

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUSMAN GODFREY, LLP,

Plaintiff,

vs.

EXECUTIVE OFFICE OF THE
PRESIDENT, et al,

Defendants.

Civil Action
No. 1: 25-1107

Washington, DC
May 8, 2025

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE LOREN L. ALIKHAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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P R O C E E D I N G S

THE COURTROOM DEPUTY: Good afternoon, Your Honor.
We are now the record for Susman Godfrey, LLP, versus Executive Office of the President, et al, civil action 25-1107.

Could counsel please come forward and note their appearance for the record beginning with the plaintiff.

MR. VERRILLI: Good afternoon, Your Honor. And may it please the Court, I am Don Verrilli for Susman Godfrey. With me at counsel table is firm chair, Brad Brian, Ginger Anders, Elaine Goldenberg and Jerry Kreisberg. Also representing Susman Godfrey here this afternoon we have Kalpana Srinivasan and Vineet Bhatia. In addition in the audience we have our comanaging partner at Munger, Tolles; Hailyn Chen, and several other lawyers and employees of the firm.

THE COURT: Good afternoon.

MR. LAWSON: Good afternoon, Your Honor. Richard Lawson with the Department of Justice.

THE COURT: Good afternoon.

So we are here today for a hearing on the motions for summary judgment and motions to dismiss.

Oh, forgive me. Before we begin, Ms. Pham reminds me that we have activated the public line for this hearing. Any unauthorized broadcast will be subject to sanctions including contempt.

So with that, we are here for a hearing on the motion

1 to dismiss, a motion for summary judgment.

2 I do want to hear just briefly from the parties
3 before we begin about the import of the order I issued earlier
4 today about the schedule for an amended complaint and
5 subsequent briefing.

6 So I will hear first from you, Mr. Verrilli, because
7 it was your motion.

8 MR. VERRILLI: Thank you, Your Honor.

9 May it please the Court, we made that motion in the
10 aftermath of discussion of this very issue in the *Perkins Coie*
11 case in which the United States made an issue regarding any
12 order that the Court might issue to the United States as a
13 whole, or to the Executive Office of the President, would run
14 by its own terms against every Executive Branch agency or
15 whether all of the Executive Branch agencies needed to be
16 named. In the *Perkins* case, the plaintiff amended the
17 complaint to name every executive agency to avoid that problem.
18 And we are just taking the same step here to avoid that
19 potential ambiguity.

20 THE COURT: All right. Thank you. Are you intending
21 to drop any parties like the Executive Office of the President
22 or the United States?

23 MR. VERRILLI: No.

24 THE COURT: All right. Thank you.

25 Do you have anything to add, Mr. Lawson?

1 MR. LAWSON: No, Your Honor. I think that is a fair
2 summary.

3 THE COURT: All right. Thank you very much. So I
4 know you have dueling motions, so I suppose we could flip a
5 coin to decide who goes first. But I am inclined to hear first
6 from counsel for the plaintiff. I will note that we have
7 already had an extensive hearing on the temporary restraining
8 order, which focused on Sections 1, 3 and 5 of the executive
9 order. So if you could give me any developments or additional
10 arguments you have as to those sections, but also walk me
11 through Sections 2 and 4 since we haven't yet had the
12 opportunity to discuss those.

13 MR. VERRILLI: I would be happy to.

14 May it please the Court, in Your Honor's provisional
15 ruling granting the temporary restraining order, the Court
16 observed that the framers would have found that executive order
17 to be a shocking abuse of power. The summary judgment
18 submissions vividly confirm the accuracy of that observation.
19 We now have undisputed facts that establish that the order
20 retaliates against the firm for its advocacy on behalf of
21 Dominion Voting Systems and state election officials. And
22 remarkably now we know that it also retaliates against Susman
23 Godfrey for a charitable contribution to an organization that
24 advocates for gay and lesbian equality. Now, that violates the
25 First Amendment for all of the reasons that Your Honor found

1 provisionally and that we discussed previously. It is
2 retaliatory. It is odious viewpoint discrimination. It
3 burdens the right to petition and it disrupts our association
4 with our clients.

5 THE COURT: If I could press you on that. So this
6 charitable contribution, do you have a sense of how it is
7 related to the -- what the order calls interference with
8 military operations? I am looking for the precise quote, but I
9 think you know which phrasing --

10 MR. VERRILLI: I certainly do, Your Honor. And I am
11 speculating here. Of course, it is something that is
12 presumably within the knowledge of the United States. My
13 speculation goes something like this: The organization GLAAD,
14 to which the contribution was made, is an advocacy
15 organization. One of the things it advocates for is equal
16 treatment for gay and lesbian service members. And I believe
17 also it takes positions with respect to equal treatment for
18 transgender service members. And I presume that they have
19 brought litigation to try to advance those interests, although
20 I don't know specifically what litigation the government has in
21 mind, if it does have in mind that litigation. And that
22 litigation, I assume, is what the government suggests is
23 interference with military operations. That is the best I can
24 do, but I think it must be something like that.

25 THE COURT: And the Susman firm, they were not

1 involved in bringing any of this litigation?

2 MR. VERRILLI: Correct. It was a charitable
3 contribution to an organization.

4 THE COURT: Do you have a sense of when the
5 charitable contribution was made?

6 MR. VERRILLI: I don't have it at my fingerprints. I
7 apologize, Your Honor. I should know that. I can try to
8 figure it out, but I don't have it at my fingerprints.

9 THE COURT: But in your view, it was made not in
10 connection with any type of litigation?

11 MR. VERRILLI: That is my understanding, right. Even
12 if it were, of course, it would be completely and thoroughly
13 protected under the Supreme Court's *Bonta* decision. But I don't
14 believe that there was any specific connection of that kind.

15 THE COURT: All right. And while we are it, why
16 don't you also tell me a bit about the Susman Godfrey Prize.

17 MR. VERRILLI: Yeah. This goes, I guess, to the
18 order as a whole and to Section 3 and to Section 5 and maybe
19 Section 4. The undisputed facts, which we have submitted in
20 the form of declaration establish that the Susman Godfrey Prize
21 is a prize that includes a cash award and mentoring. It does
22 not include an offer of employment. And as a result of it not
23 including an offer of employment, it is not within Title VII
24 because it is not a term or condition of employment. It cannot
25 be a violation of 42 U.S.C Section 1981 because it is a grant,

1 a gift, and not a contract. So there is nothing unlawful about
2 it, nothing.

3 THE COURT: All right. Thank you very much.

4 MR. VERRILLI: Now, with -- what I would like to
5 do -- you know, I will work through the specifics and focus on
6 the issues we haven't talked about as much. But if Your Honor
7 would permit me, I would like to make two overarching points at
8 the outset here. I want to make sure they don't get lost as we
9 work through the specifics on the merits. I want to make sure
10 we don't miss the forest for the trees. What James Madison
11 said in the early days of the republic by way of explanation,
12 was, "We guarantee free speech principally and primarily to
13 ensure that citizens can check and constrain their government,"
14 that they can do that when the government is wrong including in
15 court.

16 And since the time of the Magna Carta, the guarantee
17 of due process has existed principally to check and constrain
18 the arbitrary use of executive power to threaten life, liberty
19 or property. And the framers put those guarantees in our
20 constitution precisely for moments like this one.

21 And, second, again, I don't want to have us miss the
22 forest for the trees when we are talking about the equities and
23 the public interest. The whole point of the Susman Godfrey
24 executive order and the others like it is to intimidate law
25 firms into abandoning advocacy on a behalf of their clients.

1 Now Susman Godfrey is fighting that effort and
2 intimidation. But as our statement of material facts and our
3 supporting declaration show, other firms are already
4 acquiescing to that intimidation. And that is
5 unconstitutional, full stop, no matter what the motivation is.
6 But the specific goal of this intimidation is what makes it so
7 pernicious. The issue specific point of these orders is to
8 prevent courts from hearing the best arguments from the best
9 lawyers challenging executive actions.

10 It is to silence the challenges to the myth that the
11 2020 election was somehow rigged. It is really to silence any
12 argument that the President finds threatening to the image he
13 wants to project to the world and the policies he wants to
14 pursue. That is why it is such an extensional -- particular
15 extensional threat to the independence of the Bar, to the
16 independence of the judiciary, to our constitution and to our
17 basic commitment to the rule of law. That is why every section
18 of this order needs to be enjoined, respectfully.

19 With respect to Section 1, I do think we did discuss
20 it. There are, I think, a couple of points that would be
21 helpful to make before moving to Section 2. The government's
22 pitch at TRO stage and the pitch now is this is just good
23 old-fashioned government speech, Section 1, and you should just
24 treat it as a standalone basis of good old-fashioned government
25 speech. To point out the irony of this first -- what the

1 President of the -- they are describing what we are doing here
2 as an effort to muzzle the speech of the President, when what
3 is at issue is one of the most brazen efforts by a President
4 ever to muzzle private speech. And it can't be defended as
5 government speech and *Vullo* is really controlling here. The
6 President can speak all he wants. What the President can't do
7 is retaliate against us for protected speech.

8 And just as Judge Howell found in the *Perkins Coie*
9 case, Section 1 is government action. It is not just some
10 disembodied opinion. It is findings. And those findings are
11 that operative basis for all of the specific commands that
12 follow.

13 THE COURT: So in your view, if the entirety of the
14 executive order was Section 1, you still would have an argument
15 that this is not purely government speech?

16 MR. VERRILLI: Absolutely, we absolutely would. And
17 there are a couple of reasons for that. The first one is --
18 and I think the first of the two can be illustrated by the
19 Jenner & Block experience that we talked about at the TRO
20 hearing. Those findings are findings that operationalize
21 Sections 2 through 5. But they are also findings that
22 government agencies in the Executive Branch could rely on more
23 broadly to take action against Susman Godfrey. And, of course,
24 that is exactly what the attorney general and the Director of
25 the Office of Management and Budget in a memorandum in the wake

1 of the TRO issued in the Jenner & Block case urged government
2 agencies to do. This is the -- after the TRO was in place and
3 the order was enjoined, this memo went around. I am just going
4 to reiterate what I said last time because it so astounding
5 that "Jenner & Block is a law firm committed to the
6 weaponization of justice, discrimination on the basis of race,
7 radical gender ideology" --

8 THE COURT REPORTER: Sir, you need to slow down.

9 MR. VERRILLI: I'm sorry.

10 -- "radical gender ideology and other anti-American
11 pursuits."

12 And then the key for present purposes as this note
13 says, "Of course, as noted in the Court order agencies are
14 permitted to carry on their ordinary course of business, which
15 carries with it the authority to decide with whom to work" --
16 so that consequence right there going beyond Sections 2 through
17 5.

18 And then, of course, the important part of our due
19 process claim is that our reputation -- and through it our
20 ability to attract and retain clients has been seriously
21 damaged by the -- what our -- what we believe to be the
22 completely baseless findings in Section 1.

23 So our due process claim also goes directly to
24 Section 1. So if it were alone, we would still I think would
25 have very, very powerful arguments that ought to be enjoined.

1 But, of course, it is not alone.

2 THE COURT: And so again just taking it on its own,
3 is it the findings itself? I am just trying to determine where
4 is the line between government speech and government action?

5 MR. VERRILLI: So I think the key thing, Your Honor,
6 if I may is to point the Court to the -- our proposed order and
7 the relief that we seek. And this is on page 2 in particular
8 of our proposed order.

9 THE COURT: Give me a minute to get there.

10 MR. VERRILLI: Of course, paragraph 2 on page 2.

11 THE COURT: I'm sorry. There is a lot of pages here.
12 All right.

13 MR. VERRILLI: What we are seeking the Court to do --
14 asking the Court to enjoin is any Executive Branch employee,
15 et cetera, from relying on or using in any way or for any
16 purpose or otherwise taking any action based upon the
17 statements laid out in Section 1 of the executive order.

18 We are not asking -- we are asking that it -- that
19 those statements not be operationalized within the four corners
20 of this executive order or more broadly as attempted with
21 respect to *Jenner & Block*. So we are not asking that any
22 speech be enjoined. What we are asking is that the operative
23 effect of that speech be comprehensively enjoined.

24 THE COURT: And how does that work with regard to
25 Section 1? Because I understand your argument to be Section 1

1 states why Sections 2 through 5 are necessary in the
2 government's view. So if I enjoin Sections 2 through 5, can
3 Section 1 stand or is it part and parcel of the action?

4 MR. VERRILLI: No. I think it has to be part and
5 parcel, in part because enjoining Sections 2 through 5 would
6 not cure all of the constitution harm and practical harm to us
7 for the sort of *Jenner & Block* circumvention kind of reasons I
8 was talking about.

9 THE COURT: And it wouldn't prevent the Executive
10 Branch from issuing a *Jenner & Block* like memorandum.

11 MR. VERRILLI: Correct. Precisely. It also would
12 not address our due process objection to the defamatory and
13 baseless statements about our reputation. And there is also
14 this direct connection between Section 1 and Section 3 where
15 Section 1, baselessly says that Susman Godfrey is acting
16 against the national interest. And then Section 3 tells every
17 federal government agency supervising government contracts that
18 it should take the fact that -- it should take the national
19 interest into account in deciding which contracts to terminate.
20 So it just seems to me -- that is, I think, helpful in
21 illustrating that it is just interwoven with the whole
22 document. There is no way I think it could be allowed to stand
23 for all of those reasons.

24 If Your Honor has no more questions about Section 1,
25 I can move to Section 2.

1 THE COURT: Yes.

2 MR. VERRILLI: I think the key question here about
3 Section 2 is the security clearances issue.

4 THE COURT: Do you know if any Susman Godfrey
5 employees have had their security clearances revoked? I know
6 you weren't seeking a temporary restraining order about that.

7 MR. VERRILLI: I am not aware that they have, Your
8 Honor. I am not aware that they have.

9 THE COURT: Thank you.

10 MR. VERRILLI: But the question here I think is
11 whether our constitution claims are justiciable. And both *Egan*
12 in the Supreme Court and *Lee* in the D.C. Circuit are
13 justiciability cases. And I think it is quite important to
14 look at what *Egan* talks about and to contrast it with what we
15 have in this executive order. *Egan* describes the
16 determinations that are insulated from judicial review that
17 aren't justiciable as protective judgments about an
18 individual's future actions, specifically attempts to assess
19 whether under compulsion of circumstances or for other reasons,
20 the individual might compromise sensitive information and
21 threaten national security. That is at pages 528 and 529. So
22 in other words, individualized decisions about the
23 trustworthiness of particular applicants or holders of security
24 clearances, that is not this.

25 And I think maybe to illustrate that the fundamental

1 difference if a President were to issue an executive order that
2 no woman could receive a security clearance or that no
3 republican could receive a security clearance, there is not a
4 chance in the world that the Supreme Court or the D.C. Circuit
5 would find that executive order to be nonjusticiable. And that
6 is because it differs fundamentally from what *Egan* and *Lee* were
7 talking about.

8 And this EO is a version of the same thing. This is
9 a categorical suspension of security clearances to a class
10 defined by its exercise of First Amendment rights. That is
11 what it is. There is no individualized consideration that
12 preceded the suspension. There is a suspension and then they
13 claim there will be individualized consideration to follow
14 about whether to restore that which has been suspended. But
15 the suspension occurred on the basis of retaliation for the
16 collective exercise of First Amendment freedoms by the firm and
17 not based on any individualized determination about anyone.

18 THE COURT: And what do you make of your friend on
19 the other side's argument that a post deprivation process like
20 this review about whether the clearance should be reinstated is
21 sufficient for purposes of due process?

22 MR. VERRILLI: Well, the first observation I would
23 make about that, Your Honor, is it doesn't address the First
24 Amendment problem. This was imposed in retaliation for
25 exercise of First Amendment rights and has suffered the same

1 defect that an order saying no woman or no republican can hold
2 a security clearance would have. It is based on a categorical
3 judgment and an impermissible criterion defending that
4 categorical judgment. That is the first problem with it.

5 The second problem with it is that the suspension has
6 adverse effects in the here and now. And because it will
7 prevent those who do have security clearances from being able
8 to use them to -- in the event that the firm is retained to
9 carry out work that requires the security clearances. And as
10 we have demonstrated in our factual submissions, the firm
11 routinely does that kind of work. Of course, we have got
12 somebody in the reserves who needs a security clearance
13 unrelated to firm work. And that person's security clearance
14 has been suspended. There is also a defamatory element to the
15 suspension of the security clearances that happens in the here
16 and now. The argument is that no one in Susman Godfrey is
17 trustworthy enough to have a security clearance. It is just
18 pure defamation that occurred with no process.

19 THE COURT: And is not connected at all to the
20 specific problems that Section 1 is trying to address?

21 MR. VERRILLI: None whatsoever.

22 Your Honor, I will point -- it is a little bit
23 surprising. Section 2 doesn't even have the words national
24 security in the Section.

25 And so, you know, a couple more points if I could

1 make about this. You know, this exact same suspension of
2 security clearances, was in the Paul Weiss executive order and
3 exact same justification that Paul Weiss had undertaken
4 representation that were against national interest that is what
5 justified the suspension of the Paul Weiss security clearances.
6 And then whenever it was, a few days later, the President
7 rescinded the Paul Weiss order. There was no change in
8 circumstances with respect to the trustworthiness of Paul Weiss
9 lawyers between the imposition of that executive order and its
10 rescission a few days later, I think in some ways that tells you
11 all you need to know about whether there is anything legitimate
12 about the suspension.

13 THE COURT: Is the Paul Weiss the only order that was
14 issued and rescinded? Am I correct in thinking the other
15 agreements, as least to public knowledge didn't --

16 MR. VERRILLI: I believe that is correct, Your Honor,
17 yes.

18 THE COURT: Thank you.

19 MR. VERRILLI: And then, you know, the other one more
20 point I would make about Section 2, if I could -- and in
21 particular I would commend to Your Honor's attention the D.C.
22 Circuit's *Rattigan* decision, which we cite in our briefs. And
23 the -- what the Court said in that decision I think is exactly
24 what we are talking about here. It said that the Court has
25 dual responsibilities in a security clearance situation. Its

1 duty is to follow *Egan*, but it is also -- and I am quoting
2 here, "To preserve to the maximum extent possible" legal
3 protections for individuals. That is at page 770 of 689 F.3d.

4 Judge Howell said something very much along the same
5 lines at page 41 of her opinion enjoining the equivalent
6 provisions of the Perkins Coie order.

7 If the Court has nothing further on Section 2, I will
8 move to Section 3.

9 THE COURT: You argue in the alternative that *Lee* is
10 bad law. But I don't need to reach that --

11 MR. VERRILLI: No. We are preserving that in case we
12 need it. We don't think we need it for all of the reasons. We
13 have identified this is, as we have said is -- this is upstream
14 of the kind of decision that is at issue in *Lee*. But we are
15 just preserving that issue. We are not asking Your Honor to
16 rule on it.

17 With respect to Section 3, I think there is a pretty
18 clear way to just cut through it all. And it is this: If one
19 looks at page 16 of the government's motion to dismiss, there
20 is a sentence there --

21 THE COURT: If you will give me a moment to get
22 there.

23 MR. VERRILLI: Sure.

24 THE COURT: I am with you.

25 MR. VERRILLI: Just in the very middle of the page,

1 it is the sentence penultimate -- it is the last sentence of
2 the carryover paragraph that starts with the word furthermore.
3 The key language I think for the moment here is that it says,
4 "While Section 3 relies equally on plaintiff's racial
5 discrimination and its malfeasance in election litigation for
6 its authority." So the government has conceded that Section 3,
7 the disabilities imposed and burdens imposed by Section 3 rest
8 equally on our election litigation and their baseless
9 allegations of racial discrimination. One of those two things
10 is a blatant First Amendment violation. It is retaliation,
11 viewpoint discrimination, et cetera. So once one recognizes
12 that there is viewpoint discrimination and retaliation going on
13 here in violation of the First Amendment, then what we have is,
14 in the best case scenario for the government, you have got an
15 order that is justified equally by the unconstitutional First
16 Amendment violation and their concern -- purported concern with
17 race discrimination.

18 Well, there is a well associated constitutional
19 methodology for dealing with a situation like that. It is the
20 *Mount Healthy* methodology. The Supreme Court applied it just
21 earlier this year in the TikTok case. You have to ask the
22 question, whether the government would have gone forward with
23 the action based solely on the -- on the rationale that doesn't
24 violate the constitution. And the government bears the burden
25 of making that proof. They didn't even try to make that

1 argument. So I just think it is game over on that. They have
2 conceded retaliation. And they haven't tried to defend on the
3 *Mount Healthy*. I would point out that this case that -- about
4 which they make a great deal, the *Umbehr* case by the Supreme
5 Court -- the holding of that case, the holding of that case was
6 that government contracts may not be terminated based on
7 government officials' retaliation or viewpoint discrimination
8 against the speech of the contract. And then it goes on to
9 apply the *Mount Healthy* kind of analysis that I just described.
10 It instructed the lower courts to do so, because it hadn't been
11 done yet. But the case they cite establishes the principle
12 that defeats their position on that issue. It is just plain as
13 could be.

14 THE COURT: Which case are you relying on there?

15 MR. VERRILLI: It is the *Umbehr* case.

16 THE COURT: Okay. Because they cite *McGowan* for the
17 notion that you can support it under both an unconstitutional
18 and a constitutional justification and just evaluate on the
19 basis --

20 MR. VERRILLI: Right. But *McGowan* is a very old
21 case. And the Supreme Court law has evolved a very great deal
22 since then to the *Mount Healthy*, *TikTok* approach. As I said,
23 the best proof for it is the *Umbehr* case, which they cite which
24 says exactly what I am saying now about how to go about it.
25 And they haven't attempted that. And, you know, I think there

1 is probably a good reason why they haven't attempted it,
2 because they couldn't possibly justify what they have done here
3 on the basis of the spurious allegations of racial
4 discrimination that they have made in the executive order that
5 they have sought to defend in the summary judgment proceedings.

6 There are really two elements to it. The first is
7 the Susman Prize, which they point to. Your Honor has asked
8 appropriately about that. I have explained, it is 100 percent
9 lawful. That can't possibly justify this. And the only
10 thing -- the only other evidence that they support to are some
11 statements that they pulled off of the website basically that
12 says that Susman is committed to diversity and that they have
13 signed a pledge that commits them to gender parity. I mean,
14 God forbid that Susman Godfrey would pledge itself to equal
15 treatment for men and woman. That is what they are saying
16 constitutes the unlawful discrimination.

17 And I do think it is important too if I could ask
18 Your Honor to take a look at page 13 of the defendant's
19 opposition to our summary judgment motion.

20 THE COURT: You said page 13?

21 MR. VERRILLI: Thirteen, yes.

22 THE COURT: I am ready when you are.

23 MR. VERRILLI: Yes. This is the first full
24 paragraph. So they have pointed to these statements on the
25 website "And our commitment to gender equality" and they say --

1 and I just -- I am going read to it out loud because it is just
2 astounding. They say, "This is precisely the sort of racial
3 and gender considerations prohibited by civil rights laws. And
4 Susman appears to have fallen short of these principles. Such
5 explicit race-based criterion goes well beyond the hidden
6 consideration of race that the Supreme Court condemned in
7 *SSFA*." They are saying these website statements go
8 considerably beyond what was at issue in *SSFA*. What was at
9 issue in *SSFA* was express race conscious decision making that
10 granted benefits on the basis of race. They are saying those
11 website statements go beyond what was at issue. They don't
12 remotely approach what was at issue in *SSFA*. And the idea the
13 United States would say something like this in a brief, I mean,
14 I just -- I -- I am speechless, frankly. So there is no
15 possible way that this race discrimination justification, even
16 if they had tried to prove what they have to prove on *Mount*
17 *Healthy*, even if they had tried, and they haven't, there is no
18 way it could uphold any part of this order.

19 THE COURT: This is a better question for your friend
20 on the other side so I will ask him. But what law do you
21 perceive then to believe the statements on the website to be
22 violating certainly? Title VII is out of the picture, because
23 the Susman Godfrey Prize and some mere statements I think
24 wouldn't rise to the level of a Title VII claim. Do you have
25 any other guesses?

1 MR. VERRILLI: I don't know. We are not subject to
2 the equal protection clause because we are a private entity.
3 And maybe they have got some Title VI theory in mind. I don't
4 know. I think what their theory is basically, we don't like
5 what they are doing. And because we don't like what they are
6 doing, we are going to impose this Draconian set of
7 punishments. This language I read tries to gesture at some
8 thought that maybe this is unlawful in some way, but it just
9 isn't. It just isn't.

10 With respect to -- I can move on to Sections 4 and 5
11 and I think I can move pretty quickly through them, Your Honor.
12 With respect to Section 4, I think the point, again, is very
13 straightforward. We are not seeking an injunction that the
14 EEOC may never investigate Susman Godfrey. We are seeking an
15 injunction that the EEOC and every other government agency
16 can't open an investigation or otherwise come after us on the
17 basis of this executive order, because this executive order is
18 impermissibly retaliatory in violation of the First Amendment.
19 An EEOC investigation prompted by this executive order would be
20 a form of retaliation. We are not asking for an immunity from
21 EEOC proceedings. And so I just think this is very
22 straightforward. This goes back to the language that Your
23 Honor and I discussed in page 2 of the proposed order. It
24 could prohibit the EEOC from acting on the basis of the
25 findings in Section 1 or anything else in the EO. But it

1 doesn't ask for immunity, so I think that is pretty
2 straightforward.

3 THE COURT: Now, I confess I have some concerns about
4 Section 4. It would be one thing I think were Section 4 to put
5 you at the head of the line of any EEOC investigation. All
6 this seems to be saying is that nothing in the order is
7 constraining the prior order which had directed these type of
8 EEOC investigations. So is Section 4 actually doing something
9 affirmative as opposed to just limiting its potential to be
10 construed as undermining an earlier order?

11 MR. VERRILLI: Yes. And it is because of the
12 connection between Section 1 and Section 4. Section 1 contains
13 as I hope I have demonstrated absolutely spurious allegations
14 that we have engaged in race discrimination. And Section 4 is
15 connected to Section 1 in the same executive order. And our --
16 and the remedy we propose in that language that we were
17 discussing earlier, Your Honor, is that you can't act on the
18 basis of this executive order. So the EEOC can't open an
19 investigation based on the findings in Section 1. I think that
20 is quite important. And so it is not shutting down an EEOC
21 permanently, but they can't do that. Just like every other
22 agency in the Executive Branch can't act on the basis of those
23 findings.

24 THE COURT: And Section 4 of the *Perkins Coie* order
25 has been enjoined?

1 MR. VERRILLI: It has.

2 THE COURT: I think there are more steps in that
3 litigation to come. Isn't there also an even earlier order,
4 the EO on DEI, does that affect you or is it really just the
5 *Perkins Coie* order from which these EEOC investigations are
6 stemming?

7 MR. VERRILLI: So it doesn't effect the firm directly
8 in the sense that we haven't been -- Susman hasn't subjected
9 to -- it wasn't on the list of firms subjected to the EEOC
10 investigations. And, you know, I think given that it wasn't on
11 the list, there would be lot of reasons to be suspect of being
12 put on the list now in light of what is happening. Again, all
13 we are asking for is that the Court enter that the -- the
14 language that we propose on page 2 in paragraph 2 of our
15 proposed order, which would prohibit what we think would be the
16 unconstitutional action while leaving the EEOC with the
17 authority to proceed in regular order in a proper way without
18 any unconstitutional taint.

19 THE COURT: Thank you.

20 MR. VERRILLI: With respect to Section 5, two points.
21 The first, it has the exact same problems as Section 3. I
22 mean, on the merits what the government is trying to do with
23 respect to Section 5 is argue, well, you know, we are a
24 contractor. We have rights. We have broader latitude than we
25 have as a sovereign. And when we are landlord or proprietor we

1 have broader rights than we have as a sovereign. You don't
2 have the right as -- just as you don't have the right as a
3 contractor to engage in blatant viewpoint discrimination, you
4 don't have the right as a proprietor or landlord or anything
5 else to engage in blatant viewpoint discrimination. You don't
6 have the right, period, if you are the government. You don't
7 have the right to deny due process as a landlord or proprietor,
8 just like you don't have a right to deny due process as a
9 contractor.

10 So it really just -- exactly the same arguments apply
11 that they -- you know, in order to have any chance of
12 prevailing on this, they would have to come in and say, there
13 is some neutral, non -- some neutral constitutional ground that
14 we are invoking to justify the exclusion from government
15 buildings and facilities, et cetera, and that the President
16 would have adopted this executive order with this exact same
17 restriction, even absent the retaliatory First Amendment
18 motive. They haven't tried to make that argument. So, again,
19 on the *Mount Healthy* analysis there is -- they just -- it is
20 game over. They haven't made the -- even begun to make the
21 case they would have to make to make the relief. And they
22 couldn't, of course, because of the reasons we talked about
23 with respect to Section 3.

24 THE COURT: Do you perceive this dichotomy between
25 the government as sovereign and the government as contractor or

1 landlord?

2 MR. VERRILLI: So the government -- there is some
3 difference. There is some latitude that the government has as
4 employer or as contractor or as landlord. But it is not that
5 the constitution applies to the government as sovereign and the
6 constitution doesn't apply to the government as landlord and
7 contractor, et cetera. Again, the *Umbehr* case on which they
8 rely, that is exactly what it says. So that is a case about --
9 that was a case about retaliation against a contractor for the
10 contractor's criticism of local government officials. And what
11 the court held in that case was that the government can't
12 retaliate, can't terminate a contract in retaliation for that.

13 And so while there might be some additional latitude,
14 it doesn't extend so far as to the types of things the
15 government is trying to do here. So I really think that is the
16 fundamental problem.

17 THE COURT: Your friend on the other side relies on
18 *Rust v. Sullivan* and that line of cases to say the government
19 is allowed to favor particular types of speech. Is your view
20 that, be that as it may, that does not apply when you are
21 cutting off a contract or retaliating or how do you sort of
22 square those lines of cases?

23 MR. VERRILLI: So I will address contracting in a
24 minute. It can't possibly justify keeping us out of government
25 buildings. That has no bearing on that whatsoever. And then

1 with respect to the -- with respect to government contracts,
2 what it says is that, you know, the government can decide that
3 the government's money will be, you know, put to the uses that
4 the government directs that it be put to. But, of course, all
5 of that is happening with respect to the contracts that would
6 be at issue here. And what they are trying to do is impose an
7 extraneous set of constraints. I mean, you couldn't possibly,
8 I think, justify a rule that said, no women-owned businesses
9 shall receive government contracts based on the fact that
10 government wants only men, only male-owned businesses to
11 receive government contracts. You couldn't possibly do that on
12 the theory that government can spend its own money any way it
13 wants. It can't do that.

14 And then the *Umbehr* case specifically holds that you
15 can't -- that whatever *Rust v. Sullivan* might have said, it
16 doesn't mean that the government can terminate a contract based
17 on its disagreement with the -- or in retaliation for the
18 particular political viewpoints that the speaker -- that the
19 speaker manifests. And so I just think that that argument
20 is -- you know, *Rust v. Sullivan* stands for a limited
21 proposition, an important one, but it is a limited one and it
22 doesn't come close to justifying what they have done here.

23 And with that, Your Honor, I do have one more point
24 to make about Section 5, but of course, I want to answer any
25 questions Your Honor has.

1 THE COURT: No. Give me your point and then I have a
2 few questions.

3 MR. VERRILLI: Okay. So with respect to the other
4 argument they make with respect to Section 5 is the ripeness
5 argument. I think that was thoroughly vetted at the TRO
6 hearing. And it was just obviously ripe. And one thing I
7 think is worth pointing to is -- and this is in our statement
8 of facts 160. When the President was signing the executive
9 order, the official who handed him the document to sign said,
10 this is an executive order that takes certain measures against
11 Susman Godfrey to ensure they cannot access government
12 resources, government buildings, et cetera -- to ensure that
13 they cannot access. Okay. And so I just think the idea that
14 it isn't ripe is just an insubstantial argument.

15 THE COURT: Can I turn you to your vagueness
16 argument?

17 MR. VERRILLI: Sure.

18 THE COURT: So your friend on the other side
19 maintains that your due process vagueness argument doesn't hold
20 water because this is neither criminal nor regulatory. So what
21 is your response to that?

22 MR. VERRILLI: Well, fortunately, it is not criminal.
23 It is obviously regulatory. It is instructing government
24 agencies to take regulatory action against us. I don't see how
25 you could think of it any other way. And the idea that -- and

1 then, just stepping back again, you know, let's not lose the
2 forest for the trees here. Look at what they are doing. They
3 are saying, you can't bring a First Amendment challenge --
4 excuse me -- a due process vagueness challenge against an order
5 like this, because in some technical sense it is not
6 challenging the application of the regulation. I mean, how
7 could that be? How could it be that a private citizen, a
8 private entity subject to Draconian punishment like this can't
9 object to the fact that it was done without any notice, without
10 any opportunity to be heard? How could that be?

11 THE COURT: And the last question I have for you is,
12 obviously, we have the benefit of the *Perkins Coie* opinion from
13 Judge Howell. Does that affect how you wish this proceeding to
14 proceed?

15 MR. VERRILLI: So, you know, I think the -- what we
16 are hoping to have happen in this proceeding is final judgment,
17 entry of permanent injunction enjoining the order as a whole in
18 the manner that we have described in our proposed order. And
19 we think Judge -- we think Judge Howell's opinion is supportive
20 in every particular, that result. And so I think in that
21 respect, the -- we endorse Judge Howell's reasoning. And we
22 think it -- we think it provides a quite useful road map. And
23 we think that the -- we hope that the Court is able to move
24 expeditiously to a final judgment here.

25 THE COURT: And is there any portion of the Judge

1 Howell opinion with which you take issue?

2 MR. VERRILLI: I don't think there is any portion
3 with which we take issue. We might emphasize, you know, the
4 arguments that we have made today in some places are maybe a
5 little bit different in emphasis than Judge Howell's, but there
6 are no real fundamental diversions I don't think.

7 THE COURT: Thank you very much.

8 MR. VERRILLI: Okay. Thank you, Your Honor.

9 THE COURT: Mr. Lawson.

10 MR. LAWSON: Good afternoon, Your Honor.

11 I believe as I mentioned at the TRO hearing, we
12 think -- and counsel for plaintiffs approached it this way as
13 far as section by section. And I think, as I believe I
14 referenced at the TRO hearing, at sort of a 30,000-foot level,
15 I think the biggest point of difference is whether or not these
16 are punishments in the traditional sense that the court -- the
17 Supreme Court has looked at and in cases like *Vullo* and *Bantam*
18 *Books* or if this is more discretionary. Our position, of
19 course, is that this is executive discretion. One of the
20 reasons, I am -- I'm sorry I have already forgotten the example
21 that Mr. Verrilli was referencing a moment ago in the due
22 process section. We would point -- our general overarching
23 position is that due process would apply certainly in a
24 criminal type of prosecution, certainly would apply in a
25 licensing type of issue where there is an inherent right of

1 access and so forth.

2 Our position is that on these points, the -- there is
3 no inherent right of access, that the -- it is discretionary as
4 to who has and is able to maintain security clearances,
5 discretion as to who can be a contractor with the government,
6 discretion as to the guidance given to Executive Branches to
7 inquire into areas.

8 And if I can just flag on Section 4, an EEOC
9 investigation is a bit of a term of art as I have been
10 learning. And this is more of a review.

11 But then also to kind of round out, discretion, no
12 inherent right on the Section 5, the last point, that, you
13 know, access to buildings, access to staff, hiring, again
14 discretionary.

15 THE COURT: Isn't there --

16 MR. VERRILLI: It is conceivable --

17 I'm sorry, Your Honor.

18 THE COURT: Isn't there an inherent right of access
19 to federal courthouses for purposes of the petition clause?

20 MR. LAWSON: Of course. I don't want to go down the
21 hypothetical of saying this guidance regarding access to
22 buildings would necessarily violate, because between the time I
23 gave the hypothetical and the guidance came out, maybe I could
24 come up with some reason on it. I have to concede that it
25 could be possible for some guidance limiting access to a

1 building to at the very least affect the right of petition, but
2 that it is conceivable that is done. But that drives home the
3 point that I have been making throughout this proceeding that
4 it is not ripe. We don't have that. Obviously, we have
5 submitted that that is a grounds to dismiss. If the Court
6 denies the dismissal and denies the motion for summary
7 judgment, then perhaps the Court could revisit the issue on the
8 TRO aspect and at least allow the guidance to be developed to
9 see if we are coming across an issue that raises constitutional
10 implications. Right now, we have hypothetical parades of
11 horrors. I would submit that we need something granular and
12 specific on that point.

13 So that is the sort of 30,000-foot variation and
14 approach. And I think however the Court decides on that point,
15 much will flow for the rest of the order and the decision.
16 Certainly, I can go section by section as to how we view it.
17 Unfortunately, this may be a bit of a repeat for the Court from
18 some of the prior hearings.

19 THE COURT: Before we get there, can I just ask --

20 MR. LAWSON: Yes.

21 THE COURT: -- some factual questions?

22 MR. LAWSON: Please.

23 THE COURT: I think you had said at the TRO stage
24 that no one reached out to the firm before issuing the order,
25 which is different than what happened with a lot of other law

1 firms.

2 MR. LAWSON: I don't -- I can't speak to that. And I
3 apologize if I said that that was the case. I don't think I
4 have ever known one way or the other on that.

5 THE COURT: All right. Maybe your friend on the
6 other side said it and you didn't contradict it.

7 MR. LAWSON: Yes. I have no evidence either way that
8 I can give. If his representation is no contact was made, I
9 have nothing to refute that, certainly.

10 THE COURT: Do you have any explanation for why
11 certain firms were entitled to dialogue and Susman was not?

12 MR. LAWSON: No, I don't have any information on the
13 nature of those conversations with the White House. I have
14 been purely handling the litigation.

15 THE COURT: Do you know if the agreements with the
16 firms that entered into agreements are written agreements?

17 MR. LAWSON: I know of nothing beyond I think the
18 generally publicly available information. I think there have
19 been some press releases that have some details. I cannot
20 remember if plaintiffs -- any of those releases were attached
21 in the declarations from plaintiff. I don't think we included
22 them. But to my knowledge that I know of, no other documents
23 than that. That is not saying there isn't any, but I know of
24 no others.

25 THE COURT: Do you know if any security clearances

1 have been revoked that belong to Susman employees?

2 MR. LAWSON: No, I do not know of that.

3 THE COURT: No, they haven't; or, no, you do not
4 know?

5 MR. LAWSON: I do not have any information on that
6 point. If Mr. Verrilli is saying that none have done -- I have
7 nothing to contradict that.

8 THE COURT: All right. Thank you. You can return to
9 your previously scheduled remarks.

10 MR. LAWSON: I appreciate the Court's enthusiasm on
11 the point.

12 So, again, as to Section 1 I think the Court's
13 questions as to the fundamental issue in Sections 2, 3, 4 and 5
14 are not present, is there anything worth enjoining in Section
15 1? I would submit, no, that Section 1 really is just
16 commentary. We have made the argument in the other cases or
17 made the notation in the other cases that it is informative as
18 to how the sections, the operative sections, would be viewed.
19 I can't dispute that. It is certainly in the order. And if
20 someone is going to be looking at how to deal with Section 3,
21 they would probably look at Section 1 for some information on
22 that. But I don't think that makes Section 1 operative. I
23 don't think in a vacuum -- if you are an agency and you see
24 Section 1, I don't think there is any direction to take. It is
25 a little more than reading a press conference. That would be

1 our position.

2 THE COURT: But you agree that Section 1 informs what
3 actions may be taken under Sections --

4 MR. LAWSON: Absolutely. It is part of the order. I
5 can't deny there is information there.

6 THE COURT: So given that, why doesn't Section 1
7 confirm that what we are looking at here are punishments as
8 opposed to discretionary decisions, because the language is in,
9 I think even you would concede, quite punitive terms.

10 MR. LAWSON: That is a great question. And I would
11 submit that the punishment has to be looked at at the act being
12 taken. And so therefore, this is why in all of these cases and
13 in all of these points -- or all of these motions, we have gone
14 granular in Sections 2, 3, 4 and 5. Is whatever may be
15 informed in Section 1, whatever intent someone may want to read
16 into Section 1, the rubber hits the road on whether this is
17 punishment or discretion by the terms of the operative
18 sections. And on each one of those, I make the point as the
19 Court is now painfully aware on it being a form of discretion,
20 that this is how it is determined.

21 So the punishment in some of the other cases and
22 maybe even in some of the amicus briefs and there has been the
23 issue of bills of attainder and that type of issue. So the
24 punishment -- is it barring somebody from something they have
25 an absolute right to? The practice of law versus, you know,

1 being able to act as a contractor. One is eliminating
2 somebody's ability to get a bar license is considerably
3 different than the ability to work as a government contractor.
4 The ability to, again -- you can just apply that to all of the
5 other sections.

6 So that is where -- and, again, we -- obviously in
7 that context, we are outside of a criminal section. And this
8 is where -- I am mixing and jumping ahead to the *McGowan* and
9 the *O'Brien* issues, those were the Court giving some deference
10 to intent reading in favor of congressional intent on criminal
11 punishment. And so here we have an executive order where the
12 consequences are not jail time on any of these, far from. It
13 is not barring anybody from anything they would like to do or
14 have a right to do. It is -- strike that. It is not something
15 they have a right to do. It is something that they may want to
16 do, but there is a counter-party who has discretion and that is
17 the government in this case.

18 THE COURT: So there are a lot of circumstances in
19 which the Executive Branch or the Judicial Branch has
20 discretion. So if I were to instruct my law clerk in applying
21 an abuse of discretion standard to do so with a retaliatory
22 intent, is the mere fact that we are exercising discretion
23 enough to immunize that retaliatory intent?

24 MR. LAWSON: No. And I think we concede that point
25 when we cite the cases discussed earlier with -- well, I can't

1 remember if we cite *Mount Healthy*, but we certainly channel it
2 when we cite the *Umbehr* line of cases. And even in *Umbehr*
3 there is the -- forgive me if I am mispronouncing it. There is
4 the point at the case in the -- this is around page 685 of the
5 point where if a plaintiff is able to establish that speech
6 issues had some role in a termination -- this is, of course, a
7 contract termination -- the government would then have a valid
8 defense if it can show by a preponderance of the evidence that
9 in light of their knowledge and policies at the time, they
10 would have terminated regardless of the speech. So there is
11 still that -- there is still that inquiry. Is there something
12 else? Is there the valid choice? If the Court's instruction
13 to the clerk was irredeemably ill-motivated that would be one
14 issue. But I think this is a case -- and again it is the
15 *Umbehr*, *Mount Healthy* line is far more on point than the *Vullo*
16 line. Because *Vullo* is, of course, involving real sanctions.
17 I don't think crime, criminal sanctions were at play, they were
18 more regulatory, but sanctions nonetheless. And that is the
19 state acting as a sovereign. Here is not a sovereign, here is
20 a balancing factor. So there is that inquiry.

21 THE COURT: So this is where you are relying on
22 *McGowan*, which there is a --

23 MR. LAWSON: To a degree, yes.

24 THE COURT: -- permissible and impermissible, the
25 Court should look at the permissible. So how does that work in

1 practice? Because you are talking about unlawful racial
2 discrimination. And it doesn't seem like anything that you
3 have alleged in Section 1 actually constitutes unlawful racial
4 discrimination.

5 MR. LAWSON: So what I would put to is obviously
6 Section 1 is as detailed and it states what it states. I --
7 the verbiage there is what it is. What we have referenced in
8 some of our summary judgment pleadings -- I think it is in the
9 declaration. One of the points that -- and this just may be a
10 fundamental legal philosophical difference here. Our view of
11 the *SSFA* decision is that -- and I want to get this right. It
12 is sort of upper case diversity. Diversity as it was
13 formulated in the *Bakke* decision and then evolved. That
14 necessarily deals with -- and it is interested in the academic
15 setting on race-based balancing, representation. And one of
16 the points that you will see in our exhibit regarding the
17 Susman Godfrey website on diversity is the phrase or the word,
18 underrepresented.

19 The concern that is present with that approach is
20 that it is presuming there is inadequate representation based
21 on race, ethnicity, gender. And that is what *SSFA* has
22 completely undermined. There are five Justices in that case,
23 three in dissent, two in concurrence who have acknowledged that
24 the *Bakke* line is over. The majority, of course, is coming at
25 it from the *Grutter* 25-year extension is not done. But

1 logically what it is speaking to there is that the balancing,
2 which was limited exclusively in the academic setting for
3 student body and representation based on these categories are
4 not applicable. So the Court had a question. Hopefully I will
5 get to the --

6 THE COURT: But before we get there, I guess I don't
7 understand how much weight you are putting on underrepresented.
8 So, for example, let me give you the hypothetical, which is
9 somewhat grounded in reality. My understanding is that women
10 make up a majority of law school graduates but are a
11 significant minority of law firm partners. Given that, would
12 it be an objective factual statement to say that women lawyers
13 are underrepresented in the partner ranks?

14 MR. LAWSON: No, because I think you are just talking
15 about what the statistics show. But if you start to make
16 hiring decisions based on -- not on individual merit, but from
17 an idea of, hey, we need to get this group up to a certain
18 level, then is that person being hired on merits and individual
19 quality or they almost like some identity ambassador to fill
20 that represented category that is deemed to need to be hired?

21 THE COURT: So you're essentially getting that Susman
22 has a quota system -- I believe this ECF 159-2 at page 10 ECF
23 page. It is the statement, "The firm strongly encourages
24 members of all grounds underrepresented in the profession to
25 apply to join us."

1 MR. LAWSON: That is one example. There are multiple
2 throughout that page.

3 THE COURT: It goes on to say, Susman Godfrey does
4 not discriminate based race, creed, religion, color, national
5 origin, ancestry, sex, age, marital status, disability, sexual
6 orientation or gender identity. So why are we not reading that
7 earlier statement in context? Which it is to say as in my
8 hypothetical, women who want to be law firm partners, we
9 encourage you to apply because we know that you are objectively
10 underrepresented in this pool. That said, we abide by Title
11 VII -- I assume the DCHRA or whatever other -- I guess they
12 don't have a DC office -- what other state antidiscrimination
13 statutes there are to say, we encourage everyone to apply,
14 especially those in underrepresented groups but in making a
15 decision of whether to hire you, we are going to abide by the
16 letter of the anti-discrimination laws.

17 MR. LAWSON: The next section, the diversity
18 committee is -- and this is the second sentence, but the
19 first --

20 THE COURT: Before we get to that, could you answer
21 my question as it gets to the talent section. I mean, they
22 say, we encourage people from underrepresented backgrounds, but
23 we will follow the law; correct?

24 MR. LAWSON: That is correct, but in the next
25 paragraph they talk about dedicating to improving diversity in

1 the firm by recruiting and supporting lawyers. So we are
2 talking there about what I think is not an unreasonable
3 interpretation of hiring decisions based on trying to address
4 an underrepresented issue, which is quite suspect after the
5 *SSFA* decision.

6 THE COURT: By virtue of a recruiting, which I take
7 to be sort of encouraging lawyers to apply and supporting those
8 lawyers?

9 MR. LAWSON: I would also think that recruiting and
10 hiring are synonymous there.

11 THE COURT: So you think that recruiting means hiring
12 a quota of underrepresented --

13 MR. LAWSON: I am not asking the Court to make an
14 inquiry into whether or not -- or a ruling into whether or not
15 setting up interviews are the issue. This -- the concern would
16 be true hiring -- you know, I am not necessarily saying there
17 is no issue with the hiring -- or strike that -- no issue with
18 the interviewing process. I am not looking at that. That is
19 not the concern. The concern would be actual hiring decisions
20 based on trying to hit a representative, however determined
21 level that is deemed appropriate. That is what I think is
22 quite suspect in light of the *SSFA* decision.

23 THE COURT: Okay. So I am just trying to assess if
24 we are in the *McGowan* world and we are putting your retaliatory
25 motive to one side --

1 MR. LAWSON: Okay.

2 THE COURT: -- whether this can stand on your
3 presumption they are engaging in unlawful race discrimination.
4 I think we are agreeing today it would actually have to be
5 hiring some number of underrepresented individuals that might
6 not otherwise be hired in a diversity blind procedure.

7 So you then go on to say in Section 1, "Susman itself
8 engages in unlawful discrimination, including discrimination on
9 the basis of race." What is your support for that statement?

10 MR. LAWSON: I would -- I would really just draw to
11 the -- the exhibit we were talking about a moment ago, the
12 information off of the website. I don't have the hard data on
13 hiring. We move on an expedited basis for various reasons,
14 the Court is familiar with. I don't have the --

15 THE COURT: So your evidence of unlawful
16 discrimination including discrimination on the basis of race
17 is, this award they have, which doesn't go to hiring, which I
18 think we all agree.

19 MR. LAWSON: Yes.

20 THE COURT: So really it is just the word recruiting
21 and supporting lawyers who identify as members of
22 underrepresented groups?

23 MR. LAWSON: Underrepresented, yes, that is the key
24 concern.

25 THE COURT: Okay. So if you are factually incorrect

1 or if I am unable to determine whether or not you are factually
2 correct or incorrect, how can I sustain the order on the basis
3 of their alleged racial discrimination?

4 MR. LAWSON: I think that you could -- there is still
5 the element of discretion. We are talking in the world of
6 Section 3, the contracting world. You have the -- you have
7 that -- the government acting as a contractor, not as the
8 sovereign with discretion. If it is concerned about these
9 hiring practices, what does this really mean? I don't -- I
10 have not read the case that says that it has to grant the
11 contract without a preponderance of the evidence conclusively
12 issuing that these hiring patterns are or are not existent. If
13 it is concerned about this generally, that is one thing. And,
14 again, I would track back to the decades of law supporting the
15 old LBJ order. That if the social policy -- I think really
16 where this comes to -- and hopefully I am getting close to
17 answering the Court's key question here. If the social
18 policy -- I think the Court's question is really what is the
19 quantum of evidence that must be present either in the order or
20 supportable through litigation that could support the validity
21 of the social policy? I think in this context, given the
22 extraordinary -- we cite the *Chao* case, I think it is, in this
23 circuit in particular the great deference that is given to
24 executive order, determining efficiencies and obviously that
25 was the -- there is no end of law regarding diversity and

1 affirmative action, et cetera, as a social policy that
2 increases efficiency. I would think that absent the hard data
3 of who has applied, who has been hired, who has not been hired,
4 which we do not have, I still think there is some discretion
5 that the executive would have if they look at this and they are
6 like, I think I know what this means, I am not sure I want to
7 jump into business with that person. I think there has to be
8 some level of discretion given to the executive on that.

9 THE COURT: I do agree that you have some discretion.
10 But you rely very heavily on efforts to combat racial
11 discrimination dating back to 1940 as it pertains to government
12 contracting.

13 MR. LAWSON: Yes.

14 THE COURT: There I believe there was a documented,
15 objective understanding that these contracts were not being
16 awarded on a race-neutral basis. And here you make this
17 allegation -- one that your friend on the other side says is
18 potentially defamatory that Susman engages in unlawful
19 discrimination, including discrimination on the basis of race.
20 And other than one sentence about trying to recruit individuals
21 from underrepresented backgrounds, you don't have any evidence
22 of that. So it strikes me that if you are engaging in a
23 discretionary decision to which you might be entitled to
24 deference on the basis of incorrect data, that is sort of
25 necessarily an abuse of your discretion.

1 Right? If I commit a legal error, I have necessarily
2 abused my discretion.

3 MR. LAWSON: Yes.

4 THE COURT: So I don't know how if you are relying on
5 a legally erroneous statement you are entitled to exercise that
6 discretion.

7 MR. LAWSON: Well, I think it -- would be in the
8 realm for the executive to kind of look at the context of what
9 is meant by diversity. We cite a few other points that the --
10 increasing parity from the -- it is the *Houston Bar*
11 *Association*.

12 THE COURT: So increasing parity, that we should pay
13 people that do the same work, similar salaries.

14 MR. LAWSON: That wouldn't be objectionable. What is
15 objectionable is saying, hey, we need this number of people to
16 make sure this underrepresented group is properly represented.
17 At what level? Why?

18 THE COURT: And I think if we saw that on the Susman
19 website, I might follow your argument, right? If it said only
20 members of underrepresented minorities should apply or we have
21 a specific pipeline or we have a quota. I just don't see any
22 evidence of that.

23 MR. LAWSON: I would submit that, again, it goes back
24 to the point we were just chatting about that. That is going
25 towards an issue of what is the quantum of proof that must

1 exist for the executive to determine a social policy and try to
2 use the procurement power to further that. And the -- *Kahn* I
3 think is the underlying case where the circuit -- the Court is
4 nodding -- it was dealing with an inflation issue. And the
5 Circuit Court here in DC said, look, it is an economic issue,
6 it is a procurement issue. There is plenty of good reasons on
7 one side versus the other as to whether or not this is going to
8 work. We are deferring. And I think that was a play again at
9 *Chao*, which I am remembering a little better, which involved
10 the presence of posters being required to alert workers that
11 they didn't have to join a union. And I believe the Court made
12 a passing reference, you know, putting that sign in there may
13 boost union membership as much as deflate it.

14 So, again, I think if the Court -- if I am
15 understanding the Court's question, I think it is going towards
16 what is the quantum of proof that is required I would submit
17 under the circuit precedence is low when it comes to this
18 issue.

19 THE COURT: And assuming that it is low, I think that
20 is -- there is some room for debate. I think it is hard in
21 looking at this part of Section 1 to say *Susman* itself engages
22 in unlawful discrimination, including discrimination on the
23 basis of race. For example, and then you go on to discuss the
24 *Susman Prize*, which I think is not, I think you agree, unlawful
25 discrimination on the basis of race.

1 So if I say, Judge AliKhan's chambers engages in
2 unlawful discrimination, including discrimination on the basis
3 of race and then I say, for example, she has hired all women.
4 That obviously would not be an example of unlawful
5 discrimination on the basis of race, because the two don't jibe
6 together. I think that is exactly what you have here. So when
7 we are talking about the quantum of proof, I think if you had
8 come in and your second sentence had said, here is our evidence
9 of unlawful discrimination, then you might be entitled to some
10 deference in this space. I just don't know how you square the
11 circle of the first sentence and the only quantum of proof you
12 are offering is the second sentence, which I think you agree --
13 and please tell me if I am wrong, you agree is not evidence of
14 racial discrimination.

15 MR. LAWSON: I think if I am understanding the point
16 that counsel has made regarding the prize is that that is an
17 award. That is not Title VII employment decisions.

18 THE COURT: Do you agree with that?

19 MR. LAWSON: Yes, this is just a prize. Now, I am
20 going to put that most of the concern I think that is in the
21 order regarding racial discrimination is regarding to Title VII
22 employment. And an academic prize, as I sit here now, I don't
23 particularly view as relating to employment. Is there some
24 subset of Title VII law that I am overlooking? I -- so I can't
25 sit here and say, look, it is -- that it is not. But I don't

1 see it offhand. And it certainly is not the key issue of the
2 hiring decisions that are the real concern with hiring towards
3 these goals of an ideal level of representation based off of
4 quite sensitive categories.

5 THE COURT: That is not the example that you
6 included, even crediting that would be evidence of
7 discrimination.

8 MR. LAWSON: Well, the order is what it is. I
9 can't -- I can't say, no, Your Honor, we cited something else.

10 THE COURT: So you agree that the only example of
11 this purported unlawful discrimination is not itself unlawful
12 discrimination? Yes or no?

13 Yes or no, sir?

14 MR. LAWSON: I would like to think about that, Your
15 Honor.

16 THE COURT: I would like an answer before you leave
17 my courtroom.

18 MR. LAWSON: I understand. And I think the Court
19 knows the concern I have got is -- I just haven't examined if
20 there is a Title VII application to scholarships. That is the
21 fundamental issue on that point. To the degree Title VII --
22 the Court pointed to Title VII as employment. This is not
23 employment, I can give you that answer, yes.

24 THE COURT: So this is not --

25 MR. LAWSON: It is not employment, but is there a

1 Title VII application towards scholarships? I am not in a
2 position to give an affirmative answer or negative.

3 THE COURT: Last I checked, Title VII was concerned
4 with employment in terms of --

5 MR. LAWSON: But there are subsections, of course,
6 that deal with training and education and there may be some
7 angle in there that I am overlooking.

8 THE COURT: All right. Just to make sure that we are
9 on the same page here, assuming that we think of -- reading the
10 first sentence of Susman engages in unlawful discrimination,
11 including discrimination on the basis of race, if you and I
12 agree that Title VII goes to the terms and conditions of
13 employment, do you agree the Susman Prize is not an example of
14 unlawful racial discrimination?

15 MR. LAWSON: I think that is a correct reading.

16 THE COURT: So given that we are on the same page
17 about that, doesn't your only quantum of evidence fall out of
18 the equation?

19 MR. LAWSON: If it is in the order. But the
20 deference that is given -- that is required to be given to
21 courts -- or by courts to executive orders is quite broad.
22 That was the --

23 THE COURT: I understand that. I guess, I -- I am
24 just trying to understand, why I am supposed to defer to
25 something I can't read. Right? The President wrote these

1 words. I assume that his example was the best example, because
2 if there was some other one out there, it would have been good
3 to include it. And we don't see that here. And so I don't
4 know how as someone who is reading this and trying to decide
5 how to implement this, I can accord you any deference or
6 determine that you are exercising discretion, as opposed to
7 putative action based on something I can't read.

8 MR. LAWSON: Well, I guess I can only kind of repeat
9 what I have said earlier regarding the -- under *Kahn* and *Chao*
10 cases with the deference due on procurement power that there is
11 a very low burden of proof. Perhaps the Court is not satisfied
12 that that low burden of proof has been met, but that is -- I
13 believe it is a low burden.

14 THE COURT: And you are not, as you stand here today,
15 trying to defend the election interference or the malfeasances
16 in election litigation as an appropriate reason to discriminate
17 or penalize the firm?

18 MR. LAWSON: I think as far -- certainly, no. I can
19 give a very simple answer on that, no. Because we don't view
20 this as a penalty, as the Court knows already.

21 As it relates to Section 3, I think obviously a core
22 portion of the defense of Section 3 is under the diversity
23 issue, et cetera. I am not prepared to just wipe out the --
24 the election issues, because, again, not viewing this as
25 viewpoint retaliation, not viewing this as punishment, not

1 viewing it as falling under the First Amendment, we would view
2 that as just part of the factors that an executive not acting
3 as sovereign would have as discretion. But, again, this goes
4 back to that 30,000-foot level if you go down the path of
5 punishment, that is one answer. We would submit it is not.

6 THE COURT: All right. And so getting into this
7 world of election malfeasance. So explain to me your best
8 argument for why that would be an appropriate basis on which to
9 exercise any deference or discretion as opposed to a penalty?

10 MR. LAWSON: Okay. Well, for the election issue that
11 I think was referenced in the order, I would view -- I have
12 viewed that as mainly going towards Section 2, regarding the
13 security clearances.

14 THE COURT: Well, in your brief citing, you know,
15 *McGowan*, you say that Section 3 can stand because it relies
16 equally either on racial discrimination or malfeasance in
17 election litigation.

18 MR. LAWSON: Correct. So as to Section 3, we would
19 view it as just -- some of the concerns that the executive
20 voiced regarding some of the work that had been done on this
21 issue. I don't have anything more specific that I can give on
22 that point. The majority, of course, is, as we referenced on
23 the discrimination issue, thus the bifurcation. I mean, we
24 obviously wanted to put that in there in case the Court
25 disregarded it. But --

1 Yes.

2 THE COURT: What is election malfeasance if not
3 discrimination on the viewpoint of the clients that the firm is
4 retaining?

5 MR. LAWSON: I would -- I viewed -- and I would like
6 to shift over if I could to Section 2.

7 THE COURT: I want to stay on Section 3 --

8 MR. LAWSON: Section 3?

9 THE COURT: -- because I am looking at your brief and
10 we are talking about Section 3.

11 MR. LAWSON: I understand. I would view that as some
12 of the concerns of the executive as to the firm as a
13 counter-party to the government and does it want to work with
14 that entity? I think there is some discretion given to the
15 executive on that.

16 THE COURT: Ostensibly the firm has clients. Those
17 clients have positions that are adverse to the federal
18 government. So your view is that the President can say, I
19 don't want any firm that has ever been adverse to me in any
20 type of litigation to receive government contracts?

21 MR. LAWSON: I don't think it would have to be that
22 broad. I think it could be -- if I have a particular concern
23 about certain issues, I think it could be more narrow than
24 that.

25 THE COURT: And am I correct in thinking that in most

1 if not all of these cases where Susman was representing
2 individuals affiliated with election interference, they
3 prevailed in court?

4 MR. LAWSON: I don't -- I -- that would certainly be
5 the reading I have taken from pleadings from plaintiff. And I
6 have no evidence to counteract that.

7 THE COURT: Do you dispute that the monies they got
8 for Dominion Voting were I think the highest defamation award?

9 MR. LAWSON: I have no dispute on that.

10 THE COURT: Okay. And so I guess I am just trying to
11 figure out where your line is between presidential preferences
12 and viewpoint discrimination.

13 MR. LAWSON: The -- I think a large part of it is
14 driven by the nature of the act taken. If this was real
15 punishment, if this was a direction to try to sanction, you
16 know, prevent them from practicing, exact fines, threatened
17 criminal prosecution, yeah, that is an issue. If it is an
18 inherently discretionary act, contracting, there -- there is no
19 right to have full access if they just don't want to be a
20 counter-party.

21 THE COURT: So there is no legal limit? So if I
22 said, I as the President don't want government contracts going
23 to anyone who defends criminal defendants. I don't think they
24 are entitled to a defense. I think that any firm that takes
25 that on is not a firm I want as a counter-party. Is that

1 appropriate?

2 MR. LAWSON: I think a variation on that is --

3 THE COURT: No. Answer my hypothetical, please.

4 MR. LAWSON: Well, I think the -- the concern I see
5 is that who gets to challenge what? Is every denial of a
6 contract now going to be a justiciable issue where everyone is
7 coming in, saying, hey, I wanted this contract, I didn't get
8 it, you know, he looked at me crosswise, he knew I gave money
9 to the other opponent a few years ago, I ran against him. I
10 mean, we could have candidates going against candidates and
11 litigating over denial of contracts.

12 THE COURT: That strikes me as a far cry from the
13 situation that we are in where we have an executive order.
14 This isn't like a nudge and wink where I am seeing ghosts where
15 I shouldn't. This is, I don't like the things that you did, so
16 I am going to bar you from this space. You are saying because
17 that is not putative in your view, there is no constitutional
18 test.

19 MR. LAWSON: I think if there is not punishment, no.
20 Now, the Court may dispute whether or not it is punishment or
21 not. But if there is not punishment, all of those cases,
22 whether *Vullo* and *Bantam* or whether it is *Umbehr* and *Mount*
23 *Healthy*, all of them involve some punitive aspect.

24 THE COURT: So an executive order that says, I only
25 like women, I only want my contracts to go to women.

1 MR. LAWSON: That would have problems.

2 THE COURT: And what are the problems? Because in
3 your view, that is not punitive; right? It is giving contracts
4 to people that you want to have as counter-parties.

5 MR. LAWSON: Well, what plausible basis could there
6 be for --

7 THE COURT: I really like women. My clerks are
8 women. I think they are good lawyers. I want them to be on my
9 legal team.

10 MR. LAWSON: You would have certainly some equal
11 protection issues I think at play in a situation like that.

12 THE COURT: All right. What if we take it a step
13 further and it is any gender, but I only want people who have
14 represented women, because I think women are entitled to a good
15 defense? So I only want to engage with firms that have
16 represented women?

17 MR. LAWSON: I -- I --

18 THE COURT: I am not asking these questions to
19 browbeat you. I am trying to figure out where the lines are.
20 Because it seems like you are saying that when we get to the
21 outer bounds of what we think would be problematic, it doesn't
22 matter that it is punishment versus discretion. And I just
23 don't know why this is where your line is and why Susman falls
24 on one side and my hypotheticals fall on the other. Right. If
25 I rule for you, I need to write an opinion.

1 MR. LAWSON: Yes.

2 THE COURT: What would that opinion say?

3 MR. LAWSON: Well, I think it would say that a --
4 there needs to be a denial of the contract that could be -- a
5 denied access, a canceled contract that meets with *Umbehr*
6 before it could be reviewable. If it doesn't -- again, this
7 goes back to some issues that we have raised in our motion to
8 dismiss regarding what is at play here. There is concern from
9 plaintiff as to the way the order is written. Where is the
10 injury? If this -- you know, an order would -- needs to be
11 mindful of opening the door to just every single denial of a
12 federal contract being subject to inquiry.

13 THE COURT: What if it were limited to EOs that say
14 don't contract?

15 MR. LAWSON: Well, the -- I think that still opens
16 the door considerably to massive amounts of litigation over
17 what was in somebody's mind at the time they decided to deny a
18 contract when that just will massively impede the functioning
19 of the government.

20 THE COURT: I know you have been wanting to talk
21 about Section 2, so I will let you go there.

22 MR. LAWSON: Okay. Well, Section 2, I think the --
23 obviously there is inherent discretion on security clearances
24 that are deferred to by the courts. And obviously the Court
25 knows the -- there is *Egan* and *Lee* cases. And so we would view

1 this as falling within that category of the --

2 THE COURT: So you argue that Section 2, the
3 challenge is both nonjusticiable, but is it also not ripe.
4 Which is it in your view? My sense is if it is nonjusticiable,
5 it would never become ripe for me.

6 MR. LAWSON: I think as written, it is not
7 justiciable. As I understand the justiciability issue when it
8 comes to security clearances, it is -- what is justiciable is a
9 process-based analysis. I would submit -- I will just jump
10 right into this issue that has come up elsewhere and I suspect
11 will come up in a few minutes, so I will try to anticipate it.
12 That the direction is to take steps consistent with applicable
13 law. And I would submit that before the suspensions -- if you
14 have a pool of Susman attorneys and Susman staff who have
15 clearances, if you have that pool -- and under this term, I
16 would view it as under applicable law, those clearances have to
17 be suspended, applicable with law, which would require as under
18 the rules, each clearance holder's clearance to be individually
19 analyzed to make sure that the initial suspension was correct.

20 And then there is, of course, the second provision
21 that is requiring -- you know, what is the phrase? Pending
22 review of whether the clearance -- so that is a very specific,
23 individualized review.

24 The reason I am jumping straight to this is I think
25 that really harps on it. If the clearance issue is

1 individually focused, I think there is extraordinary deference,
2 to the degree it is a group approach I think that is where some
3 of the concern has come from plaintiff's counsel and some of
4 the other courts on the issue. And that has been our approach
5 here is that the suspension has to be done consistent with the
6 applicable law rather than just a wholesale approach.

7 THE COURT: You think consistent with applicable law
8 necessarily means on an individualized basis?

9 MR. LAWSON: Yes. Before you could -- before you
10 could take it -- you know, there are going to be various rules
11 and regulations -- forgive me, I don't have them at the ready
12 and recall as far as what they would be. But whatever the
13 agency procedures are regarding the granting suspension of
14 clearances, those would have to be followed. And you could
15 take the individual and run that through that process for the
16 suspension. And then you could conduct the more fulsome,
17 individual review.

18 THE COURT: And so you had said in your brief that
19 this was a situation where post-deprivation process was
20 appropriate. So are you walking that back now and saying --

21 MR. LAWSON: I'm sorry.

22 THE COURT: You said in your brief that vis-a-vis
23 Section 2, post deprivation process, the subsequent review that
24 was supposed to happen was an adequate substitute for
25 pre-deprivation process. But now it seems like you are saying

1 there is pre-deprivation process.

2 MR. LAWSON: Well, certainly as it states in the
3 order that there is the applicable law provision. The order
4 also is calling for a much more fulsome post-suspension review,
5 individual. But I think that that -- the big concern that I
6 have seen is this group being singled out without any sort of
7 merits-based analysis. And I think that it -- you know, any
8 agency trying to implement this would have to take that first
9 step as it states in the order, consistent with applicable law.

10 THE COURT: All right. Talking about
11 post-deprivation process, my understanding is that
12 post-deprivation process is appropriate where there is some
13 extraordinary situation where there is a government interest at
14 stake in acting before you can give pre-deprivation process.
15 What is that circumstance here?

16 Or I am misunderstanding the test?

17 MR. LAWSON: I don't -- I am not in a position to say
18 the Court is misunderstanding the process. As to --

19 THE COURT: So I am quoting your motion to dismiss at
20 page 15. You cite *Smith versus District of Columbia*, "In
21 extraordinary situations where some valid governmental interest
22 is at stake that justifies postponing the hearing until after
23 the deprivation, a post-deprivation opportunity to be heard
24 suffices."

25 And you cite that in support of your argument that

1 there will be appropriate process with regard to maintaining or
2 restoring the security clearance.

3 MR. LAWSON: Yes. I think we are -- the point we are
4 trying to make there is that post deprivation, I guess is the
5 phrase, revocation can be undertaken. And that would be an
6 example. I don't -- I don't have anything particular beyond
7 what is in the order as far as the extraordinary circumstances
8 provision. I think that is the Court's question. I don't have
9 anything beyond what is actually included in Section 1 to
10 expand on that.

11 THE COURT: All right. So in the absence of that,
12 don't you necessarily lose?

13 MR. LAWSON: I would submit that the -- we don't have
14 to lose, no. Because there is the provision in there that the
15 first suspension is done consistent with applicable law.

16 THE COURT: And what also do you make of the fact
17 that Section 2 speaks of being consistent with the national
18 interest, as opposed to national security? And I am wondering
19 in particular to what extent does that undermine your *Lee* and
20 *Egan* argument. Because I absolutely agree with you that the
21 executive has the authority to determine who, for purposes of
22 national security, is entitled or not entitled to a security
23 clearance. But here the national interest seems to be not
24 related to national security but purely the types of clients
25 they represent -- not even they represent. Anyone in the firm

1 seems to be tarred and feathered with this, even if they have
2 nothing to do with the voting litigation or any sort of
3 purported unlawful discrimination.

4 MR. LAWSON: Well, I think, you know, Section 2 is
5 labeled security clearance review. I think national interest
6 is going to definitely be defined and cabined, if you will,
7 within that interest. You know, one of the points in the
8 deference is, you know, is the custodian -- the executive as
9 custodian for national secrets, is he able to -- does he have
10 confidence in the people who have security clearances? And I
11 think that, you know, it could be a broad individualized
12 inquiry as to whether or not people should be able to retain
13 and hold on to their clearances.

14 So, you know -- I guess to the Court's question as to
15 what is the national interest, I think it is something that is
16 definitely driven by national security, even if it didn't use
17 that phrase. I cannot sit here and tell you, well, they chose
18 national interest or that word was used or national security
19 for X, Y, Z reasons. I am not in a position to be able to do
20 that, but I think it is certainly informed by it within the
21 framing of the section.

22 THE COURT: Did you want to move to Section 4?

23 MR. LAWSON: I am happy to help the Court.

24 So Section 4 is actually a very interesting one. The
25 *Perkins* order directed a review by the chair of the EEOC of

1 large law firms' diversity practices. I don't believe to this
2 date Susman has received any inquiry, whether investigation as
3 a term of art or review is a term of art, from EEOC. So I
4 think there is a significant issue as to their ability to
5 challenge that. It is almost like there is some agency over
6 there that is doing something in my industry and I want to go
7 stop it. I don't think there has been any direct impact there.
8 I think that there -- I would urge great care in the Court's
9 order as to Section 4 as to the impact of any order impairing
10 the ability of the executive to give some direction as to
11 prioritization of efforts by cabinet agencies and other
12 government entities like the EEOC.

13 That has been something that we have wrestled with
14 significantly on Section 4 as to how does this -- what does
15 this do? Is this inadvertently immunizing an entire industry
16 from any Title VII review? And that is a bit of the art of the
17 drafting, so I would urge care from the Court on that point.
18 But I think the larger point is, what is Susman's interest in
19 Section 4 of the *Perkins'* order? I am not quite sure I see
20 that.

21 THE COURT: Do you take issue with how your friend on
22 the other side framed it, which is just any injunction would be
23 against using the order -- this order as a basis for --

24 MR. LAWSON: The only issue I would have, as I
25 understood his argument, is that viewing again -- returning to

1 the 30,000-foot level, is this discretion? Is this punitive?
2 As I heard it, he is, of course, taking the view that it is
3 punishment, it is punitive -- that I understood him to be
4 stating that the relief he would be seeking from this Court is
5 that no inquiry pursuant to this order be used, not any sort of
6 blanket Title VII immunity. I am sure he will be able to clean
7 up anything I have mistaken about.

8 THE COURT: That is how I understand Mr. Verrilli as
9 well. So if that is the world we are in, what is your
10 objection to that?

11 MR. LAWSON: Well, at the 30,000-foot level, I am
12 objecting to the punishment. But I certainly see where that is
13 coming from. An order that is simply stating that Section 4 --
14 I mean, I would urge the Court to not issue an -- or deny the
15 relief on Section 4, because I don't think it -- I think it is
16 too complicated given the fact that it is not in this case or
17 it is not in the order of Susman. And it is -- there has been
18 no outreach by the EEOC. But that being said, an order that is
19 simply saying that no retaliatory efforts pursuant to this
20 order can be engaged in is -- I think is workable.

21 Noting, of course, hopefully that I am not suggesting
22 that there is a retaliatory angle. I am just trying to work
23 out, how does an order get written that is not overbroad? So
24 that is really the biggest point and maybe the only point to
25 talk about on 4.

1 A related theme on Section 5, I think we talked about
2 that very early as far as we just need the granularity of the
3 guidance, as to access to buildings, access to staff. We don't
4 have that. I will, as I mentioned earlier, concede that it is
5 possible that something could be drawn that could impact -- I
6 think the clearest, easiest one is the petition process that --
7 but that -- there is -- I don't think there is a reason to
8 believe it would be written that broadly. And we haven't seen
9 it, we don't know what exactly we are enjoining.

10 THE COURT: Your friend on the other side argues that
11 clients are getting sheepish. They point to other firms that
12 have had clients withdraw, because they are worried about
13 whatever this guidance might say. So how is it that the harm
14 now can't be remedied until we have the guidance? Because the
15 guidance may or may not prove to be uniquely harmful.

16 MR. LAWSON: Yeah. It is -- well, let me put it this
17 way: That might be sufficient harm to grant a TRO. But for a
18 summary judgment, what is the relief? What is the problem that
19 is being enjoined? We don't know. We haven't seen it. And so
20 that just may be one to -- I mean, formally that we don't think
21 a TRO would be appropriate. But just practically speaking, we
22 need the granularity to know what is being enjoined, even if it
23 is simply, you know, the government shall have 30 days to
24 propose something and submit to the Court or something along
25 those lines. That would be a much better decision than we are

1 in right now.

2 THE COURT: What is to prevent you from thinking up
3 that guidance now?

4 MR. LAWSON: As I read the Court's order, I think it
5 is --

6 THE COURT: You can't act on it, if you thought there
7 was --

8 MR. LAWSON: Implement and develop and enforce, I
9 have -- we viewed it quite broadly and we have wanted to steer
10 clear on that.

11 THE COURT: All right.

12 MR. LAWSON: Obviously, we have been moving at a
13 lightning pace on these things. So the core issue, if it moves
14 beyond, if you issue a final judgment, we have that to deal
15 with. If you deny both motions, then we can address it then.
16 So --

17 THE COURT: All right. Fair point.

18 Did you have anything else that you would like to
19 address?

20 MR. LAWSON: I think I am going to end on the Court
21 stating fair point.

22 THE COURT: I do have one more question.

23 MR. LAWSON: I thought I made it out.

24 THE COURT: Do you think that the *Perkins Coie*
25 opinion effects this Court's proceedings in any way?

1 MR. LAWSON: I can't think offhand -- has driving
2 things in one fashion or another. I don't know if the Court
3 has a specific issue. No, I --

4 THE COURT: I am wondering if you thought -- wanted
5 to stay this proceeding something else, whether you had views
6 about how these cases should travel.

7 MR. LAWSON: No, I don't -- there is nothing in there
8 that I -- obviously, we take issue with the finding, but I
9 don't think there is anything urgent I need to bring to the
10 Court's attention.

11 THE COURT: My final question for you, given that
12 these are cross-motions, would you like some time for rebuttal
13 on your motion to dismiss or have you said everything you would
14 like to say?

15 MR. LAWSON: I have essentially said everything I
16 would like to say, but maybe if I have one material question or
17 point to make, I would keep it very limited.

18 THE COURT: I will give you that opportunity.

19 MR. LAWSON: Thank you.

20 THE COURT: Thank you, Mr. Lawson.

21 Mr. Verrilli.

22 MR. VERRILLI: Thank you, Your Honor. I might want
23 to start at the granular level and then ascend to 30,000 feet.

24 With respect to discrimination, I think as a result
25 of Your Honor's questioning, what we have established now is

1 that the support for the President's finding in an executive
2 order that Susman Godfrey has engaged in unlawful
3 discrimination on the basis of race consists of a website
4 statement that uses the word underrepresented and the fact that
5 the firm has agreed to a pledge that focuses on gender parity.
6 That is it. That is the sum total.

7 Now what my friend, Mr. Lawson, said was that, you
8 know, these are exactly the kinds of things that go to what was
9 at the heart of what was concerning in the majority of the
10 Supreme Court in the *SSFA* decision -- well, I commend Your
11 Honor's attention at page 2166 of 143, Supreme Court where
12 Chief Justice Roberts said in the *SSFA* decision that, "The
13 goals of improving diversity and dealing with
14 underrepresentation are commendable." What he said was that
15 those goals don't provide a sufficiently compelling
16 justification for specific racial preferences because they are
17 too amorphous. He didn't say that they were dangerous. He
18 didn't say that they were negative. He said, they were
19 commendable. So the very things that my friend on the other
20 side is saying are the reason why Susman Godfrey should be
21 suspect, are things that the Chief Justice said in *SSFA* were
22 commendable.

23 Now, I can't help but point out that my friend on the
24 other side also referenced President Johnson's executive order.
25 Of course, that executive order was rescinded by this

1 President.

2 THE COURT: I guess I am surprised you are starting
3 with the *SSFA* and not the fact that none of those concerns
4 actually made it into the executive order.

5 MR. VERRILLI: So the -- well, what I heard my friend
6 on the other side saying is that is the factual support for the
7 finding that this is unlawful. And I guess what I am trying to
8 suggest is not only is it not unlawful, but it is quite a
9 substantial distance from anything that was concerning the
10 Supreme Court in *SSFA*. Because I quoted from their papers
11 earlier to Your Honor that they said these are exactly the
12 kinds of concerns that animated *SSFA*. And I guess I am just
13 trying to suggest that that really is not correct.

14 Now, I want to reiterate a point I made earlier. I
15 just want to make sure it is clear that, you know, the weakness
16 of this discrimination rationale I think is apparent from the
17 discussion today. But even if it had any substance -- it
18 doesn't, but even if it did, the burden would still be on the
19 government here under *Mount Healthy* and *TikTok* to prove that
20 this executive order with all of its terms would have been
21 adopted based solely on that rationale putting aside the
22 retaliation for Susman's constitutionally protected speech.
23 They haven't tried to do that. And so they just -- so they
24 just lose for that reason alone.

25 Now, my friend raised this issue about the risk of

1 speculation here with respect to government motives. There is
2 some hard cases maybe with respect to that. This is not one of
3 them. There is no need to speculate. We are not asking the
4 Court to speculate. All we are asking the Court to do is read
5 the executive order. It is right there what the President's
6 reasons were.

7 The point about Section 4 -- I think, you know -- I
8 think Your Honor's questioning accurately represented what we
9 are asking for. But the idea that we don't -- that we
10 shouldn't have any concern about Section 4. In Section 1, the
11 President of the United States determined that we have engaged
12 in unlawful racial discrimination.

13 And then Section 4 is a direction to the EEOC. And
14 so, you know, if the EEOC were to issue a notice saying they
15 are launching an investigation against Susman Godfrey because
16 the President of the United States has found that Susman
17 Godfrey engaged in unlawful racial discrimination, that would
18 be unconstitutional. So, of course, we have a concern over
19 that.

20 With respect to the Section 5, again, my friend has
21 raised this issue, well, we don't know what the guidance would
22 say. I think here is the fundamental problem with that. There
23 is nothing that the government could do, nothing, in Section 5
24 in terms of restricting Susman's lawyers from access to federal
25 buildings, talking to federal officials, et cetera, nothing

1 that they could constitutionally do in retaliation for Susman
2 exercising its constitutionally protected First Amendment
3 rights to advocate on behalf of its clients. There is not a
4 single thing that they could constitutionally do. No guidance
5 is necessary for the Court to reach that conclusion.

6 THE COURT: What if we are looking at not the
7 retaliatory election litigation, but the allegation of racial
8 discrimination?

9 MR. VERRILLI: Same problem under *Mount Healthy*.
10 They would have to prove they would take that step irrespective
11 of their retaliatory motive. They haven't tried, so they lose
12 on that ground. Beyond that, I don't know. I don't -- I am
13 trying to be careful here. It seems ridiculous to me to say
14 that because Susman Godfrey said on its website that it had
15 used the word underrepresented groups and it supports gender
16 equality that one could justify any restriction, any
17 restriction at all on access to government facilities or
18 buildings or the ability to meet with government personnel. I
19 don't see how anyone could possibly think that is okay.

20 Now, the -- my friend has stressed this idea that
21 there is a big difference between punishment and discretion
22 and, of course, the government can't do these things as
23 punishment. It can do these things if it has discretion. I
24 just want to spend a minute with that. The -- because it is
25 wrong. The government may have some additional latitude, as we

1 discussed earlier, Your Honor, with respect to contractor, et
2 cetera. But they don't have the discretion to blatantly
3 violate the constitution. And a good example came up in Your
4 Honor's questioning. You know, the government doesn't have the
5 discretion to afford preferences on government contracting
6 based on race. Right? That is discretion whether to award a
7 contract. But they don't have that. That is the *Adarand*
8 decision. That is 30-plus years old now. That is contracting.
9 That is discretion. But the constitution limits the
10 discretion.

11 And the *Umbehr* decision that we were discussing
12 earlier, again the case that the government relies on and that
13 Mr. Lawson discussed today, I think it is helpful. I am going
14 to read something from page 674 of the decision, because I
15 think it is complete refutation of the core premise of the
16 government's argument here. The opinion is discussing the
17 Court's precedence on page 674 and says, "Those precedents have
18 long since rejected Justice Holmes' famous dictum that a
19 policeman may have a constitutional right to talk politics, but
20 he has no constitutional right to be a policeman. Recognizing
21 that the constitutional violations may arise from the deterrent
22 or chilling effect of government efforts that fall short of
23 direct prohibition against the exercise of First Amendment
24 rights, our modern 'unconstitutional conditions' doctrine holds
25 that the government may not deny a benefit to a person on the

1 basis that infringes his constitutionally protected freedom of
2 speech even if he has no entitlement to that benefit." In
3 other words, even if the government is exercising discretion.
4 So that whole premise is just misconceived.

5 And then, you know, to ascend to 30,000 feet here, if
6 I could. I would like to take a step back and think about what
7 this executive order says. In Section 1 it says -- this is a
8 President of the United States in an operative legal document
9 directing federal agencies to take action against Susman. It
10 says, in the second paragraph of Section 1, "Susman spearheads
11 efforts to weaponize the American legal system and to degrade
12 the quality of American elections."

13 Now what does that amount to? Susman's
14 constitutionally protected right to advocate on behalf of
15 Dominion Voting Systems and on behalf of the Secretaries of
16 State of Wisconsin and Arizona in defense of the integrity of
17 Dominion's voting machines and the integrity of the electoral
18 results in those states. That is what this refers to.

19 And then the next sentence, "Susman also funds groups
20 that engage in dangerous efforts to undermine the effectiveness
21 of the United States military through injection of political
22 and radical ideology."

23 Now, what does that amount to? A charitable
24 contribution to the GLAAD organization. Again, something that
25 the Supreme Court has said as recently as *Bonta* is fully

1 constitutionally protected.

2 And then, third, it supports efforts to discriminate
3 on the basis of race. And Susman itself engages in unlawful
4 discrimination. So we discussed that. It is completely
5 baseless.

6 And the government is trying very hard here to make
7 it seem like this executive order is no big deal. But as this
8 Court has already observed in the TRO ruling and as everyone in
9 this country knows, these executive orders are designed to
10 intimidate law firms so that they will not advocate on the
11 basis -- for the interests of their clients if the President of
12 the United States doesn't like what they are advocating for.
13 And we know that while Susman is fighting and several other
14 firms are fighting that several of the nation's largest and
15 most powerful law firms have agreed to acquiesce to this
16 intimidation. We know that clients aren't getting
17 representation that they need because of that intimidation.
18 This is as serious as it gets. This is as serious an abuse of
19 executive power as has happened in the history of this country.
20 And I would urge the Court as promptly as the Court can
21 reasonably do so to issue a judgment definitively and
22 permanently enjoining it. Thank you.

23 THE COURT: All right. Thank you very much.

24 Mr. Lawson.

25 MR. LAWSON: I have no specific points unless the

1 Court has any.

2 THE COURT: All right. Thank you very much. I will
3 take the motions under advisement. I will endeavor to get
4 something out in due course. I believe the parties have agreed
5 to keep the TRO in place until my ultimate merits ruling. The
6 parties are still in agreement on that?

7 MR. VERRILLI: Yes, Your Honor.

8 MR. LAWSON: Yes, Your Honor.

9 THE COURT: Thank you. I thank the parties and the
10 amici for their briefing. You have given me and my clerks a
11 lot to think about and I very much appreciate it.

12 So this matter is adjourned.

13 (Proceedings concluded at 3:55 p.m.)
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C E R T I F I C A T E

I, SHERRY LINDSAY, Official Court Reporter, certify
that the foregoing constitutes a true and correct transcript of
the record of proceedings in the above-entitled matter.

Dated this 9th day of May, 2025.

A handwritten signature in black ink, appearing to read 'Sherry Lindsay', is written over a horizontal line.

Sherry Lindsay, RPR
Official Court Reporter

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