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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Rita F. Lin, Judge Presiding

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| ANTHROPIC PBC,<br><br>Plaintiff,<br><br>VS.<br><br>U.S. DEPARTMENT OF WAR, et al.,<br><br>DefendantS. | ) | **NO. 3:26-cv-01996-RFL** |

San Francisco, California
Thursday, July 30, 2026

**AMENDED TRANSCRIPT OF PROCEEDINGS**

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**Thursday - July 30, 2026** **10:07 a.m.**

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

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**THE COURTROOM DEPUTY:** Now calling Civil Matter 26-1996, Anthropic PBC vs. Department of War.

Counsel, please approach and state your appearances for the record, starting with the plaintiff.

**MR. MONGAN:** Good morning, Your Honor. Michael Mongan from WilmerHale on behalf of plaintiff Anthropic Public Benefit Corporation. I'm joined in court this morning by my colleagues from WilmerHale Joshua Geltzer, Emily Barnet, Susan Hennessey, Lauren Moxley Beatty, Bardia Vaseghi, Dakota Foster, and Salus Kim; and I'm also joined by Jeff Bleich, general counsel at Anthropic, and Devon Hanley Cook, associate general counsel.

**THE COURT:** Good morning.

**MR. HARLOW:** Good morning, Your Honor. James Harlow with the Justice Department on behalf of the defendants, and I'm joined here by my colleague Christian Dibblee.

**THE COURT:** Good morning.

I thought it might be helpful for me to start with some of my preliminary impressions from your papers which were very helpful, and then we'll walk through the questions that I put out earlier in the week. Each of the questions is directed at one side or the other. We'll start with that side and then the other side will have an opportunity to respond to that

question, and then we'll just proceed down.

I promise that at the end I'll reserve some time for you-all to tell me anything else you think I ought to know about the matter before I take it under submission, and that will also be an opportunity for you-all to respond to some of the preliminary thoughts I'm going to give you.

Having reviewed the record that the parties have submitted on the cross-motions for summary judgment, it appears to me to be largely the same as the record that I assessed at the preliminary injunction stage.

I don't see additional evidence from the Government really justifying what it did. If anything, it seems like the record in some ways has gotten worse for the Government. I don't see evidence that Anthropic could alter the model after it was delivered or flip some kind of kill switch. I don't see evidence that Anthropic seeded the model before delivery with some nefarious thing that it could do or control mechanism that it would have; and nor do I see signs, specific signs, that there was a basis to suspect Anthropic would do either of those things.

Really it seems like what we have is the Government's argument that Anthropic criticized the Department of War's positions publicly and in the press and that this public criticism created what the Government calls lack of trust.

I worry that the Government's position seems to be that if

a government contractor goes out and publicly criticizes the Administration in a defense contracting context, that the Government can turn around and say, "Well, we don't trust you because you criticized us," and then the Government can go ahead and retaliate against the contractor by labeling them as a subversive, by saying they're an enemy of the state, taking away their contracts, threatening to take away contracts from anyone who might do business with them.

I find that position, if that's really what the Government's position is, to be really troubling. It seems at odds to me with the First Amendment, with Section 3252.

So at the end when we get through some of my questions, I would like to understand better -- I think a lot of my questions are targeted at this -- I would like to understand better if that's really what the Government's position is because it seems quite extreme. And then if it's not what the Government's position is, how the Government sees this case as not quite going as far as I seem to see it going.

So those are my preliminary thoughts, but before we get to the response to those, let's just go through some of the questions I have that are a little more fine grain and then we can get to an opportunity to respond to the concerns I raised.

So let's start with Question 1. If counsel would come to the podium, please.

For Question 1, this first question is really directed at

the Government so I'll give defendants the first opportunity to respond. Let me read the question so we're on the same page, and I think it makes sense to address 1A and 1B at the same time.

So Question 1 is: Defendants argue that the *Pickering* framework applies to Anthropic's First Amendment challenge. My first part of the question is: Does that framework really apply to government contractors when the Government levies a punishment that goes beyond terminating the parties' contractual relationship or altering its terms?

And then the second part of my question was a hypothetical to try to illustrate that issue. So imagine that a hypothetical future Administration has a contract with a private company to procure drones for surveillance. For years the company's taken the position that it won't produce drones that can be used for lethal purposes and it publicly refuses the request from the Administration to produce drones with those capabilities.

In direct response to that public messaging, the Administration then puts up billboards around the country labeling the company and its CEO enemies of the state, warns others not to do business with them or risk unspecified consequences.

Assuming the company brought a First Amendment challenge, would the Government's view be that *Pickering* should apply in

that situation? So that's a two-part long question for the Government --

**MR. HARLOW:** All right.

**THE COURT:** -- but it's your first opportunity to respond.

**MR. HARLOW:** Okay. Thank you, Your Honor. And obviously I'll take part A first.

So it depends on the nature of the hypothetical punishment, which is -- and that's coming from *Umbehr*, which distinguishes between when the Government is acting or exercising contractual power versus sovereign power and that, again as *Umbehr* emphasizes, can be a fact-intensive inquiry.

So to the extent Your Honor's question is getting at a hypothetical punishment that were to fall within the Government contractual power, *Umbehr* tells us that the *Pickering* framework is the correct one to apply.

But if the Government is exercising a more general regulatory power, *Umbehr* uses the term "sovereign power" but to some extent, I mean, everything the Government does is sovereign, so I think regulatory is maybe a better way to capture it, but if the Government is exercising a more general regulatory power against this hypothetical contractor that's regulating this contractor's interactions as a private entity with third parties, it's not apparent that *Pickering* would apply in that situation.

And we think that, fortunately, our case does not require the Court to struggle with a categorization because we believe it's clear on its face that all the Government has done here is act in its capacity as contractor and just exercised its contractual authorities to decide whether or not to procure Anthropic's products or services, and that all of the actions that were taken here by the Government are inwardly focused on the Government's own internal information technology systems.

**THE COURT:** One question I have about that analysis is you used the term "regulatory," which isn't quite what the term that *Barrett* uses. It's "sovereign power."

**MR. HARLOW:** Right.

**THE COURT:** But I think it's an interesting gloss on that. Do you see Government contract -- Government conduct that attempts to deter on a broader scope than just the individual contractor if it's trying to affect contractors beyond this one independent -- one individual contractor by deterring them from public criticism or deterring them from engaging in the conduct that the contractor at issue did, would you see that as regulatory? I think that that is regulatory in a sense, but tell me what you think.

**MR. HARLOW:** It would depend on the nature of the adverse action, and that's where if it was the -- I mean, to some extent, by terminating a contract the Government is trying to, you know -- arguably, you know, could be seen as pressuring

or coercing a party, and that's squarely within the *Umbehr* framework. So it depends on really the specific facts of the power, the legal authority that the Government is exercising in --

**THE COURT:** So what if it's just a contract termination but the Government is out there saying, "This is a warning to all of you. We're making an example -- I'm making a public example of this company. You should never criticize the Administration in this way"? Do you think the *Pickering* framework is appropriately applied in that situation?

**MR. HARLOW:** Yes, Your Honor. If the underlying conduct that the Government has taken is simply -- with respect to this contractor is simply the termination of the contract, then, yes, *Pickering* and *Umbehr* would apply in that scenario.

**THE COURT:** Even if the purpose is to regulate and deter a broader swath of activity among others who are watching the situation?

**MR. HARLOW:** And I think that's when it would get to is this the fact-intensive nature of what the Government is doing and the particular message. Because obviously we know from the Supreme Court's recent *Vullo* decision has emphasized that government officials are certainly entitled to advocate publicly for their preferred policies and do so stridently, that there's no First Amendment violation with that.

So it's not that the Government is per se not permitted to

engage in messaging about the actions that it has taken. But if it is simply, say, a scenario where the Government's messaging is directed towards other contractors to say, "Whatever happened here, nobody who wants a contract with the Government" -- right? -- "that we will not tolerate this in terms of our contractual authority," I think then that would remain within *Pickering* versus some broad, you know, never -- nobody should ever do business in any capacity with this company. That's then the Government extending beyond and going more towards its regulatory powers where it's regulating private third-party conduct.

**THE COURT:** Okay. So in an example in which the Government -- well, let me just ask about this case then.

Is it your view that the secondary boycott, that is, the pronouncement that any defense contractor who does business with Anthropic will have their contract terminated, that would go beyond the *Pickering* framework; right?

**MR. HARLOW:** Well, I think our position has been clear throughout that the secondary boycott doesn't actually exist, that there is no secondary boycott. That all the --

**THE COURT:** Let's just assume one existed.

**MR. HARLOW:** Okay.

**THE COURT:** If that were the case, would it go beyond the *Pickering* framework?

**MR. HARLOW:** If it were tailored to the -- like, for

example, how the 3252 determination speaks to not just Anthropic's direct contractual relationships but also extends to Anthropic as a potential subcontractor or as a vendor or a provider of a service to a contractor or a subcontractor who is accessing the covered national security networks, then *Pickering* would still apply in that context.

But if it were just an across the board that, you know, Bank of America can never use Anthropic to help with upgrading its HR functions, then that is getting more into the regulatory framework. And that's why it's, again, getting into the exact -- you know, the fact-intensive nature of exactly what is the legal authority that is being exercised here.

**THE COURT:** So the line from Secretary Hegseth's post was, "Effective immediately no contractor, supplier, or partner that does business with the United States military may conduct any commercial activity with Anthropic." If that were the policy adopted and enacted by the Department of War, would that go beyond the *Pickering* framework?

**MR. HARLOW:** To the extent that any action that the Government took was -- had no nexus to any government contract, but they --

**THE COURT:** So let's just say that line was -- the Government went forward and carried out a policy that complied with what Secretary Hegseth said in that post. That's the hypothetical. Is that beyond the *Pickering* framework?

**MR. HARLOW:** If it was a scenario like the one I just described, like Bank of America, say they have a contract with the Department of War and they hire Anthropic to upgrade their own internal HR functions that's entirely unrelated to, you know, any work that Bank of America is doing that touches upon a covered system under 3252, then it's hard to see how *Pickering* would apply in that scenario.

But, again, we're not --

**THE COURT:** So this directive doesn't have any limitations on it. Let's just assume it's implemented just as Secretary Hegseth described, no limitations, effective immediately in every situation in which there is a contractor, supplier, or partner that does business with the United States military, they may not conduct any commercial activity with Anthropic. Let's say it's completely without limitation. Do you agree that *Pickering* would not apply?

**MR. HARLOW:** Not -- I can't give a categorical answer to that because it would apply in some instances just as we know like from the 3252 designation; right? The 3252 applies to all covered procurement actions; right? And so there are -- and that's -- I take absolutely Your Honor's hypothetical, and I think that we are -- we're fortunate here that we -- we don't need to speculate because we know exactly the legal form that the Secretary's social media post in that statement was reduced to, which was the four corners of the 3252 determination. And

it's been our position that the Secretary has no legal authority that it's exercising here beyond the covered procurement actions in the statute.

**THE COURT:** I see what you're saying now. So let's say that we have this directive, it's actually implemented, and you have a government contractor who has their contract terminated by the Department of War because they did unrelated business with Anthropic that has nothing to do with the government contractor's work for the Defense Department.

**MR. HARLOW:** Okay.

**THE COURT:** In that scenario, even though the only thing that happened was a termination from the government contract, *Pickering* would not apply; would you agree?

**MR. HARLOW:** Well, it would be hard to see who's -- in that scenario, it wouldn't be that the private -- that the third-party contractor, they're not bringing a First Amendment claim in that instance. It would be Anthropic trying to come on in and saying, "Our business has been terminated."

If the contract were entirely -- if the termination in this hypothetical were entirely unrelated to any of the covered networks or systems of DOW, then it's not clear how *Pickering* -- or that the case law doesn't appear to have extended *Pickering* to that scenario. That that would be more like what the Ninth Circuit's -- the *Riley's American Heritage Farm* decision where the Ninth Circuit said: You know, that

we've stopped short of applying *Pickering* in the scenario where the Government is acting as regulator of purely private conduct that's not tethered to its own internal contracting purposes.

**THE COURT:** What -- so this case has made me think of a lot of hypotheticals, so I hope you'll bear with me. But one hypothetical I was thinking about was, you know, just imagine -- I feel like this should be an easy question, honestly, but maybe it's not in your view.

Imagine the Government were just to publicly announce that it is terminating every defense contract with anyone who has ever publicly criticized President Trump. Then the contractor goes out and criticizes President Trump and their contract is immediately terminated. It has a chilling effect on all the government contractors. Nobody is saying a word about criticizing the President at that point. Do you believe the *Pickering* framework would apply?

**MR. HARLOW:** Yes. Yes, in that scenario because it is -- that is the Government then, if all it is doing is terminating government contracts, then *Umbehr* says that that is the exercise of the Government's contractual powers. It is acting as contractor, and so *Umbehr* would apply in that scenario.

And I think -- I know this is getting at --

**THE COURT:** And do you think that even if the Government then came out and said, "Just so you-all know, in

case anyone was unclear, the reason we're doing this is to stop the unfair criticism of the President," do you still think *Pickering* would apply?

**MR. HARLOW:** Yes, because it would go to, I think, *Umbehr* and *Pickering*. This gets at Your Honor's I think second or third question, that it --

**THE COURT:** I have too many of them.

**MR. HARLOW:** That's okay. We're happy to field them.

-- that it would be -- that *Umbehr* and the *Pickering* test perfectly is equipped to handle that sort of scenario. Because obviously after the plaintiff makes their prima facie case, if they're able to do so, then the burden shifts to the Government where the Government has to then identify a legitimate government interest for what it's doing.

And if in your -- you know, Your Honor's scenario -- right? -- that you just said, it's because we don't like any public criticism of the President, if that is the sole -- you know, I mean, that's the burden then on the Government to explain why that qualifies under *Umbehr* as a legitimate government interest.

So it's not that the -- just that the mere application of *Pickering* and *Umbehr* means that these -- that these questions can never arise.

**THE COURT:** Right. So in a scenario in which the only basis was to stop public criticism of the President in my

hypothetical, it would still violate the First Amendment even under *Pickering*; right?

**MR. HARLOW:** If that is the sole legitimate government interest just saying that we don't like any public criticism, then I do agree. I think that would be very hard for the Government to satisfy its burden then at that second prong of *Umbehr*.

**THE COURT:** I mean, I think it would be an easy answer -- I would think that an easy answer to that question would be, yes, it's a First Amendment violation when the Government's sole purpose is to stop public criticism of the President.

**MR. HARLOW:** I think -- Your Honor, I think that's not this case, and so I'm --

**THE COURT:** I know it's not this case.

**MR. HARLOW:** -- I'm reticent to offer any --

**THE COURT:** I'm surprised that you can't give a yes to what seems to me to be an easy question.

**MR. HARLOW:** And I think if there were to be a case that actually raised that very question, then I think then someone from the Department could come up here and perhaps give you that clear answer.

But I think I've given you the best answer that I can that sort of, you know, acknowledges that this -- that in contrast to the national security and procurement interests that we've

raised here, which the Supreme Court has recognized in numerous times as legitimate government interests, if it is just a pure, you know, we don't like any criticism whatsoever, there's -- the Supreme Court hasn't recognized, you know, that there's a legitimate interest in that.

I don't want to foreclose a potential argument again in terms of a hypothetical scenario, but I'm trying to give Your Honor the best that we can in dealing with a hypothetical.

**THE COURT:** I hear you.

So I recognize that you're saying it would be pretty hard for the Government to carry its burden --

**MR. HARLOW:** Yes. Yes.

**THE COURT:** -- if all it could say was, "We don't want any public criticism of the government."

**MR. HARLOW:** Correct. Correct. Absolutely.

**THE COURT:** Maybe this gets into my next question in a way, but what if in my hypothetical the Government is publicly announcing it's terminating all the government -- all defense contracts, anyone who ever publicly criticized the President, a contractor criticizes the President, is immediately terminated, there's a chilling effect on everyone else, and the Government says, "The reason we did this is because we can't trust you. Now that you criticized the President, you might be anti-American and we just can't trust you to be a contractor. So that's why we're adopting this rule across the board. We

just can't trust anyone who's criticized the President"? I'm assuming in your view *Pickering* would still apply.

**MR. HARLOW:** Correct. There would still be -- yes.

**THE COURT:** Then in your view, would there -- would there be a violation of the First Amendment?

**MR. HARLOW:** It would depend upon what facts the Government were able to introduce in this -- you know, under the burden-shifting framework of *Pickering/Umbehr* to then substantiate the loss of trust.

And I know that Your Honor has indicated in your preliminary thoughts that, you know, you don't think that the Government has done so here. I'm certainly prepared to address that because we think that the record amply demonstrates the factual basis for why the Secretary and his high-level subordinates reached that determination and found that the -- that the facts justified a supply chain risk.

So it would come down to the facts, not just a bare statement of, you know, "Oops, loss of trust; therefore, we win." That has not been our position and that's not our position in this case.

**THE COURT:** Okay. I think we're well into Question 2 now, so let me just ask you about that. And I promise I'll give plaintiffs an opportunity in a moment.

But Question 2 was --

**MR. HARLOW:** 1B do you mean or are we skipping?

**THE COURT:** I'm sorry?

**MR. HARLOW:** 1B or 2?

**THE COURT:** Actually, let me just ask you about 1B too. So what do you -- before we get to Question 2.

What do you think about my drone hypothetical? There's this billboard that says that the company and CEO are enemies of the state, they are warned not to do -- other people are warned not to do business with them. Do you think the *Pickering* framework applies there?

**MR. HARLOW:** It would apply if the Government is maintaining in its contractual relations with the drone company or if the Government has terminated its contractual relations.

But to the extent that this -- the hypothetical is getting into, you know, warning others not to do business, then, as my previous answers were indicating, we think then that under *Umbehr*, that's getting more into the sovereign regulatory capacity, where it's regulating -- it's an outward-focused regulation of private third-party conduct. That's something that we have not seen in the Supreme Court or the Ninth Circuit, as it recognized in the Riley's case, it has not extended the *Pickering* framework to that sort of scenario.

**THE COURT:** So in your view, if the billboard just said, "The company and the CEO are enemies of the state," and then terminated the contracts, that is --

**MR. HARLOW:** *Umbehr*.

**THE COURT:** -- *Pickering* applies?

**MR. HARLOW:** Yes. Because that is -- that's -- the scenario in which that is arising out of is the contractual relationship between the drone manufacturer and the Government. So, yes, *Umbehr* would apply.

**THE COURT:** And then in the scenario in which they added to the billboard, "No one else better do business with this company or else," that second sentence *Pickering* would not apply to it?

**MR. HARLOW:** It would -- again, it would depend upon -- it's fact intensive, as the Supreme Court said in *Umbehr*, but at that point you're maybe veering more towards that aspect of the case being an exercise of potential sovereign or regulatory power.

**THE COURT:** Okay. Let's -- before we move on, though, let me ask you then. My understanding of the *Pickering* framework is that I need to look at the entirety of the Government's conduct as a whole, I look at the holistic sum total of the conduct. I don't parse it into individual pieces to determine if the framework applies. Do you agree with that?

**MR. HARLOW:** Yes.

**THE COURT:** So I need to look at the whole thing, the Hegseth directive, the presidential directive, and then also the designation, all of it together in order to see if does this whole package seek to affect other people in their

business relationships with Anthropic or is it really just about the Government's contracting relationship with Anthropic. Is that the right way to analyze this?

**MR. HARLOW:** It would be based upon the -- each adverse action. And so we have the -- there would be a First Amendment analysis for the President's February 27th post, a First Amendment analysis for the Secretary's actions here, which, again, we view as only the March 3rd, but to the extent the first -- there's a separate analysis, then it would be a separate analysis for the February -- the Secretary's February 27th post and the Department's March 3rd determination.

Now, obviously they're all arising and involving the same corpus of facts here and so the same facts that are animating, you know, the APA challenges are those that are underlying the First Amendment challenges here. So it's all the same facts that the Court's going to be considering.

**THE COURT:** But in assessing each challenged action, I need to look at the context of everything that the Government was doing as a whole -- right? -- in order to see if the Government is just exercising its contractual power or whether it's trying to exercise a regulatory power?

**MR. HARLOW:** Well, each government actor has different powers; right? I mean, the President has Article II authority that the Secretary does not himself possess. So that's why

we're saying it needs to be -- a First Amendment analysis for the President's actions needs to be different than a First Amendment analysis for what the Secretary is doing.

And that's sort of a theme that we can touch on later as well, is that there's a tendency in this case to just sort of lump all the defendants together under the category of defendants; but each defendant here, in terms of the President and each of the individual agencies, they all have -- they all operate in discrete spaces, they all operate under discrete legal authorities, and that the Government is not a monolith in this scenario.

**THE COURT:** It's interesting when you say that, though, because I don't see a record as to what the President knew about the potential threat that Anthropic posed. So when I am analyzing the President's tweets, is it your view that I can't consider what DOW knew in this process and the record that it developed? Because I don't have any evidence that the President looked at all of that when he was writing this tweet.

**MR. HARLOW:** Right. I think it would be the record evidence as we've filed it to the Court as it existed as of the date of the President's Truth Social post, which was February 27th.

**THE COURT:** So the President basically had no information at that point; right?

**MR. HARLOW:** The -- I mean, the information -- I'm not

going to speak to what the President knew or did not know besides the face of the --

**THE COURT:** What's your view of the record? I mean, for me looking at the record, it doesn't look like as of February 27th there's any information in the record about what Anthropic could or couldn't do or whether it posed a threat.

**MR. HARLOW:** There is in terms of the Secretary -- the Department of War documents describe events that had happened before March 2nd and March 3rd. So the record does reflect --

**THE COURT:** But how do I know the President saw that?

**MR. HARLOW:** It's -- in terms of evaluating the President's action? I mean, you can certainly just evaluate it based upon the face of the President's Truth Social post. It has not been a case where we've -- the parties have agreed that the record here is the record.

**THE COURT:** Maybe instead of moving to Question 2, I better give the plaintiffs an opportunity to respond. I'll come back to Question 2.

**MR. HARLOW:** Sure.

**MR. MONGAN:** Thank you, Your Honor.

There's a lot to respond to. Let me try to do so succinctly.

I think that we have some material differences of opinion as to how the *Pickering* framework operates, so perhaps I'll start by addressing that; and then I would like, if it pleases

the Court, to respond briefly to a few points that defendants have made.

As to 1A, the question about the application of *Pickering* to government contractors, what the precedent shows is that *Pickering* applies in cases where there's an employer-employee relationship between the Government and the plaintiff or something closely analogous to that, and the challenged Government action is the type of day-to-day management action that an employer takes with an employee and not, as my colleague acknowledged, a regulatory action or another exercise of sovereign power.

So *Pickering* can apply to a government contractor if the contractor is doing work akin to what an employee would do. That doesn't necessarily mean that it always applies to all government contractors or to all actions that are taken retaliating for speech of a government contractor or its employees.

The Government has to take the kind of action in response to speech that an employer takes in managing employees. So to respond to the call of the question, yes, that could include altering the terms of a contract or terminating the contract such as in a circumstance where terminating the contract is functionally analogous to firing someone for cause; but it doesn't extend, as I think we're in agreement on, to exercises of sovereign power.

Now, briefly how that maps onto this case, in this case *Pickering* doesn't apply because, one, providing frontier AI services to the Department of War is not remotely analogous to anything that a government employee would do; two, the Anthropic executives who made the statements that so upset defendants are certainly not comparable to government employees who are acting under the supervision of the government or something akin to that; and, three, even setting all that aside, here's where the fundamental point of disagreement is: That actions that we challenge here are not similar to day-to-day management of employees. They are classic exercises of sovereign power.

And if I can unpack that, I don't think you can point at these and say: Oh, this is just ordinary contracting akin to what an agency would do to manage ordinary efficiency of public services or make sure that there is order in the workplace.

I think that it's actually quite easy to answer this question in this case because there is a whole body of law and regulations that address procurement. And so even if you're assuming that this is a contract that is potentially within the scope of *Pickering*, if you want to ask, well, what would an employer do in an equivalent situation, well, you would turn to the ordinary procurement authorities. And you could, for example, terminate a contract for cause; or if you have concerns about the contractor, you could make a responsibility

determination or institute the process for suspension or debarment. Those are the types of things you would do in an analogous situation where you're dealing with an employer-employee relationship.

That's not what they did here. And with respect, whether you analyze them together considering all the circumstances or individually, each of the challenged actions strikes me as a classic exercise of sovereign power.

As to the secondary boycott order, I know that my friend would like to assume it away, but it is still there and a Truth -- sorry -- an X post that is still out in the public record and, as Your Honor indicated, by its terms it says no military contractors may do any commercial activity with Anthropic effective immediately, and I heard my colleague concede that that is something that would be sovereign in nature.

The unprecedented immediate permanent and government-wide debarment of Anthropic, it seems plain as day that that is a sovereign regulatory power. And how do we know that? Well, because there are actually regulations regarding debarment. They don't allow anything like this, but that type of action is something that is addressed in the Government's sovereign capacity.

And even as to 3252, Your Honor, this is an unprecedented exercise of a statutory national security risk designation

authority, and the Secretary was clear that it was to the fullest extent of that authority: All actions, all procurements, all covered systems.

And, again, this is an area where if they wanted to do something that was akin to the ordinary thing you would do if you had concerns about an employee or a contractor, that would be to terminate for cause or to wind down the contract, not to invoke a national security authority, which on its face is the type of thing that a sovereign does, not a day-to-day management.

I guess the last thing that I would want to say is -- well, two more things. I think there is some staggering implications to the answer that you just heard about the hypothetical. That the Government could come out and say that any federal contractor who criticizes the federal government is subject to punitive actions and that would be subject to *Pickering* balancing. There are thousands and thousands of government contractors. That would lead to an immediate diminishment in their First Amendment rights.

Now, we heard some careful answers but not a very clear answer. I think I agree with Your Honor that the answer to that hypothetical is, yes, that would obviously violate the First Amendment.

I suspect that the reason that we're not getting a clear answer is that my colleague's a very good lawyer and

appreciates that that could very well be the next case. And so these lines that we're drawing about the nature of the First Amendment, they really matter in this case and more broadly. And I have not seen the precedent that supports the very expansive conception of *Pickering*.

The final note I would say, of course, and I don't need to expand on these arguments here, but our view is that even if the Court were to apply *Pickering* under these circumstances, our First Amendment claim would prevail whether that's because the Court rules that *Pickering* applies or decides to conduct an alternative analysis.

**THE COURT:** What is your view as to this issue of how I look at the First Amendment claims? I see language in the case law saying that I should look at the actions as a whole in terms of deciding whether the purpose was to retaliate and whether they are supported, and so I should look at all three challenged actions together in a sense. But I also hear the Government's point that I should separate these out and look at them kind of on their own. Do you have a view as to that issue?

**MR. MONGAN:** Like most issues, I think that these are fact specific, and I could imagine a scenario where there are totally unrelated government actions and there's a more plausible argument that they really have to be siloed. I don't see how you can make that argument on this record.

The Secretary -- sorry. The President's Truth Social post happens on February 27th. It refers to the ongoing discussions regarding the Department of War. The Secretary of War's X post happens I think within an hour or two. The follow-on implementation actions are taken a few days after that clearly in response to the Secretary's directive that this company has to be designated as supply chain risk designation -- sorry -- a supply chain risk.

All of these are entangled, and I do think it makes sense to look at the big picture. But I would add Your Honor, I don't think it matters because even if you looked at them individually, the answer should be the same. None of them is subject to *Pickering* and they all violate the First Amendment.

**THE COURT:** Let me move to Question 2, which is defendants argue that Anthropic breached the Government's, quote, "trust" by airing criticisms of the Government's contracting position in the press which led to fears that Anthropic might secretly sabotage Claude.

My question was: Would it eviscerate First Amendment protections to allow the Government to retaliate against a defense contractor for public criticism so long as the Government described its actions as being based on a breach of trust?

And I know defendants started answering that question, but I know you said that you had more you wanted to say about why

this situation is different but I'd like to hear your answer to the specific question also.

**MR. HARLOW:** Sure.

So the answer is, no, Your Honor, that the *Pickering* framework is more than adequate to address this situation. As we've discussed under *Pickering*, once the plaintiff establishes their prima facie case, the burden then shifts to the Government to establish and persuade the Court that its adverse actions or its challenged actions were motivated by a legitimate interest and that this interest outweighs the free speech interests at stake.

And so we -- our briefing and we think that the record certainly hammers home that this case is -- this case is not simply about public criticism by Anthropic of the Department of War, that there is a lot more going on here. So I'm happy to sort of walk through our thoughts on that if you'd like me to do that now.

**THE COURT:** Please.

**MR. HARLOW:** Okay. So you need to -- we think that this is clear from the various risk assessment memos and declarations that Under Secretary Michael submitted that shed light on the entire nature of this activity, and so it requires sort of stepping back and thinking sort of at the most general level that what's happening here is we're dealing with frontier artificial intelligence technology, which is, as Under

Secretary Michael described it, a bit of a black box. It's opaque by its very nature.

This is not akin to the Government procuring standard military hardware like a rifle; that if you want to make sure that the rifle manufacturer gave you the right technology, you can just simply disassemble a representative sample of them and ensure that the rifle is exactly designed and produced to your specifications.

That is not the case with frontier artificial intelligence products. Anthropic, also as the builder of its AI models, has privileged access to the models. It is able to go add in guardrails to these models to reflect its internal company policies. And Anthropic is certainly within its rights as a private corporation to develop whatever corporate policies it sees fit, and we know that it has done so on at least -- with respect to at least several issues, which is the two that have been flagged in this case.

But obviously nothing prevents Anthropic from in the future developing new policy positions and those policy positions, those corporate views can then be baked into the models through additional guardrails.

Those guardrails may or may not be disclosed to the Department of War. It is -- this is where the trust issue comes in where the Department of War needs to trust that its AI vendors are going to be forthright and honest with the

Department about the technology and about what guardrails have actually been installed within the technology.

Also --

**THE COURT:** So would this apply to any AI vendor then? Essentially what I hear you saying is that it's okay for the Government to end a contract or, you know, more broadly, to say that a contractor is a potential subversive because that contractor can't be trusted after its public criticism, that is fine and supportable in the AI context. That's what I hear you saying; is that right?

**MR. HARLOW:** Not -- not solely in terms of just a public criticism. But I think this is where it's just trying to -- there need to be the specific articulable facts for why the trust has been lost, but I think this is -- this is laid out in Under Secretary Michael's memorandum. But I think just getting to the need for trust and the -- essentially the leap that the Department of War needs to take with a contractor is much greater when it comes to AI models than when it comes to the classic piece of military hardware because there are limits to the Department of War's ability to verify this.

There's also the fact that it's not a one-time transaction; right? It's not like I purchase a rifle, I can check it once, and I know it's produced to my specifications, I issue it to the troops and we know that that's a done deal.

With AI technology, as the Secretary's January 2026, you

know, policy memorandum says, that it's incumbent upon us to protect national security that the Department have access to the latest AI models. And it's become clear throughout this case it's -- that it's -- AI is not like -- to update it is not like doing a software patch. As Anthropic agrees, it is that a new AI model for an update needs to be installed on the system.

So from DOW's perspective, each new update then is a new opportunity from where they need to then sit back and think: Okay. Well, has there been a guardrail slipped into this model that we may or may not know about? So that's sort of the -- oops, excuse me -- the general background.

And now the specific facts here --

**THE COURT:** Well, let me just ask you.

**MR. HARLOW:** Sure.

**THE COURT:** Is that really that different from other defense contractors? I mean, I'm picturing someone who provides drones. They give you the first shipment. You look at it and the shipment seems fine. But every subsequent shipment could be a little different. They could stick something in there that you don't know about, and it's -- I mean, I don't know that much about how drones work, but I'm sure it's not completely straightforward to know if there's a software component in there that could cause the drone to self-destruct in a very dangerous place.

So I'm having a hard time seeing what is so different

about AI that allows this trust issue to carry the day for the Government.

**MR. HARLOW:** Because it's not -- and this is set forth in Under Secretary Michael's materials and we've cited to it in our brief, that this is -- AI is fundamentally different not just from a physical piece of hardware -- right? -- like a drone, an artillery piece, but even from your traditional software. Right? It's not like a copy of Microsoft Word that has a finite amount of software code that can be checked.

The nature of these artificial intelligence models is just so staggeringly enormous and opaque that it's not as if the Department has the ability to peek beneath the hood and evaluate it in the same way that it is able to for, you know, an actual physical piece of hardware.

**THE COURT:** So what are the specific articulable facts that suggest Anthropic might --

**MR. HARLOW:** Right. So --

**THE COURT:** -- sabotage its software in this way?

**MR. HARLOW:** So what we get to is then, the risk of, you know, for shorthand of AI model poisoning, that that's really what's been identified here by the Department.

And it's as the Under Secretary applied the U.S. Government's risk management framework and he recognized that it's not -- perhaps not one of these factors standing alone would justify the determination; but when looked collectively,

sort of that the sum of the whole is greater than each of the parts. And this is -- the parts that the Secretary's identified here are the refusal of Anthropic to permit all lawful uses.

And this is where the scenario to sort of reduce it is the Department has never asked Anthropic or isn't looking for Anthropic to produce a special -- a special model; right? This is not what the -- Your Honor's hypothetical about the lethal drone -- right? -- where the Department was asking the manufacturer to make this lethal drone that it's never made before. What the Department would like to do here is just to be able to use the product without the external limitations that Anthropic would impose upon it.

There is the fact that the -- a -- which is demonstrated in the record, that a high-level Anthropic executive questioned the use and the propriety of the technology during an active ongoing overseas military operation, and that use at the time was clearly permitted under the terms between Anthropic and the prime contractor, and that as a result of that outreach of asking -- you know, the mere nature of asking the question -- like, why would you ask the question if you were --

**THE COURT:** What was the question that was asked? It was not explained in the materials what the question was.

**MR. HARLOW:** Right. And I think that's where it's not contained and it's not sort of suitable for the public record

given that it was about ongoing active military operations, but what we know and as it's described is that it was questioning the propriety of the use. Essentially, like, whether it was right for our -- Anthropic's technology to be used in support of this active ongoing military operation.

**THE COURT:** So it could be, for example, is it a good idea to use the technology in X situation? That would be questioning the use; right?

**MR. HARLOW:** Not -- it was not in the way that it's described in the record. Not that it was just is this the best technology for you to use, but can you or should you even be able to use our technology for this purpose.

**THE COURT:** Do you think the record precludes the possibility that the question was: Is it a good idea to use the technology in this situation?

**MR. HARLOW:** Yes, Your Honor.

**THE COURT:** All right.

**MR. HARLOW:** Because I think that it's not just as it's described and hasn't been, you know, denied by Anthropic in this case, that it wasn't that we were dealing with an unreasonable reaction just by DOW but also that the prime contractor here also grew concerned by the mere fact -- by the mere asking of the question. Because this is -- sort of it's not -- it's not within the purview of any particular company executive to be questioning, you know, how and why this

technology is being used.

And I think that sort of gets to whether DOW's concern about potential, you know, corporate morality and a corporate moral judgment that, you know, may then be baked into a future version of the model. That if particular -- if the company were to feel that its technology shouldn't be used for these kinds of things, then it would slip that into the model and DOW might not know about that.

**THE COURT:** So your specific articulable facts are contractual refusal and then the --

**MR. HARLOW:** This questioning, right.

**THE COURT:** -- the questioning.

**MR. HARLOW:** Right. And then we have -- and then the fact too that it was then further discussions were had by the executive with -- about this confidential sort of classified information with people who hadn't then been cleared within the company to discuss it, which in the Under Secretary's view, you know, raised doubts about the company's commitment to information security and sort of, you know, safeguarding classified details and keeping all that siloed.

There was the fact that DO -- that Anthropic raised the dispute to between this -- the ongoing contract negotiations and the parties sort of working through some of these issues in late February and early March, that Anthropic then sort of disclosed the nature of these ongoing negotiations to the

public in a way that, as Exhibit 1 to Mr. Mongan's declaration in summary judgment refers to the company being threatened by the Department of War, that it's -- and then, as we've noted in citations to record materials, that there is also a communication that was issued internally within the company that expressed, you know, hostility towards current DOW leadership.

And it's certainly permissible under longstanding First Amendment case law that, you know, speech can be viewed as evidence of potential intent. And that's where DOW's looking at this and saying: Well, if you truly believe that we are -- you know, we're so hostile to you, then it's all of that is going into the mix of thinking that, you know, is this company -- you know, where do they -- do they truly see themselves as a partner or is this more, you know, in terms of the language of 3252, the adversary supply chain risk relationship?

And because we are dealing with -- we're dealing in the space of national security and procurement, you know, these are areas where the case law is clear that there should be deference to the judgment of these officials who are responsible for making these determinations because it is the Secretary at the end of the day who bears the ultimate responsibility for safeguarding the national security systems. And if those systems were not to be safeguarded, you know, if

the risk that he perceives were to actually manifest and it were not to have been guarded against, if he were not to have deployed those authorities that he possessed to mitigate against that risk, then that would come back on the Secretary.

And so these are the sort of calculuses that the Secretary and his senior leadership are facing on a daily basis.

**THE COURT:** Let me give plaintiffs an opportunity to respond.

**MR. MONGAN:** Thank you, Your Honor.

So responding to the call of the Question Number 2, yes, on the facts here it would certainly violate the First Amendment, and we have addressed that at length in our briefing. I agree, as the explanations have evolved over the course of this litigation, they have shifted somewhat and now we hear a repeated incantation of trust.

I think that merely repeating a subjective view that Anthropic's protected expression and the other things that my colleague pointed to created a breach of trust doesn't absolve defendants of their First Amendment violation, and I think defendants recognize that. And I was glad to hear them acknowledge that to prevail in this case, they would need to point to specific articulable facts and evidence that actually substantiate the assertions that have been made that Anthropic is a national security risk, that it is an adversary that creates a risk of covertly sabotaging the operations of the

armed forces. Let me turn to that.

The first thing that my colleague pointed to was Under Secretary Michael's risk analysis memo which is dated March 2nd. I want to be clear on this point because the timeline does matter. That was March 2nd. On February 27th, the Friday, was when we saw the President's directive and Secretary Hegseth's directive. And if I'm reading their briefs correctly, they were suggesting that the work on the risk analysis memorandum and the other implementation steps for the supply chain risk designation took place after those directives.

So I don't really see how they can plausibly point to a memo written by a subordinate the next week to substantiate the concerns in defending against a First Amendment challenge, the February 27th directives.

Setting that aside, I heard a lot of details about the nature of frontier AI in that it is perhaps more opaque than some technologies, that the model developer has privileged access, that the new models are released periodically. Again, that is true of all frontier AI companies. So it has to be more than that.

And I certainly resist the notion that because of these features of frontier AI technology that it's so different that the First Amendment safeguards are radically different here. I agree with Your Honor, there's lots of technologies out there

that share many of these features and the Constitution is meant to be an enduring document that applies even when we are grappling with new technologies.

What are the specific articulable facts that are purportedly specific to Anthropic? A refusal to permit all lawful uses. I want to be clear on this and this is clear in the record and in our papers. The two use restrictions that Anthropic wanted to preserve have always applied with respect to the use of Claude for domestic surveillance of Americans or lethal autonomous warfare. The Government and its prime contractors knew that, they knew that when they began contracting with Anthropic and when they used Claude.

And so I think it's a little hard to swallow the suggestion that all of a sudden on February 27th this elevated the relationship from a contractual impasse to the nature of a supply chain risk.

The question related to raising concerns in the press. I think this just gets us back to the nature of our claim. There's some back and forth on this in the e-mails in the record that Your Honor might have seen, a discussion of both sides talking about: Well, you know, concerns about this being in the press and we want to make sure that we're careful about that. I think that's a fairly common dynamic.

But speaking with the press is a core First Amendment protected activity, and so that may cause you to not like a

contractor and it may cause you to take some legitimate procurement authority or even to just decide I'm not going to contract with them, but it doesn't make them a supply chain risk.

And that would be a very scary scenario if we get to a point where the Government can say that speaking to the press or speaking publicly about your views on a question of great public significance like AI safety and the responsible use of your own models that you are intimately familiar with creates you -- creates a situation where you are a supply chain risk and may be sanctioned by the Government.

The question about -- the incident regarding the question about the use of Claude in foreign operations, let's just assume that everything that they put into the record on this is correct and look at the other record material. It does not remotely get to a place where it could substantiate a conclusion that Anthropic is an adversary intent on sabotaging operations of the United States Government.

Again, as we've noted in the record, Anthropic's whole mission is about the safe and responsible use of AI and partnering with government agencies, including national security agencies, to advance the interest of this country safely and responsibly.

The question at issue is described in their own telling as a question raised by an Anthropic executive to a third party

not to the Department. There's no indication that Anthropic or the executive or anyone took any steps to interfere with an ongoing operation.

And I point Your Honor to the rest of the story in that in the e-mail exchange between Anthropic and Under Secretary Michael, there's an e-mail at administrative record page 3 where Anthropic's CEO makes clear that they're not concerned with foreign operations. They are concerned about these very important use restrictions in the contract.

The Heck declaration makes clear when Anthropic's executives went to meet with Secretary Hegseth in person, they made clear that Anthropic had not objected to use in a foreign operation and had no interest in interfering with those operations. And, indeed, Anthropic and, you know, to allay any doubt, offered a contract term to make very clear that Anthropic would not interfere in that way. That's at the Heck declaration, paragraphs 20 and 25.

And I guess the final point that I would make, Your Honor, is that if we are assuming a saboteur who is an adversary of the United States and want to interfere with ongoing foreign military operations, the last thing that that person or company would do would be to make a principled stand about the importance of particular usage restrictions in terms of safety and responsible use. They would just swallow it. They would accept whatever terms the contract wants to -- the Government

wants to offer and then they would go ahead and do their sabotage.

So none of this adds up. And despite my colleague's best efforts, there is nothing in this record or otherwise that remotely substantiates the suggestion that Anthropic is a national security risk in these ways.

And I guess, if I might, one more point I'd like to add. I heard my colleague say, well, really this is all about predeployment model poisoning, that's the real concern. They said that in their response to the record motion as well.

We've all been involved in this case since March. That has not been the only concern. That was not the central concern. The central concern in their papers, in their presentation before this Court, in the record documents, indeed in Under Secretary Michael's risk analysis is post-deployment operations.

And only after it became clear because of our evidentiary submissions that that is not technically feasible, that Anthropic has no ability once its models are deployed to interfere with how they're being used by the Department of War did they pivot and start to emphasize this predeployment model poisoning rationale, which itself is undermined by the record because of the extensive opportunity that they have to test and the fact that they get to decide before any model is deployed.

And I think that that shifting of rationales, which we

have seen over the course of this litigation, is powerful evidence of pretext and that is a problem for them both with respect to the First Amendment claim and the APA claim.

**THE COURT:** Let me move to -- I know there might be more to say but, as I said, I'll give an opportunity at the end for folks to let me know anything else you think I don't know, but let me move to Question 3, which is for the Government.

Have any defendant federal agencies actually terminated their contracts with Anthropic or otherwise begun winding down their use of Anthropic's products as was permitted in the preliminary injunction order through standard procurement processes since that order was issued?

**MR. HARLOW:** So candidly, Your Honor, we weren't entirely sure what prompted this question. The agency's post-PI order conduct would be beyond the scope of the record, and I don't think there's been any question raised about the agency's compliance with the terms of the preliminary injunction order.

But we -- you know, to answer the Court's question, we've gone back to the agencies and we can report that the Department of War continues to wind down its use of Anthropic products on its systems, and by -- on covered procurements -- or not on covered procurements but on the DOW systems, that the process remains ongoing and is scheduled to be completed by September 30th.

Another agency -- another one of the defendant agencies had a preexisting plan for a particular service program to be transitioned away from Anthropic to another AI provider. That transition is underway and is scheduled to be completed soon.

The other defendant agencies did not report that they had ceased use of Anthropic's products since the March PI order, although I'll note that there's a fair amount of nuance in the nature of each agency's -- each agency's relationship to Anthropic, which is obviously borne out in the record.

You know, several of the agencies are only using Anthropic on a pilot program that is slated to expire at the end of August. So, you know, even though maybe they haven't already wound down their use or terminated it, it's otherwise scheduled to expire.

Other agencies are only -- you know, they're -- this is a point in the federal government where we are very much, you know, dipping our toe into AI, and this is borne out in the record where there's these sandboxes and agencies are just exploring what AI tools are out there and how they might be used.

But these are -- oftentimes agencies are using them through third-party vendors where this is -- you know, particular AI models are optional features that the vendor provides to an agency which can be, you know, turned on or turned off or the agency is free to select from.

**THE COURT:** So I hear you saying DOW has wound down Anthropic and their --

**MR. HARLOW:** In the process.

**THE COURT:** -- or is in the process of winding down --

**MR. HARLOW:** Yes.

**THE COURT:** -- and will be done September 30th.

**MR. HARLOW:** Right.

**THE COURT:** And other agencies, most of them are still using Anthropic and some of them are even piloting new Anthropic products --

**MR. HARLOW:** Oh, I'm sorry. The pilots, those were preexisting pilots. Those pilots had started before this -- certainly before the Court's PI order. And so after the PI order, then the agencies have continued to just -- just have the -- carry out the pilot program as normal, and these pilots were already slated to expire on August 30th. So several of the agencies, you know, unless they make a decision at that point to continue or modify the use, that use would stop.

**THE COURT:** Let me just ask you about Question 4 also --

**MR. HARLOW:** Okay.

**THE COURT:** -- which is, which, if any, defendant agencies have expanded their use of Claude in national security work since the preliminary injunction was issued, including by deploying new -- the new Mythos model.

**MR. HARLOW:** Right. So, Your Honor, defendants, very respectfully, object to this question. The question calls for nonpublic information about which of 18 agencies are using certain AI models for national security purposes, and the Government believes that it would set a very dangerous precedent for the United States to answer these questions calling for government-wide information about national security tools in this setting.

Defendants also view the question's call for information about events that postdate the challenged actions as inconsistent with the scope of APA review and the question seeks information that is outside the record and could not have been before the defendant agencies. So we respectfully object.

**THE COURT:** So the reason I'm asking is because if it is true that the Department of War believes Anthropic to be such a national security threat that they're going to poison the AI model, it seems inconsistent with that for the Department of War to be then, as has been reported and cited in some of the amicus briefs, for the Department of War to then be using Anthropic to -- and expanding its use of the AI model. Doesn't that seem like it would be relevant at least to the First Amendment claim?

**MR. HARLOW:** I appreciate the additional sort of the backdrop for -- and the motivation for the Court's question, but because, you know, any subsequent actions, like the Mythos

model, that those were not before -- they're not reflected in the administrative record, as was not --

**THE COURT:** I mean, all the time, for example, in a criminal case -- I was a prosecutor before so that's what my mind goes to. In a criminal case, sometimes someone's action after the crime occurs can give you insight into their intent at the time they were committing the actions at issue.

So that's why I'm asking about after-occurring actions, which would give insight into the intent at the time the Department was acting in March.

**MR. HARLOW:** And I appreciate that, Your Honor, and I'm not authorized to provide a substantive response to Your Honor's question during today's hearing; but if the Court does believe that a substantive response is necessary, then it might be possible for the parties to meet and confer after the hearing and try to submit something afterwards.

It does -- obviously because of the nature of the information that might be called for, like it's -- we need to be particularly careful about what we're providing and how.

**THE COURT:** Okay. Let me give plaintiff an opportunity to respond. Thank you for the offer. I'll think about that. If I do want to do that, I'll do it by written order after the hearing.

**MR. HARLOW:** All right.

**MR. MONGAN:** Your Honor, if I might, maybe I'll start

with Question 4 since we've just been on it and then double back to Question 3.

**THE COURT:** That's fine.

**MR. MONGAN:** So I want to be candid with the Court and responsive to its questions. At the same time I hear the Federal Government to be saying that this question calls for sensitive information that they don't feel comfortable discussing in open court.

Maintaining a strong relationship with the Federal Government is very important to Anthropic and that's especially true when it comes to national security and sensitive information and, indeed, for that reason it reached out in advance to flag this question for defendants.

We do think this is a relevant question for many of the reasons that Your Honor indicated, and that's especially true given the arguments and the assertions that defendants in this case and more broadly have made about Anthropic and its services.

With that said, I would say that Anthropic's main priority here is to obtain a final judgment that provides it with full relief against these very unprecedented Government actions; and our view is that regardless of the answer to Question 4, it's more than clear on the existing record that these actions violated the law and that we're entitled to that relief.

I would say similarly, if the Court is interested in

pursuing this further, I would propose that either we could speak briefly in camera or, you know, file -- have the defendants file a short explanation later today and we could file a response tomorrow.

But in all events, we would very much hope that any further discussions or deliberations arising out of the defendants' objection and refusal to answer the question would not delay the Court in resolving of this motion and in its work getting to a final judgment.

**THE COURT:** All right. Thank you.

**MR. MONGAN:** Would it be helpful for me to respond to Question 3?

**THE COURT:** Yes, please.

**MR. MONGAN:** Okay. So here's what I can tell you based on what I understand from my client. Most agencies have continued to work with Anthropic since the preliminary injunction order. Two agencies have paused negotiations of new contracts and there are some federal agencies that are negotiating new contracts.

We are not aware of any agencies who have cancelled contracts since the preliminary injunction order. Your Honor I think may be aware of the CDAO contract that was just cancelled just before the preliminary injunction order.

With respect to the question about winding down use of Anthropic's models, we, of course, have only limited

information about the extent to which agencies are internally winding down their own use.

As to any efforts to wind down use by private contractors or subcontractors, again, here we have only secondhand information mainly from our customers, which I suspect is based on their own imperfect understanding of this situation.

We have heard some secondhand reports about the Department of War making communications to contractors and subcontractors about their use of Claude; but I think as to that, defendants are in the best position to provide any -- you know, complete information about that guidance.

**THE COURT:** Then my last question was a question for Anthropic. As to the APA claim, Anthropic asks the Court to vacate and set aside the supply chain risk designation and the secondary boycott.

Shouldn't any remedy also include a remand as to the supply chain risk designation to allow the Department of War to attempt to make the necessary showing if it so chooses and so long as the designation is not otherwise unlawful or a violation of Anthropic's constitutional rights?

And then do the parties remand -- agree that remand would be unnecessary as to the secondary boycott if I were to find an APA violation as to that since DOW has since disavowed that there even is such a thing?

**MR. MONGAN:** Right. So, Your Honor, as a formal

matter, the default remedy when agency action is held unlawful under the APA, as the Court knows, is to vacate and remand to the agency. We would have no objection to that being included in the Court's order.

As a practical matter, and maybe this is why we weren't thinking about it when we drafted the order, there is no viable way for the Department to lawfully designate Anthropic a supply chain risk on remand given the facts as we know them and the demanding requirements of Section 3252.

And they've had a litany of supplemental briefs and declarations where they've tried to spin out new theories and none of them comes close, and we're certainly not aware of any facts that would change that situation. But as a formal matter, we wouldn't object to that.

On the second part of the question, I have not conferred with my colleague. I think we would agree that no remand is necessary there because to their credit, they have correctly acknowledged that there's absolutely no legal authority allowing the Secretary of War to do what he tried to do by imposing a secondary boycott against Anthropic on all military contractors.

**THE COURT:** Let me ask the Government to respond.

**MR. HARLOW:** So as we argued in our opening brief, that should the Court identify inadequacies in DOW's explanation for the 3252 determination or any procedural

deficiencies, we think that this case is a prime candidate for a remand without vacatur. We think under -- the Ninth Circuit's *Pollinator Stewardship Council* decision supports this because DOW is likely to remedy any deficiencies in explanation or any, you know, procedural oversights and still reach the same decision.

If the Court does vacate the March 3rd determination, we don't think as a legal matter it matters whether the Court includes a remand instruction in the order because that particular action is then invalidated, and so anything -- the Secretary would always retain the authority under the statute to take new action. If -- remand would really only matter if the Court is considering doing that without vacatur.

As to the secondary boycott, I think the same thing is true, that we don't necessarily see that there's any -- perhaps maybe as I'm -- to the extent the Court has any clarification or would like the Secretary an opportunity to clarify whether the secondary boycott actually exists or to confirm, as we've all been -- as we've represented, it is only as -- you need to view that as manifested in the 3252 determination. A remand without vacatur would then be an appropriate to do that; but if the Court is just going to vacate the February 27th social media post, then for the same reasons we don't think that a -- including remand in an order is -- matters one way or the other.

**THE COURT:** Thank you.

**MR. MONGAN:** Your Honor, might I briefly respond on the remand without vacatur point?

**THE COURT:** You may.

**MR. MONGAN:** I'll make it very quick.

My colleague referenced Ninth Circuit case law. The cases make clear this is for very rare circumstances where there's serious and irremediable harms. Pardon me. I can't get that word out. They have been subject to a preliminary injunction since March and they can't point to that type of harm. And it's not reserved for situations where there are serious errors, and I don't think I can imagine a more serious error than the one that we have here.

**THE COURT:** I promised you-all a final opportunity to address any remaining issues. I'll give the Government the first opportunity since you didn't have an opportunity to respond to some of my initial thoughts, although I think you've covered a lot of it already.

**MR. HARLOW:** I hope so. But -- and thank you, Your Honor. I think there's a few points, just as Mr. Mongan's been providing answers to the Court's questions, that I just want to make sure that I essentially provide just a rebuttal on some of those.

As to the scope of *Pickering*, I think I heard my colleague on the other side describe it as the Ninth Circuit regards

*Pickering* as applying in something close to an employer-employee relationship, and I think that there he's perhaps pulling language from the Ninth Circuit's *Riley's* case.

But if you actually look at *Riley's*, what the Ninth Circuit is saying is that it has extended the *Umbehr/Pickering* framework beyond *Umbehr* to additional scenarios that are something close to an employer-employee relationship. So the Ninth Circuit isn't, you know, narrowing the scope of *Umbehr* to just employer-employee relationships. Obviously it can't. *Umbehr* expands it to contracting relationships overall. So I think that's important to recognize.

And then on the scope of, you know, whether or not the Government has exercised sovereign powers here, this -- Mr. Mongan referenced the facts that the Government has regulations and statutes about procurement and so, therefore, the Government must be exercising sovereign powers.

But I think this gets back to why when I said I -- I'm a little bit -- I think "sovereign" is a little bit imprecise because everything the Government does is a sovereign power. Really it's about regulatory work because the statutes and regulations about procurement, sure, I mean, they're sovereign statutes of a government but they're really about permitting the government to engage in contracting behavior.

So I think the mere fact that there's a statute or a regulation at issue doesn't answer the question one way or the

other. It's about is this a statute or regulation that happens to be about a contracting or procurement authority. That's really the kind of more targeted analysis that *Umbehr* requires.

For Question 2 I realized that I'd forgotten as one of the additional risk factors the CDC example that I know we've discussed in our briefs. And I think the CDC example is something that is -- the Department of War has pointed to as sort of demonstrating how this risk might manifest. Where it's you could have a guardrail --

**THE COURT:** It's with the commercial model though; right? The commercial model of Anthropic software. They were using the commercial model instead of the government model, so then it had restrictions. And when Anthropic realized that, they took off the restrictions.

**MR. HARLOW:** Right. But I think what the -- it demonstrates is technologically that there was a guardrail where these employers at CDC -- or employees at CDC were trying to use the model for what was, they understood, a permitted use and then it refused to operate because there was a guardrail that they weren't aware of.

And so from DOW's perspective, that -- the scenario that they fear is, you know, there's an ongoing military operation, they are using a model, you know, and the model is then not operating all of a sudden in a way and doing something that they believed that it should be doing for them; and in a

scenario where just given the nature of DOW's work that, you know, American war fighters and civilian safety can be at risk.

Mr. Mongan also talked about the fact that Anthropic's -- that by the time the Government has acted here, you know, in late February, early March, that Anthropic's policy about these two particular, you know, corporate redlines was well known and that it wasn't a deal breaker to DOW.

And I think that that actually sort of helps the DOW's point here because it shows that, yes, DOW was aware of all of, you know, Anthropic's preexisting public statements about safe -- about AI policy and how AI should be used and DOW, nonetheless, continued to engage in negotiations and work with the company.

It wasn't simply that, you know, before February Anthropic had said some stuff that the Secretary thought was silly and just reacted harshly against the company; right? This is not about the company's speech. It really was truly about these additional factors that I went through.

Let me see... One thing on Question 4, and I know Your Honor is considering that issue and if you -- if you'd like a response to that, you said you'd indicate -- you indicated that you'd issue an order. And Mr. Mongan asked for, you know, perhaps a response by today or tomorrow.

I would just ask for a week. I think just given the nature of the information here, there's -- and all of the

defendant agencies, that if you really want something, and it will take a lot of work on our end to go consult with people, to reach out to Anthropic, to hash out a response. So I just respectfully submit that, you know, one or two days is not sufficient time, and that there's really no -- two days versus a week is, in the grand scheme of things, not dispositive.

So we're -- one thing that we -- I know none of the questions touched on the due process or ultra vires claims. I don't know if Your Honor has any questions about that. I'm --

**THE COURT:** I thought it was well briefed and I didn't have a lot of questions.

**MR. HARLOW:** Okay. Then the only thing that I could also speak to is the APA claims against the other agencies, sort of the non-DOW agencies, and then the proposed order that Anthropic filed if Your Honor would find that helpful.

So as to the other agencies, I think we've pointed out that really Anthropic had the burden in its opening brief to actually put forward the evidence and arguments, and the only agency -- the only non-DOW agencies that it identified or spoke about in its brief --

**THE COURT:** I'm not sure that's really fair. I mean, they said that they were talking about all the agencies, and then they put "See e.g." and then they put record cites to some of the agencies, but all of the information was in the record.

But, in any event, it's your opportunity to respond.

**MR. HARLOW:** Right.

**THE COURT:** So if there's something I should know about the evidence and the notion that these -- what Anthropic said was not accurate as to the actions taken by the agency --

**MR. HARLOW:** Right.

**THE COURT:** -- here's your opportunity.

**MR. HARLOW:** Sure.

So in terms of in order for there to be an actual APA claim against any of these other agencies, they must necessarily have taken agency action first and then to have it be final agency action.

And as to a number of these agencies, as we've discussed in the record, and it's clear that they didn't actually have direct contractual relationships with Anthropic, it was the scenario that I was describing a moment ago where they have a contract with a third party, you know, cloud service provider who has a whole suite of options available to an agency and they just said, "Okay. We'll allow our employees to use Option B instead of Options A and B."

And so to call that sort of internal instruction a sanction or an order would, you know, dramatically expand the scope of APA review. And there's no case that Anthropic has cited that would -- that would justify doing so here and, in fact, the cases that we've cited have expressed caution about expanding judicial review and judicial supervision of these

sort of like work-a-day agency IT decisions.

The -- in terms of the proposed order and the remedies, we think there are -- it would be important for the Court to actually -- there -- given some of Anthropic's, you know, concessions in response to our arguments hear, that it seems clear that at least some of the defendants are entitled to summary judgment at this point. That would be at least the executive office of the President, the Social Security Administration, the Federal Reserve Board, the National Endowment for the Arts, the Does 1 through 10 who are still technically in this case and maybe who nobody knows who they are.

And then to the extent that the Court agrees with us as to the APA claims about the non-DOW agencies, then those agencies would be entitled to summary judgment in their favor as well.

The proposed order lumps together the various actions and defendants. This is something I noted earlier. And I think that that's inappropriate in terms of actually -- if the Court is going to grant relief for Anthropic, the starting point obviously would be if the Court is going to find for Anthropic on any of the APA claims, then there are the standard APA remedies, and then it's up to the Court under the *Monsanto* case to decide whether further remedies, equitable relief, is then further warranted. And we don't think that the facts justifying further relief are warranted here given the nature

of the challenged DOW actions under the APA.

And so -- but if the Court were to disagree and consider equitable relief, then it would be important to actually tailor that equitable relief to particular actions and particular agencies. Just, you know, for example, there's a relief on Anthropic's constitutional claim would enjoin defendants writ large from, you know, taking -- rescinding guidance and communications and instructions and preventing the implementation of, quote, "the unchallenged actions." Well, that would then sort of enjoin, you know, the State Department from implementing something that the Secretary did, but they have no legal connection or they wouldn't be doing that anyway.

And so it's -- obviously if the Court is going to enter equitable relief, it needs to be as narrowly tailored as possible and it needs to be carefully calibrated, and the proposed order, you know, just, respectfully, doesn't engage in that kind of careful tailoring.

We also don't think that -- oh, the other point too, just to highlight again, I know we've dropped this in footnotes in both of our briefs, is that there is a statutory prohibition on enjoining FHFA as a conservator. Anthropic's never responded to that, but we've noted that in footnotes in both of our briefs in the equitable -- the equitable relief sections of both of our briefs. I can pull the statutory cite if Your Honor likes but it's in our briefs.

Also, any proposed order would -- just as the Court did with the preliminary injunction order, should preserve the right of the agencies to stop using Anthropic services because, again, to the extent that these are just ordinary procurement decisions, the agencies have the right to decide which AI models to procure and not procure; and agencies, even if they enter contracts, are entitled to terminate those contracts without cause. They have the right to do that under the FAR.

There's also no basis for the compliance report that has been called for here or that has been included in the proposed order. You know, we think that defendants -- there's been no question of defendants' compliance with the Court's preliminary injunction order; and that if the Court enters an order here that's adverse to the defendants, that, you know, as normal course, the Government is presumed to comply with that order. And we don't think that anything that we've done in this case would merit, you know, special measures where we affirmatively demonstrate our compliance. I think it's presumed and we think we've done so. We've already demonstrated that through our history here.

**THE COURT:** All right. Let me give Anthropic an opportunity to respond.

**MR. MONGAN:** Sure, Your Honor. I would like to briefly respond to a few arguments. I want to be succinct so I'm not going to cover the waterfront of issues raised by my

colleague. Just if we can all agree that isn't a waiver or forfeiture of any arguments.

On *Pickering* I just want to elaborate on a point that my colleague picked up on. You know, the point that I was trying to make about the existence of regulations governing procurement is that when the Government wants to set new rules on that, that's a sovereign thing and it does it through regulations. And, yes, of course, then you can imagine a situation where an agency exercises one of those procurement authorities and that falls within *Pickering* for all the reasons that we've discussed.

But what we have here, and I think this may be conceded, is the President in the February 27th directive going beyond the procurement authorities and just having a blanket functional debarment that's not contemplated by statute or regulation and the Secretary issuing a secondary boycott order which they acknowledge is not based on any legal authority.

So they're essentially trying to regulate on the fly without authority to do so, and that's the type of action that I think very readily falls within the bucket of sovereign regulatory power.

On the point about CDC, one response was that this illuminated for the Government that the AI model has safeguards. All responsible frontier AI models have safeguards so that's just in the bucket of concerns that are applicable to

all AI models.

It also ignores the fact that's in the record that we had specifically and at our own expense built a version of Claude, Claude Gov, that is meant for national security use. This was, as Your Honor pointed out, a commercial model. As soon as we were aware of it, we worked collaboratively with CDC. So that underscores our argument and undermines theirs. It shows that Anthropic is a company that wants to collaborate with the Government in service of public safety and not to undermine it.

Third, on the point about Question 4 and the response, I don't want to quibble. I will just say the Government had this question since Monday and this is a fairly straightforward question, and the suggestion that timing doesn't matter here I don't think is quite right. I mean, we've been laboring under unconstitutional and unlawful actions since February.

And we've heard today that agencies are winding down. There have been communications between agencies and contractors and subcontractors. We don't know exactly what the content of that is. There's been a campaign of retaliation. It's very important to the company that we have a final judgment that will provide us with relief expeditiously.

I am not going to wade into the doctrinal subject matter that you didn't ask us specific questions about, but I would just want to make an overarching point.

When my colleague talks about the separation of powers

claims, the 558 claim, and the remedy, if you step back, the suggestion seems to be that there's no way for an entity to get any review of a presidential directive, which is not reviewable under the APA, that, concededly, is not exercising any statutory authority and we think violates the First Amendment and the due process clause. You can't sue the President. And then I think the suggestion was, well, we couldn't come back around and sue the agencies because they argued that that's not final agency action.

I don't think that that can be right. I don't think it's something that we really need to deal with here because if the Court agrees with us that that violates the First Amendment and the due process clause, the Supreme Court has made very clear that the appropriate thing for a litigant to do is to sue the officers that might be then implementing the unconstitutional directive from the President and get injunctive relief.

Other than that, I think you have our arguments from the briefs. I would just say that we appreciate very much the Court and defendants moving quickly in litigating these claims. These are actions that profoundly harm Anthropic and they threaten more broadly to chill speech and debate on a very important issue. There aren't any material disputes of fact and Anthropic is entitled to judgment as a matter of law.

**THE COURT:** All right. Thank you all for the argument. It was very helpful. I will take the matter under

submission and issue a written order. Thank you.

**MR. HARLOW:** Thank you, Your Honor.

**MR. MONGAN:** Thank you.

(Proceedings adjourned at 11:46 a.m.)

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**CERTIFICATE OF REPORTER**

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Friday, July 31, 2026

Kelly Shainline, CSR No. 13476, RPR, CRR
U.S. Court Reporter