No. 25-_____

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re DONALD J. TRUMP, *in his official capacity as President of the United States, et al.*,

Petitioners-Defendants.

(full caption on inside cover)

On Petition for Writ of Mandamus to the United States District Court for the Northern District of California

PETITION FOR WRIT OF MANDAMUS AND EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR STAY PENDING CONSIDERATION OF THE PETITION AND IMMEDIATE ADMINISTRATIVE STAY

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In re DONALD J. TRUMP, *in his official capacity as President of the United States*, *et al.*,

DONALD J. TRUMP, *in his official capacity as President of the United States*; OFFICE OF MANAGEMENT AND BUDGET; RUSSELL VOUGHT, *in his official capacity as Director of U.S. Office of Management and Budget*; UNITED STATES OFFICE OF PERSONNEL MANAGEMENT; CHARLES EZELL, *in his official capacity as Acting Director of the U.S. Office of Personnel Management*; UNITED STATES DEPARTMENT OF GOVERNMENT EFFICIENCY; ELON MUSK, *in his official capacity*; AMY GLEASON, *in her official capacity as Acting Administrator of the Department of Government Efficiency*; UNITED STATES DEPARTMENT OF AGRICULTURE; BROOKE ROLLINS, *in her official capacity as Secretary of the U.S. Department of Agriculture*; UNITED STATES DEPARTMENT OF COMMERCE; HOWARD LUTNICK, *in his official capacity as Secretary of the U.S. Department of Commerce*; UNITED STATES DEPARTMENT OF DEFENSE; PETER HEGSETH, *in his official capacity as Secretary of the U.S. Department of Defense*; UNITED STATES DEPARTMENT OF ENERGY; CHRIS WRIGHT, *in his official capacity as Secretary of the U.S. Department of Energy*; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; ROBERT F. KENNEDY, Jr., *in his official capacity as Secretary of the U.S. Department of Health and Human Services*; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; KRISTI NOEM, *in her official capacity as Secretary of the U.S. Department of Homeland Security*; UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; SCOTT TURNER, *in his official capacity as Secretary of the U.S. Department of Housing and Urban Development*; UNITED STATES DEPARTMENT OF JUSTICE; PAMELA BONDI, *in her official capacity as Attorney General of the United States*; UNITED STATES DEPARTMENT OF THE INTERIOR; DOUG BURGUM, *in his official capacity as Secretary of the U.S. Department of the Interior*; UNITED STATES DEPARTMENT OF LABOR; LORI CHAVEZ-DEREMER, *in her official capacity as Secretary of the U.S. Department of Labor*; UNITED STATES DEPARTMENT OF STATE; MARCO RUBIO, *in his official capacity as Secretary of the U.S. Department of State*; UNITED STATES DEPARTMENT OF THE TREASURY; SCOTT BESSENT, *in his official capacity as Secretary of U.S. Department of Treasury*; UNITED STATES DEPARTMENT OF TRANSPORTATION; SEAN DUFFY, *in his official capacity as Secretary for the U.S. Department of Transportation*; UNITED STATES DEPARTMENT OF VETERANS AFFAIRS; DOUG COLLINS, *in his official capacity as Secretary of Veterans Affairs*; AMERICORPS, (a.k.a the Corporation for National and Community Service); JENNIFER BASTRESS TAHMASEBI, *in her official capacity as Interim Agency Head of AmeriCorps*; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; LEE ZELDIN, *in his official capacity as Administrator of U.S. Environmental Protection Agency*; UNITED STATES GENERAL SERVICES ADMINISTRATION; STEPHEN EHIKIAN, *in his official capacity as Acting Administrator for U.S. General Services Administration*; NATIONAL LABOR RELATIONS BOARD; MARVIN E. KAPLAN, *in his official capacity as Chairman of the National Labor Relations Board*; WILLIAM COWEN, *in his official capacity as the Acting General Counsel of the National Labor Relations Board*; NATIONAL SCIENCE FOUNDATION; BRIAN STONE, *in his official capacity as Acting Director of the National Science Foundation*; UNITED STATES SMALL BUSINESS ADMINISTRATION; KELLY LOEFFLER, *in her official capacity as Administrator of the U.S. Small Business Administration*; SOCIAL SECURITY ADMINISTRATION; FRANK BISIGNANO, *in his official capacity as Commissioner of Social Security*,

Petitioners-Defendants,

v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,

Respondent,

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO; AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO; SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO; AFGE LOCAL 1122; AFGE LOCAL 1236; AFGE LOCAL 2110; AFGE LOCAL 3172; SEIU LOCAL 1000; ALLIANCE FOR RETIRED AMERICANS; AMERICAN GEOPHYSICAL UNION; AMERICAN PUBLIC HEALTH ASSOCIATION; CENTER FOR TAXPAYER RIGHTS; COALITION TO PROTECT AMERICA'S NATIONAL PARKS; COMMON DEFENSE CIVIC ENGAGEMENT; MAIN STREET ALLIANCE; NATURAL RESOURCES DEFENSE COUNCIL, INC.; NORTHEAST ORGANIC FARMING ASSOCIATION, INC.; VOTEVETS ACTION FUND INC.; WESTERN WATERSHEDS PROJECT; COUNTY OF SANTA CLARA; CITY OF CHICAGO; COUNTY OF MARTIN LUTHER KING, JR.; COUNTY OF HARRIS; CITY OF BALTIMORE; *and* CITY AND COUNTY OF SAN FRANCISCO,

Real Parties in Interest-Plaintiffs.

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INTRODUCTION

Pursuant to the All Writs Act, 28 U.S.C. § 1651, and Rule 21 of the Federal Rules of Appellate Procedure, the federal government respectfully asks this Court to issue a writ of mandamus directing the district court to vacate its order of July 18, 2025, which directs the government to produce voluminous privileged documents to plaintiffs' counsel and the district court. As of now, the government is required to produce the documents for *in camera* review and to the plaintiffs' counsel by noon PDT on Wednesday, July 23. The government requested that the district court stay any order compelling production pending final resolution of a mandamus petition or at least to stay any such order for seven days to allow for orderly appellate review. Dkt. 208 at 18. By ordering production without addressing that request, the district court implicitly refused to grant a stay. Therefore, the government also seeks an immediate administrative stay and stay pending consideration of this petition to pause its production obligation until this Court can address the lawfulness of the district court's order.

The district court clearly erred in requiring disclosure of the documents and the government will suffer irreparable harm absent mandamus. On July 8, with only one noted dissent, the Supreme Court stayed a preliminary injunction issued by the district court in this case, concluding that plaintiffs were unlikely to succeed on the merits of their challenges to an Executive Order and an associated guidance memorandum, which call for agencies to prepare to reorganize themselves and to undertake

reductions in force (RIFs) consistent with applicable law. *See Trump v. AFGE*, No. 24A1174, 2025 WL 1873449, at *1 (U.S. July 8, 2025). Yet just ten days later, the district court issued an order compelling production of privileged documents concerning agency plans for those potential reorganizations and RIFs. And it did so despite plaintiffs' failure to identify any viable legal theory for which the documents they seek could make a material difference.

The documents the district court ordered the government to produce are plainly covered by the deliberative-process privilege. They are pre-decisional planning tools requested by the President and submitted to a component of the Executive Office of the President to memorialize agencies' thinking at one stage of an interagency dialogue about plans for potential RIFs and reorganizations. A court may authorize discovery into such Executive Branch deliberations only as a last resort. But here, the district court reflexively ordered production, ignoring many other viable alternatives—including first resolving the government's forthcoming motion to dismiss. In similar circumstances, the Supreme Court recently summarily reversed the D.C. Circuit's denial of mandamus relief to the government. *See U.S DOGE Service v. Center for Responsibility & Ethics in Wash.,* 145 S. Ct. 1981, 1982 (2025).

The prospect of production will have a chilling effect on internal Executive Branch deliberations and a prejudicial effect on the government in litigating challenges to the agency actions that were the subject of the deliberations. That the district court restricted dissemination to the government's litigation adversaries does not alleviate

those harms. And once confidential information is disclosed, that disclosure cannot be undone. Mandamus and an immediate stay are warranted.

STATEMENT

A. Statutory and Regulatory Background

1. The Office of Personnel Management (OPM) is an independent establishment in the Executive Branch that assists the President in overseeing the federal workforce. *See* 5 U.S.C. §§ 1101-1104. The Office of Management and Budget (OMB) is a component of the Executive Office of the President (EOP) that assists the President in preparing the budget and overseeing agencies. *See* 31 U.S.C. §§ 501-503. The U.S. DOGE Service (USDS) is an entity in EOP created to help advise and consult on the President's agenda of "modernizing federal technology and software to maximize governmental efficiency and productivity." Executive Order 14158, 90 Fed. Reg. 8441, 8441 (Jan. 29, 2025).

2. Federal law expressly recognizes that the government may conduct RIFs, an "administrative procedure by which agencies eliminate jobs and reassign or separate employees who occupied the abolished positions." *James v. Von Zemenszky*, 284 F.3d 1310, 1314 (Fed. Cir. 2002); *see* 5 U.S.C. § 3502. OPM has promulgated regulations specifying requirements for RIFs, under which "OPM may examine an agency's preparations for [RIFs] at any stage." 5 C.F.R. § 351.205.

Agencies' authority to conduct RIFs predates the modern civil service. *See* Act of Aug. 15, 1876, 19 Stat. 143, 169; *see generally Hilton v. Sullivan*, 334 U.S. 323, 336-39

(1948). Courts have recognized the government's broad discretion to decide which employees to retain or separate. *See, e.g.*, *Keim v. United States*, 177 U.S. 290, 295 (1900). And the President has often set priorities for federal agencies resulting in RIFs. *See, e.g.*, Executive Order 12839, 58 Fed. Reg. 8515, 8515 (Feb. 10, 1993) (directing 4% reduction in civilian workforce to be implemented through "detailed instructions" from OMB).

B. The Executive Order and Memorandum

In February, the President issued an executive order, directing "Agency Heads [to] promptly undertake preparations to initiate large-scale reductions in force (RIFs), consistent with applicable law." Add.158-60 (Exec. Order No. 14210, 90 Fed. Reg. 9669 (Feb. 11, 2025)). The order sets priorities for how agencies carry out RIFs and categorically exempts from RIFs "functions related to public safety, immigration enforcement, or law enforcement." Add.159.

The Executive Order further provides that, by March 13, 2025, "Agency Heads shall submit to" OMB "a report that identifies any statutes that establish the agency, or subcomponents of the agency, as statutorily required entities," and which "discuss[es] whether the agency or any of its subcomponents should be eliminated or consolidated." Add.159. The Executive Order again emphasizes that agency heads need not consider reductions for "any position they deem necessary to meet national security, homeland security, or public safety responsibilities," Add.159, and that the

order "shall be implemented consistent with applicable law and subject to the availability of appropriations." Add.160.

Two weeks later, OPM and OMB jointly issued a guidance Memorandum to agencies. Add.162-68 (*Guidance on Agency RIF and Reorganization Plans Requested by Implementing the President's "Department of Government Efficiency" Workforce Optimization Initiative* (Feb. 26, 2025)). The Memorandum explained that agencies should submit Agency RIF and Reorganization Plans that "seek to achieve" (1) "[b]etter service for the American people"; (2) "[i]ncreased productivity; (3) "[a] significant reduction in the number of full-time … positions by eliminating positions that are not required"; (4) "[a] reduced real property footprint; and (5) "[r]educed budget topline." Add.162-63. OPM and OMB cautioned agencies, in formulating the Plans, to review "their statutory authority and ensure that their plans and actions are consistent with such authority." Add.163.

The Memorandum explains that agencies should submit Plans in two phases. The initial Plans were to be submitted by March 13, 2025, and "focus[ed] on initial agency cuts and reductions." Add.164. The second-phase Plans, to be submitted by April 14, 2025, "outline[d] a positive vision for more productive, efficient agency operations going forward" to be implanted by the end of the fiscal year. Add.165. The Plans were to be submitted to OMB and OPM "for review and approval." Add.164-65.

The Plans do not themselves implement any RIFs. Rather, the Plans describe RIFs that an agency may undertake. Add.165-66. Agencies must then follow an established process to actually reduce their workforce, including providing 30- or 60-days' notice, *id.* at 7. *See* 5 U.S.C. § 3502; 5 C.F.R. Part 351 Subpart H.

C. Prior Proceedings

Plaintiffs are unions, advocacy organizations, and local governments. Add.51-59. Eleven weeks after the President issued the Executive Order, they sued the President, OPM, OMB, USDS, and twenty-one federal agencies—including every Cabinet-level agency except the Department of Education. Add.59-64. Plaintiffs principally alleged that the President transgressed the separation of powers by directing agencies to prepare for RIFs and that OMB and OPM usurped other agencies' statutory authority by providing related guidance as the President directed. *See, e.g.*, Add.49.

1. The district court entered a putative temporary restraining order on May 9, 2025, and further ordered the government to produce, by May 13, 2025, four categories of documents: (1) "the versions of all defendant agency [Plans] submitted to OMB and OPM," (2) "the versions of all" Plans "approved by OMB and OPM," (3) "any agency applications for waivers of statutorily-mandated RIF notice periods," and (4) "any responses by OMB or OPM to such waiver requests." Dkt. 85 at 40. In ordering the production of those documents, the court explained only that "good

cause [for disclosure] ha[d] been shown pursuant to Federal Rule of Civil Procedure 26(d)." *Id.*

The government moved for reconsideration and a protective order to prevent disclosure of the Plans, Add.173-83, and the plaintiffs agreed not to oppose an order pausing the government's production obligation until the court ruled on the motion for reconsideration, Add.171-72. In light of the deadline to disclose the documents, the government filed a mandamus petition in this Court. *See In re Trump*, No. 25-3034 (9th Cir.).

The district court subsequently stayed its discovery order pending further consideration of the government's motion. Add.169. The district court then entered an order directing the government to file additional declarations to enable the district court to "assess whether the [deliberative process] privilege applies" to the agency Plans it had previously ordered the government to produce. Add.29. In light of that order, the government withdrew its mandamus petition while reserving the right to seek relief again if the court ordered disclosure of privileged materials. *See* Mot. to Withdraw Mandamus Pet., *In re Trump*, No. 25-3034 (9th Cir. May 30, 2025).

2. The district court entered a preliminary injunction on May 22, 2025. On the merits, the court held that absent express authorization, the President cannot direct agencies to engage in large-scale RIFs and that OMB, OPM, and USDS are unlawfully usurping agencies' authority to make RIF determinations. Dkt. 124. The court prospectively enjoined about 20 agencies, OMB, OPM, and USDS, as well as "any

other individuals acting under their authority or the authority of the President," from "taking any actions to implement or enforce sections 3(c) and 3(e)" of the Executive Order or the Memorandum. *Id.* at 47-48.

The government appealed and sought a stay pending appeal. A divided motions panel of this Court denied the stay motion. *See AFGE v. Trump*, 2025 WL 1541714 (9th Cir. May 30, 2025).

3. The government thereafter applied to the Supreme Court for a stay of the preliminary injunction, which the Court granted on July 8, 2025. The Court noted that the government is "likely to succeed on its argument that the Executive Order and Memorandum are lawful," and that the "other factors bearing on whether to grant a stay are satisfied." 2025 WL 1541714, at *1. The Court explained that it "express[ed] no view on the legality of any Agency RIF and Reorganization Plan," noting that the district court "enjoined further implementation or approval of the plans based on its view about the illegality of the Executive Order and Memorandum, not on any assessment of the plans themselves," which were not before the Court. *Id.*

Justice Sotomayor concurred in the grant of a stay, noting that "the relevant Executive Order directs agencies to plan reorganizations and reductions in force 'consistent with applicable law,'" as the Memorandum reiterated, and that "[t]he plans themselves are not before this Court." 2025 WL 1541714, at *1 (Sotomayor, J., concurring). Only Justice Jackson filed a dissent.

4. Following the Supreme Court's stay decision, plaintiffs filed in district court an "urgent request" that the district court confirm its prior discovery order and deny the government's request for reconsideration and a protective order. Add.12-26.

The district court granted plaintiffs' motion in part on July 18, 2025, ordering the government to produce to the court and plaintiffs' counsel, by Wednesday, July 23, at noon PST, "the versions of [Plans] submitted to OMB and OPM" and "the versions of [Plans] approved by OMB and/or OPM." Add.10.

Addressing the deliberative process privilege, the district court assumed that "at least some [Plans] may include pre-decisional and deliberative materials," but concluded that plaintiffs' need for the Plans outweighed the government's interest in non-disclosure. Add.7. The district court concluded that the Plans were relevant to plaintiffs' claim under the Administrative Procedure Act alleging that defendants' "implementation of [the Plans] are arbitrary and capricious." Add.6. The court rejected the government's arguments that, to the extent plaintiffs alleged any APA claim challenging the agency's implementation of RIFs that remained viable following the Supreme Court's stay decision, any such claim would have to be "adjudicated based on the administrative record," which has not yet been compiled, and the Plans would not be part of the administrative record. Add.6. The court explained that there are "exceptions to the general rule that courts" are limited to the administrative record and speculated that such an exception might apply here. Add.6. The court dismissed as "specious" the government's assertions that disclosure of the Plans

would harm the government, noting that any harm to the government is "self-inflicted" by the government's decision to engage in RIFs. Add.6.

In ordering disclosure, the court granted the government's motion for a protective order limiting dissemination of the Plans to plaintiffs' counsel, at least "at this still-early stage of the case." Add.9. The district court also permitted the government to redact, in the material provided to plaintiffs' counsel "any material addressing union negotiating strategy." Add.9.

ARGUMENT

I. The Court should exercise its mandamus authority to block the production order.

Mandamus relief is appropriate where a petitioner has "no other adequate means to attain the relief desired," where "the right to the writ is clear and indisputable," and where "the writ is appropriate under the circumstances." *Karnoski v. Trump*, 926 F.3d 1180, 1203 (9th Cir. 2019) (per curiam) (quoting *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380-81 (2004)). This Court considers:

> (1) whether the petitioner has no other means, such as a direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in any way not correctable on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district court's order is an oft repeated error or manifests a persistent disregard of the federal rules; and (5) whether the district court's order raises new and important problems or issues of first impression.

Id. (citing *Bauman v. U.S. Dist. Court*, 557 F.2d 650, 654-55 (9th Cir. 1977)). These factors "serve as guidelines," and "[n]ot every factor need be present at once" or even

"point in the same direction" for a writ of mandamus to issue. *Hernandez v. Tanninen*, 604 F.3d 1095, 1099 (9th Cir. 2010) (quotation marks omitted).

A. The district court clearly erred in compelling production of the Plans.

The deliberative process privilege is a subset of executive privilege and protects deliberations by shielding from disclosure documents "reflecting advisory opinions, recommendations and comprising part of a process by which governmental decisions and policies are formulated." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). "[I]t would be impossible to have any frank discussions of legal or policy matters in writing if all such writings were to be subjected to public scrutiny." *EPA v. Mink*, 410 U.S. 73, 87 (1973).

The privilege may be overcome if a litigant's "need for the materials and the need for accurate fact-finding override the government's interest in non-disclosure." *FTC v. Warner Communc'ns*, 742 F.2d 1156, 1161 (9th Cir. 1984) (per curiam). In assessing a claim under the privilege, a court must consider "1) the relevance of the evidence; 2) the availability of other evidence; 3) the government's role in the litigation; and 4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions." *Id.*

1. The district court assumed without deciding that the Plans may contain material covered by the privilege. *See* Add.6. That assumption was plainly warranted. The Plans are predecisional. "A predecisional document is one prepared in order to

assist an agency decisionmaker in arriving at his decision." *Assembly of State of Cal. v. U.S. Dep't of Com.*, 968 F.2d 916, 920 (9th Cir. 1992) (quotation marks omitted). That is satisfied here. The final decision an agency will reach is whether or not to conduct a RIF or otherwise to reorganize itself. That is true regardless of whether OPM or OMB opines on a Plan because the final authority to proceed with a RIF rests with the employing agency. The Plans do not embody any final decisions on RIFs or reorganizations; rather, they are "subject to change at any moment as the agency's needs, missions, and staffing evolve or as new leadership joins an agency." Add.185. A Plan is never final and may change drastically as the agency's priorities and thinking changes. "Indeed, the non-final and frequently changing nature of [Plans] is one of the reasons OMB and OPM requested that the agencies submit monthly progress reports in May, June, and July." Add.185. Nothing in any Plan irrevocably commits an agency to taking any specific step. Add.185. The Plans are also deliberative. "A predecisional document is a part of the deliberative process, if the disclosure of the materials would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Carter*, 307 F.3d at 1089. As the Memorandum and the Billy Declaration both make clear, the Plans contain a significant amount of information concerning the agencies' future plans and strategies, not all of which will actually be acted upon.

2. The relevant question is therefore whether the privilege can be overcome. The district court clearly erred in concluding that it could.

Foremost, the Plans are not relevant to any viable claim plaintiffs could assert. Plaintiffs' core theory in this lawsuit is that the Executive Order and Memorandum are unlawful because Congress must affirmatively authorize the President to direct agencies to conduct "large-scale" RIFs and OPM, OMB, and USDS lack authority to review and approve agencies' Plans. *See, e.g.*, Add.49, 140, 142, 144-46. As the Supreme Court's stay order confirms, plaintiffs are "likely" to fail on that theory. *See Trump v. AFGE*, No. 24A1174, 2025 WL 1873449, at *1 (U.S. July 8, 2025) (holding that "the Government is likely to succeed on its argument that the Executive Order and Memorandum are lawful"). And more importantly for present purposes, the validity of that theory cannot possibly turn on the content of any particular Plan. The President's authority to issue an Executive Order, and OMB and OPM's authority to issue guidance on implementing that order, does not depend on Plans that agencies issue in response to the Executive Order and Memorandum. Indeed, it is blackletter administrative law that challenges may not rest on post-decision records. *See Southwestern Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996). Nor could the content of the Plans inform whether the Executive Order or Memorandum are themselves legal where, as Justice Sotomayor emphasized in her concurrence, the Executive Order and Memorandum direct agencies to proceed "consistent with applicable law." *Trump v. AFGE*. 2025 WL 1541714, at *1

(Sotomayor, J., concurring) (citation omitted). To the extent a particular Plan developed by an agency was unreasonable or recommended a course of action that was not consistent with applicable law, that would be a defect in the Plan—it would not demonstrate that the Executive Order and Memorandum were themselves unlawful.

The district court understood one claim in plaintiffs' complaint to arguably allege an APA arbitrary-and-capricious challenge to agencies' "implementation of [the Plans]." Add.5. A challenge to unspecified future agency action is not a cognizable APA claim to begin with. But even assuming plaintiffs may bring an APA claim in district court to agencies' implementation of a specific RIF, plaintiffs here do not challenge the specifics of any final agency action implementing any particular RIF. Rather, plaintiffs allege wholesale that agencies are violating the APA by "implementing the President's" Executive Order and acting pursuant to the Memorandum. *E.g.*, Add.149. That claim, like plaintiffs' other claims, turns on plaintiffs' arguments about the Executive Order and the Memorandum. As with plaintiffs' other claims, the Supreme Court's stay order confirms that argument is not viable, and the content of any particular Plan is not relevant to addressing it. Now that the Court has concluded plaintiffs are likely to fail on their core theory, plaintiffs cannot turn this suit into a vehicle for challenging particular agency RIFs that have not been finalized. Nor could plaintiffs plausibly seek to challenge the Plans themselves, given that those Plans are—by their nature—deliberative documents that

do not mark the consummation of an agencies' thinking on RIFs and reorganizations and carry no legal consequences. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). The district court clearly erred in requiring the government to disclose agency Plans for RIFs that have not yet occurred and that are not properly before the court in this lawsuit.

Moreover, even assuming plaintiffs could somehow pursue in this case an APA claim challenging as arbitrary-and-capricious the specifics of any particular future agency RIF, the district court's disclosure order would still be manifestly improper. Any such APA claim would need to be adjudicated based on the administrative record, of which the Plans would not be a part. An agency's action can be held arbitrary or capricious if the agency's decision is not "founded on a reasoned evaluation of the relevant factors." *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 994 (9th Cir. 2014) (citation omitted); *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Because a court "assess[es] the lawfulness of agency action based on the reasons offered by the agency[,] [d]eliberative documents, which are prepared to aid the decision-maker in arriving at a decision, are ordinarily not relevant to that analysis." *Blue Mountains Biodiversity Project v. Jeffries*, 99 F.4th 438, 445 (9th Cir. 2024) (citation omitted). Agencies' plans, which, as discussed above, are deliberative and pre-decisional, would not be part of the administrative record for the agency's final action and would not be relevant to plaintiffs' purported arbitrary-and-capricious claim. An agency is not

required to defend every potential option it considered and committed to paper; it would simply have to defend its final decision on the basis of the record it assembles and its own contemporaneous explanation.

The district court did not purport to dispute that the agencies' Plans would not be part of any administrative record. Add.6. Rather, in ordering the Plans' disclosure to plaintiffs, the district court emphasized that there are "'exceptions' to the "general rule" that an APA claim must proceed only on the administrative record, and the court speculated that such an exception might possibly apply here. *See* Add.6. That gets the burden for justifying discovery in an APA case precisely backwards: the burden would be on the plaintiffs, at the appropriate time, to establish that any certified administrative record is inadequate and that extra-record discovery is appropriate. *See San Luis*, 776 F.3d at 993. The burden is not on the government to preemptively negate that any exception might be possible—let alone before any administrative record has even been compiled and certified, in part because many of the potential RIFs discussed in the Plans have not even been finalized. That is particularly true when the plaintiffs have not made any sort of showing of agency bad faith or agency reliance on extra-record materials. *See San Luis*, 776 F.3d at 992. Indeed, the government has not yet responded to plaintiffs' complaint, and it advised the district court that it intended to soon move to dismiss, a motion that it will file today. Doc. 208, at 8; *see In re Musk*, No. 25-5072, 2025 WL 926608, at *1 (D.C. Cir. Mar. 26, 2025) (granting stay pending mandamus because "petitioners have shown a

likelihood of success on their argument that the district court was required to decide their motion to dismiss before allowing discovery"). A party should not be able to engage in intrusive discovery to prove up a complaint that suffers from fatal defects. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) ("[W]hen the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court.") (cleaned up)); *see also In re United States*, 583 U.S. 29, 32 (2017) (per curiam) (vacating and remanding to the district court with instructions to rule on the government's threshold arguments regarding jurisdiction and reviewability under the APA which "likely would eliminate the need for the District Court to examine a complete administrative record."). That is especially so where the Supreme Court has already held that plaintiffs' claims are likely to fail on purely legal grounds that do not depend on factual development—namely, that the President has lawful authority, with the assistance of OPM and OMB, to direct and guide agencies in implementing RIFs, and that any defects in those future RIFs do not negate the validity of the Executive Order and Memo pursuant to which they were adopted.

The district court's reflexive discovery order is particularly erroneous given the nature of the documents at issue. The Supreme Court has repeatedly held that "[t]he high respect that is owed to the office of the Chief Executive … is a matter that should inform the conduct of the entire proceeding, including the timing and scope of

discovery." *Clinton v. Jones*, 520 U.S. 681, 707 (1997). That office's "unique position in the constitutional scheme" "counsel[s] judicial deference and restraint." *Nixon v. Fitzgerald*, 457 U.S. 731, 749, 753 (1982). "[S]pecial considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated." *Cheney*, 542 U.S. at 385. And because discovery against the White House raises the prospect of a "'constitutional confrontation'" between the Executive and Judicial Branches, the Supreme Court has made clear that it is reserved for exceptional circumstances and that such confrontations "should be avoided whenever possible." *Id.* at 389-90 (quoting *United States v. Nixon*, 418 U.S. 683, 692 (1974)); *see, e.g.*, *U.S DOGE Service v. Center for Responsibility & Ethics in Wash.*, 145 S. Ct. 1981, 1982 (2025) (summarily vacating denial of mandamus petition because court of appeals gave insufficient consideration to the "separation of powers concerns [that] counsel judicial deference and restraint in the context of discovery regarding internal Executive Branch communications").

The Supreme Court's decision in *Cheney* illustrates the proper application of these principles. There, President George W. Bush had established a "National Energy Policy Development Group" within the White House to help develop national energy policy over the course of five months. 542 U.S. at 373. A district court authorized extensive discovery into the energy task force as part of litigation to determine whether the task force was subject to the Federal Advisory Committees

Act. *Id.* at 375. After the D.C. Circuit denied the government's petition for a writ of mandamus, the Supreme Court reversed. *Id.* at 376, 392. The Court emphasized that the case did not present "a routine discovery dispute" and that the courts had failed to take adequate account of the "special considerations" that "control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated." *Cheney*, 542 U.S. at 385. Given the separation-of-powers concerns present in those circumstances, the Court made clear that discovery into the actions of the President and his close advisors should be permitted only as a last resort, that district courts must "explore other avenues" to avoid it, and that courts must ensure that any permitted discovery is "precisely identified" and no broader than necessary to serve its purpose. *Id.* at 387, 390.

Here, the district court ordered production of deliberative documents prepared at the request of the President and that the President's Executive Order directed be sent to OMB, a component of the Executive Office of the President. *See* Add.159. These documents speak to how agencies plan to implement core presidential priorities; to be effective, they must candidly convey the agencies' assessments of their staffing needs and programmatic priorities. *See* Add.163-67. It would plainly hamper agencies' ability to communicate effectively with the President and those components charged with coordinating his agenda if agencies had to be concerned about the deliberative documents' use in future litigation. The district court paid no heed to the

nature of these documents in hastily ordering their disclosure, without considering alternatives that could obviate any need for discovery—namely, waiting to rule on the need for disclosure until after the district court adjudicated the government's forthcoming motion to dismiss and an administrative record for any properly challenged RIFs are certified and deemed inadequate.

B. The government will suffer irreparable harm absent mandamus and a post-judgment appeal does not provide an adequate means for relief.

Disclosure of confidential information is irreversible. "[O]nce a secret is revealed, there is nothing for [a court order] to protect." *Ace Am. Ins. Co. v. Wachovia Ins. Agency Inc.*, 306 F. App'x 727, 732 (3d Cir. 2009). As a party is likely to suffer irreparable harm if required to disclose privileged materials, courts recognize that mandamus is appropriate to review such disclosure orders. *See, e.g.*, *In re von Bulow*, 828 F.2d 94, 98 (2d Cir. 1987) (recognizing that "appeal after judgment" is "inadequate at best" to address compelled disclosure of privileged material). The need for interlocutory review is heighted here given "[t]he unique features of the … deliberative process privilege." *Karnoski*, 926 F.3d at 1203.

Here, disclosure "would seriously undermine agency operations" across the Executive Branch. Add.185. As an OMB declarant explains, the Plans contain "highly sensitive information," which may include nascent regulatory plans, and intended approaches for engaging with Congress. Add.185. The protective order the district court issued does not ameliorate the discovery order's unwarranted intrusion

into the government's privileged deliberations. It cannot eliminate the chilling effect created by disclosures of deliberative materials, nor justify disregarding the government's interest in maintaining the documents' confidentiality. *Cf. Perry v. Schwarzenegger*, 591 F.3d 1147, 1163-64 (9th Cir. 2009) (granting defendants' mandamus petition and overruling a district court's order compelling the defendants to produce documents whose disclosure threatened to "inhibi[t] internal campaign communications that are essential to effective association and expression," while emphasizing that "[a] protective order limiting dissemination of this information will ameliorate but cannot eliminate these threatened harms"). Moreover, disclosing to litigation adversaries deliberative plans concerning future agency actions that will be subject to litigation causes the very type of harm to the government that the deliberative process privilege is meant to prevent.

C. The issues presented are important and warrant this Court's immediate intervention.

The deliberative process privilege exists because disclosure of deliberative documents chills the willingness of government officials to engage in "open, frank discussion[s]" about difficult policy choices. *Mink*, 410 U.S. at 87. Here, where the discission involves top-level officials making long-term policy judgments at the President's request, the government's interest in confidentiality is at its apex. The government cannot function if officials are worried that in writing down their strategies for future staffing needs or for budget talks with congressional

appropriators or for any number of other sensitive decisions, those deliberations may be shared on a whim. The stakes of disclosure justify this Court's exercise of its mandamus jurisdiction.

II. This Court should grant a stay pending review of the petition and an immediate administrative stay.

This Court should also stay the district court's order pending its consideration of this petition and grant an administrative stay pending its consideration of the stay motion. This Court commonly grants stays pending disposition of a writ of mandamus, including in cases involving challenges to discovery orders. *See, e.g.*, Order, *In re United States of America*, No. 17-72917 (Oct. 24, 2017) (staying discovery and record supplementation); *Barton v. U.S. Dist. Court*, 410 F.3d 1104, 1106 (9th Cir. 2005). A stay is equally appropriate here.

Once the government has been required to turn over the Plans, the intrusion upon the prerogatives and autonomy of the Executive Branch and the confidentiality of its communications will have occurred and cannot be remedied. Conversely, plaintiffs will not be harmed if it is prevented from obtaining (improper and irrelevant) discovery during the short time it will take this Court to decide the government's mandamus petition. Given the significant separation-of-powers concerns that the district court's order raises and the absence of any clear, immediate need for intrusive discovery, the equities and public interest plainly favor a stay.

CONCLUSION

For the foregoing reasons, this Court should grant an immediate administrative stay and grant a stay pending resolution of the petition for mandamus. Additionally, this Court should issue a writ of mandamus compelling the district court to vacate its July 18 production order.

Respectfully submitted,

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