No. 25-4014

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

American Federation of Government Employees, AFL-CIO, et al.

Plaintiffs-Appellees,

vs.

Donald J. Trump, in his official capacity as President of the United States, et al.

Defendants-Appellants.

On Appeal From the United States District Court
for the Northern District of California

Brief of the States of Minnesota, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Michigan, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, Washington, and Wisconsin *as Amici Curiae* in Support of Plaintiffs-Appellees.

KEITH ELLISON
Attorney General
State of Minnesota

LIZ KRAMER
Solicitor General

PAUL DIMICK
MADELEINE DEMEULES
Assistant Attorneys General

Office of the Attorney General
445 Minnesota Street, Suite 600
St. Paul, Minnesota 55101-2131
(651) 757-1010
liz.kramer@ag.state.mn.us

(Additional Counsel Listed on Signature Page)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Federal Cases

Federal Statutes

Federal Rules

Other Authorities

IDENTITY AND INTERESTS OF AMICI CURIAE

The State of Minnesota, represented by and through its Attorney General, and the States of Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Michigan, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, Washington, and Wisconsin ("Amici States") respectfully submit this brief under Federal Rule of Appellate Procedure 29(a)(2).

Amici States submit this brief in support of Plaintiffs-Appellees and in opposition to Executive Order 14251, *Exclusions from Federal Labor-Management Relations Programs*, 90 Fed Reg. 14553 (Apr. 3, 2025) ("Challenged EO"). The Challenged EO, which targets unions deemed "hostile" to President Trump's policy agenda and strips them of their collective bargaining rights, strikes at the very core of the First Amendment's prohibitions. *See* The White House, Fact Sheet: President Donald J. Trump Exempts Agencies with National Security Missions from Federal Collective Bargaining Requirements (Mar. 27, 2025) ("Fact Sheet"); *see also*, *e.g.*, *Lozman v. City of Riviera Beach*, 587 U.S. 87, 90 (2018) ("[T]he First Amendment prohibits government officials from retaliating against individuals for engaging in protected speech."). By promulgating the Challenged EO to remove an unprecedented number of federal employees from coverage under the Federal Service Labor-Management Relations Statute ("FSLMRS"), Defendants-Appellants

("the United States") also severely undermined "the public interest" and "efficient accomplishment of the operations of the Government." *See* 5 U.S.C. § 7101(a)(2).

Through their affiliated councils and local unions, Appellees collectively represent over one million federal employees working in all 50 states and the District of Columbia. Amici States hold a strong interest in ensuring that Appellees' members retain their collective bargaining rights and union representation. Indeed, many state employees across the country, including employees in many of the undersigned states, are represented by unions and Amici States recognize the importance of ensuring that public-sector employees have robust representation and workplace protections to ensure the efficiency and quality of the services that they provide.

In much the same way, federal employees living in Amici States depend upon Appellees for critical workplace protections, ranging from contractually guaranteed benefits like parental leave to limitations on reduction-in-force actions. *Cf. Small v. Avanti Health Sys., LLC*, 661 F.3d 1180 (9th Cir. 2011) (recognizing the numerous economic and non-economic benefits of union representation). These dedicated federal employees work for over 40 executive departments, agencies, and subdivisions—including the Department of Justice, Centers for Disease Control and Prevention, and Environmental Protection Agency—all of which Amici States rely upon for vital federal services and programs. Congress long ago determined that the

best way to improve employee performance and ensure a competent civil service is to protect "the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing." 5 U.S.C. § 7101(a)(1). The Challenged EO's elimination of those rights for nearly two-thirds of the federal workforce inflicts concrete harm on Amici States by reducing the efficiency of federal agencies and the essential services they provide to Amici States and their residents.

Amici States seek to support and preserve the rights of Appellees and their members to engage in constitutionally-protected speech and petitioning activities, including filing lawsuits challenging executive actions, pursuing grievances for contract violations, and making statements critical of public officials. *See, e.g.*, *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011) ("[T]he Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes."); *Lozman*, 585 U.S. at 101 (explaining that "criticisms of public officials" are "high in the hierarchy of First Amendment values"). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Yet the Challenged EO does precisely that, sanctioning Appellees and their members for "'fighting back' against Trump" and

challenging his administration's policies. *See* Fact Sheet. In doing so, the Challenged EO not only violates the First Amendment rights of Appellees and their members, but also imposes a significant chill on the protected speech and activities of federal unions and employees who remain covered by the FSLMRS. Amici States urge the Court to uphold Appellees' critical First Amendment rights and affirm the district court's preliminary injunction.

ARGUMENT

The Court should affirm the decision below. First, the Challenged EO directly harms residents of Amici States by stripping them of constitutionally protected rights. Amici States support Appellees' challenge to the Executive Order on First Amendment grounds but do not address those merits here. Rather, Amici States focus on the United States' application of *Mt. Healthy*'s governing test. The Court should decline the United States' invitation to depart from well-established law and principles of justice. For these reasons, Amici States respectfully urge this Court to affirm the decision below.

I. THE UNITED STATES ASKS THIS COURT TO ABDICATE JUDICIAL REVIEW OF CLAIMS AGAINST GOVERNMENT EMPLOYERS AND EMPLOYERS WHO RAISE NATIONAL SECURITY CONCERNS.

In the proceedings below, Appellees established and the district court accepted strong evidence that the United States acted with a retaliatory intent when it issued the Challenged EO. Unable to refute this evidence, the United States now

tries to dodge it on appeal by invoking two defenses: the presumption of regularity and national security. But both defenses can be rebutted on the right record, and the record evidence before the district court supports the conclusion that both are pretextual in this case. This Court must recognize the United States' argument for what it is: an attempt to insulate itself from unfavorable evidence with a narrative of boundless and unreviewable government power.

Beginning with the presumption of regularity, public officials and agencies are generally entitled to the presumption that they have "properly discharged" official duties. *Cruz v. Bondi*, __ F.4th __, 2025 WL 2026174, at *5 (9th Cir. July 21, 2025). This doctrine is a "general working principle" that applies when courts review the actions of public officials and agencies. *Id*. As sovereigns also accorded the benefit of the presumption of regularity, Amici States understand the importance of that presumption in preserving separation of powers by providing both federal and state governments room to make reasoned policy judgments. *See Conley v. United States*, 5 F.4th 781, 791 (7th Cir. 2021). To that end, courts place the burden of rebutting this presumption squarely on the party challenging a government action to provide "clear and affirmative" record evidence of impropriety. *Cruz*, 2025 WL 2026174, at *6 (citing *Gov't of Guam v. Guerrero*, 11 F.4th 1052, 1060 (9th Cir. 2021)).

This presumption is rebuttable when a party presents "clear, affirmative evidence" that establishes the public official or agency's departure from regular conduct. *Id*. Thus, to determine whether this presumption has been rebutted, courts must assess whether "anything in the record" reveals improper decision-making by the official or agency in question. *Id.*; *see also*, *e.g.*, *Conley*, 5 F.4th at 791 (noting that presumption is "an analytic tool," not a "rubberstamp").

In this case, the United States contends that the application of this doctrine requires the Court to "accept the President's [national security] determination at face value." (Dkt. 27.1, at 28.) The United States' argument rests on its contention that the district court should not have considered "extrinsic and circumstantial evidence that unconstitutional motivations prompted" the challenged Executive Order, even though this evidence was part of the record before the district court. (*Id.* 30.)

The United States' position contradicts Supreme Court guidance and this Court's settled law. It is well established that a court may consider circumstantial evidence of the motivations behind government actions when a party challenging the same carries its burden of presenting such evidence to the court and arguing that the otherwise controlling presumption has been rebutted. *Cruz*, 2025 WL 2026174, at *5. The Supreme Court has similarly assumed that courts may "look behind the face" of challenged statements to evaluate whether such defenses have been rebutted. *Trump v. Hawaii*, 585 U.S. 667, 704 (2018).

In this case, the United States' approach would require this Court to treat the presumption of regularity as functionally irrebuttable and to "rubberstamp any and all executive action as lawful." *Conley*, 5 F.4th at 791. Besides its conflict with settled law, this approach would upend separation of powers principles as well as the rights of individuals who are subjected to unlawful discrimination and retaliation. *See id.*; *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1092 (9th Cir. 2008) (explaining, in Title VII case, that plaintiffs must be able to rely on circumstantial evidence to prove discrimination because defendants may be "careful to construct an explanation that is not controlled by known direct evidence").

The same is true of the United States' national security defense. In *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), the Supreme Court rejected the argument that government conduct is unreviewable simply because the United States represents that national security concerns are at stake. 561 U.S. at 34 ("We do not defer to the Government's reading of the First Amendment, even when [national security] interests are at stake."). To be sure, national security justifications are "entitled to deference." *Id.* at 33. But such review is not toothless. *Id.* at 33-34; *Trump v. Hawaii*, 585 U.S. at 704 (assuming that Court may "look behind the face" of the challenged executive proclamation).

Even when its review is limited or deferential, this Court cannot determine whether these defenses apply in the first place without at least considering the

proffered reasons for decisions or conduct at issue. "Accepting contrived reasons would defeat the purpose of the enterprise" of judicial review. *Dep't of Com. v. New York*, 588 U.S. 752, 785 (2019) (rejecting notion of judicial review as an "empty ritual"). And courts can conduct a deferential review without needing to "exhibit a naivete from which ordinary citizens are free." *Id*. On the facts of this case, neither the presumption of regularity nor the mention of national security entirely insulate the Challenged EO from this Court's review.

II. THE UNITED STATES MISAPPREHENDS THE ROLE OF CIRCUMSTANTIAL EVIDENCE.

In this appeal, the United States contends that the district court erred in at least two ways when it applied the *Mt. Healthy* test for First Amendment retaliation claims. First, the United States argues that Appellees failed the first half of this test because they failed to establish a prima facie case of retaliation. (Dkt. 27.1, at 25-34.) Second, the United States argues that it can establish an independent basis for its adverse actions against Appellees. (*Id.* 34-37.) The United States' position conflicts with well settled principles about the role of circumstantial evidence in civil rights litigation.

The United States's argument is flawed because it relegates circumstantial evidence to a lesser rung on the ladder of evidentiary value. This approach unfairly burdens litigants who, by no choice of their own, encounter retaliation and other forms of illegal behavior that leave no direct evidence behind.

Even accepting the United States' erroneous premise that the evidence here is circumstantial, the United States is simply incorrect that Appellees cannot rely on circumstantial evidence of the motivations underlying the Challenged EO to establish a likelihood of success on their First Amendment retaliation claim. In "any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence." *U.S. Postal Serv. Bd. of Govs. v. Aikens*, 460 U.S. 711, 714 n.3 (1983). The Supreme Court has recognized this evidentiary principle since at least as early as 1814. *See The Struggle*, 9 Cranch 71, 73-74 (U.S. 1814) (rejecting the notion that courts must credit "positive testimony, without regard to other circumstances, or to the sit[u]ation and character of the witnesses").

The Supreme Court treats both forms of evidence alike for reasons that are both "clear and deep rooted." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) (acknowledging the "utility" of circumstantial evidence in discrimination cases). As relevant here, retaliatory intent, as is the case with discriminatory intent, "is rarely susceptible to direct proof." *Mi Familia Vota v. Fontes*, 129 F.4th 691, 724 (9th Cir. 2025). Circumstantial evidence is thus "not only sufficient, but may also be more certain, satisfying, and persuasive than direct evidence." *Desert Palace*, 539 U.S. at 100.

The Ninth Circuit regularly accepts circumstantial evidence of unlawful retaliation as sufficient evidence for a plaintiff who is attempting to satisfy the prima

facie component of a retaliation claim, under the First Amendment or antidiscrimination statutes. *See MacIntyre v. Carroll Coll.*, 48 F.4th 950, 954 (9th Cir. 2022) (Title IX); *Emeldi v. Univ. of Or.*, 673 F.3d 1218, 1226 (9th Cir. 2012) (same); *Coszalter v. City of Salem*, 320 F.3d 968, 977-79 (9th Cir. 2003) (First Amendment). In *Coszalter*, for example, this Court provided a thoughtful analysis about how unexplained differences in treatment between a claimant and comparators may provide circumstantial evidence of retaliatory motive. *See* 320 F.3d at 977-79 (noting "lack of clarity and even handedness" in a policy's application). When a policy's application "tend[s] to change from one to the other," a reasonable factfinder may infer improper motives from such inconsistent application of the policy. *Id*. at 978. Ignoring circumstantial evidence when retaliatory intent is "a question of fact" sensitive to surrounding circumstances will only make it easier for bad actors to "retaliate with impunity." *Id*.

The same is true for defendants seeking to rebut a prima facie showing of discrimination or retaliation who reach the later stages of *Mt. Healthy*'s burden-shifting framework and seek to prove that they would have made the same decision even in the absence of any protected activity. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Waters v. Churchill*, 511 U.S. 661, 663 (1994) (describing this aspect of *Mt. Healthy* framework as "a pretext inquiry"). Indeed, defendants often rely on circumstantial evidence to rebut a plaintiff's prima

facie case of retaliation or discrimination. And as with a prima facie case of retaliation, litigants who attempt to prove that a retaliatory motive animated the challenged conduct may use direct or circumstantial evidence. *Allen v. Iranon*, 283 F.3d 1070, 1075 (9th Cir. 2002) (noting that courts "often look to evidence that the employer's proffered reasons for the challenged decision were pretextual" in *Mt. Healthy* analyses); *accord Mooney v. Fife*, 118 F.4th 1081, 1097-98 (9th Cir. 2024) (denying summary judgment on retaliation claim due to circumstantial evidence establishing pretext).

It would thus be legal error to require direct evidence and reject claims supported by sufficient circumstantial evidence that is not otherwise rebutted, as the United States asks the Court to do here. *See, e.g.*, *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1030-31 (9th Cir. 2006); *see also France v. Johnson*, 795 F.3d 1170, 1175 (9th Cir. 2015) (collecting cases and noting that a plaintiff's burden to raise a triable issue of pretext is "hardly an onerous one"); *Grabowski v. Ariz. Bd. of Regents*, 69 F.4th 1110, 1121-22 (9th Cir. 2023) (reversing judgment on the pleadings and confirming that circumstantial evidence can establish causation in a retaliation claim).

The United States' cramped approach to the role of circumstantial evidence contradicts well settled law and will ultimately undermine plaintiffs and defendants alike, making it harder both to substantiate a prima facie claim of retaliation and

mount a full and fair defense to such claims. In turn, this departure from settled law will also require courts to weigh nuanced and fact-intensive questions that are often based on the totality of circumstances with a "naivete from which ordinary citizens are free." *See Dep't of Comm. v. New York*, 588 U.S. at 785.

And because *Mt. Healthy*'s rule of causation "applies equally" to retaliation claims based on laws other than the First Amendment, the risk that the United States' position will have spillover effects in other realms of civil rights law is similarly pronounced. *See, e.g., Murray v. UBS Sec., LLC*, 601 U.S. 23, 35-36 (2024) (discussing role of circumstantial evidence in whistleblower action); *Ruggles v. Cal. Polytechnic State Univ.*, 797 F.2d 782, 786-87 (9th Cir. 1986) (noting *Mt. Healthy*'s causation analysis also applies to Title VII retaliation claims, any differences in their burden-shifting frameworks notwithstanding); *Emeldi*, 673 F.3d at 1223-24 (adopting Title VII retaliation test for Title IX retaliation claims).

CONCLUSION

The issues at stake here have the potential to impact litigants and laws far beyond this appeal. To safeguard both, Amici States respectfully urge this Court to affirm the decision below.

Respectfully submitted,

KEITH ELLISON
Attorney General
State of Minnesota

/s/ Liz Kramer
LIZ KRAMER
Solicitor General

PAUL DIMICK
MADELEINE DEMEULES
Assistant Attorneys General

Office of the Attorney General
445 Minnesota Street, Suite 600
St. Paul, Minnesota 55101-2131
(651) 757-1010
liz.kramer@ag.state.mn.us

On behalf of:

KRISTIN K. MAYES
Attorney General
State of Arizona
2005 N. Central Ave.
Phoenix, AZ 85004

ANDREA JOY CAMPBELL
Attorney General
Commonwealth of Massachusetts
One Ashburton Place, 20th Floor
Boston, MA 02108

ROB BONTA
Attorney General
State of California
1515 Clay Street
Oakland, CA 94612

AARON D. FORD
Attorney General
State of Nevada
100 North Carson Street
Carson City, NV 89701

PHILIP J. WEISER
Attorney General
State of Colorado
1300 Broadway, 10th Floor
Denver, CO 80203

MATTHEW J. PLATKIN
Attorney General
State of New Jersey
25 Market Street
Trenton, NJ 08625

WILLIAM TONG
Attorney General
State of Connecticut
165 Capitol Avenue
Hartford, CT 06106

KATHLEEN JENNINGS
Attorney General
State Of Delaware
820 N. French Street
Wilmington, DE 19801

BRIAN L. SCHWALB
Attorney General
District of Columbia
400 Sixth Street, NW
Washington, D.C. 20001

ANNE E. LOPEZ
Attorney General
State of Hawai‘i
425 Queen Street
Honolulu, HI 96813

KWAME RAOUL
Attorney General
State of Illinois
115 South LaSalle Street
Chicago, IL 60603

DANA NESSEL
Attorney General
State of Michigan
P.O. Box 30212
Lansing, MI 48909

AARON M. FREY
Attorney General
State of Maine
6 State House Station
Augusta, ME 04333

RAÚL TORREZ
Attorney General
State of New Mexico
408 Galisteo Street
Santa Fe, NM 87501

LETITIA JAMES
Attorney General
State of New York
28 Liberty Street
New York, NY 12224

JEFF JACKSON
Attorney General
State of North Carolina
114 W. Edenton Street
Raleigh, NC 27603

DAN RAYFIELD
Attorney General
BEN GUTMAN
Solicitor General
State of Oregon
1162 Court Street NE
Salem, OR 97301

PETER F. NERONHA
Attorney General
State of Rhode Island
150 South Main Street
Providence, RI 02903

CHARITY R. CLARK
Attorney General
State of Vermont
109 State Street
Montpelier, VT 05609

ANTHONY G. BROWN
Attorney General
State of Maryland
200 Saint Paul Place
Baltimore, MD 21202

JOSHUA L. KAUL
Attorney General
State of Wisconsin
17 W. Main Street
Madison, WI 53703

NICHOLAS W. BROWN
Attorney General
State of Washington
P.O. Box 40100
Olympia, WA 98504

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number 25-4014

I am the attorney or self-represented party. **This brief contains 2,746 words,** including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief *(select only one)*:

☐ complies with the word limit of Cir. R. 32-1.

☐ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

X is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R.29-2(c)(2), or Cir. R. 29-2(c)(3).

☐ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

☐ complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:

☐ it is a joint brief submitted by separately represented parties.

☐ a party or parties are filing a single brief in response to multiple briefs.

☐ a party or parties are filing a single brief in response to a longer joint brief.

☐ complies with the length limit designated by court order dated.

☐ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2025, an electronic copy of the foregoing brief was filed with the Clerk of Court using the ECF system and thereby served upon all counsel appearing in this case.

/s/ Liz Kramer
LIZ KRAMER
Solicitor General

PAUL DIMICK
MADELEINE DEMEULES
Assistant Attorneys General

Office of the Attorney General
State of Minnesota