

NO. 141 Original

In The
SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS
v.
STATE OF NEW MEXICO and
STATE OF COLORADO

TRANSCRIPT OF SEPTEMBER 29, 2021,
REMOTE HEARING BEFORE HONORABLE MICHAEL A. MELLOY,
SPECIAL MASTER, UNITED STATES CIRCUIT JUDGE, 111
SEVENTH AVENUE, SE, CEDAR RAPIDS, IOWA 52401,
beginning at 11:01 a.m.

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1 **JUDGE MELLOY:** Good morning, everyone.
2 This will be our run-through on what we're going to be
3 doing in terms of the trial next week. As you have
4 noted, I assume, the -- everybody will come on muted
5 and will also have -- excuse me a second here.
6 They'll come on muted and camera off, and what I would
7 request is that only the person -- the people who will
8 be participating in the proceedings that day turn on
9 their cameras and un-mute. What I will do at that
10 point is then take appearances just from those folks.
11 Everyone else will be -- will be -- remain muted and
12 their camera off throughout the proceedings. And so
13 for purposes of this morning's proceeding, let me ask:
14 Who's going to be appearing for the State of Texas?
15 We'll have to remember to turn our microphone --

16 **MR. SOMACH:** That would be certainly
17 helpful. This is Stuart Somach, counsel of record for
18 the State of Texas. Did you also want me to make
19 appearances for everyone? Is that what you'd like me
20 to do?

21 **JUDGE MELLOY:** No. I just think just
22 for the people who are going to be appearing today.

23 **MR. SOMACH:** Theresa Barfield may also,
24 depending upon whether or not there's anything
25 substantive related to some of the exhibits or other

1 things, she may also appear.

2 **JUDGE MELLOY:** Okay. And then for New
3 Mexico?

4 **MR. WECHSLER:** Good morning, Your Honor.
5 Jeff Wechsler. We can see Lisa Thompson there, as
6 well.

7 **JUDGE MELLOY:** Okay. And then for the
8 United States? You have to un-mute. You should be
9 able to just hit your spacebar and hold it down.
10 You're still muted. There you go.

11 **MR. DUBOIS:** We're using a VTC setup in
12 our conference room, Your Honor, and, yeah, we had a
13 little transition problem there. My apologies. It
14 was working earlier.

15 **JUDGE MELLOY:** All right.

16 **MR. DUBOIS:** James Dubois for the United
17 States.

18 **JUDGE MELLOY:** And then for the State of
19 Colorado?

20 **MR. WALLACE:** Yes. Good morning. This
21 is Chad Wallace, Your Honor.

22 **JUDGE MELLOY:** We're getting some
23 feedback, Mr. Wallace.

24 Well, let me first ask: Is anybody
25 having any technical issues that we need to talk to

1 Worldwide about in terms of getting online or any of
2 the -- any of the issues that we might -- we might
3 have? Anyone?

4 (No response.)

5 **JUDGE MELLOY:** All right. As I
6 indicated, it's my intent that we will not be tag
7 teaming, so to speak, during the examination of
8 witnesses. There will be one attorney examining the
9 witness and one attorney, I presume, will also be the
10 one cross-examining and will be making the objections.
11 As far as my particular setup here is concerned, I had
12 given serious thought about trying to do this from the
13 courtroom. We tried that out a week or two ago.
14 There's just a lot of -- there was just a lot of
15 technical problems with it, plus the way the
16 courtrooms here are set up, all the monitors are
17 recessed into the bench so I would be looking down the
18 whole time or if I looked at the big monitor, I'd be
19 looking this way the whole time. So anyway, this just
20 seems to work a lot better, both from technology and
21 -- and from a lot of different aspects so this is the
22 way we'll be doing it.

23 A couple things I wanted to talk about
24 for next week. Now, as I understand it, under our
25 protocol, Texas should have, by this point, exchanged

1 its exhibits it plans to use for the witnesses that'll
2 be taken on the first two days of testimony. Is that
3 your understanding, Mr. Somach, of what's been done
4 here?

5 **MR. SOMACH:** Let me refer to
6 Ms. Barfield.

7 **MS. BARFIELD:** Good morning, Your Honor.
8 Theresa Barfield on behalf of Texas. The protocol
9 would have the list itself of the first witness
10 exchanged today, I believe, and the first witness is
11 going to be with United States and so I'll allow
12 Mr. Dubois to speak specifically to that exchange.

13 **JUDGE MELLOY:** Well, just to -- but it
14 says here five calendar days -- oh, calendar days.
15 I'm sorry. Not five business days. Okay. I misread
16 it. So you're exchanging your exhibits today for
17 Monday?

18 **MS. BARFIELD:** I may have misspoken. It
19 could be Thursday. Go ahead, Mr. Dubois.

20 **MR. DUBOIS:** For Monday's, yes, Your
21 Honor, we'll be exchanging those today.

22 **JUDGE MELLOY:** And when -- and when --
23 I'm still a little bit unclear. So when do I get the
24 hard copies? Will you be sending them out today to me
25 or how --

1 **MR. DUBOIS:** Yes.

2 **JUDGE MELLOY:** -- are you going to do
3 that.

4 **MR. DUBOIS:** We're going to FedEx them
5 out to you. The working assumption, Your Honor, is
6 until there is a dispute to be resolved, you know, you
7 don't necessarily need to have them in hand when we
8 exchange them because then there's the -- the
9 objection dispute process for trying to resolve any
10 objections so that when we come to you on the first
11 day of trial, if we have anything, you've got a hard
12 copy of the documents, you've got the whatever
13 argument counsel have on exhibits. So they will be
14 FedExed to you today.

15 **JUDGE MELLOY:** Now, as I understand it,
16 you've indicated that from -- from what I understand
17 from Texas' submission yesterday, all of the exhibits
18 that will be used, this is all during just the first
19 phase of the trial or during the entire trial will be
20 uploaded to Veritext, which will then transfer them to
21 Box.com? Am I understanding that correctly, how that
22 procedure is going to work?

23 **MR. DUBOIS:** No, Your Honor --

24 **MS. BARFIELD:** Are you speak --

25 **MR. DUBOIS:** Go ahead, Theresa, you

1 probably have a better grip. I probably have to rely
2 on Seth anyway.

3 **MS. BARFIELD:** For clarification, Your
4 Honor, are you speaking of the e-mail service by the
5 State of Texas yesterday or is your question related
6 to admitted trial exhibits as we proceed?

7 **JUDGE MELLOY:** It's a little bit of
8 both. I don't have that -- you sent an amended trial
9 list and -- yesterday, and as I understand it, let me
10 look here. Let me see what you said here yesterday.
11 But as I understand it, what you had said was that you
12 were going to be uploading them and then they were
13 going to be transferred to Box.com. I understood that
14 to be all the exhibits, so am I understanding that
15 correctly?

16 **MS. BARFIELD:** Not completely correctly,
17 Your Honor. The upload yesterday was the amended
18 final exhibit list for the State of Texas, which Your
19 Honor granted leave for us to file last week. Per our
20 protocol traditionally, we uploaded to Veritext. It
21 takes a little bit of time due to the volume and so we
22 were going to send out an additional notification to
23 let folks know that the documents were moved into
24 Veritext vault and made live. Now, Box.com is the
25 platform that we have all agreed upon to use for the

1 trial exhibits themselves, so it was not our intention
2 to put our entire list into Box.com, but rather as we
3 move through trial, the exhibits that are utilized by
4 Texas and the United States, once again, it would be
5 moved into Box.com.

6 **MR. WECHSLER:** But, Your Honor, may I be
7 heard on this, as well?

8 **JUDGE MELLOY:** Yes.

9 **MR. WECHSLER:** I think New Mexico is
10 doing exhibits a little bit different than Texas and
11 the United States. We sent all of our exhibits and
12 all of the joint exhibits to the court, and one of the
13 reasons we did that is so that we could avoid this
14 daily FedEx to the court, so you should have all of
15 our exhibits. At the same time, many weeks ago, we
16 talked about uploading all of our exhibits so that
17 they're available both to the court and all of the
18 amici or participating parties if they want to see
19 them in PDF form. So we will be uploading all of our
20 exhibits to Box.com. We then understand there to be a
21 separate folder for admitted exhibits, and as exhibits
22 are admitted, I expect that'll happen at the end of
23 each trial day, we will then move exhibits into that
24 admitted folder as they've been admitted.

25 **JUDGE MELLOY:** So you're going to put

1 all your exhibits in one folder in Box.com and then
2 the admitted will go into another folder, and Texas is
3 putting all their exhibits into Veritext and then
4 moving them into that admitted folder from Veritext.
5 Am I understanding that correctly?

6 **MS. BARFIELD:** Partially, Your Honor.
7 We actually didn't realize until just this moment that
8 it was New Mexico's intention to put their entire list
9 into Box.com. I'm sure that Texas and the United
10 States can also do that and use that procedure for
11 trial itself and then move docs as they're admitted
12 into a separate folder in Box.com. The Veritext vault
13 upload is just per the protocol that we've had since
14 discovery began to make sure that all of the documents
15 in the case are lodged in some form in the Veritext
16 Vault. For purposes of the trial, we can put our
17 whole list into Box.com. We can start that process
18 today. That's fine. However, as to hard copies, we
19 have understood from different conversations we've had
20 with Your Honor during status conferences that the
21 Court did not want hard copies of the entire list but
22 rather only wanted hard copies of the documents
23 actually used with witnesses, which is why we are
24 planning to prepare these witness binders for the
25 Court and have them in the Court's hands before each

1 witness testifies.

2 **JUDGE MELLOY:** And New Mexico,
3 Mr. Wechsler, is -- you will give me a list of
4 exhibits, and then I'll go to your notebooks to get
5 those exhibits; is that your understanding?

6 **MR. WECHSLER:** Yes, Your Honor. So that
7 is part of the protocol. So the -- so in this
8 instance, since Ms. Estrada-Lopez will be the first
9 witness, I agree with Mr. Dubois that the first
10 exchange of exhibits happens today. So the United
11 States will identify their exhibits and we'll get a
12 CSV file with those exhibits, then tomorrow, we
13 provide our cross-examination exhibits, if we're
14 intending to admit those. Of course, that omits
15 impeachment exhibits, but does include demonstrative
16 exhibits. There's then a meet-and-confer process over
17 the next couple of days and then the entire list will
18 be transmitted to you by the sponsoring party. In
19 this case, Mr. Dubois will send you -- I understand
20 that will likely be Sunday -- a list of all exhibits
21 that will be introduced with Ms. Estrada-Lopez and
22 that list will have an indication on it as to whether
23 or not it's objected to or not. So our -- at least my
24 expectation, and I don't know that we've explicitly
25 talked about this amongst the parties is that at the

1 beginning of each witness, those exhibits that simply
2 had no objection through that process can be admitted
3 so that we can save all of the time of laying a
4 foundation, and it's only on those exhibits that do
5 have objections that -- that that would be necessary.
6 So, for example, as Mr. Dubois is presenting Ms.
7 Estrada-Lopez, if there's no objection to, say, U.S.
8 Exhibit 512, then he can simply bring that exhibit up
9 and -- and talk about it without introducing it;
10 however, if there's an objection to U.S. 200, then on
11 U.S. 200, he'll have to go through the process with
12 Ms. Estrada-Lopez of laying a foundation and offering
13 it in order to give us an opportunity to object.

14 **JUDGE MELLOY:** Well, that -- that
15 basically is my understanding of how the process was
16 going to work is that as you -- you've outlined to
17 Mr. Wechsler, as soon as -- once the witness is sworn
18 or even before the witness is sworn, I will admit all
19 the exhibits that are not objected to and without any
20 further discussion, argument, or comment, and then, of
21 course, once they're admitted, anyone is free to use
22 them. It will be only those to which there are
23 objections that we'll then have to discuss what the
24 objection is and whether it's -- whether it's
25 admissible over the objection. So -- but going back

1 to what we were talking about before, so Texas and the
2 United States are going to -- what are you going to do
3 with your exhibits, Mr. Dubois? Are you going to put
4 them all in Box.com or are you going to use Veritext
5 or --

6 **MR. DUBOIS:** We -- we are going to put
7 them all on Box.com, Your Honor. Just checking to
8 make sure I'm not muted. You know, that's -- that's
9 something we can do, and we can start processing that
10 today.

11 **JUDGE MELLOY:** So -- and then -- and
12 from a technological standpoint, since you're the one
13 standing up, Mr. Dubois, is there any problem with
14 having a separate folder that they can then be
15 transferred over to -- to -- to be where they are
16 called the admitted exhibits?

17 **MR. DUBOIS:** Seth?

18 **MR. ALLISON:** So we can create an
19 admitted folder.

20 **MR. DUBOIS:** Yes. We can create those
21 pretty easily, Your Honor. We can create an admitted
22 folder -- or we will create an admitted folder.

23 **JUDGE MELLOY:** All right. Hopefully
24 this will not become an issue, but to the extent we
25 run into a dispute at some point down the road as

1 between what's in Box.com and what's in the paper
2 format -- and like you say, hopefully they'll be a
3 hundred percent consistent -- I think for purposes of
4 the trial, the exhibits in the Box.com admitted folder
5 would be the official record. Does anybody have a
6 problem with that? If -- if there would turn out to
7 be a discrepancy between -- between exhibits. Like I
8 say, hopefully that's not an issue, but if it is, just
9 make clear at this point, Box.com becomes the official
10 record. I don't know if the Supreme Court will want
11 the -- the exhibits in paper format. Obviously it
12 will be a lot of paper or whether they will be -- want
13 them in electronic format, but we'll work that out
14 with the clerk.

15 So going back to Texas, do you want to
16 just admit -- put yours in Box.com then, Ms. Barfield,
17 since everybody else is, and Colorado the same way?
18 Any objection to that?

19 **MS. BARFIELD:** Yes, Your Honor.

20 **JUDGE MELLOY:** Okay.

21 **MS. BARFIELD:** We'll start that process
22 today to upload the entire list into Box.com.

23 **JUDGE MELLOY:** All right.

24 **MR. DUBOIS:** And, Your Honor, with
25 regard to our entire list, I'm intending to send a

1 letter today to Your Honor regarding a single
2 additional document that we want to add to our list
3 and so we will upload that one, as well. I talked
4 briefly to Mr. Wechsler about it earlier, and I don't
5 think there's any objection from New Mexico. I think
6 that we're all realizing with the number of documents
7 in this case, the -- the occasional stragglers can be
8 found when we're preparing witnesses.

9 **JUDGE MELLOY:** All right. Continuing on
10 with the exhibits. What is the status of the joint
11 exhibits? I mean, we have -- we have an exhibit list
12 with the joint exhibits listed, but as I understand
13 it, there's a -- you're not admitting or not agreeing
14 that they're all admissible. I guess I'm a little
15 unclear as to where we are with joint exhibits.

16 **MR. WECHSLER:** Your Honor, so hopefully
17 you've received a paper copy of the joint exhibits,
18 and we will also --

19 **JUDGE MELLOY:** I have.

20 **MR. WECHSLER:** We'll put all of those in
21 Box.com, as well, in a separate joint exhibit folder.
22 My understanding was not what you just articulated,
23 however, though. I -- I had understood that at the
24 beginning of trial, those joint exhibits would simply
25 be admitted as exhibits that have been identified by

1 all of the parties as appropriate for part of the
2 record.

3 **JUDGE MELLOY:** Does anybody disagree
4 with that? I mean, that was my understanding
5 initially, but there was something in the filings that
6 -- that seemed to indicate that maybe there was some
7 disagreement about some of the exhibits, but if it's a
8 joint exhibit, as soon as we start the trial, they can
9 be admitted. Does everybody agree to that?

10 All right. And -- all right.

11 **MR. WALLACE:** Your Honor, this is Chad
12 Wallace for Colorado. I'm -- I'm getting note that
13 there may be a discrepancy on the joint list that
14 maybe contain more exhibits than Colorado agreed to
15 for admission.

16 **JUDGE MELLOY:** Well, do you know -- can
17 you identify which ones of those before Monday that
18 you have not agreed to?

19 **MR. WALLACE:** Yes, we can.

20 **JUDGE MELLOY:** Can you hold on just a
21 second? I'm having some technical difficulties here,
22 and I want to get our IT people up here. Just one
23 second.

24 (Break.)

25 **JUDGE MELLOY:** All right. Anything else

1 about the exhibits?

2 **MR. DUBOIS:** Your Honor, if I may, this
3 is James Dubois. I'm sorry. It's -- I'm not going to
4 object to admitting all of the joint exhibits if
5 that's what Your Honor wants to do, but I will note
6 that, frankly, our assumption was that a lot of those
7 joint exhibits may not be relevant to anything that's
8 being presented at the trial. For instance, every
9 project history, there are some of them that folks may
10 rely on, but it was unclear on that, so I will note
11 that there -- there could be all sorts of relevance
12 issues with individual -- say, individual project
13 report from 1932. I mean, I don't know, but if the
14 Court would prefer to just admit all those joint
15 exhibits without any relevance to testimony being
16 shown, we can live with that.

17 **JUDGE MELLOY:** Well, do you want to make
18 a relevance objection? I guess it's up to you.
19 That's -- that's what I'm trying to get clarified is
20 can we admit the joint exhibits without objection or
21 are there objections to the joint exhibits?

22 **MR. DUBOIS:** I'm -- I'm fine with going
23 forward with -- with admitting them, Your Honor. I
24 don't think that it -- it matters, but it is going to
25 present the Court with a -- a much larger record than

1 what you're going to actually be presented in trial.

2 **JUDGE MELLOY:** Okay. All right.

3 Anything else about the exhibits that we need to talk
4 about?

5 Anything else about any of the trial
6 mechanics that people have a question about or -- or
7 are concerned about in any way?

8 **MR. WECHSLER:** Well, if I may, Your
9 Honor, and I think this is something that we will work
10 out with Worldwide after the hearing, but I'll inform
11 you just of how we are intending to conduct the -- the
12 trial from New Mexico's perspective. So the room that
13 Ms. Thompson is in right now is where the attorney who
14 is either examining or cross-examining for New Mexico
15 will be. We expect that it'll simply be called NM
16 Attorney, and we'll talk to Worldwide about getting
17 appropriate access, and then the room where I am now,
18 once it switches to New Mexico's case, is where our
19 witnesses will be, and, again, I'll talk to Worldwide
20 because we'll need two different feeds, one for the
21 exhibits and one for the -- for the screen. So I just
22 wanted to alert you to that.

23 **JUDGE MELLOY:** Okay. And -- and I think
24 -- I'm -- I'm going to ask Pete from Worldwide, once
25 he gets his spreadsheet complete, I'd ask him to send

1 me a copy of it, but I think actually it would be a
2 good idea for everybody to see who has registered. If
3 you have some concern about anybody, we can -- we can
4 take it up. I will advise you that we've had one
5 request from news media and I have approved that and I
6 will probably approve any other requests of the news
7 media who want to observe the trial. It is a public
8 trial, and I know there's a lot of public interest.
9 If you see a name on the list that you feel for some
10 reason shouldn't be there, certainly we can take that
11 up. That's not to say they're all going to be there
12 every day. I suspect there will be a lot of days
13 when, you know, there will be significantly less than
14 everybody who's registered, but I think we -- once
15 that list gets finalized, I think I will have Pete
16 circulate it to everybody so you know who -- who has
17 registered and is likely to be participating.

18 One other question I had is the -- the
19 service list includes the -- the former -- the -- I
20 don't know if it's the former or current, I guess,
21 mediator. Has anybody talked to Judge Granger about
22 the fact that you no longer want to use his services
23 or do you want me to talk to him or where -- where do
24 you stand with him?

25 **MR. SOMACH:** I don't believe we've had

1 any communication with him. We talked several months
2 ago indicating that we weren't going to proceed with
3 the mediation. I don't believe that we have indicated
4 any switch in mediators. I'd be more than happy to
5 give -- actually, I'd be more than happy, but I will
6 be going to give him a call as a courtesy and let him
7 know.

8 **JUDGE MELLODY:** That's fine. I
9 appreciate that. And we'll take him off the service
10 list then next time we do an update. And do you know
11 if Judge Boylan wants to be on the service list? Or I
12 can talk to him about that. Has he given any
13 indication?

14 **MR. SOMACH:** To my knowledge, he has
15 not. We've had communications with him where the
16 parties are pulling together initial materials to be
17 provided to him some time this week, in fact, and
18 there are dates scheduled in December.

19 **JUDGE MELLODY:** All right. A couple
20 issues that are hanging out there. I am -- I know I
21 owe you an order on the deposition designations, but
22 my -- my inclination is to allow those in. I don't
23 know of any reason they can't be admitted, and Texas
24 and United States will have to plan accordingly if
25 they want to call those witnesses to explain or rebut

1 or expand upon the depositions that New Mexico wants
2 to add. As far as United States motions in limine, my
3 current plan is to reserve ruling on those until I
4 have a little more context and we see the witnesses at
5 that time. Mr. Dubois or whoever else is on his team
6 can renew their objection.

7 **MR. SOMACH:** Your Honor, can I ask you a
8 question about the deposition designations?

9 **JUDGE MELLOY:** Go ahead.

10 **MR. SOMACH:** We will evaluate whether or
11 not we want to call those witnesses. My -- my belief
12 at this time is that we probably will, but we may not
13 call them in the fall and so I am wondering whether or
14 not the admission of deposition declarations could
15 track when, in the fall or in the spring, we decide to
16 put those witnesses on. That would be helpful. That
17 way we don't have to worry about prejudice of those
18 being in the record before we can actually put those
19 witnesses online.

20 **JUDGE MELLOY:** Do you have any thought
21 about that, Mr. Wechsler?

22 **MR. WECHSLER:** I have no objection to
23 that.

24 **JUDGE MELLOY:** Okay. So that'll be the
25 ruling then. They'll be admitted, but we don't admit

1 them until the second phase of the trial. Any other
2 -- anything else we need to talk about today?

3 (No response.)

4 **JUDGE MELLOY:** All right. Then if not,
5 I will see everybody 11:00 a.m. Central time, 10:00
6 a.m. Mountain, 9:00 a.m. Pacific next Monday morning.
7 Thank you, everyone.

8 **MR. SOMACH:** Thank you, Your Honor.

9 **MR. WECHSLER:** Thank you, Your Honor.

10 **MR. DUBOIS:** Thank you, Your Honor.

11 **MR. WALLACE:** Thank you.

12 (The proceedings adjourned at 11:28
13 a.m.)

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Heather L. Garza



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