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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF ARIZONA**

Mark Brnovich, in his official capacity as  
Attorney General of Arizona; *et al.*,

Plaintiffs,

v.

Joseph R. Biden in his official capacity as  
President of the United States; *et al.*,

Defendants.

No. 2:21-cv-01568-MTL

**PLAINTIFFS' MOTION FOR  
LEAVE TO FILE REPLY TO  
DEFENDANTS' RESPONSE TO  
PLAINTIFFS' AUGUST 12, 2022  
NOTICE OF SUPPLEMENTAL  
AUTHORITY**

**MOTION FOR LEAVE**

On August 25, 2022, this Court granted leave (Doc. 207) to Defendants (the “federal government”) to file a Reply to Plaintiffs’ (the “State”) August 12, 2022 Notice of Supplemental Authority. (Doc. 203.) The State hereby requests leave to file the attached Reply to the federal government’s Response. The State seeks leave for two reasons:

1) The federal government’s 9-page Response significantly expands upon the scope and subject matter of the State’s 4-page Notice. The attached Reply will thus afford the State the opportunity to address issues not covered in its Notice, including entirely new arguments by Defendants.

2) In its Response, the federal government hyperbolically contends (at 1) that “Plaintiff has *not proffered one shred of evidence*” (emphasis added) for its claims. That is incorrect, but additional evidence has come to light from Defendants’ own employees that directly contradicts this assertion. In particular, discovery has proceeded in the parallel litigation of *Florida. v. United States*, No. 21-CV-1066 (N.D. Fla.), which has uncovered significant evidence supporting the State’s claims here. The proposed reply summarizes that evidence, most of which was provided by U.S. Border Patrol Chief Raul Ortiz, the federal government’s own Fed. R. Civ. P. 30(b)(6) witness. Chief Ortiz’s testimony establishes that the Parole and Non-Detention Policy exists, that much of it was promulgated by telephone or email, and that the Policy specifically harms Arizona.

1 RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of September, 2022.

2 **MARK BRNOVICH**  
3 **ATTORNEY GENERAL**

4 By: /s/ James K. Rogers

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9 *Attorneys for Plaintiffs Mark Brnovich and the State of*  
10 *Arizona*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 9<sup>th</sup> day of September, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Arizona using the CM/ECF filing system. Counsel for all Defendants who have appeared are registered CM/ECF users and will be served by the CM/ECF system pursuant to the notice of electronic filing.

/s/ James K. Rogers

*Attorney for Plaintiffs Mark Brnovich, in his official capacity as Attorney General of Arizona; and the State of Arizona*

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and the State of Arizona*

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**PLAINTIFFS' REPLY TO  
DEFENDANTS' RESPONSE TO  
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NOTICE OF SUPPLEMENTAL  
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## REPLY

Federal Defendants’ recent filing (Doc. 208) advances arguments that fail as a matter of both fact and law. On the facts, the federal government erroneously contends that the State has not offered any evidence that the federal government is implementing a programmatic policy and further ignores that in the parallel litigation taking place in Florida, the federal governments’ *own witnesses* have already provided such evidence. On the law, Federal Defendants’ standing theories contravene Supreme Court and Ninth Circuit precedent.

### I. The State Has Standing

The Supreme Court held in *Massachusetts v. EPA* that states are entitled to “special solicitude in [courts’] standing analysis.” 549 U.S. 497, 520 (2007). In its Response, the federal government mischaracterizes the Supreme Court’s holding, claiming that it is limited only to cases where “Congress had granted States a procedural right to challenge the EPA’s denial of its petition for rulemaking.” (at 2.) To the contrary, the Supreme Court held that states are entitled to special solicitude when Congress has conferred a *generalized* procedural right, not some right specifically unique to the States. Indeed, the procedural right at issue in *Massachusetts v. EPA* was not a statute conferring special procedural rights on the states, but rather generalized APA-type rights. *Massachusetts v. E.P.A.*, 549 U.S. at 500, 520 (citing procedural right afforded by 42 U.S.C. § 7607(b)(1), which confers procedural right on any party to challenge environmental regulations that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” 42 U.S.C. § 7607(d)(9)(A)). Thus, under *Massachusetts v. EPA*, “special solicitude” inheres whenever two conditions are met: 1) the State has a “procedural right” and 2) the State has relevant “quasi-sovereign interests.” *Id.*

The APA affords the State the procedural rights that it seeks to vindicate here. *See* Doc. 134, Third Amended Complaint, (“TAC”) ¶¶ 216-232 (asserting four APA claims). The State also has “quasi-sovereign interest[s] in the health and well-being—both physical and economic—of its residents in general.” *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982). Those interests are harmed by Defendants’ policies, which force the State to divert resources away from protecting its citizens’ welfare. *See* TAC ¶¶ 144-49 (allegations about law

1 enforcement and medical costs to the State caused by the Parole and Non-Detention Policy).  
 2 Thus, the State is entitled to special solicitude here.

3 Indeed, the Ninth Circuit recently reiterated that “[i]n our dual sovereign system,  
 4 Arizona enjoys ‘special solicitude in our standing analysis.’” *Arizona v. Yellen*, 34 F.4th 841, 851  
 5 (9th Cir. 2022) (quoting *Massachusetts v. EPA*, 549 U.S. at 520). That follows many other similar  
 6 holdings. *See, e.g., California v. Trump*, 963 F.3d 926, 936 (9th Cir. 2020), vacated on other  
 7 grounds, *Biden v. Sierra Club*, 142 S. Ct. 46 (2021) (holding that, in challenge to federal  
 8 immigration policy, “[s]tates are ‘entitled to special solicitude in our standing analysis.’”  
 9 (quoting *Massachusetts v. EPA* 549 U.S. at 520)); *Sierra Club v. Trump*, 977 F.3d 853, 866 (9th  
 10 Cir. 2020), vacated on other grounds. *Biden v. Sierra Club*, 142 S. Ct. 56 (2021) (same).

11 Similarly unavailing is Defendants’ argument that the State lacks standing because the  
 12 State’s harms are allegedly “indirect” and “incidental effects of federal policies.” (at 3). To  
 13 make this argument, the federal government relies (at 3-4) on the Sixth Circuit’s decision in  
 14 *Arizona v. Biden*, 40 F.4th 375 (6th Cir. 2022) and the D.C. Circuit’s decision in *Arpaio v. Obama*,  
 15 797 F.3d 11, 21 (D.C. Cir. 2015). That case law is both inapposite and, ultimately, irrelevant,  
 16 as controlling Ninth Circuit precedent holds otherwise. In *City & County of San Francisco v.*  
 17 *USCIS* (“*San Francisco*”), 944 F.3d 773 (9th Cir. 2019), a variety of plaintiffs, including a  
 18 coalition of 18 States, sued to challenge a proposed new regulation implementing the  
 19 Immigration and Nationality Act’s (“INA”) prohibition on the admission of aliens who might  
 20 become public charges. *See* 8 U.S.C. 1182(a)(4) (making inadmissible to the United States  
 21 “[a]ny alien who ... is likely at any time to become a public charge”). As here, the federal  
 22 government argued that the states lacked standing because their claimed harms of the “loss of  
 23 federal funds and increase in operational costs related to individuals disenrolling from” public  
 24 benefits were based on an “attenuated chain of possibilities that does not show certainly  
 25 impending injury.” *San Francisco*, 944 F.3d at 787 (cleaned up). The Ninth Circuit squarely  
 26 rejected this argument, holding that, “the predicted result is premised on the actions of third  
 27 parties, but this type of ‘predictable effect of Government action on the decisions of third  
 28 parties’ is sufficient to establish injury in fact.” *Id.* (quoting *Dep’t of Commerce v. New York*, 139

1 S. Ct. 2551, 2566 (2019)).

2 The Ninth Circuit found such “predictable effect[s]” based on two things 1) admissions  
3 made by the federal government, and 2) evidence supplied by the states. Both such types of  
4 evidence will be available in this case as well. As explained below, the federal government has  
5 admitted that the Parole and Non-Detention Policy harm the States, including Arizona  
6 specifically. And as also explained below, further discovery in this case will further show the  
7 specific financial harms that the Parole and Non-Detention Policy is causing to the State.

8 More generally, *Department of Commerce* rejects Defendants’ “indirect” and  
9 “downstream” arguments. There, New York’s injuries were indirect and downstream of not  
10 just illegal third-party conduct (*i.e.*, predicted non-completion of census forms) but a multitude  
11 of other laws’ operations and agency action (*e.g.*, funding formulas based on census data). *Dep’t*  
12 *of Com.*, 139 S. Ct. at 2565–66. Despite the extended causal chain, the Supreme Court  
13 *unanimously* held that New York had standing (while dividing 5-4 on the merits). *Id.* at 2556  
14 (noting unanimous parts of opinion, including part II, about jurisdiction and standing).  
15 Arizona does here too *a fortiori*.

16 Nor is the federal government correct that the Parole and Non-Detention Policy is  
17 unreviewable under *Heckler v. Chaney*, 470 U.S. 821 (1985). In the federal government’s telling,  
18 the State has no standing to challenge the aggregate of DHS officer’s grants of parole. That is  
19 not the law. The Ninth Circuit specifically has held that parties *do* have standing to challenge  
20 “programmatic shift[s]” in immigration enforcement even if they could not challenge  
21 “individual ... decisions.” *Regents of the Univ. of California v. DHS*, 908 F.3d 476, 503 (9th Cir.  
22 2018), *rev’d in part on other grounds*, 140 S. Ct. 1891 (2020). That is exactly this suit: a challenge  
23 to Defendants’ programmatic shift in immigration enforcement.

24 More generally, the *Heckler* presumption of unreviewability applies to challenges to  
25 *particular* decisions not to initiate enforcement actions, not outright sweeping policies of non-  
26 enforcement such as programmatic grants of parole *en masse* to avoid enforcing immigration  
27 laws. *See, e.g., ILWU v. Meese*, 891 F.2d 1374, 1378 n.2 (9th Cir. 1989) (describing *Heckler* as  
28 applying to “an agency’s refusal to prosecute or enforce a statute in a specific case”); *Bresgal v.*



1 *Brock*, 843 F.2d 1163, 1169 n.1 (9th Cir. 1987) (same); *see also OSG Bulk Ships, Inc. v. United*  
 2 *States*, 132 F.3d 808, 812 (D.C. Cir. 1998) (explaining that “an agency’s adoption of a general  
 3 enforcement policy is subject to review,” thereby distinguishing *Heckler’s* presumption of  
 4 unreviewability as applying only to individual cases of non-enforcement).

5 The federal government has never disputed the accuracy of the parole statistics cited  
 6 by the State. (*E.g.* Doc. 167 at 1, 4, 23, 35; Doc. 203 at 1). The federal government’s argument  
 7 rests entirely on the fiction that, much like the spoon in *The Matrix*, there is no Parole and  
 8 Non-Detention Policy. Thus, in its telling, for no apparent reason it can discern—and  
 9 mysteriously starting in January 2021—grants of parole exploded by 300,000%, increasing  
 10 from just a few dozen a month to tens of thousands every month. Even more astonishing,  
 11 Defendants go so far as to contend that these skyrocketing numbers do not even constitute a  
 12 “shred of evidence” of any new policy. (at 1.) To believe that would require this Court “exhibit  
 13 a naiveté from which ordinary citizens are free.” *Department of Commerce*, 139 S. Ct. at 2575.

14 The 300,000% increase is *itself* evidence of the policy. That is particularly true as “[i]t is  
 15 the effect of the action and not its label that must be considered. To this end, finality is to be  
 16 interpreted in a pragmatic way.... [A]n agency action may be final if it has a direct and  
 17 immediate ... effect on the *day-to-day business* of the subject party.” *See Oregon Nat. Desert Ass’n*  
 18 *v. U.S. Forest Serv.*, 465 F.3d 977, 985, 987 (9th Cir. 2006) (emphasis added) (cleaned up). The  
 19 prospect that Defendants have not changed their “day-to-day business” in granting parole is  
 20 fanciful. That is particularly so as DHS has offered no *other explanation* for this gargantuan shift.  
 21 Ultimately, this “is precisely the sort of large-scale policy that's amenable to challenge using  
 22 large-scale statistics and figures, rather than highly specific individualized documents. And [the  
 23 State’s] standing is robustly supported by just such big-picture evidence.” *Texas v. Biden*, 20  
 24 F.4th 928, 971 (5th Cir. 2021), *rev’d and remanded on other grounds*, 142 S. Ct. 2528 (2022).

25 But it gets even stranger: as discussed next, in the *Florida* case, the federal government  
 26 *itself* provided conclusive evidence that the Parole and Non-Detention Policy exists and is  
 27 causing harm to the State. Indeed, a copy of the putatively non-existent DHS policy is attached  
 28 hereto as Exhibit B.

## II. Discovery in *Florida v. United States* Provides Evidence That the Parole and Non-Detention Policies Harm the State

Discovery has commenced in a case raising claims similar to those here, in *Florida v. United States*, No. 21-CV-1066 (N.D. Fla. 2021). In that case, the federal government has produced information about aliens released into the United States who listed Florida addresses as their intended place of residence, including statistics about how many aliens had failed to check in with DHS for further processing. *See* Exhibit A, Excerpts from Deposition of Raul Ortiz, Chief of the U.S. Border Patrol at 146:9-148:21. DHS’s own statistics show that the number of Florida-bound aliens who have absconded after being issued a Notice to Report or allowed into the United States under Parole+ATD currently stands at close to 50,000. During Florida’s deposition of U.S. Border Patrol Chief Raul Ortiz, Chief Ortiz admitted that this was “a large number” that was “concerning.” *Id.* at 148:11-14.

The State fully expects that further discovery in this case will show a similar—or larger—number for Arizona. (Federal Defendants would of course know now but are not forthcoming with that data.) Furthermore, under federal law, aliens who have been paroled into the United States become eligible for a variety of State benefits after five years.<sup>1</sup> These State benefits, which impose significant costs on the State, include AHCCS/Medicaid<sup>2</sup>; Nutrition Assistance/SNAP (also known as “food stamps”)<sup>3</sup>; and Cash Assistance/TANF

<sup>1</sup> *See* 8 U.S.C.A. § 1641(b)(4) (defining a “qualified alien” as “an alien who is paroled into the United States under [8 U.S.C. § 1182(d)(5)] for a period of at least 1 year”); 8 U.S.C. § 1612(2)(L) (making eligible for food stamps aliens who have been “qualified aliens” for a period of 5 years or more”); 8 U.S.C. § 1613(a) (making qualified aliens eligible for “any Federal means-tested public benefit ... 5 years” after “the date of the alien’s entry into the United States”).

<sup>2</sup> *See also* Arizona Health Care Cost Containment System (“AHCCCS”), Medical Assistance Eligibility Policy Manual §§ 524A and 524B (defining “qualified noncitizen” to include “[p]arolee[s] for at least one year” and making such parolees eligible for benefits after the alien “[h]as been a qualified noncitizen for at least five years”).

[https://azahcccs.gov/Resources/guidesmanualspolicies/eligibilitypolicy/eligibilitypolicymanual/#t=Policy%2FChapter\\_500\\_Non-Financial\\_Conditions\\_of\\_Eligibility%2F524\\_NonCitizen\\_Status%2FA\\_Overview.htm](https://azahcccs.gov/Resources/guidesmanualspolicies/eligibilitypolicy/eligibilitypolicymanual/#t=Policy%2FChapter_500_Non-Financial_Conditions_of_Eligibility%2F524_NonCitizen_Status%2FA_Overview.htm) and [https://azahcccs.gov/Resources/guidesmanualspolicies/eligibilitypolicy/eligibilitypolicymanual/#t=Policy%2FChapter\\_500\\_Non-Financial\\_Conditions\\_of\\_Eligibility%2F524\\_NonCitizen\\_Status%2F524B.htm](https://azahcccs.gov/Resources/guidesmanualspolicies/eligibilitypolicy/eligibilitypolicymanual/#t=Policy%2FChapter_500_Non-Financial_Conditions_of_Eligibility%2F524_NonCitizen_Status%2F524B.htm).

<sup>3</sup> Ariz. Dep’t of Econ. Sec., Cash and Nutrition Assistance Policy Manual, § FAA3.D(04)(B), [https://dbmefaapolicy.azdes.gov/#page/FAA3/Qualified\\_Noncitizens.html](https://dbmefaapolicy.azdes.gov/#page/FAA3/Qualified_Noncitizens.html) (“To be potentially eligible for [Nutrition Assistance]” aliens are required” to have been in parole status “for at least one year” and have been granted parole under 8 U.S.C. § 1182(d)(5)(A)).

(also known as welfare payments).<sup>4</sup>

The number of parolees in Arizona will cause quantifiable financial harm to the State, and the exact magnitude of those harms will become clear in discovery, when the federal government produces statistics about the number of aliens settling in Arizona. For present purposes, however, that matters little as even “a dollar or two” of injury satisfies Article III. *Sprint Commc’ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 289 (2008).

Discovery from *Florida* provides additional evidence of the State’s harm. At his deposition, Border Patrol Chief Ortiz admitted that “the southern border is currently in crisis” and that “the crisis that is currently ongoing at the southern border [is] making the border less safe for Americans and aliens alike.” Ex. A at 40:18-21, 53:9-13. This decrease in safety causes harm to Arizona, including increased law enforcement costs.

Chief Ortiz also admitted that since President Biden’s election, the number of aliens trying illegally to enter the United States has increased, and that internal Customs and Border Patrol documents state that “since President Biden was elected ... aliens illegally entering the United States perceive that they will be able to enter and remain in the United States.” *Id.* at 59:12-60:5. Chief Ortiz agreed that “aliens who cite favorable immigration policy as a reason to come to the United States are perceiving what actually is happening in the United States.” *Id.* at 67:22-68:5. Chief Ortiz also explained that it is important to detain and remove aliens who illegally enter the United States, because when there are no consequences, the number of illegal crossings increases; that “if migrant populations are told that there's a potential that they may be released, that yes, you can see increases [in illegal crossings]”; and that if DHS is not detaining and removing aliens who cross illegally, the flow of illegal crossers “will increase.” *Id.* at 171:13-172:9, 173:7-12.

Chief Ortiz stated that the Biden Administration affirmatively decreased ICE’s detention capacity and also eliminated other processing pathways for aliens. *Id.* at 233:9-17. He further agreed with the statement that “each one of those decisions [to degrade detention capacity and eliminate processing pathways] in the midst of a historic flood of aliens to the

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<sup>4</sup> Ariz. Admin. Code § R6-12-305 (making eligible for Cash Assistance (TANF) “a noncitizen legal alien who satisfies the requirements of [8 U.S.C. § 1641]”).

1 southern border increased the pressure on Border Patrol and its limited capacity” and that “as  
2 that pressure built, there’s no other choice other than to release [aliens].” *Id.* at 233:18-234:5.  
3 Ortiz affirmed that the decrease in ICE’s detention capacity impacts Border Patrol. *Id.* at 33:3-  
4 16. He also admitted that, if ICE had not degraded its detention capacity, it would have taken  
5 pressure off of Border Patrol, allowing it to transfer more aliens to ICE for detention, rather  
6 than paroling them into the United States. *Id.* at 231:17-232:19.

7 Chief Ortiz went on to admit that criminal trafficking organizations incentivized by the  
8 Parole and Non-Detention Policy “are putting ... border communities in danger,” such as by  
9 locating “stash houses in neighborhoods” and causing “damage to property [of] ranchers and  
10 farmers,” including damage to “fences” and “livestock that are lost when these smugglers drive  
11 through their property,” and that they “have little regard for the safety of the community out  
12 there.” *Id.* at 241:6-242:3. All of this constitutes injury to Arizona and to its quasi-sovereign  
13 interests.

14 Chief Ortiz further admitted that criminal trafficking organizations “continue to flood  
15 the border area with ... narcotics... We’ve had more agents assaulted this year than we ever  
16 have, and we continue to see increase in firearm seizures.” *Id.* at 243:7-9, 15-17. Chief Ortiz  
17 specifically disclosed that these policies disproportionately harm Arizona specifically, expressly  
18 stating that the Tucson Border Patrol sector is one of the two sectors “where we see the  
19 criminal organizations, smuggling organizations operating at a higher level.” Ex. A at 83:10-  
20 13. The Parole and Non-Detention Policy is thus causing increased crime in Arizona, and  
21 causing increased law-enforcement costs to the State.

22 Chief Ortiz was deposed under Fed. R. Civ. P. 30(b)(6) as a representative of the federal  
23 government. *E.g.* Ex. A at 10:7-11. These admissions, therefore, were made by DHS. The  
24 harmful effects of the Non-Detention and Parole policies are predictable enough that even  
25 the federal government itself recognizes them. And the Supreme Court and Ninth Circuit have  
26 both made clear that standing may be based on the “predictable effect of Government action  
27 on the decisions of third parties.” *Department of Commerce*, 139 S.Ct. at 2566; *accord San Francisco*,  
28 944 F.3d at 787. That Federal Defendants themselves have made such predictions should

1 dispel any doubts about the State's standing.

### 2 **III. The Parole and Non-Detention Policy Exists and Is Subject APA Review**

3 The federal government also argues that “this Court cannot postulate the existence of  
4 a policy from individual parole decisions absent any guiding document or other evidence of  
5 the existence of such a policy.” (at 7) Not so. As explained above, the inquiry is pragmatic—  
6 rather than formalistic as Defendants contend—and may be premised on changes to agency's  
7 “day-to-day” operations, which here are massive and undeniable. *Supra* at I.

8 The federal government also claims that the policy of issuing Notices to Report  
9 (“NTRs”) does “not constitute final agency action because the policy did not compel anyone  
10 to do or refrain from doing anything” and that the slightly revised version of the NTR policy—  
11 the Parole and Non-Detention Policy—“is illusory, and is nothing more than the  
12 amalgamation of individual, discretionary, parole decisions.” (at 7). Not so.

13 As the State previously explained (Doc. 167 (“MTD Response”) at 1:17-2:9), unwritten  
14 policies *are* subject to APA review. *See Brotherhood of Locomotive Eng'rs & Trainmen v. Fed. R.R.*  
15 *Admin.*, 972 F.3d 83, 100 (D.C. Cir. 2020) (collecting authorities establishing that unwritten  
16 policies are subject to APA review); *Damus v. Nielsen*, 313 F. Supp. 3d 317, 339–42 (D.D.C.  
17 2018) (reasoning that a court may infer the existence of an immigration policy where the facts  
18 suggest that one exists). The federal government *never* attempted—not in its MTD Reply (Doc.  
19 174) and neither in its Response here (Doc. 208)—to distinguish the case authorities that the  
20 State cited in its MTD Response about unwritten policies still being subject to APA review,  
21 nor has the federal government cited any authority for its (incorrect) argument that policies  
22 must be committed to writing to be subject to APA review.

23 Indeed, as discussed below, Chief Ortiz's deposition testimony conclusively proves  
24 that DHS has been trying to do exactly that, by communicating elements of the Parole and  
25 Non-Detention Policy by telephone and email, rather than by formal memo. The unrefuted  
26 case law cited by the State makes clear that such attempts to circumvent the APA through  
27 unwritten policies is unavailing. Instead, “agency action need not be in writing to be final and  
28 judicially reviewable pursuant to the APA. An unwritten policy can still satisfy the APA's

1 pragmatic final agency action requirement.” *Al Otro Lado, Inc. v. McAleenan*, 394 F. Supp. 3d  
2 1168, 1206–7 (S.D. Cal. 2019) (cleaned up) (collecting case citations).

3 In any event, important elements of the Parole and Non-Detention *were* committed to  
4 writing. The Parole+ATD policy has been the subject of at least two official DHS memos.  
5 Curiously, the federal government has not provided either memo to the Court. The State  
6 attached the first memo to its MTD Response (Doc. 167-1), and attaches here the second  
7 memo as Exhibit B. These memos *mandate* that DHS agents parole aliens when specific  
8 numerical border crossing thresholds are reached. As explained more below, Chief Ortiz  
9 confirmed that these requirements apply to *all* affected aliens—there is no discretion. The  
10 memos compel DHS officers to implement a programmatic *en masse* parole policy, removing  
11 their discretion and violating the INA’s requirement that parole be granted “only on a case-  
12 by-case basis for urgent humanitarian reasons or significant public benefit,” 8 U.S.C.  
13 § 1182(d)(5)(A). The Parole and Non-Detention Policy is thus final, reviewable agency action.

14 **A. Discovery in *Florida* Provides Conclusive Evidence That the Parole and**  
15 **Non-Detention Policy Exists and that the Federal Government**  
16 **Promulgated It By Telephone and Email**

17 Chief Ortiz made a number of admissions in his deposition that provide concrete  
18 evidence confirming the State’s allegations about the existence of the Parole and Non-  
19 Detention Policy, and that the Policy was often not committed to formal memos, or even to  
20 writing at all.

21 Chief Ortiz confirmed that, under the Trump Administration, agents’ ability to release  
22 aliens or to parole them was only allowed in “very exigent circumstances,” such as for medical  
23 or humanitarian reasons. *Id.* at 173:13-174:7. He also confirmed that when the Biden  
24 Administration took office, the new Parole Policy was initially communicated “telephonically  
25 or through e-mail coordination between Border Patrol headquarters and the sector.” *Id.* at  
26 174:9-176:10. He went on to explain that when the Parole Policy was expanded beyond the  
27 first sector where it had been imposed, there were two ways it was communicated: “Every  
28 Tuesday we have a chiefs’ call where we coordinate directly with the sector chiefs and the  
deputy chiefs. And then the operations directorate would also communicate with the sectors



1 if there were specific issues centered around coordination, operational coordination that had  
 2 to happen.” *Id.* at 176:20-177:8. He also admitted that, even after DHS had issued its formal  
 3 Parole+ATD memo, changes to the policy were communicated by email. *Id.* at 224:22-225:11.

4 Under the first iteration of the Parole and Non-Detention Policy, when DHS was  
 5 issuing Notices to Report (“NTRs”), Chief Ortiz testified that guidance about NTRs “was  
 6 sent out and distributed through multiple platforms. Initially we had a telephonic call with all  
 7 the associate chiefs. We also asked that the operations directorate send out a[n] e-mail to the  
 8 sector points of contact, which would have been an assistant chief at those sectors, to include  
 9 the sector chiefs.” *Id.* at 198:5-15. He also claimed that he believed a memorandum had been  
 10 issued as well, but admitted that he had been unable to find a copy of it, and counsel for  
 11 Florida affirmed that no such memorandum had been produced to Florida. *Id.* at 198:15-20.

12 Most importantly, Chief Ortiz affirmed that the Parole+ATD policy was a  
 13 programmatic policy such that, once numerical thresholds for illegal border crossings had been  
 14 reached, the policy required categorical grant of parole to *all* aliens covered by the policy: “Q.  
 15 Okay. So if the Rio Grande Valley or Del Rio hit the thresholds that are laid out in the second  
 16 page of this document ... *all* family units would be paroled plus ATD, correct? ... A. *All* family  
 17 units minus Central Americans and Mexican family units.” *Id.* at 212:4-10 (emphasis added).

18 Chief Ortiz’s deposition testimony confirms the central elements of the State’s  
 19 allegations in this case: the Parole and Non-Detention Policy exists; it was not necessarily  
 20 memorialized in formal memos, or even in writing at all; and the Policy imposed mandatory  
 21 requirements on DHS agents, removing their discretion to grant parole on a “only on a case-  
 22 by-case basis for urgent humanitarian reasons or significant public benefit,” 8 U.S.C.  
 23 § 1182(d)(5)(A), and instead requiring that *all* aliens in certain categories be paroled.

## 24 CONCLUSION

25 Discovery in *Florida* has provided ample evidence that the Parole and Non-Detention  
 26 Policy exists and that it harms the State. The State should be allowed to continue to prosecute  
 27 its claims. Discovery should commence here, and Federal Defendants’ motion to dismiss  
 28 should be denied.

1 RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of September, 2022.

2  
3 **MARK BRNOVICH**  
4 **ATTORNEY GENERAL**

5 By: /s/ James K. Rogers

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11 *Arizona*  
12  
13  
14  
15  
16  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 9<sup>th</sup> day of September, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Arizona using the CM/ECF filing system. Counsel for all Defendants who have appeared are registered CM/ECF users and will be served by the CM/ECF system pursuant to the notice of electronic filing.

/s/ James K. Rogers

*Attorney for Plaintiffs Mark Brnovich, in his official capacity as Attorney General of Arizona; and the State of Arizona*

# Exhibit A

Ortiz, Raul

July 28, 2022

1

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA  
PENSACOLA DIVISION

- - - - - x  
STATE OF FLORIDA, :  
 :  
 Plaintiff, :  
 :  
 vs. : Case No.  
 :  
 THE UNITED STATES OF AMERICA, : 3:21-cv-1066  
 :  
 et al., :  
 :  
 Defendants. :

- - - - - x

Arlington, Virginia

Thursday, July 28, 2022

Videotaped Deposition of RAUL L. ORTIZ, a  
witness herein, called for examination by counsel for  
Plaintiff in the above-entitled matter, pursuant to  
notice, taken at the offices of Henderson Legal  
Services, 2300 Wilson Boulevard, Seventh Floor,  
Arlington, Virginia, at 9:32 a.m. on Thursday, July  
28, 2022, and the proceedings being taken down by  
stenotype by and transcribed by KAREN YOUNG.

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Exhibit C - 2

Ortiz , Raul

July 28, 2022

2

1 APPEARANCES:

2 On Behalf of the Plaintiff:

3 JOHN GUARD, ESQ.  
4 JAMES H. PERCIVAL, ESQ.  
5 ANITA J. PATEL, ESQ.  
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15 (850) 245-0147

10 On Behalf of the Defendants:

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15 Washington, D.C. 20044  
16 joseph.a.darrow@usdoj.gov  
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16 ALSO PRESENT:

17 Michelle Tonelli, Esq., DHS  
18 Stephanie Muffett, Esq., CBP  
19 Krishna Sharma, Videographer  
20  
21  
22

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3 RAUL L. ORTIZ

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Exhibit C - 6

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1 P R O C E E D I N G S

2 THE VIDEOGRAPHER: Good morning everyone.

3 This begins Media Number 1 in the videotaped  
4 deposition of Mr. Raul Ortiz, taken in the matter of  
5 the State of Florida versus the United States of  
6 America et al. This case is filed at the U.S.  
7 District Court, Northern District of Florida,  
8 Pensacola Division, Case Number 3:21-cv-1066. This  
9 deposition is being held at 2300 Wilson Boulevard,  
10 Arlington, Virginia on July 28, 2022, and the time on  
11 the video monitor is 9:32 a.m.

12 At this time attorneys please identify  
13 yourselves for the record, and after that, our court  
14 reporter from Henderson Legal Services will swear in  
15 the witness and we can begin.

16 MR. GUARD: Good morning. John Guard,  
17 Chief Deputy Attorney General for the State of  
18 Florida.

19 MR. PERCIVAL: James Percival for the State  
20 of Florida.

21 MS. CHRISTMAS: Natalie Christmas for the  
22 State of Florida.

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1 MS. PATEL: Anita Patel for the State of  
2 Florida.

3 MR. DARROW: Joseph Darrow on behalf of the  
4 United States.

5 MS. RYAN: Erin Ryan on behalf of the  
6 United States.

7 MS. TONELLI: Michelle Tonelli on behalf of  
8 the United States.

9 MS. MUFFETT: Stephanie Muffett on behalf  
10 of the United States.

11 MR. GUARD: Good morning, Chief Ortiz.  
12 Whereupon,

13 RAUL ORTIZ,  
14 business address at U.S. Department of  
15 Homeland Security, 1300 Pennsylvania  
16 Avenue, Northwest, Washington, D.C., called  
17 for examination by counsel for  
18 Plaintiff and having been duly  
19 sworn by the Notary Public, was examined  
20 and testified as follows:

21 - - -

22 EXAMINATION BY COUNSEL FOR PLAINTIFF

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Exhibit C - 8

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8

1 BY MR. GUARD:

2 Q. Let me try that again. Good morning, Chief  
3 Ortiz. Can you state and spell your name for the  
4 record?

5 A. Yeah, Raul Ortiz, R-A-U-L, Ortiz,  
6 O-R-T-I-Z.

7 Q. Thank you. Chief Ortiz, some ground rules  
8 for this deposition. While if you and I were at a  
9 restaurant talking, we would not always give audible  
10 responses. We have a court reporter sitting next to  
11 my right, your left, who's taking everything down,  
12 and she cannot take down shakes of the head and  
13 other, you know, things that -- winks, nods, all  
14 those kind of things. So if you could please just  
15 make sure that you -- you, when asked a question, you  
16 give an audible response so she can take that down,  
17 is that fair?

18 A. Yes.

19 Q. If you don't understand a question I ask, I  
20 would ask you to ask me to rephrase it, and I will  
21 try to make it so that you can understand the  
22 question. If you answer the question, I'm going to

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1     assume that you understood it. Is that fair?

2           **A.     That's fair.**

3           Q.     All right. And from time to time, Mr.  
4     Darrow may object to the questions. Obviously we  
5     don't have a judge here, so unless he instructs you  
6     not to answer a question, if he objects, you go ahead  
7     and answer the question, and we then take care of  
8     that later in court. Is that fair?

9           **A.     Okay.**

10          Q.     And this is not the Bataan death march or  
11     anything like that, so if you need a break, if you'll  
12     just answer the question pending, I'll give you any  
13     breaks or all breaks you want. Is that fair?

14          **A.     That's fair.**

15          Q.     And the last thing is more my problem  
16     probably than your problem. If we were in a  
17     restaurant and we were talking, we'd probably  
18     interrupt each other and maybe at times talk over  
19     each other because that's how human beings behave,  
20     but again, we have a court reporter, and if we're  
21     both talking at the same time, she can't possibly  
22     take that down, so let's both try to avoid that. Is

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1 that fair?

2 **A. That's fair.**

3 Q. All right. Are you under the influence of  
4 any alcohol, medication or substances that would  
5 impair your ability to testify today?

6 **A. No.**

7 Q. And do you understand that today you're  
8 being deposed as both a corporate representative of  
9 the Department of Homeland Security and in your  
10 individual capacity as well?

11 **A. Yes.**

12 Q. And to make sure the record is clear which  
13 capacity you're testifying to, the first part of this  
14 deposition is going to be you testifying in your  
15 individual capacity. We'll then take a break, and  
16 then we'll do the corporate deposition.

17 **A. Okay.**

18 Q. All right? Have you ever been deposed  
19 before?

20 **A. Yes.**

21 Q. How many times?

22 **A. Less than ten.**

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11

1 Q. Okay. And I'm not asking for the specific  
2 circumstances of each deposition, but generally what  
3 were those -- what subject matter were those  
4 depositions?

5 A. Most of them involved labor employee  
6 relations.

7 Q. Okay. How did you prepare for this  
8 deposition?

9 A. I met several times with our counsel.

10 Q. Okay. Other than your counsel, did you  
11 speak to anyone else?

12 A. No.

13 Q. Okay. Did you review any materials to  
14 prepare for this deposition?

15 A. Yes.

16 Q. What materials did you review?

17 A. E-mails and some memoranda and some policy  
18 documents.

19 Q. Okay. And did you bring anything with you  
20 to this deposition?

21 A. No.

22 Q. Okay. Have you read any of the court

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1 filings in this action?

2 **A. No.**

3 Q. Okay. Have you reviewed any of the  
4 deposition transcripts from anyone else that's been  
5 deposited in this action?

6 **A. No.**

7 Q. Have you spoken to Mr. Barker about his  
8 deposition?

9 **A. I've spoken to Mr. Barker about many  
10 things, but not specifically his deposition.**

11 Q. Okay. Have you -- and I apologize if I  
12 mispronounce his name. Did you speak with Mr.  
13 Guadian?

14 **A. No.**

15 Q. Okay. Have you spoken with Mr. Davies?

16 **A. No.**

17 Q. Okay. Did you speak to your boss,  
18 Commissioner Magnus, about this deposition?

19 **A. No.**

20 Q. Have you spoken to any of your subordinates  
21 about this deposition?

22 **A. Other than the logistics, my adjutant.**

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1 Q. Okay.

2 MR. DARROW: Adjutant I think is what he  
3 said.

4 A. Yes.

5 Q. Did you have any of your subordinates  
6 gather or provide you any information with respect to  
7 this deposition?

8 A. Other than printing and binding the  
9 information that our counsel provided.

10 Q. Okay. In the course of your preparation  
11 for this deposition, did you review the Department of  
12 Homeland Security's responses to Florida's requests  
13 for production of documents?

14 A. I believe I saw some of those documents in  
15 what was printed for me, but I didn't spend an awful  
16 lot of time on that.

17 Q. Okay. Is it okay if I use DHS for --

18 A. Yes.

19 Q. -- Department of Homeland Security? All  
20 right. Well, we're going to have a bunch of those  
21 kind of abbreviations, and I'll ask you before I  
22 abbreviate anything. Have you reviewed DHS's

Ortiz, Raul

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14

1 responses to Florida's interrogatories in preparation  
2 for this deposition?

3 **A. No.**

4 Q. All right. Have you reviewed DHS's  
5 responses to Florida's requests for admissions in  
6 preparation for this deposition?

7 **A. No.**

8 Q. What is your understanding, Chief Ortiz, as  
9 to what this lawsuit is about?

10 **A. I believe it's a challenge of our**  
11 **utilization of ATD parole process as a processing**  
12 **pathway.**

13 Q. Okay. Do you have a college degree?

14 **A. No.**

15 Q. And you've been employed with the Border  
16 Patrol for 31 years, correct?

17 **A. That's correct.**

18 Q. And you've not worked for any other law  
19 enforcement agency other than the Border Patrol,  
20 right?

21 **A. That's correct.**

22 Q. All right, and you have not worked any



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July 28, 2022

15

1 other job except for the Border Patrol since May 13th  
2 of 1991, right?

3 **A. Well, I was assigned to the Department of**  
4 **Homeland Security for a year as their attache, and**  
5 **then I returned back to the Border Patrol in 2011.**

6 Q. So you were detailed to DHS. Was that  
7 attache --

8 **A. I was actually assigned --**

9 Q. Okay.

10 **A. -- to DHS.**

11 Q. Okay. And that was for an attache in  
12 Kabul, Afghanistan?

13 **A. That's correct.**

14 Q. Okay, and you graduated from the Border  
15 Patrol Academy, right?

16 **A. That's correct.**

17 Q. When did you graduate from the Border  
18 Patrol Academy?

19 **A. In September of 1919.**

20 Q. And I believe you were part of academy  
21 class 247; is that right?

22 **A. That's correct.**

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16

1 Q. Just curious, how many Border Patrol agents  
2 are still active that were part of your class?

3 A. One.

4 Q. Okay. My wife just retired from the FBI,  
5 and she was down to two.

6 A. Yeah.

7 Q. So I appreciate that. So after you  
8 graduated from the academy, you became an agent?

9 A. That's correct.

10 Q. And what capacity do you serve the Border  
11 Patrol now?

12 A. I am the chief of the United States Border  
13 Patrol.

14 Q. And when did you assume that office?

15 A. August 15th of last year.

16 Q. Okay, so roughly 11 months ago?

17 A. That's correct.

18 Q. Okay. Almost a year. What are your duties  
19 as chief of the U.S. Border Patrol?

20 A. I oversee approximately 21,000 employees, a  
21 budget of just under six billion dollars, and am  
22 responsible for the operational oversight of the

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17

1 southwest border, the northern border and our coastal  
2 regions, plus our OCONUS mission, which is our  
3 overseas deployments.

4 Q. And prior to being chief of the U.S. Border  
5 Patrol, what job did you have with the Border Patrol?

6 A. I was the deputy chief of the United States  
7 Border Patrol.

8 Q. Is there just a single deputy chief or --

9 A. That's -- there's only one deputy chief in  
10 the United States Border Patrol.

11 Q. Okay, and how do the duties of deputy chief  
12 compare to the duties of chief?

13 A. Very similar. They're a partnership. The  
14 -- certainly the chief is the ultimate authority  
15 within the United States Border Patrol, but as a  
16 deputy chief, I was considered, you know, his chief  
17 operating officer and coordinated all efforts with  
18 respect to the border security mission and some of  
19 the other coordination we have within the inter-  
20 agency.

21 Q. Okay. And when did you become the deputy  
22 chief of the U.S. Border Patrol?

Ortiz, Raul

July 28, 2022

18

1           **A.       2019.**

2           **Q.       2019.**

3           **A.       March of 2019.**

4           **Q.       And so you served as deputy chief for more**  
5           **or less 17 months?**

6           **A.       Yes, sir.**

7           **Q.       Okay. Prior to being deputy chief, what**  
8           **role did you serve in the Border Patrol?**

9           **A.       I was the chief of the Del Rio sector,**  
10          **which is in west Texas.**

11          **Q.       And that's actually where you're from**  
12          **originally, right?**

13          **A.       That's correct.**

14          **Q.       And how long did you serve as the chief of**  
15          **the Del Rio sector?**

16          **A.       For approximately a year.**

17          **Q.       Okay. And starting there and kind of**  
18          **working backwards, can you just summarize your**  
19          **experience in the top?**

20          **A.       Yeah, so my first nine years in the United**  
21          **States Border Patrol, I spent in San Diego,**  
22          **California. I was both an agent, a senior agent and**

Ortiz, Raul

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19

1 a first-line supervisor. In the year 2000, I  
2 transferred to Texas as a -- what would be considered  
3 a mid-level manager, assistant patrol agent in charge  
4 of a Border Patrol station and then ultimately became  
5 an agent in charge of two different stations in Del  
6 Rio sector.

7 After that, I became a staff officer, which  
8 is an assistant chief, and then I was detailed to  
9 Afghanistan for a year to run a task force as a  
10 director in 2009. I returned and worked for the  
11 State Department for a year as a DHS senior advisor,  
12 and then I went back to Afghanistan as a DHS attache  
13 in 2010 to '11, and then subsequently, I was promoted  
14 as the deputy chief of operational programs in  
15 Washington, D.C.

16 Q. Okay. What were your duties -- so when  
17 approximately were you the deputy chief of operations  
18 in Washington, D.C.?

19 A. So I did that job for approximately two  
20 years, from 2011 to 2013, and I served as both the  
21 deputy of operational programs and operations. I did  
22 about a year of each. And then after that, I was

1 promoted to the deputy chief of Rio Grande Valley  
2 sector in 2013.

3 Q. Okay. What -- what were your duties as  
4 either deputy chief of operations or deputy chief of  
5 operational programs?

6 A. So in the Border Patrol, we have 20  
7 sectors. We have an academy, and we also have a  
8 special operations group. As the deputy chief of  
9 operations, just in general, our job is to oversee  
10 and coordinate with the other directorates. At the  
11 time, there were three different directorates within  
12 the Border Patrol. We had a policy shop, we had a  
13 mission readiness shop, and we had an operations  
14 directorate, and so we had roughly about four or five  
15 hundred Border Patrol agents and professional staff  
16 members assigned to our headquarters division.

17 And on top of managing those personnel, we  
18 also oversaw the operations in the field and  
19 coordinated resourcing the sectors both from a  
20 budgetary standpoint as well as ensuring that they  
21 were executing against the chief's operational  
22 priorities and the commissioner's.

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21

1 Q. Okay. At what points in time in your 31  
2 years with Border Patrol have you been involved in  
3 developing policies?

4 A. Probably most of the policy engagement that  
5 I was responsible for happened in the three years  
6 that I was assigned to our Afghanistan mission.  
7 After that, most of the work as a deputy chief of ops  
8 or ops programs centered around coordinating  
9 resourcing. We were in the process of restructuring  
10 the Border Patrol in 2012. I participated in  
11 multiple working groups to ensure that we were able  
12 to restructure appropriately. I worked closely with  
13 our partner agencies. At that time, there was an  
14 awful lot of coordination between us, DOJ and the DHS  
15 components to include ICE. And so most of my duties  
16 and responsibilities centered around that  
17 coordination.

18 Q. The restructuring that you're mentioning --  
19 was that part of the restructure that actually  
20 created the Department of Homeland Security?

21 A. No, actually, this was an internal Border  
22 Patrol restructuring.

Ortiz, Raul

July 28, 2022

22

1 Q. Prior to being chief of the Border Patrol,  
2 at what points in time in your career have you been  
3 involved in developing guidance?

4 A. Probably since I became a supervisor, which  
5 was in 1997, either implementing guidance or  
6 providing information to those who were formulating  
7 the guidance.

8 Q. Okay. And how does -- as far as  
9 implementing guidance, how does Border Patrol  
10 typically I guess for lack of better words get the  
11 word out about a new guidance?

12 A. So it happens on several different  
13 platforms. First, we issue memoranda to the field to  
14 ensure that they understand policies, procedures. We  
15 also quite often develop either SOPs, standard  
16 operating procedures, or IOPs, internal operating  
17 procedures, for our operational components. And then  
18 quite often sometimes in exigent circumstances, it  
19 could be via an e-mail, and then we also develop  
20 operational plans.

21 Operational plans are a very formalized  
22 approval process. If a sector or an operational



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23

1 component makes -- has a recommendation on a  
2 particular initiative, they may submit a operational  
3 plan to headquarters, and it will typically be  
4 approved by either the operations directorate chief  
5 or may even come to me for approval.

6 Q. Okay, so if a sector -- well, strike that.  
7 In developing guidance, does information come from  
8 the field to whoever's developing -- involved in  
9 developing the guidance?

10 A. Yes, quite often it's very important to  
11 involve field representation when developing guidance  
12 because every sector's unique. Every sector has  
13 different challenges, and unfortunately, amongst the  
14 20 sectors, you know, I have sectors that range from  
15 36, 37 hundred employees all the way down to, you  
16 know, a couple of hundred. And so it can't be a  
17 cookie cutter approach. We certainly make sure that  
18 we involve the sector reps as we start to develop  
19 guidance that may impact them.

20 Q. So the sector that's covering the state of  
21 Vermont may have a different amount of employees than  
22 the sector that's covering the Rio Grande Valley.

Ortiz, Raul

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24

1           **A.       That's correct.**

2           Q.       And to be clear, the sector that's covering  
3       Vermont would have less employees.

4           **A.       Yes, most definitely.**

5           Q.       All right. Now, the operational plans, the  
6       IOP, the SOP and the memorandum, would those go to  
7       the chiefs and deputy chiefs of each executive sector  
8       for further dissemination to the Border Patrol  
9       agents?

10          **A.       That's correct.**

11          Q.       Okay. And they would go up through -- up  
12       and down the chain of command?

13          **A.       That's correct.**

14          Q.       Okay. If I were just an average line  
15       Border Patrol agent and there was a change in policy  
16       or change in guidance, would it be common for me to  
17       get something in writing?

18               MR. DARROW: Objection as to form. You can  
19       answer.

20          **A.       Yes.**

21          Q.       In your 31 years with Border Patrol, have  
22       you ever done anything that you viewed as inhumane to

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1 an alien?

2 A. No.

3 Q. In your 31 years with Border Patrol, have  
4 you ever done anything that you viewed as cruel to an  
5 alien?

6 A. No.

7 Q. What would you do as chief of the Border  
8 Patrol if you found out that an employee of Border  
9 Patrol was doing something inhumane?

10 MR. DARROW: Objection as to form. You can  
11 answer.

12 A. So certainly there's a disciplinary  
13 process. One of the things that I've been awfully  
14 proud of in the 31 years is that, you know, the men  
15 and women of the Border Patrol have done a phenomenal  
16 job under very stressful and dire circumstances, and  
17 they continue to demonstrate the utmost  
18 professionalism, but any time I or expectation  
19 anybody within the Border Patrol witnesses or  
20 observes somebody mistreating or conducting  
21 themselves in a manner that would not be to the  
22 standard of the United States Border Patrol,

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1     **expectation is that that would be reported.**

2           Q.     The expectation is that no one in Border  
3     Patrol's going to condone inhumane behavior.

4           **A.     That's correct.**

5           Q.     All right, and the expectation is the  
6     Border Patrol agents on the line or even the  
7     supervisor, they're going to perform professionally.

8           **A.     That's correct.**

9           MR. DARROW:  Objection as to form.

10          BY MR. GUARD:

11          Q.     I know it's -- I know, again, if we were at  
12     a meal, it would be typical for us just to talk and  
13     rattle off, but if you could just pause a second so  
14     that Mr. Darrow can get his objections in --

15          **A.     I will.**

16          Q.     -- that'll just help the court reporter,  
17     and she won't yell at all of us.  Do you believe that  
18     detaining an alien illegally present in the United  
19     States until he can be processed and either removed  
20     or admitted is inhumane?

21          **A.     Can you repeat the question?**

22          Q.     Sure.  Do you believe that detaining an

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1 alien illegally present in the United States until  
2 that alien can be processed and either removed or  
3 admitted is inhumane?

4 **A. No.**

5 Q. Do you believe that detaining an alien  
6 illegally present in the United States until he or  
7 she can be processed and either removed or admitted  
8 is cruel?

9 **A. No.**

10 Q. In your career, would it be fair to say  
11 that millions of aliens that have illegally entered  
12 the United States have been detained by the Border  
13 Patrol?

14 **A. Yes.**

15 Q. The detention of family units by Border  
16 Patrol is not something that just happened under  
17 President Trump, right?

18 MR. DARROW: Objection as to form.

19 **A. That's correct.**

20 Q. The Border Patrol has detained family units  
21 for your entire 31-year career, correct?

22 **A. Well, the Border Patrol does not detain.**

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1 We process. The detention operation is the  
2 responsibility of ICE, enforcement removal  
3 operations. Typically we try and keep people in  
4 custody for under 72 hours, and most of that time is  
5 spent either processing or coordinating the  
6 repatriation or the transfer to one of the other  
7 agencies.

8 Q. All right. So what at least Border Patrol  
9 tries to do is tries to detain temporarily for a  
10 period of time that you try not to exceed 72 hours.  
11 Is that fair?

12 A. Yes.

13 Q. Okay, and family units illegally present in  
14 the United States were detained under President  
15 Obama, right?

16 A. Yes.

17 Q. Family units illegally present in the  
18 United States were detained under President Clinton,  
19 correct?

20 A. Yes.

21 Q. Would it be fair to say that presidents of  
22 both parties have detained family units?

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1           **A.     Yes.**

2           Q.     Now, the detention of juveniles is not  
3 something that just happened under President Trump,  
4 correct?

5           **A.     That's correct.**

6           Q.     Juveniles have been detained since you  
7 joined the Border Patrol.

8           **A.     That's correct.**

9           Q.     Okay. And are you familiar with something  
10 known as the Flores consent decree?

11          **A.     Yes.**

12          Q.     And do you know when the Flores consent  
13 decree was entered roughly?

14          **A.     I know that in 2018 and '19, I traveled to**  
15 **Los Angeles to participate in a hearing under the**  
16 **Flores decree. I can't remember the exact month.**

17          Q.     Okay, all right. Has the Flores decree  
18 existed for decades?

19          **A.     No, not that I know of.**

20          Q.     Okay, so you're not aware that it was  
21 roughly entered in 1997?

22          **A.     No.**

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1 Q. Okay. And the Flores consent decree deals  
2 with the detention and treatment of juveniles, does  
3 it not?

4 A. Yes.

5 Q. Would you agree that the detention of  
6 juveniles raises additional challenges for the Border  
7 Patrol that are not present when you're dealing with  
8 single adults?

9 MR. DARROW: Objection.

10 A. Yes.

11 Q. What are those additional challenges?

12 A. So one, the Border Patrol facilities were  
13 never designed to support long-term detention of  
14 juveniles. Juveniles require different care, to  
15 include, you know, in some cases infant and tender  
16 age children under the age of seven. Our Border  
17 Patrol agents first off didn't receive training at  
18 their academy to be able to support the wrap-around  
19 services that unaccompanied children pose in our, and  
20 so just in general, when you -- when you're housing,  
21 you know, large numbers of unaccompanied children in  
22 congregate settings with adults and family units, the



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1 facilities do not have sufficient space to ensure  
2 that their safety and security is -- can be  
3 prioritized the way it should be in a family  
4 residential center or facility that HHS may operate.

5 Q. Okay. I want to kind of carve off  
6 unaccompanied children from family units.

7 A. Okay.

8 Q. Both of them have juveniles, correct?

9 A. That's correct.

10 Q. All right. Unaccompanied children, Border  
11 Patrol doesn't turn those children over to ICE,  
12 correct?

13 A. That's correct.

14 Q. Instead, it turns them over to Department  
15 of Health and Human Services, right?

16 A. HHS, yes.

17 Q. All right. I'm going to call it HHS just  
18 to -- for ease and comfort. And does Border Patrol  
19 segregate for a short time juveniles apart from  
20 family units and single adults?

21 MR. DARROW: Objection.

22 A. Yes.

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1 Q. Okay, and then it coordinates with HHS to  
2 remove them from Border Patrol facilities, right?

3 A. Yes.

4 Q. Family units. Do you segregate or separate  
5 family units from single adults?

6 MR. DARROW: Objection.

7 A. We try to.

8 Q. And when you say Border Patrol tries to  
9 separate family units from single adults, is that  
10 when there is capacity?

11 A. That's correct, it's dependent on space and  
12 detention and the facility itself. They are  
13 certainly separated within cells, but quite often in  
14 the processing area, we have seen on occasion family  
15 units and single adults commingled.

16 Q. Okay. Now, again, I'm going to carve off  
17 unaccompanied children. I'm not talking about HHS.  
18 I'm not trying to wander into that because I think  
19 the answer's going to vary. I just want to talk  
20 about family units. So that's the premise of this  
21 question and probably a series of questions. Is  
22 Border Patrol's capacity dependent upon how fast you

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1 can move out families to ICE?

2 **A. Yes.**

3 Q. So if ICE is either unwilling or unable to  
4 take family units, Border Patrol's facilities become  
5 more and more crowded?

6 MR. DARROW: Objection.

7 **A. Yes.**

8 Q. So if ICE were to cut its detention  
9 capacity in half, that would have an impact on Border  
10 Patrol.

11 MR. DARROW: Objection.

12 **A. Yes.**

13 Q. And if ICE were to cease detaining family  
14 units, that could have an impact on Border Patrol.

15 MR. DARROW: Objection.

16 **A. Yes.**

17 Q. I'm going to -- I'm going to show you what  
18 I'm going to mark for identification as Exhibit 1. I  
19 actually got a copy for him. I'm giving you --

20 MR. DARROW: Okay.

21 MR. GUARD: -- your copy too.

22 (Ortiz Exhibit No. 1

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1 was marked for  
2 identification.)

3 BY MR. GUARD:

4 Q. Have you seen Exhibit 1 before?

5 A. Yes.

6 Q. What is Exhibit 1?

7 A. It is a table of organization for the  
8 Department of Homeland Security.

9 Q. Okay. Is it a fair and accurate  
10 representation of the organization of the Department  
11 of Homeland Security?

12 A. It appears to be.

13 Q. All right. The United States Border Patrol  
14 is not listed on this chart, is it?

15 A. It is a subcomponent of the U.S. Customs  
16 and Border Protection, so no, by itself, it's not  
17 listed on this.

18 Q. Okay. And if I refer to the United States  
19 Customs and Border Protection as CBP, you'll know  
20 what I'm talking about?

21 A. Yes.

22 Q. Okay. And what does CBP do?

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1           A.       Customs and Border Protection is a  
2       component within the Department of Homeland Security  
3       that is responsible for border security. They're  
4       responsible for facilitating legal trade and travel  
5       at our ports of entry, seaports and airports, and  
6       then we also have -- are responsible for facilitating  
7       trade. We have six operational components within  
8       CBP, the Office of Trade, United States Border  
9       Patrol, Office of Field Operations, Executive  
10      Services, and Operational Services I believe, yeah.

11          Q.       All right. I'm going to show you what I'm  
12      going to mark as Exhibit 2 to your deposition.

13                 MR. DARROW: Thank you.

14                                 (Ortiz Exhibit No. 2  
15                                 was marked for  
16                                 identification.)

17                 THE WITNESS: Thank you.

18                 BY MR. GUARD:

19          Q.       Have you ever seen Exhibit 2 before?

20          A.       That's correct.

21          Q.       And what is Exhibit 2?

22          A.       Exhibit 2 is the table of organization for

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1     **Customs and Border Protection.**

2           Q.     And that was what you were just -- the six  
3     departments that you were just describing?

4           A.     **That's correct.**

5           Q.     And on this -- on Exhibit 2, there's  
6     actually a place for Border Patrol?

7           A.     **That's correct.**

8           Q.     What does the Border Patrol do?

9           A.     **Border Patrol's responsible for securing  
10    the border in between the ports of entry.**

11          Q.     Okay. And would you agree that Border  
12    Patrol's responsibilities are to act in concert with  
13    the other components of CBP?

14          A.     **Yes.**

15          Q.     And to act with the other components of DHS  
16    to secure the United States.

17          A.     **Yes.**

18          Q.     All right. Would you agree that a large  
19    part of what Border Patrol does is encounter and  
20    determine who is entering the United States?

21                   MR. DARROW: Objection.

22          A.     **Yes.**

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1 Q. Okay. And you report to the deputy  
2 commissioner; is that correct?

3 A. That's correct.

4 Q. And Troy Miller is the current deputy  
5 commissioner, right?

6 A. Yes.

7 Q. And do you understand the difference  
8 between career and political appointees?

9 A. I do.

10 Q. Is Mr. Miller a career or a political  
11 appointee?

12 A. Career.

13 Q. Okay, and who is the commissioner of Border  
14 Patrol -- or excuse me, of CBP?

15 A. Chris Magnus.

16 Q. Okay, and is Mr. Magnus a career or  
17 political appointee?

18 A. Political appointee.

19 Q. All right. Below -- on Exhibit 2, below  
20 Chief of Border Patrol, do you see Office of Field  
21 Operations?

22 A. I do.

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1           Q.     What are -- what is the Office of Field  
2     Operations?

3           A.     So Office of Field Operations are the  
4     customs and agricultural inspectors that work at our  
5     ports of entry, our airports and our seaports to  
6     facilitate legal trade and travel, and certainly  
7     those folks that are traveling and presenting  
8     themselves for inspection.

9           Q.     Okay, and how does Office of Field  
10    Operations and the responsibilities they have differ  
11    from the Border Patrol?

12          A.     So at ports of entry, it is a certainly  
13    designated entry point. They work closely with our  
14    Canadian, our Mexican partners to the south of us,  
15    and then even to some degree in foreign countries.  
16    We have preclearance facilities throughout the world.  
17    Our Office of Field Operations officers roughly have  
18    about 25,000 employees, and they are responsible for  
19    both goods, cargo that are traveling through our  
20    ports of entry, but they're also responsible for the  
21    inspection of individuals that are presenting  
22    themselves for inspection.



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1 Q. Okay. If you'll flip back to Exhibit 1 and  
2 look at Exhibit 1, does it -- Exhibit 1 contain a  
3 component named United States Immigration and Customs  
4 Enforcement? It's on the bottom row to the right?

5 A. Yes.

6 Q. Okay, and is it all right if I refer to  
7 them as ICE?

8 A. Yes.

9 Q. Okay, and ICE is a separate entity from  
10 CBP, right?

11 A. That's correct.

12 Q. All right, and it's definitely a separate  
13 entity from Border Patrol.

14 A. Yes.

15 Q. All right. Would it be fair to say that  
16 ICE and Border Patrol have an ongoing relationship?

17 A. Yes.

18 Q. Okay. And would it be fair to say that  
19 Border Patrol has multiple memorandums of  
20 understanding with ICE?

21 A. Yes.

22 Q. All right. Among those memorandums of

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1 understanding is there one that -- where ICE agrees  
2 to provide transportation from the border?

3 **A. Yes.**

4 Q. All right. Does ICE also agree to  
5 transport aliens back to their country of origin as  
6 part of the memorandum?

7 **A. Yes.**

8 Q. Okay. And another I guess relationship  
9 that ICE and Border Patrol has is that ICE agrees to  
10 accept transfer aliens that need to be detained; is  
11 that correct?

12 **A. That's correct.**

13 Q. All right. And for -- strike that. Would  
14 it be fair to say that Border Patrol often detains  
15 aliens that it encountered at the southern border  
16 until they can be processed and turned over to ICE?

17 **A. Yes.**

18 Q. Would you agree, Chief Ortiz, that the  
19 southern border is currently in crisis?

20 MR. DARROW: Objection.

21 **A. Yes.**

22 Q. Would you agree, Chief Ortiz, that historic

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1 numbers of aliens are illegally entering the United  
2 States through the southern border?

3 MR. DARROW: Objection.

4 A. Yes.

5 Q. Would you agree, Chief Ortiz, that  
6 unprecedented numbers of aliens are illegally  
7 entering the United States right now?

8 MR. DARROW: Objection.

9 A. Yes.

10 Q. Would you agree, Chief Ortiz, that more  
11 aliens are going through the southern border than we  
12 have seen in the last 20 years?

13 A. Yes.

14 Q. Would you agree -- would you agree, Chief  
15 Ortiz, the Border Patrol has never had as many  
16 encounters with aliens in a physical year as it has  
17 had in the last two years?

18 MR. DARROW: Objection.

19 A. Yes.

20 Q. Chief Ortiz, do you expect the historic  
21 number of aliens illegally entering the United States  
22 to increase in the near term?

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1 MR. DARROW: Objection.

2 A. Actually, we'd seen a decrease over the  
3 last two months, and I expect that in July, we will  
4 see a continuing decrease from the previous two  
5 months.

6 Q. Is some of that the seasonality of the  
7 border?

8 A. I haven't seen much of a seasonal trend  
9 over the last three or four years.

10 Q. Okay. Are you familiar with something  
11 known as Title 42?

12 A. I am.

13 Q. Do you expect that the number of aliens  
14 trying to illegally enter the United States will  
15 increase if the Title 42 order is rescinded?

16 MR. DARROW: Objection.

17 A. I always prepare for scenarios that may  
18 impact the flow of the migrant population, and so we  
19 have prepared for both higher and lower numbers.

20 Q. I'm going to show you what I'm going to  
21 mark for identification as Exhibit 3 to your  
22 deposition.

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1 (Ortiz Exhibit No. 3  
2 was marked for  
3 identification.)

4 MR. DARROW: Thank you.

5 BY MR. GUARD:

6 Q. Have you seen Exhibit 3 before, Chief  
7 Ortiz?

8 A. I have.

9 Q. What is Exhibit 3?

10 A. It's a memorandum that I signed on May  
11 19th, 2022, and it discusses the non-citizen releases  
12 from our custody.

13 Q. Okay. And so that's roughly two months  
14 ago?

15 A. That's correct.

16 Q. All right. In your experience 31 years  
17 with the Border Patrol, have you ever seen a document  
18 -- or have you ever seen a memorandum like Exhibit 3  
19 before?

20 A. No.

21 Q. Why did you send out Exhibit 3?

22 MR. DARROW: Objection.

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Exhibit C - 44

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1           **A.**       To ensure that our Border Patrol sectors  
2       were coordinating with our non-governmental  
3       organizations and were also focused on perhaps the  
4       impact to the communities and ensuring that we were  
5       coordinating with our ICE partners.

6           Q.       Would you agree with me, Chief Ortiz, that  
7       Exhibit 3 deals with the possible rescission of Title  
8       42?

9           MR. DARROW:   Objection.

10          **A.**       **Yes.**

11          Q.       Would you agree with me, Chief Ortiz, that  
12       Exhibit 3 provides directions to sectors in the  
13       southwest border if the capacity becomes an issue?

14          **A.**       **Yes.**

15          Q.       And what does this memorandum direct the  
16       sector chiefs to do if detention capacity becomes an  
17       issue on the southwest border because of the repeal  
18       of Title 42?

19          MR. DARROW:   Objection.

20          **A.**       **It directs the sectors to ensure that prior**  
21       **to any releases, that we have worked closely with our**  
22       **non-governmental organizations or our partners within**

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1     our respective communities. It also reminds the  
2     sectors to factor in the safety and security of the  
3     migrant populations that we are processing. One of  
4     the things that we did not want to see happen is  
5     migrants released in the middle of the night where  
6     transportation nodes were closed if they weren't able  
7     to be turned over to a nongovernmental organization  
8     because NGOs and their facilities were also facing  
9     some constraints and challenges with respect to  
10    space.

11       Q.     Wasn't this guidance issued for situations  
12     where ICE was either unable or unwilling to accept  
13     transfers of aliens?

14             MR. DARROW: Objection.

15       A.     Yes.

16       Q.     And if ICE were either unwilling or unable  
17     to accept transfer of aliens, this memo authorizes  
18     the sectors to release aliens into the interior of  
19     the United States.

20             MR. DARROW: Objection.

21       A.     Well, it authorizes them to release them  
22     into the communities that they were apprehended in.

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1 Q. Okay. And does Exhibit 3 authorize the  
2 release of aliens that would otherwise be  
3 inadmissible into the United States?

4 MR. DARROW: Objection.

5 A. Yes.

6 Q. Have you ever heard the term "broken  
7 arrow"?

8 A. Yes.

9 Q. What is a broken arrow?

10 A. Typically in the context of operations, it  
11 is unsustainable operational circumstances.

12 Q. Okay. Is Exhibit 3 meant to deal with  
13 situations where Border Patrol had what amounts to a  
14 broken arrow?

15 MR. DARROW: Objection.

16 A. No.

17 Q. Okay. Can you explain to me why not?

18 A. Well, we still had processes in place, and  
19 we still expected a majority of the encounters that  
20 we were experiencing on the southwest border would be  
21 facilitated from us to NGOs, but we also recognize  
22 that in a couple locations, that we were going to





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1 Q. All right. Is there currently or was there  
2 in 2018 a crisis at the northern border?

3 MR. DARROW: Objection.

4 A. No.

5 Q. Okay. Now, looking at Exhibit 4 on its  
6 first page, this document contains data not just from  
7 physical year of 2018, right?

8 A. Yes.

9 Q. It also includes data from physical years  
10 2016 and 2017, correct?

11 A. That's correct.

12 Q. The high number of apprehensions for Border  
13 Patrol for those years was in 2016, right?

14 A. That's correct.

15 Q. And that was 415,816?

16 A. Yes.

17 Q. Right? And if you look down at the -- for  
18 the total for enforcement actions for all of the CBP  
19 components, the high was again in 2016, right?

20 A. Yes.

21 Q. And that was 690,637, correct?

22 A. Yes.

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1 Q. All right. I'm going to show you what I've  
2 marked for identification as Exhibit 5 to your  
3 deposition.

4 (Ortiz Exhibit No. 5  
5 was marked for  
6 identification.)

7 MR. DARROW: Thank you.

8 BY MR. GUARD:

9 Q. Exhibit 5 is the CBP enforcement statistics  
10 for fiscal year 2022, right?

11 A. Yes.

12 Q. And again, these are statistics that are  
13 publicly available on CBP's web site, right?

14 A. Yes.

15 Q. And physical year 2022 is not yet  
16 concluded, correct?

17 A. That's correct.

18 Q. All right. Now, Exhibit 5 contains data  
19 not just for fiscal year 2022, correct?

20 A. That's correct.

21 Q. It contains the data for physical years  
22 2017 through physical year 2021?

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1 MR. DARROW: Just for clarification, it  
2 sounds like you're saying physical. Fiscal, right?

3 MR. GUARD: Yes.

4 MR. DARROW: Okay, sorry.

5 BY MR. GUARD:

6 Q. Sorry. F-I-S-C-A-L, to be clear. Prior to  
7 the Biden administration being inaugurated, the  
8 highest number of Border Patrol encounters occurred  
9 in 2019, right?

10 A. Yes.

11 Q. And the highest number of enforcement  
12 actions by CBP occurred in fiscal year 2019, correct?

13 A. '21, it was higher.

14 Q. Oh, sorry. All right. Prior to the Biden  
15 administration.

16 A. Yes.

17 Q. Okay, and in '19, the number of Border  
18 Patrol encounters was 859,501, right?

19 A. Yes.

20 Q. And the number of total enforcement actions  
21 was 1,148,024, correct?

22 A. Yes.

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Exhibit C - 51

Ortiz, Raul

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1 Q. All right. And Joseph R. Biden, Junior was  
2 inaugurated on January 20th of 2021, right?

3 A. Yes.

4 Q. Okay. And if you look at the physical year  
5 '21 numbers, and Donald Trump would have been  
6 president for the first three months of that physical  
7 year?

8 A. Yes.

9 Q. Okay. And then Biden would have been  
10 president after that point in time?

11 A. Yes.

12 Q. All right. And in that year, fiscal year  
13 '21, the number of Border Patrol encounters doubled  
14 from 2019.

15 MR. DARROW: Objection.

16 BY MR. GUARD:

17 Q. Correct?

18 A. Yes.

19 Q. And the number of Border Patrol encounters  
20 in fiscal year '21 is four times any other year other  
21 than fiscal year '19.

22 MR. DARROW: Objection.

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1           **A.       Yes.**

2           Q.       Okay. Looking at fiscal year '22, year to  
3       date, we have still roughly three months of  
4       encounters to occur, and the number of encounters by  
5       Border Patrol in fiscal year '22 is almost at the  
6       total year number for fiscal year '21, right?

7           **A.       We've already exceeded that number, yes.**

8           Q.       Okay. So you obviously in your role see  
9       data as it happens and not necessarily as it gets  
10      reported on a public web site. You're already in  
11      excess sitting here right now with roughly three  
12      months to go, the total number of encounters that  
13      you've had in fiscal year '22 is in excess of  
14      physical year '21.

15                   MR. DARROW: Objection.

16           **A.       Yes.**

17           Q.       Now, the numbers that we're experiencing in  
18      2021 and 2022 are mainly encounters at the southern  
19      border, correct?

20           **A.       And we have seen some increases in the**  
21      **coastal region in Miami and in Puerto Rico.**

22           Q.       Would you agree the primary driver of the

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1 numbers in '21 and '22 is the southern border?

2 MR. DARROW: Objection.

3 A. Yes.

4 Q. Okay. From your 31 years of experience,  
5 has the Border Patrol in a year ever had the number  
6 of encounters that it's going to have in 2022?

7 MR. DARROW: Objection.

8 A. No.

9 Q. Is the crisis that is currently ongoing at  
10 the southern border making the border less safe for  
11 Americans and aliens alike?

12 MR. DARROW: Objection.

13 A. Yes.

14 Q. Before I move on, turning back for a minute  
15 to I think it was Exhibit 3, has to your knowledge  
16 Exhibit 3 ever been implemented?

17 A. No.

18 Q. Okay. Chief Ortiz, are you aware that more  
19 aliens have died trying to illegally enter the United  
20 States in the last two years than ever before?

21 MR. DARROW: Objection.

22 A. Yes.

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Exhibit C - 54

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1 Q. Now, Chief Ortiz, does CBP components  
2 survey aliens that they encounter on why they were  
3 entering the United States?

4 A. Yes.

5 Q. I'm going to show you what I marked for  
6 identification as Exhibit I think 6.

7 (Ortiz Exhibit No. 6  
8 was marked for  
9 identification.)

10 MR. DARROW: Thank you.

11 BY MR. GUARD:

12 Q. Exhibit 6 is an overview of the southwest  
13 border by CBP, correct?

14 A. Yes.

15 Q. Have you ever seen Exhibit 6 before?

16 A. I'm not sure what the date is on this, but  
17 yes, it does look familiar.

18 Q. All right. Well, let's try to figure out  
19 the date from -- from the document. If you look at  
20 the first paragraph of Exhibit 6, that first bullet  
21 point mentions spring of 2021, correct?

22 A. Yes.



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1 Q. And that's -- it is talking about  
2 unaccompanied children that arrived at the border  
3 through spring of 2021; is that correct?

4 A. That's correct.

5 Q. So it would appear to be at some point in  
6 time after the spring of 2021? Is that fair to say?

7 A. That's fair to say.

8 Q. All right. And if you look at page 2 at  
9 the second bullet point, it talks about two  
10 hurricanes, Ada and Iota, that made landfall in  
11 November of 2020, so again, sometime after the late  
12 2020 is what that paragraph seems to indicate?

13 A. Yes.

14 Q. And so sometime late 2020 would be when  
15 this document -- hold on. Strike that. Going back  
16 to that first bullet point, the first three months of  
17 fiscal year 2021 -- never mind. Strike that. On the  
18 second page of Exhibit 6, at the first bullet  
19 point --

20 A. On the second page you said?

21 Q. Yes, sir.

22 A. Uh-huh.

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Exhibit C - 56

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1 Q. The overview lists seven factors that CBP  
2 designates as, quote, the primary push-pull factors  
3 cited by migrants?

4 MR. DARROW: Objection.

5 BY MR. GUARD:

6 Q. Did I read that correct?

7 A. Yes.

8 Q. All right. And what are push-pull factors?

9 A. Those are factors that are considered  
10 either drivers or opportunities that migrants may  
11 perceive as a reason to enter illegally into the U.S.

12 Q. Okay. Looking at the first I guess  
13 sub-bullet point under -- under the primary push-pull  
14 factors that are cited by migrants, it says economic  
15 opportunities. Did I read that correct?

16 A. Yes.

17 Q. All right. Economic opportunities are --  
18 would you agree are a consistent driver of aliens  
19 entering the United States?

20 MR. DARROW: Objection.

21 A. Yes.

22 Q. In your 31 years, economic opportunities

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1 has been a driver every year?

2 MR. DARROW: Objection.

3 A. Yes.

4 Q. Okay, all right. Looking at the next  
5 bullet points, next bullet point, regional and  
6 political instability, you see that?

7 A. Yes.

8 Q. And that's regional and political  
9 instability in Central and Southern America?

10 A. Well, Haiti. It's 158 different countries  
11 that we encounter migrants from.

12 Q. Okay. Would it be fair to say that over  
13 your 31 years, there's been regional -- regional and  
14 political instability somewhere in those 158  
15 countries that you've encountered?

16 A. Yes.

17 MR. DARROW: Objection.

18 BY MR. GUARD:

19 Q. And so that's a consistent driver --

20 MR. DARROW: Objection.

21 BY MR. GUARD:

22 Q. -- of illegal immigration into the United

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1 States?

2 **A. Yes.**

3 Q. Okay. Fear of violence is the next bullet  
4 point. Did I read that correct?

5 **A. Yes.**

6 Q. All right. Fear of violence -- has that  
7 been a factor that has been present for at least part  
8 of your 31 years as a Border Patrol agent driving  
9 illegal immigrants into the United States?

10 **A. Yes.**

11 Q. Okay. If you drop down a couple more,  
12 perception -- perceptions of favorable U.S.  
13 immigration policies, you see that?

14 **A. Yes.**

15 Q. Do you know if prior to the Biden  
16 administration being inaugurated, whether aliens had  
17 a favorable view or favorable perception of U.S.  
18 immigration policies?

19 MR. DARROW: Objection.

20 **A. Repeat the question please?**

21 Q. Sure. Let me -- I inartfully worded it  
22 because I actually worded two questions together.

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1 Prior to January 20th, 2021 when President Biden was  
2 inaugurated, from your experience as a Border Patrol  
3 agent, did aliens have a favorable view or  
4 unfavorable view of Trump's immigration policies?

5 MR. DARROW: Objection.

6 **A. They had an unfavorable view.**

7 Q. Okay. Would an unfavorable view of Trump's  
8 immigration policies kept aliens from coming the  
9 border?

10 MR. DARROW: Objection.

11 **A. Some.**

12 Q. Okay. When President Biden was elected,  
13 did the number of aliens trying to illegally enter  
14 the United States increase or decrease?

15 MR. DARROW: Objection.

16 **A. Increase.**

17 Q. Okay. Did caravans restart to the border  
18 after President Biden was elected?

19 MR. DARROW: Objection.

20 **A. Caravans are a recent phenomenon that we've**  
21 **seen over the last couple of years.**

22 Q. Okay. Since President Biden was elected,

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1 does this document indicate that aliens illegally  
2 entering the United States perceive that they will be  
3 able to enter and remain in the United States?

4 MR. DARROW: Objection.

5 **A. Yes.**

6 Q. You can set that document aside. I think  
7 we're on 7.

8 (Ortiz Exhibit No. 7  
9 was marked for  
10 identification.)

11 BY MR. GUARD:

12 Q. I'm going to show you what I marked for  
13 identification as Deposition Exhibit 7.

14 MR. DARROW: Thank you.

15 BY MR. GUARD:

16 Q. Have you seen Deposition Exhibit 7 before?

17 **A. Not this specific document.**

18 Q. Okay. Does Exhibit 7 have comments that  
19 Secretary Mayorkas, Commissioner -- Acting  
20 Commissioner Miller and you made?

21 **A. Yes.**

22 MR. DARROW: Objection.

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1 BY MR. GUARD:

2 Q. What is the date of Exhibit 7?

3 A. September 20th.

4 Q. Okay.

5 A. '21, sorry.

6 Q. What were the circumstances that caused you  
7 to -- you, Secretary Mayorkas and Acting Commissioner  
8 Miller to make comments on that day?

9 A. We had a mass migration event in Del Rio,  
10 Texas of between 16 and 19 thousand migrants from  
11 principally Haiti, but we also encountered  
12 individuals from Venezuela, Cuba, Nicaragua and a few  
13 other countries.

14 Q. And there was news coverage going on of  
15 migrants living under a bridge I think?

16 MR. DARROW: Objection.

17 BY MR. GUARD:

18 Q. Is that correct?

19 A. Yes.

20 Q. All right. And there was a lot of press  
21 coverage. Would that be fair?

22 MR. DARROW: Objection.

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1           **A.     Yes.**

2           Q.     Okay. And you had to respond to that  
3 situation, right?

4                     MR. DARROW: Objection.

5           **A.     Yes.**

6           Q.     Okay. And what -- the comments that were  
7 being made by the three of you were kind of detailing  
8 that -- the Border Patrol's response to the situation  
9 of the 16 to 19 thousand migrants that had entered  
10 the United States illegally, right?

11                    MR. DARROW: Objection.

12           **A.     Yes.**

13           Q.     Okay. I want to kind of focus on your  
14 comments, and if you look at the third page of  
15 Exhibit 7, and I'm not sure if it's -- since there's  
16 no indents, I can't tell if it's a continuation of  
17 the previous paragraph or it's a new paragraph, but  
18 the paragraph that says, "I talked yesterday"? Do  
19 you see where I am at the top of the page?

20           **A.     Yes, okay.**

21           Q.     You said, "I talked yesterday about how so  
22 much of this migration is driven through social media



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1 and word of mouth, and smugglers are significant  
2 drivers of the misinformation that people that" --  
3 "that gets to people to undertake these dangerous  
4 journeys." What are you describing with that  
5 sentence?

6 A. So prior to this event, we had scheduled  
7 some repatriation flights back to Haiti. Those  
8 flights were cancelled, and when those flights were  
9 cancelled, those migrants were unable to be  
10 repatriated, and so what happens quite often is the  
11 migrant population will use the social media  
12 platforms to inform folks that were already making  
13 the trek from South America and from some of the  
14 other countries, most -- or quite a few of the  
15 Haitian migrants that we encountered underneath the  
16 bridge had already been domiciled in other countries  
17 in South America. So they had begun to make the  
18 trek, and when they found out that the flights had  
19 been turned off in Del Rio, we found that criminal  
20 organizations, smuggling organizations were  
21 chartering buses and driving them to Ciudad Acuna,  
22 which is just south of Del Rio.

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1 Q. Okay, and the migrants were being told that  
2 if you go to the Del Rio sector, you will not be  
3 repatriated, correct?

4 MR. DARROW: Objection.

5 A. They were told a couple of things. They  
6 were told that it's safe in Acuna and in Del Rio.  
7 They were told that they would be processed  
8 relatively quickly, and then I'm sure they were told  
9 that there was a chance that they may be released.

10 Q. Okay. Were -- from those flights that were  
11 cancelled, were any of those Haitians actually  
12 released into the interior of the United States?

13 A. Yes.

14 Q. Do you know approximately how many Haitians  
15 were released into the interior of the United States?

16 A. No.

17 Q. Are we talking tens, hundreds or thousands

18 --

19 MR. DARROW: Objection.

20 BY MR. GUARD:

21 Q. -- being released?

22 A. I would assume it was in the hundreds

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1 initially.

2 Q. Okay. Now, after the crowd of aliens under  
3 the bridge had gathered, how were they dispersed?

4 A. So we focused on the vulnerable populations  
5 first. When I arrived, we had a rough estimate of  
6 about 16,000 migrants underneath the bridge, and so  
7 just in doing my initial assessment, I was able to  
8 ascertain that many of them were family units and  
9 quite a few of them were pregnant females, and so we  
10 worked with our partners to try and focus on those  
11 individuals first.

12 Q. Okay. As to the family units and to the  
13 pregnant females, when they would go through  
14 processing, would -- would they have likely been  
15 released into the interior of the United States or  
16 would they have been removed?

17 MR. DARROW: Objection.

18 A. So most of those family units and -- were  
19 taken to our Office of Field Operations. We had to  
20 shut down the port of entry in Del Rio, and we began  
21 processing them in a different facility, and then we  
22 also bused some of those populations to some of the

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1 other surrounding sectors, and we actually flew some  
2 of them to other sectors. What their disposition  
3 once they reached the processing centers is unknown  
4 to me.

5 Q. Okay. This was September of 2021?

6 A. That's correct.

7 Q. All right. Do you know if by September of  
8 2021, ICE was -- or had any detention beds for family  
9 units?

10 MR. DARROW: Objection.

11 A. No.

12 Q. No, you don't know that they had -- whether  
13 they had detention for family units, or no, they did  
14 not have any detention for family units?

15 A. It is my understanding that they did not  
16 have any detention beds for family units.

17 Q. So as to the family units in that group of  
18 16 to 19 thousand people, they could not have been  
19 detained, right?

20 MR. DARROW: Objection.

21 A. That's correct.

22 Q. All right. So the option would have been

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1 to admit them or to repatriate them, right?

2 MR. DARROW: Objection.

3 A. Yes.

4 Q. Now, if you look at the next paragraph in  
5 your statement -- first let me ask you this because I  
6 forgot to ask it, and you can take a minute if you'd  
7 like to take a minute, but are the paragraphs here  
8 that -- where it says transcript of U.S. Border  
9 Patrol Chief Ortiz, are they accurate?

10 A. Yes.

11 Q. Okay. If you look at the last paragraph,  
12 the first sentence says, "The smugglers leverage  
13 misinformation to mislead people. Some of that  
14 information is focused on TPS." First, what is TPS?

15 A. Temporary protective status.

16 Q. All right. And what are smugglers doing  
17 with information on TPS?

18 A. They are telling -- or they were telling  
19 the migrant population that regardless of when you  
20 entered or were processed, that you would be allowed  
21 to stay in the United States.

22 Q. Would you agree, Chief Ortiz, that the

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1     aliens who cite favorable immigration policy as a  
2     reason to come to the United States are perceiving  
3     what actually is happening in the United States?

4             MR. DARROW:   Objection.

5             **A.     Yes.**

6             Q.     Prior to President Biden being elected, did  
7     you review Candidate Biden's immigration proposals?

8             MR. DARROW:   Objection.

9             THE WITNESS:   No.

10            MR. GUARD:   If this is a good time to take  
11   a break, we can take a break because I did not write  
12   down my tab number on --

13            THE WITNESS:   Yeah.

14            MR. GUARD:   -- this exhibit, and we've been  
15   going for a while.

16            THE WITNESS:   That'll work.

17            MR. GUARD:   Okay.

18            THE VIDEOGRAPHER:   We are now off the  
19   record at 10:48.

20                        (Recessed at 10:48 a.m.)

21                        (Reconvened at 10:57 a.m.)

22            THE VIDEOGRAPHER:   We're now back on the

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Exhibit C - 69

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1 record at 10:57.

2 BY MR. GUARD:

3 Q. All right, Chief Ortiz, I think before we  
4 left and went on break, I was asking you if you'd  
5 reviewed Candidate Biden's immigration proposals. Do  
6 you remember that?

7 A. Yes.

8 Q. All right, and you had not.

9 A. I had not.

10 Q. Okay. I'm going to show you what I marked  
11 for identification as Exhibit 8 to your deposition.

12 (Ortiz Exhibit No. 8  
13 was marked for  
14 identification.)

15 BY MR. GUARD:

16 Q. If you look at the second sentence on the  
17 first page of Exhibit 8, it reads, "When children are  
18 locked away in overcrowded detention centers and the  
19 government seeks them there indefinitely."

20 MR. DARROW: Take your time to read it if  
21 you need it.

22 BY MR. GUARD:

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1 Q. Did I read that sentence correctly?

2 A. Yes.

3 Q. During the Trump administration, is that  
4 sentence -- was that sentence true, to your  
5 knowledge?

6 MR. DARROW: Objection.

7 A. We had a unaccompanied child crisis in  
8 2014. I was the deputy chief in Rio Grande Valley,  
9 and we saw a significant spike in unaccompanied  
10 children during that time.

11 Q. And so 2014, that would have been the Obama  
12 administration?

13 A. That's correct.

14 Q. Okay. Was that still true under the Trump  
15 administration?

16 MR. DARROW: Objection.

17 A. We had seen steady increases since 2014 of  
18 unaccompanied children that we hadn't experienced  
19 prior to that.

20 Q. Okay. But were unaccompanied children  
21 walked away in overcrowded detention facilities and  
22 kept there indefinitely at that time?



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1           **A.       No.**

2                   MR. DARROW:   Objection.

3                   BY MR. GUARD:

4           Q.       All right.   If you'll turn to page 5 of  
5   Exhibit 8, the second bullet point says, "End  
6   prolonged detention and reinvest in a case management  
7   program."   You see that?

8           **A.       Yes.**

9           Q.       In the two years that the Biden  
10   administration has been in office, or roughly two  
11   years, have they ended prolonged detention?

12                  MR. DARROW:   Objection, and take your time  
13   to read it if you need it.

14           **A.       We have continued to do a better job of**  
15   **minimizing the time in custody of the migrant**  
16   **population within the Border Patrol, and I would**  
17   **imagine that's probably holds true for our ICE/ERO**  
18   **partners.**

19           Q.       Are you aware of whether or not ICE has cut  
20   its detention capacity?

21                  MR. DARROW:   Objection.

22           **A.       I could not speak to that.**

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1           Q.       So you as the chief of Border Patrol do not  
2       know whether ICE has reduced the number of detention  
3       beds that it has.

4                   MR. DARROW:   Objection.

5           A.       I do know that ICE has had some capacity  
6       issues with respect to detention beds and space, but  
7       the number of reduced beds, I'm not familiar with the  
8       exact number.

9           Q.       And you are familiar, I believe, with the  
10      fact that ICE has stopped detaining family units,  
11      correct?

12                  MR. DARROW:   Objection.

13          A.       I am familiar that they are no longer  
14      manning residential facilities.

15          Q.       Okay.   If you'll look down in the  
16      paragraph, one, two, three, four, five sentences in,  
17      the sentence reads, "Biden will codify protections to  
18      safeguard children to make sure their treatment is  
19      consistent with their best interest and invest in  
20      community-based" -- "community-based case management  
21      programs, including those supported by faith-based  
22      organizations, such as Lutheran Immigration and

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1 Refugee Services, to move migrants into safe  
2 environments as quickly as possible." Did I read  
3 that correctly?

4 **A. Yes.**

5 Q. Now, that sentence uses the word "codify."  
6 Do you see that?

7 **A. I do.**

8 Q. What does the word "codify" mean to you?

9 **A. It means that they're going to establish a**  
10 **process and develop a policy that focuses on**  
11 **protecting unaccompanied children and migrants.**

12 Q. Does it also mean for family units?

13 MR. DARROW: Objection.

14 **A. It doesn't indicate that it's for family**  
15 **units.**

16 Q. Okay, but family units have children,  
17 right?

18 **A. Typically.**

19 Q. Okay. And the word "codify" -- does that  
20 indicate that they need to go to Congress to pass  
21 something?

22 MR. DARROW: Objection.

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1           A.       That I'm not going to assume.

2           Q.       Okay.

3           A.       We've seen executive orders issued for the  
4       last few years that we hadn't seen previously, and I  
5       say the last, I'm talking about the last five or six  
6       years.

7           Q.       Sure. Now, Border Patrol itself under your  
8       direction -- strike that. For a moment, Chief Ortiz,  
9       I want you to ignore the existence of the Title 42 CD  
10      order and assume Title 8 was the only -- Title 8  
11      flows are the only flows for aliens encountered at  
12      the southern border, okay? When a Border Patrol  
13      agent finds an individual on or near the southwest  
14      border that he or she believes to be an alien, does  
15      the agent seek a warrant to detain the alien?

16                 MR. DARROW: Objection.

17           A.       Typically when we encounter migrants along  
18      the southwest border, we process them via Title 8,  
19      which is our authority to issue a notice to appear  
20      and a warrant of arrest, and then if they are from  
21      Mexico, we can voluntarily return that migrant  
22      population with a repatriation agreement we have with

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1     **the government of Mexico.**

2           Q.     Okay, but as far as the actual seizing of  
3     the alien, is it a warrantless or a warrant seizure  
4     of -- of -- of the --

5           **A.     Warrant.**

6           Q.     So okay. All right, so the border agent  
7     seizes the alien and conducts an inspection, right?

8           **A.     That's correct.**

9           Q.     Okay. With that inspection, the Border  
10    Patrol agent is trying to determine whether the alien  
11    is admissible or inadmissible, right?

12           MR. DARROW: Objection.

13           **A.     That's correct.**

14           Q.     Okay. And you know, the Border Patrol  
15    agent is trying to discern the appropriate pathway to  
16    process an alien, correct?

17           **A.     That's correct.**

18           Q.     Okay. And you're familiar with the  
19    immigration and naturalization act of 1965?

20           **A.     I am.**

21           Q.     Okay. And Congress and I'm going to call  
22    it the INA established pathways, correct?

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1           **A.     That's correct.**

2           MR. DARROW:   Objection.

3           BY MR. GUARD:

4           Q.     And Congress set out the process for  
5     inspections to happen.

6           MR. DARROW:   Objection.

7           BY MR. GUARD:

8           Q.     Correct?

9           **A.     Yes.**

10          Q.     And I believe it's section 235 of the  
11     Immigration and Nationality Act, or also known as 8  
12     USC section 1225; is that correct?

13          **A.     Yes.**

14          Q.     All right, let's -- let's look at that.   I  
15     keep on losing my pen.   You'll have eight or ten pens  
16     in this -- we're on 9?

17                                 (Ortiz Exhibit No. 9  
18                                 was marked for  
19                                 identification.)

20          BY MR. GUARD:

21          Q.     I show you what I marked for identification  
22     as Exhibit Number 9.   Now, Exhibit Number 9 is the --

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1 is section 235 of the Immigration and Nationality  
2 Act, is it not?

3 **A. Yes.**

4 Q. Okay, and if you look at section (a)(1) of  
5 that statute, it provides -- or that section, it  
6 provides aliens who are present in the United States  
7 and not admitted shall be detained, correct?

8 MR. DARROW: Objection.

9 **A. Where does it say not --**

10 Q. If you look at --

11 **A. You said (a)(1)?**

12 Q. Yes.

13 **A. I don't see anything that talks about**  
14 **detention.**

15 Q. Sorry. Excuse me. (b)(1). Strike that.  
16 All right, let's move on. Section 1225(a)(1) is the  
17 authority that Border Patrol agents use every day to  
18 conduct inspections, right?

19 MR. DARROW: Objection.

20 **A. Yes.**

21 Q. Now, looking at 1225(a)(3), that's the  
22 section of the statute that provides for an

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1 inspection.

2 MR. DARROW: Objection.

3 A. Yes.

4 Q. Okay. And looking down to the next  
5 section, it has a section entitled -- or -- so that's  
6 1225(a)(4), it says, "Withdrawal of an application  
7 for admission." Do you see that?

8 A. I do.

9 Q. And withdrawal of an application, that is a  
10 -- one of the processing pathways, is it not?

11 MR. DARROW: Objection.

12 A. Not that the Border Patrol uses.

13 Q. Okay. So an alien, if they just want to be  
14 removed, they cannot withdraw their application and  
15 just be repatriated?

16 MR. DARROW: Objection.

17 A. We do have a voluntary return.

18 Q. Okay.

19 A. Yeah.

20 Q. All right. Looking down at (b)(1), so  
21 that's on the second page of Exhibit Number 9,  
22 (b)(1)(A) sub 1 -- I guess it's actually on the first



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1 page. I apologize. So (b)(1), big A little I is --  
2 it describes the inspection that is being conducted  
3 generally, correct?

4 MR. DARROW: Objection.

5 A. That's correct.

6 Q. Okay. And it makes reference to two  
7 statutes, 1182(a) subsection A, 6 big C, and  
8 1182(a)(7). Do you see that?

9 A. I do.

10 Q. Okay. And so the Border Patrol, when it's  
11 doing this inspection in general, is inquiring of an  
12 alien about his citizenship, correct?

13 MR. DARROW: Objection.

14 A. Yes.

15 Q. Okay. And if that alien misrepresents his  
16 citizenship, he can be removed?

17 MR. DARROW: Objection.

18 A. Yes.

19 Q. And if he does not have a visa and a  
20 passport, he can be removed.

21 A. Yes.

22 Q. Okay. And so the initial screening, you're

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1 gathering biographical information and citizenship  
2 documents. Is that fair to say?

3 MR. DARROW: Objection.

4 A. If they possess travel documents or some  
5 sort of immigration documents, yes, we will --

6 Q. Okay. And all or almost all of the aliens  
7 that Border Patrol encounters at the southern border  
8 don't have a visa to enter the United States. Is  
9 that fair?

10 MR. DARROW: Objection.

11 A. Yes.

12 Q. Okay, and the vast majority of aliens  
13 encountered at the southern border don't have a  
14 passport, right?

15 MR. DARROW: Objection.

16 A. Typically they discard them before they  
17 enter the U.S. Quite often our officers will find  
18 them discarded in or around the border area.

19 Q. Okay, and sometimes they'll have I think  
20 they call it pocket trash? Are you familiar with  
21 that term?

22 A. I am.

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1 Q. What is pocket trash?

2 A. It could be anything from a map to phone  
3 numbers to smugglers or, you know, information on who  
4 to contact when they make it to the U.S.

5 Q. Do sometimes pocket trash include  
6 information indicating that whatever they've told the  
7 Border Patrol agent is not true?

8 MR. DARROW: Objection.

9 A. Yes.

10 Q. Okay. Under 1225, if an alien doesn't have  
11 a visa and a valid passport, what is supposed to  
12 happen to that alien?

13 MR. DARROW: Objection.

14 A. We take them into custody.

15 Q. Okay. Are they supposed to be detained?

16 MR. DARROW: Objection.

17 A. Yes.

18 Q. Okay. And -- and they're to be removed  
19 unless they request asylum?

20 MR. DARROW: Objection.

21 A. Yes.

22 Q. Okay.

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1           **A.       If we have a repatriation agreement with**  
2           **the country that they are traveling from or that they**  
3           **are citizens of.**

4           Q.       Okay. And the removal, assuming that  
5           there's a repatriation agreement, is supposed to be  
6           immediate, correct?

7                   MR. DARROW: Objection.

8           **A.       Well, that's very dependent on logistics.**

9           Q.       Okay.

10          **A.       Flights occur, you know, at different**  
11          **times, and so a lot of coordination and logistics**  
12          **have to happen.**

13          Q.       Okay. And that would be coordination and  
14          logistics with ICE.

15          **A.       With ICE and the host country.**

16          Q.       Okay, all right. And the exception -- and  
17          again, the exception to removal is if the alien  
18          claims asylum?

19                   MR. DARROW: Objection.

20                   BY MR. GUARD:

21          Q.       Correct?

22          **A.       Well, there's a couple of exceptions. One**

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1 is asylum. The second may be if they're a part of a  
2 smuggling investigation or event, they may be held as  
3 a material witness.

4 Q. Any other exceptions?

5 A. Typically those are the ones that we  
6 encounter the most.

7 Q. Okay. And how frequently do you hold or  
8 process people as material witnesses?

9 MR. DARROW: Objection.

10 A. It's very dependent on the sector. When  
11 you think about, you know, Laredo and Tucson sector  
12 where we see the criminal organizations, smuggling  
13 organizations operating at a higher level, I think  
14 you'll find that we'll have more material witnesses  
15 kept within ICE's custody in those locations.

16 Q. Okay. Would the number of exceptions for  
17 material witnesses be greater than the number of  
18 people claiming asylum?

19 MR. DARROW: Objection.

20 A. No.

21 Q. Would the number of people climb claiming  
22 asylum dwarf the number of material witnesses?

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1 MR. DARROW: Objection.

2 A. Once again, it's going to be dependent on  
3 location.

4 Q. Okay, all right. Is it typical for aliens  
5 encountered at the border to claim asylum?

6 MR. DARROW: Objection.

7 A. Initially when they are taken into custody  
8 by the Border Patrol, quite often the asylum claim  
9 does not happen until after the processing begins --

10 Q. Okay.

11 A. -- or they are turned over to ICE.

12 Q. Okay. And while I'm sure it varies,  
13 sometimes they're processed on the scene. Is that  
14 fair to say?

15 MR. DARROW: Objection.

16 A. We have instituted some mobile processing  
17 --

18 Q. Okay.

19 A. -- in certain locations due to COVID, but  
20 more often than not, most of them are processed at a  
21 facility or a centralized processing center.

22 Q. Okay, all right. So it's not -- they don't

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1 make an asylum claim when the initial encounter  
2 happens. They make the claim when they get  
3 transferred back to a Border Patrol processing  
4 center. Is that fair?

5 MR. DARROW: Objection.

6 **A. Typically that's when that happens, yes.**

7 Q. Okay. And it's not unusual for aliens to  
8 make an asylum claim?

9 MR. DARROW: Objection.

10 **A. It's not unusual.**

11 Q. Okay. If an alien claims asylum, the agent  
12 or some other immigration officer has to perform a  
13 further interview, correct?

14 MR. DARROW: Objection.

15 **A. Yes.**

16 Q. All right, at that interview, is it  
17 determined if the alien has a credible fear of  
18 persecution?

19 MR. DARROW: Objection.

20 BY MR. GUARD:

21 Q. Correct?

22 **A. Persecution or torture.**

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1 Q. Would you agree with me, Chief Ortiz, that  
2 the vast majority of asylum claims, there is not a  
3 credible fear of persecution or torture?

4 MR. DARROW: Objection.

5 A. I do not have the disposition of all the  
6 credible fear claims, and it would be unfair for me  
7 to --

8 Q. Okay. And -- but that interview is  
9 supposed to take place before the alien is processed  
10 further, correct?

11 MR. DARROW: Objection.

12 A. Yes.

13 Q. Okay. Are Border Patrol agents currently  
14 performing credible fear interviews before they  
15 either parole or release aliens on their own  
16 recognizance?

17 MR. DARROW: Objection.

18 A. No.

19 Q. Is Border Patrol transferring aliens who  
20 have made asylum claims to ICE custody without  
21 performing credible fear interviews?

22 A. Yes.



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1 Q. Looking -- looking back at -- at Exhibit  
2 Number 9 at I think it's (b)(1) large B sub -- you  
3 got to love these statutes. Three little I -- or no,  
4 excuse me, two little I, it says "Referral of Certain  
5 Aliens." You see that?

6 A. I do.

7 Q. All right. What does that section indicate  
8 that is supposed to happen if the asylum officer  
9 determines that an alien has a credible fear of  
10 persecution?

11 MR. DARROW: Objection.

12 A. The alien shall be detained for further  
13 consideration of the application for asylum.

14 Q. If you look at the next subsection, so  
15 that's 1225(b)(2) big B sub 3 little I big I, what is  
16 supposed to happen if the asylum officer finds that  
17 an alien does not have a credible fear of  
18 persecution?

19 MR. DARROW: Objection.

20 A. Removal without further review if no  
21 credible fear of persecution.

22 Q. Is the alien supposed to be detained until

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1 removal?

2 MR. DARROW: Objection.

3 A. Yes.

4 Q. Okay. Now, that's not necessarily the end  
5 of the process, correct?

6 A. That's correct.

7 MR. DARROW: Objection.

8 BY MR. GUARD:

9 Q. An alien who's made an asylum claim can ask  
10 for review; is that right?

11 MR. DARROW: Objection.

12 A. Yes.

13 Q. If the alien asks for review of a finding  
14 of no credible fear, if you look at 1225(b)(2), sub  
15 B, I think it's three little I, sub 4, there's a  
16 section that says "Mandatory Detention." Excuse me.  
17 (b)(1). Sorry. (b)(1) sub B three little I sub 4.  
18 It's on 2, second column, second heading in, it says  
19 "Mandatory Detention." Do you see that?

20 A. I do.

21 Q. All right. So if an alien who got a  
22 finding of no credible fear on their asylum claim

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1 wants a hearing, what is supposed to happen to that  
2 alien pending the hearing?

3 MR. DARROW: Objection.

4 A. Should be detained.

5 Q. And it actually uses the word "mandatory,"  
6 correct?

7 MR. DARROW: Objection.

8 BY MR. GUARD:

9 Q. Now, Chief Ortiz, when you tell your Border  
10 Patrol agents that they shall do something, do you  
11 expect them to follow your command?

12 MR. DARROW: Objection.

13 A. Yes.

14 Q. Okay. When you tell your Border Patrol  
15 agents that they shall do something, do you expect  
16 that they will try and figure out ways around your  
17 command?

18 MR. DARROW: Objection.

19 A. No.

20 Q. Okay. For example, did the Border Patrol  
21 agent require its agents to obtain the COVID-19  
22 vaccine?

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1 MR. DARROW: Objection.

2 A. Yes.

3 Q. Were any Border Patrol agents fired for  
4 refusing to get vaccinated?

5 MR. DARROW: Objection.

6 A. No.

7 Q. What happened to the Border Patrol agents  
8 that refused to get vaccinated?

9 MR. DARROW: Objection.

10 A. **Ninety-eight percent of the employees that**  
11 **failed to be vaccinated submitted a request for**  
12 **exception.**

13 Q. Okay. They filed for an exemption based on  
14 some ground.

15 A. Yes.

16 MR. DARROW: Objection.

17 BY MR. GUARD:

18 Q. What about that two percent?

19 MR. DARROW: Objection.

20 A. **The two percent of the population continued**  
21 **-- either retired or opted to resign.**

22 Q. Chief Ortiz, and if you need to take a

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1 moment, please take a moment. Is there anywhere in  
2 section 1225, Exhibit 9 that's in front of you, where  
3 the statutory language indicates that the alien shall  
4 be released?

5 MR. DARROW: Objection.

6 A. I'd have to read the entire document.

7 Q. Do you know from your experience utilizing  
8 this section in your job, do you know that from just  
9 your use?

10 MR. DARROW: Objection.

11 A. We -- when you talk about releases, you  
12 know, in the Border Patrol context, I consider  
13 paroles, I consider, you know, other means of  
14 releasing somebody out of our custody as an option  
15 for humanitarian reasons. We've had situations where  
16 we may encounter somebody who is, you know, eight,  
17 eight and a half months pregnant, or there may be a  
18 medical or humanitarian reason for us to release  
19 somebody into the community or to a sponsor or to --  
20 so there are other --

21 Q. Sure.

22 A. -- conditions that exist.

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1 Q. And we're going to look at I think the  
2 statute that allows for that in a little bit, but  
3 those situations that you just described are  
4 individual one-off kind of situations, correct?

5 MR. DARROW: Objection.

6 A. That's correct.

7 Q. Okay. Is there anything within section  
8 1225 that allows for the processing of family units  
9 to be different --

10 MR. DARROW: Objection.

11 BY MR. GUARD:

12 Q. -- than single adults?

13 A. I don't believe so.

14 Q. Okay. Chief Ortiz, if trafficking  
15 organizations know that family units will be  
16 released, aren't they likely to disseminate that  
17 information to migrants?

18 MR. DARROW: Objection.

19 A. Yes.

20 Q. Okay. Does differentiating detention  
21 policy based on whether an alien is part of a family  
22 or not encourage some forms of irregular immigration

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1 to the United States?

2 MR. DARROW: Objection.

3 A. I would imagine so.

4 Q. Okay. Does differentiating detention  
5 policy based on the nationality of an alien encourage  
6 irregular immigration?

7 MR. DARROW: Objection.

8 A. Yeah, so you think about, you know, what  
9 we're experiencing right now with Cuban, Venezuelans  
10 and Nicaraguans and to some degree Peruvians now, the  
11 fact that we do not have the ability to repatriate  
12 those populations has certainly increased the  
13 migration flows from those countries, and so to  
14 answer your question, yes.

15 Q. Sure. And do you know if ICE is detaining  
16 individuals from those four countries that you just  
17 listed?

18 A. So we have instituted a initiative in the  
19 last week where we are trying to detain as many of  
20 that population within ICE custody in certain areas.  
21 We -- when you look at the nine southwest border  
22 sectors over the last 12 months, three of them have

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1    been problematic for us as an organization, Yuma, Del  
2    Rio, Rio Grande Valley. We have been able to do a  
3    very good job of managing the security in San Diego,  
4    El Centro, El Paso, Big Bend, Laredo. We don't see  
5    the same migration flow patterns in those sectors,  
6    and a lot of that is driven by the criminal  
7    organizations.

8                   And so when you think about instituting a  
9    -- and having the ability to detain certain  
10   populations, you really want to focus that in areas  
11   where you see the highest flows, and that continues  
12   to be those three sectors, Yuma, Del Rio and Rio  
13   Grande Valley.

14           Q.     And so you want -- is the purpose of kind  
15   of targeted detention of specific populations to  
16   either dissuade immigration coming to the southern  
17   border, or is it to cause the flows to go to those  
18   other sectors and spread out?

19                   MR. DARROW: Objection.

20                   BY MR. GUARD:

21           Q.     Or both?

22           A.     It's actually even more than that. It's an



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1     **opportunity, one, to institute a consequence against**  
2     **the migrant populations, and then certainly as a**  
3     **deterrent.**

4           Q.     Okay. Going back for a moment to Exhibit  
5     Number 9, if you look at I think it's (b)(2)(C), big  
6     C, so that's on page 3, first column, bottom of it,  
7     it says, "Treatment of aliens arriving from  
8     contiguous territory." It's on the bottom of the  
9     third page, first column.

10           **A.     Okay.**

11           Q.     Are you familiar with a policy called  
12     remain in Mexico?

13                   MR. DARROW: Objection.

14           **A.     Yes.**

15           Q.     Okay. And that policy explicitly required  
16     migrants to remain in Mexico until their asylum  
17     hearing; is that correct?

18                   MR. DARROW: Objection.

19           **A.     Yes.**

20           Q.     Okay, and the Biden administration ended  
21     that policy, correct?

22           **A.     Initially, yes.**

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1 Q. Okay. Has that policy restarted?

2 MR. DARROW: Objection.

3 A. Well, the migrant protection protocols have  
4 been operational for, you know, a majority of the  
5 calendar year at some degree in certain locations.

6 Q. Is it -- the migrant protection protocols  
7 or MPP, are they operating at the same extent as they  
8 did under the Trump administration?

9 MR. DARROW: Objection.

10 A. No.

11 Q. Okay. If you -- if someone didn't want  
12 children detained because they were traveling to the  
13 border with their family, would remain in Mexico  
14 accomplish allowing them not to be retained in a  
15 custodial setting?

16 MR. DARROW: Objection.

17 A. It would allow them to be detained in a  
18 migrant camp in Mexico.

19 Q. Okay. We're on 10 I think.

20 A. Yeah.

21 (Ortiz Exhibit No. 10  
22 was marked for

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1 identification.)

2 BY MR. GUARD:

3 Q. I'm going to show you what I marked for  
4 identification as Exhibit 10 to your deposition. Are  
5 you familiar with section 212 of the INA?

6 A. I am.

7 Q. Okay, and Exhibit Number 10 in front of you  
8 is 8 United States code 1182, which is section 212 of  
9 the INA, correct?

10 A. That's correct.

11 Q. All right. And this section does actually  
12 a couple things. First, this section makes certain  
13 groups of aliens inadmissible into the United States,  
14 right?

15 MR. DARROW: Objection.

16 A. Yes.

17 Q. It makes certain criminals inadmissible,  
18 correct?

19 MR. DARROW: Objection.

20 A. Yes.

21 Q. It makes terrorists unsurprisingly  
22 inadmissible, right?

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1 MR. DARROW: Objection.

2 A. Yes.

3 Q. All right. And it also makes, another  
4 example that seems not surprising, people who commit  
5 genocide, right?

6 MR. DARROW: Objection.

7 A. Yes.

8 Q. All right. If you'll turn about 13 pages  
9 into Exhibit 10, there's a section that's 1182  
10 section -- subsection F?

11 A. What page is it?

12 Q. It's 13. It says "Suspension of Entry or  
13 Imposition of Restrictions by President," is what the  
14 heading is.

15 MR. DARROW: For the record, it looks like  
16 it's on page 145 of the --

17 BY MR. GUARD:

18 Q. Oh, I'm sorry. I apologize.

19 A. Okay.

20 Q. I didn't realize there were page numbers on  
21 top. All right, section 1192(f) allows the president  
22 to bar admission of any class of aliens, right?

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1 MR. DARROW: Objection, and read it if you  
2 need to.

3 A. Yes.

4 Q. Okay. Section 1192(f) allows for the  
5 exclusion of an entire group of aliens, right?

6 MR. DARROW: Objection.

7 A. Yes.

8 Q. All right. And Congress utilized the word  
9 "class" when it wanted to give the authority for the  
10 administration to take an action against a group,  
11 right?

12 MR. DARROW: Objection.

13 A. I would imagine that's what that means,  
14 yes.

15 Q. Okay. Now if you turn -- go back one page,  
16 so now that I know there are page numbers on it, 144,  
17 it's the 12th page of Exhibit 10, and there's a --  
18 it's -- technically it's 1182(d) sub 5 large A,  
19 you're familiar with this subsection?

20 MR. DARROW: Objection.

21 A. Yes.

22 Q. All right, and you've actually utilized

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1 this subsection in memos, correct?

2 **A. That's correct.**

3 MR. DARROW: Objection.

4 BY MR. GUARD:

5 Q. Looking at section 1182, I believe it's D  
6 sub 5 sub A, the authority that's granted by Congress  
7 in this section is for relief on a case-by-case  
8 basis, correct?

9 MR. DARROW: Objection.

10 **A. Yes.**

11 Q. And Congress chose in that subsection not  
12 to utilize the word "class," right?

13 MR. DARROW: Objection.

14 **A. Yeah, I don't see class in here.**

15 Q. Okay. 1182(b) sub 5 sub A requires an  
16 individualized determination can be utilized, right?

17 MR. DARROW: Objection.

18 **A. It says by case-by-case basis, yes.**

19 Q. Okay. Now, you mentioned earlier on that  
20 you were now detaining aliens from certain countries  
21 in certain sectors. You recall that?

22 **A. Yes.**

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1 Q. Is the new initiative that you just  
2 mentioned related to the July 18th memo that just  
3 came out?

4 MR. DARROW: Objection.

5 A. No.

6 Q. Okay. I want to show you what I'm going to  
7 mark as Exhibit 11 --

8 (Ortiz Exhibit No. 11  
9 was marked for  
10 identification.)

11 BY MR. GUARD:

12 Q. -- to your deposition. I think we're on  
13 11.

14 MR. DARROW: Thank you.

15 BY MR. GUARD:

16 Q. Have you seen Exhibit 11 before?

17 A. I have.

18 Q. What is Exhibit 11?

19 A. It's a document that displays the  
20 processing pathways that Border Patrol has at their  
21 disposal.

22 Q. Okay. Is -- okay. There are -- on the

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1 left-hand side, there are three diamond shapes that  
2 have been blacked out. What are the difference  
3 between those three diamond shapes?

4 MR. DARROW: Objection.

5 A. From my recollection, it is single adults,  
6 family units and unaccompanied children.

7 Q. Okay. Is unaccompanied children, would  
8 that be the top group?

9 MR. DARROW: Objection. It's blacked out  
10 because it's privileged. Don't answer that.

11 MR. GUARD: Okay, well, the document  
12 doesn't say it's privileged, so there are claims of  
13 privilege. So that's why I was asking. We got these  
14 documents in FOIA. There are a whole bunch of  
15 exceptions for FOIA.

16 MR. DARROW: This was --

17 MR. GUARD: Oh.

18 MR. DARROW: -- from this case.

19 BY MR. GUARD:

20 Q. Okay, I apologize. Okay, so -- all right,  
21 so regardless of which diamond shaped is chosen,  
22 which pathway, going across the page, the diamonds



1 are encountering aliens, correct?

2 MR. DARROW: Objection.

3 A. Yes.

4 Q. All right. And then there are lines going  
5 across the page. It says biographical, biometrics  
6 and records check. Do you see that? And that is an  
7 inspection?

8 A. That's part of the processing, yes.

9 Q. Okay. And then there's a box at the bottom  
10 saying 14-year-old and up for biometrics. You have  
11 for children that are under 14, you do not gather  
12 biometrics; is that correct?

13 A. That's correct.

14 Q. Okay, all right. And then the next kind of  
15 bar going down the page, it says, "Review history,  
16 criminal and immigration." I would assume that is  
17 after you gather that biographical data, you do  
18 database checks and then you get returns of those  
19 database checks that the officer reviews?

20 A. Yes.

21 Q. Okay. And for single adults and family  
22 units, the next diamond is Title 42, correct?

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1 MR. DARROW: Objection.

2 BY MR. GUARD:

3 Q. Are unaccompanied minors subject to Title  
4 42 removal?

5 A. No.

6 MR. DARROW: Objection.

7 BY MR. GUARD:

8 Q. Okay. And so there's a CDC order that is  
9 currently in effect. Is that fair to say?

10 A. Yes.

11 Q. And the vast majority of folks that  
12 illegally enter the United States are being expelled  
13 pursuant to that order?

14 MR. DARROW: Objection.

15 A. No.

16 Q. Okay. What percentage approximately is  
17 being expelled --

18 MR. DARROW: Objection.

19 BY MR. GUARD:

20 Q. -- pursuant to Title 42?

21 A. The last report I reviewed, it hovered  
22 between 35 and 40 percent of the population was being

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1     **processed via Title 42 and expelled under those**  
2     **authorities, and the remaining were processed via**  
3     **Title 8.**

4           Q.     Okay. Was there a point in time when that  
5     percentage was higher than 35 or 40 percent?

6           MR. DARROW:   Objection.

7           A.     **Yes.**

8           Q.     In the recent term, was the percentage  
9     higher than 35 to 40 percent?

10          MR. DARROW:   Objection.

11          A.     **At the beginning of the year, it was about**  
12     **a 50/50 split.**

13          Q.     Okay. At the diamond, there's a decision  
14     for the -- or a decision that the Border Patrol agent  
15     has to make, and this is whether it -- they're Title  
16     42 amenable. Do you see that?

17          A.     **I do.**

18          Q.     Okay, and if the answer is yes, they're --  
19     the alien is expelled; is that correct?

20          MR. DARROW:   Objection.

21          A.     **That's correct.**

22          Q.     And if it's no, you go down the Title 8

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1 processing lanes, right?

2 **A. Yes.**

3 Q. Okay. Now, there's a box at the bottom  
4 that it says that certain countries present unique  
5 challenges to U.S. Border Patrol by not accepting  
6 repatriations. Are those countries -- well, strike  
7 that. We've talked about several countries that  
8 don't accept repatriations. Are they among the  
9 countries that aren't also receiving repatriations to  
10 Title 42?

11 **A. Yes.**

12 Q. Okay, all right. Now looking at the Title  
13 8 path, are -- there are one, two, three, four, five,  
14 six, seven different processing pathways in this  
15 diagram from Title 42 to Title 8 and going out; is  
16 that correct?

17 **A. Well, there's nine if you include the top**  
18 **two, the voluntary return and the WA/NTA.**

19 Q. Okay. Those are actually repeated in the  
20 bottom seven, correct?

21 **A. Yeah.**

22 Q. Okay, all right. All right, we've already

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1 talked I believe about the MPP pathway, correct?

2 **A. Yes.**

3 Q. All right. We haven't yet talked about the  
4 expedited removal pathway, have we?

5 **A. No.**

6 MR. DARROW: Objection.

7 BY MR. GUARD:

8 Q. Okay. What is expedited removal?

9 **A. It's a Title 8 processing pathway for**  
10 **migrants that do not have a credible fear or asylum**  
11 **claim.**

12 Q. Okay, and what happens to aliens who are  
13 subject to expedited removal?

14 **A. They are processed and then turned over to**  
15 **ICE for detention and then repatriated back.**

16 Q. Okay. Do you know if there are any pending  
17 rules or pending proposed rules regarding expedited  
18 removal?

19 MR. DARROW: Objection. That's subject to  
20 the deliberative process privilege. Don't answer  
21 that.

22 MR. GUARD: I believe it's actually been

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1 published in the Federal Register, so I was not  
2 seeking deliberative privilege material. If you'll  
3 let me get the proposed rule out, I'm happy to do  
4 that.

5 MR. DARROW: No, I just clarified that  
6 you're asking for public matter.

7 BY MR. GUARD:

8 Q. Yes. Are you aware that there's public  
9 information about a change to expedited removal?

10 A. Yes.

11 Q. And what is your understanding of the  
12 proposed rule on expedited removal? What is the  
13 change?

14 A. I'd have to -- I'd have to go back and  
15 review it.

16 Q. Well, does it expand -- do you know sitting  
17 here right now as the chief of the Border Patrol  
18 whether it expands or contracts expedited removal?

19 MR. DARROW: Objection.

20 A. I believe it contracts it.

21 Q. Okay. So you're having a historic surge of  
22 aliens crossing the southern border, and the Biden

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1 administration is trying to tie Border Patrol's hands  
2 and restrict a processing pathway; is that correct?

3 MR. DARROW: Objection.

4 A. I can't assume what the policy officials  
5 are proposing. I can tell you that as Border Patrol  
6 agents, you know, we try and leverage as many of the  
7 pathways that we have at our disposal, and ER is one  
8 of them.

9 Q. Okay. And the contraction of the  
10 availability of ER, as you called it, means that the  
11 aliens that were going through expedited removal have  
12 to go through a different pathway, right?

13 MR. DARROW: Objection.

14 A. Potentially, yes.

15 Q. Okay. And so we talked about MPP earlier,  
16 and that -- MPP is not being utilized to the extent  
17 it was previously under the Trump administration,  
18 correct?

19 MR. DARROW: Objection.

20 A. Yes.

21 Q. So MPP has been contracted, right?

22 MR. DARROW: Objection.

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1           **A.       Yes.**

2           Q.       Expedited removal has been contracted.

3                   MR. DARROW:  Objection.

4           **A.       We're still leveraging ERs, not -- not to**  
5           **the same degree that -- that we have in the past.**

6           Q.       Okay, and so two pathways that were  
7           previously available are being limited or contracted,  
8           right?

9                   MR. DARROW:  Objection.

10          **A.       Yes.**

11          Q.       There are -- on the seven -- or the --  
12          looking at the bottom, the seven different  
13          categories, we talked about expedited removal and  
14          MPP.  There are two that have the -- well, yeah, have  
15          -- one has NTA and the other has notice to appear.  
16          Do you see that?

17          **A.       Yes.**

18          Q.       All right.  The warrant of arrest in NTA,  
19          that's warrant of arrest slash notice to appear,  
20          correct?

21          **A.       That's correct.**

22          Q.       All right.  And the one that's I guess two



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1 spots down below on Exhibit 11 is notice to appear  
2 slash own recognizance. Do you see that?

3 **A. I do.**

4 Q. Okay. What is the difference between those  
5 two processing pathways?

6 **A. Warrant of arrest, NTA, the individual will**  
7 **be kept in custody. Notice to appear O.R., the**  
8 **individual potentially would be released.**

9 Q. Okay. Would the warrant of arrest slash  
10 NTA pathway include aliens that you encountered that  
11 were going to be indicted criminally for some  
12 violation of law?

13 **A. Yes.**

14 MR. DARROW: Objection.

15 BY MR. GUARD:

16 Q. Okay. In addition to Title 8, Border  
17 Patrol agents also from time to time deal with Title  
18 18 and Title 21?

19 **A. Yes.**

20 MR. DARROW: Objection.

21 BY MR. GUARD:

22 Q. Okay. Title 18 is federal crimes, and

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1 Title 21 is controlled substance offenses; is that  
2 correct?

3 MR. DARROW: Objection.

4 A. Yes.

5 Q. Okay. The first one, reinstatement of  
6 prior order removal, bag and baggage, what is that?

7 A. That is somebody who's already been ordered  
8 removed from the country, their immigration hearing  
9 was either heard and they were ordered removed, and  
10 so when the agent or the officer, immigration officer  
11 encounters them in the field, the processing has  
12 already been completed and a disposition has already  
13 been rendered, and so they are taken into custody,  
14 turned over to ICE and removed.

15 Q. Okay. What does bag and baggage refer to?

16 A. It just refers to the processing of those  
17 individuals.

18 Q. Okay, all right. Looking down to the third  
19 of the seven that are listed on the bottom of Exhibit  
20 11, it says voluntary return slash withdrawal of  
21 application of admission. What does that pathway  
22 include?

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1           **A.**       Those are typically centered around the  
2       **Mexican nationals, that population group, and allows**  
3       **us to process them and allows them to be removed at**  
4       **the nearest port of entry.**

5           Q.       Okay, okay. Looking at the notice to  
6       appear slash own recognizance released, I believe you  
7       described that those folks are released. Is that  
8       fair?

9                   MR. DARROW: Objection.

10          **A.**       **Yes.**

11          Q.       Okay. Are aliens that are in that process  
12       flow aliens that may be inadmissible?

13                  MR. DARROW: Objection.

14          **A.**       **They may be, yes.**

15          Q.       Okay. And if we were to compare that  
16       process way with the parole plus ATD process  
17       through-put or whatever -- pathway, would the  
18       difference between the two pathways largely be  
19       whether a notice to appear is actually issued?

20                  MR. DARROW: Objection.

21          **A.**       **Yes.**

22          Q.       Okay. Is there a consequence to an alien

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1 if they fail to appear when they have a notice to  
2 appear?

3 **A. At some point, yes.**

4 Q. Okay. Can they have an order of removal  
5 entered against them in absentia? You can't nod your  
6 head. I need you to say yes or no.

7 **A. Just pausing for --**

8 Q. Oh, okay.

9 **A. Yes.**

10 Q. Okay. Sorry. It's the first time you  
11 actually nodded your head, and I just wanted to make  
12 sure we weren't going to fall into a bad habit with  
13 the court reporter, or she hates all three of us.  
14 Now, we're going to talk about parole plus ATD more a  
15 little bit later, but the bubble below the parole  
16 plus ATD pathway reads, "Used as a last resort in  
17 select sectors when certain triggers are met, single  
18 adults is only approved by USB chief and CBP  
19 commissioner," right?

20 **A. Yes.**

21 Q. All right. Originally was parole plus ATD  
22 meant only for family units?

1 MR. DARROW: Objection.

2 A. Yes.

3 Q. Okay. Do you know when parole plus ATD was  
4 first utilized with single adults?

5 A. I'd have to go back and check.

6 Q. Okay. Was it in the last fiscal year?

7 A. Yes.

8 Q. Okay. Was it since January?

9 A. Yes.

10 Q. Okay. For single adults where parole plus  
11 ATD is being utilized, are there any common  
12 characteristics like national origin that are defined  
13 when it is used and when it is not used?

14 A. Yes.

15 Q. All right. What are those common  
16 characteristics?

17 A. Quite often it's going to be from  
18 populations where we do not have a return mechanism,  
19 and then also it would be, you know, for those  
20 populations with no criminal history, they are deemed  
21 not a security risk, and more often than not, they  
22 would be considered vulnerable population.

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1 Q. When you said -- so we're talking about  
2 single adults, right?

3 A. Could be a female.

4 Q. Okay. That's -- you said vulnerable  
5 population, so I wanted to -- what do you mean by  
6 that?

7 A. Yes.

8 Q. Females?

9 A. Females that may be pregnant in their third  
10 trimester.

11 Q. Okay. Any other common characteristics  
12 other than vulnerable adults, people from countries  
13 not subject to repatriation, are there any other kind  
14 of common characteristics or groups that are parole  
15 plus ATDs being utilized as far as single adults?

16 A. Not that I can think of.

17 Q. Okay, all right. And the countries that  
18 we're talking about regarding not being able to  
19 repatriate, are the most common ones Cuba, Nicaragua  
20 and Venezuela?

21 MR. DARROW: Objection.

22 A. Yes.

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1 Q. Okay. Did you approve of the expansion of  
2 parole plus ATD to single adults?

3 A. Yes.

4 Q. Have you approved its utilization in  
5 specific sectors?

6 A. Yes.

7 Q. What sectors have you approved its  
8 utilization in?

9 A. Yuma, Del Rio, and Rio Grande Valley.

10 Q. Okay. Now, we kind of moved past it pretty  
11 quickly because of the bubble there, but as far as  
12 family units, have you approved parole plus ATD being  
13 utilized in any sectors?

14 A. Yes.

15 Q. What sectors have you approved parole plus  
16 ATD to be utilized in?

17 A. Those sectors that meet certain criteria,  
18 to include detention capacity and our inability to  
19 decompress to other locations. So we have seen  
20 spikes in other sectors on occasion, and so when we  
21 do not have the ability to transfer the migrant  
22 population to ICE, we do not have a mechanism to

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1     **return them, and they have been in our custody longer**  
2     **than a certain period of time, I have authorized the**  
3     **use of ATD plus parole in certain circumstances.**

4           Q.     Okay. Would it be in the three sectors  
5     that you mentioned earlier?

6           A.     **Yes.**

7           Q.     And then a couple sectors on occasion  
8     outside those three sectors.

9           A.     **That's correct.**

10          Q.     Okay. Now, moving back to single adults,  
11     how was the expansion of parole plus ATD communicated  
12     to the associates of the southwest border?

13                  MR. DARROW: Objection.

14          A.     **A couple of ways. One, we issued a**  
15     **memoranda, and then we also issued e-mail guidance to**  
16     **the sectors.**

17          Q.     Counsel, we've not received a copy of any  
18     memoranda expanding it to single adults, and I think  
19     we've requested that in discovery, so I would ask for  
20     it again, and I'll reserve having to recall this  
21     witness once we get that memo. Do you have any idea  
22     of approximately how many single adults have been



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1 released utilizing parole plus ATD?

2 **A. No.**

3 MR. GUARD: Okay, all right. It is noon.  
4 Do you want to take a break for lunch because I'm  
5 about to start a whole new subject that's going to  
6 take about an hour.

7 MR. DARROW: Take a break for lunch?

8 THE WITNESS: Sure.

9 (Recessed at 11:59 a.m.)

10 (Reconvened at 1:08 p.m.)

11 THE VIDEOGRAPHER: We're now back on the  
12 record at 13:08.

13 BY MR. GUARD:

14 Q. All right, when we broke, we were talking  
15 about immigration processing pathways that Border  
16 Patrol utilizes. I want to change the subject and  
17 talk about detention and detention capacity. Now, in  
18 the last several physical years, Border Patrol under  
19 your direction has taken proactive steps to deal with  
20 the border crisis as far as its detention capacity,  
21 correct?

22 **A. Yes.**

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1 Q. All right. You've actually increased  
2 Border Patrol's detention capacity, right?

3 A. Yes.

4 Q. You put up I think one or two soft-sided  
5 facilities; is that correct?

6 A. We put up multiple soft-sided facilities,  
7 and we also completed our centralized processing  
8 center in Rio Grande Valley, which is our Ursula  
9 facility. We stood that up under the previous  
10 administration after the -- in 2014, and continued to  
11 operate that for the next four years, but it needed  
12 some engineer's modifications to bring it up to code,  
13 and so we in essence had to shut it down, but over  
14 the last -- I believe we opened it back up in  
15 December.

16 Q. Okay. And increasing detention capacity  
17 for any organization, but for a federal government  
18 agency, takes time, right?

19 A. Yeah, most definitely. You need both, in  
20 this case, the contracting ability to be able to do  
21 it, you have to have the funding to be able to do it,  
22 and then you have to have the manpower to support

1     **those facilities.**

2           Q.     And standing up additional facilities is  
3     something that takes time, right? Takes multiple  
4     years, correct?

5           A.     Typically -- I mean, we have stood up some  
6     soft-sided facilities in relatively quick periods of  
7     time depending on the conditions, but more often than  
8     not, it takes months if not a year to plan.

9           Q.     Okay, and today, you can now handle a  
10    higher volume of aliens as far as processing than you  
11    could before January of 2021, right?

12           MR. DARROW:   Objection.

13           A.     So depending on what you are sort of -- so  
14    we were already dealing with this COVID environment  
15    in January 2021, and so our ability to safely care  
16    for, detain, process the migrant population as well  
17    as care -- ensure safety and security of our  
18    personnel was already being challenged. When you  
19    think about, you know, having the ability to --  
20    normally without it being in a pandemic or in a COVID  
21    environment, a whole 17,000 people at max capacity,  
22    that's not optimal. When you talk about detention,

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1 space as law enforcement officials, you don't want to  
2 fill every seat, every bed, every corner of those  
3 processing centers. I mean, that's -- when you get  
4 to those -- or you exceed or reach those maximum  
5 capacity levels, you are really stretching the  
6 logistics and the capacity of the sectors and the  
7 stations.

8 Q. I appreciate that, Chief Ortiz, but I guess  
9 from -- just from a mathematical perspective, the  
10 number of available beds has increased as far as  
11 Border Patrol from January 2021 till the present.

12 A. Well, we have really no beds. We were  
13 never -- processing --

14 Q. Yes.

15 A. -- centers.

16 Q. Okay, I was --

17 A. Occupancy level of our facilities has  
18 increased, yes.

19 Q. Okay, that's all I was trying to get at.

20 A. Okay.

21 Q. And I appreciate that during COVID, you  
22 were at 75 percent occupancy level; is that right?



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1 budget for a physical year?

2 **A. For fiscal year '21, yes.**

3 Q. Okay, and on -- if you want to look, on  
4 page 22 and 23 of Exhibit 12, it has CBP, some pages  
5 about CBP, and it has in -- on pages 22 and 23  
6 information about Border Patrol too, correct?

7 **A. That's correct.**

8 Q. All right. All right, if you'll flip to  
9 page 32, if you look on page -- so we're not hiding  
10 anything, if you look back at page 28, 28 through  
11 page 33 deals with ICE, correct?

12 **A. Yeah, it appears to.**

13 Q. Okay, and so this is a summary that is  
14 prepared for DHS about ICE's budget highlights,  
15 correct?

16 **A. That's what it appears to demonstrate,**  
17 **yeah.**

18 Q. Okay, and physical year 2021, that budget  
19 would have been put together by the Trump  
20 administration; is that correct?

21 **A. That's correct.**

22 Q. Okay. It would have been the last budget

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1 that the Trump administration personnel would have  
2 put together, right?

3 **A. That's correct.**

4 Q. All right. If you'll look over on page 32,  
5 towards the bottom of the page, it has increase to  
6 60,000 ADP. Do you see that?

7 **A. Yes.**

8 Q. And so the budget in FY 2021 for ICE was  
9 proposing an increase to 60,000 ADP. Do you know  
10 what ADP is?

11 **A. You know, I've never seen that acronym**  
12 **before.**

13 Q. Okay. If -- if you look at the second  
14 sentence underneath the increase to 60,000 ADP, it --  
15 well, look at the first sentence. It says of the  
16 60,000, 55,000 are adults and 5,000 for family. Do  
17 you see that?

18 **A. Yes.**

19 Q. Okay, and then it talks of the requested  
20 adult beds, does ADP have to do -- deal with  
21 something with detention beds?

22 MR. DARROW: Objection.

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1           **A.       Yeah, I'm going to assume it stands for**  
2       **authorized detention. I'm not sure what the P stands**  
3       **for, but --**

4           Q.       Okay. Let me see if I can find -- if you  
5       look on page 29, if you look at service to the public  
6       --

7           **A.       Average daily population. I wasn't even**  
8       **close.**

9           Q.       So it's their average detention capacity is  
10       what ADP stands for?

11                   MR. DARROW: Objection.

12           **A.       Or daily population, yeah, that's what it**  
13       **stands for.**

14           Q.       Okay. And it's talking about how many  
15       people are housed by ICE, right?

16                   MR. DARROW: Objection.

17           **A.       On average, yes.**

18           Q.       Okay. And that's ERO? ERO would be the  
19       component housing for ICE?

20           **A.       Enforcement removal operations, yes.**

21           Q.       Okay. I probably -- I forgot that is not  
22       one we've yet touched on.



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1           **A.       Yeah.**

2           Q.       So ERO stands for enforcement removal  
3 operations; is that right?

4           **A.       That's correct.**

5           Q.       Okay, and that's an ICE component, right?

6           **A.       It's one of two ICE component.**

7           Q.       And it's the ICE component that you deal  
8 with when you're going to transfer aliens, right?

9           **A.       That's correct.**

10          Q.       Okay. When Exhibit 12 was being created,  
11 would you have had any reason or had any reason for  
12 anyone on your staff to kind of peruse what the other  
13 components of DHS are doing or not doing?

14               MR. DARROW: Objection. Are you asking  
15 when the budget proposal was being created? Because  
16 that's deliberative process protected.

17               BY MR. GUARD:

18          Q.       No, I'm asking Exhibit 12 was -- it was  
19 created, so after it's released, would he have had  
20 anyone on his staff review it.

21           **A.       Yes, I would.**

22          Q.       Okay. Would they report changes or -- or

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1 additions or subtractions to the budget of entities  
2 that Border Patrol deals with?

3 **A. Yes.**

4 Q. Okay, and you were not Border Patrol chief  
5 in -- when the physical year 2021 budget process was  
6 going on, were you?

7 **A. No, I was the deputy chief.**

8 Q. Okay. As deputy chief, would you have had  
9 someone reporting to you on what was being published  
10 as far as ICE's budget and the changes thereto as is  
11 relevant to Border Patrol?

12 **A. Yes.**

13 Q. I'm going to mark for identification as  
14 Exhibit 13 to your deposition the following document.

15 (Ortiz Exhibit No. 13  
16 was marked for  
17 identification.)

18 MR. GUARD: I couldn't get a stapler to  
19 staple it.

20 MR. DARROW: Too big.

21 BY MR. GUARD:

22 Q. So that was my way of dealing with that

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1 problem. Exhibit 13 is a Congressional justification  
2 created by the Department of Homeland Security, U.S.  
3 Immigration and Customs Enforcement budget overview,  
4 correct?

5 **A. That's what it appears to be, yes.**

6 Q. And -- and there are similar documents for  
7 each component of the Department of Homeland  
8 Security, right?

9 **A. Yes.**

10 Q. And you're involved probably in the  
11 creation of the CBP version of this document?

12 **A. I am.**

13 Q. Okay. Now, looking at this document,  
14 Exhibit 13, you first will turn to the page on the  
15 bottom, it's labeled ICE 3, it's in the strategic  
16 context portion of the document?

17 MR. DARROW: You're talking this ICE-3?

18 MR. GUARD: It's under the strategic  
19 context component overview. I'm not responsible for  
20 --

21 MR. DARROW: There might be a couple ICE 3s  
22 in here.

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1 BY MR. GUARD:

2 Q. I don't know why -- that would make no  
3 sense, but -- hold on. Let me look at it.

4 A. **There is.**

5 Q. Hold on. Strike that. Let's go back.  
6 Let's go to instead ICE-O&S-18, or 17 is where it  
7 starts. Program change number 1 is listed as an  
8 adult bed increase to 55,000 ADP. That's the same as  
9 that budget overview line item that we were looking  
10 at a few minutes ago in Exhibit 12, correct?

11 A. **Yeah, it appears to be the same.**

12 Q. And if you look on page 18, it has a  
13 justification for why the increase is necessary,  
14 correct?

15 A. **Yes.**

16 Q. All right. And -- and the reason at least  
17 the Department of Homeland Security, or what the  
18 Department of Homeland Security was telling Congress,  
19 who appropriates money for it, is that the increase  
20 provides ICE greater flexibility and capacity to  
21 detain a larger number of recent border crossers,  
22 alien populations ineligible for a quick turn,

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1 apprehensions and removals and criminal aliens. Did  
2 I read that justification correctly?

3 **A. Yes.**

4 Q. And then it -- it provides some ADP numbers  
5 for previous years, correct?

6 **A. Yeah, it appears like it goes back all the**  
7 **way to 2017, and there's been a 33 percent increase,**  
8 **22 percent increase over those years consecutively.**

9 Q. And so for the 2019 number that is included  
10 in this document, the number of an average daily  
11 population at an ICE facility was 48,850, so almost  
12 50,000 individuals.

13 **A. That's correct.**

14 Q. All right. You'll turn to ICE dash O&S27,  
15 it details a program change, it's program change  
16 number 9 towards the bottom of the page, family bed  
17 increase to 5,000 ADP. Do you see that?

18 **A. Yes.**

19 Q. And so again, this is the other part of --  
20 so the line item in the budget in brief that DHS  
21 published was 60,000, the adult bed was 55,000, and  
22 5,000 was family beds, correct?

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1           **A.       That's correct.**

2           Q.       All right. And so this is just a  
3       justification for two -- to Congress by DHS of what  
4       they need, right?

5                   MR. DARROW: Objection.

6           **A.       It appears that that's what that is, yes.**

7           Q.       All right. And if you turn, or you look at  
8       the bottom of the page, the justification that ICE --  
9       or that HHS is making to Congress, its appropriators,  
10       is that in recent years, family unit arrivals have  
11       outpaced ICE -- ICE's capacity for processing and  
12       detaining families. That's the justification for the  
13       increase?

14                  MR. DARROW: Objection.

15                  BY MR. GUARD:

16           Q.       Or what the document says the justification  
17       for the increase is?

18           **A.       That, and the fact that they've seen a 341**  
19       **percent increase from 2018 to 2019 was part of the**  
20       **justification, yes.**

21           Q.       Okay. All right, if you'll put that  
22       document aside, and you're going to have to put it --

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1 I'm going to show you what I'm going to mark for  
2 identification as Exhibit 14 to your deposition.

3 (Ortiz Exhibit No. 14  
4 was marked for  
5 identification.)

6 THE WITNESS: Thank you.

7 MR. DARROW: Thank you.

8 BY MR. GUARD:

9 Q. Exhibit 14 is the FY 2022 budget in brief  
10 for the Department of Homeland Security, correct?

11 A. Yes.

12 Q. And again, this is a document that you  
13 would have -- as either deputy chief or chief would  
14 have been involved in at some point in time.

15 A. Yes.

16 Q. And it's a document that you would have had  
17 someone on your staff review after it was published.

18 A. Yes.

19 Q. And that staff member would have been  
20 looking to see changes for other DHS components that  
21 could affect Border Patrol's operations, right?

22 A. Both the Border Patrol and CBP, and then

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1     **also our partner agencies.**

2           Q.     Okay. And again, this document contains a  
3     section for CBP on page 23.

4           **A.     Yes.**

5           Q.     Okay. And if you'll then flip to page 29,  
6     there's a section for ICE, correct?

7           **A.     Yeah.**

8           Q.     All right, and if you'll look to page 35,  
9     the only proposed major decrease to ICE's budget was  
10    to decrease the number -- decrease to 30,000 adult  
11    ADP.

12                   MR. DARROW: Objection.

13                   BY MR. GUARD:

14           Q.     Did I read that correctly?

15           **A.     Yes.**

16           Q.     No other decrease that is disclosed in this  
17    document for ICE?

18                   MR. DARROW: Objection.

19           **A.     I haven't reviewed the entire document, so**

20    **--**

21           Q.     Well, on page 35, is there any other  
22    decrease?



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1           **A.       That's the only one I see.**

2           Q.       Okay. And if you look on -- do you see, if  
3 you start on page 32 going through page 34, there are  
4 a number of programs that are being increased, right?

5           **A.       Well, I believe the management efficiency's**  
6 **being reduced.**

7           Q.       By five million dollars.

8           **A.       Yeah.**

9           Q.       Okay. Other than the management  
10 efficiencies and the adult ADP, there are no other  
11 decreases disclosed in this DHS document, right?

12                   MR. DARROW: Objection. He can't speak to  
13 the whole document unless you give him a chance to  
14 read the whole thing.

15                   BY MR. GUARD:

16           Q.       Counsel, you're allowed to object to form.  
17 You're not allowed to coach witnesses. I would  
18 appreciate if you would just please keep your  
19 objections to object to form. In the ICE section of  
20 this document, so I'm talking pages 32 halfway down  
21 through 35, little over three pages, there are only  
22 two decreases proposed by DHS to ICE's budget, right?

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1           **A.       Well, it actually starts on page 29. Let**  
2       **me -- those seem to be the only two decreases.**

3           Q.       Okay, and if you look at the -- under -- on  
4       page 35 under the major decreases section, it  
5       indicates that their ADP level is going to 32,500,  
6       paren, 30,000 adult and 2,500 family, correct?

7           **A.       That's correct.**

8           Q.       And in the previous budget, 55,000 adults  
9       and 5,000 family beds were being requested.

10               MR. DARROW: Objection.

11               BY MR. GUARD:

12           Q.       Right?

13           **A.       Well, they were being requested, but that**  
14       **was not what was authorized --**

15           Q.       Okay, again, but --

16           **A.       -- by Congress.**

17           Q.       What was being requested was up to 55 and  
18       five, correct?

19           **A.       What was being requested in the '21 budget**  
20       **was 60,000. What was being requested in this budget**  
21       **was 30 -- 30,000 -- or 3 -- 32,000 -- or 33,000, but**  
22       **what was actually enacted was much lower than both**

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1     **those numbers.**

2           Q.     And was that because DHS was operating on a  
3     continuing resolution?

4           **A.     I believe that's because that's what**  
5     **Congress authorized, or appropriated.**

6           Q.     Okay, all right. And so this is a decrease  
7     -- so this is 2021 is when this -- when this document  
8     is being prepared. We're at a historic unprecedented  
9     flood of aliens across the border, and Department of  
10    Homeland Security is decreasing the number of  
11    detention beds?

12                   MR. DARROW:   Objection.

13                   BY MR. GUARD:

14           Q.     Is that right?

15           **A.     1,500, yes.**

16           Q.     You'll -- I'm going to mark for  
17    identification as Exhibit 14, 15 --

18           **A.     Yeah.**

19                   MR. DARROW:   Fifteen, yeah.

20                                   (Ortiz Exhibit No. 15  
21                                   was marked for  
22                                   identification.)

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1 MR. DARROW: Thank you.

2 BY MR. GUARD:

3 Q. No problem. Exhibit Number 15 is the FY  
4 2023 budget in brief by the Department of Homeland  
5 Security, correct?

6 A. Yes.

7 Q. Okay, and this again, you were chief of the  
8 Border Patrol when this document was being created,  
9 right?

10 A. That's correct.

11 Q. All right. And would you have had some  
12 involvement in at least either providing information  
13 or in the preparation of this document?

14 A. On the CBP portion, yes.

15 Q. Okay. And there is a, like in the previous  
16 one, starting on page 26, there is a section for  
17 Customs and Border Patrol, right?

18 A. Yes.

19 Q. All right. And if you look on page 33,  
20 there -- like in the previous budget in brief, the  
21 two that we looked at, there is an ICE portion,  
22 right?

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1           **A.     Yes.**

2           Q.     And if you turn to page 40, there's again a  
3     section for FY 2023 major decreases, right?

4           **A.     Yes.**

5           Q.     And DHS was proposed to -- a budget that  
6     decreased ADP to 25,000, right?

7           **A.     Yes.**

8           Q.     And so that's 5,000 adult ADP from the  
9     previous budget.

10          **A.     Yes.**

11          Q.     Okay. And in addition to the 5,000 less  
12     adult ADP from the previous budget, so going from  
13     30,000 to 25,000, this major decrease also eliminated  
14     the funding for family detention beds, correct?

15                 MR. DARROW: Objection.

16          **A.     That's what it states, yes.**

17          Q.     Okay. So again, in the middle of a  
18     historic unprecedented flow of illegal immigrants  
19     across the southern border, the Department of  
20     Homeland Security's budget decreases the detention  
21     capacity of ICE?

22                 MR. DARROW: Objection.

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1           **A.       It looks like it decreases the detention**  
2       **capacity but increases the ATD program by \$527**  
3       **million.**

4           Q.       And so you brought up ATD, and so instead  
5       of detaining aliens, this administration has decided  
6       to release aliens, including inadmissible aliens into  
7       the interior of the country, correct?

8                   MR. DARROW:   Objection.

9           **A.       It decided to put them in another program**  
10       **of detention, which is alternative to detention with**  
11       **either electronic monitoring devices or another**  
12       **technical means.**

13          Q.       Or having them call in or report  
14       occasionally to an ICE facility, correct?

15          **A.       That's correct.**

16          Q.       All right.   I would assume, since you're  
17       not an ICE person, you have no idea how many people  
18       they're actually electronically monitoring right now,  
19       do you?

20                  MR. DARROW:   Objection.

21          **A.       I do not.**

22          Q.       Okay.   You do not know how many people

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1 they're just having go by and occasionally check in  
2 with an ICE office, right?

3 **A. No.**

4 MR. DARROW: Objection.

5 **A. I don't have access to that --**

6 Q. Okay.

7 **A. -- information.**

8 Q. Again, I assumed you wouldn't because  
9 you're Border Patrol. You're not ICE. Now, have you  
10 ever heard the phrase "catch and release"?

11 **A. Yes.**

12 Q. And the phrase "catch and release" is that  
13 you -- at least in the context that you work in, is  
14 that you catch an illegal alien and then you release  
15 them, right?

16 MR. DARROW: Objection.

17 **A. Typically that's how it's been used.**

18 Q. And so the budgets that we've looked at  
19 have increased funding for releasing aliens,  
20 including inadmissible aliens, right?

21 MR. DARROW: Objection.

22 **A. It's using an alternate means of detention,**

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1     **yes.**

2           Q.     And that alternate means involves release,  
3     right?

4           **A.     Ultimately --**

5                   MR. DARROW:   Objection.

6           **A.     -- they are released into the community,**  
7     **yes.**

8           Q.     Okay.   Do you have any idea how many people  
9     on alternative detention have absconded from ICE's  
10    custody?

11                  MR. DARROW:   Objection.

12           **A.     I do not.**

13           Q.     In formulating policies for the Border  
14    Patrol, did you consider the rate of -- that aliens  
15    in the past had absconded in determining whether to  
16    have a proposal pathway?

17                  MR. DARROW:   Objection.   The formulation of  
18    policies is deliberative process protected.

19                  BY MR. GUARD:

20           Q.     Okay.   In the memo which we're about to get  
21    to, there is no mention in that memo of the number of  
22    aliens that absconded from parole, correct?



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1           **A.       That's correct.**

2           Q.       Okay. For an organization that is to  
3 provide security for the border, do you believe that  
4 the number of aliens that abscond from control of ICE  
5 would be a consideration that should be made?

6                   MR. DARROW: Objection.

7           **A.       The number of aliens that the Border Patrol**  
8 **releases under the ATD parole pathway is typically**  
9 **family units or single adults that are considered a**  
10 **low threat population. So there could be many**  
11 **factors associated with their failure to report to an**  
12 **ICE facility, anywhere from the address or their**  
13 **final destination ended up being somewhere different**  
14 **to, you know, their inability to actually get to an**  
15 **ICE location close to where their final destination**  
16 **was.**

17          Q.       Okay. I'm going to show you what I marked  
18 for identification to your deposition as Exhibit 16.

19                                   (Ortiz Exhibit No. 16  
20                                   was marked for  
21                                   identification.)

22                   MR. DARROW: Thank you.

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1 BY MR. GUARD:

2 Q. Have you seen Exhibit 16 before?

3 A. No.

4 Q. Okay. Exhibit 16 was information that the  
5 Department of Homeland Security provided us in  
6 connection with this case. Now, looking at the top  
7 query, there's a program called notice to report.  
8 What was notice to report?

9 A. Notice to report was a processing pathway  
10 that the previous chief of the Border Patrol, Rodney  
11 Scott, developed and instituted because our  
12 facilities were overcrowded and we needed to ensure  
13 that we had a mechanism to process a low-threat  
14 population and ease the overcrowded conditions in  
15 some of our facilities.

16 Q. Okay. And the aliens that were released to  
17 the notice -- on the notice to report policy were  
18 given a document that it was not a notice to appear,  
19 correct?

20 A. That's correct.

21 Q. And they were basically told to go to the  
22 nearest ICE location to the address they provided to

1 Border Patrol, right?

2 MR. DARROW: Objection.

3 **A. That's correct.**

4 Q. Okay. And does Border Patrol -- when it is  
5 doing its biographical gathering during the  
6 inspection, does it request addresses where the alien  
7 is going to?

8 **A. It depends on what type of process we're**  
9 **doing, but normally when we issue a notice to appear,**  
10 **yes.**

11 Q. Okay. And it's not unusual for them to  
12 request -- request an address if they're thinking  
13 about going through one of those processing avenues,  
14 right?

15 **A. That's correct.**

16 Q. And it has the ability -- does the Border  
17 Patrol have the ability to query and find out how  
18 many aliens are going to a particular area or  
19 particular state?

20 **A. I don't know if our systems allow us to**  
21 **query those data points.**

22 Q. Okay. Have you ever seen any reports that

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1 report where people are going that are coming through  
2 the border and being released?

3 **A. Not any of the CBP or Border Patrol reports**  
4 **that I've seen, no.**

5 Q. Okay, all right. That's why I'm asking  
6 you. I get a chance to find out what you all track  
7 and what you don't track.

8 **A. Yeah.**

9 Q. All right, the first data point indicates  
10 that between, you know, 1/2021 to 11/1/21,  
11 non-citizens released with a notice to report during  
12 those dates and who failed to check in but provided a  
13 Florida address, and it's more than -- it's 1,127  
14 people, correct?

15 **A. That's what the report says, yes.**

16 Q. Okay, and then looking down at the second  
17 query, that's parole plus ATD, which we were just  
18 talking about, right?

19 **A. Yes.**

20 Q. And same -- it's a little broader query,  
21 non-citizens released with parole plus ATD between  
22 11/1/2021 to 7/4/2022 and who failed to check in but

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1 provided a Florida address, and that is as of July  
2 4th of 2022 47,984 non-citizens, correct?

3 **A. That's what the report says, yes.**

4 Q. Okay, all right. Now, would that -- and  
5 you may not be able to answer that. I -- I get  
6 you're not the guy who's running queries on a  
7 database, and if you are, we're in a world of  
8 trouble, not because you can't, but just because you  
9 have better things to do. Would that 47,984 number  
10 -- when you're doing parole plus ATD, my  
11 understanding is that you're only giving the -- a  
12 document to one member of the family unit. You're  
13 not giving a document to all four -- you're doing an  
14 alien file for the lead, for lack of a better term,  
15 alien, right?

16 MR. DARROW: Objection.

17 **A. So the A number's issued to the head of**  
18 **household when we process a family unit for parole**  
19 **plus ATD, but I would imagine that the children are**  
20 **also going to be included as family members in this**  
21 **data set.**

22 Q. Okay, all right. That's what I was trying

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1 to get at.

2 **A. Yeah.**

3 Q. But you didn't run the query, and you don't  
4 know for sure, but you think based on your 31 years'  
5 experience inside Border Patrol that to be true.

6 **A. That's correct.**

7 Q. Okay. 50,000 people, or nearly 50,000  
8 people is a lot of people to not know where they are.  
9 Would you agree with that?

10 MR. DARROW: Objection.

11 **A. 50,000 people is a large number.**  
12 **Comparatively speaking, when you're apprehending, you**  
13 **know, 1.7 million people in eight months of a fiscal**  
14 **year, it is certainly a number that is concerning,**  
15 **but I'd be curious as to in this number, does it --**  
16 **is it also taking in consideration the folks that are**  
17 **already on a electronic monitoring device. So**  
18 **there's a lot of unknowns with respect to that 47,000**  
19 **number that I -- I would, as a leader in the Border**  
20 **Patrol organization, I'd ask additional questions**  
21 **about.**

22 Q. Okay. Obviously I'm not the database guy

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1 either, so I'm not going to be able to --

2 **A. Yeah.**

3 Q. -- to answer that question.

4 **A. I got you.**

5 Q. And -- and that 47,000 number, that's just  
6 for Florida addresses, right?

7 **A. That's what it indicates, yeah, but for**  
8 **Florida addresses, yeah.**

9 Q. Okay. Do you know if -- if just by  
10 anecdotal evidence, whether Florida's a common  
11 destination for aliens entering at the southwest  
12 border?

13 MR. DARROW: Objection.

14 **A. Well, we've seen increases in migration**  
15 **from Cuba and some of the other countries within the**  
16 **Caribbean, and obviously their final destination**  
17 **tends to be Florida, so Florida is a destination that**  
18 **we see quite often --**

19 Q. Okay.

20 **A. -- from some of the demographics.**

21 Q. Have you ever seen any statistics or data  
22 that shows that Florida's in the top six for

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1 destination for -- for aliens entering this country?

2 A. I haven't seen --

3 Q. Okay.

4 A. -- a report that demonstrates that. I can  
5 tell you that, you know, for some reason, Haitian  
6 migrants like to go to Maine, and that's one of those  
7 things that -- Portland, Maine would never been a  
8 final destination that I would have assumed Haitian  
9 migrants would want to travel to.

10 Q. I think you'd need to have some agents ask  
11 some questions about why they're going to Portland,  
12 Maine.

13 A. Actually, Portland welcomed them.

14 Q. Okay. That's -- you couldn't get any  
15 further from Haiti than Portland, Maine.

16 A. I would agree.

17 Q. Having been there, it's a wonderful place.  
18 I'm not saying anything negative about it. Just  
19 would not be what I pictured for -- for Haitian  
20 immigrants. And they're wonderful people too, and we  
21 have lots of them in Florida. I'm going to show you  
22 what I'm going to mark as 17.



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1 (Ortiz Exhibit No. 17  
2 was marked for  
3 identification.)

4 MR. DARROW: Thank you.

5 BY MR. GUARD:

6 Q. Have you seen Exhibit Number 17 before?

7 A. Yes.

8 Q. You're actually copied on Exhibit 17,  
9 correct?

10 A. That's correct.

11 Q. Before I get into Exhibit 17, do you recall  
12 when you learned that ICE was no longer going to  
13 accept transfer for detention family units?

14 A. I don't have the specific date, no.

15 Q. Okay. Now, looking at Exhibit -- Exhibit  
16 17, it looks like someone who it is not disclosed who  
17 was e-mailing Rodney Scott, who was your chief at the  
18 time, correct?

19 A. Yes.

20 Q. And forwarding him or I guess -- I can't  
21 tell for sure if they're going back and forth because  
22 the froms and tos are blocked out with PII, but

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1 they're either going back and forth or the chief is  
2 getting an e-mail forwarded to him. Is that -- is  
3 that fair?

4 **A. Yes.**

5 Q. Okay, and I think you're copied on both --  
6 both of the top two e-mails, right?

7 **A. Yes.**

8 Q. Okay. And the subject line, first, this  
9 e-mail is on February 16th of 2021, right?

10 **A. Yes.**

11 Q. That's 26 days after Joe Biden has been  
12 inaugurated, right?

13 **A. Yes.**

14 Q. Okay, all right. The subject matter of  
15 this e-mail is ERO changes, correct?

16 **A. Yes.**

17 Q. And ERO again is the ICE component that  
18 handles detention and/or transfers from Border  
19 Patrol.

20 **A. That's correct.**

21 Q. All right. If you look down at the third  
22 e-mail, or what I think is the third e-mail in the

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1 chain, there is a paragraph that has been I guess --  
2 I guess it was sent because of Chief Scott being in  
3 this chain, I guess it was sent to at least at some  
4 point to Chief Scott, right?

5 **A. Yes.**

6 Q. Okay, and if you look at the second page of  
7 Exhibit 17, again, it is blacked out as per PII  
8 reasons. It says Chief, Law Enforcement Operations  
9 Directorate, United States Border Patrol  
10 headquarters. Do you recall who served in that role  
11 in February 2021?

12 MR. DARROW: Objection. You're trying  
13 again to identify what's blocked out by the PII.

14 MR. GUARD: Yes. I'm asking who sent this  
15 e-mail.

16 MR. DARROW: That's privileged information,  
17 hence, the redaction.

18 MR. GUARD: So you're claiming what  
19 privilege, Counsel?

20 MR. DARROW: Law enforcement sensitive  
21 privilege.

22 MR. GUARD: For a senior-level official

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1 reporting a conversation.

2 MR. DARROW: One second. Thank you. I had  
3 some clarification. Yeah, the reason we consider it  
4 law enforcement sensitive is that these officers are  
5 regularly doxed when this information is released and  
6 people get their PII.

7 BY MR. GUARD:

8 Q. Can you please mark this, and I'll take  
9 this up with the court, and we may have to come back.  
10 So whoever was chief of law enforcement operations  
11 directorate sent an e-mail to -- well, before I get  
12 there, is -- if I -- if I were to Google chief of law  
13 enforcement operations directorate, U.S. Border  
14 Patrol, could I probably figure out who the chief of  
15 law enforcement operations Border Patrol was at the  
16 time?

17 MR. DARROW: Objection.

18 A. You may be challenged because that has been  
19 a acting capacity for probably 90 percent of the time  
20 that I've been either the deputy chief or the chief.  
21 It has -- we've struggled with filling the position  
22 on a couple of occasions, and then at one point, the

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1 person who occupied the position permanently that  
2 Chief Scott transferred in there was detailed out.

3 Q. Okay. Do Border Patrol agents, including  
4 folks in the upper management of the Border Patrol,  
5 use social media like LinkedIn?

6 A. Yes.

7 Q. Okay. All right, we'll deal with that in  
8 front of the court later. Oh, Counsel, you're  
9 instructing the witness not to answer. I want to  
10 make that sure that it's clear that you're  
11 instructing him to.

12 MR. DARROW: Yes.

13 MR. GUARD: Okay.

14 MR. DARROW: Not to answer, that's correct.

15 MR. GUARD: Okay, I just -- you just --  
16 never say that.

17 MR. DARROW: Right, right, no.

18 BY MR. GUARD:

19 Q. So I just wanted -- I didn't want that to  
20 be the technical defense, that I forgot to get you to  
21 say that. All right, looking at the actual e-mail on  
22 the first page, and sorry that you had to listen to

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1 all that lawyer talk. It just happens from time to  
2 time. All right, this person who was the chief of  
3 that group at Border Patrol had a conversation with  
4 someone at ERO, right, and they advised that the  
5 three FRCs -- what are FRCs?

6 **A. Family residential centers.**

7 Q. Okay, and then it lists out the three  
8 family residential centers, were transitioning to  
9 reception centers, correct?

10 **A. That's what it indicates, yes.**

11 Q. And basically those three facilities were  
12 now going forward only going to be used to house  
13 families for 72 hours.

14 **A. That's correct.**

15 Q. Okay, all right. Do you know -- do you  
16 recall receiving this e-mail?

17 **A. Yes.**

18 Q. Okay. Do you recall thinking that this  
19 e-mail was going to become an issue?

20 **A. Well, during this time, it was the height**  
21 **of COVID.**

22 Q. Okay.

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1           A.       So this wasn't the only issue that we were  
2       dealing with at the time, but it was certainly going  
3       to be impactful, yes.

4           Q.       Okay, it was going to constrict or  
5       constrain the available processing pathways for  
6       family units, right?

7                   MR. DARROW:   Objection.

8           A.       Well, it's going to mean that we are going  
9       to have to transfer the family units to those  
10       facilities as quickly as possible out of our custody  
11       so they could be tested and then ultimately released.

12          Q.       Okay.   But there's not going to be -- this  
13       e-mail's disclosing that ICE is no longer going to  
14       retain family units, right?

15                  MR. DARROW:   Objection.

16          A.       That's what it appears to be indicating,  
17       yes.

18          Q.       All right, so as a policy member, ICE was  
19       letting Border Patrol know we're not going to detain  
20       any more family units, right?

21                  MR. DARROW:   Objection.

22          A.       Well, they were advising that they were

1     **changing the operational posture of the three FRCs in**  
2     **central Texas.**

3           Q.     Okay, but that change, that operational  
4     change, as you referred to it, meant that family  
5     units would no longer be able to be detained.

6           A.     **For longer than 72 hours. Looks like they**  
7     **were going to release them within 72 hours.**

8           Q.     Okay. So if someone is from a -- a country  
9     that -- where you cannot repatriate them to or even  
10    if someone has some other indication that would make  
11    them detainable, if they're with a family unit, there  
12    no longer is going to be bed space for that  
13    individual, right?

14           MR. DARROW: Objection.

15           A.     **Yeah, it appears that there was no longer**  
16    **going to be an opportunity to detain them.**

17           Q.     So at that point, all family units were  
18    going to be released after the 72 hours at the,  
19    quote, reception center, right?

20           MR. DARROW: Objection.

21           A.     **Yes.**

22           Q.     Okay. Now, do you know if this e-mail was



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1 the first notice that you got about this operational  
2 change?

3 **A. I can't recall.**

4 Q. Okay, but as like a kind of -- like by  
5 February 16th, 26 days into the Biden administration,  
6 you knew this was going to be what was going to  
7 happen going forward, right?

8 MR. DARROW: Objection.

9 **A. Yeah, based upon the e-mail, yes.**

10 Q. We're on 18? No, that's not going to work.  
11 I'll come back to that. I'm going to need a sticker.  
12 I finally found one where I didn't put a sticker on  
13 it.

14 (Ortiz Exhibit No. 18  
15 was marked for  
16 identification.)

17 BY MR. GUARD:

18 Q. Mark for identification USA 002081 as  
19 Exhibit 18 for your deposition.

20 MR. DARROW: Thank you.

21 BY MR. GUARD:

22 Q. All right, now, this is an e-mail involving

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1 a Tony Barker, who's an employee -- or is the -- I  
2 guess he's the deputy chief of operations for Border  
3 Patrol, right, at the time?

4 **A. At this time, he was, yes.**

5 Q. Okay. Is he still with Border Patrol?

6 **A. Yeah, he's -- he's the acting operations**  
7 **chief.**

8 Q. Okay, all right. Would Mr. Barker reported  
9 to the mystery man on the previous page, the previous  
10 e-mail, Exhibit 17?

11 MR. DARROW: Objection. Again, that calls  
12 for disclosure of --

13 MR. GUARD: I'm not asking his identity.  
14 I'm asking the organizational structure, who reports  
15 to who just by title.

16 MR. DARROW: With that clarification, you  
17 can answer.

18 THE WITNESS: So the deputy chief reports  
19 to the chief of operations, the deputy chief of the  
20 Border Patrol and the chief of the United States  
21 Border Patrol.

22 BY MR. GUARD:

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1 Q. Okay, so would that be a different person  
2 than the person who was serving in chief, law  
3 enforcement operations directorate, or is that the --

4 A. That's the same.

5 Q. Same, okay. So Mr. Barker, whose name is  
6 being disclosed, but whoever was the chief at the  
7 time, was not. All right, and I can't tell you who  
8 this e-mail was sent to and who it was from. My  
9 initial question to you is do you know if you ever  
10 received this e-mail?

11 A. I couldn't tell you.

12 Q. Okay. That's fair enough. What does this  
13 e-mail seem to report?

14 A. It seems to report how many family units we  
15 were apprehending, how many we were turning over to  
16 ICE/ERO, and then how many of those family units are  
17 NTA/OR'd.

18 Q. Okay, let's start with the -- I think it's  
19 the -- probably the -- so the first e-mail in the  
20 string is someone sending e-mails -- an e-mail to Mr.  
21 Barker reporting the numbers at the different  
22 southern border sectors of family units, right?

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1           **A.       Yeah, both the seven day and 21 day**  
2           **average, yeah.**

3           Q.       Okay, and then the next e-mail in the chain  
4           is Mr. Barker sending to it looks like it's probably  
5           more than one person since there are multiple lines  
6           blocked off, and it says this is the flow that ICE  
7           will have to accept if we do a hundred percent  
8           referral. What does hundred percent referral refer  
9           to?

10          **A.       That's a reference to the amount of family**  
11          **units that we would want to dispo over to ICE/ERO.**  
12          **Dispo, disposition, I'm sorry, or transfer.**

13          Q.       Then there's an e-mail from someone back to  
14          Mr. Barker asking a question, "Is that number we are  
15          currently releasing on NTA, right?" And that's  
16          releasing with notice to appear, correct?

17          **A.       That's correct.**

18          Q.       All right, and then Mr. Barker responds,  
19          and all this is happening on May 21st of 2021, NTA  
20          and PD, right? What is PD?

21          **A.       Prosecutorial discretion.**

22          Q.       Okay. We haven't talked about

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1 prosecutorial discretion today. What -- as a  
2 processing pathway. Is -- is PD or prosecutorial  
3 discretion still being utilized by Border Patrol?

4 **A. No.**

5 Q. Okay. When did it cease being utilized  
6 approximately?

7 **A. I couldn't tell you.**

8 Q. Okay. And what was prosecutorial  
9 discretion?

10 **A. That was the Border Patrol's or CBP, not**  
11 **just the Border Patrol, CBP's authorization to not**  
12 **issue a notice to appear for an alien in their**  
13 **custody based upon certain conditions.**

14 Q. Do you recall what those conditions were?

15 **A. They obviously couldn't be a criminal**  
16 **alien, you know, a threat to national security,**  
17 **flight risk. There was several factors.**

18 Q. Okay. Do you know approximately when the  
19 prosecutorial discretion category began?

20 **A. I couldn't tell you.**

21 Q. Was it after the Biden administration  
22 started?

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1           **A.       We've leveraged PD in the past, so I would**  
2           **imagine that it wasn't just under this**  
3           **administration, but once again, I'm unsure.**

4           **Q.       Okay, all right. And I don't want you to**  
5           **speculate, but if you can approximate, I'd appreciate**  
6           **it. All right, was prosecutorial discretion in 2021**  
7           **being utilized with any specific group of alien?**

8           **A.       I'm not going to speculate on that.**

9           **Q.       Okay, so you don't recall?**

10          **A.       That's correct.**

11          **Q.       Okay. Was it -- if I were to look at a**  
12          **report of releases by Border Patrol, would it be**  
13          **under a -- do you know what category prosecutorial**  
14          **discretion would be included in?**

15          **A.       Typically I think they were categorized**  
16          **under O.R., but I'd have to confirm that.**

17          **Q.       Okay, all right.**

18          **A.       Our reports have changed quite a bit over**  
19          **the last couple of years. They continue to evolve,**  
20          **and some of the data sets that we look at have**  
21          **changed.**

22          **Q.       Okay. I just have never seen PD on a**

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1 report, so --

2 **A. Yeah, no.**

3 Q. I was just asking for my edification so I  
4 can go back and see how frequently -- was PD the same  
5 as the NTR program that we were talking about a  
6 little bit earlier?

7 **A. No.**

8 Q. Okay. How did PD differ from NTR?

9 **A. So NTRs were only for family units.**

10 Q. Okay. And PD, could it be single adults?

11 **A. Could have been.**

12 Q. Okay. Any other -- the result of either  
13 process at least as you explained it is that the  
14 alien is not getting an NTA, right?

15 MR. DARROW: Objection.

16 **A. That's correct.**

17 Q. All right, so as far as that is concerned,  
18 that they were similar, right?

19 MR. DARROW: Objection.

20 **A. Well, the forms used were different.**

21 Q. Okay, but they didn't get a notice to  
22 appear and a date and time to show up at an ICE

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1 facility, right?

2           **A. I think with the notice to report, they had**  
3 **X amount of days to present themselves at an ICE**  
4 **facility, and most of that was on the I-385, and I**  
5 **believe they had 60 days.**

6           **Q. Okay. And I've tried to really avoid using**  
7 **the -- all the different forms you utilize because**  
8 **I'd just likely mess it up worse than I mess up --**

9           **A. I got you.**

10           **Q. -- mess up the statutes, but for -- for --**  
11 **for PD, or for people that were released on**  
12 **prosecutorial discretion, was an I-385 issued?**

13           **A. That I do not know. I do know for the ITR,**  
14 **the I-385 was issued.**

15           **Q. Okay. Do you not -- do you recall if a**  
16 **different form was utilized?**

17           **A. It's been a while since I processed, so I**  
18 **couldn't tell you.**

19           **Q. Okay, all right. But if something was**  
20 **going to be rolled out to the rank and file during**  
21 **May of 2021, you were the deputy chief, right?**

22           **A. That's correct.**



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1 Q. And for -- did you typically at that time  
2 look at what was being rolled out to the rank and  
3 file?

4 A. I tried to review most of the forms that  
5 were included, yes.

6 Q. Okay.

7 A. If it was already an existing program, I  
8 wouldn't go back and review that, but if it was a new  
9 program, I would have, yes.

10 Q. Okay, all right. Fair enough. Looking  
11 back at Exhibit 18, it's the second page of the  
12 exhibit, we're moving -- it's all again within a  
13 couple hours on May 21st of 2021, Barker is  
14 responding to someone -- or a group of people cc-ing  
15 a bunch of people, and with last sector data, right?  
16 All right. What is LRT?

17 A. Laredo, Texas.

18 Q. Okay, I thought so, but I did not want to  
19 assume. And so is this just separate data for Laredo  
20 being reported here?

21 A. No, it's going to include RGV, and it may  
22 also include Del Rio.

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1 Q. Okay, so at the time, you were transferring  
2 along the border it looks like family units from --  
3 from sectors that were busier.

4 A. That's correct.

5 Q. And that's what this is kind of reporting,  
6 right?

7 A. That's correct.

8 Q. Okay. Looking back to the first page of  
9 the e-mail, this is minutes after that last exchange,  
10 and there's an e-mail from someone again that we  
11 don't know who to Mr. Barker, and it says the fact  
12 that RGV is only able to refer a hundred families a  
13 day is absurd. We should start with that. What is  
14 that statement referring to?

15 MR. DARROW: Objection.

16 A. I'm assuming it's somebody's opinion that  
17 the fact that only a hundred families can be referred  
18 to ICE/ERO is unacceptable.

19 Q. Okay. If ICE were only willing to accept a  
20 hundred family units from the Rio Grande Valley,  
21 would that cause a capacity issue at -- for the Rio  
22 Grande?

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1 MR. DARROW: Objection.

2 A. Yes.

3 Q. For -- okay, all right. You can put that  
4 exhibit aside. I'll mark this as Exhibit 19 --

5 (Ortiz Exhibit No. 19  
6 was marked for  
7 identification.)

8 BY MR. GUARD:

9 Q. -- to your deposition.

10 MR. DARROW: Thank you.

11 BY MR. GUARD:

12 Q. Have you seen Exhibit 19 before?

13 A. It doesn't look familiar, but chances are I  
14 may have seen it.

15 Q. Okay, all right. And the only reason I'm  
16 asking you again is that the to and the cc are  
17 blocked out, so I don't know if you have or haven't,  
18 but it's an e-mail from Mr. Barker, who now is chief,  
19 right, of the law enforcement operations directorate,  
20 so he's now promoted by this point in time, right?

21 A. He's acting chief, yes.

22 Q. Okay. And that's the same role in Exhibit

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1 17 that was blocked out. And you know, this e-mail's  
2 -- right? Let me --

3 MR. DARROW: Objection.

4 BY MR. GUARD:

5 Q. So on Exhibit 17, the chief of the law  
6 enforcement operations directorate name was blocked  
7 out, but here Mr. Barker's mail is being disclosed,  
8 right?

9 MR. DARROW: Objection.

10 A. Yes.

11 Q. Okay, all right. And this is an e-mail  
12 from May 15th, 2022, right?

13 A. Yes.

14 Q. Okay, and my question for you is there's a  
15 quote, "We must ensure that we are detaining and  
16 removing the demographics that are amenable or else  
17 the flows will only compound more." Do you see that  
18 quote?

19 A. I do.

20 Q. Do you know what Mr. Barker's referring to  
21 with that quote?

22 MR. DARROW: Objection.

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1           A.       So it appears that this was part of a  
2       tabletop exercise that was executed on that Saturday,  
3       and part of the exercise -- the tabletop exercise  
4       requires injects to determine what CBP, ICE and the  
5       department are going to do if there were to be a mass  
6       migration, if Title 42 were to come down and we were  
7       to begin to see some increases in flow. So it sounds  
8       like Tony is describing to the FEMA exercise  
9       operators that that should be a priority, removing  
10      those demographics, but this is all I believe  
11      centered around a tabletop exercise. This wasn't the  
12      operational environment on that particular day.

13           Q.       Okay. Why is it important to detain and  
14      remove demographics that are amenable to the Border  
15      Patrol?

16           A.       One, you want to make sure you have  
17      consequences.

18           Q.       Okay. And if you don't have consequences,  
19      what is likely going to happen?

20                   MR. DARROW: Objection.

21           A.       In my experiences -- in my experience, we  
22      have seen increases when there are no consequences.

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1 Q. Okay. So if migrant populations believe  
2 that they're going -- there are not going to be  
3 consequences, more of them will come to the border?  
4 Is that what you're saying?

5 MR. DARROW: Objection.

6 A. There is an assumption if migrant  
7 populations are told that there's a potential that  
8 they may be released, that yes, you can see  
9 increases.

10 Q. Okay. And if you see -- and so if you do  
11 not -- you said number one, consequences. Are there  
12 any other things that -- other than just that one,  
13 consequences? Is there a two or a three?

14 A. Two or three what?

15 Q. Well, you said number one, consequences. I  
16 didn't know if there were -- if that was the complete  
17 list or there were other things that --

18 A. Affect the flow?

19 Q. Yeah.

20 A. Of course, there's many things. There's,  
21 you know, what our partners to the south do, our  
22 ability to communicate the dangers, our ability to

1 impact the criminal organizations, smuggling  
2 organizations that are trafficking the migrant  
3 populations, our ability to deploy technology and  
4 manpower in areas where we're starting to see greater  
5 flows. All of those factor into the flow and how  
6 it's managed.

7 Q. Okay, and if you're not detaining and  
8 removing demographics that are amenable and the flow  
9 will compound, so it will increase at an exponential  
10 rate? Is that what's being suggested here?

11 MR. DARROW: Objection.

12 A. Well, I do think it will increase, yeah.

13 Q. Now, during the Trump administration, were  
14 you able -- we've talked a little today about  
15 releasing aliens on their own recognizance. During  
16 the Trump administration, were you able to release  
17 aliens on their own recognizance?

18 A. It would have to be on very exigent  
19 circumstances.

20 Q. Some humanitarian reason?

21 A. Medical or humanitarian reason, yes.

22 Q. Okay. As far as using parole under the

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1 Trump administration, was that as well limited?

2 **A. Yes.**

3 Q. Okay. Was it limited to aliens who agents  
4 found were going to be admissible?

5 MR. DARROW: Objection.

6 **A. Parole was used on a limited basis based**  
7 **upon humanitarian reasons also.**

8 Q. Okay. When the Biden administration took  
9 over from the Trump administration, how were the  
10 changes to parole and releasing aliens on own  
11 recognizance communicated to Border Patrol and to the  
12 line agents?

13 MR. DARROW: Objection.

14 THE WITNESS: Can I confer?

15 MR. GUARD: We'll take a break. We've been  
16 going for a while anyway.

17 MR. PERCIVAL: With an open question?

18 MR. GUARD: I'll let him do it.

19 THE VIDEOGRAPHER: We're now off the record  
20 at 14:27.

21 (Recessed at 2:27 p.m.)

22 (Reconvened at 2:46 p.m.)



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1 THE VIDEOGRAPHER: We're now back on record  
2 at 14:46.

3 MR. GUARD: If the court reporter can  
4 please read the last question back.

5 THE REPORTER: Question: "When the Biden  
6 administration took over from the Trump  
7 administration, how were the changes to parole and  
8 releasing aliens on own recognizance communicated to  
9 Border Patrol and to the line agents?"

10 MR. DARROW: And I remind the witness not  
11 to reveal anything privileged in his answer.

12 THE WITNESS: So during this time frame,  
13 one of the things that we were encountering is Rio  
14 Grande Valley, which is in South Texas, was really  
15 the only area that was problematic for us at the  
16 time, and so most of the coordination centered  
17 between the headquarters operations directorate and  
18 the sector personnel, and then some decompression  
19 into Laredo, but at the time, it wasn't an issue for  
20 all nine southwest border sectors.

21 BY MR. GUARD:

22 Q. Okay, I thought the question was how was

1 the changes to own recognizance and parole by the  
2 Biden administration communicated. I understand it  
3 may have only been the Rio Grande Valley. Were there  
4 memorandum or e-mails or was it by telephone or radio  
5 or however? I mean, I'm not trying to be cute or  
6 smart, but I mean, I'm asking you how was it  
7 communicated.

8 **A. So most of the coordination occurred either**  
9 **telephonically or through e-mail coordination between**  
10 **Border Patrol headquarters and the sector.**

11 Q. Okay. While the problem or the issue at  
12 the time may have been the Rio Grande Valley, would  
13 changes to Border Patrol's policies with respect to  
14 parole or own recognizance that occurred after the  
15 Biden administration taken -- had taken over  
16 eventually trickled out to the other sectors of the  
17 southern border?

18 MR. DARROW: Objection.

19 **A. Yes.**

20 Q. Okay. And how would those changes have  
21 been communicated to those other sectors when they --  
22 later?



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1 Q. Okay. If you'll look at -- all right, so  
2 the date of the document's March 5th, 2021, correct?

3 A. Yes.

4 Q. All right, and if you look at the signature  
5 page, and it has Deane Dougherty, who's an ICE  
6 employee?

7 MR. DARROW: Is that on page 8?

8 BY MR. GUARD:

9 Q. Page 8. Sorry. I should have said that.  
10 Actually, it's page 9 if you look at the top.

11 MR. DARROW: Oh.

12 BY MR. GUARD:

13 Q. Page 8 if you're looking at the bottom  
14 numbers. Page 9 if you're looking at the top.

15 A. Okay.

16 Q. Okay. If you'll look at page 2, the first  
17 line on top of the page, it indicates that, "ICE  
18 would like to note that it's revising its current  
19 family detention posture at the FRCs to allow a  
20 broader repurposing of the physical facilities to  
21 better meet operational needs." Did I read that  
22 correctly?

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1           **A.       Yes.**

2           Q.       All right, and so on March 16th, we looked  
3       at the e-mail, I believe it's Exhibit 17, that had  
4       ICE telling you all that they were no longer going to  
5       be detaining families, and this is a document being  
6       filed in court indicating that it's revising its  
7       posture, correct?

8           **A.       Yes.**

9                   MR. DARROW: Objection.

10                  BY MR. GUARD:

11           Q.       All right. Turn to page 4. If you look at  
12       the second sentence on top of page 4, it says a chart  
13       updated on March 4th, 2020 shows only 13 families  
14       remained in custody. I think that actually is a  
15       typographical error, because if you actually look at  
16       the chart, it says March 4th, 2021, right, and the  
17       document itself is filed on March 5th of 2021, right?

18           **A.       Yes.**

19           Q.       Okay, and it says that there were only 13  
20       families remained in custody as of that date, March  
21       4th, 2021, right?

22           **A.       That's correct.**

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1 Q. So in a little over -- little less than two  
2 months of being in office, the Biden administration  
3 has only -- has 13 families in ICE custody, right?

4 MR. DARROW: Objection.

5 BY MR. GUARD:

6 Q. Excuse me, 13 juveniles in custody, 13  
7 families. Sorry. Strike that.

8 A. To be honest with you, I don't really  
9 understand this whole report.

10 Q. Okay, but ICE is representing to a court  
11 that there are 13 families in custody as of March  
12 4th, 2021, right?

13 A. That's what the report states, yes.

14 Q. Okay, all right. Well, you can put that  
15 aside. Now, when immigration law changes, like the  
16 family detention rule, newspaper articles and -- and  
17 press cover it, correct?

18 MR. DARROW: Objection.

19 A. Yes.

20 Q. And smugglers and others see those  
21 newspaper articles, and that can affect perception,  
22 right?

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1 MR. DARROW: Objection.

2 A. I can assume they read it also, yes.

3 Q. Okay, all right. Well, folks that are here  
4 legally or illegally can read those news sources,  
5 right, if nothing else.

6 MR. DARROW: Objection.

7 A. Yes.

8 Q. Okay, and I believe in one of your speeches  
9 in Del Rio, you talked about word of mouth, right?

10 A. I did.

11 Q. Okay. So changes like to the family  
12 detention policy get communicated to folks outside  
13 the United States.

14 MR. DARROW: Objection.

15 THE WITNESS: Yes.

16 MR. GUARD: Okay. I'm going to mark this  
17 as 21?

18 MR. DARROW: Yeah.

19 (Ortiz Exhibit No. 21  
20 was marked for  
21 identification.)

22 MR. DARROW: Thank you.

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Exhibit C - 182

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1 MR. GUARD: And I'll go ahead and mark the  
2 second document as 22, because it may be just easier  
3 to do.

4 (Ortiz Exhibit No. 22  
5 was marked for  
6 identification.)

7 MR. DARROW: Thank you again.

8 MR. GUARD: No problem.

9 THE WITNESS: I think you gave me two  
10 copies.

11 BY MR. GUARD:

12 Q. Okay, don't want to do that. All right,  
13 Exhibit 21 are custody and transfer statistics for  
14 CBP for physical year 2020?

15 A. Yes.

16 Q. And 22 are custody and transfer statistics  
17 for CBP for fiscal year 2021, right?

18 A. That's correct.

19 Q. All right. If you look at the -- I think  
20 it's one, two, three, the fourth page in the exhibit  
21 --

22 MR. DARROW: Exhibit 21?



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1 BY MR. GUARD:

2 Q. Twenty-one. I think it's the fourth page  
3 in both, but let's look at 21 first. Okay, there are  
4 two reports from Border Patrol, correct?

5 A. Yes.

6 Q. And these are monthly reports, right?

7 A. Yes.

8 Q. Okay. Of -- and this is for monthly  
9 southwest border apprehensions by processing  
10 disposition, correct?

11 A. That's correct.

12 Q. All right, and so you have the different  
13 pathways and how many aliens were processed through  
14 each pathway, right?

15 A. That's correct.

16 Q. Okay. And so you have -- we've talked  
17 about expedited removal, right? You have to say yes.

18 A. Yes.

19 Q. It's okay. It's been a long day. I  
20 appreciate it, you know, but I've got to try to  
21 protect the record, and again, at some point the  
22 court reporter will start yelling at both of us. The

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1 next line is PACR, HARP, and ACA. Now, we've not  
2 talked about any of those acronyms yet today. What  
3 are those acronyms?

4 **A. So PACR stands for prompt asylum claim**  
5 **review. HARP is humanitarian -- humanitarian asylum**  
6 **review process, and ACA is the asylum cooperative**  
7 **agreements that we have with third countries.**

8 Q. Okay, all right. And it looks like --

9 **A. I think I got it right.**

10 Q. It sounds pretty good to me. And there's a  
11 footnote, and they have those three plus MPP, which  
12 we've talked about all in the kind of same -- it's  
13 the subjects enrolled in multiple rooms only counted  
14 once based on the following order. So it's at least  
15 trying to make it so the math doesn't -- the math  
16 adds up I guess. And so you have -- those three  
17 programs only have January 2020, February 2020 and  
18 March 2020, right?

19 **A. That's correct.**

20 Q. Do those programs end in March 2020?

21 **A. It appears that they ended in March --**

22 Q. Okay.

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1           **A.       -- of 2020.**

2           Q.       All right. We talked about notice to  
3       appear and order of recognizance, released. We've  
4       talked about reinstatement of prior removal, talked  
5       about voluntary -- well, we've talked about all these  
6       other than the other category, which seems to be any  
7       alien that was processed, but it's -- whatever the  
8       code is hadn't been entered into the system, so it  
9       was just what was ever kind of left because of the  
10      end of a month or end of a -- of a time period,  
11      right?

12                   MR. DARROW: Objection.

13           **A.       That's correct.**

14           Q.       Okay, all right. The bottom -- so that was  
15      processing dispositions. The bottom table is for  
16      Border Patrol southwest border apprehensions by  
17      transfer destination. And so that's telling where  
18      they were sent or what entity dealt with them, right?

19           **A.       Yes.**

20           Q.       Okay. You have humanitarian release. What  
21      type of aliens would be within the humanitarian  
22      release category, to your knowledge?

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1           **A.       Folks that were dispositioned via O.R. due**  
2           **to medical or some other exigent circumstances.**

3           Q.       Okay. You've got federal, and that has a  
4           -- you can look at -- if you want to look at the  
5           footnote, that's anyone who was transferred to ICE or  
6           HHS or marshals or whatever.

7           **A.       That's correct, those are prosecutions,**  
8           **misdemeanor, felony prosecutions, will also include**  
9           **the folks that are turned over ORR, the unaccompanied**  
10          **children, and then the migrant population that would**  
11          **be turned over to ICE for repatriation.**

12          Q.       Okay, and then there are two other  
13          repatriation pathways that are marked federal. You  
14          had northern triangle, which is Guatemala, Honduras  
15          and El Salvador.

16          **A.       That's correct.**

17          Q.       And Mexican repatriation, right?

18          **A.       That's correct.**

19          Q.       And then you had folks that you turned over  
20          to a port of entry that were not under the MPP  
21          program, so that would be OFO would be who they would  
22          have been turned over to, correct?

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1           **A.       Actually, I believe the non-MPP population**  
2       **would be Mexican nationals that were VR'd.**

3           **Q.       Okay, all right. And then VR means**  
4       **voluntary return --**

5           **A.       Voluntary return, yes, sir.**

6           **Q.       -- to Mexico. And then the next category,**  
7       **port of entry, MPP, that would be -- they would have**  
8       **been -- I believe you described them, immigration**  
9       **camp, Mexican immigration camp, or immigration camp**  
10       **located in Mexico, and they would go back to the port**  
11       **of entry for their asylum hearing?**

12               **MR. DARROW: Objection.**

13           **A.       So when the migrants are processed via the**  
14       **migrant protection protocols, they are returned to**  
15       **Mexico, and most of them remain in those border**  
16       **communities housed in not government-run facilities,**  
17       **but non-governmental organization-run facilities.**

18           **Q.       Okay.**

19           **A.       So they're called migrant camps.**

20           **Q.       All right, and there's a category for state**  
21       **and local law enforcement agencies, right?**

22           **A.       Those are folks that are turned over to our**

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1 state and local partners because they had warrants or  
2 some other prosecutorial charge.

3 Q. Okay. It's fair to say that looks back at  
4 the processing disposition, notice to appear, order  
5 of recognizance in FY 2020 ranged from a low of one  
6 to 91, right?

7 A. Yes.

8 Q. Okay. All less than a hundred.

9 A. That's correct.

10 Q. Okay. Turning over to Exhibit 22, look  
11 again at the -- well, I think now it starts on the  
12 third page and goes to the fourth page, you have the  
13 same two charts that we just looked at, right?

14 A. Yes.

15 Q. Okay. It looks like PACR, PARP and ACA  
16 have started up again at least at some point in time  
17 in 2021?

18 A. Yeah, it appears that in May, we had a  
19 couple that were processed under the PACR program.

20 Q. Okay. Do you know in 2022 whether that is  
21 continuing?

22 A. I believe we have a small number.

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1 Q. Okay, all right. If you look at notice to  
2 appear, order of recognizance, there's now a third  
3 category which says I-385 dash released. What is  
4 included within I-385 dash released?

5 A. That is the notice to report.

6 Q. And if you look at the last month, last  
7 full month of the Trump administration, December of  
8 2020, there were 17 aliens released on a notice to  
9 appear order of recognizance, right?

10 A. That's correct.

11 Q. All right, and by July of 2021, that  
12 number's over 60,000, correct?

13 MR. DARROW: Objection.

14 A. That's correct.

15 Q. If you look, in July 2021 at -- and compare  
16 the notice to appear order of recognizance I-385  
17 released with the warrant slash notice to appear dash  
18 detained, the number of aliens being detained under  
19 the Biden administration is half of that which is  
20 being released, right?

21 MR. DARROW: Objection.

22 A. Yeah, it appears that it would be less than





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1           **A.**     I wasn't at headquarters in December of  
2           2014. I was in the field, so typically we didn't  
3           create policy in the field, so --

4           **Q.**     But you would have implemented a policy if  
5           it had been created.

6           **A.**     **Yes.**

7           **Q.**     Okay, and you don't recall implementing  
8           this policy.

9           **A.**     **No.**

10          **Q.**     Okay. So looking at the -- kind of the  
11          last paragraph of this -- well, first, looking at --  
12          under the second paragraph, it says, "Effective  
13          immediately, any parole under a section 212(d)(5) of  
14          the Immigration and Nationality Act for nonimmigrant  
15          aliens, alien," parens, closed paren, "that meet the  
16          following criteria." Now, section 212(d)(5), that's  
17          the statute we looked at earlier, 8 USC 1182 to 85,  
18          correct?

19          **A.**     **Yes.**

20          **Q.**     And then looking down at the last paragraph  
21          of this one-page memo, it reads, "Lack of detention  
22          space, requests from other law enforcement agencies,"

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1 paren, "unless accompanied by a valid unexpired I-512  
2 issued by HSI," closed paren, "or other purposes not  
3 considered essential for law enforcement are not  
4 appropriate reasons to parole an inadmissible alien."  
5 Does it say that?

6 **A. Yes.**

7 Q. All right. So this policy has nothing to  
8 do with capacity, right?

9 MR. DARROW: Objection.

10 **A. This is pertaining to folks that are**  
11 **presenting themselves for admission at a port of**  
12 **entry.**

13 Q. Okay.

14 **A. And typically Office of Field Operations**  
15 **never encounter the numbers that the Border Patrol**  
16 **encounters.**

17 Q. Fair enough. I'm going to mark this as  
18 Exhibit 25.

19 **A. Twenty-four.**

20 Q. Twenty-four --

21 (Ortiz Exhibit No. 24  
22 was marked for

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1 identification.)

2 BY MR. GUARD:

3 Q. -- to your deposition.

4 MR. DARROW: Thank you.

5 BY MR. GUARD:

6 Q. Have you seen Exhibit 24 before?

7 **A. I don't believe so.**

8 Q. All right. Like the previous exhibit,  
9 Exhibit 23, this appears to be an Office of Field  
10 Operations policy?

11 **A. Yes.**

12 Q. All right. And again, it's another parole  
13 policy, right?

14 **A. That appears to be what it is, yes.**

15 Q. Okay, all right. You can put that aside.

16 (Ortiz Exhibit No. 25  
17 was marked for  
18 identification.)

19 MR. GUARD: Twenty-five.

20 MR. DARROW: Thank you.

21 BY MR. GUARD:

22 Q. Have you seen Exhibit 25 before?



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1 Q. Okay. If you'll flip to the page that's  
2 labeled AR -- AR 003 --

3 A. I don't have an -- oh, there it is, my  
4 signature.

5 Q. That was going to be the question, is that  
6 your signature?

7 A. Yes.

8 Q. All right, and did you sign this document  
9 under penalties of perjury? Look back to the next  
10 page.

11 A. Yes.

12 Q. Okay. That was not a trick question. I  
13 was not trying to trick you. All right, I know it's  
14 been a long day. All right, since you signed this  
15 document on April 19th, 2022, has any additional  
16 information or documents that are nonprivileged come  
17 to your attention that should be part of the  
18 administrative record?

19 MR. DARROW: Objection.

20 A. Yes.

21 Q. What additional documents should be added  
22 to the administrative record?

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1           **A.       The commissioner's memo on parole plus --**  
2           **ATD plus.**

3           Q.       So are you talking about the July -- I  
4           think it's July 18th?

5           **A.       18th memo, and then my July 20th memo, yes.**

6           Q.       So you issued a July 20th memo?

7           **A.       Yes.**

8           Q.       Counsel, I don't think we've ever seen the  
9           July 20th memo, but we can take that up later, but  
10          just raising that to your attention. All right, you  
11          understand that the memo, which is at AR 004, the  
12          next page, has now been rescinded, right?

13          **A.       Yes.**

14          Q.       Okay, and in its place, there's a new memo,  
15          right?

16          **A.       That's correct.**

17          Q.       Okay. We're going to get to the new memo.  
18          That's -- that's the next -- that's the next exhibit  
19          and the last exhibit of this deposition, so -- and  
20          that's a promise, of this deposition. There --  
21          corporate representative, there may be one exhibit.  
22          All right, so but other than those two documents,

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1 you're aware of no other documents that should be in  
2 the administrative record that are nonprivileged,  
3 correct?

4 **A. That's correct.**

5 Q. Okay, all right. Now, looking at AR 4  
6 through AR 6, this is a memo which you sent out,  
7 correct?

8 **A. That's correct.**

9 Q. All right. And you sent it out to chief  
10 parole agents and deputy chief parole agents, right?

11 **A. That's correct.**

12 Q. And that's the agents that are in charge of  
13 the sectors of Border Patrol, right?

14 **A. That's correct.**

15 Q. Okay. Looking at this memo, it indicates  
16 that it is superseding a previous guidance, correct?

17 **A. That's correct.**

18 Q. And the previous guidance that it was  
19 superseding was your predecessor's notice to report,  
20 right?

21 **A. That's correct.**

22 Q. Now, the memo indicates that that -- and I

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1 think we weren't able to come to a date earlier that  
2 notice to report was promulgated. It indicates that  
3 that policy was promulgated in March of 2021, right?

4 **A. That's correct.**

5 Q. Okay. I don't think I asked you this  
6 before, and if I did, I apologize. How was the NTR  
7 guidance sent out to the field in March of 2021?

8 MR. DARROW: Objection.

9 **A. It was sent out and distributed through**  
10 **multiple platforms. Initially we had a telephonic**  
11 **call with all the associate chiefs. We also asked**  
12 **that the operations directorate send out a e-mail to**  
13 **the sector points of contact, which would have been**  
14 **an assistant chief at those sectors, to include the**  
15 **sector chiefs, and to my recollection, I believe**  
16 **Chief Scott also issued a memoranda.**

17 Q. Okay. Well, I haven't seen that  
18 memorandum, so if it exists, obviously we'll take  
19 that up with your counsel.

20 **A. I couldn't find it either.**

21 Q. Okay, all right. Well, I deal with public  
22 records too. I know sometimes how things don't get



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1 filed how they should get filed, so we'll work with  
2 that through your counsel. And so he would have  
3 signed a similar memorandum to this, to your  
4 recollection?

5 A. Typically that's how information would be  
6 distributed to the field, which is why I thought  
7 there was a notice to report memoranda, but when I  
8 looked through my files, I could not find one either.

9 Q. Okay. And the justification for this  
10 policy is the health of aliens, correct?

11 MR. DARROW: Objection.

12 A. Yes.

13 Q. And the health of Border Patrol employees,  
14 right?

15 MR. DARROW: Objection.

16 A. Well, it's not just that. I mean, it's the  
17 health of the communities. At the time, almost every  
18 single one of the border communities that we have a  
19 sector or experiencing significant increases in COVID  
20 exposures, to include COVID deaths, we had a  
21 significant spike across the entire southwest border  
22 and COVID exposures, and even to this day, this

1 morning I think I had 388 agents still in quarantine  
2 status. We've had 11,692 agents I believe that  
3 tested positive for COVID out of 19,355. We had 19  
4 agents die due to COVID, to include two contractors  
5 that I attended probably 75 percent of their  
6 funerals.

7 Our communities, the health officials, our  
8 law enforcement partners were also under the same  
9 issues and faced with some of the same concerns that  
10 we had as a law enforcement organization. Typically  
11 we use local county detention facilities to house  
12 some of our prosecutions, and they were experiencing  
13 complete shut-downs of their facilities because of  
14 COVID exposures. So it wasn't just the migrants, it  
15 wasn't just our agents, but it was our families, the  
16 communities, and all of this was placing a  
17 significant strain on the entire border environment.

18 Q. And I agree and appreciate that, but in the  
19 first sentence of the second paragraph, would you  
20 agree with me that it only mentions the health and  
21 safety of migrants and the health of the work force?

22 MR. DARROW: Objection.

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1 BY MR. GUARD:

2 Q. First sentence of the second paragraph.

3 A. That first sentence, that's exactly what  
4 that says, yes.

5 Q. Okay, and at least -- and I'm not  
6 minimizing this, because I agree with you, and I've  
7 attended too many law enforcement funerals in the  
8 last year as well, so I'm not minimizing that at all,  
9 but at least I hadn't seen mention of, at least in  
10 this document, of the community as a reason for the  
11 policy.

12 MR. DARROW: Objection.

13 A. Well, I can tell you as the person who  
14 signed this document, that the communities certainly  
15 were a factor in my decision-making process.

16 Q. Okay, all right.

17 A. My mother lives in a border community in  
18 Del Rio. She's 85 years old, very vulnerable and  
19 certainly susceptible to COVID, and so I can  
20 guarantee you I factored her health into the issuance  
21 of this memoranda.

22 Q. Again, I'm not quibbling with that at all.

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1           **A.       I get it.**

2           Q.       I just -- it wasn't mentioned, and that was  
3 going to be one of my questions, is why was that not  
4 factored, and you're telling me that it was. Other  
5 than the health and safety of communities, were there  
6 any other reasons that are not disclosed in this  
7 e-mail that form the basis of you issuing this memo?

8           MR. DARROW: Objection.

9           **A.       Yes.**

10          Q.       Okay. Where are they?

11          **A.       Overcrowded conditions in these facilities.**

12          Q.       That actually is mentioned.

13          **A.       To include ensuring that we are compliant**  
14 **with the Jane Doe litigation in Arizona, and also**  
15 **ensuring that we had significant wrap-around services**  
16 **to support the different demographics that we were**  
17 **responsible for.**

18          Q.       Okay.

19          **A.       At the time, we were expanding our**  
20 **detention facilities, and I can tell you that**  
21 **typically during this time is at the beginning of the**  
22 **budget year, and this is -- this year was no**

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1 different. We were under a continuing resolution, so  
2 we're operating at 75 percent of our budget, and so  
3 ensuring that we had the requisite supplies and  
4 equipment to support everything that comes with  
5 having 15,000 people in custody was part of the  
6 decision-making process.

7 Q. Okay. I think part of that is actually  
8 reflected in this memo. Again, I'm not --

9 A. Yeah, got you.

10 Q. Not trying to play a got you game or  
11 anything like that. If you look at -- I think it's  
12 the -- it's the fourth sentence, excuse me, starting  
13 with the use of this processing pathway --

14 A. Uh-huh.

15 Q. -- enabled -- well, it's talking  
16 technically about NTRs, but this is replacing NTRs,  
17 right?

18 MR. DARROW: Objection.

19 BY MR. GUARD:

20 Q. You may answer.

21 A. Yes.

22 Q. Okay. To relieve overcrowding in

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1      congregate settings.

2           **A.      That's correct.**

3           Q.      Okay, thus better protecting both the work  
4      force and non-citizens in our custody.

5           **A.      That's correct.**

6           Q.      Okay. So looking at the second paragraph,  
7      it talks about the process for -- of issuing notices  
8      to appear, the last -- I think it's the last two  
9      sentences. See that?

10          **A.      Yes.**

11          Q.      All right. Notices to appear are  
12      time-consuming.

13          **A.      That's correct.**

14                   MR. DARROW: Objection.

15                   BY MR. GUARD:

16          Q.      Were -- under either NTR or parole plus  
17      ATD, are Border Patrol agents establishing A files,  
18      apple files?

19          **A.      Yes.**

20          Q.      Okay. Were they establishing A files under  
21      NTR?

22          **A.      No.   Actually, they were for head of**

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1     **household.**

2           Q.     Okay.

3           **A.     But they weren't for the remaining family**  
4     **unit members.**

5           Q.     Okay. For parole plus ATD, are they only  
6     doing A files for the head of household or are they  
7     doing A files for all the members of the family?

8           **A.     I believe they are issuing A files for all**  
9     **the members within the family unit.**

10          Q.     Okay. Now, just -- I want to talk about  
11     parole plus ATD. I'm sorry, for the first time ever  
12     in my life I went quiet and maybe mumbled a little  
13     bit because I was looking down. Parole plus ATD, are  
14     Border Patrol agents completing the asylum interview  
15     process?

16          **A.     No.**

17          Q.     Where does the asylum review -- asylum  
18     interview process occur?

19          **A.     Usually that occurs with an asylum officer**  
20     **within CIS.**

21          Q.     Okay.

22          **A.     Citizen and immigration services.**

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1 Q. Okay, and that's after the person has been  
2 released on parole plus ATD?

3 A. Yes.

4 MR. DARROW: Objection.

5 A. Unless they are held in a detention  
6 facility.

7 Q. And at least initially in this memo, parole  
8 plus ATD was being limited to family units, right?

9 MR. DARROW: Objection.

10 A. Yes.

11 Q. The last sentence on the first page, AR 004  
12 reads, "Parole plus ATD is a rigorous enforcement  
13 process that is effective and includes accountability  
14 measures to require non-citizens to report to ICE for  
15 issuance of an NTA and continue through the formal  
16 immigration process." Did I read that sentence  
17 correctly?

18 A. Yes.

19 Q. Okay. What did you mean by rigorous?

20 MR. DARROW: Objection.

21 A. Rigorous requires more information than we  
22 were issuing with the notice to report, to include



1 next of kin, final destination. When you process  
2 somebody for -- under the normal Title 8 process, you  
3 obtain more biographical information, to include  
4 where they're coming from, where they're going to,  
5 their mode of travel. There's a slew of biographical  
6 information that you obtain under this process that  
7 normally would not be gathered during the NTR  
8 process.

9 Q. Okay. So under the NTR process, which  
10 lasted roughly from March 2021 through November of  
11 2021, that roughly eight months, Border Patrol was  
12 not gathering destination of where aliens were going?

13 MR. DARROW: Objection.

14 A. We would put that on the I-385, but in a  
15 normal I-213, which is the initial biographical --

16 Q. Uh-huh.

17 A. -- document that we process migrants or  
18 aliens under, we actually detail very specifically  
19 their route of travel from their home to their final  
20 destination, to include any stops and their method of  
21 travel, whether they made any smuggling arrangements,  
22 whether they paid any smuggling fees. Under the NTR

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1 process, you may not have gathered all that  
2 information just depending on how many people you had  
3 in custody, what your time in custody times were, and  
4 the manpower constraints that you were under.

5 Q. Sure, and different Border Patrol agents  
6 may -- some are more thorough than others. Is that  
7 fair?

8 A. Most definitely.

9 Q. Okay, all right. You wrote here that  
10 enforcement process that is effective. What did you  
11 mean by effective?

12 MR. DARROW: Objection.

13 A. I meant that it is a method that allows us  
14 to monitor the migrant population from when we  
15 process them and turn them over to ICE/ERO.

16 Q. Okay, so whether -- whether this program's  
17 effective or not is going to depend on ICE and ERO,  
18 right?

19 A. Yes.

20 Q. Okay. And you would have only known  
21 whatever ICE had shared with you, correct?

22 A. That's correct.

1 MR. DARROW: Objection.

2 BY MR. GUARD:

3 Q. Okay. And I'm not asking him what they  
4 shared. I'm just asking that would be the limited  
5 extent of his knowledge. The next phrase says  
6 includes accountability measures. What did you mean  
7 by that?

8 MR. DARROW: Objection.

9 A. That means the technical and the ankle  
10 bracelets, the electronic monitoring devices or  
11 measures that allowed ICE to track and monitor and  
12 account for the folks that we transferred to their  
13 custody.

14 Q. Okay. And then again, that would have been  
15 information that you would have gathered or gleaned  
16 from ICE, right?

17 MR. DARROW: Objection.

18 A. Yes.

19 Q. Okay. So whether or not the program's  
20 effective and accountable is again going to depend on  
21 ICE and how they implement it, right?

22 MR. DARROW: Objection.

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1           **A.       Yes.**

2           Q.       Okay. If they do a good job, then it will  
3 be effective and accountable. If they do a bad job,  
4 it won't, right?

5                   MR. DARROW: Objection.

6           **A.       Well, I would imagine it's dependent on**  
7 **their capacity also, whether they have enough**  
8 **monitoring devices or cell phones, mobile devices.**

9           Q.       Okay. So there could be budgetary  
10 constraints, right?

11          **A.       Yes.**

12          Q.       Did you have to -- before you enrolled  
13 someone in -- to parole ATD, at least at the time of  
14 -- because I know -- frankly, I think it changes now,  
15 but at the time of November 2nd, 2021, did you have  
16 to check with ICE before you processed someone  
17 through that pathway?

18                  MR. DARROW: Objection.

19          **A.       Yes.**

20          Q.       Okay, all right. Would that have been  
21 communicated to the sector chiefs and the deputy  
22 chiefs in a separate communication, that they needed

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1 to talk with ICE before they used this pathway?

2 MR. DARROW: Objection.

3 A. Most of the sectors at this time were  
4 already starting to have ICE/ERO personnel assigned  
5 to their processing centers. I know in Rio Grande  
6 Valley, at one point we probably had 60 or 70 ICE/ERO  
7 personnel working almost 24/7 side by side with our  
8 Border Patrol agents.

9 Q. Okay.

10 A. So they were involved with the process at  
11 the very beginning.

12 Q. Okay, and that was part of the -- there was  
13 a surge of -- of other personnel from DHS to respond  
14 to the increase in -- in encounters, correct?

15 MR. DARROW: Objection.

16 A. There was a surge of DOD resources, DHS  
17 resources. We increased state and local funding for  
18 Operation Stone Garden, and there was a whole  
19 government approach.

20 Q. Okay, all right. Looking at -- now, this  
21 memo, if certain averages and thresholds were met,  
22 was going to be triggered as to all family units,

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1 right?

2 MR. DARROW: Objection.

3 A. Yes.

4 Q. Okay. So if the Rio Grande Valley or Del  
5 Rio hit the thresholds that are laid out in the  
6 second page of this document on AR 5, all family  
7 units would be paroled plus ATD, correct?

8 MR. DARROW: Objection.

9 A. All family units minus Central Americans  
10 and Mexican family units.

11 Q. Okay. So there are -- for those, there  
12 were -- was at the time an alternative pathway that  
13 expelled, correct?

14 A. That's correct.

15 Q. All right, all right. Looking down at the  
16 third paragraph, there's a reference to the 2019 May  
17 daily average. Why was the 2019 May daily average  
18 utilized for those two statistics?

19 MR. DARROW: Objection.

20 A. Because those two -- that month saw the two  
21 highest encounter apprehension numbers for 2019.

22 Q. So 2019 was a surge year, right?

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1           **A.     Yes.**

2           Q.     Okay, and so you -- you -- that was the  
3     highest month in that surge year; is that correct?

4           **A.     That's correct.**

5           Q.     All right, and so you're using now 2021 and  
6     2022, as we talked about doubled that, right?

7           **A.     That's correct.**

8                     MR. DARROW:  Objection.

9                     BY MR. GUARD:

10          Q.     All right, but you were utilizing the  
11     previous high as -- as kind of the point where this  
12     was going to be triggered.  Is that fair?

13                     MR. DARROW:  Objection.

14          **A.     Yes.**

15          Q.     Okay, all right.  And then outside those  
16     two sectors, either Commissioner Magnus or you were  
17     going to have to say yes, you can use this policy,  
18     correct?

19                     MR. DARROW:  Objection.

20          **A.     That's correct.**

21          Q.     All right.  And I think you've indicated  
22     that this policy was utilized in a couple other

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1 sectors on the southwest border, right?

2 A. That's correct.

3 Q. Yuma I think you mentioned, and what were  
4 the -- and I apologize.

5 A. I believe it was Yuma and El Paso, and it  
6 would have been Acting Commissioner Troy Miller at  
7 the time, not -- Commissioner Magnus didn't take over  
8 till January of this year.

9 Q. Okay. Now, the second to last paragraph  
10 talks about the fluidity of the COVID-19 pandemic.  
11 Do you see that?

12 A. Yes.

13 Q. All right. So this policy was only  
14 intended to be temporary?

15 MR. DARROW: Objection.

16 A. Yes.

17 Q. All right. Looking at -- there are a  
18 series of e-mails in the administrative record that  
19 follow. It looks like data was being sent to I  
20 assume you, even though the -- you know, the from and  
21 tos are blacked out on every one of them, there's  
22 looks like reports of the situation at different



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1 border crossings, or border sectors? Excuse me,  
2 correct?

3 MR. DARROW: Objection.

4 **A. Yes.**

5 Q. All right. And it looks like there's  
6 several different days that are reported. Looks like  
7 you got October 20th, 2021, September 22nd, 2021,  
8 August 12th, 2021, August 11th of 2021, August 2nd of  
9 2021, and then the last one is actually e-mail  
10 guidance. Why were those specific dates versus other  
11 dates chosen or utilized by you?

12 MR. DARROW: Objection.

13 BY MR. GUARD:

14 Q. I mean, I would assume you get a cit rep  
15 every day? Is that fair?

16 MR. DARROW: Objection.

17 **A. Now I have a dashboard.**

18 Q. Okay.

19 **A. So --**

20 Q. I could pull out -- I got printouts of your  
21 -- I probably have your dashboard.

22 **A. Yeah.**

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1 Q. But at the time, I assume you were getting  
2 e-mails like this almost practically every day?

3 MR. DARROW: Objection.

4 A. Yes.

5 Q. Were these dates dates that were  
6 particularly heavy or, you know, why -- why include  
7 these and not others into the -- to what you  
8 considered?

9 MR. DARROW: Objection.

10 A. I'm going to have to assume because these  
11 were probably dates where we experienced higher  
12 levels of encounters than we had on previous  
13 occasions. When you look at Del Rio, 3,600  
14 encounters in three days, that's an average of 1,200  
15 a day, that's significant.

16 Q. Okay. If you look down at Rio Grande on  
17 that same -- you're looking at the e-mail from  
18 October 20th, 2021?

19 A. That's correct.

20 Q. Okay. And you look down at Rio Grande and  
21 you have on, again, over three days, I think it's  
22 4,489 encounters, but you don't recall specifically

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1     why you considered this e-mail. You just looking at  
2     it now, that seems to be -- makes sense to you,  
3     correct?

4           **A.     Yes.**

5           MR. DARROW: Objection.

6           BY MR. GUARD:

7           Q.     Okay. And if you look at the September  
8     22nd of 2021 e-mail, if you look at the second page,  
9     Del Rio, it says on pace for 15,052 this week?

10          **A.     Yes.**

11          Q.     Okay. But you don't know why you included  
12     this dashboard versus any other dashboard that -- or  
13     not dashboard. Any other stats you report in the  
14     administrative record.

15          MR. DARROW: Objection.

16          **A.     This one would have been right after the**  
17     **event in Del Rio where the Haitian migration flow**  
18     **staged underneath the port of entry.**

19          Q.     Okay, all right. Looking back at AR 0012,  
20     the e-mail from September 22nd, 2021, under the Rio  
21     Grande Valley component, there's 475 paroles, paren,  
22     475 FMUA, closed paren. Would those have been

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1       paroles under NTR?

2                   MR. DARROW:   Objection.

3           **A.       Probably so.**

4           Q.       Okay, all right.   All right, we can turn to  
5   AR 0016.   This looks like it's some kind of a  
6   roll-out of e-mail of some kind.   Is that fair?

7           **A.       Yes.**

8           Q.       All right, and it's providing guidance on  
9   how to stamp the I-385, among other things?

10                  MR. DARROW:   Objection.

11           **A.       Yes.**

12           Q.       And it's limit -- it says until 15 days  
13   from entry, right?

14           **A.       That's correct.**

15           Q.       All right.   And then if you look at AR 18,  
16   this is -- there's another e-mail from August 5th of  
17   2021, but there's a -- you know, this is the e-mail  
18   that was probably provided to either the assistant  
19   chiefs or the chiefs of the sectors that are  
20   affected, right?

21                  MR. DARROW:   Objection.

22           **A.       Looks like this one just went to Del Rio.**

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1 Q. Okay, and it says, "Sir," comma, and then  
2 there's a lengthy thing. All right, and you know,  
3 the -- what does B-L-U-F or BLUF stand for?

4 A. Bottom line up front.

5 Q. Okay, so executive summary kind of thing?

6 A. Exactly.

7 Q. Okay, here's the take-away you need to take  
8 from this, and it indicates this is just for family  
9 units, right, as of that time.

10 A. Yes.

11 Q. Okay. Looking down at the list of bullet  
12 points, it has as one of the factors to be considered  
13 whether ICE slash ERO will accept custody of the  
14 non-citizens, right? So we're on AR 3018.

15 A. Uh-huh.

16 Q. Almost three quarters of the way down,  
17 bullet points. You with me?

18 A. Yeah.

19 Q. All right. It says whether ICE slash ERO  
20 will accept custody of non-citizens. You see that?

21 A. Yes.

22 Q. At that point in time, ICE/ERO wasn't

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1 accepting custody of any citizens, was it?

2 MR. DARROW: Objection.

3 A. I don't believe so.

4 Q. Okay. So that was always going to be a no.

5 I mean, you were always going to read that bullet  
6 point, right?

7 MR. DARROW: Objection.

8 A. Yeah, I think there were maybe some  
9 conditions where there was a mandatory hold on  
10 certain populations if they were bag and baggage,  
11 flight risk. So there were some exceptions.

12 Q. Okay.

13 A. Well, it says it in the next bullet.

14 Q. Okay. Well, in the next bullet is -- it  
15 makes it -- whether the non-citizen poses a threat to  
16 national security, border security or a heightened  
17 public safety risk. Now, this e-mail for whatever  
18 reason doesn't -- the previous one has citizens with  
19 a paren S closed paren. This one doesn't. Is this  
20 e-mail saying that you could actually split apart a  
21 family unit and peel off a criminal or if someone  
22 was, you know, the son of a terrorist, you know, you

1 would have the mother and son could go through and  
2 the father who's a terrorist would be split off? Is  
3 that what it's kind of suggesting?

4 MR. DARROW: Objection.

5 A. We have had situations in encounters of  
6 family units where it could be potentially a mother  
7 and a father, and the father would have a criminal  
8 record and would be a mandatory detention, and so in  
9 that case you're not separating the child from the  
10 father, but you are taking one of the adults into  
11 custody.

12 Q. Okay, all right. That makes sense. All  
13 right. And then the rest of the guidance on AR 0019  
14 is just you have the documentation --

15 A. The process, yes.

16 Q. All right, and if you look at AR 21, it is  
17 slightly different. This is on August 11th, so the  
18 process I guess has changed in some way, and what I'm  
19 referring to specifically on the previous one, it  
20 said until the date, and it had 15 days from entry,  
21 and this one is says 60 days from entry, right?

22 A. That's correct.

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1 MR. DARROW: Objection.

2 BY MR. GUARD:

3 Q. Okay. And this one actually has a copy of  
4 the stamp and telling them like explicitly how to  
5 fill it out so they don't mess it up, correct?

6 A. That's correct, I had a conversation with  
7 the A chief and ask that they specifically annotate  
8 exactly what needed to be done.

9 Q. Fair enough. All right, and then I think  
10 the e-mail on AR 22 is the same as the e-mail that  
11 was on AR 17, so this is just a -- they took an old  
12 e-mail and stuck the first -- the top e-mail on it;  
13 is that correct?

14 A. It appears to be similar, yes.

15 Q. They're both from August 5th at 1:48 p.m.,  
16 and it looks the same. All right, looking at AR 25  
17 and 26, these again are just -- this is August 2nd of  
18 2021, and again, it's just encounter data, right?

19 A. That's correct.

20 Q. All right.

21 A. Detention and encounter data.

22 Q. And you don't recall why this specific



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1 e-mail was chosen versus the other ones you get every  
2 day.

3 MR. DARROW: Objection.

4 A. No.

5 Q. Okay, all right. Now you're to the next  
6 page, which is AR 28, and this is from July 31st,  
7 right?

8 A. Yes.

9 Q. And again, this is an e-mail to Rio Grande  
10 Valley?

11 A. That's correct.

12 Q. All right. And so this is -- so the  
13 previous e-mail that we looked at was an August 5th  
14 e-mail of 2021. This is -- this is, you know, five  
15 days earlier, right, and this e-mail that went to --  
16 I don't know again who it went to, but it looks like  
17 it is going to Rio Grande just based on the content  
18 on the first line of AR 28, this e-mail says family  
19 units or single adults in the one -- well, it's the  
20 paragraph that begins with, "Agents may consider,"  
21 right?

22 A. That's correct.

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1 Q. All right, so did -- between July 31st and  
2 August 5th, was there a revision of the policy  
3 between whether -- whether single adults are included  
4 or not?

5 MR. DARROW: Objection. That would be  
6 deliberative process.

7 BY MR. GUARD:

8 Q. Okay. So we have the memo, which says  
9 family units only, right?

10 A. Yes.

11 Q. Okay, and then we have, in a series of  
12 time, we have an e-mail from August 5th that says  
13 family units, right?

14 A. Yes.

15 Q. And then we have an e-mail from July 31st  
16 that says family units and single adults, correct?

17 A. That's correct.

18 Q. Okay. So when you issued the policy, it  
19 was only family units, right?

20 MR. DARROW: Objection.

21 A. Yes.

22 Q. Okay. And if after the policy was issued,

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1 at some point in time you added single adults, right?

2 MR. DARROW: Objection.

3 A. Yes.

4 Q. Okay. And most likely that would have been  
5 communicated in an e-mail that would be similar to  
6 this one, right?

7 MR. DARROW: Objection.

8 A. Yes.

9 Q. Would it necessarily require a new memo?

10 MR. DARROW: Objection.

11 A. Not necessarily.

12 Q. Okay, all right. You can put that aside.  
13 What number are we on now?

14 MR. DARROW: Twenty-seven I believe.

15 MR. GUARD: Twenty-seven.

16 (Ortiz Exhibit No. 27  
17 was marked for  
18 identification.)

19 BY MR. GUARD:

20 Q. I'm going to mark this exhibit as Exhibit  
21 27 to your deposition.

22 MR. DARROW: Thank you.

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1 BY MR. GUARD:

2 Q. Have you seen Exhibit 27 before?

3 A. No.

4 Q. Okay, all right. It is a document that is  
5 I believe signed by Mr. Barker, or excuse me, I  
6 should call him Chief Barker. I need to call him the  
7 right title, but Chief Barker?

8 A. He likes to be called Dr. Barker, but  
9 that's okay.

10 Q. I'll be glad to call him Dr. Barker.  
11 Correct?

12 A. Yes.

13 Q. Okay, so on page 2 of the exhibit, it has  
14 -- are you familiar with Mr. Barker's signature?

15 A. I am.

16 Q. Okay, and is that his signature on page 2?

17 MR. DARROW: Objection.

18 A. It appears to be.

19 Q. Okay, all right. If you look at the --  
20 this one's not stamped with those nice numbers, but  
21 if you look at the fourth page of the document,  
22 there's a memo, correct?

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1           **A.       Yes.**

2           Q.       And that is the -- I believe you earlier in  
3       the deposition talked about the July 18th, 2022 memo,  
4       correct?

5           **A.       That's correct.**

6           Q.       All right. Can you flip through this  
7       document and see if your July 20th memo is anywhere  
8       in here?

9           **A.       I do not see it.**

10          Q.       Okay, all right. And that -- your July  
11       20th memo implements this memo?

12          **A.       Typically when I receive a memo from the**  
13       **secretary or the commissioner, I place a cover memo**  
14       **and distribute it to the field for implementation.**  
15       **So my July 20th memo would have been similar to this**  
16       **memo without all of the additional information that I**  
17       **don't -- I felt like, you know, the field didn't need**  
18       **to have visibility on as far as, you know, some of**  
19       **the policy issues.**

20          Q.       Okay, all right. So it would have been a  
21       -- kind of your summary of this memo with the points  
22       that you believe to be relevant for Border Patrol.

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1 MR. DARROW: Objection.

2 A. For implementation by the sector chiefs,  
3 yes.

4 Q. Okay, all right. All right. And this memo  
5 rescinds your previous memo, right?

6 A. That's correct.

7 Q. Okay. And like your memo, this memo's  
8 premised on capacity and detention space, right?

9 MR. DARROW: Objection.

10 A. That's correct.

11 Q. And like your memo, your previous memo in  
12 2021, this parole plus ATD memo is based on the  
13 public benefit of disease mitigation, right?

14 MR. DARROW: Objection.

15 A. Yeah, it's based upon the health and  
16 welfare of the migrant population, Border Patrol  
17 personnel --

18 Q. Okay.

19 A. -- and overcrowded conditions within the  
20 facilities.

21 Q. And like with your memo -- well, this  
22 memo's not -- on its face not limited to just family

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1 units, right?

2 **A. That's correct.**

3 Q. It applies to both family units and single  
4 adults, correct?

5 **A. That's correct.**

6 Q. Okay. And so if the triggers in this memo,  
7 which are slightly different than your triggers, are  
8 met, then both single adults and family units would  
9 be released, right?

10 MR. DARROW: Objection.

11 **A. Could be released, yes.**

12 Q. Okay. Would they only be released if they  
13 didn't meet some other pathway, like bag and baggage  
14 or -- or something like that?

15 MR. DARROW: Objection.

16 **A. There would be a few issues that would be**  
17 **factored into the utilization of ATDP. Whether we**  
18 **had an opportunity to decompress the population into**  
19 **other facilities along the southwest border. We on**  
20 **occasion will place some facilities or find a**  
21 **solution to incur greater capacity numbers if we have**  
22 **a repatriation flight scheduled in a certain**

1 location, and then if we know that ICE is going to be  
2 able to receive certain populations, we will work  
3 with them to try and transfer those individuals as  
4 quickly as we possibly can.

5 Q. Okay, but barring those things, single  
6 adults and family units, when the triggers are met,  
7 will be released.

8 MR. DARROW: Objection.

9 A. Can be released.

10 Q. Okay. And they're going to be released  
11 kind of as a class or a group, right?

12 MR. DARROW: Objection.

13 A. Well, it's supposed to be considered on a  
14 case-by-case basis, and then a lot of it will depend  
15 on our capacity to process the migrant population.  
16 So I have folks assigned from -- or agents assigned  
17 from all over the country supporting these processing  
18 efforts, to include the northern -- northern border.

19 So if -- we use Yuma as an example. If we  
20 start to see a spike in Yuma, we will empty out  
21 facilities near southern Arizona to try and  
22 accommodate those populations. And so if a sector



1 hits a trigger point, it doesn't automatically go  
2 straight to ATD parole as a processing pathway. We  
3 look at whether there are any other options available  
4 to us before we leverage the ATD parole pathway.

5 Q. Okay. When those options max out, then  
6 everyone after that certain point is going to be  
7 going to parole ATD point unless there is a criminal  
8 threat, you know, national security threat or some  
9 other kind of threat to the United States, right?

10 MR. DARROW: Objection.

11 A. Yeah, if they're public safety, flight  
12 risk, and then if -- that will happen until we can  
13 get those facilities under what we would consider,  
14 you know, acceptable detention conditions.

15 Q. Okay. Now, you mentioned decompression.

16 A. Yes.

17 Q. Now, earlier on, I showed you some budget  
18 documents where ICE had gotten rid of, you know,  
19 thousands of beds, detention beds, right?

20 A. Yes.

21 Q. If they had not gotten rid of those  
22 thousands of beds, there would have been another

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1 place where you could have transferred aliens to,  
2 right?

3 MR. DARROW: Objection.

4 A. Yeah, potentially there would have been an  
5 opportunity to transfer more of the non-citizens or  
6 migrants to ICE/ERO, but their capacity was -- even  
7 at 50,000 weren't going to be enough to support the  
8 amount of encounters we were experiencing.

9 Q. Okay. And I appreciate that, but at  
10 50,000, that's possibly another, you know, average  
11 daily population of 20,000 additional migrants or  
12 25,000 additional migrants being detained, right?

13 MR. DARROW: Objection.

14 A. Yes.

15 Q. And that would have taken the pressure off  
16 of Border Patrol and its detention facilities,  
17 correct?

18 MR. DARROW: Objection.

19 A. For a short period of time, it would have.

20 Q. Okay.

21 A. But when you're apprehending 65, 70  
22 thousand migrants in a 24-hour period, you can do the

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1     **math. It's not going to take long for them -- for us**  
2     **to exceed their capacity also.**

3           Q.     Okay. And if the -- and that was a  
4     decision by the Biden administration to not go  
5     forward and to limit the capacity of ICE, right?

6           MR. DARROW: Objection. That calls for  
7     deliberative process information.

8           BY MR. GUARD:

9           Q.     I'm just asking what administration made  
10    that decision. The decision's made in public.

11          **A.     It would have been under this**  
12    **administration, yes.**

13          Q.     Okay. And the Biden administration decided  
14    to narrow other pathways too, correct?

15          MR. DARROW: Objection.

16          **A.     There were other pathways that were**  
17    **eliminated, yes.**

18          Q.     Okay. And each one of those decisions in  
19    the midst of a historic flood of aliens to the  
20    southern border increased the pressure on Border  
21    Patrol and its limited capacity, right?

22          MR. DARROW: Objection.

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1           **A.       Yes.**

2           Q.       And as that pressure build, there's no  
3       other choice other than to release, right?

4                   MR. DARROW:   Objection.

5           **A.       That's correct.**

6           Q.       If you'll look at -- again, there's not  
7       numbers on the bottom, but it's an e-mail -- there's  
8       an e-mail from July 22nd, 2022.   Do you see that?

9           **A.       I do.**

10          Q.       All right.   Now, the policy's dated July  
11       18th, 2022, right?

12          **A.       That's correct.**

13          Q.       So this e-mail couldn't possibly have been  
14       considered by Commissioner Magnus and Mr. Johnson in  
15       forming the policy, right, because it postdates the  
16       policy.

17                   MR. DARROW:   Objection.

18          **A.       That's correct.**

19          Q.       And is this an e-mail that you received?

20                   MR. DARROW:   Objection.   That information  
21       is blacked out for privilege reasons.

22                   MR. GUARD:   What is your assertion of

1 privilege?

2 MR. DARROW: Same -- same assertion as  
3 before, PII based on law enforcement.

4 BY MR. GUARD:

5 Q. Well, you're going to enjoy defending them  
6 in front of the judge, but we'll deal with that  
7 later. Now, if you'll look behind that, are these  
8 your -- your dashboards that you were talking about?

9 A. They are similar to the dashboards.

10 Q. Okay.

11 A. These are actually dashboards that the  
12 operations directorate uses. The dashboard I use is  
13 a little bit different, but I think it contains some  
14 of the same information.

15 Q. Okay. Is -- and you can flip --  
16 unfortunately, again, there's not numbers on the  
17 bottom of this. There's another kind of different  
18 dashboard. I was just curious what you're actually  
19 looking at. This one has more than just "Border  
20 Patrol" on it. It says "Daily Snapshot" on the top  
21 of it, and I'm trying to show it to you to make it  
22 easier to find. You got it right there. You got it

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1 right there. Does that look like your -- your -- no,  
2 all right.

3 A. I'm going to tell you, I don't look at this  
4 dashboard. It's too busy for me, and it -- I've  
5 asked the team to get rid of it actually several  
6 times.

7 Q. Okay.

8 A. They like it, so --

9 Q. All right.

10 A. As long as they use it for whatever  
11 purposes they use it for, it's fine.

12 Q. Okay, and then if you'll flip forward,  
13 there's a third kind of dashboard in here. It looks  
14 like -- it's called SWB daily snapshot.

15 MR. DARROW: Is this the one we're up to,  
16 SAR 32? Sorry, it's kind of small at the bottom.

17 MR. GUARD: Forty-six --

18 MR. DARROW: Oh, 46?

19 BY MR. GUARD:

20 Q. -- is the one I got --

21 A. Got it.

22 Q. Okay. Does that look like -- more like the

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1 dashboard you use, or still not.

2 **A. I don't like any of these, no.**

3 Q. Okay, all right.

4 **A. Sorry.**

5 Q. That's fine. I was just curious. All  
6 right, and then if you look at -- actually, I now see  
7 the SAR numbers. I apologize for that. If you look  
8 at SAR 85 --

9 **A. Okay.**

10 Q. And there's temporary injunction entered  
11 prohibiting the repeal of Title 42?

12 **A. Yeah.**

13 Q. Okay, all right. You can put that aside.  
14 I'm trying to speed this up. The next I think 40  
15 pages are what we previously looked at for your --  
16 that were in your administrative record before, and  
17 then at SAR122, it's something from the CDC?

18 **A. Yeah.**

19 Q. Okay. And this is about the repeal of the  
20 Title 42 order?

21 **A. That's correct.**

22 Q. All right, and then moving to SAR 152, this

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1 -- is this the order that you were referring to  
2 before about Yuma, or Tucson, the injunction?

3 A. I believe it's the -- it pertains to the  
4 Doe litigation, yes.

5 Q. Okay, all right. All right, you can put  
6 that aside. If I can have -- if we can take a break  
7 for about ten minutes, I can just go through my  
8 questions to see if I've got that down. We may come  
9 back and rest and then I'll move the corporate rep  
10 deposition pretty quickly.

11 THE VIDEOGRAPHER: We're now off the record  
12 at 16:10.

13 (Recessed at 4:10 p.m.)

14 (Reconvened at 4:27 p.m.)

15 THE VIDEOGRAPHER: We're now back on the  
16 record at 16:27.

17 MR. GUARD: I have no further questions for  
18 you, Chief. I thank you for your service to this  
19 country, and I'll pass the witness.

20 EXAMINATION BY COUNSEL FOR THE DEFENDANTS

21 BY MR. DARROW:

22 Q. Thank you. Just have a few questions,



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1 Chief. Try not to prolong things any longer than we  
2 have to. I believe you testified before, and correct  
3 me if I'm wrong, that the government is currently  
4 using MPP, the migrant protection protocol, less than  
5 it was before; is that correct?

6 **A. That's correct.**

7 Q. Okay, and why is that?

8 **A. There are a couple other factors that have**  
9 **forced or reduced the number of enrollees in the MPP**  
10 **program. First, the coordination with the government**  
11 **of Mexico has to occur, and currently as it exists,**  
12 **the one sector that is accepting MPP enrollees are,**  
13 **or the one area is South Texas. Two, one of the**  
14 **things we have seen is that many of the individuals**  
15 **that are enrolled in the MPP program claim protected**  
16 **status, whether they are part of a protected group.**  
17 **And so once that happens, they are no longer -- or**  
18 **they're removed from the MPP program or process.**

19 Q. Okay. Any other factors?

20 **A. No.**

21 Q. We talked before about expedited removal.  
22 Which agency is primarily responsible for doing the

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1 credible fears -- credible fear interviews of  
2 non-citizens in expedited removal?

3 A. So that responsibility falls to U.S. CIS,  
4 Citizenship and Immigration Services. They have  
5 asylum officers that are assigned to conduct these  
6 credible fear claims or CF claims.

7 Q. Have there been border surges under other  
8 administrations?

9 A. I've been a Border Patrol agent for 31  
10 years and I've been chasing traffic since 1996. I  
11 have worked in South Texas in '96. In '98, I worked  
12 in Southern California when traffic surged there. In  
13 2000, I worked in Arizona when traffic surged there,  
14 and then I was the deputy chief or acting chief under  
15 the 2014 UAC crisis and the 2019 family unit surge,  
16 and so yeah, there have been surges throughout my  
17 career.

18 Q. Were there any surges under the previous  
19 Trump administration?

20 A. Yes.

21 Q. I believe you also said before, and also,  
22 please correct the record if I'm wrong on this, that

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1 the border crisis is making things unsafe for  
2 Americans and aliens alike. Do you remember saying  
3 that?

4 A. Yes.

5 Q. And why is that?

6 A. Well, what typically happens is the  
7 criminal organizations use the migrant populations as  
8 pawns in this effort. They place them in harm's way,  
9 as we saw last month when 53 migrants perished in the  
10 back of a tractor trailer. They promise and provide  
11 information that is inaccurate, and quite often, that  
12 puts them in peril.

13 And then what we also see is that, you  
14 know, these criminal organizations are putting these  
15 border communities in danger because they are hiring  
16 smugglers and traffickers, and quite often we see  
17 these second effects in the -- manifest themselves in  
18 stash houses in neighborhoods. We see, you know,  
19 damage to property, ranchers and farmers or, you  
20 know, having to repair fences and, you know,  
21 accommodate for livestock that are lost when these  
22 smugglers drive through their property, so -- and

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1     **then you have these smugglers that are just -- you**  
2     **know, have little regard for the safety of the**  
3     **community out there.**

4           Q.     I'd like to go back to what I believe is  
5     marked as Exhibit 6 briefly. It's this document  
6     that's top line points. Is it all right if I have  
7     the witness look at my copy?

8           MR. GUARD: That'll speed things up.

9           MR. DARROW: Yeah, here you go.

10          MR. GUARD: That's fine.

11          THE WITNESS: Sorry.

12          BY MR. DARROW:

13          Q.     It's okay. I opened it to the second page  
14     --

15          **A.     All right.**

16          Q.     -- so we're all looking at the same --  
17     there is there at the top a list of bullet points  
18     with push-pull factors that we spoke about before.  
19     Do you recall that?

20          **A.     Yes, I do.**

21          Q.     Are there any push-pull factors that you  
22     have experienced that are not included in that list?

1           A.       Yeah, one of the things that, you know,  
2       that we were just talking about is the criminal  
3       organizations or the transnational criminal  
4       organizations that are reaping all kinds of benefits  
5       from migration and the surges that we're experiencing  
6       right now, both from a -- the fees that they charge  
7       the migrants that they're trafficking, and the fact  
8       that they continue to flood the border area with, you  
9       know, narcotics and whatnot.

10                So those are the criminal organizations'  
11       ability to drive migration, not just in and along the  
12       border area, but you know, in specific locations.  
13       Cartel violence occurs south of many of our sectors,  
14       and as we've seen acts of violence perpetrated  
15       against our officers quite often. We've had more  
16       agents assaulted this year than we ever have, and we  
17       continue to see increase in firearm seizures. So  
18       certainly the criminal organizations drive, you know,  
19       these migrant populations because it's a billion  
20       dollar business for them.

21                Previously cartels focused principally on  
22       narcotics trafficking. Now based upon some of the

1 information that we receive from our intelligence  
2 sources, it isn't uncommon for us to see these plaza  
3 bosses or cartel bosses reap as much proceeds from  
4 immigration smuggling as they do from narcotics  
5 trafficking.

6 Q. So among the factors, the ones listed on  
7 the page and the ones that you just enumerated, and  
8 feel free to review them further if you need to,  
9 would you say that some factors are more significant  
10 than others in -- in pushing as a push/pull factor?

11 A. Yes, most definitely. I think almost every  
12 single one of the migrants that we encounter are  
13 being driven by economic opportunities that exist or  
14 the lack of economic opportunities in their home  
15 country, and so that certainly is a factor that is  
16 considered. I track the remittances that occur  
17 between the U.S. and Central America and Mexico, and  
18 what is an indicator as to what type of migration  
19 trends we may begin to see, and what I've seen over  
20 the last several years is an uptick in those  
21 remittances.

22 And so this is certainly in a COVID global

1 environment, and lack of opportunities in some of  
2 these countries is certainly pushing migrant -- these  
3 migrant populations to an area where, you know, our  
4 medical care and facilities are much better than what  
5 they may be experiencing in Central America, South  
6 America. You see the political unrest that's  
7 occurring in Peru and Venezuela and some of the other  
8 countries is a significant driver of the population  
9 into the U.S.

10 Q. All right, we don't need to look at that  
11 exhibit anymore. How has Border Patrol's processing  
12 capacity changed since January 20th, 2021?

13 A. One of the things that question have been  
14 able to invest in considerably is our ability to  
15 process the migrant populations much more  
16 efficiently. We have made some significant  
17 investments in our ability to begin the process much  
18 sooner. We have and are currently working on an  
19 electronic A file. Traditionally Border Patrol, when  
20 they would issue an A file, everything was done via  
21 computer and printed out and signed and stored in a  
22 paper file system.

1           We are rolling out our electronic A file  
2       system across the country. We are working on our  
3       unified processing module, which will allow us to  
4       transfer information from us to the other component  
5       agencies to include CIS and ICE, Immigration and  
6       Customs Enforcement. We are able to take biometrics  
7       in the field and determine immediately whether  
8       somebody has been apprehended previously, whether  
9       they have a criminal record, and whether they are a  
10      threat to our national security or to our officers.

11           So what we've been able to do is speed up  
12      the processing in some locations by as much as, you  
13      know, half, or cut the processing times in half in  
14      many locations, and this is -- you know, we do not  
15      have unfortunately mobile devices in every Border  
16      Patrol agent's hands, but we're working on  
17      prioritizing that in those sectors that are seeing  
18      the highest increases of flow. Yuma's a hundred  
19      percent conducting mobile intake, and our plan is to  
20      roll it out to Del Rio and Rio Grande Valley, and  
21      then continue to expand that across both the  
22      southwest border and the northern border.



1                   So on top of being able to make some  
2                   investments in some of our processing centers, to  
3                   include the one I mentioned earlier, the Ursula  
4                   facility, which has the ability to house about a  
5                   thousand people in a hardened structure, we continue  
6                   to also update and modernize our processing programs  
7                   because they certainly were in need of improvement.

8           Q.       And what impact does -- does cutting  
9                   processing time have on the immigration process as a  
10                  whole?

11          A.       Well, one, it's going to make it more  
12                  efficient, and two, it allows us to segregate the no-  
13                  threat humanitarian asylum seeker population from  
14                  what would -- what I would consider my normal or  
15                  traditional border security work, which are those  
16                  migrants that are seeking to come to the U.S. for  
17                  strictly economic reasons and would not, you know, be  
18                  eligible for some sort of immigration benefit based  
19                  upon, you know, humanitarian or political conditions.

20                   MR. DARROW: All right. Thank you very  
21                   much, Chief. That's it for us.

22                   FURTHER EXAMINATION BY COUNSEL FOR PLAINTIFF

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1 BY MR. GUARD:

2 Q. Okay, just a couple follow-ups. You were  
3 just asked about MPP. That program was suspended  
4 after the Biden administration took over, correct?

5 A. Yes.

6 Q. All right, and then it had to be restarted  
7 as a result of a court order; is that correct?

8 A. Yes.

9 Q. Okay, and so the fact that it's only  
10 available in one sector reflects its suspension and  
11 the court order, right?

12 MR. DARROW: Objection.

13 A. Yes.

14 Q. Okay. You mention the protected group.  
15 Can you -- what is -- what --

16 A. LGBTQ2 -- QT.

17 Q. Okay.

18 A. Yeah.

19 Q. Okay.

20 A. Sorry.

21 Q. I just wanted to make sure I understood  
22 what that was.

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1           A.       Uh-huh.

2           Q.       And then finally -- well, I may have two  
3       questions. You mentioned that you had been chasing  
4       traffic since you got on the job and had seen  
5       previous surges, right? Have you ever seen traffic  
6       like this before?

7           A.       Yes, in -- let me explain. In 1991, when I  
8       started, we had about 4,000 Border Patrol agents, and  
9       the amount of apprehensions didn't even come close to  
10      the amount of people that got away from us. There --  
11      I mean, we couldn't even count how many people got  
12      away from us. So I can tell you that, you know,  
13      those first couple of years in my career weren't even  
14      close, and that was -- and I was only one sector. I  
15      didn't have the national perspective, but I'm sure  
16      that played out in multiple sectors.

17                 Two, the population that we're experiencing  
18      now is a little bit different than what we've  
19      experienced in other surges. When I was assigned to  
20      South Texas in '96, Arizona in 2000, Southern  
21      California in '98, during those surges, that  
22      population wasn't turning themselves in to our Border

1 Patrol agents. They were all trying to evade  
2 apprehension. What we're experiencing now,  
3 specifically in Yuma, Del Rio, and to some degree Rio  
4 Grande Valley is, you know, 75 percent of that  
5 population is turning themselves in, and then roughly  
6 25 or maybe a little bit more than that are actually  
7 trying to evade apprehension.

8 This isn't a matter of us not having the  
9 ability to encounter those groups. This is when you  
10 break down the 1.8 million apprehensions that we've  
11 already made so far this year, I would imagine quite  
12 a few of those large groups are this no-threat  
13 humanitarian population that, you know, should be  
14 processed at a port of entry.

15 Q. Are the individuals that are turning  
16 themselves in -- are they turning themselves in  
17 because they believe they're going to be paroled?

18 MR. DARROW: Objection.

19 THE WITNESS: I would imagine that they're  
20 turning themselves in because they think they're  
21 going to be released, yes.

22 MR. GUARD: Okay, all right. I don't think

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1 I have any further questions. Do you want to explain  
2 read versus waive? Or I guess by -- I guess if you  
3 can have follow-ups.

4 MR. DARROW: No, no, no, that -- yeah,  
5 we're going to -- we're going to read.

6 MR. GUARD: Okay, all right.

7 MR. DARROW: And could we also request  
8 scans of the marketed exhibits for the witness?

9 MR. GUARD: Sure, I'm going to have her  
10 make electronic copies of them.

11 MR. DARROW: Okay.

12 MR. GUARD: So I'm -- I'm fine with that  
13 because that's easier for me too.

14 MR. DARROW: Okay, great.

15 MR. GUARD: All right. We're going to go  
16 off the record and then back on for the corporate rep  
17 deposition, which is going to be extremely short.

18 THE VIDEOGRAPHER: This concludes today's  
19 deposition. We're now off the record at 16:44.

20 (Whereupon, at 4:44 p.m., the taking of the  
21 instant deposition ceased.)

22

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CERTIFICATE OF DEPONENT

I have read and examined the foregoing  
pages and find the answers contained therein with  
changes made by me, if any, to be true and correct.

\_\_\_\_\_  
Signature of the Witness

Subscribed and sworn to before me this  
\_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Notary Public in and for  
\_\_\_\_\_

My Commission Expires \_\_\_\_\_.

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1 UNITED STATES OF AMERICA )

2 ss:

3 COMMONWEALTH OF VIRGINIA )

4 I, KAREN C. YOUNG, a Notary Public within  
5 and for the Commonwealth of Virginia, do hereby  
6 certify that the witness whose deposition is  
7 hereinbefore set forth was duly sworn and that the  
8 within transcript is a true record of the testimony  
9 given by such witness.

10 I further certify that I am not related to  
11 any of the parties to this action by blood or  
12 marriage and that I am in no way interested in the  
13 outcome of this matter.

14 IN WITNESS WHEREOF, I have hereunto set my  
15 hand this 4th day of August, 2022.

16

17

18

19

20 My commission expires:

21 June 30, 2026

22 Registration No. 7046852

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Exhibit C - 300

# Exhibit B



FOR OFFICIAL USE ONLY



U.S. Immigration  
and Customs  
Enforcement



U.S. Customs and  
Border Protection


July 18, 2022

MEMORANDUM FOR:

Raul L. Ortiz  
Chief  
U.S. Border Patrol

Corey A. Price  
Executive Associate Director  
Enforcement and Removal Operations

FROM:

Chris Magnus   
Commissioner  
U.S. Customs and Border Protection

Tae D. Johnson   
Acting Director  
U.S. Immigration and Customs Enforcement

SUBJECT:

Policy on the Use of Parole Plus Alternatives to Detention  
to Decompress Border Locations

### Purpose

To require that certain processing be completed, and certain capacity criteria be met, before noncitizens may be released from custody along the Southwest border via Parole plus Alternatives to Detention (Parole + ATD). This memorandum rescinds and replaces all prior guidance regarding the use of Parole + ATD, including but not limited to the November 2, 2021, memorandum from USBP Chief Raul L. Ortiz, titled *Parole Plus Alternative to Detention*.

### Background

Undocumented noncitizens who are not expelled pursuant to the court-ordered implementation of the Centers for Disease Control & Prevention's Title 42 public health Order are inspected by U.S. Customs and Border Protection (CBP), U.S. Border Patrol (USBP) upon encounter, consistent with 8 U.S.C. § 1225(a); this is often referred to as "processing." Processing includes, among other things, identification, review of immigration and criminal history, an assessment of national security concerns, and an evaluation of what pathway is most appropriate for the individual noncitizen, to include removal proceedings under section 240 of the Immigration and Nationality Act (INA), 8 U.S.C. § 1229. expedited removal, permitting an individual to voluntarily return, and/or parole.

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Policy on the Use of Parole Plus Alternatives to Detention to Decompress Border Locations  
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Pursuant to section 212(d)(5)(A) of the INA, 8 U.S.C. § 1182(d)(5)(A), the Secretary of Homeland Security has the authority to parole certain noncitizens into the United States “temporarily . . . on a case-by-case basis for urgent humanitarian reasons or significant public benefit.” When, pursuant to an inspection of a noncitizen under 8 U.S.C. § 1225(a), CBP exercises its discretion to parole noncitizens on a case-by-case basis into the United States, including during the initiation of or to facilitate the initiation of removal proceedings under section 240 of the INA, those noncitizens may be eligible to be enrolled in the U.S. Immigration and Customs Enforcement (ICE) ATD program.

The goal of the ICE ATD program is, for a portion of the enrolled non-detained population, to increase compliance with release conditions, court appearances, and final orders of removal. ATD is an alternative to detention and allows ICE to exercise increased supervision over noncitizens who, on a case-by-case basis, are not detained, but are potentially subject to removal. The level of supervision and technology assigned to noncitizens enrolled in the ATD program is determined on a case-by-case basis based on each individual’s current immigration status, criminal history, compliance history, community or family ties, role as a caregiver or provider, and other humanitarian or medical factors. ICE may adjust the level of supervision and technology required as the level of the noncitizen’s compliance either increases or decreases.

Generally, CBP standards allow for short-term detention of fewer than 72 hours in CBP facilities, after which time CBP is expected to transfer the noncitizen to ICE if CBP believes continued custody is required. While this time period may sometimes be exceeded, CBP facilities are not structured or equipped for long-term detention. This yields numerous challenges, including the ability to provide appropriate medical care and to treat and control contagious illnesses. In sum, crowding in border facilities poses risks to both individuals in custody and those working there. Border encounters remain at historic highs. With a record number of displaced persons in the hemisphere, high encounter rates and the associated challenges are expected to continue. It is incumbent on CBP to transfer noncitizens to ICE or if discretion warrants, to release the noncitizen under appropriate conditions.

Parole + ATD provides a processing mechanism to address situations in which there is not appropriate detention space available, and there are operational concerns about the number of people present in, and potentially subject to a prolonged time-in-custody at, USBP facilities along the Southwest border. It is significantly more efficient—approximately 60 minutes faster—to process individuals, consistent with 8 U.S.C. § 1225(a), for Parole + ATD as opposed to issuing a Notice to Appear (NTA) or other charging document at the time of encounter. Use of Parole + ATD also allows ICE to exercise increased supervision over certain noncitizens who are released from CBP custody pending the initiation of removal proceedings. Those subject to Parole + ATD are not simply released into the community; they are subject to supervision and are subsequently issued an NTA under INA § 240.

That said, Parole + ATD is a tool that should be used sparingly—only when justified by an urgent humanitarian reason or because it yields a significant public benefit in the form of disease-mitigation, as a safety valve to address overcrowding.



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**Policy**

Over the last several months, CBP and ICE have made deliberate efforts to prioritize the health and safety of noncitizens and the workforce. The use of Parole + ATD provides one such tool—allowing for the more rapid decompression of facilities that otherwise may be overcrowded in ways that promote health and safety. That said, and as this guidance makes clear, the use of Parole + ATD is not meant to be a primary processing tool; its use is permitted only in those situations in which threshold criteria are met, and its use is subject to appropriate approvals and oversight — thus ensuring that its application is limited to those situations in which the relevant health and safety conditions justify its use.

*Threshold Criteria and Approval Process*

Parole + ATD may be authorized by the Commissioner of CBP only when the following criteria exist:

- There are more than 15,000 noncitizens in USBP custody across all Southwest border sectors OR a sector or centralized processing center's in-custody total exceeds 100% of its full capacity; AND
- CBP has encountered more than 6,000 noncitizens per day across the Southwest border over a 72-hour period.

When these scenarios exist, they create urgent crowding and excessive time-in-custody concerns that justify application of ICE's limited ATD resources to support CBP's use of parole on a case-by-case basis for urgent humanitarian reasons or significant public benefit.

To use Parole + ATD in a specific border sector, the relevant USBP Sector Chief must request approval from the Commissioner of CBP, through the USBP Chief.

Approval for Parole + ATD may be granted only on a sector-by-sector basis and Parole + ATD may not be used for noncitizens transferred laterally from a sector that has not met the threshold criteria above. Additionally, approval for use of Parole + ATD is time limited and must be reassessed every week by the Commissioner or Deputy Commissioner. USBP is not authorized to process noncitizens via Parole + ATD when these criteria are not met, absent extraordinary circumstances as determined by the Commissioner of CBP.

*Individual Assessment*

Each noncitizen is individually processed consistent with 8 U.S.C. § 1225(a) after encounter. This inspection process includes, but is not limited to, an assessment of the individual's identification and immigration background, review of any national security or criminal concerns, and consideration of which immigration processing pathway is best applicable to the individual noncitizen. This memorandum applies only to those individuals who are expected to be placed in removal proceedings under INA § 240.

Once the Parole + ATD initial threshold is met, each individual noncitizen should be assessed on a case-by-case individualized basis to determine whether he or she is eligible for parole based on

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an urgent humanitarian reason or whether there is a significant public benefit. In making this determination, agents shall consider individualized circumstances, such as an individual's current immigration status, criminal history, compliance history, community or family ties, role as a caregiver or provider, and other humanitarian or medical factors. Upon placing an individual in Parole + ATD, CBP will temporarily pause the completion of the removal paperwork under INA § 240, which will instead be completed at a later date.

Prior to a noncitizen's processing via Parole + ATD, CBP must conduct biometric identity verification and thoroughly evaluate any potential national security and public safety concerns. USBP must also collect and document a physical address for each noncitizen processed via Parole + ATD.

*Ineligible for Parole + ATD*

Parole + ATD may not be used for noncitizens who, based on an individualized assessment, pose a national security risk, unmitigable flight risk, public safety threat, or who claim to be, are suspected to be, or are determined to be unaccompanied children as defined by 6 U.S.C. § 279(g)(2) or appear likely to be subject to the mandatory detention requirements of INA § 236(c), 8 U.S.C. § 1226(c), if processed for removal proceedings pursuant to INA §240, 8 U.S.C. § 1229.

*Subsequent Processing*

CBP and ICE will work jointly to streamline and complete charging document issuance for individuals processed via Parole + ATD. Each agency is responsible for completing the processing for 50 percent of the total Parole + ATD caseload. The final processing and placement into removal proceedings pursuant to 8 U.S.C. § 1229 is expected to be the same, regardless of whether that paperwork occurs as a part of the Parole + ATD processing.

**Reporting and Oversight**

CBP must notify ICE in writing each time Parole + ATD is authorized in a sector to ensure that ICE has the appropriate staff and ATD capacity available in the applicable location(s). Such notification must occur before processing for Parole + ATD begins in the authorized border sector(s). In each case, ICE will determine the appropriate ATD enrollment conditions for the noncitizen, including but not limited to the type of technology used or frequency of required check-in appointments.

CBP will provide daily reporting to Department of Homeland Security Headquarters and ICE, detailing how many noncitizens were processed at the Southwest border with charging documents, voluntary return, and Parole + ATD, by sector. The daily reports will be used to identify any operational changes that are needed to modify the continued use of Parole + ATD at any given time.

**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

Mark Brnovich, in his official capacity as  
Attorney General of Arizona; *et al.*,

Plaintiffs,

v.

Joseph R. Biden in his official capacity as  
President of the United States; *et al.*,

Defendants.

No. 2:21-cv-01568-MTL

**[PROPOSED] ORDER**

1           Having considered Plaintiffs' Motion for Leave to File Reply to Defendants'  
2       Response to Plaintiffs' August 12, 2022 Notice of Supplemental Authority, **IT IS**  
3       **HEREBY ORDERED** granting the motion.  
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