at immigration hearing.

24 Q. Are you familiar with the Form I-200?

25 A. Yes.



1 Q. Is that the administrative warrant form that accompanies a  
2 Notice to Appear?

3 A. Yes.

4 Q. You were shown Exhibit 59 which I have a copy of if you  
5 need to see it, or do you recall it?

6 A. Sorry.

7 Q. I know we got a lot. Here we go.

8 Do you recall being asked about this form?

9 A. I do.

10 Q. Is there a date on this?

11 A. I don't see a date on the top, no.

12 Q. Is it signed?

13 A. No.

14 Q. If it's unsigned, what does that indicate to you?

15 A. That it was probably just a draft.

16 Q. You were also asked about different policies being enacted,  
17 additional policies that allow for release of inadmissible  
18 aliens. Do you remember that?

19 A. Yes.

20 Q. Do those policies require release of inadmissible aliens?

21 A. No.

22 Q. Does the standard by which you process those aliens change  
23 at all?

24 A. No.

25 Q. So it's still done on a case-by-case basis?

1 A. That's correct.

2 Q. You were also asked about Plaintiff's Exhibit 18.

3 Looking at the last page real quick, there was a line  
4 that you were asked about specifically. At the top here:  
5 "Thanks. Many rapid changes happening." Do you remember being  
6 asked about that?

7 A. Yes.

8 Q. Did you write that email?

9 A. No.

10 Q. So do you know what they were referring to when they said  
11 that?

12 A. Not necessarily but one might assume just because -- I  
13 mean, there's changes happening due to the conditions that  
14 what's happening on the border between COVID and you had  
15 administration change, you had leadership changes. There were a  
16 lot of changes occurring at the time.

17 Q. Does that necessarily mean policy changes?

18 A. Not necessarily, but I'm sure that was part of it.

19 Q. And you were also asked about Exhibit 98 where there's a  
20 reference to ICE ERO's capacity being at full capacity. Do you  
21 remember that?

22 A. Yes.

23 Q. And you were also asked by counsel about other evidence  
24 indicating that ICE's capacity was at 18 percent. Do you recall  
25 that?

1 A. Yes.

2 Q. Wouldn't capacity of 18 percent be unheard of in the time  
3 of COVID for a detention facility?

4 A. Yes.

5 Q. 18 percent would be unheard of because of COVID?

6 A. Maybe I'm not following the question.

7 Q. Sure. Let me try to rephrase that for you.

8 A. I'm sorry.

9 Q. In this email here you had testified that Border Patrol  
10 facilities were operating at only 25 percent, correct?

11 A. That's correct.

12 Q. At a 75 percent reduction?

13 A. Reduction, yes.

14 Q. So if an ICE facility was operating at only 18 percent of  
15 its total physical capacity, would that be unheard of in the  
16 time of COVID?

17 A. Not -- not when you think about the limitations and the  
18 PREA standards that ICE has to adhere to. Their standards are  
19 much -- they're governed by a much different policy than  
20 processing facilities are. It's much more strict. So that  
21 wouldn't be unheard of.

22 Q. So if a detention facility was operating at 18 percent of  
23 its physical capacity, that could still be considered full?

24 A. And under these conditions, yes.

25 MS. RYAN: No further questions, Your Honor.

1 THE COURT: All right. Thank you.

2 Chief, just a couple questions from me.

3 THE WITNESS: Yes, sir.

4 THE COURT: I had the pleasure I guess, quotes,  
5 watching your video deposition as well. So I've seen you now,  
6 I've heard you. I got the sense both a little bit today and  
7 also from your testimony on the deposition that you were not  
8 overly happy with the ICE reductions in capacity because it tied  
9 your hands somewhat. Is that a fair assessment to take?

10 THE WITNESS: Yeah. One of the challenges that I've  
11 always struggled with and I've heard from not just ICE but other  
12 agencies is that hey, we have to adhere to, you know, certain  
13 policies or guidance and, you know. But they never factor in  
14 the consideration that the Border Patrol has policies and  
15 guidance that we want to adhere to also.

16 And that's, you know, in reference to my statement  
17 earlier where I said, you know, I'm one of the few agencies or  
18 we're one of the few agencies that can't say no. And so I'm so  
19 reliant on all the other offices, whether it's a community,  
20 whether it's an NGO, whether it's ICE, ERO, the Government of  
21 Mexico. So my ability to dispo individuals in my custody always  
22 depend on somebody else just about.

23 THE COURT: And on the flip side of that I also heard  
24 testimony from Director Price who -- I think that was him. He's  
25 at ERO?

1 THE WITNESS: Yes, sir.

2 THE COURT: And I got the sense from him, his  
3 testimony that he wasn't particularly happy with Border Patrol  
4 with the notices to report and the Parole Plus ATD because it  
5 was pushing your processing work to them. Is that a fair  
6 assessment as well?

7 THE WITNESS: Yes, sir. One of the things that we  
8 heard initially is that there were long lines outside of ICE  
9 offices in some of the areas that these migrants were traveling  
10 to and that was posing a challenge to them. So, yeah, I would  
11 imagine that he was probably less than happy with some of the  
12 things that were happening -- or some of the decisions that we  
13 were making within Border Patrol.

14 THE COURT: All right. Does that generate a need for  
15 anything from the attorneys?

16 MR. GUARD: No, Your Honor.

17 MS. RYAN: No, Your Honor.

18 THE COURT: All right. Well, thank you, Chief, for  
19 being here. We hate to work you hate but at least we're going  
20 to get you out of here today.

21 THE WITNESS: Thank you, sir.

22 THE COURT: All right. Have a good day.

23 *(Witness excused.)*

24 THE COURT: All right. I think, counsel, we are at a  
25 good point to break for the day.

1 Ms. Ryan, what do you anticipate tomorrow? Is it  
2 still going to be a short day?

3 MS. RYAN: I believe so at. This time we only have  
4 two witnesses, Robert Guadian from ICE and one of the  
5 plaintiff's witnesses on standing will be here as well.

6 MR. GUARD: And, Your Honor, just to be clear, we're  
7 releasing Chief Ortiz.

8 THE COURT: Okay. If you'll just let him know he's  
9 free to go about his business.

10 MS. RYAN: I'll run after in a second.

11 THE COURT: All right. Well, we will reconvene then  
12 at 9:00 tomorrow and go through what you describe and we're  
13 still on track then to recess for the day and then come back  
14 Thursday morning and deal with the last standing witness and  
15 then any rebuttal case that Florida has, correct?

16 MR. GUARD: Yes, Your Honor.

17 THE COURT: And then after that, we will hear argument  
18 relating to the Parole Plus ATD policy as well as a preview of  
19 what I might see in your proposed findings and you will engage  
20 in discussion with me about all that, and we will leave each  
21 other's company hopefully with less of the congressional budget  
22 than you wanted to give me initially.

23 All right. Well, we'll be in recess until  
24 9:00 tomorrow morning.

25 *(Proceedings adjourned at 5:50 p.m.)*