ORAL ARGUMENT NOT REQUESTED

No. 23-5173

In the United States Court of Appeals for the District of Columbia Circuit

America First Legal Foundation,
Plaintiff-Appellant,

v.

United States Department of Agriculture, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia Civ. A. No. 22-cv-3029
(Hon. Beryl A. Howell)

AMICUS CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF APPELLANT AND URGING REVERSAL

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Pursuant to D.C. Circuit Rule 28(a)(1), *amicus curiae* submits this certificate as to parties, rulings, and related cases.

A. PARTIES AND *AMICI*

Except for the following, all parties and intervenors appearing in this Court are listed in the Brief of Plaintiff-Appellant: (1) *amicus curiae* the American Center for Law and Justice, which files this *amicus* brief in support of Appellant.

B. RULINGS UNDER REVIEW

References to the rulings at issue appear in the Brief for Plaintiff-Appellant America First Legal Foundation.

C. RELATED CASES

Counsel for *amicus curiae* is unaware of any related cases within the meaning of Circuit Rule 28(a)(1)(C).

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IDENTITY, INTEREST AND AUTHORITY OF *AMICUS*

Amicus, the American Center for Law and Justice (ACLJ),[1] is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have frequently appeared before the United States Supreme Court as counsel either for a party, *e.g., Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for *amicus*, *e.g.*, *Biden v. Nebraska*, No. 22-506, 2023 U.S. Lexis 2793 (U.S. June 30, 2023). The proper resolution of this case is a matter of utmost concern to the ACLJ, more than 150,000 of its members, and more than 4,500 supporters of its sister organization, ACLJ Action, Inc., because of their commitment to holding the government accountable to protect the rule of law. To that end, the ACLJ regularly engages the Freedom of Information Act and litigates against agencies overextending FOIA exemptions to evade the statute's text and spirit, including successfully challenging an improperly asserted presidential communications privilege. *See Am. Ctr. for Law & Justice v. Dep't of State*, 535 F. Supp. 3d 23, 28 (D.D.C. 2021) (holding "that State has not met its burden of showing that the redacted material

[1] Per Fed. R. App. P. 29(a)(4)(E) & D.C. Circuit R. 29(b), *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party contributed money intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

is covered by the presidential communications privilege, and thus may be withheld.").

The ACLJ files this brief with the knowledge and consent of the parties.

ARGUMENT

I. The District Court's Interpretation of the Executive Order Improperly Set Aside the Text of the Order to Rely Instead on the Appellee's Own Interpretation.

The task of interpreting any legal instrument, whether Constitution, statute, or executive order, necessarily begins with the text, and must be determined "by reference to the language itself, the specific context in which that language is used, and the broader context of the [legal instrument] as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). The district court failed to follow this principle. It began and ended its interpretative effort with a post hoc declaration by White House special counsel defending nondisclosure and the position of the appellee agency. In so doing, it failed to recognize what the actual text of the Executive Order requires.

A. This Court Should Review the District Court's Interpretation of the Executive Order De Novo.

Courts construe an executive order as they construe statutes. *Ex parte Endo*, 323 U.S. 283, 298 (1944). "Questions of statutory interpretation . . . are . . . reviewed *de novo*." *Woodhull Freedom Found. v. United States*, 72 F.4th 1286, 1297 (D.C. Cir. 2023); *see also Utley v. Varian Assocs., Inc.*, 811 F.2d 1279, 1284 (9th Cir. 1987) (A "district court's decision construing"

an executive order is reviewed "*de novo*."). Therefore, this Court should review the district court's construal of the Executive Order *de novo* and correct the legal errors that court made.

B. Executive Orders are Legal Documents and No Deference to Post-hoc Agency Interpretation Should Be Given.

"Statutory interpretation, as we always say, begins with the text." *Ross v. Blake*, 578 U.S. 632, 638 (2016). And as the Supreme Court also explicitly has indicated, "[w]e approach the construction of [executive orders] as we would approach the construction of legislation in this field." *Ex parte Endo*, 323 U.S. at 298; *see Minn. v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 191 (1999) ("[F]or purposes of this case we shall assume, arguendo, that the severability standard for statutes also applies to Executive Orders."). Accordingly, executive orders must be interpreted first and foremost by examining the text of those orders to determine their meaning on their face. *Bassidji v. Goe*, 413 F.3d 928, 934 (9th Cir. 2005) ("As is true of interpretation of statutes, the interpretation of an Executive Order begins with its text.")

The district court's interpretation of the Executive Order relied on the Special Counsel's affidavit explicitly and extensively in order to interpret the Executive Order. *See, e.g., Am. First Legal Found. v. United*

States Dep't of Agric., 2023 U.S. Dist. LEXIS 122994, *21 ("Consistent with this language, the Special Counsel's affidavit suggests . . . "). This is improper. Rather than first analyzing the actual text of the Executive Order, then resorting to interpretative tools like the statutory canons, dictionaries and the like as needed, the Court relied on the appellee agency's own understanding of the governing language. Such stacking of the deck is not how interpretation works.

"[E]xecutive orders are legal documents . . . . and their purpose and scope are clear from the orders themselves. [The Court is] . . . not obliged to accept complaint allegations that are inconsistent with the plain meaning of those documents." *Paradigm Care & Enrichment Ctr., LLC v. W. Bend*, 33 F.4th 417, 423 (7th Cir. 2022)*; see also*, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) ("Given the clarity of the text, we need not consider such extra-textual evidence."); *id.* (refusing to consider extrinsic statements in review of an executive order). Any deference to agency interpretation "is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history." *Int'l Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 566 n.20 (1979).

While deference is arguably given to executive interpretations in some

circumstances, deference does not apply to a "post hoc justification adopted in response to litigation." *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 614 (2013). Such a "a 'post hoc rationalization' advanced by an agency seeking to defend past agency action against attack," *Auer v. Robbins*, 519 U.S. 452, 462 (1997) (quoting *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988)), is not entitled to deference. The declaration at issue in this case is precisely such a post hoc attempt to rationalize the action. *Decker* and its discussion of "post hoc justifications" was not addressed by the district court, but the law that such rationalizations cannot provide a true basis for interpretation is well established and should have led the district court to reject the Special Counsel's affidavit as irrelevant.

Moreover, deference is not given to interpretations obtained without formal rulemaking. "Interpretations such as those in opinion letters -- like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law -- do not warrant *Chevron*-style deference." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). The interpretation relied on by the district court here, a statement of an executive branch employee in a declaration supporting summary judgment is such an act of informal opinion, made without the force of law. It is not

entitled to any deference. The district court completely ignored *Christensen* in its opinion, but the Court in that case dispositively indicates that the Special Counsel's affidavit should not have been given interpretative deference.

As the United States Supreme Court has regularly emphasized, the Freedom of Information Act was designed "'to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.'" *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976). There is accordingly a "strong presumption in favor of disclosure." *United States Dep't of State v. Ray*, 502 U.S. 164, 173 (1991). Relying on an agency's own view of what executive orders require and say fails to recognize that presumption and permits an agency to frustrate the will of Congress.

As the Appellant highlighted in its appeal, in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), the Supreme Court outlined the various threshold considerations before deference could be given, threshold considerations that the Appellee failed to satisfy here in a number of ways. *Kisor* is a recent case, outlining the extensive limits on when government interpretations of executive orders may be given deference, but the district court in this case never addressed *Kisor*, its holding or its analysis. This silence is material to the error of its ruling.

Kisor held that the lower courts "jumped the gun in declaring the

regulation ambiguous. We have insisted that a court bring all its interpretive tools to bear before finding that to be so." *Id.* at 2423. The *Kisor* Court held that a court may not merely "casually" find regulatory language to be ambiguous. "Rather, the court must make a conscientious effort to determine, based on indicia like text, structure, history, and purpose, whether the regulation really has more than one reasonable meaning." *Id.* at 2423-24. The district court in this case made no such "conscientious" effort before looking at the Special Agent's declaration. Instead it immediately went to the Special Counsel's declaration as a basis for its conclusion that the Executive order was not "unambiguous." *See Am. First Legal Found.*, 2023 U.S. Dist. LEXIS 122994, **19-20. This reasoning is reasoning of the very sort *Kisor* rejected. The district court jumped right to the Special Agent's declaration. In other words, the district court failed to begin where the law required it to begin – the plain text of the Executive Order.

"[I]t is the function of the courts and not the Legislature, . . . , to say what an enacted statute means." *Pierce v. Underwood*, 487 U.S. 552, 566, 108 S. Ct. 2541, 2550 (1988). In *Pierce*, the Court made clear that it would not defer to a House Committee's interpretation of a statute to determine a statute's meaning, but instead carry out its own responsibility to interpret the

statute independently. How much more ought this principle apply to a single White House Special Counsel?

It is this Court, not the Special Counsel, that has the authority to determine what the law, including Executive Orders, means. If the "Legislature" cannot "say" what an "enacted statute" means, it follows that the Executive Branch cannot say what an "executive order" means. That is a question for the Court. A single Executive employee cannot, through an affidavit, change an order's plain language.

C. If the Court Had Properly Reviewed the Executive Order, it Would Have Found That the Strategic Plans it Envisaged Were Not Covered by the Presidential Communications Privilege.

When the words themselves are examined here, rather than the Appellee's own view of those words, the result is clear. The Executive Order in this case, Exec. Order No. 14,019, *Promoting Access to Voting*, 86 Fed. Reg. 13623 (Mar. 7, 2021) ("EO 14019"), is clear and unambiguous. It requires that executive agencies make strategic plans, providing,

> *Agencies shall consider* ways to expand citizens' opportunities to register to vote and to obtain information about, and participate in, the electoral process. *The head of each agency shall evaluate ways in which the agency can*, as appropriate and consistent with applicable law, *promote voter registration and voter participation*.

Id. (Emphasis added) (cleaned up). Section 3(b) further provides:

> Within 200 days of the date of this order, the head of each agency shall submit to the Assistant to the President for Domestic Policy a strategic plan *outlining the ways identified under this review that the agency can promote voter registration and voter participation.*

Id. (emphasis added). In other words, the Executive Order requires the creation of strategic plans, and that those strategic plans and evaluation documents be later submitted to the President, containing an outline of the further ways in which the agency can act further in this area of voter registration and participation.

The presidential communications privilege "preserves the President's ability to obtain candid and informed opinions from his advisors and to make decisions." *Loving v. Dep't of Def.*, 550 F.3d 32, 37 (D.C. Cir. 2008). It "applies to communications made in the process of arriving at presidential decisions." *In re Sealed Case,* 121 F.3d 729, 745 (D.C. Cir. 1997). Thus, the privilege protects "communications directly involving and documents actually viewed by the President" during that process of shaping policies and making presidential decisions. *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1114 (D.C. Cir. 2004). An agency bears the "burden of demonstrating that the documents requested

are . . . exempt from disclosure under FOIA." *ACLU v. Dep't of Justice*, 655 F.3d 1, 5 (D.C. Cir. 2011) (citations and internal quotation marks omitted). As the court explained in *Am. Ctr. for Law & Justice v. Dep't of State*, 535 F. Supp. 3d 23, 28 (D.D.C. 2021), "the burden is on State to show that the privilege applies, ... The Court knows of no reason why it should excuse State's failure to present direct evidence, by its nature within State's control, about this key prerequisite for the presidential communications privilege to attach.").

The Appellee failed to meet that burden here. Specifically, it failed to overcome the plain language of the Executive Order. The order requires agencies to create strategic plans, outlining actions the agencies can take in the future and have taken in the past regarding voter participation. This is distinct and separate from the recommendations to the President delineated in other parts of the order, specifically section 6. The order does not specify that these strategic plans are received for purposes of presidential decision making, but instead, for something very different, the creation of agency plans.

In short, the privilege "covers documents reflecting 'presidential decisionmaking and deliberations,'" *Loving*, 550 F.3d at 37 (quoting *In*

re Sealed Case, 121 F.3d at 744-45). The strategic plans at issue here were not recommendations for the President; those recommendations were contained in Section 6. Instead, they were what the plain text of the order describes, strategic plans of the agency. The simple fact that they were transmitted to the President does not suffice to change the nature of the documents. The Executive Order clearly explicates what document it requires agencies to create, namely, a strategic plan *for the agency*. Such plans were clearly not recommendations to the President or his legal advisors, and accordingly did not fall under the privilege for such documents. This is especially so given the overarching purpose for and default presumption required by the Freedom of Information Act: disclosure.

CONCLUSION

For the reasons set forth above, in addition to those advanced by the Appellant, this Court should reverse the judgment of the district court. An affidavit of a Special Counsel cannot provide a basis for setting aside the plain language of the Executive Order to thwart the express will of Congress.

Dated: December 11, 2023

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned counsel certifies compliance with the requirements of Fed. R. App. P. 32. The brief is 2,430 words in length and follows the required font and formatting regulations. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). This document has been prepared in a proportionally spaced typeface using Microsoft Word 2013 (32-bit) in 14 pt. Century Schoolbook font.

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Dated: December 11, 2023

CERTIFICATE OF SERVICE

I, Benjamin P. Sisney, certify that on December 11, 2023, I caused the foregoing document to be filed with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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