

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

LEAGUE OF WOMEN VOTERS OF  
MASSACHUSETTS, et al.,

Plaintiffs,

v.

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

Defendants.

Civil Action No.  
1:26-cv-11549-IT

STATE OF CALIFORNIA, et al.,

Plaintiffs,

v.

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

Defendants.

Civil Action No.  
1:26-cv-11581-IT

BEFORE THE HONORABLE INDIRA TALWANI, DISTRICT JUDGE

MOTION HEARING

Tuesday, June 2, 2026  
10:15 a.m.

John J. Moakley United States Courthouse  
Courtroom No. 9  
One Courthouse Way  
Boston, Massachusetts

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

(In open court at 10:15 a.m.)

THE DEPUTY CLERK: United States District Court is now in session, the Honorable Judge Indira Talwani presiding.

This is a motion hearing in Case Numbers 26-cv-11549, League of Women Voters of Massachusetts, et al. v. Trump, et al.; and 26-cv-11581, State of California, et al. v. Trump, et al.

Will counsel please identify themselves for the record.

MR. COHEN: Good morning, Your Honor. Michael Cohen on behalf of the State of California and the plaintiff states.

THE COURT: Good morning.

MS. BELLOWS: Anne Bellows on behalf of the State of California and plaintiff states. And I'd like to note Mr. Cohen and myself will be splitting argument.

THE COURT: Okay. Good morning.

MR. IRELAND: Good morning, Your Honor. Kiel Ireland on behalf of the State of Nevada.

THE COURT: Good morning.

MS. ARSLANIAN: Good morning, Your Honor. Vanessa Arslanian from the Massachusetts Attorney General's Office.

MS. LEE: Theresa Lee from the American Civil Liberties Union on behalf of the League of Women Voters of

1 Massachusetts plaintiffs. I'd also like to acknowledge that  
2 members of each of our plaintiff organization are here with  
3 us in the courtroom today.

4 THE COURT: Good morning.

5 MS. LAKIN: Good morning. Sophia Lakin with the  
6 ACLU for League of Women Voters plaintiffs.

7 THE COURT: Good morning.

8 MS. ROSSMAN: Good morning, Your Honor. Jessie  
9 Rossman with the ACLU of Massachusetts.

10 THE COURT: Good morning.

11 MS. SWEREN-BECKER: Good morning, Your Honor.  
12 Eliza Sweren-Becker with the Brennan Center for Justice on  
13 behalf of the League plaintiffs.

14 THE COURT: Good morning.

15 MR. PIERCE: Good morning, Your Honor. Clayton  
16 Pierce with the American Civil Liberties Union on behalf of  
17 the League plaintiffs.

18 THE COURT: Good morning.

19 MR. PEZZI: Good morning, Your Honor. Stephen  
20 Pezzi from the Department of Justice on behalf of the  
21 United States.

22 THE COURT: Good morning.

23 MR. AL-SHAREFFI: Good morning, Your Honor. Esam  
24 Al-Shareffi from the Department of Justice, also representing  
25 the United States.

1           THE COURT: Good morning.

2           MR. CAPOZZI: Good morning, Your Honor. Louis  
3 Capozzi on behalf of the intervenor defendants, State of  
4 Missouri and the other states.

5           THE COURT: Good morning.

6           MR. GILBERG: Good morning, Your Honor. Benjamin  
7 Gilberg on behalf of the intervenor states as well.

8           THE COURT: Good morning.

9           MR. PATTON: Good morning, Your Honor. Michael  
10 Patton on behalf of the intervenor states.

11          THE COURT: Good morning.

12                 So I have, essentially, three motions in front of  
13 me: I have the defendants' motion to dismiss in both cases,  
14 I have the plaintiff states' motion for summary judgment, and  
15 I have the League of Women Voters plaintiffs' motion for a  
16 preliminary injunction.

17                 And I think the way I'm planning to proceed here is  
18 I'm going to start with the defendants', really, the 12(b)(1)  
19 arguments that are applicable in both cases and hear argument  
20 on that; I then intend to hear argument on the state  
21 plaintiffs' motion for summary judgment and then on the  
22 League plaintiffs' motion for a preliminary injunction.

23                 And I'm doing the two plaintiffs groups in that  
24 order because -- I suppose we could switch it the other way,  
25 too, but the state plaintiffs, I understand, are seeking to

1 address Sections 2, 3, and 5 of the executive order; and the  
2 League plaintiffs are only addressing Section 3 of the  
3 executive order. So that's how I intend to proceed.

4 I do want to start with a sua sponte  
5 reconsideration of a prior order of mine. When the states --  
6 you've identified yourself as the intervening states, but  
7 when the states moved -- and that is the -- Missouri,  
8 Alabama, Florida, Indiana, Kansas, Louisiana, Montana,  
9 Nebraska, Oklahoma, South Carolina, South Dakota, and  
10 Texas -- when those states sought to intervene, the  
11 defendants and the plaintiffs opposed intervention as of  
12 right, which I continue to agree with.

13 On permissive intervention, the League plaintiffs  
14 didn't oppose it. The state plaintiffs did. So on the  
15 League plaintiffs, I just allowed it without -- because it  
16 was unopposed as permissive intervention.

17 On the state case, the defendant -- the plaintiff  
18 states argued that, for permissive intervention, one question  
19 is whether the defendant will be fully defending the action  
20 and/or sufficiently defending the action. And based on that,  
21 I denied the motion to intervene in the state case and only  
22 allowed participation as amicus.

23 After reviewing the briefs on merits, I do think  
24 there's a distinction between the positions taken by the  
25 United States and the intervening/amicus states which is, in

1       brief, that the United States has taken the position that we  
2       don't yet know what's going to happen with these citizenship  
3       lists, whereas -- or whether they're feasible or will ever  
4       come to happen -- whereas the states are affirmatively taking  
5       the position that you want the citizenship lists.

6               And so, for that reason, I do think that  
7       distinction does merit permissive intervention; and so, on  
8       reconsideration on my own of that order, I am allowing the  
9       states that moved to intervene to intervene in both cases,  
10      not just the one.

11             So with that starting point -- I don't think, for  
12      the 12(b) (1) argument, we're necessarily in a different --  
13      that there's anything that I'm really looking for you to add  
14      on that, although you're welcome to; but on the merits  
15      arguments, I do think I'd like to hear a little bit more from  
16      everyone.

17             So with that, I always start with the moving party;  
18      and on the 12(b) (1), that is the defendants. And for those  
19      of you who have been before me before, you know I go back and  
20      forth as I try to make my way through the arguments.

21             MR. PEZZI: Okay. Good morning, Your Honor.  
22      Stephen Pezzi from the Department of Justice on behalf of the  
23      United States.

24             I'd like to start with the timing of this lawsuit,  
25      or these lawsuits, which were filed mere days after the

1 issuance of Executive Order 14,399. Those timing  
2 considerations bear significantly on the 12(b)(1) arguments  
3 that the government has raised here and that Judge Nichols  
4 addressed in his preliminary injunction opinion last week in  
5 parallel litigation in the District of Columbia.

6 In short, there are both standing and ripeness  
7 problems created by plaintiffs' litigation strategy here to  
8 immediately challenge the executive order itself and on its  
9 face rather than to await and then challenge eventual  
10 implementation of that executive order by the defendant  
11 agencies here.

12 And so I'm happy to take the provisions of the  
13 executive order one by one. Section 2(a) of the executive  
14 order is about state citizenship lists. It contemplates --

15 THE COURT: For ease of communication here, there  
16 are things that the federal government is doing as  
17 contemplated by the executive order, there are things that  
18 states might be doing as contemplated by the executive order,  
19 and then there are things specifically that the post office  
20 may be doing as contemplated by the executive order. And  
21 there are lists being generated all over.

22 So for clarity, the list that's referenced in 2(a),  
23 which is a list generated by the federal government to be  
24 given state specifically, if we call it a "state citizenship  
25 list," it sounds like it's the list the state is creating.

1           So can you refer to that list as either the  
2     "federal citizenship list" or the "citizenship list," but  
3     not -- I know the executive order says "state," but that's  
4     not what it is. It's the list that the federal government is  
5     hoping to generate on a state-by-state basis.

6           MR. PEZZI: Yes, Your Honor. I will endeavor to be  
7     as precise as possible, notwithstanding the language of the  
8     executive order itself that has, of course, been drilled into  
9     my head for several weeks now.

10          But, yes, the citizenship lists contemplated by  
11     Section 2(a) of the executive order to be generated primarily  
12     by the Secretary of Homeland Security, to the extent feasible  
13     and consistent with applicable with law. The executive order  
14     contemplates preparation of certain infrastructure that would  
15     allow both individuals and states to make any sort of  
16     corrections or editions to those lists if necessary.

17          But, I mean, the most important part of that  
18     section of the executive order for today's purposes, in the  
19     view of the United States, is that, you know, as the record,  
20     I think, makes clear and as I think is undisputed, this is  
21     all potential implementation activity that has not yet been  
22     completed; and there remain significant uncertainties, even  
23     within the federal government, about how and to what extent  
24     the executive order will be implemented.

25          THE COURT: Okay. So let me just make sure we're

1 on the same page about timing. There -- for Section 2(a),  
2 there is a deadline for DHS to have established the  
3 infrastructure necessary to compile the lists, correct?

4 MR. PEZZI: Yes, Your Honor. That's in  
5 Section 4(c).

6 THE COURT: And that's 90 days, which would be  
7 June 29th?

8 MR. PEZZI: I believe that's right. Yes,  
9 Your Honor.

10 THE COURT: Okay. So by June 29th, DHS is to have  
11 established the infrastructure. And then under the -- I'm  
12 not sure which section it is -- the DHS is required to  
13 provide the states a copy of this list no later than 60 days  
14 before a regularly scheduled federal election or promptly  
15 before another election as requested by the states, correct?

16 MR. PEZZI: So with the very important caveat, I  
17 guess, two important caveats, I mean, one that I don't want  
18 to dwell on because I know Your Honor is familiar with it,  
19 the feasibility and legality considerations first would need  
20 to be overcome before DHS does that; but assuming those  
21 issues are overcome, that is certainly the timeline  
22 contemplated by the executive order.

23 Those are not legally binding or judicially  
24 enforceable deadlines, of course. That is, you know, the  
25 President's direction to his or her subordinates, and I don't

1 want to jump around on different parts of the executive  
2 order; but, I mean, the postal service notice of proposed  
3 rulemaking, for example, that is being published in the  
4 federal register this morning missed that deadline by a few  
5 days, so I don't want to suggest --

6 THE COURT: Okay. So let's hold off on the post  
7 office for a minute because I just -- I think -- to be clear,  
8 as I read the executive order, there's some overlap between  
9 what happens with the citizenship list and what happens with  
10 the post office. But in many ways, they're very separate;  
11 and so let's talk about them first separately. I mean,  
12 you're welcome to explain their interactions.

13 But the citizenship list, as you said, may or may  
14 not be coming out, but it's unlikely to come out prior to the  
15 date given, which was June 29th.

16 MR. PEZZI: That's right, Your Honor.

17 THE COURT: But at the same time, if an election is  
18 coming up, you have to provide that list -- assuming it's  
19 come out June 29th, you would be providing that list then to  
20 the state 60 days before the election, right?

21 MR. PEZZI: Not necessarily, Your Honor. I mean --  
22 and I think this is where the feasibility constraint in  
23 Section 2(a) could be very important.

24 I mean, there have already, in fact, been federal  
25 elections since the issuance of this executive order; and,

1 again, I think it's undisputed that, you know, no state --  
2 excuse me -- no citizenship lists contemplated by  
3 Section 2(a) were sent.

4 THE COURT: Well, there's been elections, but I  
5 think today is the first day that we have elections since the  
6 60-day -- so there was an initial 60-day deadline -- no, I'm  
7 sorry. For the citizenship list, the first date is the  
8 90 days.

9 So we haven't yet had an election that has happened  
10 under the anticipated dates here. The anticipated date was  
11 that you would get a citizenship list by 6/29. And once you  
12 have that citizenship list, the states can then ask for the  
13 citizenship list for a regularly scheduled -- for a special  
14 election; but in addition, any regularly scheduled election,  
15 you have to give it to them 60 days before.

16 MR. PEZZI: I think, generally, that is what the  
17 executive order contemplates; but to the extent Your Honor's  
18 question was about -- you know, to the extent there's some  
19 sort of impossibility or incompatibility between those  
20 timelines, I mean, I think by using the word "feasible," the  
21 executive order is making clear that, if it is not possible  
22 to do that, the agency need not do that, and that does not  
23 violate the executive order. That's all I'm trying to say.

24 THE COURT: Okay. So I'm just really wanting to  
25 focus for a few minutes on -- more on timing, because I do

1 think timing is a really critical question here. So I  
2 went -- I'm not going to say this out loud because then it  
3 gets picked up by the news.

4 But I managed to get a list of all of the dates,  
5 and I won't tell you how I managed to get this date or its  
6 reliability; but it is my understanding that we have  
7 elections coming up, so June 2nd, today -- too soon for this.

8 Let's forward to June 29th. So after June 29th, we  
9 have a primary in Colorado on June 30th, a primary in Arizona  
10 on July 29th. So let's say the June 30th is still in the not  
11 feasible area. We're right at the end between when you get  
12 this thing on June 29th and they can't get it -- they  
13 certainly can't get it 60 days before.

14 The July 28th runoff, you wouldn't have 60 days  
15 before, but you'd have time to -- some time to be able to get  
16 it. That's South Dakota runoff, if applicable.

17 August 4th, primaries in Kansas, Michigan,  
18 Missouri, Virginia, Washington; August 6th, Tennessee  
19 primary; August 6th, Hawaii primary; August 11th,  
20 Connecticut, Minnesota, Vermont, Wisconsin; August 18th,  
21 Alaska, Florida, Wyoming; August 25th, Oklahoma, if there's a  
22 runoff; September 1st, Massachusetts primaries;  
23 September 8th, New Hampshire.

24 So certainly towards those end dates, the argument  
25 that if those lists come out, it's not feasible has sort of

1 disappeared, right? At that point, we might have a list.

2 So if I tell these folks that this is premature and  
3 the list comes out as scheduled on June 29th and they have a  
4 primary on September 1st, that list will be in play.

5 MR. PEZZI: Possibly, Your Honor, although, again,  
6 some important caveats. I won't repeat all the caveats that  
7 I've already advanced, but one or two more that I think are  
8 important.

9 One is, it is not clear on the face of the  
10 executive order whether it's intended to apply to primary  
11 elections. That was also true of the postal service  
12 provision, which I know we'll get to, and now the proposed  
13 rulemaking -- which, again, is just a proposal -- proposes  
14 carving out primary elections, and so --

15 THE COURT: But right now -- I mean, on its face,  
16 what it says is you'll give it for a federal election. And I  
17 understand that the post office has taken the position that a  
18 primary isn't a federal election because it's something else.  
19 I'm not sure. But that could -- they could change that view  
20 by the time a final rule comes out; but, at any rate, this  
21 executive order just says this.

22 So -- and let's assume that the state wants to use  
23 it, right? So now we have the state saying, "I want to use  
24 this. I have a primary September 8th." What happens then?  
25 Do they then file at that point?

1           MR. PEZZI: Sure, Your Honor. And to be clear, I  
2 mean, we don't dispute the basic premise that there are  
3 eventually going to be federal elections coming after the  
4 date by which, if and when these citizenship lists are  
5 produced, that they are -- and they're, obviously,  
6 contemplated --

7           THE COURT: So I understand, for example, that if  
8 you have a challenge to how a census is going to be, but  
9 nothing really is going to happen for a few years that really  
10 matters, that you let it work its way through.

11           But my question here for you -- and so to the  
12 extent -- I can sort of give you a little bit of my tentative  
13 thinking on this. To the extent that the challenge is to  
14 these -- to the executive order ongoing or to the rules  
15 ongoing, for the more distant future, let's say after  
16 November 3rd, it probably is premature.

17           What I'm thinking about, though, is are -- the  
18 elections between now and November 3rd and including  
19 November 3rd; and what I'm thinking further is that I'm just  
20 a district judge, right? And whatever I do, one side or the  
21 other is going to appeal.

22           And when you appeal, if I have granted relief, the  
23 government will be asking me to stay my hand, stay the order,  
24 and it will go up to the Court of Appeals. And whatever  
25 happens there, it's likely one side or the other will seek

1 review of it.

2 So when I'm thinking about, can you run into court  
3 to deal with this election coming, I'm not thinking, can I  
4 work 24 hours around the clock and get an answer out on a TRO  
5 or on a PI in very, very short order; but I'm -- this is an  
6 issue that I'm not resolving at the end of the day finally.

7 I think -- certainly, I think that is the position  
8 of the government, that, ultimately, one district judge here  
9 or one district judge there, they do what they do; but there  
10 will be the court of appeal and maybe the Supreme Court that  
11 will decide.

12 So given that, is this really not in a position to  
13 address its ramifications for the November 3rd election or  
14 the elections before November 3rd?

15 MR. PEZZI: Sure, Your Honor. And I'm candidly  
16 quite sensitive, and as I'm sure all the many lawyers in this  
17 room are quite sensitive to some of the practical  
18 implications of the government's position here and the  
19 opinion issued by Judge Nichols recently in that -- I mean,  
20 we fully expect and are -- it is entirely consistent with our  
21 position here that judicial review of these issues will  
22 happen.

23 And if the Court were to accept the government's  
24 arguments, some of those issues may have to be litigated on a  
25 time-sensitive basis. And the government is sensitive to the

1 practical problems that arise from that sort of litigation.

2 THE COURT: But it's a time-sensitive basis -- I  
3 mean, to -- if you -- if you came here into the court and you  
4 said, "Judge, don't deal with this now, but if you deal with  
5 this on October 15th, we will all live with that for the  
6 November 3rd election," that would be one thing.

7 But, you know, you can go and listen to the  
8 justices talking about the emergency docket, and everybody  
9 else; we are all, at all levels of the court, we are all  
10 struggling with having to deal with weighty, constitutional  
11 issues on an expedited basis.

12 And so to say let's start that run-up now --  
13 because, at the end of the day, nobody wants my opinion on  
14 this. At the end of the day, the question is: What's the  
15 Supreme Court going to say on this, or at least the Court of  
16 Appeals? It may not or may not be taken by the Supreme  
17 Court, but at least the Court of Appeals.

18 And so when you say it's not ripe and there's  
19 enough time to address this once the other shoe drops, is  
20 that really true?

21 MR. PEZZI: I think it can be litigated, if  
22 necessary, on an expedited basis later this summer or in the  
23 fall. I don't have an answer other than the doctrinal one,  
24 which is that, you know, there is no convenience exception  
25 under Article III. And so we've --

1           THE COURT: No, but isn't -- on the cases you've  
2     cited to me where you say we wait on ripeness, we wait till  
3     it's, you know, really there and ready, don't they all have  
4     sort of a carve-out assuming review would then still be  
5     possible at that time?

6           And so to the extent that the question here today  
7     would be can these issues be addressed in time for when they  
8     matter, which would be when people are voting next, which  
9     could be November 3rd, but it could be August or September,  
10    isn't that -- under those same cases that you have cited,  
11    don't those fall under the "so long as review can happen"?

12           Because what -- you can't take the position -- I  
13    think you would agree with me on this -- you can't take the  
14    position that there can never be review. The point is there  
15    has to be review, and there has to be review that's  
16    meaningful. You don't let all the rights come and go and  
17    say, well, that's okay. We can lose rights for this time  
18    around. Whether it's the right of the states that want the  
19    list or the rights of the states or the organizations that  
20    are concerned about these, on both sides, don't they get an  
21    answer to that before the election?

22           MR. PEZZI: So we are certainly not taking the  
23    position that nobody gets judicial review. We expect it --  
24    if the government were to prevail on every argument in this  
25    motion to dismiss, that if and when the agencies, you know,

1 complete final agency actions to implement these actions or  
2 plaintiffs face either an actual or an imminent injury -- to  
3 be clear, an imminent injury also works under Article III --  
4 the judicial review is quite likely. Obviously --

5 THE COURT: And Judge Nichols' decision in DC was  
6 absolutely not on the merits. It was entirely just on the  
7 question -- it was a denial of the requested relief without  
8 prejudice until things moved forward.

9 MR. PEZZI: He did address likelihood of success on  
10 the merits, but you're certainly right, Your Honor. I mean,  
11 that's a preliminary injunction opinion, and his opinion  
12 contemplates, just like the government's briefs contemplate,  
13 the possibility of judicial review once final actions are  
14 taken, if final actions are taken, to implement these  
15 provisions of the order.

16 THE COURT: Okay. So let's go back to ripeness. I  
17 understand the argument on ripeness, to the extent that  
18 you're saying, if no rule ever comes out from the post  
19 office, that's not yet ripe; but let's turn to the  
20 citizenship part of it, because we're not waiting on a rule.  
21 We're -- or rulemaking. We're having, currently, the  
22 Department of Homeland Security compiling this list, putting  
23 together a process and figuring out if it's feasible and so  
24 forth, yes?

25 MR. PEZZI: Yes, Your Honor.

1           THE COURT: So tell me more about your view on why  
2 that isn't ripe at this point.

3           MR. PEZZI: Certainly, Your Honor.

4           So the challenge here is to Section 2(a) of the  
5 executive order, which does contemplate the creation of these  
6 sorts of lists to the extent feasible and consistent with  
7 applicable law, including but not limited to the Privacy Act.  
8 Those deliberations were ongoing during the parties' briefing  
9 and remain ongoing now. And so no final decisions have been  
10 made, as I understand it, within the Department of Homeland  
11 Security on these issues.

12           And so not only are plaintiffs not suffering any  
13 Article III injury from that portion of the executive order,  
14 it's very difficult to imagine how we could litigate the  
15 merits of the claims that would attack those provisions of  
16 the executive order, and I'll give an example or two.

17           I mean, to the extent plaintiffs discussed this in  
18 their briefs, a lot of their theories are about the Privacy  
19 Act and privacy rights. And, in fact, plaintiffs explicitly  
20 say in one or two places in their brief that the executive  
21 order is unlawful because it, you know, commands violation of  
22 plaintiffs' privacy rights. I mean, I think the executive  
23 order commands the opposite. It commands compliance with the  
24 Privacy Act.

25           THE COURT: Well, it says, "Create a list as

1 feasible and lawful of eligible citizens who are residents of  
2 a particular state." It doesn't say, "Compile a list of  
3 ineligible people." So let's sort of -- just sort of divide  
4 out. So it's creating a list of people who are -- who the  
5 government can confirm are citizens of a particular state.

6 But -- and maybe the -- maybe the answer here, as  
7 I'm pondering this myself, is that if you comply with the  
8 privacy right -- the Privacy Act, you'll have a small list.  
9 You'll have a list of the people who -- you might have people  
10 who you think aren't eligible, but that's not what you're  
11 giving the state. You're giving the state the list of people  
12 you think are eligible. And if you're complying with the  
13 privacy right -- the Privacy Act, I'm not sure what you're  
14 compiling that from.

15 For example, if you have a five-generation  
16 US citizen who has always filed their taxes and lives in a  
17 particular state, their tax records would probably go back  
18 and show their Social Security number and where they live and  
19 so forth. But I'm not sure how they would show up on your  
20 list without violating the Privacy Act.

21 MR. PEZZI: I think there's some fair questions  
22 there, Your Honor. I mean, I think, to the extent  
23 Your Honor's intuition is that a list of individuals  
24 confirmed to be over the age of 18 and confirmed to be US  
25 citizens and confirmed to live in a particular state is going

1 to include less than 100 percent of the individuals who --

2 THE COURT: Well, more than -- I mean, let's not  
3 be -- we're not talking 99 percent either. We're talking a  
4 very much smaller percent, because what you're getting --  
5 you're getting people -- you'll get your -- ideally, you will  
6 get your naturalized citizens.

7 But let's talk for a minute about native-born  
8 Americans. How are you getting them on your list? How are  
9 you getting the women who've changed their names when they  
10 got married? How are you getting the Americans who've moved  
11 from state to state? They're not in a federal database by  
12 state.

13 You're getting -- you're saying to the states,  
14 "Here's a list of naturalized citizens." I think you can  
15 get -- probably get to that, although, obviously, the  
16 plaintiffs have talked about problems with same names and so  
17 forth, but -- or that you didn't think they were naturalized  
18 yet, but they are.

19 But putting those aside, let's assume you can try  
20 to get a close group of the naturalized citizens. Let's  
21 just -- you certainly aren't saying you're getting 99 percent  
22 of Americans, of American-born citizens, are you? From what  
23 database?

24 MR. PEZZI: So those very questions, Your Honor, I  
25 think, are core to the government's ripeness argument here

1 and, I think, support the government's position. Because I  
2 don't know, plaintiffs do not know, and the Department of  
3 Homeland Security has not made any final decisions regarding  
4 what databases are going to be relied upon. The executive  
5 order itself identifies some possibilities.

6 THE COURT: No, but you're not promising -- you're  
7 not promising a complete list. That's not what this  
8 executive order is about. You're promising a list of  
9 confirmed citizens, which, I think, you're not -- you're not  
10 disputing and you're saying it's not 100 percent, but you're  
11 not disputing it's not going to be complete, to be clear.

12 MR. PEZZI: Yes, Your Honor. It is a list of  
13 confirmed citizens. So to the extent someone is  
14 unconfirmed --

15 THE COURT: Okay.

16 MR. PEZZI: -- it does not mean they're a  
17 noncitizen.

18 THE COURT: So why would I assume -- why should I  
19 assume for purposes of this ripeness analysis that DHS isn't  
20 going to do what the President has asked it to do, which is  
21 to create a list, to the extent possible, of confirmed  
22 United States citizens residents? And so there will -- why  
23 shouldn't I assume there will be such a list?

24 MR. PEZZI: So I think -- even if Your Honor were  
25 to assume that, I don't think that is fatal to the

1 government's ripeness argument, because to litigate the  
2 questions of whether that sort of list violates the law, you  
3 require some information that no one in this courtroom has  
4 right now about how the lists were compiled, using what  
5 information and --

6 THE COURT: Okay. So let me assume regularity,  
7 which I think I'm supposed to do. So let me assume that the  
8 government has -- the federal government had created a list  
9 of confirmed citizens without violating the Privacy Act.  
10 Okay?

11 Can I consider at that point -- maybe they don't  
12 have any other challenges, but can't I consider that, whether  
13 that -- if they were -- if they're coming out with a list  
14 that violates the Privacy Act, we have that problem.

15 But let's say they come out with a list that the  
16 main criticism of this list is that it is underinclusive.  
17 Okay? So it's not violating any laws. It's just an  
18 underinclusive, perhaps closely underinclusive, but let's say  
19 it's an underinclusive list. They may or may not have good  
20 legal arguments about it, but isn't that question ripe?

21 MR. PEZZI: So once -- if and when a list is  
22 created, there are still significant steps that would have to  
23 be taken before plaintiffs suffer any Article III injury or  
24 any final agency action is created -- is taken.

25 I mean, there are all sorts of data in all sorts of

1 government databases right now and have always been there.  
2 And that data just sitting in a file somewhere, under the  
3 Supreme Court's decision in *TransUnion*, does not give rise to  
4 Article III standing.

5 The question is what the federal government first  
6 and then, ultimately, I think, in this set of questions, what  
7 the state governments might do with such a list that would  
8 give rise to some sort of Article III injury that could be  
9 litigated.

10 Now, obviously, on that hypothetical, the  
11 government hasn't violated the law anyway, and so I'm not  
12 sure what the concern would be.

13 THE COURT: Well, so let me ask them. Let me  
14 assume that I accord a presumption of regularity. And under  
15 the Privacy Act, much of the data that the President has  
16 suggested maybe should be included, maybe it won't be  
17 included because we have these Privacy Act laws. So let's  
18 assume that the government comes out with a list on June 29th  
19 that is not violating the Privacy Act. It's now a federal  
20 list of confirmed citizens.

21 Do you have a ripe issue at that point?

22 MS. BELLOWS: I can address that for plaintiff  
23 states. If I may, I'd like to handle two housekeeping  
24 matters first.

25 One, I just want to reiterate our objection to the

1 intervention of the other states for the reasons that were  
2 laid out in our papers and additionally note that issue is  
3 currently being briefed in the First Circuit.

4 I also just want to clarify for the Court I'll be  
5 addressing Section 2 issues; and my colleague, Mr. Cohen,  
6 will be addressing issues related to Section 3, so you can  
7 direct your -- and Section 5, so you can direct questions  
8 accordingly.

9 So if the government created a list that was in  
10 compliance with the Privacy Act -- and to be clear, plaintiff  
11 states have not raised a Privacy Act claim here. We  
12 certainly would have and, in fact, we do have today a live  
13 controversy about whether the President has statutory or  
14 constitutional authority to direct the Department of Homeland  
15 Security and the Social Security Administration to create  
16 such a list.

17 And one of the reasons we have that today is  
18 because the executive order is extraordinarily clear about  
19 what DHS must do. It's clear about what the list consists of  
20 with criteria for inclusion on the list, when it must be  
21 deliberated, that there needs to be these mechanisms by which  
22 individuals and states can submit instructions.

23 And defendants have talked about feasibility, but  
24 there is no evidence in the record citing any barrier to the  
25 creation of this list. And they have not --

1           THE COURT: Well, that's my point in saying it  
2 might be a -- it might turn out as a feasibility matter that  
3 it's a small list, but a list of some sort could be created  
4 without violating the Privacy Act. It just might be a small  
5 list.

6           MS. BELLOWS: Correct. And there's nothing in the  
7 record to suggest otherwise.

8           On the -- I guess, let me also address some of the  
9 ripeness colloquy, if that's all right, that came up earlier.  
10 I think the Court identified some of the grave hardship  
11 issues that come from withholding review.

12           But the other reason that this is ripe is that our  
13 challenge goes to the President's authority to issue these  
14 orders, and that has already occurred. Those -- that issue  
15 has been -- has been squarely crystallized by the issuance of  
16 this executive order.

17           And there's nothing about the implementation that  
18 will change either the shape of that question nor the fact  
19 that we have existing harms. So as we've laid out in a  
20 mountain of evidence through our declarations, plaintiff  
21 states, as administrators of the election, need to grapple  
22 with the fallout from these lists no matter what. So -- and  
23 there's two reasons -- three reasons, actually, that I'd like  
24 to highlight for that.

25           First is that our election officials are under a

1 threat of prosecution under this executive order if they  
2 issue ballots to voters who the federal government believes  
3 are not eligible to vote in federal elections, and I can talk  
4 at length about that, but that means --

5 THE COURT: And just to be clear here, we have a  
6 little bit of a disconnect because the list you're getting  
7 from the government isn't a list of people who are  
8 disqualified from voting. It's a list that is not a complete  
9 list of some people who are qualified to vote, but if the  
10 election officials are sending ballots or allowing people to  
11 vote who aren't on the list, there's a threat of prosecution.

12 MS. BELLOWS: That's right. And election officials  
13 have testified to this in the declarations we've put in  
14 describing it as chilling in a way with no prior antecedent  
15 in their experience, saying that they feel personally  
16 threatened about the risk of a criminal prosecution if a  
17 ballot issues to state election officials.

18 So one -- one result of this is that, in order to  
19 protect their election officials and others involved in  
20 administering the elections, states have to try to minimize  
21 errors on that list to the extent possible. So when these  
22 lists come out, as everything indicates they will, we're  
23 going to have to launch a massive and technically very  
24 complex data matching and analysis investigation.

25 And, currently, states are already working to

1 prepare what their plan will be, who will handle it, can they  
2 get additional resources, what are some of the technical  
3 hurdles that we'll have to cover come, so those injuries are  
4 occurring now.

5 Other reasons I want to highlight why these lists  
6 will cause and are causing injuries are that, first of all,  
7 no matter what, they will cause confusion among voters and  
8 among election officials; and that, too, is attested in the  
9 declarations by all of the inquiries and concerns that have  
10 already been brought to the forefront, to the feet of our  
11 elections officials, and that will only increase once these  
12 come out.

13 So states are beginning to and will have to issue  
14 guidance and training to elections officials so they  
15 understand what their duties are and are not related to this  
16 list.

17 There are tens or hundreds of thousands of people  
18 who we entrust to run our elections throughout plaintiff  
19 states; and we need to make sure that all of them know, for  
20 example, that just because someone is not on the state  
21 citizenship list, that does not mean they're not eligible to  
22 vote.

23 THE COURT: I'm calling it the "citizenship list"  
24 for here.

25 MS. BELLWS: Sorry. Citizenship list. Thank you

1       for the reminder.

2               In the same way, to dispel confusion among the  
3 public, we'll have to mount public education campaigns,  
4 respond to questions, and make sure that the public  
5 understands, again, what these lists are and what they are  
6 not.

7               And the last reason we have to do something about  
8 this is because they pose a serious risk of  
9 disenfranchisement. And so, you know, again, that could be  
10 from voters who are confused, who are deterred from voting  
11 because they fear that they may be prosecuted wrongly for not  
12 being eligible. And it also comes from the risk that  
13 election officials, despite our best efforts, will  
14 misunderstand their duties and withhold ballots from eligible  
15 voters.

16              So this -- we know this is coming towards us. The  
17 executive order is very clear about that, and we must prepare  
18 and are preparing, and so all of those injuries are live now  
19 and will only become more acute as we approach the elections.

20              I can also speak to the saving clause and  
21 feasibility issues that my brother on the other side has  
22 raised, if that would be helpful.

23              THE COURT: Sure.

24              MS. BELLOWS: Okay. So, well, on feasibility, as I  
25 mentioned, there's nothing in the record to suggest they're

1 not feasible. I also want to point the Court to the --

2 THE COURT: Well, I think you would agree it's not  
3 feasible to create a full and complete and accurate list  
4 of -- by the federal government of citizens.

5 MS. BELLOWS: Absolutely. And we've put forward  
6 evidence to that effect. This is a core part of our concern,  
7 because we know these lists will be incomplete.

8 THE COURT: So the feasibility question is it's  
9 feasible to create some kind of list.

10 MS. BELLOWS: Right. And there's no evidence that  
11 something would stop them from actually putting forward the  
12 list, and none of their declarants have said that they  
13 wouldn't do it.

14 I also wanted to point the Court, as a legal  
15 matter, in interpreting the EO, to Section 4(c), which  
16 directs DHS and SSA to take steps, you know, to establish the  
17 infrastructure to share data, and none of that has any  
18 qualifier about feasibility in it. And I think that really  
19 shows why the feasibility is just window dressing and an  
20 attempt to insulate this particular directive from judicial  
21 review.

22 THE COURT: Well, I mean, if you take a look -- I  
23 think window dressing is a little too strong. I mean, if you  
24 take a look at what the post office's proposed rule is by  
25 cutting out primaries, they've somewhat acknowledged that the

1 way primaries are handled might be so complicated and  
2 difficult that this doesn't make sense maybe. And to cut out  
3 overseas ballots, they've recognized that the rule is not  
4 feasible as to overseas ballots.

5 Just on that question, you're not taking the  
6 position -- no one is taking the position, however, that a  
7 Section 2 list wouldn't apply to voters for overseas ballots?  
8 It's just the mail -- it's just the post office sending --

9 MR. PEZZI: So I think I generally agree with that,  
10 Your Honor. The list contemplated by Section 2 -- well, I  
11 guess I should back up and say that is just not a question  
12 that's answered by the executive order itself.

13 THE COURT: Well, it doesn't have a carve-out for  
14 overseas voters.

15 MR. PEZZI: That is correct, Your Honor. And  
16 although --

17 THE COURT: And, in fact, it cites the overseas  
18 voters statute, doesn't it? Or maybe not. Maybe it doesn't.

19 MR. PEZZI: I don't think it does in the executive  
20 order itself.

21 THE COURT: Okay.

22 MS. BELLOWS: If I could continue and address the  
23 saving clause, this is an issue that the defendants have  
24 relied on quite heavily. But if you look at their cases, for  
25 example, in *Allbaugh*, there was an order that applied across

1 the federal government, numerous agencies, numerous streams  
2 of funding. And it set a default policy and said, "Follow  
3 this to the extent permitted by law."

4 But what we have here is an executive order that is  
5 very prescriptive and very detailed about what particular  
6 agencies must do. And they're attempting to use the saving  
7 clause to nullify the provisions in the executive order.

8 And courts have strongly rejected that. They have  
9 said where a saving clause would destroy the order itself, it  
10 has no effect. When there is no way to lawfully -- to  
11 lawfully implement the provisions of the executive order, it  
12 has no effect, and the Court can directly address the legal  
13 questions presented.

14 And just to clarify, you know, Mr. Pezzi said that  
15 we should have waited for implementation but chose to mount a  
16 facial challenge, and it's absolutely correct that we have  
17 mounted a facial challenge because our contention here is  
18 that the President does not have authority to order any of  
19 this; and that, again, is something which is -- which is  
20 perfectly -- perfectly ripe for this Court's review.

21 So -- and that is also why the saving clause is  
22 sort of of no moment, because there's no way for DHS to  
23 lawfully create a new program that's beyond the statutory  
24 authority and which trespasses into the province of other  
25 branches of government, including Congress and the states to

1 regulate federal elections.

2 THE COURT: So isn't the government's argument,  
3 though, that until -- so, you know, the President puts out  
4 this executive order. We assume he means what he says, but  
5 he puts out this executive order; and, in fact, it might not  
6 happen the way he wants it to happen.

7 Why isn't that a reason, that basically he -- maybe  
8 he issued an executive order, he wants this to really happen,  
9 but it's just not going to. Why isn't that an adequate  
10 defense? Because I think that's essentially what they're  
11 saying here, or at least the government is. The intervenor  
12 states don't really want it to go that way, but that's what  
13 the government is saying, is, look, don't worry about this  
14 executive order. We don't even know if it's going to do  
15 anything.

16 Why isn't that a reason for me to hold off on  
17 considering these weighty constitutional issues?

18 MS. BELLOWS: So defendants have presented it  
19 somewhat more softly here than they have defending it in  
20 their papers. In their papers, they acknowledge, as they  
21 must, the executive orders are legally significant documents.  
22 They are -- as they put it, it's an intra-executive branch  
23 directive from the President to his subordinates, and that's  
24 in their response to plaintiffs' statement of undisputed  
25 facts, paragraph 4.

1           THE COURT: But does the Supreme Court really want  
2 me to get into the question of what the President can tell  
3 the people working for him?

4           MS. BELLOWS: Certainly where there is a clear and  
5 mandatory and detailed directive that is beyond the  
6 President's power and there is every indication that the  
7 agency will implement it, I think it is proper for the courts  
8 to step in and --

9           THE COURT: But isn't there an issue that, until  
10 they implement it, it's just him saying, "This is what I  
11 want." And somebody might say to him, "No, you can't have  
12 that"; but "This is what I want," is that something that you  
13 can act on?

14           And, you know, again, to sort of show my hand here  
15 a little bit, I think the answer is that's probably a good  
16 defense for the things that they will be trying to consider  
17 later, but that maybe isn't a good enough defense for the  
18 things that we need to deal with this year.

19           MS. BELLOWS: Yeah. I mean, executive orders are  
20 certainly within the Court's -- you know, within the  
21 justiciable acts that a Court can address. And so, you know,  
22 I understand sort of the instinct to, like, "Let's just see  
23 what happens"; but when the executive order is clear about  
24 what will happen, then there's no need to wait.

25           There may be some differences around the edges, but

1 we already know that this list is coming towards us. We  
2 already know that it's going to have a severely disruptive  
3 effect on our elections. And so all of the sort of core  
4 elements that this Court needs to find standing are live.

5 All the legal questions that are presented about  
6 the -- whether the President has the power to issue this  
7 aren't going to change based on those sorts of implementation  
8 questions, which additional databases, you know, in addition  
9 to the ones that are mandated to be used by the executive  
10 order, which additional databases will they tap into for the  
11 state citizenship list, that has no bearing on the core legal  
12 question that our challenge presents, which is: Did the  
13 President lack the legal authority to direct the creation of  
14 this program, period?

15 Whatever the minor implementation differences  
16 around that program may be, none of that is necessary for  
17 this Court to address the heart of our case. And that's why  
18 there's a clear legal question. There's a live controversy  
19 because of the harm it's causing us that is fit for a  
20 judicial resolution now.

21 THE COURT: Okay. So back to you.

22 The argument here -- and I'm not really looking  
23 right now for the merits of this question. But don't I need  
24 to determine whether they're right that he does or doesn't  
25 have the authority to do this? Isn't that question ripe?

1           MR. PEZZI: So it's, certainly, I think easier to  
2 first address that in the context of standing. I mean, we do  
3 not shy away at all from the language in the brief about an  
4 executive order, including this one, is an intra-executive  
5 branch directive from the President to his subordinates.  
6 That directive doesn't cause any of the injuries that counsel  
7 for the plaintiff states was just describing.

8           All of the injuries that we just heard about are  
9 about what might happen if the lists are created, if the  
10 lists are sent to states, and then what states might do with  
11 them; although, to be clear, I mean, I think, certainly, in  
12 response to the plaintiff states -- I recognize with respect  
13 to the League of Women Voters plaintiffs, it's a little more  
14 complicated.

15           The answer for California and the other plaintiff  
16 states is quite easy. I mean, the executive order does not  
17 require the states to do anything at all with these lists,  
18 and so even --

19           THE COURT: With the one exception, I think, that,  
20 under the -- and now I'm sliding a little bit into Section 3.  
21 But the -- the post office cannot send a ballot out to  
22 somebody who is not on the -- I'm going to call it now the  
23 "post office list," and the post office list is given to the  
24 post office by the states after the state receives the  
25 federal citizenship list.

1           So the way the executive order reads, I think, is  
2   that you have a federal list. The federal list goes to the  
3   state. The state looks at it, and then says to the post  
4   office, "Okay. Please send ballots to these people."

5           And if those people aren't on the citizenship list,  
6   does the post office send those, or will postal employees  
7   worry that they will now be subject to prosecution? Do they  
8   not get sent? What happens if they aren't on this federal  
9   list?

10          I understand that it's a post office list that's  
11   coming from the state, but if the state sends -- you're  
12   saying the state doesn't have to do anything with our  
13   citizenship list. But the state now sends a list of --  
14   saying, "Here's the people we are going to send ballots to."  
15   What happens at that point if that list is different from the  
16   citizenship list?

17          MR. PEZZI: Yes, Your Honor. I'm very glad you  
18   asked this question because I think a lot of people have read  
19   the executive order in that way. I don't think that's the  
20   way it is going to be implemented, at least based on the  
21   proposal from the postal service, which, again, is just a  
22   proposal.

23          THE COURT: But you have hanging over the threat of  
24   enforcement of federal law violations. So however those  
25   people are individually implementing it, understanding it,

1 and interpreting it, and they may all be interpreting it  
2 wrong, but tell me what the right interpretation is.

3 MR. PEZZI: Certainly. And I want to address the  
4 enforcement piece too.

5 But the high-level answer is there is not a  
6 connection between the citizenship lists generated by the  
7 Department of Homeland Security and the mail-in and absentee  
8 ballot list generated by the states for purposes of the  
9 postal service section.

10 THE COURT: So how do you tell either the postal  
11 employee who is running the mail out or the state employee  
12 who is sending the ballots over to the post office that  
13 they're not going to be prosecuted by virtue of having a  
14 state list that isn't the same as the citizenship list or  
15 sending to people who aren't on the citizenship list?

16 How do you convey that -- how do you convey the  
17 information so people aren't afraid of the threatened  
18 prosecution? Which in the first -- I mean, nobody is talking  
19 about Section 1. Section 1, the purpose of this whole thing  
20 is to prohibit noncitizens from voting and to make sure  
21 that's explicitly what we're doing, and that's why we're  
22 doing it, and we're going to do it, including preventing  
23 violations of federal criminal law.

24 So why isn't -- even though you haven't said  
25 they're connected, the fact that everybody has interpreted it

1 that way -- and I agree with you that, when you look at them,  
2 they are separate lists. There is nothing in this order that  
3 says that when the state sends -- gives ballots to the post  
4 office, they have to follow the federal list.

5 But there is, throughout the whole order, "If you  
6 mail to a noncitizen, you will be prosecuted. And we're  
7 telling you who the noncitizens are because they're not on  
8 our list."

9 MR. PEZZI: So respectfully, Your Honor, the order  
10 does not say if you mail a single ballot to --

11 THE COURT: But then why does everybody think  
12 that's what it means? And if everybody thinks that's what it  
13 means, why isn't there this real live threat?

14 MR. PEZZI: So I think the best I can say about  
15 that is neither the President nor the Department of Homeland  
16 Security nor the United States Postal Service can change the  
17 federal criminal code, and you can only be prosecuted for  
18 violating existing federal criminal laws.

19 THE COURT: Which require a willful and knowing  
20 violation. But why doesn't someone have to worry now that if  
21 they've received a list from the federal government that  
22 these are the citizens, not your list of citizens, but these  
23 are the citizens, but you still send them a ballot, you're  
24 going to be investigated for violating our election law?

25 I mean, isn't that what it has -- isn't that

1       what -- the current harm?

2               MR. PEZZI:  So, respectfully, I don't think so,  
3       Your Honor, because, again, it is not possible to prosecute  
4       somebody for violating an executive order or --

5               THE COURT:  But it is problem -- it is possible to  
6       investigate and prosecute someone for mailing a ballot to a  
7       person who is not a citizen or resident.  And even though it  
8       turns out they are, you can do that vindictive prosecution or  
9       threatened prosecution.

10              They may not be convicted for it because, in order  
11      to be convicted, you have to have a jury understand that you  
12      willfully did this.  But why wouldn't a jury be presented  
13      with information that you willfully sent it to this person  
14      when you said, "Were they on the federal list?"

15              "No, they weren't on the federal list."

16              "Well, why did you send it to that person?"

17              Wouldn't you be worried about sending it to that  
18      person at that point?

19              MR. PEZZI:  So I guess I have two responses to  
20      that.  I mean, one is the list, on its face, the citizenship  
21      lists created by the Department of Homeland Security, are  
22      lists of individuals confirmed to be US citizens.  It does  
23      not even on its face purport to be an exhaustive list, and  
24      there is no list of noncitizens that is being sent to the  
25      states.  This is a list of confirmed citizens.

1           THE COURT: So is it your suggestion that it would  
2 not -- if the State of California handed to the post office a  
3 list of people to send ballots to and 50 percent of them  
4 aren't on your list, are you saying that that person would  
5 not be investigated for violating the laws saying you can't  
6 send them to noncitizens?

7           MR. PEZZI: Well, I'm saying, Your Honor, that the  
8 things you can and cannot be prosecuted or investigated for  
9 relating to the election laws in this country are unchanged  
10 by this executive order. And whether or not someone is  
11 investigated or prosecuted and whether or not that  
12 investigation or prosecution would be lawful or appropriate  
13 or lead to a conviction --

14          THE COURT: Well, let me ask you this question: If  
15 someone sent a ballot to somebody who is not on the  
16 citizenship list, is that a reason to suspect an unlawful  
17 act?

18          MR. PEZZI: So I need to be a little bit careful on  
19 how I answer this. I am not a criminal prosecutor, and so I  
20 am not an expert on the things that can and cannot predicate  
21 a federal investigation; but I can certainly say that there  
22 will be no investigation predicated on the fact that --  
23 violation of an executive order, in other words --

24          THE COURT: No, no. But violation of the executive  
25 order isn't the issue. The issue is sending ballots to

1 people who are on -- who are not on your, acknowledged as  
2 incomplete, citizenship list. If you send a ballot to  
3 someone who is not on that list, does that mean that you are  
4 engaging in something illegal?

5 MR. PEZZI: It is -- that -- sending a ballot to  
6 someone who is not on that list standing alone I don't think  
7 would establish the violation of any federal criminal statute  
8 that I am aware of.

9 THE COURT: But would it give you probable cause?

10 MR. PEZZI: I -- I don't know the answer to that  
11 question, Your Honor. But, I mean, look, I think some of the  
12 questions we addressed earlier today might bear on that. I  
13 mean, what these lists ultimately look like and how complete  
14 they are might have a lot to do with, you know, what would be  
15 responsible for someone to use or not use.

16 THE COURT: So what are they supposed to do on  
17 September 5th, when they have to send the ballots out? How  
18 are they supposed to know the answer to these questions?

19 MR. PEZZI: So with respect to the postal service  
20 list -- and, again, this is just a proposal; and I don't need  
21 to repeat all the arguments in our brief about why the fact  
22 that it's a proposal is very legally significant.

23 But, I mean, were the postal service to finalize a  
24 rule with exactly all the terms of this proposal, it says  
25 very explicitly in multiple places that states retain full

1 control over the contents of their mail-in and absentee  
2 ballot list. This is not the postal service or the  
3 Department of Homeland Security or the President deciding who  
4 can vote by mail. It is the same people who currently decide  
5 who can vote by mail, which is state and local governments.

6 Now, again, I mean, as to the criminal enforcement  
7 priorities piece of this, we have separate justiciability  
8 arguments that Judge Nichols accepted in footnote 11 of his  
9 opinion. And, I mean, I think it's quite clear from -- the  
10 most recent Supreme Court case on this is *United States v.*  
11 *Texas* from 2023 -- that there is not a tradition of  
12 litigation over executive branch enforcement priorities.

13 And so I acknowledge that the executive order has  
14 some discussion over those enforcement priorities, but the  
15 actual federal criminal laws and the things that are and are  
16 not prescribed by those federal criminal laws are unchanged  
17 by this order.

18 THE COURT: Okay. I said that I was going to start  
19 with the justiciability arguments and then move to these  
20 other things, and we've spent most of this time on the  
21 justiciability arguments. I will make my way through them  
22 still very carefully because I do think there is a  
23 substantial issue about which shoe has dropped, as  
24 Judge Nichols has found.

25 But I am -- where I am leaning here is really

1 thinking about what happens in the next six months, in the  
2 next five months and --

3 Yes?

4 MS. LEE: Your Honor, I also just wanted to  
5 underscore that there are, obviously, for Section 2 of the  
6 order, but to the 12(b)(1) questions, though we don't seek an  
7 preliminary injunction with respect to that, there are  
8 actually injuries that we've pleaded that accrue even prior  
9 to June 29th because in order -- the Privacy Act governs not  
10 just transmission of data outside of the federal government,  
11 but across agencies as well. And --

12 THE COURT: 100 percent.

13 MS. LEE: Okay.

14 THE COURT: But there -- I understand that, that we  
15 can't -- it seems pretty ironclad to me that your IRS-filed  
16 data, for example, doesn't -- can't be used by a different  
17 part of the government just because somebody wants it to be.  
18 There's very specific rules. That's how we encourage people  
19 to file their taxes, is to not think everything is going to  
20 get spread around.

21 So I understand that, and I understand that the law  
22 is very clear that, because one piece -- part of the  
23 government has it doesn't mean another.

24 But they are saying that they are intending to  
25 figure this out without violating that. And I'm in a pretty

1 tough place to be saying, oh, no, I'm going to assume they're  
2 violating it. That's not how the Supreme Court wants me to  
3 be considering these. I believe that they are entitled to  
4 some presumption that -- of regularity.

5 So given that --

6 MS. LEE: For the motion to dismiss, however,  
7 Your Honor, the question is whether we've plausibly alleged  
8 those. Whether we ultimately succeed with respect to the  
9 Privacy Act claim isn't the particular question with respect  
10 to Section 2 for the League plaintiffs.

11 THE COURT: What's the harm for your clients and  
12 your case if I were to dismiss without prejudice the sections  
13 that you aren't pushing on a -- for a PI, your challenges  
14 that you aren't pushing for the PI, if I were to dismiss  
15 those portions of the complaint without prejudice to refiling  
16 when the next shoe drops?

17 MS. LEE: Because there's -- there's harms that are  
18 accruing now.

19 The process that they've described, even if we go  
20 outside the four corners of the complaint, nowhere have they  
21 disclaimed that there will be no list at all. And so,  
22 therefore, the transmission of data not in compliance with  
23 the Privacy Act, which cannot happen --

24 THE COURT: Well, so tell me -- are you saying  
25 that, in your view, there is no list that could be created

1 without violating the Privacy Act?

2 I mean, for example, the SAVE list. Why would --  
3 if all they did was put together the information that you can  
4 access right -- states can access right now for verification  
5 under SAVE, right? If that was the list, what would that  
6 violate?

7 MS. LEE: Because that is not one of the routine  
8 uses already contemplated, Congress provided those  
9 protections for this very reason because the federal  
10 government isn't supposed to be able to accrue and use at  
11 will tranches of data without people being able to sort of --

12 THE COURT: Because those lists are being used --  
13 are in place to verify rights for benefits, not for voting?

14 MS. LEE: Correct. And furthermore, Your Honor, we  
15 have -- there is timing that's required by the notices that  
16 are required under the Privacy Act as well and that,  
17 likewise, we have pleaded. There's only -- there's only  
18 30 days left, and those would minimally need 60 days, and so  
19 for that reason alone --

20 THE COURT: Although, for next year, we're still  
21 fine. To the extent your argument is that these injuries are  
22 happening now, if I split my analysis here between the things  
23 for next year versus the things for this year, the -- we  
24 don't need to get to the question of this has to happen in  
25 less than -- you don't have enough time to do it or you need

1 to do certain notices for next year. That's next year's  
2 problem. For this year, we would.

3 MS. LEE: Certainly, Your Honor.

4 THE COURT: What's your answer on that, either --

5 MR. PEZZI: Sure. A few things, Your Honor.

6 One is it is -- I very strongly disagree with the  
7 suggestion that it would not be possible to construct any  
8 list of the sort described in Section 2(a) consistent with  
9 the Privacy Act. The only sort of substantive reason that I  
10 heard offered there was the routine use limitations in the  
11 Privacy Act.

12 And Your Honor asked about SAVE. Both DHS and SSA  
13 relatively recently updated their systems of records, notices  
14 to explicitly allow sharing of information related to voter  
15 verification purposes. This is described in another case  
16 filed by the League of Women Voters. It's 2025 WL 3198970.  
17 It's in footnote 7 of our motion to dismiss.

18 And so, I mean, I agree with the general concept  
19 that there might be some procedural constraints on the  
20 sharing of that information, and there's some substantive  
21 constraints as well imposed by the Privacy Act, other  
22 statutes like Your Honor mentioned, the IRS data.

23 But the executive order itself commands compliance  
24 with those obligations, and so that can't be the basis either  
25 of harm, certainly not irreparable harm; and, you know,

1 ultimately on the merits, those questions could be addressed  
2 later.

3 MS. LEE: Your Honor, just in response to that, the  
4 *League of Women Voters* case, that was as to the PI. That  
5 case was not -- was not a dismissal. And so the standard  
6 here is whether we have plausibly alleged this violation when  
7 we're speaking to Section 2, and nothing counsel has  
8 indicated undermines that conclusion.

9 And additionally, they've repeatedly said here that  
10 it would not be an exhaustive list. It would not be a  
11 comprehensive list. In addition to the procedural  
12 protections of the Privacy Act, we have also plausibly  
13 alleged violation of the more substantive that require all  
14 such data to be accurate, complete, and timely.

15 THE COURT: Okay.

16 MR. CAPOZZI: Your Honor, may the states be heard  
17 on --

18 THE COURT: Absolutely.

19 MR. CAPOZZI: -- some of the standing issues here?

20 Good morning, Your Honor. The intervenor states  
21 are thankful that you granted intervention.

22 On the Section 2 challenges, I think it's helpful  
23 to differentiate between Section 2(a), which is -- create the  
24 list and Section 2(b), which is the executive branch's  
25 enforcement priorities.

1           The intervenor states understand Section 2(a) quite  
2 differently than our colleague states. The lists are purely  
3 optional. Every state has the choice to do something with  
4 the list or do nothing with the list. And so with due  
5 respect to the California, they can just ignore the list if  
6 they want to and --

7           THE COURT: So what do your client states want to  
8 do with the list?

9           MR. CAPOZZI: Well, I think the first response is  
10 we want to see what the list actually looks like. We don't  
11 know exactly what the list will be.

12          THE COURT: Okay.

13          MR. CAPOZZI: Once we know what it purports to be,  
14 each state will have to do a legal analysis. Every state has  
15 state laws and federal law to follow in maintaining voter  
16 registration list.

17          THE COURT: But don't you have state and federal  
18 laws to both allow voters who are citizens and residents to  
19 vote? You have an affirmative obligation to let them vote  
20 and an affirmative obligation to protect citizens from  
21 fraudulent votes, but they're both equally there in your  
22 requirement.

23                So you get this list from the government that, you  
24 know, let's be simplistic here; it doesn't include any  
25 married women who changed their name, for example -- might

1 not. Or it doesn't include anybody who has moved into your  
2 state in the last five years.

3 What are you going to do now?

4 MR. CAPOZZI: I think each state will have to make  
5 an independent choice based on what the list ends up looking  
6 like, and that's my point, Your Honor.

7 Part of the issue with plaintiffs' suit in this  
8 posture is this is really a state-by-state or maybe even a  
9 county-by-county issue because every state handles voter  
10 registration differently, and so they're seeking nationwide  
11 relief as to Section 2(a). That will cover a lot of states  
12 that simply could choose to ignore the order. So we don't  
13 see how there could be --

14 THE COURT: Well, I think the problem with your  
15 concern about their ignoring the order is that every other --  
16 not every other sentence -- but many sentences in the  
17 executive order talk about how these things are going to be  
18 enforced. So I think their decision to opt out is a  
19 different question.

20 Your -- what I'm interested in is your -- as I  
21 understood the reason you wanted to be here was not because  
22 you cared what California did, but that you wanted to use the  
23 list. And that's why I'm asking you what do you do with the  
24 list that the -- that the federal government is conceding  
25 here will not be complete?

1           How incomplete, we don't know, but it isn't -- you  
2 know, I think the confusion here is that it sounds like  
3 you're being given a list of people to say these people can't  
4 vote, but that's not what you're being given. You're being  
5 given a list of these people who can vote. It's a subset of  
6 your people who you are legally required by the Constitution  
7 and by all of these federal and state laws to let vote.

8           So what are you going to do when you get this list,  
9 which is supposed to be the people who -- it's not the people  
10 who can't vote, it's just a subset of the people who can  
11 vote?

12           MR. CAPOZZI: So the inherently speculative nature  
13 of plaintiffs' claims forces me to speculate a bit to answer  
14 your question, but I think what we could do theoretically,  
15 depending on the shape the list takes when it's finalized, is  
16 states could check their existing voter registration lists  
17 and flag people on the state voter registration list that are  
18 not on the federal list; but then just to be clear, it would  
19 be illegal, under state and federal law to just throw those  
20 people off the list. We would have to engage in additional  
21 verification procedures.

22           THE COURT: Could you do that by November 3rd?

23           MR. CAPOZZI: I doubt it. And so I think that's  
24 another practical point is plaintiffs have not shown  
25 irreparable because it's just not plausible that states are

1 going to try to throw people off the voter registration lists  
2 when, in many states, there's already ongoing active  
3 elections.

4 In Missouri, we have an ongoing primary election  
5 right now, and I'm pretty sure there's state law that would  
6 prevent us from changing the voter registration lists in the  
7 middle of an election.

8 And so, again, it's a standing issue because  
9 plaintiffs haven't shown how this harms them. It's an  
10 irreparable harm issue because they haven't pleaded, let  
11 alone proved, that there is any imminent risk of people being  
12 taken off the voter registration lists.

13 THE COURT: So --

14 MR. CAPOZZI: The only thing that was brought up  
15 today was this fear of prosecution, the fear that Your Honor  
16 articulated where, if a state official chooses to ignore the  
17 Section 2 list, you know, when it comes to Section 3, well,  
18 what happens to that election official?

19 The standard for standing here comes from  
20 *Clapper v. Amnesty International*. And the Supreme Court said  
21 you can't point to chill. You can't point to fear. You have  
22 to point to concrete evidence of an imminent criminal  
23 prosecution in a specific case, which plaintiffs don't have  
24 here.

25 I mean, they point to the *Susan B. Anthony v.*

1     *Driehaus* case, which is a slightly relaxed imminent standard  
2     for First Amendment claims. But in *Susan B. Anthony List*,  
3     the particular plaintiff had been prosecuted under the  
4     challenged law. I think it was a year earlier.

5             And so there was enforcement evidence in that case.  
6     There's no evidence of investigations. There's no evidence  
7     of enforcement here.

8             THE COURT: So this is the part that I'm having a  
9     little difficulty on both the defendant and the defendant  
10    intervenors' argument, which it feels like it comes down to:  
11    Don't worry about what -- any of the things they're saying  
12    because this list isn't going to have any meaning or import  
13    this election cycle.

14            And I don't -- I don't -- I mean, if your  
15    defense -- and that's really why I wanted you in here as  
16    intervenors because I didn't think the government was  
17    defending it. But now you're not either. You're saying we  
18    really won't be able to get a chance to use this before  
19    November 3rd.

20            MR. CAPOZZI: Well --

21            THE COURT: So my question for you is then why -- I  
22    mean, I understand this idea that, "Okay. There's no harm,  
23    no foul. Go away, Judge. We don't need anything." But if  
24    there's no harm, no foul, then there's also, you know, on the  
25    balancing on their PI or whatever, what's the problem if I

1 say no one can use this list for this November election?

2 MR. CAPOZZI: So to be clear, the states do want  
3 the list. The limited point that I was just making is I  
4 think it's unlikely that states would actually remove voters  
5 from the registration rolls this year.

6 That doesn't mean that states couldn't use the  
7 lists this year this election cycle. States could use the  
8 list for monitoring, for law enforcement purposes, for  
9 investigations, for tracking. Again, a lot of this is  
10 speculation because we don't know exactly what the lists are  
11 going to look like.

12 But the reason that the intervenor states wanted to  
13 get into this case is because plaintiffs' lawsuit seeks to  
14 prevent the federal government from creating these lists at  
15 all. And it is a resource. We think it could be helpful.  
16 We're not exactly sure how we would use it because we're not  
17 exactly sure what the lists would look like. But we're here  
18 because we don't want this process to be sort of strangled in  
19 the crib, so to speak.

20 THE COURT: So any response? And perhaps the  
21 response here may be from the League. Do you have anything  
22 to say? Because I think the plaintiff states and the  
23 intervenor states might be dealing with different groups of  
24 people on different issues, but you've got the voters in  
25 their states.

1 MS. LEE: Sure. So one thing I will say,  
2 Your Honor, is that, to the extent he was speaking about  
3 kicking people off the lists immediately, one of the things  
4 that's obviously and has no feasibility carve-outs,  
5 et cetera, within the executive order itself is the  
6 nontransmission of ballots. So it's not as though the only  
7 risk to voters here is cancellation of voter registration.  
8 So that's sort of a first initial point.

9 With respect to Section -- the sections are getting  
10 a little bit muddled, Your Honor. If you'd like me to speak  
11 to the harms related to Section 3 --

12 THE COURT: I think we can -- let's move on to  
13 Section 3 substantively here.

14 MS. LEE: Okay.

15 THE COURT: It would be helpful because I think  
16 we're running out of time if we don't get there.

17 MS. LEE: Okay. So -- certainly, Your Honor.

18 So moving to Section 3 substantively, I think  
19 the -- what three courts did with respect to the 2025  
20 executive order, including another -- another court within  
21 this district provides a clear path for the Court here and in  
22 particular for the League plaintiffs' preliminary injunction.  
23 And that's the *LULAC* -- for the preliminary injunction  
24 standard it's the *LULAC I* case and then the *California v.*  
25 *Trump I*. There's a follow-on motion to dismiss there as

1 well.

2 And just as there, here the executive order directs  
3 unconstitutional action from an independent agency -- there  
4 the EAC, here the USPS. And there's no way for it to proceed  
5 in accordance with law because the directive itself violates  
6 separation of powers and is ultra vires.

7 And all of the evidence demonstrates this is the  
8 case as well: the statement before the executive order was  
9 signed; the text of the executive order itself that all the  
10 following subsections are hereby ordered; and then within  
11 Section 3, the post master general is -- it hereby directs  
12 and that the rule shall include at a minimum; and then the  
13 statement of the post master general after, and that's at  
14 75-8; and the head of the postal workers' union statement at  
15 75-9; to the White House's own fact sheet, which is at  
16 ECF 140-2, which says that it requires the postal service to  
17 transmit ballots only to those on the relevant list.

18 And the proposed rule itself --

19 THE COURT: Which list? Which list there?

20 MS. LEE: So this would be the what we've been  
21 calling the -- I believe the postal service, the postal  
22 service list. But the proposed rule itself and that it's  
23 proposed doesn't alter the certainty. It's just more  
24 evidence demonstrating that the order itself is not  
25 contingent and is ripe for review and if --

1 THE COURT: But --

2 MS. LEE: Sorry.

3 THE COURT: -- just to be careful there, the list  
4 that you can't -- you're saying if -- if this order said the  
5 postal service may not deliver a ballot to the -- anyone who  
6 is not on the citizenship list, that would be one case. I'm  
7 not sure that's the case we have.

8 MS. LEE: Oh, I certainly agree that's not the case  
9 we have, Your Honor. But what is defined as nonmailable  
10 material is in statute, and that does not include ballots,  
11 whether they're on this list or that list or whichever list  
12 we're talking about.

13 The refusal to transmit ballots, which is what the  
14 order directs --

15 THE COURT: But if they aren't refusing to -- it  
16 depends what it really means here, doesn't it? If what  
17 they're doing is saying you can only transmit ballots to the  
18 addresses the states give us, isn't that what you do anyway?  
19 I mean, it's going to be in a list form instead of on the  
20 individual envelopes, but you're giving them the letters to  
21 mail where you're telling them to mail it.

22 And if you -- they could just scan that and have  
23 that information. And if instead they say to you, "Give it  
24 to us in a list," what's the difference?

25 MS. LEE: What's the difference, then, is if there

1 is a distinction between what's on the envelope and what's  
2 been input into a system, it will not be transmitted and it  
3 will be returned to sender. And that is not -- and that is  
4 not something that's contemplated in the statute.

5 THE COURT: Okay. Let me just interrupt you there  
6 because I am very confused about this piece. What is  
7 different about what is inputted in by the state official who  
8 has now been designated as the ballot inputer versus what you  
9 would see when the ballot comes, scan through, if they just  
10 gave you the envelope?

11 MR. PEZZI: So to make sure I'm answering the  
12 question properly, I think Your Honor's intuition is  
13 absolutely right that, at least if finalized in the form of  
14 this proposal -- and, again, setting aside all the caveats in  
15 our brief about why it is just a proposal and why that  
16 matters -- the lists and the addresses and the names on that  
17 list are provided to the postal service by state election  
18 officials or local election officials.

19 Surely, they already have and must use lists with  
20 names and addresses to prepare and send ballots, so --

21 THE COURT: So what's going on with this step?  
22 Because it just seems -- I mean, if I brought a stack of mail  
23 to the post office and you wanted to have a list of who I'm  
24 mailing to, it would be pretty easy to generate. You're  
25 scanning the documents. You'd have the addresses in there.

1           So what exactly is it that the state official is  
2           supposed to be uploading into the ballot list which the post  
3           office is now going to compare against?

4           MR. PEZZI: Names and addresses, Your Honor. But  
5           to be clear, the postal service is not comparing that list  
6           against anything.

7           THE COURT: Well, but they are comparing it --  
8           they're not allowed to mail -- so they get a piece of mail.  
9           They can't mail it to anyone who isn't on the list that was  
10          added by -- through the portal. So they are comparing it to  
11          something.

12          MR. PEZZI: So even that, Your Honor, I think is an  
13          interpretation of the executive order itself rather than  
14          interpretation of the proposed rule. What the proposed rule  
15          says -- and, again, this is just a proposal that was  
16          published just this morning, but --

17          THE COURT: Well, it was published in exactly the  
18          same form on Thursday. So we've --

19          MR. PEZZI: Yes.

20          THE COURT: -- all had a chance to read it.

21          MR. PEZZI: Yes, Your Honor, and that's why we  
22          filed it, of course.

23          But the language that plaintiffs reference about  
24          "shall not transmit," there is not a perfectly analog for  
25          that language in the proposed rule itself. What the proposed

1 rule does is it says that if you want to send outbound  
2 federal ballot mail, as in you are a state or a local  
3 election official and you want to send absentee ballots to a  
4 group of, you know, over 200 or 500 voters, here are the  
5 procedural steps you need to take first.

6 First, you need to put in the list of names and  
7 addresses so that barcodes can be generated that match the  
8 name and address and barcode of all those individuals. And  
9 then the postal service will accept that stack of ballots  
10 sent them out as long as it meets that criteria.

11 THE COURT: Okay. So somebody goes to the ballot  
12 portal and they put a person's name, address, and barcode,  
13 right? That's on 24.4.2. And then they have a stack of  
14 envelopes that they deliver to the post office. And for some  
15 reason, the name on the stack of envelopes differs than the  
16 name that the person who was typing it in on the ballot  
17 portal. That list is being prepared, no?

18 MR. PEZZI: I actually don't -- and, again, this is  
19 not been out for very long, so it is possible that I have  
20 overlooked something; but I do not see anything in the  
21 proposed rule that even requires that sort of comparison.  
22 It's possible I've missed it.

23 But I -- what I see here is a requirement to first  
24 submit names, addresses, barcodes, et cetera, come to the  
25 postal service with a stack of ballots; and, you know, once

1 it is -- those steps have been created, the postal service  
2 will send out the ballots to the names and addresses provided  
3 by state officials, which, again --

4 THE COURT: So -- but to be clear on -- if -- even  
5 if they're not comparing it, don't we have a burden that is  
6 different than how US mail works to say to one group of  
7 senders you may not send mail, first class mail, you may not  
8 send mail to this group of people unless you comply with a  
9 set of rules?

10 MR. PEZZI: Sure, Your Honor. And this is where I  
11 think I have to return to some of the threshold caveats,  
12 which is that is part of the reason why the standing  
13 questions in this case will look very different if the postal  
14 service finalizes this rule.

15 THE COURT: But so this is again saying I don't  
16 have a defense for what you're saying the proposed rule will  
17 be except maybe they won't adopt it.

18 MR. PEZZI: Or it could differ from the contents in  
19 the proposal, which, importantly, the executive order itself,  
20 although it has some language about what the proposed rule  
21 should say, has nothing about what the final rule should say.

22 But, I mean, I -- look, I'm not even sure --

23 THE COURT: I mean, you can't be -- you can't be --  
24 you're saying here -- either you're saying your only defense  
25 is that it's not ripe yet and you have nothing to say on the

1 merits, or you can tell me what -- assuming this is ripe,  
2 this would or wouldn't be okay.

3 MR. PEZZI: Sorry, Your Honor. I understand your  
4 previous question to be about the jurisdictional questions  
5 again. I mean, on the merits, obviously, we would prepare a  
6 more fulsome defense of the merits on a final rule; but, I  
7 mean, the proposal itself cites some of the statutes that  
8 allow the postal service to issue regulations regarding the  
9 use of the mail. But, obviously, our threshold arguments  
10 will look very different if and when this rule is finalized.

11 THE COURT: Well, you have in front of you a motion  
12 for summary judgment, and I don't have a bifurcation order in  
13 here. So I am going to address your motion to dismiss first;  
14 but if I get past your 12(b)(1), we're onto the merits, and  
15 so to say you would have prepared a more fulsome answer  
16 doesn't help me.

17 MR. PEZZI: I understand that, Your Honor, although  
18 the merits of what is an important question, and the merits  
19 that are being litigated today are the merits of the  
20 executive order. We absolutely have included arguments about  
21 the merits of the executive order, and Judge Nichols accepted  
22 those arguments, that this is a directive from the President  
23 to his subordinates. It requires compliance with the law.

24 THE COURT: Okay.

25 MR. PEZZI: And --

1           THE COURT: But imagine for a moment that you're  
2 stuck with me right now, and I want to wrestle with these  
3 merits. And I hear what you're saying, that if all I'm  
4 looking at is the executive order, that's the -- I've got  
5 your briefing on that.

6           But let's assume that you're stuck with a judge who  
7 wants to say, "Okay. But we're going to deal with this next  
8 week. What's going to -- looks like it's happening; and if  
9 this looks like it's happening, would that be lawful?"  
10 What's your answer to it? Would it be lawful to require one  
11 set of users of the United States Postal Service to have to  
12 enter certain information, including barcodes, before they're  
13 allowed to use the mail service?

14          MR. PEZZI: Sure, Your Honor. So, I mean, again,  
15 it's the kind of issue that I would prefer to address in the  
16 context of an actual rule rather than a proposal, but the  
17 proposal itself does provide some citations to the agency's  
18 statutory authority. This is the -- the general concept of  
19 taking certain sensitive types of mail and requiring, you  
20 know, additional procedures to ensure they are tracked  
21 properly is not new.

22           I would also --

23          THE COURT: Requiring or recommending?

24          MR. PEZZI: So, I mean, certainly the postal  
25 service has long recommended and many of these very states

1 use many similar procedures already. Your Honor is correct  
2 that this would be imposing a new requirement with respect to  
3 election mail. We don't point to prior examples of this sort  
4 of action with respect to election mail.

5 Although, there are other types of mail for which  
6 the postal service has required special handling; and so we  
7 think that, you know, again, in the context text of a final  
8 rule, we would explain in more detail. But, I mean, that's  
9 the basis for the proposal that's stated in the federal  
10 register this morning.

11 THE COURT: Ms. Lee.

12 MS. LEE: So why I was standing for a bit,  
13 Your Honor, was I just wanted to point counsel and the Court  
14 to 24.5.1, which says -- it's not merely they drop it off and  
15 it's all taken. It requires the postal service to review the  
16 mailings prior to acceptance -- that's prior to the  
17 acceptance into the mail system -- evaluate whether it meets  
18 the standards, and is being sent to individuals who have been  
19 enrolled with the postal service. So --

20 THE COURT: That's the uploading.

21 MS. LEE: Exactly. And so this, for us, because  
22 the counts on which we're seeking a preliminary injunction go  
23 to the lawfulness of the order, this just demonstrates that  
24 the -- all of the relevant actors are taking the order as an  
25 order.

1           And, additionally, I would say, Your Honor, is that  
2   it -- the certainty of the injury -- sort of twofold. So,  
3   one, there's the currently ongoing injuries. Our clients are  
4   some of the oldest and sort of longest running largest  
5   programs who provide services to voters, including with  
6   respect to facilitating mail voting, voter registration,  
7   et cetera. And so there are present harms.

8           As you've said, everyone is understanding the order  
9   this way, and voters are being faced with concern.  
10   Especially voters who really need to rely on mail voting  
11   wouldn't be able to go in person anyway. And so there are  
12   concrete harms to our clients' direct services that they  
13   offer to voters in needing to respond, update education  
14   materials now.

15           Additionally, this echoes a lot, like, the Supreme  
16   Court case in *Diamond Alternative Energy* where the Court  
17   mused that, when the government seeks to justify its actions  
18   on the one hand that there aren't really any effects, don't  
19   worry about it, while the other time -- and thus, it's  
20   unreviewable -- while at the same time touting what it  
21   does -- i.e., the President saying that it directs that these  
22   ballots won't be transmitted -- courts can be appropriately  
23   skeptical of that argument and are -- you know, aren't bound  
24   to be more naive than the general public is free from.

25           THE COURT: Yes?

1           MR. CAPOZZI: Your Honor, briefly, if I could  
2     respond to a couple of the League's points, the League is  
3     asserting resource-diversion standing. They're talking --  
4     when they talk about their present harms, they're saying that  
5     they're diverting resources to educating voters, to  
6     responding to voter fears and concerns.

7           The US Supreme Court has abolished  
8     resource-diversion standing in the *Alliance for Hippocratic*  
9     *Medicine* case. Judge Nichols agreed with that.

10          THE COURT: What about their arguments on behalf of  
11     their members, though?

12          MR. CAPOZZI: So if the argument is that an  
13     individual member could be denied a mail ballot, I think that  
14     that's too speculative. It's not ripe for the reasons that  
15     the federal government has talked about. I'm not sure what  
16     other basis of injury an individual voter could have.

17          With respect to the proposed order, the intervenor  
18     states --

19          THE COURT: What about the likelihood that they're  
20     not going to get to vote?

21          MR. CAPOZZI: Well, I just think that's  
22     speculative, Your Honor.

23          THE COURT: Well, if you want to use those state  
24     lists, you want to use those incomplete lists that we know  
25     are incomplete, if they ever come out, but if they do come

1 out, we know they're going to be incomplete, and you want to  
2 use those to start an investigation, isn't there a reasonable  
3 fear and concern on the behalf of the voters that they're  
4 going to be precluded?

5 I just -- you know, I go into this -- the President  
6 cited as the authority for -- among the purposes, he cited as  
7 a statute -- he cited as a statute a number of criminal  
8 statutes, 18 USC Section 241, 52 USC Section 20511. And  
9 18 USC Section 241 is conspiracy to injure, oppress,  
10 threaten, or intimidate a person in the free exercise or  
11 enjoyment of rights and privileges secured by the  
12 Constitution and the lawsuits of the United States. That's  
13 people's right to vote, is included in there.

14 And 52 USC Section 2511 has criminal penalties  
15 under subsection 2 for depriving a fair election by having  
16 people vote who shouldn't. But under 1, it's threatening for  
17 registering to vote or attempting to register to vote or for  
18 voting.

19 So isn't the concern -- I mean, it's not a  
20 constitutional level. It's a statutory level. Isn't the  
21 concern about a people's right to vote -- right? You're  
22 worried about the people who can't -- who will be diluting  
23 somebody's vote if they're not lawfully here. But you have  
24 to acknowledge that the harm is equally great if the person  
25 who wants to vote with me isn't allowed to vote when they're

1 a citizen. And for the citizens themselves, the harm is  
2 enormous and direct if they're not allowed to vote.

3 And that's what they're trying -- that member's  
4 vote, right, isn't that at issue?

5 MR. CAPOZZI: So I think there's two theories here,  
6 and I don't think either of them work. If the fear is that  
7 someone is not going to be able to vote, that's a lot of  
8 speculation. There's a lot of links in the chain. It  
9 depends on the actions of third parties not before the Court,  
10 including county election officials.

11 It depends on the content of the finalized rule.  
12 It depends what which state chooses to do with the list  
13 within each state. It depends what which county official  
14 wants to do with the list. And so what I would suggest to  
15 plaintiffs is, if a particular state or if a particular  
16 county actually takes steps to use the list to disenfranchise  
17 people, sue them.

18 The other injury that you could be understanding  
19 them to make out is a sort of fear, a chill. And the Supreme  
20 Court in *Laird v. Tatum* said chill is not good enough for  
21 standing. You know, when it comes for fear of prosecution,  
22 *Clapper v. Amnesty International* is the standard. They made  
23 the same arguments in *Clapper*. The plaintiff said, "We're  
24 afraid we're going to get prosecuted. We have to do all  
25 these things to avoid prosecution," and the Supreme Court

1       said that's nowhere near good enough.

2               THE COURT:  Or "We're afraid we can't vote."  So  
3       you're saying don't address the "We're afraid we can't vote"  
4       today?

5               MR. CAPOZZI:  Correct.  I think that's -- it is  
6       either too speculative -- the idea that someone could  
7       actually be disenfranchised is too speculative --

8               THE COURT:  Well --

9               MR. CAPOZZI:  -- and fear is not a cognizable  
10       injury.

11              THE COURT:  It just seems like we're -- in the  
12       circumstance where we are announcing that there is going to  
13       be a citizenship list, that those of us here in the courtroom  
14       know is an incomplete list of people who have been verified  
15       and doesn't mean that other people aren't citizens, but --  
16       and that's all it is, and yet we're going to be out there  
17       having this citizen list that we're enforcing and making sure  
18       that people aren't going to get to vote -- you know, we have  
19       this invasion; that's the other part that is being cited by  
20       the President, this fear of invasion to our government.

21              I mean, it just seems like the fundamental votes of  
22       United States citizens are the ones, the people who have been  
23       here for generations and aren't going to show up on your  
24       naturalization records.

25              MR. CAPOZZI:  So, again, Your Honor, the sort of

1 chill, the fear of prosecution, the fear of future events,  
2 that's just too speculative. It's not sufficiently imminent  
3 for standing. That's the *Clapper* case.

4 THE COURT: Okay.

5 MR. CAPOZZI: Scholars have --

6 THE COURT: We've been here for two hours mostly on  
7 standing. I really need to talk about the merits.

8 MR. CAPOZZI: Can I make a quick one on the merits,  
9 Your Honor?

10 THE COURT: I'm going to let plaintiffs start on  
11 the merits because that's -- I start with the people whose  
12 motion it is. So I'm going to have you sit down. I'm going  
13 to have the states start in on their motion for summary  
14 judgment.

15 MS. BELLOWS: Thank you, Your Honor. I'll start  
16 addressing Section 2.

17 The President's orders must be authorized by  
18 statute or Constitution. No statute allows the activities  
19 that are very specifically mandated by this executive order  
20 as to DHS, the creation of the entire state citizenship list  
21 program. Defendants have never argued otherwise. They have  
22 never identified a statute that allows this.

23 Defendants' sole --

24 THE COURT: Any --

25 MS. BELLOWS: Sorry.

1           THE COURT: Any disagreement that there's no  
2 specific statute that authorizes what we're talking about  
3 here?

4           MR. PEZZI: Yes, Your Honor. I mean, we don't know  
5 exactly what statute we're going to need to use to justify a  
6 list that has not been created yet, but if the suggestion is  
7 that the government has conceded that there is no statutory  
8 authority to create such a list, we respectfully disagree  
9 with that.

10          MS. BELLOWS: They have not named one. And they  
11 certainly have every notice about what the state citizenship  
12 list program looks like based on the --

13          THE COURT: Don't call it the "state citizenship  
14 list."

15          MS. BELLOWS: I'm so sorry. The citizenship list.  
16 I apologize.

17          Defendants' sole constitutional argument is that  
18 they are empowered by -- the President is empowered by  
19 Article II to issue orders to subordinate branches --  
20 subordinate agencies --

21          THE COURT: Article II and to enforce the laws.

22          MS. BELLOWS: And to enforce the laws. And that  
23 provides the President the power to oversee executive  
24 agencies in the performance of their statutory duties or to  
25 delegate his own constitutional authority. But he has no

1 constitutional authority over elections that he can delegate  
2 here. And as we just discussed, there's no statutory  
3 authority to carry out these programs.

4 THE COURT: So if I find the authority that he has  
5 here is his authority to enforce the criminal statutes that  
6 prohibit illegal voting, that's the authority that all of  
7 this is under.

8 MS. BELLOWS: That -- that authority does not  
9 extend to DHS creating a new program. Federal agencies are  
10 creatures of statute, and they cannot take -- undertake  
11 freewheeling policy initiatives without -- that are beyond  
12 their statutory mandate merely to advance a criminal  
13 enforcement agenda.

14 THE COURT: So what if the reasoning goes like  
15 this: I want to make sure no noncitizen can vote; and in  
16 order to do that, I am, therefore, ordering a set of steps  
17 which will help me find out in November if anybody who wasn't  
18 a citizen voted. Why isn't he allowed to do that?

19 MS. BELLOWS: Well, the President could create  
20 investigative lists.

21 THE COURT: Yeah. So let's say this is what it is.  
22 This is an FBI -- this is a hit list. We're creating --  
23 we're starting our criminal investigation today. Can he do  
24 that?

25 MS. BELLOWS: If this was a list that was solely

1 internal to the federal government, and setting aside some of  
2 the Privacy Act questions which I know our co-plaintiffs have  
3 raised, that is not something that would give rise to our  
4 injuries.

5 What gives rise to our injuries, what makes it  
6 unlawful and problematic, is that this is a list that is  
7 distributed to state elections officials and made available  
8 to the public. And so what you have is not a simple  
9 investigatory tool that the government is using for its  
10 purposes. It's an entire program that's being rolled out  
11 across the country that will have severely disruptive effects  
12 on the administration of our elections.

13 THE COURT: It will sow confusion.

14 MS. BELLOWS: I'm so sorry?

15 THE COURT: It will sow confusion.

16 MS. BELLOWS: It will sow confusion. And it's  
17 intended in this way because there's that interaction between  
18 the federal government and the state officials around this  
19 list; it appears to be intended to supervise their  
20 administration of their voter rolls and their issuance of  
21 ballots.

22 And that supervision is trespassing on the -- both  
23 the authority of the states, who have ultimate responsibility  
24 for these things, but also the statutory design of federal  
25 laws that govern voter eligibility and -- and voter -- voter

1 roll maintenance.

2 And so what the President is doing here is stepping  
3 squarely into an area that is regulated by the states and is  
4 regulated by Congress and distorting it in ways that are  
5 deeply disruptive and intrusive on the states' authority in  
6 this area.

7 THE COURT: Okay. What's my -- we don't have an  
8 explicit cause of action here. What's my legal framework for  
9 this?

10 MS. BELLOWS: My colleague will be addressing that  
11 issue.

12 MR. COHEN: That's right, Your Honor.

13 And I can answer maybe that question first, and I  
14 fear that some of the Section 3 justiciability issues may  
15 have gotten away from us a little bit. So with Your Honor's  
16 permission --

17 THE COURT: We do need to get to Section 3A. I  
18 have to say that, although Section 3 has gotten more press,  
19 it seems to me, Section 2 seems a more fundamental question,  
20 which is who gets to decide who votes, but --

21 MR. COHEN: Well, that very question is also raised  
22 in Section 3, Your Honor, precisely because Your Honor's  
23 reading of the proposed rule is correct; and the proposed  
24 rule, of course, regurgitates what's in the order, which is  
25 that USPS is going to be screening the states' ballot mail

1 and arresting mail that is not being sent to or from a voter  
2 that's not on what we're now calling the "post office list."

3 So, certainly, that central question is also  
4 presented with respect to Section 3; but maybe before we get  
5 away from that, I can speak to the nonstatutory cause of  
6 action that the states have brought here.

7 It's really at this point uncontroversial,  
8 Your Honor. Courts across the country, up to the Supreme  
9 Court, have long recognized that a nonstatutory equitable  
10 cause of action to enjoin unlawful presidential conduct is  
11 legitimate. And that's the precise type of claims that the  
12 states are invoking here.

13 And defendants haven't offered a single argument,  
14 by the way, relevant to the states' claims, not one. They  
15 just address APA claims and some statutory claims, but that's  
16 not what the plaintiffs are presenting. They're availing  
17 themselves of this long-recognized, nonstatutory, equitable  
18 cause of action, much like the cause of action at issue in  
19 *California* and *LULAC* and some of the other authorities the  
20 plaintiffs have cited.

21 THE COURT: And in terms of this cause of action,  
22 ultimately, it is a federalism/separation of powers argument?

23 MR. COHEN: I think that's a fair framing,  
24 Your Honor. And I know that there's been some confusion over  
25 the statutory arguments that we have raised. But I do want

1 to be clear that, where the states are demonstrating that the  
2 executive order runs afoul of any statutes, that's just to  
3 further demonstrate that the President has no authority in  
4 this space. So it all ties back to this vertical and  
5 horizontal separation of powers issue.

6 THE COURT: And as I was sort of trying to reread  
7 the Constitution and figure out where we are and how we got  
8 here, we have three -- we have the parts of the Constitution  
9 that talks about how federal officers are elected.

10 And then we have three constitutional amendments:  
11 The -- everyone can -- citizens can vote regardless of race,  
12 citizens can vote regardless -- women can vote as well as  
13 men, and 18-year-olds and up can vote. So we have three  
14 constitutional amendments, which each say Congress may enact  
15 laws to further that.

16 That, to me, says the -- oh, the states shall hold  
17 elections, and Congress shall -- may enact laws further than  
18 that.

19 That's, as I see it, the constitutional framework  
20 that we're working off of, yes?

21 MR. COHEN: That's exactly right, Your Honor. I  
22 think you're alluding to, first, the elections clause; and of  
23 course, the plaintiff states have also relied on Congress's  
24 exclusive legislative authority over the postal service. So  
25 that's also cited in the states' papers.

1           But I think the way you're thinking about the  
2     framework is exactly right; and courts including *LULAC*,  
3     *California*, other courts have long recognized that this  
4     nonstatutory cause of action exists.

5           THE COURT: Okay. Your response to the idea that  
6     there's a nonstatutory cause of action, which I'm describing  
7     as separation of powers/federalism, but --

8           MR. PEZZI: Sure, Your Honor. So, I mean, the  
9     first thing I would say is it is certainly not correct to say  
10    that that is a, quote, "noncontroversial proposition." I  
11    think even the authorities that plaintiffs rely on, such as  
12    Judge Kollar-Kotelly's opinions in the *LULAC*'s case, actually  
13    talk quite a bit and say a lot that the government agrees  
14    with, even though there are parts the government disagrees  
15    with about this cause of action.

16           She recognizes, I think, correctly that it is, in  
17    fact, quite unsettled and controversial. There's more case  
18    law in the DC circuit on it than there is in the  
19    First Circuit. Plaintiffs are not wrong to say that there  
20    are cases they can cite and that they have cited where  
21    plaintiffs have brought that sort of a cause of action.

22           Our briefs largely do not get into the underlying  
23    premise because we think we satisfy the standard for  
24    prevailing on that sort a cause of action. And at least in  
25    the DC circuit, the way those cases proceed is, you know,

1 plaintiffs can and sometimes do challenge an executive order  
2 on the grounds that it is facially invalid or cannot lawfully  
3 be implemented in any way.

4 And ultimately, that is, you know, what  
5 Judge Kollar-Kotelly held in some of those cases, at least on  
6 some of those claims. You know, those cases are on appeal;  
7 and I don't want to get ahead of, you know, the government's  
8 or anybody's arguments about that appeal on those cases.

9 But, you know, we think applying that standard  
10 here, the executive order survives. It is absolutely capable  
11 of lawful implementation. We've already discussed, you know,  
12 some of the Privacy Act constraints that might apply. And  
13 the executive order does not say violate the Privacy Act. It  
14 says comply with the Privacy Act. On the --

15 THE COURT: Yeah, but the bigger question that  
16 they're proposing, which is it says that the President  
17 doesn't have authority -- their argument is the President  
18 doesn't have authority over elections, federal elections,  
19 that the states are mandated with holding those and running  
20 those elections properly; and that Congress has a supervisory  
21 role it can use, but that the President has no authority.

22 MR. PEZZI: Yeah. So I'm not even sure that there  
23 is any disagreement between the parties on any of those  
24 questions, to the extent they are presented in this case. In  
25 the abstract, does the California AG's office and the

1 Department of Justice think about the elections clause in the  
2 exact same way?

3 Candidly, I don't even know the answer to that  
4 question because, in this case, the government is not asking  
5 Your Honor to hold that the President can do election  
6 administration on its own with or without the help of  
7 Congress. The argument here is that that is just not --

8 THE COURT: That nothing is happening here.  
9 There's no there there, is kind of the argument.

10 MR. PEZZI: At least at this time, Your Honor.  
11 Yes, that's right.

12 THE COURT: So turning back to the plaintiffs -- or  
13 maybe -- I don't know who is going to answer my question  
14 here, but the plaintiffs -- have a summary judgment motion,  
15 and I have a statement of undisputed facts under Rule 56.1.

16 And under that statement of undisputed facts,  
17 there's a number of facts that are undisputed. And then  
18 there's a number of paragraphs where the plaintiffs have set  
19 out all of the obligations in -- state by state to meet  
20 certain deadlines on the calendar and that, you know, this  
21 has to happen and here's how we have to produce it and this  
22 is what the ballots require of us and all of those details.

23 Yes?

24 MR. COHEN: That's right, Your Honor. And I'll let  
25 my co-counsel speak to all this in the first instance.

1 MS. BELLOWS: Sure. Thank you for tolerating our  
2 switching back and forth.

3 So -- so I can -- I can speak to the statement of  
4 undisputed facts, and it's our view that there is no dispute  
5 of fact in the record and that the summary judgment motion  
6 should --

7 THE COURT: And I was just summarizing what you had  
8 in those paragraphs, and then I'm going to turn to government  
9 counsel on their response to it.

10 MS. BELLOWS: Okay.

11 THE COURT: So your response on those paragraphs  
12 that say, "Hey, this is what the state has to do right now  
13 per state law," is you said they're disputed because these  
14 are questions of law. But you don't have any dispute that  
15 those are the specific statutes at issue in those states, do  
16 you?

17 MR. PEZZI: No, I don't think so, Your Honor. I  
18 mean, I don't think -- I mean, we're not going to fight with  
19 the states about what state law requires. We just don't  
20 think those are factual assertions --

21 THE COURT: Okay.

22 MR. PEZZI: -- nor material.

23 THE COURT: Well, as a -- I don't want to have to  
24 go through, as a legal interpretation, and figure out what  
25 each one says. I'm going to assume, without any argument --

1 unless I have argument from you, I'm going to assume that the  
2 plaintiffs' characterizations of what those statutes require  
3 is correct.

4 Any problem with my doing that?

5 MR. PEZZI: Understood, Your Honor. And, I mean,  
6 no, we have not offered any argument in the papers; and I am  
7 not here to offer any argument today to explain why the  
8 states are wrong about those state law questions.

9 THE COURT: Okay. So we have a set of obligations  
10 that you have to meet on these. It's undisputed. And so, to  
11 some degree, for Section 2, there is a question of: To what  
12 extent there is or isn't any conflict with that?

13 Similarly, for Section 3, there's a question of:  
14 Is there or isn't there any conflict? And so maybe I'll let  
15 you speak now to Section 3, which I've been holding off on.

16 MR. COHEN: Yeah. Thank you very much, Your Honor.

17 And perhaps with Your Honor's permission, I can  
18 speak to first justiciability and then I can touch on the  
19 merits, which I know we've also batted around.

20 THE COURT: I would love for you to move quickly to  
21 merits, because it's 12:10, and I have a criminal matter at  
22 1:00. So I need to get off before that.

23 MR. COHEN: Understood. And I will be extremely  
24 quick with all of this, Your Honor.

25 I do want to emphasize that the plaintiff states

1 agree with the League that the proposed rule validates both  
2 that the executive order is mandatory and that the plaintiff  
3 states suffer real harm that flows from it.

4 And I do want to emphasize for the Court that that  
5 harm is already happening right now, and there's evidence in  
6 the record that there's fiscal and sovereign harms that are  
7 impacting the states at this moment.

8 And I would refer the Court especially to  
9 declarations like the one from Minnesota's election director,  
10 which describes the substantial time and effort that the  
11 office has understood taken to implement the order.

12 The Virginia elections commissioner, that's Docket  
13 Number 123 -- the former was 114 -- the Virginia elections  
14 commissioner describes that the reports -- that they had to  
15 issue reports and guidance after the order issued.

16 And likewise, the Nevada deputy secretary of state  
17 has a declaration that's Docket Number 103 that describes the  
18 immediate notifications that they had to undertake when  
19 they -- when the order issued.

20 So in that way, of course, there's harms that are  
21 affecting the states in this moment; and, of course, the  
22 order's further implementation will harm the states even more  
23 significantly both by exacerbating those fiscal and sovereign  
24 harms, but then also by further damaging the states'  
25 reputations and touching on some of the other harms that the

1 plaintiff states have alleged.

2 With respect to the proposed rulemaking which came  
3 up earlier, I do want to clear up a couple of questions that  
4 were raised. The first is: How does all this work? What do  
5 election officials actually do operationally here?

6 And I just want to emphasize is that the states  
7 strenuously object to the characterization of all this, that  
8 all they have to do is drag and drop data from one database  
9 into another or print out a list that they already have on  
10 hand and send it over to USPS.

11 There is some massive data compatibility and  
12 formatting issues here that are very serious and very  
13 difficult to administer. All told, it's going to be hugely  
14 burdensome for states to administer what is, essentially, a  
15 second voter roll in USPS's hands.

16 And I'll refer Your Honor to the Jana Lean  
17 declaration. She's the elections director over in  
18 California, which is Docket Number 100-1, for a description  
19 of how some of that might work operationally and precisely  
20 why it's burdensome.

21 THE COURT: Let me ask you this question about the  
22 barcodes. Other than the fact that there's probably no  
23 longer time or it will be inconvenient for this year to deal  
24 with barcodes? Is there a larger question -- in the long run  
25 if you had adequate time to figure out barcodes for your

1 envelopes, is there -- is there a problem other than  
2 implementation without adequate time with regard to the  
3 barcodes?

4 MR. COHEN: Yes, Your Honor. And the answer is  
5 cost, and I can speak to this in a few different ways.

6 I mean, the first is that, as a general matter, the  
7 states' elections budgets are already incredibly strained.  
8 So if you look, for instance, to the declaration from Oregon,  
9 it demonstrates that the state is staring down massive budget  
10 cuts; and any sort of implementation of any of these pieces  
11 of the order could really deplete their election budget and  
12 actually force them to make sacrifices in other aspects of  
13 their election administration.

14 But I also want to emphasize that this is going to  
15 be, I mean, really, just a sea change in the way that some  
16 states are administering their ballots. Not all states use  
17 intelligent mail barcodes. In fact, in Massachusetts no  
18 jurisdictions use mail -- intelligent mail barcodes;  
19 likewise, in Connecticut, or they use them in different ways.  
20 And in requiring them to do so could do just what I  
21 mentioned, which is depleting election budgets.

22 THE COURT: Okay. But nobody is doing it right  
23 now. I get that. And it's going to cost money to do it. I  
24 get that. Anything further for why it's a problem to use  
25 barcodes?

1           MR. COHEN: I think Your Honor is hitting on the  
2 top two points, really, which is it's very difficult to  
3 administer, could cause serious delays in electoral  
4 administration, and would cost a significant amount of money.  
5 The only --

6           THE COURT: What's the difficulty to -- I don't --  
7 I don't understand -- I understand the cost. That seems  
8 simple. But I'm not sure -- maybe I don't know enough about  
9 barcodes, but it would seem to me that what you're -- you  
10 know, if you have a barcode, two matching barcodes, and you  
11 put one on the ballot and one on the one envelope and one on  
12 the other envelope, then you can see if the one that you --  
13 went out is the one that comes back.

14           What's the difficulty in administering it?

15           MR. COHEN: Well, there's three points I would make  
16 on that, Your Honor. I mean, the first is that what we have  
17 to submit to USPS under the proposed rule and the order  
18 includes the intelligent mail barcode that is connected with  
19 each voter. So this information has to be nailed down well  
20 in advance, and it requires us --

21           THE COURT: I get the timing problem. So -- okay.  
22 Let's say we get past the timing. Let's say we're doing this  
23 for next year. Let's say that most voters would agree in  
24 this; most citizens would agree in this country that they  
25 should vote and noncitizens shouldn't vote.

1           And let's say that one way to make sure that  
2 noncitizens don't vote is that the ballot envelope inside and  
3 the ballot envelope on the outside match; and, moreover, that  
4 we now have computer technology so we could read it. And now  
5 you're saying but we don't have the computer technology to  
6 read it. We have a cost there. So I get the cost.

7           But I'm not -- and I get the having to give the  
8 list 30 days in advance. I see why that's a problem. But  
9 other than those two things, is there some further problem on  
10 the barcodes?

11           MR. COHEN: I don't think so, Your Honor.

12           THE COURT: Okay. I'll let you continue with 3.

13           MR. COHEN: Great. Thank you so much.

14           So all of this has shown, I think -- and there's  
15 plenty of evidence in the record to suggest that the  
16 states -- as the states have argued, that the proposed  
17 rulemaking, which clearly flows from the order -- it even  
18 says on section -- on page 2, this is USPS's adopting this  
19 consistently with the order -- is just going to be  
20 tremendously burdensome and disruptive.

21           And Your Honor's concern about the November general  
22 election was precisely the right concern. This proposed  
23 rulemaking, as is required under the order, is to be adopted  
24 shortly before that election, in fact, within weeks of  
25 ballots actually going out. So it's just difficult to

1     overstate the disruption that this will cause to election  
2     administration.

3             And, of course, the proposed rule, like the order,  
4     is drafted to become immediately effective upon adoption. So  
5     this is -- the states really cannot afford to wait for that  
6     final rule to come out.

7             THE COURT: And just so I'm -- make sure I am  
8     100 percent correct on the dates, June 29th is the date for  
9     DHS to have established infrastructure necessary to compile a  
10    citizenship list, July 29th is the final rule for USPS due,  
11    and then August 5th is the last date for states to give  
12    notice of intent to use mail ballots and saying whether they  
13    will or will not submit info for a list.

14            And I think if you don't submit info -- as the  
15    proposed rule is written, if -- you don't have to submit info  
16    for a list, but if you don't submit info for a list, no  
17    ballots would go out.

18            MR. PEZZI: So there's a 90-day optional notice  
19    ahead of time which is solely just for logistical purposes to  
20    make sure that everyone is aware. And then there are the  
21    separate provisions relating to the batch mailings of ballots  
22    that require, you know, name, address, barcodes in the ways  
23    that we discussed.

24            THE COURT: So you're saying this notice to --  
25    notice of intent to use the mail, including whether the state

1 will submit info for the list, that's totally optional?

2 MR. PEZZI: Yes, Your Honor. Again, under the  
3 proposal, it says, quote, "A state's failure to provide the  
4 optional 90-day notice to the postal service under 24.2 will  
5 not prevent enrollment under 24.4."

6 THE COURT: But that's only one of the two things.  
7 So there's the notice to use mail and then, also, separately  
8 a question -- I guess I didn't understand why it's two  
9 questions, right? If you're going to use the mail, you have  
10 to agree to submit the list.

11 MR. PEZZI: Yes, Your Honor. I think you have to  
12 go through the procedure stated here to send out batch  
13 mailings of absentee ballots.

14 THE COURT: But to be clear, there's a date, so we  
15 have 90 days before, which would be August 5th; but if you  
16 don't actually go on August 5th, you could come later, up to,  
17 I think, it's 30 days before, except if it's not practicable,  
18 and then you can do later.

19 But to the extent that they have the list, they  
20 have to tell you, yes, we're going to do mailing, and if  
21 we're going to do mailing, whether we're going to give you a  
22 list; but if you don't give us the list, then you can't do a  
23 mailing?

24 MR. PEZZI: That is, I think, an accurate  
25 description of the proposed rule. Yes, Your Honor.

1           THE COURT: Okay. So August 5th is the date --  
2       it's sort of an advisory kind of list.

3           Then September 4th -- so we had where DHS is  
4       filling out in this -- June 29th, DHS is establishing the  
5       infrastructure. And then I understand it is September 4th,  
6       60 days before the election, that DHS would confirm the list  
7       to the state.

8           MR. PEZZI: So I think that is, again, a correct  
9       reflection of the timing contemplated by the order. Those  
10      deadlines are not enforceable; and the postal service,  
11      obviously, already missed the first one. But I don't  
12      disagree with the calendar timing, unless I've missed  
13      something.

14          THE COURT: And then -- okay. I'll let you  
15      continue.

16          MR. COHEN: So maybe with that, Your Honor, I can  
17      touch on the merits of Section 3.

18          THE COURT: Please.

19          MR. COHEN: I think you're right, Your Honor. The  
20      defendants still haven't offered any theory of how USPS can  
21      implement this part of the executive order, not one. And,  
22      actually, as a matter of fact, I think that supports ripeness  
23      precisely because any manifestation of Section 3 is unlawful.

24                 I believe that there was some dialogue earlier  
25      about whether or not Section 3 really just calls for a

1 proposed rule. And while I think that's true to the text of  
2 the executive order, of course, to Your Honor's point, the  
3 Court is not required to be naive about what's actually  
4 happening here.

5 THE COURT: That was your words, not me.

6 MR. COHEN: Pardon?

7 THE COURT: You said I didn't have to be naive. I  
8 said I have to presume regularity.

9 MR. COHEN: Your Honor, as recently as 2025, the  
10 First Circuit has recognized, in *New York v. Trump*, that  
11 courts have not required to adopt a naivete from which  
12 ordinary citizens are free, and that's a direct quote.

13 And I think, in this case, that's pertinent  
14 precisely because this is nothing less than an order from the  
15 President to undertake certain actions. And, as a matter of  
16 fact, USPS is taking those actions; and it will have and is  
17 having a substantial impact on the plaintiff states.

18 But I also want to highlight another argument.

19 THE COURT: Just one little caveat there of where  
20 they're not, though: The President didn't differentiate  
21 between primaries and other elections, but they aren't  
22 enforcing this as to the primaries.

23 MR. COHEN: That's correct, Your Honor. But  
24 whatever slight deviation that might reflect from the order,  
25 I don't think that is the sort of deviation that calls into

1 question that the states have real harms that are flowing  
2 from the order, both now and in the future.

3 But I think the second argument that I'd like to  
4 highlight here is that it's just basic administrative law  
5 that any final rule has to be in keeping with a proposed  
6 rule. And, of course, that's the design of the executive  
7 order, is to take advantage of precisely that.

8 The Court said this in *National Urban League*. It  
9 said the substance of the forthcoming final rule is, quote,  
10 "clear, even if the agencies might use slightly different  
11 formulations."

12 And that's exactly true here. And that was the  
13 basis of the Court's conclusion in *LULAC*, in *California*, in  
14 the *Washington* case that the states have cited. All of these  
15 cases reflect the idea that, you know, what the President is  
16 purporting to try and accomplish here is require a certain  
17 deliberative process that belongs to an agency under that  
18 agency's congressionally and legislatively enacted authority  
19 to come out in a certain way. And that's exactly what's  
20 happening with respect to Section 3.

21 In fact, I'll quote just one more portion from  
22 *National Urban League*, which is that the Court there found  
23 the defendants were the ones speculating by suggesting that  
24 the agencies weren't going to follow the President's orders  
25 at issue in that case.

1           And I think that's true exactly here as well. The  
2 executive order is mandatory. Defendants seem to agree that  
3 the executive order is mandatory, and it requires USPS to do  
4 a certain thing. And so I don't think we need to sit here  
5 and speculate that USPS isn't going to be doing that thing  
6 precisely because they already are.

7           Another case that I would refer the Court to is the  
8 *Susman Godfrey* case. That was also a challenge to an  
9 executive order. It's cited in the states' reply. And that  
10 case concerned restrictions on law firms' dealings with the  
11 federal government.

12           And the Court found there that, while the precise  
13 contours of those limitations hadn't been set, any limitation  
14 contemplated by the executive order would be unlawful; and,  
15 likewise, that is exactly the case here. So I don't think we  
16 have to suppose anything that the order doesn't actually say.

17           THE COURT: And is that because -- are you taking  
18 that position because it doesn't matter what -- in your  
19 view -- what the details are of the directives in the rule  
20 with regard to the post office's involvement here, but  
21 because it violates either states' rights or Congress's role  
22 here?

23           MR. COHEN: That's exactly right, Your Honor. The  
24 order leaves nothing left for further development. It's  
25 clear and it's directive and it's mandatory.

1 THE COURT: Okay.

2 MR. COHEN: So with that, Your Honor, I think  
3 there's not been any real dispute over whether the President  
4 has authority to order agencies like USPS to violate their  
5 governing statutes because defendants' primary argument is,  
6 well, we can't know whether they're doing that yet. But, of  
7 course, much of plaintiff states' merits argument raises that  
8 exact point, and it hasn't really been seriously --

9 THE COURT: Okay. So I understand the "they're not  
10 going to violate the Privacy Act." What's the argument here  
11 that enacting this rule would violate the post office's  
12 governing statute?

13 MR. COHEN: Sure.

14 THE COURT: Because they -- well, tell me.

15 MR. COHEN: So there are a few reasons cited in  
16 plaintiffs' papers, and both in our motion and in our reply  
17 papers; but just to summarize it for the sake of time,  
18 Title 39 of the US code imposes a great deal of restrictions  
19 on USPS's operation. And the order flouts those precisely by  
20 expanding nonpostal services and categories of nonmailable  
21 matter beyond what the statutes contemplate.

22 THE COURT: So if they're not creating the list and  
23 they're merely checking the list, does that get them out of  
24 the problem?

25 MR. COHEN: I don't think it would, Your Honor. I

1 mean, as a matter of course --

2 THE COURT: Because I think what the defendants'  
3 position is, is you're telling them where to mail it, and  
4 they're mailing it to them --

5 MR. COHEN: Well --

6 THE COURT: -- to people. They're saying they're  
7 not differentiating in their mailing between what you're  
8 giving them. They're just going ahead and mailing to those  
9 people.

10 MR. COHEN: With the only addition that their  
11 position is we'll do that provided you play by our rules;  
12 and, as a matter of course, those rules encroach very  
13 substantially into the way that the states actually  
14 administer mail voting.

15 THE COURT: Okay. But right now we're talking  
16 about the postal -- the postal service coming up with things  
17 that would be in violation of their own governing laws, so  
18 tell me -- you started off by saying they're going to be  
19 doing things that aren't part of their mandate. And your  
20 briefing, I think, said they're creating lists, but they're  
21 not creating the list. They're only checking on it.

22 So is it your position that checking on a list  
23 would be beyond the role of delivering mail and so forth?

24 MR. COHEN: Well, I think that provision comes with  
25 a number of other very substantial and disruptive provisions,

1     which don't just require us to give them information that  
2     they administer. They will be checking outbound and inbound  
3     mail under the proposed rule. So clearly they're playing  
4     this screening role, which is exactly what the order  
5     contemplates.

6             THE COURT: Are they checking the inbound mail, or  
7     is the problem that the state official has to check the  
8     inbound mail and check the barcode to make sure they take the  
9     vote?

10            MR. COHEN: Well, I would refer Your Honor to 705,  
11     24.4.2, which is very close to the provision that the League  
12     referenced earlier. At least as I read that provision, it  
13     does require some sort of USPS screening of inbound mail.  
14     And, in fact, in 24.5.3, it says mailings that don't comply  
15     with 24.5.1 won't be accepted, and they're going to be  
16     returned to the states.

17            THE COURT: Right. That's your outgoing mail.

18            MR. COHEN: That's right. I believe the  
19     provision -- well, I suppose that all of this is sort of  
20     downstream of what is already obvious, which is that USPS is  
21     not going to be accepting this ballot mail into its mail  
22     stream in the first place, which is, of course, itself  
23     extremely disruptive.

24            And I'll add, too, that if USPS undertakes this  
25     screening close in time to an election, as it presumably

1 would because that's when states actually sent out ballots,  
2 the ballots wouldn't be returned to the state.

3 In other words, the state wouldn't actually know  
4 that the ballot isn't being delivered to the voter until well  
5 into the election calendar, presumably within days of the  
6 election, in fact. So there's no question that this could be  
7 extremely disruptive to states' mail ballot programs.

8 With that, Your Honor, I think we've sort of  
9 hammered the new restrictions on mail voting. I can touch  
10 for a moment on some of these new ballot design mandates  
11 which we got into with the intelligent mail barcode.

12 But I do want to emphasize that the President can't  
13 unilaterally override Congress's design for USPS's regulatory  
14 changes. And the first First Circuit alluded to this in  
15 *Campanale* case that we've cited in the states' papers in  
16 which the Court found that a statutory consultation  
17 requirement actually has to be meaningful; otherwise, it  
18 completely undermines what Congress intended to do in setting  
19 out that exact process.

20 I mean, I would ask what's even the point of a  
21 postal regulatory commission that is independent and  
22 bipartisan and issues advisory opinions on regulatory changes  
23 like these if the President can just bypass it, as he's done  
24 here.

25 THE COURT: What's your answer to that, that this

1 is bypassing the postal commission?

2 MR. PEZZI: Yeah, so the postal regulatory  
3 commission has this complicated structure for purposes of  
4 issuing advisory opinions -- which, to be clear, are only  
5 advisory -- is not triggered for every single thing that the  
6 postal service does. That's for nationwide service changes,  
7 change in, you know, postal rates, for example.

8 And so my understanding is that the long-standing  
9 position of the postal service, unchanged here, is that this  
10 sort of regulatory change does not go through the postal  
11 regulatory commission process.

12 THE COURT: So this manual, the postal -- post  
13 office manual that's being proposed to amend here, all of  
14 that is at some point came through notice rulemaking,  
15 presumably. Would that have been with or without the  
16 approval of the postal commission?

17 MR. PEZZI: So I wish I could make a more  
18 definitive statement. I am quite confident that this is not  
19 the first time that changes to the domestic mail manual have  
20 been made without going through the postal regulatory  
21 commission. There may have been some changes that did, but  
22 it is certainly not a new position of the postal service that  
23 this sort of regulatory change would not require going --

24 THE COURT: But is there somewhere where that  
25 distinction has -- rests? You know, is it from enacting

1       legislation of the postal commission? Is there somewhere  
2       where there's a division of what types of things -- I mean, I  
3       hear you saying rates would have to go to the postal  
4       commission.

5               MR. PEZZI: I believe that's right. The answer to  
6       your question is a statutory one. There are statutes that  
7       are not, candidly, the focus of either side's briefing in  
8       this case that do govern the question of when something does  
9       or does not have to go through postal regulatory commission  
10      review.

11              Now, even at the end of that process, to be clear,  
12      it's a nonbinding advisory opinion, as I understand it. And  
13      I think, to the extent plaintiffs have had a concern about  
14      that, judicial review of those questions goes directly to the  
15      DC circuit, typically.

16              So I don't -- I don't think that question is  
17      squarely teed up here. There may be a disagreement between  
18      the parties on it that is not addressed at much length in the  
19      briefs, but that is certainly the position of the postal  
20      service. On --

21              THE COURT: Any disagreement there, that a  
22      challenge to the postal commission role would have to go  
23      through the DC circuit?

24              MR. COHEN: Not exactly directly to that point,  
25      Your Honor. I do want to point to page 36; that's the ECF

1 pagination of plaintiffs' reply brief, Docket Number 163,  
2 which lays out some of the regulatory infrastructure here and  
3 describes why, in the states' view, this is -- you know, this  
4 is a substantive change, clearly, to the domestic mail  
5 manual. It has the potential to massively disrupt mail  
6 voting.

7 And those regulations seem to be very clear that  
8 substantive changes to the domestic mail manual are revised  
9 through a public notice and comment process. And that's  
10 precisely what USPS is doing here --

11 THE COURT: Well, isn't this a -- yeah. Okay. So  
12 this is a public notice and comment. But the question is:  
13 Where does the commission's advisory role come in?

14 MR. COHEN: This would be on -- it looks like it's  
15 39 CFR 3661, which dictates some of the commission's  
16 requirements. I'm not prepared, Your Honor, to necessarily  
17 insist here that USPS has made some grave error in not  
18 seeking the postal regulatory commission's advisory opinion.

19 What I will point out, though, is that even if the  
20 PCR process isn't actually going to be playing out because,  
21 in USPS's view, this isn't the sort of thing that needs to be  
22 brought to their attention, there's still a public notice and  
23 comment process. And so I would pose the exact same  
24 question.

25 THE COURT: I'm sorry; isn't that what the rule,

1 proposed rule is, is the notice and comment?

2 MR. COHEN: That's exactly right, Your Honor. And  
3 where I'm going with that is that I would pose the same  
4 question that I posed with respect to the postal regulatory  
5 commission, which is: What is the point of public notice and  
6 comment if not to establish a deliberative process where what  
7 comes out the other end could be different? But here, the  
8 President has dictated precisely what needs to come out the  
9 other end.

10 THE COURT: No. So you want me to say that because  
11 the President said do X, the notice and comment rulemaking is  
12 a farce. I -- that's kind of beyond what is my role to do  
13 here.

14 MR. COHEN: Well, it is not unusual for courts to  
15 have done that in the sense that, I mean, if we look to the  
16 first elections executive order case that the plaintiff  
17 states brought in this district last year, the Court did find  
18 that the order unconstitutionally required some sort of  
19 outcome to the election assistance commission's deliberative  
20 process for rulemaking in that context.

21 So in that way, it's not so different. But,  
22 certainly, I also think that we're getting a little too far  
23 afield potentially from what is the core of the states'  
24 claims, which is that it's the order itself that's  
25 unconstitutional.

1           And insofar as the proposed rulemaking is really  
2 relevant here, it is in a major way relevant precisely  
3 because it validates that, one, USPS is actually adopting  
4 this proposed rule, doing what the President is clearly  
5 telling the agency to do; and, two, it validates that the  
6 states have real harms that flow from it, and those harms are  
7 in the record.

8           And by the way, Your Honor, defendants haven't even  
9 contested the fiscal harms in the record as to Section 3.  
10 Those harms remain uncontested. So there's no question that  
11 there's real harms that flow from this order, and the  
12 proposed rulemaking just emphasizes that.

13           MR. PEZZI: I want to be respectful of Your Honor's  
14 time, but very briefly, I very strongly disagree with much of  
15 what my friend on the other side just said. The last thing  
16 he said I think is completely right, which is that the  
17 question before Your Honor right now is the legality of the  
18 executive order rather than the legality of a possible future  
19 rule to be issued by the postal service.

20           What is very much not correct is that the contents  
21 of a final rule issued by the postal service are knowable in  
22 advance, are required by the executive order. Even on its  
23 face, the executive order does not require the contents of  
24 any particular final rule. It says that any final rule shall  
25 be issued by a particular date. That is the only thing it

1       says about a final rule.

2               And I can certainly say that the men and women of  
3       the postal service take very seriously their obligations to  
4       deliver the mail. Some of the concerns that plaintiffs have  
5       raised I think would be a completely appropriate ground for a  
6       comment.

7               So, for example, to the extent there are data  
8       limitations or compatibility issues or practical concerns,  
9       the postal service very much wants to hear about those in  
10      this very comment process and, of course, ultimately will  
11      consider all the comments it receives, both about the  
12      legality of the proposed rules as well as the practical  
13      concerns the plaintiffs have raised, any policy  
14      considerations anyone wants to advance.

15              And if it issues a final rule, it will account for  
16      those comments. Until that happens, I don't think there's  
17      any basis for judicial review over the postal service's  
18      actions thus far.

19              MR. COHEN: The only thing I would add, Your Honor,  
20      is that the states can't afford to wait here. If a rule,  
21      anything like this, any rule like this, issues shortly before  
22      the general election, I think I've hammered this pretty hard,  
23      that it's going to be extremely disruptive to the states'  
24      mail ballot programs.

25              And so for that reason, we can't just wait to see

1 what shakes out on the other end precisely because we know  
2 what the President wants, and we know what he's told USPS to  
3 do. So for that reason, we would ask that the Court enjoin  
4 the order now.

5 MS. LEE: Your Honor, just very briefly on the  
6 merits, just as with the 2025 executive order, plaintiffs --  
7 and I understand this to be the plaintiff states' argument as  
8 well -- argue that there's no lawful outcome possible because  
9 the directive itself is unconstitutional.

10 The President is acting at the lowest ebb of any  
11 possible powers. I don't believe *Youngstown* is cited in  
12 defendants' briefs, but that is the framework we're looking  
13 at these through, nor is the postal clause.

14 So we have both the elections clause, which  
15 textually assigns the authorities here to the states with  
16 Congress as a check, as has been discussed; but the postal  
17 clause also textually assigns these authorities to Congress  
18 as well.

19 And because of the directive itself being unlawful,  
20 the President lacks any authority to dictate the USPS  
21 rulemaking, much less rulemaking as relates to ballots.

22 And the savings clauses don't help because, if  
23 there's no authority to issue the order, necessarily,  
24 everything commanded in the order is likewise unlawful. And  
25 that would be the exact scenario where the savings clauses

1 are being used to subsume all of the content within.

2 I have various justiciability points for  
3 Your Honor, but they're well covered in our briefs, and I  
4 will not beat them to death here.

5 MR. CAPOZZI: Your Honor, just one point.

6 So the intervenor states did argue on the merits  
7 for Section 2 that the President doesn't need affirmative  
8 statutory authority to do 2(a), that he has inherent  
9 authority under the *Youngstown* framework. We did engage with  
10 the *Youngstown* framework. We would just refer the Court to  
11 those arguments.

12 THE COURT: Okay. Thank you.

13 I have one other question for the states. And I  
14 think, if I were to open -- if I were to go through your  
15 declarants' statements, they would say we are currently in  
16 the process of doing X. The question for you is: When  
17 before an election do you start the process for that  
18 election?

19 MR. COHEN: Sure, Your Honor. I'd be happy to take  
20 that. And you're right that the declarations really do lay  
21 out quite a lot of evidence that we're doing things right now  
22 and suffering harms right now.

23 But the reality is that states are, essentially,  
24 always in the course of an election cycle because elections,  
25 as the Supreme Court has recognized, are extremely

1 complicated. They take months and months and months to  
2 prepare for and administer; and any change along the lines of  
3 that contemplated in the order tends to trigger a lot of  
4 outreach from elections officials, from the public. And, of  
5 course, what hangs in the balance is the fundamental right to  
6 vote.

7 So states can't take their obligations on this  
8 score lightly. So if you were to ask any of the secretaries  
9 of state or chief elections officials who are the states'  
10 declarants in this case, I think they would say we have  
11 year-round obligations every year to do something that is  
12 incredibly burdensome, incredibly complex, and that the  
13 executive order, by the way, unlawfully encroaches upon.

14 THE COURT: And that ramps up 3 months before,  
15 6 months before, 9 months before, 12 months before an  
16 election?

17 MR. COHEN: So there's --

18 THE COURT: I don't imagine it's constant. I mean,  
19 sorry, that's the wrong word. I don't imagine it doesn't  
20 have ebbs and flows.

21 MR. COHEN: I think you're exactly right,  
22 Your Honor. It does have ebbs and flows.

23 I think the point at which election administration  
24 obligations are most acute is probably roughly six to eight  
25 months before an election, and they sort of become more and

1 more burdensome as you get closer to election day.

2 Of course, in the weeks and months following an  
3 election, there's certifications and statements of the vote,  
4 but I think that's the rough time period that I would point  
5 Your Honor to. But I do want to emphasize that these  
6 obligations don't ever just go away. I mean, these are  
7 ongoing year-round obligations for the states.

8 THE COURT: Okay. Last question for you. We  
9 haven't talked about Section 5 at all. I understand the  
10 plaintiff states' position to be that we're required by  
11 Congress to keep ballots for 22 months, or whatever the  
12 number is. And the defendants' position is this is simply  
13 "should"; we're not telling you what to do.

14 Is that the end of that discussion, that,  
15 essentially, the government's position is that Section 5  
16 doesn't mandate anything?

17 MR. PEZZI: Yes, Your Honor. That is the position  
18 of the United States.

19 MR. COHEN: That's exactly right, Your Honor. I  
20 would just point Your Honor to the Michigan declaration,  
21 which in paragraph 85 describes some of the costs that the  
22 state will incur. There's other --

23 THE COURT: But they're saying they're not asking  
24 you to do it, or they're not telling you to do it.

25 MR. COHEN: That's right, Your Honor. But as a

1 matter of course, elections officials are treating this as  
2 mandatory and understandably so because it's something that  
3 comes from an executive order --

4 THE COURT: Well, if I write an opinion that says  
5 the government takes the position this is not mandatory, it's  
6 just a suggestion, they still think it's mandatory? Because  
7 nobody is that interested in what I have to say, again.

8 MR. COHEN: Well, you're doing yourself a dishonor,  
9 Your Honor, but as a matter of -- no pun intended.

10 But I think that's precisely why the courts -- the  
11 states have requested the relief we have on this point. And  
12 in plaintiff states' reply brief, we've stayed, look, if  
13 Your Honor finds that this is strictly precatory, please just  
14 say so so that we know and we don't have to incur all the  
15 costs that record shows we will incur from this section.

16 THE COURT: You don't disagree that I can say it's  
17 strictly precatory?

18 MR. PEZZI: I'd love to be able to consent to  
19 relief on that section. We obviously can't because of the  
20 jurisdictional positions we've taken in the brief. But to  
21 the extent Your Honor is already writing an opinion, it is  
22 certainly the position of the United States that that section  
23 of the executive order imposes no mandatory obligation on the  
24 states. So we have no objection with Your Honor saying that.

25 THE COURT: Okay. I think I have to give my court

1 reporter a break for a few minutes and get off the bench.

2 Thank you. It was all very helpful argument, and  
3 I'm -- don't have it written. It will take me some time, but  
4 I understand that time is sensitive here, so . . .

5 THE DEPUTY CLERK: We are in recess.

6 (Court in recess at 12:43 p.m.)  
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**CERTIFICATE OF OFFICIAL REPORTER**

I, Robert W. Paschal, Registered Merit Reporter and Certified Realtime Reporter, in and for the United States District Court for the District of Massachusetts, do hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing pages are a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 8th day of June, 2026.

/s/ Robert W. Paschal

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ROBERT W. PASCHAL, RMR, CRR  
Official Court Reporter