

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

BEFORE HONORABLE DANA M. SABRAW, JUDGE PRESIDING

_____ )	
MS. L., ET AL., )	
PETITIONERS-PLAINTIFFS, )	CASE NO. 18CV0428-DMS
VS. )	18CV1832-DMS
U.S. IMMIGRATION AND CUSTOMS )	
ENFORCEMENT ("ICE"), ET AL., )	SAN DIEGO, CALIFORNIA
RESPONDENTS-DEFENDANTS. )	FEBRUARY 21, 2019
----- )	3:00 P.M. CALENDAR

REPORTER'S TRANSCRIPT OF PROCEEDINGS

**MOTION HEARING**

REPORTED BY:

LEE ANN PENCE,  
OFFICIAL COURT REPORTER  
UNITED STATES COURTHOUSE  
333 WEST BROADWAY, ROOM 1393  
SAN DIEGO, CALIFORNIA 92101

FOR PLAINTIFF:

LEE GELERNT, ESQ.  
STEPHEN KANG, ESQ.  
ANAN BALAKRISHNAN  
ACLU IMMIGRANT RIGHTS PROJECT  
125 BROAD STREET 18TH FLOOR  
NEW YORK, NEW YORK 10004

FOR DEFENDANT:

SCOTT STEWART, ESQ.  
SARAH B. FABIAN, ESQ.  
U.S. DEPARTMENT OF JUSTICE  
OFFICE OF IMMIGRATION LITIGATION  
P.O. BOX 868  
BEN FRANKLIN STATION  
WASHINGTON, DC 20044

ALSO APPEARING:

ZACHARY BEST, ESQ.  
SIRINE SHEBAYA, ESQ.  
WILSON BARMEYER, ESQ.  
STEVEN HERZOG, ESQ.  
CATHERINE WEISS, ESQ.  
LINDA DAKIN-GRIMM, ESQ.

1 SAN DIEGO, CALIFORNIA - THURSDAY, FEBRUARY 21, 2019 3:00 P.M.

2 \* \* \*

3 **THE CLERK:** NO. 1 ON CALENDAR, CASE NO. 18CV0428,  
4 MS. L. VERSUS U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; ON FOR  
5 MOTION HEARING.

6 **THE COURT:** GOOD AFTERNOON. MAY I HAVE APPEARANCES  
7 FROM COUNSEL WHO ARE PRESENT IN COURT TODAY?

8 **MR. STEWART:** SCOTT STEWART ON BEHALF OF THE  
9 DEFENDANTS, YOUR HONOR.

10 **MS. FABIAN:** SARAH FABIAN ON BEHALF OF THE  
11 DEFENDANTS, YOUR HONOR.

12 **MR. GELERNT:** GOOD AFTERNOON, YOUR HONOR. LEE  
13 GELERNT ON BEHALF OF THE MS. L. PLAINTIFFS.

14 **MR. KANG:** AFTERNOON. STEPHEN KANG FOR THE MS. L.  
15 PLAINTIFFS.

16 **THE COURT:** GOOD AFTERNOON. WELCOME. IT IS  
17 DELIGHTFUL TO SEE COUNSEL AGAIN IN PERSON.

18 AND WE HAVE A NUMBER OF ATTORNEYS ON THE PHONE, AND  
19 I WILL IDENTIFY THOSE INDIVIDUALS AT THIS TIME.

20 I HAVE AN INDICATION THAT MR. BALAKRISHNAN IS  
21 PRESENT FOR MS. L. FOR THE DORA PLAINTIFFS SIRINE SHEBAYA AND  
22 WILSON BARMeyer. FOR THE MMM PLAINTIFFS ZACHARY BEST.  
23 STEPHEN HERZOG IS PRESENT, AS WELL. AND I HAVE CATHERINE  
24 WEISS APPEARING TELEPHONICALLY AS WELL.

25 I HAVE AN APPEARANCE NOTED FOR MS. LINDA

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1 DAKIN-GRIMM.

2 MS. DAKIN-GRIMM IS PRESENT, AM I CORRECT?

3 **MS. DAKIN-GRIMM:** I AM HERE, YOUR HONOR.

4 **THE COURT:** ALL RIGHT. THANK YOU. SO LET ME GET TO  
5 THAT ISSUE A LITTLE BIT LATER.

6 THERE ARE A NUMBER OF OTHER MATTERS THAT WE NEED TO  
7 ADDRESS AT THIS TIME, SO I WOULD LIKE TO MOVE INTO THOSE RIGHT  
8 AWAY. AND PERHAPS WE CAN START FIRST WITH THE STATUS REPORT.

9 AND HERE, I APPRECIATE THE UPDATE. IT APPEARS THERE  
10 IS A LOT THAT HAS BEEN ACCOMPLISHED, AND THERE IS A LOT THAT  
11 IS PRESENTLY BEING DISCUSSED AND WILL BE REPORTED ON AT THE  
12 NEXT STATUS CONFERENCE. SO LET'S RUN THROUGH THIS, AND I HAVE  
13 JUST A FEW QUESTIONS.

14 ON PAGE 3, THERE IS AN INDICATION THAT OF THE  
15 CHILDREN WHO HAVE BEEN DISCHARGED APPROPRIATELY TO SPONSORS OR  
16 HAVE TURNED 18, THERE IS AN IDENTIFICATION OF THAT NUMBER, 24  
17 OF THOSE CHILDREN UNDER AGE FIVE, AND 556 AGE FIVE AND OVER.

18 THE QUESTION I HAD WAS WITH RESPECT TO THE CHILDREN  
19 WHO HAVE TURNED 18. THEY ARE RELEASED, WHERE DO THEY GO? FOR  
20 MY OWN EDIFICATION, HOW ARE THEY PROCESSED? WHAT DOES HHS DO,  
21 ARE THEY -- ORDINARILY DO RELATIVES PICK THEM UP, OR DO SOME  
22 OF THE NGO'S GET INVOLVED IN THEIR PLACEMENT?

23 **MS. FABIAN:** IT COULD VARY, YOUR HONOR. THEY COULD  
24 BE TURNED OVER TO ICE AT TIMES, SO ICE SOMETIMES WILL TAKE  
25 CUSTODY OF THEM. THERE IS A PROVISION IN THE TVPRA THAT

1 PROVIDES -- THAT PROVIDES SOME PROTECTION TO CHILDREN BEING  
2 RELEASED FROM HHS. THERE IS ACTUALLY A LAWSUIT IN DC ABOUT  
3 THAT PROVISION AND HOW IT IS BEING APPLIED.

4 IN GENERAL, CHILDREN RELEASED FROM O.R.R. CUSTODY  
5 BECAUSE THEY TURN 18 WILL -- ICE WILL CONSIDER WHETHER TO TAKE  
6 THEM INTO CUSTODY. AND UNLESS ICE DETERMINES THAT IT NEEDS TO  
7 TAKE CUSTODY, THEY WILL BE RELEASED JUST AS ANY OTHER ADULT  
8 WOULD BE FROM IMMIGRATION CUSTODY.

9 **THE COURT:** ALL RIGHT. SO I WOULD ASSUME, THEN,  
10 THAT MOST OF THESE CHILDREN ARE RELEASED TO ICE CUSTODY. AND  
11 THOSE THAT ARE NOT HAVE SOME KIND OF A SOFT LANDING THROUGH A  
12 RELATIVE OR AN NGO PROVIDING SHELTER FOR THEM.

13 **MS. FABIAN:** I WOULD GUESS THAT THAT'S CORRECT. IF  
14 THEY DON'T HAVE A RELATIVE IN THE UNITED STATES, THAT CAN BE A  
15 FACTOR AS TO ICE'S DECISION WHETHER THEY WOULD BE RELEASED  
16 FROM CUSTODY JUST AS A GENERAL MATTER. SO PRESUMABLY THAT  
17 WOULD BE ONE FACTOR CONSIDERED WITH THEIR RELEASE WITH ICE.

18 AND I WANT TO CLARIFY. I AM NOT TOTALLY SURE TODAY  
19 WHETHER IN ALL CASES THEY WOULD BE PHYSICALLY TRANSFERRED TO  
20 ICE CUSTODY OR WHETHER ICE MIGHT MAKE THE DETERMINATION  
21 WITHOUT NEEDING TO TAKE CUSTODY. I JUST DON'T HAVE AN ANSWER  
22 TO THAT. BUT THERE WOULD BE SORT OF A CONSIDERATION OF  
23 WHETHER THEY WOULD NEED TO GO INTO ICE CUSTODY.

24 **THE COURT:** OKAY. THANK YOU.

25 MR. GELERNT, DO YOU HAVE ANY INFORMATION ON THAT?

1           **MR. GELERT:** YOUR HONOR, I DO NOT HAVE MORE, BUT I  
2 CAN CIRCLE BACK WITH NGO'S WHO DEAL WITH THAT NITTY-GRITTY  
3 SITUATION AND PROVIDE THE COURT AT THE NEXT JSR WHAT OUR  
4 UNDERSTANDING IS ABOUT WHAT IS HAPPENING ON THE GROUND.

5           **THE COURT:** OKAY. THANK YOU.

6           ON PAGE 4, DEALING WITH THE 149 CHILDREN IDENTIFIED  
7 RECENTLY. IT APPEARS THAT OF THOSE 64 HAVE CHILDREN WHO WERE  
8 REMOVED FROM COUNTRY. SO THE LAST BALLPARK NUMBER WE HAD, IF  
9 MEMORY SERVES, WAS THAT ABOUT 414 PARENTS HAD BEEN REMOVED  
10 FROM THE COUNTRY WITHOUT THEIR CHILD. AND SO AM I CORRECT IN  
11 ASSUMING THAT TO THAT NUMBER, WHATEVER THAT NUMBER IS, WE  
12 WOULD BE ADDING ANOTHER 64 OR SO. SO THIS BALLPARK NUMBER --  
13 AND I KNOW THERE WILL BE A REPORT ON IT AT THE NEXT STATUS,  
14 BUT THE BALLPARK NUMBER IS GOING TO BE AROUND 500. AM I  
15 CORRECT?

16           **MS. FABIAN:** I WOULD SAY IT WILL BE LESS THAN THAT,  
17 BUT THE -- I AM NOT QUITE SURE WHERE THE 414 COMES FROM, BUT  
18 THERE IS A NUMBER IN THE 400'S THAT WAS AN ORIGINAL NUMBER  
19 THAT MANY PARENTS WERE REMOVED FROM THAT FOR REASONS THAT THEY  
20 WERE NOT ACTUALLY REMOVED. SO WE ARE TRYING TO WORK OUT --  
21 BETWEEN THE 343, WHICH WAS THE NUMBER WE STARTED WORKING WITH  
22 THE STEERING COMMITTEE ON, AND THAT -- I WANT TO SAY IT WAS  
23 AROUND 450, WHICH WAS A VERY EARLY NUMBER THAT HAS SINCE GONE  
24 DOWN. SOMEWHERE IN THERE IS WHAT WOULD BE THE BENCHMARK. AND  
25 THEN THAT WOULD, YES, ADD THESE 64 AS WELL.

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1           **THE COURT:** OKAY. THANK YOU.

2           THERE IS A GOOD REPORTING ON THE PROCESSES AND  
3 PROCEDURES THAT ARE BEING DISCUSSED WITH RESPECT TO FAMILIES  
4 THAT HAVE BEEN SEPARATED SINCE JUNE 26, 2018, AND I SIMPLY  
5 ENCOURAGE THE PARTIES TO KEEP WORKING THROUGH THAT. AND THEN  
6 WE WILL HAVE A REPORT AT THE NEXT STATUS CONFERENCE ON THAT  
7 IMPORTANT ISSUE.

8           THE ONLY OBSERVATION I HAVE THERE, ON PAGES 14, 15,  
9 16, AND 17 THERE IS A NARRATIVE OF -- OR AN OUTLINE OF THE  
10 PROCESSES AND PROCEDURES THAT ARE BEING DISCUSSED AND ARE  
11 CURRENTLY IN PLACE. THERE IS NO REFERENCE HERE TO DEPARTMENT  
12 OF JUSTICE, AND IT SEEMS TO ME THAT DOJ AND B.O.P. SHOULD BE A  
13 PART OF THIS PROCESS. BECAUSE WHAT WE KNOW -- AND THERE WAS A  
14 CASE CITED IN THE COURT'S PRELIMINARY INJUNCTION ORDER FROM  
15 THE WESTERN DISTRICT OF TEXAS -- IS THAT MANY OF THESE  
16 PARENTS, WHEN THEY ARE PROSECUTED CRIMINALLY AND SEPARATED,  
17 ARE PLACED IN DOJ CUSTODY, AND THEY ARE SPECIFICALLY WITH THE  
18 B.O.P., AND WHEN THEY APPEAR IN COURT NO ONE HAS ANY  
19 INFORMATION AS TO WHERE THE CHILDREN ARE.

20           IT SEEMS TO ME AN IMPORTANT COMPONENT OF THESE  
21 PROCESSES AND PROCEDURES WOULD INCLUDE B.O.P. SO THAT THERE  
22 CAN BE A FULL LINK-UP FROM DAY ONE INVOLVING ALL AGENCIES THAT  
23 HAVE CARE AND CUSTODY OF PARENTS AND CHILDREN THROUGHOUT THE  
24 PROCESS.

25           **MS. FABIAN:** JUST TO CLARIFY, YOUR HONOR.

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1           **THE COURT:** YES.

2           **MS. FABIAN:** YOUR CONCERN IS INFORMATIONAL, TO MAKE  
3 SURE THAT B.O.P., WHEN THEY HAVE CUSTODY OF A PARENT, WOULD  
4 HAVE THE INFORMATION AS TO WHERE THE CHILD IS SO THAT THEY  
5 COULD FACILITATE COMMUNICATION AND LET THE PARENT KNOW TO THE  
6 EXTENT THE PARENT NEEDS TO KNOW.

7           **THE COURT:** YES. SO ALL OF THESE AGENCIES NEED TO  
8 BE COMMUNICATING. AND ULTIMATELY I THINK THE GOAL HERE, AND  
9 WHAT THE PARTIES ARE WORKING TOWARD, IS PROCEDURES AND  
10 PROTOCOL IN A CENTRALIZED DATA SYSTEM WHERE ALL OF THE KEY  
11 AGENCIES -- DOJ, DHS, HHS -- COMMUNICATE SO THAT PARENTS AND  
12 CHILDREN ARE ACCOUNTED FOR THROUGHOUT THE PROCESS.

13           AND THAT WHEN, FOR EXAMPLE, A PARENT HAS FINISHED  
14 HIS OR HER CUSTODIAL TIME ON A CRIMINAL SENTENCE AND THEY ARE  
15 TRANSFERRED FROM B.O.P. TO ICE, THAT THERE BE A COMMUNICATION  
16 SYSTEM IN PLACE WHERE HHS IS THEN NOTIFIED AND REUNIFICATION  
17 CAN BEGIN.

18           **MS. FABIAN:** AND I BELIEVE THAT PART OF IT IS  
19 ACCOUNTED FOR IN OUR OVERVIEW, AND WE CAN TALK ABOUT THE  
20 DETAILS MORE WITH PLAINTIFFS' COUNSEL.

21           SO I THINK THE PART THAT MAY NOT BE ACCOUNTED FOR  
22 THAT I HEARD YOU EXPRESS CONCERN ABOUT IS DURING THE TIME IN  
23 B.O.P. CUSTODY, MAKING SURE THAT THE PARENT IS NOT IN THE DARK  
24 AS TO WHERE THEIR CHILD IS.

25           **THE COURT:** YES, BECAUSE WE DO KNOW THAT THERE IS --



1 CAN BE A SIGNIFICANT PERIOD OF TIME. IT CAN BE A MATTER OF  
2 DAYS, 30 TO 60 DAYS, WHERE A PARENT IS DOING A SENTENCE ON A  
3 1325 CONVICTION, AND THEY DON'T KNOW WHERE THEIR CHILD IS.  
4 AND THE ATTORNEYS DON'T KNOW, AND THE COURT DOESN'T KNOW, NO  
5 ONE KNOWS.

6 AND IT SEEMS TO ME, THROUGH THIS PROCESS THAT THE  
7 PARTIES ARE WORKING ON, IF B.O.P. IS INCLUDED IN THIS  
8 INFORMATIONAL GATHERING AND REPORTING PROCESS THEN THERE WILL  
9 BE A COMPLETE ACCOUNTING FOR PARENT AND CHILD THROUGHOUT THE  
10 PROCESS AT ALL STAGES.

11 **MS. FABIAN:** UNDERSTOOD, YOUR HONOR. I WILL WORK ON  
12 THAT.

13 **THE COURT:** THE ONLY OTHER QUESTION I HAD RELATES TO  
14 PARENTS WHO HAVE PREVIOUSLY BEEN REMOVED. AND AT PAGE 19,  
15 TURNING TO FOOTNOTES 14 AND 15, IT APPEARS THAT ALL BUT TWO OF  
16 THE REMOVED PARENTS HAVE BEEN CONTACTED. AND THEN IN FOOTNOTE  
17 15 IT INDICATES THAT AS TO ONE OF THE TWO, THE NON-REMOVED  
18 PARENT WAS CONTACTED.

19 SO DOES THAT MEAN THERE IS STILL ONE CHILD WHOSE  
20 PARENTS HAVE NOT BEEN CONTACTED?

21 **MR. HERZOG:** YOUR HONOR, THIS IS STEVEN HERZOG.

22 ON THAT, THAT'S THE SAME -- WE SPOKE ABOUT THAT CASE  
23 VERY BRIEFLY DURING THE LAST CONFERENCE. THAT'S A CASE WHERE  
24 THE PARENT WAS REPRESENTED BY A SEPARATE ATTORNEY, AT LEAST  
25 FOR SOME PERIOD OF TIME. AND WE HAVE NOT BEEN IN DIRECT

1 CONTACT WITH THAT PARENT, THAT ATTORNEY WAS COMMUNICATING THAT  
2 PARENT'S PREFERENCE, AT LEAST FOR A WHILE. AND WE ARE NOW  
3 TRYING TO REACH OUT TO THAT PARENT DIRECTLY.

4 **THE COURT:** OKAY. THANK YOU. I KNOW THAT WE TALKED  
5 ABOUT THAT AT THE LAST STATUS, BUT THE WAY THIS WAS WRITTEN ON  
6 PAGE 19, I BEGAN TO DOUBT WHETHER MY RECOLLECTION WAS ACCURATE  
7 AS TO THE CONTACT OF THAT PARENT.

8 SO IT WOULD APPEAR, BASED ON THAT INFORMATION, THAT  
9 EVERY CHILD'S PARENT OR NON-REMOVED PARENT HAS BEEN REACHED  
10 AND WILL BE ABLE TO WEIGH IN ON THE REUNIFICATION QUESTION.

11 OTHER THAN THAT, I THINK THE STATUS REPORT IS  
12 EXCELLENT. THERE ARE A NUMBER OF SIGNIFICANT TOPICS THAT ARE  
13 BEING ADDRESSED BY THE PARTIES AND WILL BE REPORTED ON AT THE  
14 NEXT STATUS.

15 ABSENT ANY QUESTIONS OR COMMENTS BY COUNSEL, I WOULD  
16 BE PREPARED TO MOVE TO THE NEXT -- TO THE MOTIONS THAT ARE  
17 PENDING. ALL RIGHT.

18 LET'S START, THEN, WITH THE MMM MOTION TO ENFORCE  
19 THE SETTLEMENT AGREEMENT FOR CLASS MEMBERS WHO HAVE NOT  
20 SUBMITTED EXECUTED WAIVER FORMS.

21 HERE, IN READING THE GOVERNMENT'S OPPOSITION -- AND  
22 PERHAPS I AM MISAPPREHENDING THE GOVERNMENT'S POSITION. BUT  
23 IT APPEARED THAT THE GOVERNMENT WAS PREPARED TO IDENTIFY THE  
24 PARENTS WHO ARE ENTITLED TO THE SETTLEMENT PROCEDURES.

25 SO AT PAGE 2 AND 3 OF THE OPPOSITION THERE IS AN

1 INDICATION THAT MANY OF THESE CLASS MEMBERS RECEIVED NOTICES  
2 TO APPEAR RATHER THAN E.R. ORDERS, AND THUS THEY ARE NOT PART  
3 OF THE SETTLEMENT AGREEMENT.

4 AND THEN THE OPPOSITION GOES ON TO STATE THAT FOR  
5 THE REMAINING INDIVIDUALS, THOSE WOULD BE THE PARENTS WHO  
6 RECEIVED THE E.R. ORDERS, THE PARTIES OUGHT TO IDENTIFY THOSE  
7 INDIVIDUALS WHO ARE ENTITLED TO THE SETTLEMENT PROCEDURES BUT  
8 HAVEN'T SUBMITTED ELECTION FORMS.

9 AND IT APPEARS THE GOVERNMENT IS SAYING THAT IT WILL  
10 ENSURE THAT CLASS COUNSEL IS NOTIFIED OF SUCH INDIVIDUALS SO  
11 THAT AN ELECTION CAN BE MADE.

12 SO AM I UNDERSTANDING THAT THE GOVERNMENT IS  
13 PREPARED TO IDENTIFY THOSE PARENTS WHO RECEIVED E.R. ORDERS  
14 AND PROVIDE THAT INFORMATION TO PLAINTIFFS' COUNSEL?

15 **MR. STEWART:** I THINK THAT IS LARGELY RIGHT, YOUR  
16 HONOR, WITH THIS QUALIFICATION.

17 THE GOVERNMENT DOESN'T HAVE A READY WAY TO BREAK  
18 DOWN REMOVAL ORDERS BETWEEN SORT OF FULL-SCALE REMOVAL ORDERS  
19 AND EXPEDITED REMOVAL ORDERS. WE CAN PROVIDE A LIST OF FOLKS  
20 WITH REMOVAL ORDERS AND THEIR RELEVANT CONTACT INFORMATION,  
21 THAT WILL GIVE MR. BARMEYER AND HIS COLLEAGUES THE INFORMATION  
22 THEY WOULD NEED TO CONTACT RELEVANT FOLKS.

23 WE ALSO HAVE ANOTHER MECHANISM THAT I UNDERSTAND ICE  
24 HAS PUT IN PLACE HERE TO GET AT THE MAIN CONCERN THAT I THINK  
25 MR. BARMEYER IS IDENTIFYING AND THAT'S -- WHAT I UNDERSTAND IS

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1 THAT ICE HAS TAKEN THE STEPS TO DO IS PUT A FLAG ON THE CLASS  
2 MEMBERS WHO ARE ENTITLED TO SETTLEMENT RELIEF ON THEIR  
3 IMMIGRATION FILE, SO THAT IF SOMEBODY WERE TO COME UP FOR  
4 POTENTIAL REMOVAL THAT ISSUE WOULD BE THERE AND REMOVAL -- IT  
5 WOULD BE FLAGGED SO THAT IT WAS AN ISSUE ADDRESSED BEFORE  
6 REMOVAL.

7 SO IF SOMEONE WITH A FLAG WERE TO BE IDENTIFIED,  
8 INSTEAD OF BEING REMOVED WHAT ICE WOULD DO IS SAY, OH, THIS IS  
9 SOMEBODY WHO IS ENTITLED TO SETTLEMENT PROCEDURES, WE NEED TO  
10 TAKE THE STEPS TO MAKE SURE THAT THEY GET THEIR ELECTION FORM  
11 AND MAKE THEIR ELECTION ONE WAY OR ANOTHER SO THEY GET THE  
12 PROCESSES.

13 SO I THINK WITH THOSE TWO MECHANISMS COMBINED, EVEN  
14 THOUGH WE DON'T HAVE SORT OF THE PERFECT LIST OF THE EXACT  
15 PEOPLE BECAUSE THAT IS JUST HARD TO GENERATE WITH OUR SYSTEMS,  
16 IT IS NOT REALLY -- THE SYSTEMS AREN'T REALLY GEARED TOWARDS  
17 THIS PRECISE SETTLEMENT SITUATION.

18 BUT WITH THOSE TWO MECHANISMS WE THINK WE HAVE  
19 IDENTIFIED THE CONCERNS AND HAVE GUARDED AGAINST WHAT WE THINK  
20 IS THE MAIN THRUST OF WHAT THE MMM AND OTHER PLAINTIFFS ARE  
21 GETTING AT. SO I THINK THOSE TWO POINTS SHOULD, I THINK,  
22 ADDRESS THE BULK OF THE CONCERNS.

23 **THE COURT:** BECAUSE YOU WOULD AGREE THAT THE  
24 GOVERNMENT IS THE SOLE PARTY THAT IS ABLE TO IDENTIFY PARENTS  
25 WITH E.R. ORDERS, BECAUSE PLAINTIFFS' COUNSEL WOULDN'T HAVE

1 THAT INFORMATION. AND I THINK WHAT THEY ARE SAYING IS, WE  
2 NEED THE GOVERNMENT TO IDENTIFY THOSE PARENTS TO THEN ENSURE  
3 THAT THOSE PARENTS WILL NOT BE REMOVED PRIOR TO MAKING AN  
4 ELECTION.

5 AND THEN, IT SEEMS TO ME, IF THOSE PARENTS ARE  
6 IDENTIFIED, DOESN'T THAT ADDRESS PLAINTIFFS' CONCERNS?  
7 BECAUSE ONCE THOSE PARENTS ARE IDENTIFIED, CLASS COUNSEL WILL  
8 BE PROVIDED THE CONTACT INFORMATION. AND THEY CAN THEN  
9 DETERMINE WHETHER THOSE PARENTS ARE GOING TO PURSUE THE  
10 SETTLEMENT PROCEDURES OR NOT, SO THE ELECTION WOULD BE MADE.

11 IT SEEMS TO ME EVERYTHING WORKS OUT IF THOSE PARENTS  
12 ARE IDENTIFIED AND CLASS COUNSEL ARE ABLE TO CONTACT THEM.

13 AM I MISSING SOMETHING THERE? I GUESS I WOULD  
14 INQUIRE OF PLAINTIFFS' COUNSEL ON THAT ISSUE.

15 **MR. BARMAYER:** THANK YOU, YOUR HONOR. THIS IS MR.  
16 BARMAYER FOR THE PLAINTIFFS ON THIS.

17 YOU HAVE IDENTIFIED OUR KEY CONCERN. WE HAVE BEEN  
18 NOTIFIED BY VARIOUS CLASS MEMBERS THAT THEY HAVE BEEN TOLD BY  
19 ICE THAT THEY ARE SCHEDULED FOR REMOVAL AT THEIR NEXT  
20 CHECK-IN. AND OUR PRIMARY CONCERN, WHICH IS THE ONE YOU  
21 ARTICULATED, IS TO MAKE SURE THERE IS A PROCESS IN PLACE TO  
22 IDENTIFY THOSE INDIVIDUALS SO THAT THEY ARE NOT REMOVED BEFORE  
23 THEY EITHER RECEIVE THE SETTLEMENT PROCEDURES OR AFFIRMATIVELY  
24 WAIVE THEIR RIGHTS UNDER THE SETTLEMENT.

25 SO THAT'S THE THRESHOLD QUESTION THAT WE WANT TO

1 MAKE SURE IS CONFIRMED TODAY. AND MY UNDERSTANDING IS THAT  
2 MR. STEWART AND YOUR HONOR'S DISCUSSION JUST CONFIRMED THAT,  
3 THAT THERE WILL BE A PROCESS IN PLACE SO THAT CLASS MEMBERS  
4 ARE IDENTIFIED AND NOT REMOVED IF THEY ARE ENTITLED TO RELIEF  
5 UNDER THE SETTLEMENT OR NEED TO MAKE AN ELECTION. THAT IS MY  
6 UNDERSTANDING OF THE DISCUSSION THAT WAS BETWEEN YOUR HONOR  
7 AND MR. STEWART.

8 **THE COURT:** YES. SO IT SEEMED TO ME, IN READING THE  
9 MOTION AND THE OPPOSITION, IT WAS A LITTLE BIT LIKE SHIPS IN  
10 THE NIGHT. PLAINTIFFS WERE TALKING ABOUT ENFORCING CERTAIN  
11 PROVISIONS OF THE SETTLEMENT AGREEMENT. THE GOVERNMENT WAS  
12 SAYING, WE ARE NOT OBJECTING TO THAT, WE UNDERSTAND WHAT OUR  
13 OBLIGATIONS ARE UNDER THE SETTLEMENT AGREEMENT.

14 AND THERE WAS DISCUSSION ABOUT THE ELECTION FORM AND  
15 THAT HAVING TO OCCUR FIRST. BUT NONE OF THAT CAN HAPPEN  
16 UNLESS PLAINTIFFS' COUNSEL KNOW WHO THE PARENTS ARE, AND ONLY  
17 THE GOVERNMENT KNOWS THAT, IT SEEMS TO ME.

18 SO THE GOVERNMENT WOULD HAVE TO IDENTIFY THOSE  
19 PARENTS THAT ARE SUBJECT TO THESE SETTLEMENT PROCEDURES,  
20 IDENTIFY THEM, PROVIDE THAT INFORMATION TO PLAINTIFFS'  
21 COUNSEL. THEN PLAINTIFFS' COUNSEL COULD MEET AND CONFER AND  
22 PROVIDE THE ELECTION FORM AT THAT POINT.

23 **MR. STEWART:** YOUR HONOR, WHAT THE GOVERNMENT HAS --  
24 I THINK MOST OF WHAT YOUR HONOR HAS SAID IS RIGHT. I DON'T  
25 THINK THERE IS A DISPUTE OVER THE KEY ISSUE OF FOLKS BEING

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1 ENTITLED TO SETTLEMENT PROCEDURES, IT IS JUST OVER HOW WE KIND  
2 OF GET THERE.

3           WHAT I WOULD EMPHASIZE IS THAT THE GOVERNMENT HAS A  
4 PRACTICAL PROBLEM PINPOINTING THE PRECISE PEOPLE WHO  
5 DEFINITELY HAVE EXPEDITED REMOVAL ORDERS AT THIS POINT IN  
6 TIME. WE CAN IDENTIFY A BROADER GROUP WITH FINAL REMOVAL  
7 ORDERS, WE CAN GIVE THAT INFORMATION TO THE PLAINTIFFS WITH  
8 THE BEST CONTACT INFORMATION WE HAVE.

9           WE RECOGNIZE THAT IT WOULD BE BETTER IF OUR SYSTEMS  
10 READILY ALLOWED CONTACT INFORMATION FOR JUST FOLKS WITH  
11 EXPEDITED REMOVAL ORDERS. SINCE WE DON'T HAVE THAT READY  
12 CAPABILITY, WE HAVE A SECOND SAFEGUARD IN PLACE. AND THAT IS  
13 WHY WE SORT OF DESCRIBE IT AS THESE FOLKS COME TO OUR  
14 ATTENTION, WE LEARN ABOUT THEM BY A REMOVAL PROSPECT OR  
15 SOMETHING LIKE THAT. WE CAN FLAG THEM, BRING THEM TO MR.  
16 BARMAYER'S OR APPROPRIATE CLASS COUNSEL'S ATTENTION, AND THEN  
17 HAVE FOLKS MAKE THE RELEVANT ELECTION FORMS.

18           MY SENSE IS THAT PEOPLE, THEY CAN BE SOMETIMES HARD  
19 TO TRACK DOWN EVEN IF YOU KNOW WHO THEY ARE, EVEN IF YOU HAVE  
20 CONTACT INFORMATION. WHICH IS WHY ONCE SOMEBODY KIND OF COMES  
21 INTO CONTACT WITH US OR WE BECOME AWARE OF SOMEBODY, A GOOD  
22 PROCESS IS FOR US TO BRING THEM TO COUNSEL'S ATTENTION OR GET  
23 THEM THE APPROPRIATE ELECTION FORM SO THAT THEY CAN THEN GET  
24 THE SETTLEMENT PROCEDURES.

25           SO IT IS KIND OF A PRACTICAL WAY TO GET THERE, BEST

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1 USE USING AVAILABLE CAPABILITIES AND RESOURCES. THAT IS HOW I  
2 WOULD KIND OF DESCRIBE IT, YOUR HONOR, IS THAT IS THE APPROACH  
3 WE ARE PROPOSING. BECAUSE I DON'T KNOW ALL OF THE PARTICULARS  
4 BUT IT IS, AS I UNDERSTAND IT, JUST A DIFFICULTY WITH THE ICE  
5 SYSTEMS TO BE MORE PARTICULAR AND GRANULAR ON THIS.

6 **THE COURT:** HOW DO THESE PEOPLE COME TO YOUR  
7 ATTENTION? ISN'T IT WHERE THEY ARE GETTING READY TO BE  
8 DEPORTED, AND THEN THE GOVERNMENT KNOWS. AND THEN YOU WOULD  
9 BE TELLING PLAINTIFFS' COUNSEL THAT, HERE IS A PERSON THAT IS  
10 SUBJECT TO AN EXPEDITED REMOVAL ORDER, WE WON'T REMOVE THEM  
11 UNTIL YOU TALK TO THEM?

12 **MR. STEWART:** THAT WOULD BE ONE PROSPECT, YOUR  
13 HONOR. THE OTHER PROSPECT IS, I MEAN, CLASS COUNSEL HAD GIVEN  
14 NOTICE TO FOLKS AND THEY PRESUMABLY SWEEPED BROADLY AND GOTTEN  
15 IN TOUCH WITH APPROPRIATE FOLKS.

16 THE OTHER POSSIBILITY IS JUST IF PLAINTIFFS'  
17 COUNSEL -- THIS IS A WELL-PUBLICIZED EFFORT. PLAINTIFFS'  
18 COUNSEL, WE HAVE ASKED, WE HAVE NOT HAD ANYBODY SPECIFICALLY  
19 IDENTIFIED TO US AS, HEY, THIS IS THE PERSON WHO FACED THIS  
20 PROBLEM THAT WE ARE IDENTIFYING, HERE IS WHAT HAPPENED.

21 WE JUST HAVE NOT SEEN THAT PERSON. WE HAVE NOT  
22 SAID, OKAY, YOU KNOW, GOVERNMENT, YOU KNOW, THIS IS THE PERSON  
23 WHO RAN INTO THIS PROBLEM.

24 IT IS -- WE JUST HAVEN'T GOTTEN CONFIRMATION, SO WE  
25 HAVEN'T BEEN ABLE TO SEE, OKAY, THIS IS THE PROBLEM, HERE IS



1 HOW WE DO BETTER WITH IT; WHICH IS WHY WE ARE TRYING TO DO OUR  
2 BEST TO PROPOSE A MANAGEABLE, PRACTICAL SOLUTION TO GET IT  
3 RIGHT.

4 AND IF WE FIND -- WE HAVE BEEN TALKING A GOOD AMOUNT  
5 WITH MR. BARMeyer TO GET -- TO GET SOME MORE CLARITY ON THIS  
6 ON JUST HOW TO PROCEED AND HOW TO -- WHAT THEY WANT US TO DO,  
7 WHAT THEY DON'T WANT US TO DO, AND HOW WE KIND OF GET ALL OF  
8 THIS MOVING. AND IF WE JUST HAD MORE INFORMATION THAT COULD  
9 BE USEFUL FOR THIS, BUT I DON'T THINK THE ANSWER IS -- I THINK  
10 THAT IS THE BEST SOLUTION AVAILABLE HERE.

11 **THE COURT:** WHAT EFFORT WOULD BE INVOLVED FOR THE  
12 GOVERNMENT TO GO THROUGH ITS SYSTEM SO THAT IT CAN IDENTIFY  
13 THE PARENTS THAT ARE SUBJECT TO AN EXPEDITED REMOVAL ORDER?  
14 IT SEEMS TO ME IF THAT IS DONE THEN THIS ISSUE GOES AWAY.

15 **MS. FABIAN:** AS I UNDERSTAND IT, YOUR HONOR, WHAT WE  
16 HAVE DONE SO FAR IS TO RUN A LIST OF INDIVIDUALS WITH FINAL  
17 ORDERS, AND THEN ICE WORKED CLOSELY WITH E.O.I.R. TO PARE THAT  
18 DOWN TO THE BEST OF OUR ABILITY, WHICH WAS TO ELIMINATE FROM  
19 THAT LIST FOLKS WHO WE -- WHO WERE FOUND ALSO IN THE E.O.I.R.  
20 SYSTEMS, AND SO THAT WOULD REFLECT FOLKS WHO HAD ACTUALLY GONE  
21 THROUGH REMOVAL PROCEEDINGS.

22 AND SO THE PARED DOWN LIST THAT WE HAVE, IT IS  
23 APPROXIMATELY 370 NAMES. AND IT IS WHAT WE -- FROM USING THE  
24 SYSTEMS, THE BEST OF OUR ABILITY, TO IDENTIFY FOLKS WHO HAVE A  
25 REMOVAL ORDER AND DON'T APPEAR TO HAVE BEEN IN THE E.O.I.R.

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1 SYSTEMS. SO THAT, BY PROCESS OF ELIMINATION, ARE LIKELY TO  
2 HAVE A FINAL E.R. ORDER.

3 THE NEXT STEP WOULD BE LIKELY FOR ICE TO THEN SORT  
4 OF TAKE EACH OF THOSE INDIVIDUALLY AND GET THE A-FILE, WHICH  
5 IS A PHYSICAL FILE THAT HAS TO BE LOCATED FROM WHEREVER IT IS,  
6 AND TAKEN TO WHEREVER IT NEEDS TO BE REVIEWED. AND POSSIBLY  
7 THAT COULD GIVE A LITTLE MORE GRANULARITY TO THAT.

8 THAT CAN BE DIFFICULT BECAUSE ONCE YOU TAKE AN  
9 A-FILE FROM WHERE IT IS OR WHERE IT NEEDS TO BE, IT CAN'T BE  
10 USED FOR WHATEVER PURPOSE. SO IF, FOR EXAMPLE, THERE IS A  
11 BENEFITS APPLICATION BEING PROCESSED WITH THAT FILE, TAKING IT  
12 AWAY CAN BE PROBLEMATIC AND CAUSE A SLOWDOWN IN THAT PROCESS.

13 SO WHAT WE HAVE DONE, WE BELIEVE, IS REALLY THE BEST  
14 WAY TO GET THE MOST GRANULARITY ON THAT, WHICH IS THIS 370 WHO  
15 APPEAR TO BE EXPEDITED REMOVAL WITH NO APPARENT INTERACTION  
16 WITH E.O.I.R. AN INDIVIDUAL FILE REMOVE MIGHT YIELD A LITTLE  
17 MORE PARE DOWN OF THAT NUMBER, BUT IT WOULD BE HARDER TO SAY  
18 THE BENEFIT.

19 **THE COURT:** AND THE 370 OR SO, THESE ARE INDIVIDUALS  
20 WHO YOU HAVE ALREADY PROVIDED THE INFORMATION TO PLAINTIFFS'  
21 COUNSEL, OR NOT YET?

22 **MR. STEWART:** I DID -- I BELIEVED WE HAD. I CHECKED  
23 TODAY AND I THINK IN FACT -- A WHILE BACK IN JULY WE PROVIDED  
24 A LIST OF FOLKS WITH FINAL REMOVAL ORDERS. I MISTAKENLY TOLD  
25 MR. BARMAYER THAT IT WAS THAT LIST OF 370. I LOOKED AGAIN,

1 AND I THINK THAT WE HAVE NOT PROVIDED THAT 370 LIST YET. THAT  
2 WAS ACTUALLY DEVELOPED MORE RECENTLY, SO IT IN FACT WOULD BE  
3 MORE USEFUL THAN I HAD ORIGINALLY THOUGHT AS WELL.

4 SO, NO. BUT WE CAN DO SO.

5 **THE COURT:** MR. BARMAYER, THAT LIST, THE 370  
6 INDIVIDUALS, WHICH APPEARS TO BE OVER-INCLUSIVE BUT AT LEAST A  
7 VERY GOOD STARTING POINT. IF THAT LIST IS PROVIDED TO YOU AND  
8 YOU ARE ABLE TO CONTACT THOSE INDIVIDUALS, WOULDN'T THAT  
9 ADDRESS THIS PROBLEM? BECAUSE THEN YOU CAN MEET AND CONFER  
10 WITH THEM, AND IF THEY ARE SUBJECT TO AN EXPEDITED REMOVAL  
11 ORDER THEN ADVISE THEM WITH RESPECT TO THE SETTLEMENT, AND  
12 THEN GET THEIR DETERMINATION ON WHETHER THEY WAIVE OR NOT.

13 **MR. BARMAYER:** IN THEORY, YOUR HONOR -- AND WE HAVE,  
14 AS MS. FABIAN INDICATED, WE HAVE BEEN HAVING ONGOING  
15 DISCUSSIONS ABOUT THIS.

16 I THINK IT WOULD BE VERY HELPFUL FOR US TO CONTINUE  
17 THOSE DISCUSSIONS, FOR US TO GET THAT LIST AND REVIEW IT. AND  
18 THEN WE ALSO HAVE 300-SOMETHING PEOPLE WHO HAVE ALREADY GONE  
19 THROUGH THE SETTLEMENT PROCESS. AND IN TERMS OF US AND  
20 PLAINTIFFS' COUNSEL THINKING ABOUT WHAT THE NEXT STEPS ARE  
21 ADMINISTRATIVELY, I THINK WE WOULD WANT TO TAKE A LOOK AT THE  
22 LIST SO THAT WE CAN TRY TO GET A LEVEL OF COMFORT ON, YOU  
23 KNOW, WHAT IS THE VOLUME OF PEOPLE THAT WE ARE TALKING ABOUT.  
24 YOU KNOW, HOW MANY INDIVIDUALS ARE OUT THERE THAT WE WOULD BE  
25 TRYING TO CONTACT, AND THAT WOULD NEED TO EITHER GET RELIEF BY

1 DEFAULT OR THAT WE WOULD TRY TO GET ELECTIONS FROM.

2 SO, YES, I THINK IF WE GOT THAT LIST WE COULD  
3 CONTINUE THE DISCUSSIONS WITH THE GOVERNMENT AND UPDATE YOUR  
4 HONOR AT THE NEXT STATUS CONFERENCE.

5 **THE COURT:** ALL RIGHT. IT SEEMS TO ME, THEN, THAT  
6 ON THIS MOTION TO ENFORCE, THE MOST PRACTICAL SOLUTION AT THIS  
7 TIME IS TO RESERVE ON THE MOTION. TO SIMPLY ORDER THAT THE  
8 GOVERNMENT PROVIDE THOSE 370 NAMES WITHIN A PERIOD OF TIME,  
9 PERHAPS A WEEK, I WILL GET COUNSEL'S ADVICE ON THAT. ALLOW  
10 THE PARTIES TO MEET AND CONFER, AND AT THE NEXT STATUS REPORT  
11 SEE WHERE WE ARE. IT SEEMS TO ME THIS ISSUE WILL WORK OUT  
12 ONCE THOSE NAMES ARE PROVIDED.

13 **MR. STEWART:** WE WILL PROCEED ACCORDINGLY, YOUR  
14 HONOR.

15 **THE COURT:** MR. STEWART, HOW MUCH TIME DO YOU NEED,  
16 IS A WEEK ENOUGH? IT SEEMS LIKE YOU HAVE THE NAMES ALREADY.

17 **MS. FABIAN:** IT SHOULD BE, YOUR HONOR. MY CONTACT  
18 IS OUT THIS WEEK, BUT IF WE NEED MORE TIME I WILL LET MR.  
19 BARMAYER KNOW ON MONDAY AND WE CAN DISCUSS. THAT SHOULD BE  
20 PLENTY OF TIME.

21 **THE COURT:** FOR PURPOSES --

22 **MR. BEST:** YOUR HONOR.

23 **THE COURT:** YES.

24 **MR. BEST:** THIS IS MR. BEST FOR THE MMM PLAINTIFFS.  
25 WE JUST WANT TO PUT ONE MARKER DOWN REAL QUICK.

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1 I DO THINK THAT THE LIST OF 370 NAMES IS A KEY PART  
2 OF THIS AND WILL HELP TO MOVE THIS ISSUE FORWARD. I THINK THE  
3 OTHER KEY PART IS SOMETHING THAT MR. STEWART IDENTIFIED AT THE  
4 BEGINNING, WHICH IS THERE HAS TO BE SOME SORT OF FAILSAFE IN  
5 PLACE IN ICE'S SYSTEM TO MAKE SURE THAT THESE INDIVIDUALS ARE  
6 FLAGGED AND WON'T BE REMOVED, EVEN IF WE ARE NOT ABLE TO REACH  
7 THEM USING THE CONTACT INFORMATION THAT WE HAVE.

8 **THE COURT:** YES.

9 **MR. BEST:** SO IT SEEMS LIKE SORT OF A TWO-PRONGED  
10 STRATEGY, IN MY MIND. WE HAVE THE LIST OF NAMES, BUT ALSO  
11 THAT FAILSAFE IN ICE'S SYSTEM THAT MAKES SURE THAT NOBODY IS  
12 GOING TO BE REMOVED UNTIL WE AT LEAST HAVE A CHANCE TO TALK TO  
13 THEM. AND I JUST WANT TO MAKE SURE THAT THAT IS SOMETHING  
14 THAT THE GOVERNMENT IS GOING TO BE IMPLEMENTING AS WELL.

15 **MR. STEWART:** YOUR HONOR, WE WILL CONFIRM THAT ICE  
16 HAS THE PROCESS IN PLACE.

17 SOMETHING I NEED TO BE A LITTLE BIT CLEAR ABOUT IS  
18 THAT WE, THE GOVERNMENT, WE CANNOT GUARANTEE PERFECTION IN OUR  
19 SYSTEMS. THE BEST WE CAN DO IS GOOD FAITH EFFORT TO DO THE  
20 RIGHT PROCESSES TO MAKE SURE WE GET THE RESULT THAT IS AGREED  
21 UPON OR ORDERED, AS THE CASE MAY BE.

22 THIS HAS COME UP A NUMBER OF TIMES IN THE BACK AND  
23 FORTH WITH MY FELLOW COUNSEL. WE WILL LET ICE KNOW TO MAKE  
24 SURE TO FIND THE APPROPRIATE FOLKS AND TO TAKE THE APPROPRIATE  
25 STEPS. I JUST CANNOT GUARANTEE PERFECTION, AND CAN ONLY SAY

1 IF THERE IS A FAILURE FOR WHATEVER REASON WE WILL TAKE  
2 APPROPRIATE STEPS AT THAT TIME.

3 BUT I WANT TO RESPECTFULLY REJECT ANY SUGGESTION  
4 THAT ANY FAILURE WOULD BE NECESSARILY A SIGN OF BAD FAITH. WE  
5 WILL DO OUR BEST. WE WILL ISSUE THE DIRECTIVES TO OUR CLIENT  
6 AGENCIES, AND WE WILL PROCEED TO WORK ACCORDINGLY, YOUR HONOR.

7 **THE COURT:** SO WOULD THE GOVERNMENT OBJECT TO AN  
8 ORDER TODAY THAT THE LIST OF APPROXIMATELY 370 INDIVIDUALS,  
9 THEIR NAMES AND CONTACT INFORMATION, BE PROVIDED TO  
10 PLAINTIFFS' COUNSEL WITHIN A WEEK FROM TODAY. AND THAT  
11 COUNSEL WILL NOTIFY ICE THAT THESE INDIVIDUALS ARE NOT TO BE  
12 REMOVED PENDING EITHER FURTHER COURT ORDER OR THE SETTLEMENT  
13 PROCESS WORKING THROUGH. SOME LANGUAGE TO ENSURE THAT THESE  
14 INDIVIDUALS ARE NOT BEING REMOVED.

15 **MR. STEWART:** YOUR HONOR, I GUESS I DON'T REALLY  
16 UNDERSTAND WHAT THE NEED FOR THE ORDER WOULD BE. BECAUSE THE  
17 PARTIES SEEM TO AGREE THAT IF SOMEBODY IS A CLASS -- IS A  
18 SETTLEMENT CLASS MEMBER THEY GET TO CHOOSE WHETHER TO HAVE THE  
19 PROCEDURES OR NOT, AND THEN KIND OF GO FROM THERE. SO I THINK  
20 IT IS ALREADY COVERED.

21 I BELIEVE YOUR HONOR'S DIRECTION SO FAR AND GUIDANCE  
22 ABOUT, PRODUCE THIS LIST OF 370, CONTINUE TO MEET AND CONFER.  
23 THE GOVERNMENT SAYS WE WILL GO BACK AND MAKE SURE THAT ICE HAS  
24 THIS DIRECTIVE.

25 I THINK THAT COVERS IT, AND I THINK THE EXISTING

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1 ORDERS COVER IT.

2 **THE COURT:** YOUR POSITION WOULD BE UNDER THE  
3 SETTLEMENT AGREEMENT AND THE PRIOR ORDERS IT IS CLEAR THAT  
4 INDIVIDUALS SUBJECT TO EXPEDITED REMOVAL WOULD NOT BE REMOVED  
5 UNTIL THEY MAKE A DETERMINATION WHETHER TO PURSUE THE  
6 SETTLEMENT PROCEDURES OR NOT.

7 **MR. STEWART:** I BELIEVE THAT IS RIGHT. FOR  
8 SETTLEMENT CLASS MEMBERS WHO FIT IN THAT CATEGORY.

9 **THE COURT:** YES.

10 **MR. STEWART:** THAT'S RIGHT. THEY WOULD NEED TO MAKE  
11 AN ELECTION BEFORE THAT WOULD -- THEY WOULD BE REMOVED.

12 **THE COURT:** ALL RIGHT.

13 **MR. BARMAYER:** YOUR HONOR, THIS IS MR. BARMAYER  
14 AGAIN.

15 THIS IS A LITTLE BIT WHY THE BRIEFS ARE LIKE SHIPS  
16 PASSING IN THE NIGHT. BECAUSE I THOUGHT I UNDERSTOOD MR.  
17 STEWART CONFIRM EARLIER THAT THERE WAS A PROCESS IN PLACE TO  
18 FLAG THE CLASS MEMBERS TO MAKE SURE THAT IF THEY WERE PICKED  
19 UP BY ICE THAT THERE WOULD BE A FLAG TO SAY, OH, WAIT, THIS  
20 PERSON NEEDS A SETTLEMENT PROCESS BEFORE THEY ARE REMOVED, AS  
21 I AM SURE THERE IS FLAGS FOR A NUMBER OF REASONS.

22 IS THAT PROCESS IN PLACE, AND IF NOT WILL IT BE PUT  
23 IN PLACE?

24 **MR. STEWART:** MY RESPONSE IS THAT EVEN AFTER I  
25 ALREADY EXPLAINED THAT, MR. BEST FLAGGED A CONCERN. MY

1 RESPONSE TO MR. BEST FLAGGING THAT CONCERN WAS FOR ME TO SAY,  
2 I WILL GO BACK AND MAKE THIS DOUBLY CLEAR -- OR WE WILL GO  
3 BACK AND MAKE THIS DOUBLY CLEAR TO OUR CLIENT TO FLAG  
4 APPROPRIATELY AND GET THIS DONE.

5 THAT IS SIMPLY WHAT I WAS SAYING WAS THE CONCERN WAS  
6 RAISED ANEW, I WANTED TO MAKE SURE I WAS CLEAR WE WILL ADDRESS  
7 THAT.

8 **THE COURT:** I THINK WHAT I WILL DO IS ISSUE AN ORDER  
9 PROVIDING THAT THESE NAMES, THE 370 OR SO, WILL BE IDENTIFIED  
10 WITH CONTACT INFORMATION, AND PRODUCED TO PLAINTIFFS' COUNSEL  
11 BY A WEEK FROM TODAY.

12 I WILL ALSO ADD LANGUAGE, WHICH IS ALREADY IN PLACE,  
13 BUT JUST TO MAKE CLEAR TO ICE, THAT THEY ARE NOT TO REMOVE, SO  
14 THEY NEED TO FLAG AND IDENTIFY INDIVIDUALS WHO MAY BE CLASS  
15 MEMBERS AND SUBJECT TO THE SETTLEMENT PROCEDURES, THAT THEY  
16 ARE NOT TO BE REMOVED PENDING AN ELECTION TO WAIVE THE  
17 SETTLEMENT PROCEDURES OR EXHAUSTING THE SETTLEMENT PROCEDURES.

18 I THINK THAT IS THE BEST WE CAN DO. AND OBVIOUSLY  
19 THIS ALL ASSUMES GOOD FAITH ON THE PART OF THE ICE OFFICIALS  
20 AND PEOPLE ON THE GROUND IMPLEMENTING THE SETTLEMENT AGREEMENT  
21 AND THE COURT'S ORDERS.

22 **MS. FABIAN:** I JUST WANT TO CLARIFY ONE POINT ON THE  
23 DATA THAT WILL BE PRODUCED, BECAUSE IT IS THE LIST OF NAMES OF  
24 THE 370. AND THEN SEPARATELY WE HAVE ALREADY PROVIDED CONTACT  
25 KICKBACK INFORMATION FOR ALL SETTLEMENT CLASS MEMBERS THAT WE

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1 HAVE. AND I HAVE INFORMED MR. BARMEYER THAT FOR RELATED  
2 REASONS WE ARE DEVELOPING ANY UPDATES TO THAT CONTACT  
3 INFORMATION LIST, AND THAT WE WOULD PROVIDE THEM WITH THE  
4 UPDATES TO THE EXTENT THAT THAT IS NEW INFORMATION. THERE MAY  
5 NOT BE ANY NEW INFORMATION. THAT IS ALL THE CONTACT  
6 INFORMATION WE HAVE IN OUR POSSESSION. SO THAT IS WHAT WE  
7 WILL PROVIDE.

8 **THE COURT:** THANK YOU.

9 LET'S TURN TO THE MS. L. MOTION TO CLARIFY THE SCOPE  
10 OF THE CLASS, AND HERE IT IS TO INCLUDE PARENTS WHOSE  
11 SEPARATED CHILDREN WERE RELEASED FROM O.R.R. CARE AND CUSTODY  
12 BEFORE JUNE 26, 2018.

13 AND, TO START, IT SEEMED THAT THE MOTION WAS FOCUSED  
14 ON SIMPLY THAT, CLARIFYING THE SCOPE OF THE CLASS. MUCH OF  
15 THE OPPOSITION SEEMED TO FOCUS ON THE REUNIFICATION ISSUE, BUT  
16 IT SEEMS TO ME THAT REUNIFICATION IS A REMEDY. GIVEN THE  
17 PLAINTIFFS' ALLEGATIONS AND THE COURT'S DETERMINATION ON THE  
18 PRELIMINARY INJUNCTION ORDER OF A LIKELIHOOD OF SUCCESS, THE  
19 REMEDY WAS REUNIFICATION. THE ALLEGED WRONG IS THE GOVERNMENT  
20 CONDUCT OF SEPARATING FAMILIES AS A MATTER OF POLICY.

21 SO AS I UNDERSTAND THE PLAINTIFFS' MOTION, THEY  
22 FIRST WANT TO CLARIFY THE SCOPE OF THE CLASS BASED ON THE  
23 OVERARCHING ALLEGATION THAT THE GOVERNMENT UNLAWFULLY  
24 SEPARATES FAMILIES AT THE BORDER WHEN THEY DO SO WITHOUT  
25 MAKING DETERMINATIONS BASED ON DANGER OR FITNESS. THAT'S THE

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1 ESSENCE OF IT.

2 AND THAT CLASS, AS THE PLAINTIFFS WOULD LIKE IT  
3 DEFINED, IT SEEMS TO ME WOULD LOGICALLY START WHEN THIS POLICY  
4 WAS INITIALLY IMPLEMENTED. AND THE PLAINTIFFS ARGUE, AND THE  
5 I.G. IN ITS REPORT, INDICATES THAT THAT MAY GO BACK TO JULY OF  
6 2017.

7 SO THAT WOULD BE -- THE SCOPE OF THE CLASS WOULD BE  
8 TETHERED TO WHAT THE LEGAL ISSUE IS. AND THEN REUNIFICATION,  
9 IT SEEMS TO ME, IS ONE OF THE REMEDIES AVAILABLE, ASSUMING A  
10 LEGAL WRONG.

11 SO I UNDERSTAND THAT MUCH OF THE OPPOSITION WAS ON  
12 THE ASPECT OF, IF THE COURT ORDERS THIS THEN WE ARE TALKING  
13 ABOUT POTENTIALLY SEVERAL MORE THOUSAND CHILDREN, AND THIS IS  
14 VERY, VERY BURDENSOME. AND REUNIFICATION MAY NOT BE  
15 APPROPRIATE, IN ANY EVENT, FOR MANY OF THESE CHILDREN BECAUSE  
16 THEY HAVE ALREADY BEEN SPONSORED OUT. AND AS COMMANDER WHITE  
17 AND OTHERS HAVE SAID, TAKING THESE CHILDREN AWAY FROM THEIR  
18 SPONSORED FAMILIES AND REUNIFYING THEM CAN BE MORE HARMFUL.

19 BUT ISN'T THAT -- THAT'S AN ISSUE THAT RELATES TO  
20 THE REMEDY AND THAT IS A SECONDARY ISSUE TO THE FOCUS OF THE  
21 MOTION.

22 **MR. STEWART:** I DON'T THINK SO, YOUR HONOR, FOR A  
23 NUMBER OF REASONS.

24 ONE IS THAT WHAT WE ARE TALKING ABOUT HERE IS THE  
25 REQUIREMENTS -- IN PART OF THE REQUIREMENTS OF RULE 23, THE

1 INDIVIDUALIZED NATURE OF THE INQUIRIES.

2 AS WE HAVE TRIED TO EMPHASIZE IN OUR MOTION, FOLKS  
3 WHO ARE ALREADY RELEASED TO SPONSORS, FOLKS WHO WERE RELEASED  
4 BEFORE -- WHO ARE NO LONGER IN O.R.R. CARE PRESENT HIGHLY  
5 INDIVIDUALIZED DIFFERENT CIRCUMSTANCES.

6 WE ACTUALLY DON'T REALLY KNOW A WHOLE LOT ABOUT WHAT  
7 PARENTS WHO WANT REUNIFICATION IN THOSE CASES LOOK LIKE  
8 BECAUSE TO OUR KNOWLEDGE THE PLAINTIFFS HAVE NEVER IDENTIFIED  
9 A PARENT WHO HAS A CHILD WHO WAS SEPARATED BEFORE THE  
10 PRELIMINARY INJUNCTION WAS ENTERED WHO WAS SEEKING TO REUNIFY  
11 WITH THAT CHILD. I AM JUST NOT AWARE OF SEEING THAT. SO  
12 THERE ARE THESE IDENTIFIED NATURE OF THE CLAIMS.

13 I THINK ANOTHER POINT THAT YOUR HONOR REALLY  
14 EMPHASIZED IN -- AT DIFFERENT POINTS IN THE PRELIMINARY  
15 INJUNCTION, CLASS CERTIFICATION ORDERS IS THAT A BIG ELEMENT  
16 OF THE CASE HERE IS NOT JUST THE SEPARATION BUT THE CONTINUING  
17 SEPARATION OR THE FAILURE TO REUNIFY BY PRODUCING AND BRINGING  
18 THE PARENT AND CHILD BACK TOGETHER.

19 AGAIN, WE JUST DON'T HAVE THAT SITUATION WHEN WE  
20 HAVE A CHILD WHO IS OUT OF -- WHO IS OUT OF O.R.R. CARE. YOU  
21 DON'T HAVE THE GOVERNMENT -- A GOVERNMENT CREATED BARRIER TO  
22 REUNIFICATION IN THE SAME WAY. YOU DON'T HAVE CUSTODY OF THE  
23 SORT THAT SOMEBODY COULD REASONABLY CLAIM THAT THE GOVERNMENT  
24 HAS AN AFFIRMATIVE OBLIGATION, OR JUST A PRACTICAL MEANS TO  
25 STABLY AND EFFECTIVELY REUNIFY.

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1           SO I THINK THESE GO TO INDIVIDUALIZED INQUIRIES THAT  
2 GO TO THE HEART OF SOME OF THE RULE 23 PREREQUISITES  
3 THEMSELVES. IT WASN'T REALLY SOMETHING THAT -- IT WASN'T  
4 SOMETHING THAT HAS BEEN PART OF THE CASE UNTIL THE ATTEMPT TO  
5 MAKE IT PART OF THE CASE NOW.

6           AND I THINK IT REALLY IS A QUESTION OF LIABILITY AS  
7 WELL JUST SAYING, LIKE, WHAT ELSE IS THE LEGAL VIOLATION HERE  
8 IF PEOPLE HAVE BEEN REUNIFIED OR IF THEY DON'T WANT TO BE  
9 REUNIFIED OR IF THERE IS NO EXISTING PROBLEM OR IF SOMEBODY IS  
10 RELEASED TO A FAMILY MEMBER AND THAT -- SO I WOULD EMPHASIZE  
11 JUST -- CERTAINLY NOT ALL OF THE POINTS I WANTED TO PRESENT  
12 YOUR HONOR ON OTHER ISSUES, BUT IN RESPONSE TO YOUR QUESTION I  
13 WOULD HIT THOSE POINTS.

14           **THE COURT:** THIS MOTION TO CLARIFY THE SCOPE OF THE  
15 CLASS, THOUGH, AS I READ IT, FOCUSES ON THE OVERARCHING  
16 ALLEGATION OF THE UNLAWFUL SEPARATION. AND IF THAT'S THE  
17 FOCUS AND THAT'S THE LEGAL QUESTION AT ISSUE, SHOULDN'T THE  
18 CLASS INCLUDE EVERYONE WHO HAS BEEN ALLEGEDLY UNLAWFULLY  
19 SEPARATED? WHY WOULD IT BE TETHERED TO AN ARBITRARY DATE OF  
20 JUNE 26, 2018? IN OTHER WORDS, IF PLAINTIFFS HAVE SHOWN A  
21 LIKELIHOOD OF SUCCESS, WHICH THE COURT HAS FOUND THAT THEY  
22 HAVE, ISN'T IT IMPORTANT TO THE PROCESS TO HAVE AN ACCOUNTING?

23           THAT'S COMPLETELY SEPARATE FROM A REMEDY OF  
24 REUNIFICATION, BUT SIMPLY TO HAVE AN ACCOUNTING OF WHAT  
25 HAPPENED, TO WHOM, HOW MANY ARE INVOLVED, AND WHERE ARE THEY?

1           **MR. STEWART:** AGAIN, I DON'T THINK SO, YOUR HONOR.  
2 IT IS JUST NOT PART OF THIS LAWSUIT.

3           I WOULD EMPHASIZE THAT IT IS A DIFFERENT WRONG THAT  
4 WOULD BE -- OR A DIFFERENT ALLEGED WRONG FOR FOLKS WHO HAVE  
5 ALREADY BEEN RELEASED TO SPONSORS OR ARE CAPABLE OF JUST  
6 INFORMAL REUNIFICATION OR MAY HAVE OTHER REMEDIES.

7           THIS CASE HAS REALLY BEEN ABOUT -- AND I THINK THE  
8 ORDERS ARE PRETTY CLEAR ABOUT WHAT THE CASE IS ABOUT, AND THAT  
9 IS REUNIFYING CASES WHERE O.R.R. HAS CUSTODY AND CAN ELIMINATE  
10 THE GOVERNMENT IMPEDIMENT.

11           TO THE EXTENT THAT THE PLAINTIFFS WOULD WANT MORE  
12 INFORMATION ABOUT THESE OTHER CLASSES OR SOME SET OF  
13 PLAINTIFFS WOULD WANT THAT, IT SEEMS TO ME THAT THE  
14 APPROPRIATE APPROACH TO THAT WOULD BE TO FIND -- FOR LAWYERS  
15 TO FIND THOSE ACTUAL PLAINTIFFS, FILE A SUIT MAKING THE  
16 RELEVANT ALLEGATIONS, AND SAYING, THIS IS WHAT WE PROPOSE AS A  
17 REMEDY, THIS IS THE WRONG.

18           I THINK IT IS JUST DIFFERENT IN KIND. AND I DO  
19 THINK THERE ARE REAL CONCERNS THAT WE JUST DON'T HAVE THAT SET  
20 OF PLAINTIFFS, THAT SET OF ALLEGATIONS ABOUT THE NEED FOR  
21 INFORMATION. THIS IS SOMETHING THAT AROSE ONLY VERY, VERY  
22 RECENTLY.

23           AND THAT WOULD BE SOME OF THE POINTS I WOULD WANT TO  
24 EMPHASIZE ON THAT, YOUR HONOR.

25           **THE COURT:** WHEN THE PRELIMINARY INJUNCTION ORDER

1 WAS ISSUED IN JUNE OF 2018, AT THAT TIME THERE WAS INFORMATION  
2 THAT WAS NOT KNOWN TO THE COURT, TO GOVERNMENT COUNSEL, AND TO  
3 PLAINTIFFS' COUNSEL, IT WOULD APPEAR. MUCH MORE IS KNOWN NOW  
4 THROUGH THE BENEFIT OF THE I.G. INVESTIGATION AND  
5 INVESTIGATIVE REPORTING. A LOT HAS COME TO LIGHT THAT IS NO  
6 LONGER DEBATED AND IS NOT IN QUESTION.

7 SO, FOR EXAMPLE, ONE OF THE POINTS THAT WAS ARGUED,  
8 IN GOOD FAITH, BY GOVERNMENT COUNSEL, MS. FABIAN SPECIFICALLY,  
9 IT WAS ON MAY 4, 2018, PRIOR TO THE ATTORNEY GENERAL  
10 ANNOUNCING FORMALLY THE ZERO TOLERANCE POLICY AND PRIOR TO THE  
11 COURT'S ISSUANCE OF THE MOTION ON THE ORDER ON THE MOTION TO  
12 DISMISS, WHICH OCCURRED ON JUNE 6. THE ARGUMENT ON THE MOTION  
13 TO DISMISS IN OPPOSITION THE GOVERNMENT SAID TO THE COURT'S  
14 QUESTION, WHICH WAS: IS THERE A POLICY OR IS THERE NOT SUCH A  
15 POLICY OR PRACTICE WITH RESPECT TO FAMILY SEPARATION?

16 AND THE ANSWER WAS: THERE IS NO -- THERE IS NOT  
17 SUCH A POLICY. WHETHER THERE IS A PRACTICE OF SEPARATION,  
18 THERE IS NOT.

19 THAT WAS THE GOVERNMENT'S RESPONSE, AND I ACCEPT  
20 THAT THAT RESPONSE WAS MADE IN GOOD FAITH. BUT THEREAFTER  
21 MUCH CAME TO LIGHT, INCLUDING THE ATTORNEY GENERAL'S FORMAL  
22 ANNOUNCEMENT OF A ZERO TOLERANCE POLICY WHICH OCCURRED A FEW  
23 DAYS LATER, I THINK ON MAY 7.

24 ALSO WHAT APPEARS TO BE UNKNOWN BY EVERYONE HERE,  
25 INCLUDING PLAINTIFFS' COUNSEL, WAS THAT O.R.R. HAD A

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1 TREMENDOUS SPIKE IN THE NUMBER OF UNACCOMPANIED CHILDREN BEING  
2 DELIVERED TO THEM FAR BEFORE THE LAWSUIT WAS FILED, AND THAT  
3 O.R.R. WAS SPONSORING OUT THESE CHILDREN UNDER THE TVPRA.

4 AND SO WHEN THE COURT ASKED PLAINTIFFS' COUNSEL, MR.  
5 GELERNT, SPECIFICALLY TO PUT IN WRITING WHAT IT IS THE  
6 PLAINTIFFS WANT, WHAT RELIEF THEY WANT, THEY APPROPRIATELY  
7 IDENTIFIED ALL CHILDREN WHO WERE IN O.R.R. CUSTODY BECAUSE I  
8 THINK EVERYONE WAS ASSUMING AT THAT TIME THAT ALL SEPARATED  
9 CHILDREN WERE IN O.R.R. CUSTODY.

10 WHAT WE DID NOT KNOW IS THAT APPARENTLY A VERY  
11 SIGNIFICANT NUMBER OF CHILDREN WERE SEPARATED FROM THEIR  
12 PARENTS, PUT IN O.R.R. CUSTODY, AND THEN DELIVERED OUT,  
13 SPONSORED OUT, PRIOR TO JUNE 26.

14 SO VIEWED IN THAT LIGHT -- AND I DON'T THINK THERE  
15 IS ANY DISPUTE ABOUT THAT, THOSE FACTS. BUT VIEWED IN THAT  
16 LIGHT THE JUNE 26 DATE BECOMES VERY ARBITRARY. AND HOW WOULD  
17 IT MAKE SENSE TO TETHER A CLASS DEFINITION TO THAT DATE IN  
18 LIGHT OF THESE FACTS?

19 **MR. STEWART:** YOUR HONOR, I THINK THAT THAT WOULD  
20 HAVE BEEN KNOWN TO THE PLAINTIFFS AND THE PARTIES THAT THE  
21 TVPRA PROCESS WOULD HAVE BEEN THE PROCESS THAT WAS USED IN  
22 PLACE. THAT WAS, I THINK, PART OF WHAT YOUR PRELIMINARY  
23 INJUNCTION AND EFFORTS TO IMPLEMENT THAT PRELIMINARY  
24 INJUNCTION WERE AIMED AT ADDRESSING, WHICH WAS THE CONCERN  
25 THAT THE TVPRA PROCESS WAS NOT THE APT ONE TO USE WHEN A CHILD

1 IS SEPARATED FROM A POTENTIAL PARENT AT THE BORDER.

2 SO I THINK THAT WAS UNDERSTOOD, OR REASONABLY  
3 INFERABLE. I THINK BECAUSE ORIGINALLY THE GOVERNMENT WAS --  
4 EMPHASIZED A LOT, LOOK, YOU KNOW, WE CAN'T REALLY -- IT WOULD  
5 BE VERY HARD TO COMPLY WITH THE COURT'S PRELIMINARY INJUNCTION  
6 DEADLINES BY USING THE TVPRA.

7 AND THE COURT SAID, LOOK, THE TVPRA ISN'T REALLY THE  
8 ONE THAT APPLIES HERE, IT IS A MORE STREAMLINED PROCESS  
9 ADAPTED TO THE CIRCUMSTANCES WE HAVE.

10 SO I THINK THAT'S -- I WOULD SAY THAT THERE  
11 REALLY -- IT WASN'T THIS KIND OF UNKNOWN OR NECESSARILY  
12 SURPRISING THING. I MEAN, I BELIEVE SOME OF THE COURT'S  
13 ORDERS AT THE TIME JUST RECOGNIZED THAT, LOOK, YOU KNOW,  
14 SEPARATION IS NORMALLY REQUIRED WHEN THERE IS A CRIMINAL  
15 PROSECUTION OF A PARENT. THAT SORT OF THING HAS BEEN GOING ON  
16 FOR SOME TIME, SO IT WOULD BE EXPECTED THAT THERE WERE SOME  
17 SEPARATIONS.

18 AGAIN OUR INSTINCT WAS TO -- THE INSTINCT WAS TO USE  
19 THE TVPRA PROCESS AND THAT WAS -- WE CHANGED COURSE TO COMPLY  
20 WITH THE PRELIMINARY INJUNCTION ORDER AND TO MOVE QUICKLY.

21 BUT THOSE ARE -- I WOULD SAY THAT IT WAS NOT  
22 ARBITRARY BUT I THINK RIGHTLY UNDERSTOOD THAT THE -- OR  
23 RIGHTLY ACCOUNTED FOR THE FACT THAT THE FOCUS WAS GOING TO BE  
24 ON CHILDREN IN O.R.R. CUSTODY BECAUSE THOSE WERE THE ONES WHO  
25 HAD A BARRIER OR A DIFFICULTY TO REUNIFICATION, YOUR HONOR.

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1           **THE COURT:** ALL RIGHT.

2           MR. GELERNT, AS I UNDERSTAND THE REQUEST IT IS TO  
3 CLARIFY THE SCOPE OF THE CLASS, AS WE HAVE BEEN DISCUSSING, TO  
4 ENLARGE IT TO INCLUDE ALL INDIVIDUALS, ALL PARENTS WHO WERE  
5 SEPARATED FROM THEIR CHILDREN UNDER THIS POLICY, WHICH NOW  
6 APPEARS TO DATE BACK TO EL PASO, TEXAS IN JULY OF 2017, TO  
7 START THERE.

8           **MR. GELERNT:** THAT'S CORRECT, YOUR HONOR.

9           I AM NOT SURE I HAVE THAT MUCH TO ADD TO WHAT YOU  
10 SAID. I THINK YOU HAVE CORRECTLY SUMMARIZED OUR POSITION IS  
11 THAT WE WOULD ASK FOR AN ORDER TODAY THAT THEY ARE PART OF THE  
12 CLASS. THEN I THINK WHAT WE WOULD DO, CONSISTENT WITH HOW YOU  
13 HAVE RUN THE CASE, IS WE WOULD SIT DOWN WITH THE GOVERNMENT  
14 AND SAY, WELL, WHAT'S THE MOST EFFICIENT WAY TO FIND THESE  
15 INDIVIDUALS.

16           AND MANY OF THEM MAY SAY, WE DON'T WANT TO BE  
17 REUNIFIED. BUT, AS YOUR HONOR, KNOWS, THAT WAS TRUE OF THE  
18 400 PARENTS WHO WERE DEPORTED WITHOUT THEIR KIDS. SOME  
19 POTENTIALLY THROUGH SELF-HELP COULD HAVE BEEN REUNIFIED, MANY  
20 OTHERS WILL NOT.

21           BUT THAT IS EXACTLY RIGHT, YOUR HONOR. WE BELIEVE  
22 THAT THE REMEDY THEN CAN BE DISCUSSED. WE COULD COME BACK TO  
23 YOUR HONOR AND SAY, WE ARE HAVING SOME TROUBLES, I THINK.

24           BUT THE KEY IS, THESE ARE PART OF THE CLASS. AND I  
25 THINK THAT IS WHAT COMMANDER WHITE HAS ESSENTIALLY SAID IN HIS

1 TESTIMONY BEFORE CONGRESS RECENTLY. THE ONLY REASON THE  
2 2700-PLUS WERE REUNIFIED INITIALLY WAS BECAUSE THIS COURT  
3 CREATED A PATHWAY AND REQUIRED THE AGENCIES TO WORK TOGETHER.

4 AND SO THAT IS WHAT WE WOULD SAY, IS WE WOULD GO  
5 BACK THEN TO THE GOVERNMENT AND TALK ABOUT REMEDIES.

6 AND, AS YOUR HONOR KNOWS, WE CREATED A STEERING  
7 COMMITTEE FOR THE 400 DEPORTED PARENTS. WE ARE PREPARED TO  
8 CREATE ANOTHER STEERING COMMITTEE AND TAKE ON AN ENORMOUS  
9 BURDEN. BUT THERE IS NO WAY, WITHOUT THE INFORMATION, AT  
10 LEAST SOME INFORMATION FROM THE GOVERNMENT, WE CAN BEGIN TO DO  
11 THAT.

12 THE ONLY OTHER POINT I WOULD JUST EMPHASIZE IS THAT  
13 JUST BECAUSE THE KIDS ARE OUT OF O.R.R. CUSTODY, I THINK THE  
14 GOVERNMENT IS IMPLYING THAT, WELL, NOW THEY CAN ALL JUST  
15 REUNIFY ON THEIR OWN.

16 I THINK, AS THE COURT KNOWS WITH THE 400 PARENTS  
17 THAT WERE DEPORTED, THERE ARE ENORMOUS BURDENS AND LOGISTICAL  
18 PROBLEMS AND COST ISSUES IN TRYING TO REUNIFY. I MEAN, THE  
19 THOUGHT THAT SOME OF THESE KIDS WHO MAY BE WITH A DISTANT  
20 UNCLE OR NON-FAMILY MEMBER ARE GOING TO HAVE THE MONEY, THE  
21 WHEREWITHAL TO CONTACT SOMEONE. TO CONTACT THEIR PARENT IN AN  
22 INDIGENOUS REGION, CREATE -- FIND TRAVEL DOCUMENTS, PAY FOR A  
23 PLANE.

24 NOT JUST ON THIS SIDE BUT THEN, FOR EXAMPLE, IN  
25 GUATEMALA, GETTING THE INDIGENOUS PARENTS TO GUATEMALA CITY

1 WAS AN ENORMOUS UNDERTAKING BY THE NGO'S. SO WITHOUT THE  
2 NGO'S HELPING WE DON'T SEE ANY WAY THAT ALL OF THESE PARENTS  
3 CAN REUNIFY.

4 NOW, WE KNOW WHERE A FEW OF THE PARENTS ARE, AND SO  
5 THAT -- SO IT IS NOT TRUE THAT THE BURDEN IS ALWAYS GOING TO  
6 BE IN FINDING THE PARENTS, BUT IN CREATING THE  
7 TRANSPORTATIONAL LOGISTICS.

8 BUT I THINK AS YOUR HONOR -- I DON'T WANT TO DWELL  
9 ON THAT BECAUSE I THINK, AS YOUR HONOR HAS CORRECTLY POINTED  
10 OUT, WE ARE TALKING ABOUT LIABILITY HERE, PART OF THE CLASS.  
11 THE VIOLATION WAS THE EXACT SAME. EXACTLY WHAT REMEDY WILL  
12 HAVE TO BE IN PLACE IS SOMETHING WE CAN TALK ABOUT. AS YOUR  
13 HONOR HAS DONE THROUGHOUT THE CASE, THERE HAVE BEEN DIFFERENT  
14 REMEDIES, DIFFERENT DEADLINES FOR DIFFERENT CATEGORIES OF  
15 KIDS.

16 SO I THINK THAT IS THE NEXT STEP. BUT AS FOR TODAY,  
17 WE ARE SIMPLY ASKING FOR THAT ORDER, YOUR HONOR.

18 **THE COURT:** AM I CORRECT IN ASSUMING THAT THE RELIEF  
19 REQUESTED FOR THE PRELIMINARY INJUNCTION ORDER WAS BASED ON  
20 PLAINTIFFS' UNDERSTANDING THAT ALL SEPARATED CHILDREN WERE IN  
21 O.R.R. CUSTODY?

22 **MR. GELERT:** YOUR HONOR, TO BE HONEST, WHEN WE  
23 FILED THE LAWSUIT WE HAD VERY LITTLE UNDERSTANDING OF ANYTHING  
24 THAT WAS GOING ON, MUCH LESS THE SCOPE.

25 I WOULD SAY, MAYBE I AM NAIVE, BUT I WAS SHOCKED TO

1 HEAR THAT THERE WERE THOUSANDS WHO WERE SEPARATED AND RELEASED  
2 FROM O.R.R. BEFORE YOUR HONOR ORDERED. AND THAT THE  
3 GOVERNMENT HAD NEVER GONE PUBLIC WITH THAT AND AT LEAST SAID,  
4 WE DON'T BELIEVE WE HAVE A LEGAL OBLIGATION BUT THE PUBLIC  
5 SHOULD KNOW.

6 AT THE TIME WE DID NOT KNOW EXACTLY HOW THE  
7 GOVERNMENT WAS PROCESSING THE O.R.R. CASES. WE KNEW MAYBE  
8 THAT THEY WERE RELEASING SOME FROM SOME OF THE NAMED  
9 PLAINTIFFS, BUT IT WASN'T CLEAR EXACTLY HOW. IT CERTAINLY  
10 WASN'T CLEAR THE SCOPE OF WHAT WE WERE TALKING ABOUT.

11 SO WHEN WE INITIALLY FILED THIS MOTION TO CLARIFY  
12 WE, AS YOUR HONOR KNOWS, IDENTIFIED EIGHT TO NINE CASES THAT  
13 HAD BEEN BROUGHT TO OUR ATTENTION BY PEOPLE ON THE GROUND, BUT  
14 WE HAD -- I MEAN, WE HAD NO IDEA THAT THERE MAY HAVE BEEN  
15 THOUSANDS WHO WERE PUSHED OUT OF O.R.R. BEFORE YOUR HONOR  
16 RULED. AND THAT THE GOVERNMENT WAS GOING SAY ALL OF THESE  
17 THOUSANDS OF KIDS MAY BE PERMANENTLY ORPHANED NOW.

18 **THE COURT:** SO THE INITIAL REQUEST, THEN, IF THIS  
19 CLASS IS ENLARGED AS YOU REQUESTED, WOULD BE FOR AN  
20 ACCOUNTING.

21 **MR. GELERT:** I THINK AN ACCOUNTING AND  
22 REUNIFICATION, YOUR HONOR.

23 WHAT WE INTEND TO DO IS, WITH THE GOVERNMENT'S  
24 INFORMATION, CONTACT ALL THESE FAMILIES. AND WE ARE GOING TO  
25 PUT TOGETHER ANOTHER STEERING COMMITTEE, AND THERE, MAY NEED

1 TO BE THREE TIMES THE SIZE. BUT WE CANNOT GO BACK INTO THESE  
2 COMMUNITIES AND TELL THE PEOPLE WE ARE NOT GOING TO PUT THE  
3 EFFORT IN TO LOOK FOR THE FAMILIES.

4 AND SOME OF THE FAMILIES WE HOPE HAVE MANAGED TO  
5 REUNIFY ON THEIR OWN. SOME OF THE FAMILIES MAY CHOOSE TO  
6 LEAVE THEIR CHILD IN THE U.S., JUST AS PRIOR FAMILIES HAVE,  
7 BECAUSE OF THE DANGER. BUT I SUSPECT THERE ARE PARENTS WHO  
8 WANT TO GET THEIR CHILDREN BACK AND HAVE NOT BEEN ABLE TO.  
9 AND I THINK AT THAT POINT WE WILL HAVE TO TALK ABOUT  
10 REUNIFICATION.

11 AND THE ONE POINT I WOULD JUST CLARIFY ABOUT WHAT  
12 COMMANDER WHITE SAID, BECAUSE I THINK YOUR HONOR IS RIGHT HIS  
13 AFFIDAVIT SUGGESTED THAT THERE COULD BE TURMOIL BRINGING THE  
14 KID BACK. BUT IN THE HOUSE TESTIMONY HE GAVE ON FEBRUARY 7TH  
15 HE CLARIFIED WHAT HE MEANT BY THAT, AND I THINK IT IS VERY  
16 INSTRUCTIVE. HE SAID IT WOULD BE HARMFUL TO THE CHILD IF ICE  
17 SHOWS UP AT THE SPONSOR'S HOUSE, TAKES THE CHILD AND BRINGS  
18 THEM BACK TO O.R.R. CUSTODY.

19 BUT THERE IS NO REASON THAT NEEDS TO BE DONE. NO  
20 ONE IS TALKING ABOUT THAT. WE ARE TALKING ABOUT CALLING THE  
21 PARENT, AS WE HAVE BEEN DOING FOR THE 400 DEPORTED.  
22 CONTACTING THE CHILD'S LAWYER, SOCIAL WORKER, OR THE SPONSOR,  
23 ASKING WHAT THEY WOULD LIKE TO DO, WHAT IS IN THEIR BEST  
24 INTEREST, AND TRYING TO FIND A WAY TO REUNIFY THEM. BUT UNDER  
25 NO CIRCUMSTANCE WOULD ICE NEED TO SHOW UP AT THE SPONSORS.

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1 I THINK THAT WAS ALL COMMANDER WHITE WAS SAYING.  
2 BECAUSE THIS IS NOT A SITUATION WHERE, AS YOUR HONOR KNOWS, A  
3 PARENT GAVE UP THEIR CHILD THREE DECADES AGO FOR ADOPTION AND  
4 NOW IS JUST SHOWING UP.

5 THESE ARE PARENTS WHO HAD THEIR CHILDREN FORCIBLY  
6 TAKEN IN THE LAST YEAR. I DON'T THINK THAT WE CAN THINK THAT  
7 THERE IS FOUR-YEAR-OLD CHILDREN WHO WON'T WANT TO SEE THEIR  
8 PARENTS NOW.

9 **THE COURT:** AND IS YOUR REQUEST TO BROADEN THE CLASS  
10 DEFINITION TO GO BACK TO JULY OF 2017?

11 **MR. GELERT:** I THINK THAT IS RIGHT, YOUR HONOR.

12 I KNOW THAT THE GOVERNMENT HAS SAID, WELL, THERE IS  
13 ASCERTAINABILITY PROBLEMS. I THINK JULY OF 2017 SEEMS TO BE  
14 NOW. I MEAN, AS YOUR HONOR POINTED OUT, INFORMATION JUST  
15 KEEPS COMING OUT THROUGH INVESTIGATIVE REPORTING AND INTERNAL  
16 REPORTS BY THE GOVERNMENT. THAT SEEMS TO BE WHERE EVERYONE  
17 IS PINPOINTING IT, SO THAT WOULD BE FINE, YOUR HONOR.

18 I MEAN, I WOULD SAY THAT I WOULD BE LOATH TO SAY I  
19 WON'T COME BACK TO YOU IF INTERNAL REPORTS COME OUT THAT  
20 SOMETHING HAPPENED BEFORE THEN, AND IT WAS AN ENORMOUS THING  
21 AND GOVERNMENT HAS BEEN KEEPING THAT A SECRET. BUT RIGHT NOW  
22 THAT WOULD SEEM TO BE THE RELEVANT POINT.

23 **THE COURT:** AND THEN THE INITIAL STEP HAS TO BE AN  
24 ACCOUNTING. HHS HAS TO GO THROUGH THIS VERY LABORIOUS PROCESS  
25 WITH CLOSE TO 47,000 CHILDREN. AND I THINK, IF I AM READING

1 THESE DECLARATIONS CORRECTLY, DO IT MANUALLY.

2 **MR. GELERNT:** YOUR HONOR, LET ME MAKE A COUPLE OF  
3 POINTS ABOUT THAT BECAUSE I THINK YOU ARE READING THE  
4 DECLARATION RIGHT.

5 BUT ONE THING I THINK THAT THE DECLARATION MAY NOT  
6 HAVE BEEN AS EXPLICIT ABOUT BUT CAME OUT AT COMMANDER WHITE'S  
7 TESTIMONY BEFORE THE HOUSE IS THE BURDEN IS SIGNIFICANTLY  
8 LESSENERD IF THIS COURT SAYS ALL THE AGENCIES SHOULD COMPLY.  
9 BECAUSE WHAT COMMANDER WHITE IS SAYING IS WE ONLY HAVE A PIECE  
10 OF THE INFORMATION, WE ARE NOT TOLD WHICH PARENTS ARE  
11 SEPARATED.

12 AND THE AFFIDAVIT WE SUBMITTED WITH OUR REPLY BRIEF  
13 FROM PEOPLE WHO FORMERLY WORKED IN THE GOVERNMENT HAVE SAID  
14 THAT DHS IS SITTING ON INFORMATION THAT WOULD SIGNIFICANTLY  
15 LESSEN THE BURDEN OF HHS.

16 I THINK THAT WAS COMMANDER WHITE'S POINT IS THAT  
17 ULTIMATELY HE CAN CONTROL WHAT HHS DOES TO AN EXTENT, BUT HE  
18 CAN'T ORDER THE OTHER AGENCIES. BUT THIS COURT CREATED A  
19 PATHWAY. SO I THINK WHEN COMMANDER WHITE PUT HIS AFFIDAVIT IN  
20 HE WAS TALKING ABOUT THE BURDEN STRICTLY ON HHS. I THINK  
21 THERE MAY BE WAYS TO SIGNIFICANTLY LESSEN THAT BURDEN IF THE  
22 OTHER AGENCIES WORK.

23 THE OTHER THING I WOULD JUST SAY, WHICH IS NOT  
24 COMMANDER WHITE'S POINT, OF COURSE, BUT I THINK COMES THROUGH  
25 A LITTLE BIT IN THE GOVERNMENT'S BRIEFS, IS IT IS TOO BIG OF

1 BURDEN.

2 I THINK I WOULD HAVE TWO RESPONSES TO THAT. I MEAN,  
3 IN ADDITION TO IF DHS HELPS IT IS GOING TO LESSEN THE BURDEN.

4 ONE IS, I THINK IT IS HARD TO REWARD THE GOVERNMENT  
5 FOR NOT HAVING A TRACKING SYSTEM. AND THAT HAS BEEN ONE OF  
6 YOUR HONOR'S BIGGEST POINTS IN THIS CASE GOING FORWARD IS THAT  
7 THE TRACKING SYSTEM NEEDS TO BE DEVELOPED. AND SO FOR THAT  
8 REASON -- AND THE OTHER REASON I THINK IS JUST, WE ARE  
9 PREPARED, NO MATTER HOW BIG THE BURDEN IS, TO TAKE THAT ON.

10 WE JUST CANNOT GO BACK TO THESE COMMUNITIES AND SAY  
11 WE WERE UNWILLING TO TAKE THE BURDEN OF CALLING THESE 2,000  
12 FAMILIES OR HOWEVER MANY IT TURNS OUT TO BE. SO I THINK  
13 WHATEVER THE BURDEN, I THINK WHEN WE ARE TALKING ABOUT LITTLE  
14 CHILDREN POTENTIALLY BEING PERMANENTLY ORPHANED, I THINK WE  
15 HAVE TO UNDERTAKE THAT BURDEN.

16 **THE COURT:** THE AGENCIES INVOLVED, IF THIS MOTION IS  
17 GRANTED AND AN ACCOUNTING IS ORDERED AS A FIRST STEP, WOULD BE  
18 CBP, ICE, AND HHS, O.R.R.?

19 **MR. GELERT:** THAT IS MY UNDERSTANDING. I THINK  
20 THAT IS RIGHT, YOUR HONOR, AND OUR AFFIDAVIT SPELLS IT OUT,  
21 THE FORM THAT GOVERNMENT WORKS. I THINK THOSE ARE THE THREE  
22 AGENCIES THAT WOULD HAVE THE INFORMATION.

23 I DON'T BELIEVE -- IT IS POSSIBLE SOME OTHER  
24 AGENCIES HAVE SOME INFORMATION, BUT I THINK THOSE ARE THE  
25 THREE AGENCIES THAT COMMANDER WHITE BELIEVES NEED TO WORK



1 TOGETHER.

2 **THE COURT:** AND DO YOU SUGGEST, FOR EXAMPLE, THAT  
3 SOMETHING SIMILAR BE SET UP WHERE COMMANDER WHITE RUNS THE  
4 SHOW, OR WHOEVER THE GOVERNMENT IDENTIFIES. AND THAT HE OR  
5 SHE COORDINATES AMONG THE THREE AGENCIES, PUTS IN PLACE A  
6 PROTOCOL FOR GETTING TO THE BOTTOM OF THIS AND PROVIDING HARD  
7 NUMBERS TO THE PARTIES AND THE COURT AS TO THE NUMBER OF  
8 PARENTS AND CHILDREN WHO WERE SEPARATED?

9 **MR. GELERT:** SO, WITH THE CAVEAT THAT I NEVER WANT  
10 TO PUT A BURDEN ON SOMEONE ELSE. COMMANDER WHITE IS NOT HERE  
11 TO DEFEND HIMSELF. I WOULD SAY THAT WE HAVE A LOT OF TRUST IN  
12 COMMANDER WHITE. THAT PROCESS WORKED WELL. ADVOCATES WHO  
13 DEAL IN THESE ISSUES HAVE LOTS OF TRUST IN COMMANDER WHITE.  
14 SO I DO THINK HE WOULD BE AN IDEAL PERSON BUT, OBVIOUSLY, YOU  
15 KNOW, WE CANNOT DICTATE WHO SPECIFICALLY IT IS.

16 BUT I DO THINK WHEN YOUR HONOR SET UP THAT SYSTEM IN  
17 THE BEGINNING WHERE THERE WAS A POINT PERSON, THINGS MOVED  
18 MUCH SMOOTHER. WITHOUT A POINT PERSON IT CAN BE DONE, BUT I  
19 DO THINK IT WORKS MORE SMOOTHLY WITH THAT.

20 YOU KNOW, I KNOW COMMANDER WHITE HAD SAID AT HIS  
21 HOUSE, IF THE COURT ISSUES AN ORDER AND CREATES A PATHWAY  
22 AGAIN FOR US HE IS MORE THAN HAPPY TO MAKE IT WORK.

23 **THE COURT:** SO, MR. STEWART, IF THIS MOTION IS  
24 GRANTED, WOULDN'T IT MAKE SENSE TO DO THE SAME THING. AND  
25 THAT IS TO START WITH SOMEBODY LIKE COMMANDER WHITE WHO WOULD

1 PROBABLY COME BACK HERE AND TESTIFY OR STATE TO THE COURT, AND  
2 TO THE PARTIES, WHAT HE WOULD LIKE TO DO TO ACCOMPLISH THIS;  
3 IN OTHER WORDS, IDENTIFY A PLAN AND PROVIDE A TIME FRAME IN  
4 WHICH THIS COULD BE ACCOMPLISHED.

5 AND WHAT I AM TALKING ABOUT, AS FAR AS THE END  
6 RESULT, WOULD BE SIMPLY THE ACCOUNTING. WHAT THE NUMBER IS,  
7 IDENTIFYING THESE PARENTS AND CHILDREN, AND THEN PURSUING ANY  
8 RELIEF, WHATEVER THAT MIGHT BE.

9 **MR. STEWART:** YOUR HONOR, IT IS A LITTLE HARD FOR ME  
10 TO ANSWER THAT QUESTION BECAUSE I RESPECTFULLY SUBMIT THAT  
11 GRANTING THIS MOTION DRAMATICALLY CHANGES THE COMPLEXION OF  
12 THIS CASE, FROM THE GOVERNMENT'S PERSPECTIVE.

13 AND I UNDERSTAND THE -- THE DYNAMICS AND THE --  
14 BEHIND IT AND THE THEMES THAT MR. GELERNT HAS PRESSED. BUT I  
15 HAVE TO EMPHASIZE, YOUR HONOR, THAT THE GOVERNMENT, FACED WITH  
16 A CHALLENGING PRELIMINARY INJUNCTION THAT WE OPPOSED  
17 VIGOROUSLY, MADE THE DECISION TO MAKE IT WORK; TO WORK WITH  
18 THE COURT, TO WORK WITH THE PARTIES, TO MARSHAL EXTRAORDINARY  
19 RESOURCES TO ADDRESS THIS DIFFICULT TASK OF REUNIFICATION.

20 WE WERE VERY CLEAR WITH OUR APPROACH. WE WENT THE  
21 EXTRA MILE, WE WENT ABOVE AND BEYOND. WE NEGOTIATED RELIEF  
22 THAT WE -- GIVEN RELIEF TO FOLKS WHO AREN'T ENTITLED TO SQUARE  
23 RELIEF.

24 AND IT IS A REAL CHANGE OF COURSE, RESPECTFULLY,  
25 YOUR HONOR, TO DO ALL THAT, TO PUT ALL THAT COMMITMENT IN, TO

1 HOLD A POTENTIAL APPEAL IN ABEYANCE, TO GRANT ALL SORTS OF  
2 KIND OF THINGS THAT WE NORMALLY WOULDN'T GRANT INSTEAD OF  
3 FIGHTING TOOTH AND NAIL, MAKING IT DIFFICULT. GOING UP AND  
4 DOWN THE -- YOU KNOW, ALL OF THOSE KIND OF OPTIONS, YOUR  
5 HONOR. YOU KNOW, I AM JUST NOT SURE THAT WE CAN KEEP GOING  
6 THAT WAY.

7 IT IS JUST -- IT IS NOT REALLY A BURDEN ISSUE. THE  
8 BURDEN WILL BE VERY SIGNIFICANT IF THIS IS THE PATH THE COURT  
9 GOES DOWN. WE DIDN'T MEAN TO SUGGEST IN ANY WAY THAT DON'T DO  
10 IT JUST BECAUSE IT IS HARD. I MEAN, WE WOULDN'T HAVE BEEN  
11 ABLE TO DO ALL THAT WE HAVE DONE IF THAT WERE OUR APPROACH,  
12 BUT IT WILL BE VERY HARD.

13 WHAT WE ARE SUBMITTING, YOUR HONOR, IS THAT THERE  
14 ARE LIMITS TO THE APPROPRIATE RELIEF THAT CAN BE GRANTED IN A  
15 PARTICULAR CASE. THE COURSE OF DEALING HERE -- AND THIS  
16 COURT'S VERY CLEAR CLASS ORDER AND CLASS DEFINITION SHOWED  
17 THAT SCOPE.

18 WE THINK THAT THE COURT HAS REALLY EMPHASIZED -- YOU  
19 SQUARELY EMPHASIZED, IN ORDERS AND OTHERWISE, ORDERLY  
20 GOVERNANCE, APPROACHES THAT FOLLOW THE LAW. WE HAVE TRIED TO  
21 DO THAT, WE HAVE TRIED TO BE A GOOD PARTNER IN ALL OF THAT AND  
22 HAVE DONE WELL. AND IT IS JUST -- IT IS VERY UNFORTUNATE,  
23 YOUR HONOR, TO HAVE DONE ALL THAT, AND TO HAVE TAKEN THE PATHS  
24 WE HAVE DONE AND TO HAVE FOLKS INVOLVED AT VERY HIGH LEVELS DO  
25 ALL OF THOSE THINGS TO MAKE IT WORK; BASICALLY ON THE EVE OF

1 SUBSTANTIAL COMPLIANCE WITH WHAT WE HAVE ALWAYS IDENTIFIED AS  
2 THE TASK WE ARE DOING, TO BASICALLY HAVE THE TASK BLOWN WIDE  
3 OPEN INTO SOMETHING THAT IS JUST DIFFERENT IN KIND. THAT HAS  
4 HUGE RULE 23(B) (2) PROBLEMS BECAUSE THIS GROUP OF FOLKS WILL  
5 NOT HAVE A COMMON -- IT JUST -- THERE IS JUST NOT A COMMON  
6 REMEDY BETWEEN THIS NEW GROUP WHO WOULD BE ADDED TO THE CLASS  
7 AND THE GROUP THAT WE HAVE BEEN OPERATING ON ALL ALONG.

8 I JUST WANT TO EMPHASIZE THOSE POINTS, YOUR HONOR,  
9 BECAUSE WE HAVE TRIED VERY, VERY HARD TO DO THIS AND TO DO IT  
10 RIGHT, BUT THIS WOULD BE A DRAMATIC CHANGE IN THE CASE. AND  
11 IT IS HARD FOR ME TO JUST SAY, YES, THAT WOULD BE THE APPROACH  
12 TO GO TO, BECAUSE IT JUST -- IT PUTS THE GOVERNMENT IN A VERY,  
13 VERY DIFFICULT JOB.

14 AND I WANT TO EMPHASIZE, YOUR HONOR -- AND YOU CAN  
15 LET ME KNOW IF I AM GOING ON FOR TOO LONG, OF COURSE.

16 BUT WE ARE NOT SAYING THAT THERE IS NO REMEDY HERE,  
17 WE ARE NOT SAYING THAT FOLKS CAN'T BE REUNIFIED; WE ARE SAYING  
18 THAT IT IS JUST NOT PART OF THE CLASS THAT THIS COURT  
19 CERTIFIED, IT IS NOT PART OF THIS CASE.

20 AND THAT IF THIS WERE -- IF THERE ARE FOLKS IN THIS  
21 CATEGORY WHO WANT TO SEEK THIS KIND OF RELIEF, THAT COURTS ARE  
22 AVAILABLE FOR THEM TO DO THAT. INFORMAL CHANNELS ARE  
23 AVAILABLE FOR THEM TO DO THAT. AGAIN, WE STILL HAVE NOT SEEN  
24 AN IDENTIFIED PERSON WHO FALLS IN THIS CATEGORY.

25 AND WE WOULD EMPHASIZE -- I RE-EMPHASIZE ALL OF THE

1 POINTS WE HAVE MADE IN OUR BRIEF, YOUR HONOR. THIS IS IN  
2 KEEPING WITH THE LAW, IT IS IN KEEPING WITH THE TEXT OF YOUR  
3 HONOR'S ORDERS, IT MAKES LOGICAL AND EQUITABLE SENSE. IT IS  
4 CONSISTENT WITH THE COURT OF DEALING. THE GOVERNMENT HAS BEEN  
5 VERY CLEAR ON OUR APPROACH HERE.

6 AND I WOULD JUST EMPHASIZE, YOUR HONOR, THAT YOUR  
7 HONOR HAS PRESIDED OVER A CASE IN A WAY THAT SHOWS HOW A VERY  
8 CHALLENGING ORDER CAN BE IMPLEMENTED WELL AND IMPLEMENTED  
9 EFFECTIVELY, AND THAT THERE IS AN ALTERNATIVE TO A KIND OF  
10 TOOTH-AND-NAIL FIGHT TO EVERYTHING.

11 AND I THINK IF THE PLAINTIFFS ARE ALLOWED, THIS FAR  
12 INTO IMPLEMENTATION, TO FILE A THREE-AND-A-HALF PAGE MOTION  
13 AND BLOW THE CASE INTO SOME OTHER GALAXY OF A TASK, THAT IT  
14 WOULD BE A VERY UNFORTUNATE THING BECAUSE PARTIES WILL KNOW,  
15 WELL, IF IT DIDN'T WORK THERE IT IS NOT GOING TO WORK HERE.

16 WE ARE GOING TO HAVE TO FIGHT TOOTH AND NAIL BECAUSE  
17 IF WE ARE REASONABLE, IF WE ARE AGREEABLE, IF WE ARE SOLUTION  
18 ORIENTED, IF WE KIND OF THINK OUTSIDE THE BOX OF NORMAL  
19 ADVERSARIAL LITIGATION TO GET THINGS DONE; IT STILL WON'T  
20 REALLY HELP US BECAUSE WE WILL COMPLY AND THEN IT WILL GET  
21 EVEN WORSE FOR US, EVEN THOUGH WE HAVE DONE ALL OF THESE  
22 THINGS TO MAKE -- TO CORRECT THE WRONG THAT THE COURT FOUND TO  
23 BE PRESENT.

24 SO, I UNDERSTAND THE VERY HUMAN ELEMENT, YOUR HONOR.  
25 I WANT TO NOT SAY THAT IT IS SOMEHOW JUST A BURDEN THING.

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1 THAT IS JUST A VERY REAL REALITY THAT WE FEEL OBLIGED TO  
2 PRESENT YOUR HONOR WITH AND TO DO SO CAREFULLY.

3 I THINK COMMANDER WHITE IS, YOU KNOW, THE EXPERT ON  
4 HOW BIG OF A TASK IT REALLY IS, AND HE IS WELL AWARE OF  
5 WORKING WITH THE AGENCIES. AND EVEN WITH THOSE REALITIES HE  
6 IDENTIFIED THE BURDENS.

7 BUT I JUST WANT TO EMPHASIZE, YOUR HONOR, THAT THE  
8 THEMES OF ORDERLY GOVERNANCE, OF A LAWFUL, WELL-ADMINISTRATED  
9 IMPLEMENTATION OF A PRELIMINARY INJUNCTION ORDER, THOSE WILL,  
10 IN MY RESPECTFUL VIEW, BE LOST IF THIS MOTION IS GRANTED.

11 IF THE MOTION IS DENIED, THE CASE CAN CONTINUE AND  
12 WILL BE -- YOU KNOW, WE SUSPECT TO HAVE THE EXISTING TASK  
13 COMPLETED SOON. THE LITIGATION CAN CONTINUE. AND THE  
14 REMEDIES THAT THESE ANY -- IF ANY SUCH PLAINTIFFS MAY SEEK  
15 TO -- MAY WANT TO PURSUE WOULD STILL BE AVAILABLE TO THEM,  
16 YOUR HONOR.

17 IN OUR SYSTEM I RESPECTFULLY SUBMIT THAT THAT'S THE  
18 WAY IT SHOULD BE. THAT'S THE RIGHT RESULT. AND IT IS THE ONE  
19 CONSISTENT WITH THE LAW, IT IS THE ONE THAT RESPECTS OUR  
20 STRUCTURE.

21 SO THANK YOU FOR LETTING ME GO ON AND HIT THOSE  
22 POINTS, YOUR HONOR, I JUST WANTED TO EMPHASIZE THOSE.

23 **THE COURT:** I APPRECIATE THAT. THOSE ARE IMPORTANT  
24 CONSIDERATIONS. I HAVE A COUPLE OF OBSERVATIONS.

25 FIRST, IN FAIRNESS TO PLAINTIFFS, THEY, LIKE THE

1 COURT, ONLY HAS THE INFORMATION SECONDHAND. THEY ARE NOT  
2 CLAIRVOYANT. THEY CAN ONLY LEARN ABOUT PIECES OF INFORMATION  
3 IN BITS AND DRABS. AND AS MR. GELERNT POINTS OUT, THERE WERE  
4 EIGHT OR TEN PERSONS WHO SURFACED THAT THEY LEARNED ABOUT THAT  
5 CAUSED THEM TO THINK THAT THIS CLASS NEEDS TO BE ENLARGED TO  
6 CAPTURE EVERYONE.

7 IT IS IMPORTANT TO RECOGNIZE THAT WE ARE TALKING  
8 ABOUT HUMAN BEINGS, EVERY PERSON, AND TO GET AWAY FROM THE  
9 CONCEPT OF STATISTICS OR NUMBERS. THAT EVERY PERSON NEEDS TO  
10 BE ACCOUNTED FOR.

11 AND SO THE PLAINTIFFS ONLY HAD A LITTLE BIT OF  
12 INFORMATION, THESE EIGHT TO TEN PERSONS WHO SURFACED, WHICH  
13 CAUSED THEM TO FILE THIS MOTION. THEREAFTER, THE INSPECTOR  
14 GENERAL WEIGHED IN, THAT'S A VERY SIGNIFICANT EVENT, IN  
15 SEPTEMBER. AND THAT REPORT IS THOROUGH, AND IT IS NOT  
16 CONTROVERTED. I AM NOT HEARING THAT THE REPORT IS INACCURATE  
17 AND WE OUGHT TO ABANDON IT. IT APPEARS TO BE 100 PERCENT  
18 FACTUAL.

19 AND THE REPORT SAYS THIS SEPARATION POLICY STARTED  
20 IN JULY OF 2017. THERE WAS A PILOT PROGRAM IN EL PASO, TEXAS,  
21 AND THERE MAY BE THOUSANDS OF PARENTS AND CHILDREN WHO WERE  
22 SEPARATED. WE SIMPLY DON'T KNOW. WE, THE GOVERNMENT, THE  
23 INSPECTOR GENERAL OF THE DEPARTMENT OF HOMELAND SECURITY, DOES  
24 NOT KNOW WHAT THE NUMBERS ARE BECAUSE THERE WAS NO TRACKING.  
25 THAT'S THE HARSH REALITY.

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1           AND SO I AM NOT BLAMING YOU, MR. STEWART, I AM JUST  
2 STATING FACTS THAT WOULD DEMONSTRATE, I THINK, IRREFUTABLY  
3 THAT THE PLAINTIFFS HAVE BEEN ACTING IN GOOD FAITH AND HAVE  
4 BEEN ACTING AT A TIME WHEN THEY HAVE SOME INFORMATION.

5           AND THEN ONCE THEY ACTED, IT TURNS OUT THAT THIS MAY  
6 ONLY BE THE TIP OF THE ICEBERG. THAT THESE SEVEN, EIGHT,  
7 NINE, TEN INDIVIDUALS MAY BE SIMPLY PART OF A GROUP OF  
8 HUNDREDS OR THOUSANDS.

9           AND THEN I GO BACK TO WHAT IS THE ESSENCE OF THE  
10 LAWSUIT. AND THE VERY FUNDAMENTAL PREMISE OF THE LAWSUIT WAS  
11 THAT THERE IS AN UNLAWFUL SEPARATION PRACTICE INITIATED BY  
12 THIS ADMINISTRATION.

13           THE JUNE 26 DATE IS COMPLETELY ARBITRARY WHEN VIEWED  
14 IN THAT LIGHT, AND IT WAS FIXED BECAUSE THAT'S THE DATE THAT  
15 THE COURT HAPPENED TO ISSUE THE PRELIMINARY INJUNCTION ORDER.  
16 AND IT FOCUSED ON CHILDREN IN O.R.R. CUSTODY BECAUSE THAT'S  
17 THE INFORMATION WE HAD. THAT'S THE INFORMATION THE COURT HAD,  
18 THAT'S WHAT PLAINTIFFS REQUESTED IS THAT THE COURT ORDER  
19 REUNIFICATION AS TO CHILDREN IN O.R.R. CARE AND CUSTODY.

20           NO ONE BUT A FEW IN THE GOVERNMENT KNEW THAT THIS  
21 SEPARATION HAD BEEN GOING ON NINE OR TEN MONTHS BEFORE, AND  
22 THAT HUNDREDS, IF NOT THOUSANDS, OF CHILDREN WERE FLOODING  
23 O.R.R., AND THEN BEING SPONSORED OUT.

24           THE COURT DIDN'T KNOW THAT, AND PLAINTIFFS DIDN'T  
25 KNOW THAT. AND I DON'T THINK GOVERNMENT COUNSEL KNEW THAT,

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1 BASED ON SOME OF THE ARGUMENTS THAT WERE PRESENTED. AND I  
2 HAVE ABSOLUTE TRUST IN GOVERNMENT COUNSEL.

3 THERE IS JUST A LOT GOING ON IN THIS CASE THAT  
4 PEOPLE IN THIS COURTROOM DID NOT KNOW ABOUT BUT HAS NOW  
5 SURFACED. AND THE QUESTION IS WHETHER THE MOTION TO CLARIFY  
6 THE SCOPE OF THE CLASS IS WARRANTED UNDER THESE CIRCUMSTANCES.

7 AND AGAIN I GO BACK TO THE CONCEPT OF THE LAWSUIT.  
8 THE ESSENCE OF IT IS NOT REUNIFICATION, IT IS AN ALLEGATION OF  
9 UNLAWFUL CONDUCT. THE REMEDY CAN COME IN MANY DIFFERENT  
10 FORMS. THE PRINCIPAL REMEDY, OF COURSE, WOULD BE  
11 REUNIFICATION. AND IT JUST MAKES SENSE WHEN YOU HAVE CHILDREN  
12 WHO WERE IN O.R.R. CUSTODY TO REUNIFY THEM.

13 THIS NEXT GROUP PRESENTS PERHAPS DIFFERENT ISSUES AS  
14 FAR AS THE REMEDY, BUT THE OVERARCHING ALLEGED WRONG REMAINS  
15 THE SAME. AND THE TWO LEAD PLAINTIFFS, MS. L. AND MS. C., ARE  
16 REPRESENTATIVE OF THAT SEPARATION PRACTICE, IT SEEMS TO ME.  
17 SO THERE WOULD NOT BE AN ASCERTAINABILITY ISSUE.

18 AND THE NUMBERS THAT ARE INVOLVED MAY BE  
19 SIGNIFICANT, HUNDREDS OR THOUSANDS, BUT THAT IS NOT AN  
20 ASCERTAINABILITY ISSUE EITHER, BECAUSE THEY ARE CERTAINLY  
21 IDENTIFIABLE. IT TAKES A LOT OF WORK, BUT THEY ARE CERTAINLY  
22 IDENTIFIABLE. SO I DON'T SEE AN ASCERTAINABILITY ISSUE.

23 I DON'T SEE A TYPICALITY OR REPRESENTATIVE PROBLEM.  
24 IT SEEMS TO ME MS. L. AND MS. C. ARE REPRESENTATIVE OF THIS  
25 OVERARCHING ALLEGED WRONG.

1           AND YOU HAD MENTIONED THAT THERE WERE (B) (2) ISSUES  
2 WITH BROADENING THIS CLASS, AND SO I WANT TO MAKE SURE THAT WE  
3 HAVE ADDRESSED THEM ALL HERE BEFORE I TAKE THIS UNDER  
4 SUBMISSION.

5           **MR. STEWART:** SURE, YOUR HONOR.

6           I THINK WHEN YOU HAVE CHILDREN IN O.R.R. CUSTODY YOU  
7 CAN ORDER A COMMON REMEDY. IT IS IDENTIFY WHO THESE CHILDREN  
8 ARE, PUT THEM IN CONTACT WITH THEIR PARENTS. ORDER THAT THE  
9 GOVERNMENT, ONCE THE PARENT BECOMES AVAILABLE OR MEMBER OF THE  
10 CLASS AFFIRMATIVELY REUNIFIES THE PERSON. THAT ADDRESSES THE  
11 WRONG OF THE INITIAL SEPARATION AND THE CONTINUING GOVERNMENT  
12 INVOLVEMENT IN ANY CONTINUING SEPARATION.

13           THE PROBLEM HERE IS THAT WE DON'T HAVE THAT REMEDY  
14 ONCE CHILDREN ARE RELEASED TO SPONSORS WHO -- FOR WHOM THERE  
15 HAVE BEEN IMPORTANT DETERMINATIONS MADE ABOUT THE SPONSOR'S  
16 ABILITY, GENERALLY A FAMILY RELATIONSHIP, THAT SORT OF THING.

17           **THE COURT:** BUT CAN'T WE ADDRESS THAT LATER?

18           SO IT SEEMS TO ME IF THIS MOTION IS GRANTED, STEP  
19 ONE, WHICH IS A VERY SIGNIFICANT STEP, WOULD BE THE  
20 ACCOUNTING, WHAT ARE THE NUMBERS. WHO ARE THEY, WHERE ARE  
21 THEY.

22           STEP TWO IS THE REMEDY. AND IT SEEMS TO ME THE  
23 GOVERNMENT'S MOTION, OR OPPOSITION, FOCUSES PRINCIPALLY ON THE  
24 PROBLEM OF REUNIFICATION. AND CLEARLY THERE ARE MANY ISSUES  
25 THAT ARISE WITH REUNIFICATION. AND AS MR. GELERNT POINTS OUT

1 WITH THIS CURRENT GROUP WE HAVE ADDRESSED THEM IN VARIOUS  
2 STAGES AND IN VARIOUS MANNER, DEPENDING ON THE UNIQUE  
3 CIRCUMSTANCES OF THE INDIVIDUAL.

4 BUT IT SEEMS TO ME THAT THAT'S MORE OF A REMEDIAL  
5 ISSUE AS OPPOSED TO THE LEGAL ISSUE OF WHETHER THE COURT OUGHT  
6 TO GRANT THIS MOTION TO ENLARGE THE SCOPE OF THE CLASS.

7 **MR. STEWART:** I THINK IT IS STILL THE LEGAL ISSUE,  
8 AND JUST THE CLASS REQUIREMENTS ISSUE.

9 IF I CAN HIT -- I THINK -- WHAT I WOULD SAY IS, I  
10 WOULD CERTAINLY STICK BY ALL OF THE POINTS WE HAVE MADE IN OUR  
11 BRIEFS AND WON'T BELABOR SOME OF THOSE POINTS HERE, YOUR  
12 HONOR.

13 BUT I THINK A POINT I WOULD REALLY LIKE TO EMPHASIZE  
14 GOES -- IT GOES BACK TO THE ONE ABOUT, WHAT IS THIS CASE  
15 ABOUT. AND I THINK YOUR HONOR HIT THE POINT HOME WHERE YOU  
16 EMPHASIZED TODAY, AS YOU HAVE EMPHASIZED BEFORE, THAT WE ARE  
17 DEALING WITH INDIVIDUAL PEOPLE. IT IS -- WHAT ARE -- WHAT  
18 PROBLEM ARE THEY FACING, HOW DO YOU RESOLVE THAT.

19 AND IF WE ARE PRESENTED WITH A PERSON WHO FALLS  
20 WITHIN THE CATEGORY THAT IS BEING DESCRIBED HERE, SOMEBODY  
21 WHOSE CHILD WAS RELEASED FROM O.R.R. CUSTODY BEFORE THE  
22 PRELIMINARY INJUNCTION ORDER WANTS TO SEEK REUNIFICATION, THEN  
23 THAT PERSON CAN SEEK THOSE REMEDIES.

24 WE DON'T HAVE THAT PERSON -- WE DON'T HAVE THAT  
25 PERSON LEFT HERE, WE DON'T KNOW WHAT THAT SITUATION LOOKS

1 LIKE, AND THEREFORE WE DON'T KNOW ALL OF THE DIFFICULTIES THAT  
2 THAT PRESENTS.

3 AND I JUST EMPHASIZE, YOUR HONOR, THAT IN LINE WITH  
4 YOUR HONOR'S EMPHASIS ON JUST THE IMPORTANCE OF INDIVIDUAL  
5 PEOPLE AND CONCRETE HUMAN BEINGS AND THE PROBLEM THEY ARE --  
6 THEY ARE CREATING, THE APPROPRIATE WAY TO RESOLVE THAT IN THE  
7 SYSTEM IS FOR SUCH A PERSON TO PURSUE THAT REMEDY: THIS IS  
8 WHAT HAPPENED TO ME, HERE IS THE REMEDY I -- HERE IS THE LEGAL  
9 WRONG, HERE IS THE REMEDY, HERE IS MY LAWSUIT. OR, HEY,  
10 GOVERNMENT HERE IS MY ISSUE, CAN YOU HELP ME OUT. I  
11 UNDERSTAND THAT SOMEBODY WAS RELEASED TO A SPONSOR, WHAT CAN  
12 YOU DO?

13 RIGHT NOW WE STILL DON'T HAVE THAT IDENTIFIED PERSON  
14 WHO IS FACING THAT THING. THE TWO CLASS -- THE TWO CLASS  
15 REPRESENTATIVES WERE BOTH REUNITED WITH THEIR CHILDREN. THEY  
16 DON'T HAVE THAT -- AGAIN, THE TEN -- NINE OR TEN OR  
17 THEREABOUTS WHO MR. GELERNT IDENTIFIED, TO MY UNDERSTANDING  
18 ARE -- AGAIN, THEY ARE NOT PEOPLE WHO ARE SEEKING -- I DON'T  
19 BELIEVE THEY INVOLVE SITUATIONS WHERE SOMEBODY WAS RELEASED TO  
20 A SPONSOR BEFORE THE PRELIMINARY INJUNCTION ORDER AND IS NOW  
21 SEEKING REUNIFICATION TO STAY IN THE COUNTRY.

22 SO I GUESS I WOULD JUST EMPHASIZE, YOUR HONOR, MAYBE  
23 A MORE DIRECT RESPONSE TO YOUR QUESTION ABOUT THE ACCOUNTING.

24 I UNDERSTAND THAT THERE IS AN -- THERE IS AN  
25 ATTRACTION TO JUST HAVING THE ACCOUNTING TO GET INFORMATION.

1 BUT I RESPECTFULLY SUBMIT THAT GIVEN THE NATURE ABOUT HOW THIS  
2 CASE WAS BROUGHT, THE WAY THE CASE HAS GONE, THE REMEDY THAT  
3 HAS BEEN ORDERED, THE HISTORY OF THE CASE AND WHAT WAS  
4 UNDERSTOOD FOR A VERY LONG TIME, IT IS JUST NOT PART THIS CASE  
5 AND THERE ARE OTHER AVENUES TO ADDRESS THE CONCERNS THAT HAVE  
6 BEEN IDENTIFIED HERE. AND IT WARRANTS CONCRETE, IDENTIFIABLE  
7 PEOPLE WHO HAVE CLAIMS ABOUT THOSE SORTS OF ALLEGED WRONGS.

8 **THE COURT:** BUT DOESN'T THE ACCOUNTING, IN MANY  
9 WAYS, GO TO THE ESSENCE OF THE CASE? IT SEEMS TO ME WHEN  
10 THERE IS AN ALLEGATION OF WRONG ON THIS SCALE, ONE OF THE MOST  
11 FUNDAMENTAL OBLIGATIONS OF THE LAW IS TO BRING TO LIGHT WHAT  
12 THAT WRONG WAS AND WHAT IS THE SCOPE OF THE WRONG.

13 SO MUCH OF WHAT IS HAPPENING IN THESE KINDS OF CASES  
14 IS EXACTLY THAT; IT IS INFORMATION THAT THE PUBLIC, UNDER OUR  
15 LAW, IS ENTITLED TO. AND THERE IS NO WAY TO GET TO THAT  
16 ABSENT THE RELIEF THAT THE PLAINTIFFS ARE REQUESTING.

17 AND, TO BE CLEAR, IT SEEMS TO ME THE PRINCIPAL LEGAL  
18 RELIEF THEY ARE ASKING FOR IS THE ACCOUNTING, SO THAT WE KNOW  
19 WHAT THE GOVERNMENT IS DOING AND THE SCOPE OF IT. EVERYONE.  
20 ALL OF US. SECONDARILY WOULD BE THE REMEDY, WHICH MAY BE  
21 REUNIFICATION OR OTHER TYPES OF REMEDIES.

22 BUT THE PLAINTIFFS' LAWSUIT IS NOT JUST ABOUT  
23 REUNIFICATION. THERE IS A LARGER LEGAL ASPECT TO IT, IT SEEMS  
24 TO ME.

25 SO I GO BACK AGAIN TO THE OBSERVATION THAT THE

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1 GOVERNMENT'S OPPOSITION SEEMS TO BE FOCUSING ON THE  
2 REUNIFICATION REMEDY AND OVERLOOKING THE LEGAL QUESTION OF  
3 WHAT IS THE PROPER SCOPE OF THIS CLASS AND WHY WOULD THIS  
4 CLASS BE ENLARGED. HOW DOES ENLARGING THE CLASS ADDRESS THE  
5 ALLEGATION OF THE WRONG THAT THE PLAINTIFFS ALLEGE OCCURRED.

6 **MR. STEWART:** AGAIN, I THINK THE WRONG IS -- IT HAS  
7 TO BE VIEWED IN THE CONTEXT OF A CASE OR CONTROVERSY, THE WAY  
8 THE LITIGATION IS POISED.

9 A LITIGATION -- ANY CASE CAN IDENTIFY VARIOUS  
10 SHORTCOMINGS, FLAWS. LITIGATION DOESN'T NECESSARILY EXIST TO  
11 RESOLVE EVERY ISSUE, IT NEEDS TO BE CONCRETE AND TAILORED IN  
12 ACCORDANCE WITH THE LAW, YOUR HONOR.

13 I ALSO BELIEVE OTHER BRANCHES, OTHER COMPONENTS  
14 WITHIN -- LIKE I SAID, OTHER CASES ARE A POSSIBILITY. THE  
15 EXECUTIVE BRANCH ITSELF WITH O.I.G. REPORTS ARE THOSE -- THAT  
16 IS A POSSIBILITY. THERE ARE -- OTHER BRANCHES CAN DO THINGS,  
17 YOU KNOW, AS THEY SEE, YOU KNOW, APPROPRIATE AND CONSISTENT  
18 WITH LAW TO ADDRESS SOME OF THESE ISSUES. SO I DON'T SEE THE  
19 ABSENCE OF THAT AS A POSSIBILITY IF IT WERE PROPERLY PRESENTED  
20 AND CONSISTENT WITH LAW.

21 I JUST DON'T SEE, RESPECTFULLY, YOUR HONOR, IT IS --  
22 I UNDERSTAND THE APPEAL WITH MR. GELERNT'S PITCH THAT HE WANTS  
23 AN ACCOUNTING JUST FOR TRANSPARENCY. THAT HAS A LOT OF  
24 SIGNIFICANT SURFACE APPEAL, BUT IT IS SIMPLY NOT WHAT HE'S  
25 AFTER.

1 HE WANTS -- THAT'S THE ALLURING STEP ONE, AND ONCE  
2 THAT FOOT IS IN THE DOOR IT IS QUITE OBVIOUS THAT IT IS GOING  
3 TO BE EXTENSIVE, INVASIVE BURDENS ON THE GOVERNMENT. I MEAN,  
4 THERE IS NO -- THERE IS, RESPECTFULLY, NO CHANCE THAT MR.  
5 GELERNT STOPS AT THE ACCOUNTING, YOUR HONOR.

6 **THE COURT:** I AGREE, BUT I JUST WANT TO MAKE SURE I  
7 HAVE A FULL UNDERSTANDING OF THE LEGAL QUESTION OF WHETHER OR  
8 NOT THE MOTION TO ENLARGE THE SCOPE OF THE CLASS IS WARRANTED.

9 **MR. STEWART:** AND WE RESPECTFULLY SUBMIT IT IS NOT,  
10 YOUR HONOR. IT IS JUST NOT PART OF THIS CASE.

11 IF IT WERE A CASE THAT APPROPRIATELY WERE MAKING THE  
12 ALLEGATIONS WITH ADEQUATE REPRESENTATIVES TO ADDRESS IT AND IT  
13 WAS SHOWN THAT WE HAVE PLAINTIFFS WHO ACTUALLY FACED THIS  
14 PROBLEM AND HAVE THIS KIND OF ISSUE, THAT COULD PRESENT A  
15 DIFFERENT ISSUE. IT COULD BE ADDRESSED APPROPRIATELY AND IN A  
16 CONCRETE, PRACTICAL FORM AT THAT TIME.

17 BUT IN THE CONTEXT OF THIS CASE, YOUR HONOR, IT IS  
18 JUST NOT APPROPRIATELY PRESENTED. IT SHOULD BE DENIED, AND IT  
19 JUST -- IT IS NOT CONSISTENT WITH THE CASE, WITH THE LAW, OR  
20 WITH ORDERLY GOVERNANCE AND ADMINISTRATION.

21 I WOULD RESPECTFULLY SUBMIT FOR THE REASONS WE PUT  
22 IN THE BRIEF, AND OTHER REASONS I JUST STATED.

23 **THE COURT:** THANK YOU.

24 **MR. STEWART:** THANK YOU, YOUR HONOR.

25 **THE COURT:** MR. GELERNT, ANY FINAL OBSERVATIONS?

1           **MR. GELERT:** YOUR HONOR, I AM NOT SURE I HAVE MUCH  
2 TO ADD, I JUST -- FROM WHAT YOU SAID. I THINK, YOU KNOW,  
3 LIABILITY IS ONE THING. REMEDY, AS YOUR HONOR KNOWS, MANY  
4 CLASSES HAVE DIFFERENT REMEDIES, DEPENDING. THAT IS ONE  
5 POINT.

6           THE SECOND POINT IS, OBVIOUSLY, A CASE ALWAYS TAKES  
7 INTO ACCOUNT FURTHER DEVELOPMENTS. AND I THINK THIS IS ONE  
8 THAT IS A BOMBSHELL THAT NO ONE COULD HAVE REALLY HAVE  
9 ANTICIPATED, THAT ONLY FROM AN INTERNAL REPORT.

10           THE LAST THING I WOULD JUST SAY IS THE WHOLE POINT  
11 OF THE GOVERNMENT SAYING, WELL, EVERYONE CAN TAKE REMEDIAL  
12 STEPS ON THEIR OWN; WE COULD HELP THEM, BUT WE DON'T KNOW  
13 WHERE THEY ARE. I MEAN, THAT IS THE WHOLE REASON FOR AN  
14 ACCOUNTING IS WE ARE WILLING TO MAKE THOSE CALLS TO SEE, ARE  
15 YOU ALL RIGHT, DO YOU KNOW WHERE YOUR KID IS, ALL OF THOSE  
16 TYPES OF STEPS. BUT OBVIOUSLY WE CAN'T DO THAT WITHOUT  
17 KNOWING THE INDIVIDUAL. SO TO JUST KEEP CONTINUALLY SAYING TO  
18 US, WELL, PRESENT ALL THE CASES TO US AND WE CAN TALK TO IT.

19           WELL, I THINK THAT IS WHAT YOUR HONOR IS POINTING  
20 OUT. WE DON'T KNOW THE CASES, AND ONLY THE GOVERNMENT KNOWS  
21 THE CASES.

22           THANK YOU, YOUR HONOR.

23           **THE COURT:** THANK YOU.

24           MR. STEWART, YOU AGREE THAT IN THE PARTICULAR  
25 CONTEXT OF CLASS CERTIFICATION, THE DEFINITION OF A CLASS CAN



1 EVOLVE AND CHANGE THROUGHOUT THE LITIGATION. IT CAN CHANGE AT  
2 THE TIME OF TRIAL. CLASSES ARE ROUTINELY DECERTIFIED OR  
3 ENLARGED, DEPENDING ON THE STATE OF EVIDENCE. IT IS FREQUENT,  
4 FAIRLY COMMON, WHERE COURTS WILL CERTIFY A CLASS, A (B) (3)  
5 CLASS, AND THEN LATER DECERTIFY THE DAMAGES ELEMENT OF THAT  
6 CLASS, FOR EXAMPLE, BASED ON FURTHER DISCOVERY AND  
7 INFORMATION.

8 SO YOU DO AGREE THAT CLASS CERTIFICATION AND THE  
9 DEFINITION OF THE CLASS IS A MOVING TARGET, AND NECESSARILY  
10 SO, IN THE CONTEXT OF CLASS LITIGATION AND AS DISCOVERY AND  
11 INFORMATION SURFACES.

12 **MR. STEWART:** I THINK, YOUR HONOR, THAT CLASS  
13 DEFINITIONS, THEY -- THINGS CAN HAPPEN AS THE CASE GOES ON.

14 THIS IS SOMEWHAT OF AN ODD -- OR THIS IS A SITUATION  
15 WHERE I THINK I WOULD EMPHASIZE THE (B) (2) POINT AND HOW MUCH  
16 IMPLEMENTATION HAS OCCURRED AND WHAT WE HAVE SEEN IS THE  
17 REMEDY FOR THE FOLKS AT WHICH THE CLASS DEFINITION AIMED.

18 I THINK THE KEY PROBLEM HERE IS WE ARE COMING TO THE  
19 END OF COMPLIANCE AND PERFORMANCE ON -- WITH THE EXISTING  
20 CLASS DEFINITION, THE EXISTING PRELIMINARY INJUNCTION; AND NOW  
21 WE ARE ADDING ON A NEW GROUP OF FOLKS WHO THERE HAS BEEN NO  
22 INDICATION THAT THERE IS A COMMON REMEDY FOR THEM. THERE HAS  
23 BEEN NO INDICATION THAT THEY WILL FACE ANYTHING OTHER THAN  
24 HIGHLY INDIVIDUALIZED CIRCUMSTANCES.

25 SO I THINK TO CHANGE A CLASS DEFINITION, YOUR HONOR,

1 TO APPROVE A CLASS DEFINITION, THERE WOULD HAVE TO BE JUST A  
2 GOOD SHOWING THAT YOU HAVE ALL OF THE RULE 23 REQUIREMENTS  
3 SATISFIED.

4 AND I DON'T THINK -- I CERTAINLY REJECT THE VIEW  
5 THAT MR. GELERNT'S THREE-AND-A-HALF PAGE BRIEF, OR HIS REPLY  
6 BRIEF, THAT, FRANKLY, MAKES A FAIR NUMBER OF MODIFICATIONS TO  
7 THE ORIGINAL PITCH, DOES SOME BACKTRACKING, THAT JUST -- THAT  
8 IS A SEISMIC SHIFT IN A CASE WHERE WE ARE INTO, I SUPPOSE,  
9 ABOUT SEVEN OR EIGHT OR SO MONTHS OF PERFORMANCE BASED ON ONE  
10 SET -- BASED ON AN EXISTING CLASS DEFINITION, YOUR HONOR.

11 SO I WOULD SAY THAT THIS IS QUITE A SHIFT OF THE  
12 CLASS DEFINITION AND IT IS POTENTIALLY A SIGNIFICANT SHIFT TO  
13 THE -- JUST THE EXISTING RELIEF ORDERED IN A WAY THAT IT IS  
14 NOT CLEAR OR THERE HASN'T BEEN A SHOWING THAT THERE CAN BE  
15 COMMON RELIEF.

16 **THE COURT:** IT IS IMPORTANT TO RECOGNIZE, THOUGH, DO  
17 YOU AGREE, THAT THIS IS NOT A (B) (3) CLASS, SO WE ARE NOT  
18 TALKING ABOUT INDIVIDUALIZED INQUIRY PREDOMINATING OVER COMMON  
19 QUESTIONS OF FACT OR LAW. IT IS A (B) (2) CLASS.

20 **MR. STEWART:** YES, YOUR HONOR, A (B) (2) CLASS.

21 **THE COURT:** AND THE LAW IS CLEAR, THEN, ON A (B) (2)  
22 CLASS IF THERE IS AN OVERARCHING ALLEGED WRONG BASED ON A  
23 POLICY THAT AFFECTS ALL MEMBERS OF THE CLASS, THAT CAN BE  
24 ADJUDICATED IN ONE FELL SWOOP, THAT THAT IS A PERFECT  
25 CANDIDATE FOR CLASS CERTIFICATION.

1           AND AS I UNDERSTAND THE PLAINTIFF'S REQUEST TO  
2 ENLARGE THE CLASS, IT GOES BACK TO THIS ISSUE OF, THERE IS ONE  
3 ALLEGED LEGAL WRONG AND IT APPLIES TO EVERYONE. WHAT THE  
4 REMEDY IS BECOMES COMPLETELY SECONDARY.

5           **MR. STEWART:** I THINK I WOULD HAVE TO PUSH BACK,  
6 YOUR HONOR, AND JUST INSIST THAT THERE NEEDS TO BE A COMMON  
7 REMEDY OTHERWISE -- AND THERE IS ALSO THE RISK -- I THINK  
8 THERE IS -- WE NO LONGER HAVE A COMMON WRONG OF A CONTINUED  
9 GOVERNMENT IMPEDIMENT TO REUNIFICATION, YOUR HONOR. I  
10 UNDERSTAND YOUR POINT.

11           **THE COURT:** THE REMEDY COULD SIMPLY BE A DECLARATION  
12 BY THE COURT THAT THIS POLICY, AT THE TIME OF TRIAL, IS  
13 UNLAWFUL. AND THEN THAT COULD BE THE FORM OF DECLARATORY  
14 RELIEF, THAT COULD BE THE REMEDY.

15           BUT, OF COURSE, HERE THE PLAINTIFFS ARE SEEKING MORE  
16 THAN THAT. THEY HAVE BEEN SEEKING THAT DECLARATION, THEY HAVE  
17 BEEN SEEKING THE ACCOUNTING, THE NUMBERS, AND THEN THEY HAVE  
18 BEEN SEEKING THE REUNIFICATION.

19           **MR. STEWART:** I SUPPOSE I HAVEN'T THOUGHT ALL THE  
20 WAY THROUGH THE IMPLICATIONS OF A DECLARATORY RELIEF ONLY  
21 SITUATION IN THIS CONTEXT, YOUR HONOR, PRECISELY FOR I THINK  
22 THE REASONS YOU MENTIONED THAT IT IS VERY MUCH AN INJUNCTIVE  
23 EFFORT. AND THAT IS PART OF WHAT CREATES SUCH TREMENDOUS  
24 PROBLEMS ON A RULE 23(B) (2) BASIS.

25           **THE COURT:** OKAY. THANK YOU.

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1           **MR. STEWART:** THANK YOU, YOUR HONOR.

2           **THE COURT:** WHAT I WOULD LIKE TO DO -- I REALLY  
3 APPRECIATE COUNSEL BEING HERE AND ARGUING THE MOTION. I  
4 UNDERSTAND THE ENORMITY OF THE MOTION, THE PRACTICAL  
5 IMPLICATION OF IT, SO I APPRECIATE THE DISCUSSION.

6           I WILL TAKE IT UNDER SUBMISSION. I WILL ENDEAVOR TO  
7 ISSUE AN ORDER AS QUICKLY AS I CAN IN LIGHT OF THE  
8 SIGNIFICANCE OF THE ISSUES.

9           I WILL ASK COUNSEL TO KEEP WORKING, IN EARNEST, ON  
10 THE GROUP THAT'S AT ISSUE. WE ARE ALMOST THERE, WE ARE ALMOST  
11 DONE. A LOT OF GOOD HAS OCCURRED. AND THE FACT THAT EVERY  
12 PARENT OF EVERY CHILD HAS BEEN CONTACTED AND HAS WEIGHED IN ON  
13 REUNIFICATION OR NOT, FOR THE CURRENT CLASS, IS VERY  
14 SIGNIFICANT. THE REUNIFICATIONS THAT HAVE BEEN IMPLEMENTED  
15 AND THAT HAVE OCCURRED, THAT'S EXTRAORDINARY.

16           AND SO I WILL ENCOURAGE THE PARTIES TO KEEP WORKING  
17 IN EARNEST, TO WRAP UP THIS CHAPTER, AND WORK ON THESE OTHER  
18 IMPORTANT ISSUES WITH RESPECT TO A CENTRALIZED DATA SYSTEM AND  
19 THE LIKE.

20           I WILL SET OUT A DATE, I WILL ISSUE AN ORDER SOON  
21 FIXING THE NEXT STATUS CONFERENCE AND THE STATUS REPORTS IN  
22 THE NEXT SEVERAL DAYS. AND SO WE WILL BE MEETING AGAIN. THEN  
23 I WILL ISSUE, PROBABLY SEPARATELY, AN ORDER ON THIS MOTION TO  
24 ENLARGE THE CLASS DEFINITION.

25           THERE WAS AN INDIVIDUAL HERE, MS. LINDA DAKIN-GRIMM.

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