UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS (Boston)

No. 1:25-cv-10685-WGY

AMERICAN ASSOCIATION of UNIVERSITY PROFESSORS, et al,
Plaintiffs

vs.

MARCO RUBIO, in his official capacity as Secretary of State, et al,
Defendants

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For Bench Trial Before:
Judge William G. Young

EXCERPT

United States District Court
District of Massachusetts (Boston.)
One Courthouse Way
Boston, Massachusetts 02210
Monday, July 14, 2025

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P R O C E E D I N G S

EXCERPT BEGINS

(Resumed, 10:55 a.m.)

THE COURT: The Court takes this opportunity, on the record, in the presence -- in open court, in the presence of counsel, to accept gratefully the invitation of the Court of Appeals to address the, um, mandamus petition both generally and expressly to address the issue of waiver with respect to that petition.

I'm going to start by, um, making a request to the Court of Appeals. I'm not going to argue in any way the substance of the petition. That's for the parties. The Court's conduct is all a matter of record. And the transcript governs and is more, um, important than anything I say now. But I'm going to start with the request, simply as a matter of case management, that I would make of the Court of Appeals. And it is this.

I request the Court of Appeals to lift the stay, though I express no opinion on the disposition of the petition for mandamus, and it might well, um -- it's entirely up to the Court of Appeals, it might well make sense to let the petition survive so that it may have the benefit of further proceedings in this court.

But I would ask the Court of Appeals to lift the stay so that the evidentiary portion of this first phase

of this jury-waived trial might complete.

We are in the, um, second week of a two-week -- 9-day trial, and once that trial is over, or the evidentiary portion is over, it's appropriate for this Court to sketch what I anticipate will be the necessary further proceedings.

This is a case -- and I know the Court of Appeals appreciates this, but this is a case where intent and motive play a significant role, and once the evidence is fully before the Court, it's the Court's intention to take the matter under advisement. This is not a case where even as to a portion of the case the Court expects that, because of the evidence, to be in a position to make any ruling from the bench, rather the Court expects to take the case under advisement, seek, um, requested findings and rulings from all parties, carefully review the record, and then issue a full written opinion.

The actual likelihood of that opinion emerging before September is unlikely. So the urgency to fully decide the, um, petition is, um, not grave. Given the fact that what's done is done, the plaintiffs have access to the material which the Court deemed appropriate to subject to cross-examination during the trial, and I adhere to that decision and expect to adhere to it, subject to a proper, um, a claim of

privilege during the course of the remaining proceedings. And I'll speak to that in a moment.

And one can anticipate, of course, that as this is only the first phase of this case, if the case were to resolve in favor of the defendant public officials, then of course the plaintiffs would have the right to a plenary appeal. Contrary-wise, if the case were, at least on what I'll call the "liability phase," resolved against one or more, and I treat them separately, of the defendant public officials, um, that would afford an opinion -- that would afford a place for an interlocutory appeal, should the Court of Appeals wish to evaluate the propriety of that decision while this Court wrestled with the very real problem, even if that's how it were to play out, of redressability, something this Court has not addressed in the -- its hearings thus far. So that's the Court's approach to the management of this case.

Let me then, without arguing the point, um, explain the Court's position with respect to matters to be considered on the petition for mandamus. And I think it's important to understand that the Court, and I believe the parties, place the documents in question, because at bottom, this is an issue over evidentiary rulings mid trial as to certain documents produced.

I separate the documents into three buckets. What I've called the "core documents," these documents are documents that evidence the transmission of materials about certain target subjects, which I've required the plaintiffs to designate, which they are arguing are exemplars of their so-called "ideological deportation policy." The Court of Appeals will understand that the defense asserts there is no such policy and that the proceedings of the government agencies were lawful in every relevant part.

So the core documents are the "ROAs," so-called, and transmittal letters, um, e-mails commenting thereon, that were transmitted from the Department of Homeland Security to the Department of State, specifically to the Bureau of Consular Affairs, and certain of those, the transmittal letters that so transmitted them, and, um, thereafter the "decision memos," so-called by this Court, that the Director of the Bureau of Consular Affairs transmitted most, but not all, of the packet to the Secretary of State for decision, as required under the law.

The actual interplay is -- and the standard procedure is best illustrated in a chalk that the Court has marked HN, and will attach to the cover letter sent to the Court of Appeals, which, um, so far as this Court

can see, accurately describes the standing procedure of both executive departments in handling matters. It of course does not answer the key question which concerns the content of the materials so transmitted. So those core materials are the materials that I understand the petition to center upon, and I'll come back to them.

There are two other packets of materials that I transmitted in bulk to the Court all together, but I've broken them out for this discussion. As to one document, which I'll call Exhibit A, the government has properly, and the Court recognizes the proper -- "proper" in the sense that I recognize that it's been properly asserted and not waived, the government has asserted an Executive Privilege. That's a, in this Court's eyes, a difficult issue and one the Court has not resolved and which the Court understands it is free to resolve as the case goes on. So it's appropriate to indicate to the Court of Appeals what I've told the parties about how it will be resolved.

It seems to this Court that there are three possible resolutions. First, that the Court resolves that the specific document in question is subject to an Executive Privilege. If it is, whenever the Court makes that determination, it physically forthwith will return the document to defense counsel and make a notation on

the record.

The second possibility is that, without deciding whether the document is, um, subject to an Executive Privilege, the Court, as it comes to analyze the case -- I've read the document and I largely understand it, um, it makes no difference to the decision and the Court needs not cite it. If that is, um, decided, the Court will immediately return it to the defense counsel and again make a notation on the record.

The third possibility is that the Court, um, rejects, overrules the assertion of an Executive Privilege and also decides that the document, which the Court has thus far characterized as "peripherally relevant," is in fact relevant to some conclusion the Court determines to make. In that case, if the -- if this present petition were, um, still pending, a dispute over this document might be beholden to that petition. And I've told counsel, if I make that decision, I will stay it for 7 days so that they may take action with respect to that document.

The third packet of documents are documents as to which I have now allowed privileges to be asserted, and they have been, but which will not figure in the, um, oral testimony as no further documents are going to be produced to the plaintiff -- the plaintiffs by the

Court, but which all parties agree the Court may look at, determine privileges, as it goes forward, and I shall do so.

Again, if I decide to rely upon and cite a document, implicitly or explicitly, it will be clear that I have overruled the privilege. If I don't cite the document, it, um -- no ruling is necessary and those documents no longer figure in the case.

The written -- were a decision on the petition of mandamus -- for mandamus to await either appeal or allow an interlocutory appeal, again that could all be reviewed in the ordinary course, and evidentiary error will be reviewed, and of course it is, as to whether it makes a substantial difference in the outcome. And I would have the liberty of, on a full record, to make the findings and rulings that, um, I believe either have or have not been proved by a fair preponderance of the evidence.

So let me conclude simply by focusing on the core documents and reiterate -- which do seem central to the issues raised by the petition for mandamus, and, um, respond directly to the Court's use of the word "waiver," which the invitation expressly sought the Court's further explanation.

The use of the word "waiver," upon reflection, was

infelicitous, so, um, it caused no prejudice to anyone, because the Court followed it up with an explanation. Here is the Court's view of what has happened.

The -- during a discussion on the plaintiffs' motion to compel certain documents for, um, which the plaintiffs claim were part of the record of decision of its so-called "ideological deportation policy," the Court declined to, um -- the Court denied the plaintiffs' motion. But did say -- and again the transcript of what I actually said at the time governs, but I'll characterize it, said, "But I would receive documents as to which the law-enforcement privilege was asserted and I would honor it."

Now again the transcript governs. What happened happened, was that ultimately over 300 documents were submitted to the Court where the defense asserted not only the law-enforcement privilege, but various privileges, and, um, took, with respect to -- when you look at these documents, a very aggressive, um, position. The Court's -- the Court's review of the documents became more, um, thorough as trial approached and as the acting trial became to the front burner and trial commenced, and the Court, as to these core documents, um, came to the conclusion that the law-enforcement privilege was inapplicable and was

asserted extraordinarily overbroadly. The Court therefore was in a quandary.

Should, having overruled the -- that privilege, should the documents be disclosed to the defense? And the Court determined, to have the fairest possible trial, that such disclosure was in the interests of justice, and I did disclose it. Disclose them.

Various minor issues with respect to the -- I shouldn't call them "minor," but with respect to those -- to that disclosure have been worked out, I believe, to the satisfaction of the parties. The documents in their raw form I anticipated and expected redaction of e-mails and telephone numbers. The defense wants more. The, um -- there was indeed one reference to something that, in all fairness, in fact bore on the law-enforcement privilege, despite the Court's ruling. That was corrected by full cooperation between all parties, and the proper redaction made.

I say the use of the word "waiver" was infelicitous because the Court did ask the defense to submit the documents with respect to which it claimed a law-enforcement privilege. The government now says that they were -- they don't say this expressly, but their position is they were snookered, and I got the documents just to disclose them. Well that's not so. I certainly

never conceived that anything I said could be thought to estop the Court from making proper rulings with respect to the documents. And again, the transcript will govern. But it's the Court's position that proper rulings have been made.

One last point which, um, I state again simply to be of assistance to the Court of Appeals. Today the parties and the Court have had a very productive discussion, the full transcript is of course available to the Court of Appeals, and I recite only determinations that I believe I am still authorized to make with respect to these core documents. And I have made the following.

Actually I've made the following with respect to the assertion of the attorney-client privilege. Having reviewed the documents and the arguments, I do rule that the attorney-client privilege has been waived. It simply is inapplicable in a situation where counsel has provided documents to the factfinder, um, on the theory that these documents are relative -- are relevant to the decision, as certainly the core documents are. That constitutes a waiver of the attorney-client privilege, and the Court, less there be any doubt about it, so rules.

In one respect the Court sustains the, um, claim

of deliberative process privilege and I have sustained it as to, um, certain provision of legal advice by attorneys in certain e-mails that form a portion of the core documents. Beyond that sustaining, after discussion with counsel, I make no further rulings as to the deliberative process privilege, or any other privilege, as to the core documents. And, um, I won't say it's by agreement, but we've worked out that if permitted to continue the trial, I will make what the Court considers appropriate rulings on a question-by-question basis.

Essentially the issues relate to the Director of the Bureau of Consular Affairs, Mr. Armstrong, whose testimony had just commenced cross-examination when the stay, um, was transmitted, and a Mr. Watson, who wrote, um, the transmittal letters from the Department of Homeland Security to the State Department.

One other thing is significant and I will state it. I understand that whatever ruling the Court makes as to cross-examination in the course of the trial, the Court is empowered, without objection by the government, to review all the records in its possession, make proper privilege rulings, and rely upon those which it rules the privilege or qualified privilege does not apply.

With those explanations, which I truly hope are

helpful, the Court will respectfully submit this transcript, just as soon as I get my hands on it, to the Court of Appeals, respectfully and with appreciation for being given the opportunity to comment on these proceedings.

EXCERPT ENDS

C E R T I F I C A T E

I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER, do hereby certify that the forgoing transcript of the record is a true and accurate transcription of my stenographic notes, before Judge William G. Young, on Monday, July 14, 2025, to the best of my skill and ability.

/s/ Richard H. Romanow 07-14-25
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RICHARD H. ROMANOW Date