IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IMMIGRANT ADVOCATES RESPONSE COLLABORATIVE, et al., *Plaintiffs*, vs. UNITED STATES DEPARTMENT OF JUSTICE, et al., *Defendants*.	Case No. 25-cv-2279 Hon. Trevor N. McFadden

PLAINTIFFS' MOTION AND MEMORANDUM IN SUPPORT OF MOTION TO COMPEL PRODUCTION OF WITHHELD PORTIONS OF THE ADMINISTRATIVE RECORD

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INTRODUCTION

This case concerns four sets of policies adopted by Defendants in 2025. The Court has termed them: (1) "Dismissal Policies" (which circumvent immigration-court rules to allow the dismissal of cases so noncitizens can be dismissed from full removal proceedings and instead placed in expedited removal); (2) the "Courthouse Arrest Guidance" (which removes prior protections against arrests at immigration and other courthouses); (3) the "Expanded Expedited Removal Guidance" (under which Defendants place noncitizens with more than two years of continuous presence in the United States in expedited removal); and (4) the "Concurrent Proceedings Guidance" (under which Defendants place noncitizens in expedited removal while their full removal proceedings remain pending). *See* Mem. Order at 2-5, ECF No. 50 ("MTD Op.").[1] As this Court previously observed, resolution of Plaintiffs' challenges to these policies "requires resort to the Administrative Record." *Id.* at 13.

Defendants, however, have refused to produce the complete record for several of the policies at issue—including withholding some of the actual policies themselves. Specifically, Defendants claim that the May 20, 2025 DHS memorandum that gave effect to several of these policies, along with two earlier, related memoranda, are protected by attorney-client privilege and are attorney work product because they were issued by the ICE Office of the Principal Legal Advisor. But the federal government may not shield its policies from judicial review by issuing them through an attorney and then claiming they are cloaked in privilege. ICE's directives to its attorneys are no exception to this rule. *See, e.g.*, *Jud. Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 926 F. Supp. 2d 121, 137-47 (D.D.C. 2013) (rejecting attorney-client privilege and work-product claims over memoranda "convey[ing] agency policies and instructions regarding the exercise of

[1] Pin citations to documents filed on the Court's electronic filing system (CM/ECF) refer to the page numbers generated by that system.

prosecutorial discretion in civil immigration enforcement").

Defendants cannot conceal these policies nearly a year into litigation while continuing to apply them, thereby frustrating meaningful judicial review. For the reasons below, the Court should compel Defendants to produce the relevant documents to Plaintiffs, or—at a minimum—conduct *in camera* review to determine whether any redactions are appropriate.[2]

BACKGROUND

The Complaint, filed on July 16, 2025, alleges that the four sets of policies are arbitrary and capricious and/or contrary to law, violating the Administrative Procedure Act ("APA"). *See* Compl. ¶¶ 129-97, ECF No. 1. On July 24, 2025, Plaintiffs moved to expedite production of the Administrative Record, ECF No. 8, while Defendants moved to stay their obligation to file a certified list of the Administrative Record contents until after the Court resolved their motion to dismiss, ECF No. 16.

On March 17, 2026, the Court dismissed the individual plaintiffs from the claims challenging the Dismissal Policies but otherwise denied Defendants' motion to dismiss, allowing at least some plaintiffs to proceed with their challenges to each of the policies at issue. MTD Op. at 20. The Court granted Defendants' motion to stay their obligations regarding the Administrative Record but noted that, given the resolution of the motion to dismiss, "the Government must now turn over the Administrative Record." *Id.* at 19. And it ordered the parties to "confer and agree upon a proposed scheduling order to govern future proceedings." *Id.*

After meeting and conferring, the parties jointly proposed that Defendants would "produce the certified administrative records … associated with each challenged policy by May 15, 2026."

[2] The parties met and conferred pursuant to Local Rule 7(m), as reflected in Exhibit 2 and ECF No. 57, and were unable to reach agreement. Defendants oppose the motion.

Joint Status Report at 2, ECF No. 52. They proposed that briefing of cross-motions for summary judgment would begin "30 days after service of the" records—*i.e.*, June 15, 2026. *Id.* The Court adopted and ordered this schedule in a Minute Order dated April 17, 2026.

On Friday, May 15, the Department of Homeland Security ("DHS") and the Executive Office for Immigration Reform ("EOIR") produced three separate administrative records. Two of those records—EOIR's administrative record for its versions of the Courthouse Arrest Guidance and Dismissal Policies[3] and DHS's record for its Courthouse Arrest Guidance—did not include substantive redactions and are not at issue here.

The third administrative record covers the DHS Dismissal Policy, Concurrent Proceedings Guidance, and Expanded Expedited Removal Guidance. As the decision document for those policies, DHS produced a three-page document (the "May 20 Broadcast"), the substance of which is entirely redacted. Admin. R., Ex. 1 at 3-5. The document, titled "Broadcast Message: Referring Non-Detained Cases to ERO for Arrest," is dated May 20, 2025 and attributed to ICE Principal Legal Advisor Charles Wall of the Office of the Principal Legal Advisor ("OPLA"). ICE also produced a few tangentially relevant documents: an executive order regarding immigration enforcement generally, two memoranda regarding enforcement discretion, a notice expanding expedited removal to its full statutorily permissible two-year scope, and implementation guidance for that notice. *Id.* at 6-25. Although required to do so, Defendants did not produce a privilege log concurrent with their production of the record.

The following Monday, Plaintiffs emailed Defendants to offer to "enter into an appropriate protective order as a condition of viewing the full" May 20 Broadcast. E-mails between Joshua

[3] Plaintiffs did not allege that EOIR issued Concurrent Proceedings Guidance or Expanded Expedited Removal Guidance and do not challenge the absence of an EOIR record for those policies.

Salzman, Democracy Forward, and Dhruman Sampat, DOJ (May 18-27, 2026), Ex. 2 at 10. In response, Defendants asserted that the May 20 Broadcast "is protected by the attorney-client privilege and is protected as being attorney work product" but that they would discuss the offer of a protective order. *Id.* at 9. On May 27, 2026, without further acknowledgment of Plaintiffs' offer to enter into a protective order, Defendants indicated that they "intend[] to defend the redaction" of the May 20 Broadcast. *Id.* at 1.

The same day, Defendants belatedly produced a privilege log that listed the May 20 Broadcast and also, for the first time, disclosed the existence of two other "broadcast messages" that Defendants withheld in full, failing to include them even in their redacted version of the administrative record. *Id.*; *see also* Privilege Log, Ex. 3. Those messages are titled "Interim Guidance for Implementing Acting Secretary Huffman's Memorandum, Guidance Regarding How to Exercise Enforcement Discretion" (the "January 31 Broadcast") and "Implementing the January 2025 Expedited Removal Designation and Required Training" (the "March 5 Broadcast"). Ex. 3.[4] Defendants did not offer any explanation for their failure to disclose the two additional documents and produce a privilege log before the May 15 deadline for producing the Administrative Record.

The privilege log asserts attorney-client privilege and attorney work-product protection for all three Broadcast Messages. Specifically, it claims the following bases for withholding the documents:

- May 20 Broadcast: "Communications and attorney drafted direction from ICE Office of the Principal Legal Advisor to agency counsel containing instructions to

[4] Plaintiffs are unclear whether the "Required Training" referenced in the title of the March 5 Broadcast is a separate document or part of the March 5 Broadcast. To the extent it is a separate document, it likely should have been produced as part of the Administrative Record as well. However, without reviewing the March 5 and May 20 Broadcasts, Plaintiffs cannot determine whether that document exists and is needed to complete the Administrative Record. If Plaintiffs believe further relief is needed after production and review of the Broadcast Messages, they will promptly meet and confer with the Government.

agency counsel and ICE Enforcement and Removal Operations on processing of immigration court cases, including court strategy."

- January 31 Broadcast: "Communications and attorney drafted guidance from ICE Office of the Principal Legal Advisor to agency counsel containing instructions and legal considerations on the processing of immigration court cases."
- March 5 Broadcast: "Communications and attorney drafted guidance from ICE Office of the Principal Legal Advisor to agency counsel containing instructions and considerations on the processing of immigration court cases."

Id.

LEGAL STANDARD

The administrative record for an agency action "includes all materials compiled by the agency that were before the agency at the time the decision was made," *Hecht ex re. James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996) (cleaned up), other than "predecisional and deliberative" documents covered by the deliberative process privilege, *Oceana, Inc. v. Ross*, 920 F.3d 855, 865 (D.C. Cir. 2019). Materials subject to the attorney-client privilege are included in the administrative record but may be withheld, in which case the government must provide a privilege log. *See, e.g., All. for Retired Ams. v. Bessent*, No. 25-cv-313, 2025 WL 2576530, at *2 (D.D.C. Mar. 4, 2025).

The attorney-client privilege does not protect all communications between an attorney and client. Rather, it protects only (1) "confidential communications from clients to their attorneys made for the purpose of securing legal advice or services," and (2) "communications from attorneys to their clients if the communications 'rest on confidential information obtained from the client.'" *Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997) (quoting *In re Sealed Case*, 737 F.2d 94, 98-99 (D.C. Cir. 1984)); *see also, e.g., Schlefer v. United States*, 702 F.2d 233, 245 (D.C. Cir. 1983) ("The privilege operates when 1) the communication from attorney to client is confidential, *and* 2) the communication is based on confidential information provided by the

client.").

"[T]he attorney-client privilege is narrowly construed and is limited to those situations in which its purposes will be served." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862-63 (D.C. Cir. 1980). It "protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege." *Id.* (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976)). While the attorney-client privilege can apply to some communications between a governmental agency and agency counsel in some cases, it "may not be used to protect … agency law from disclosure to the public." *Tax Analysts*, 117 F.3d at 619.

The attorney work-product doctrine is "limited to documents prepared in contemplation of litigation" used by an attorney to "think, plan, weigh facts and evidence, candidly evaluate a client's case [or] prepare legal theories." *Coastal States*, 617 F.2d at 864. "[T]he documents must at least have been prepared with a specific claim supported by concrete facts which would likely lead to litigation in mind." *Id.* at 865. Documents "promulgated as general standards to guide … Government lawyers" are not protected by the doctrine. *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 775 (D.C. Cir. 1978), *overruled in part on other grounds*, *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051 (D.C. Cir. 1981). Even where the work-product doctrine is satisfied, a party may obtain covered documents upon a showing that it "has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." Fed. R. Civ. P. 26(b)(3)(ii); *see also Coastal States*, 617 F.2d at 864.

The party asserting the attorney-client privilege or work-product doctrine bears the burden of showing that it applies. *E.g.*, *Citizens for Resp. & Ethics in Wash. v. FEC* ("*CREW*"), No. 22-cv-35, 2024 WL 2110141, at *8 (D.D.C. May 10, 2024).

ARGUMENT

Defendants have withheld the crucial document implementing three of the policies at issue in this case, along with other decisional and procedural documents underlying those policies. This withholding thwarts both Plaintiffs' ability to challenge the policies and this Court's ability to review them. Defendants are asserting a right to "develop a body of 'secret law,' used by it in the discharge of its regulatory duties and its dealings with the public, but hidden behind a veil of privilege." *Coastal States*, 617 F.2d at 867. The D.C. Circuit has "emphatically" prohibited that result. *Id.* And courts have repeatedly rejected DHS's attempts to conceal similar policy documents. *See, e.g.*, *Jud. Watch*, 926 F. Supp. 2d at 137-47 (requiring production of memoranda that "convey agency policies and instructions regarding the exercise of prosecutorial discretion in civil immigration enforcement"); *Am. Immig. Council v. U.S. Dep't of Homeland Sec.*, 905 F. Supp. 2d 206, 221-23 (D.D.C. 2012) (requiring production of "presentations by USCIS's Office of the Chief Counsel to teach USCIS employees how to interact with private attorneys during USCIS proceedings before adjudicators").

Neither the attorney-client privilege nor the work-product doctrine provides the federal government with a shield that can hide operative agency policies from judicial scrutiny. As Defendants' belated privilege log reflects, the three Broadcast Messages are neither confidential communications from a client to an attorney nor communications from an attorney to a client resting on confidential information obtained from the client. Nor are they attorney work-product prepared with specific litigation in mind. The Court should therefore compel Defendants to produce the withheld documents, or—at a minimum—conduct an *in camera* review to determine whether and to what extent they may lawfully be withheld.

Before turning to Defendants' bases for withholding the Broadcast Messages, it is worth

noting what they *do not* argue: they do not claim that any of the Broadcast Messages are protected by the deliberative process privilege. These documents are not "predecisional and deliberative"; they were not "generated before the adoption of an agency policy" and do not "reflect[] the give-and-take of the consultative process." *Coastal States*, 617 F.2d at 866. Defendants' tacit acknowledgment that they could not satisfy the deliberative process privilege is telling: these documents are "peremptory legal opinions or directives from the Chief Counsel, written with a clearly implied expectation that they are to be followed." *Schlefer*, 702 F.2d at 240. They are, in other words, *policies*—the very policies that Plaintiffs challenge in this case. Defendants' counsel has effectively admitted as much, at least as to the May 20 Broadcast. *See* Ex. 2 at 3 ("The May 20 administrative record serves as the records for what Plaintiffs have labeled the 'DHS dismissal guidance,' 'the Concurrent Proceedings Guidance,' and the policy related to expedited removal.").

Thus, the question before the Court is not whether the Broadcast Messages are deliberative documents that fall outside the Administrative Record. It is whether Defendants may shield operative agency-wide policy documents under the attorney-client privilege or work-product doctrine. As the D.C. Circuit has repeatedly held, the federal government cannot hide its policies in this manner.

I. The Broadcast Messages Are Not Protected by Attorney-Client Privilege

Defendants' invocation of the attorney-client privilege rests on the fact that the Broadcast Messages were issued by the Principal Legal Advisor of U.S. Immigration and Customs Enforcement. But it is well settled that "[t]he privilege does not 'exempt a document from disclosure simply because the communication involves the government's counsel.'" *Elec. Priv. Info. Ctr. v. Dep't of Just.* ("*EPIC*"), 584 F. Supp. 2d 65, 79 (D.D.C. 2008) (quoting *Jud. Watch, Inc. v. Dep't of Army*, 435 F. Supp. 2d 81, 89 (D.D.C. 2006))). An agency is not "entitled to

withhold any document prepared by any person in the Government with a law degree." *Coastal States*, 617 F.2d at 865. Rather, for the privilege to apply, Defendants must show that the Broadcast Messages are "communications from attorneys to their clients ... rest[ing] on confidential information obtained from the client." *Tax Analysts*, 117 F.3d at 618 (cleaned up).[5]

Defendants have not attempted to make that showing. That fact, without more, requires rejection of Defendants' invocation of the privilege. After all, "[w]hen asserting privilege based on an attorney's communication to a client, the client has the burden of demonstrating 'with reasonable certainty ... that the lawyer's communication rested in significant and inseparable part on the client's confidential disclosure.'" *EPIC*, 584 F. Supp. 3d at 79 (quoting *In re Sealed Case*, 737 F.2d at 99). Defendants' failure to assert that the Broadcast Messages include confidential client information categorically prevent them from satisfying that burden.

Defendants could not meet their burden even if they had attempted to do so. General "advice and direction" about "how to handle cases of the type specifically contemplated in [a] memo" are not confidential attorney-client communications. *Jud. Watch*, 926 F. Supp. 2d at 143, 146 (cleaned up); *see also Am. Immig. Council*, 905 F. Supp. 2d at 222-23 ("generally applicable legal advice" by DHS lawyers not confidential attorney-client communications). Take the May 20 Broadcast. Defendants describe it as "[c]ommunications and attorney drafted *direction* ... containing *instructions* to agency counsel and ICE Enforcement and Removal Operations." Ex. 3 (emphasis added). The May 20 Broadcast provides "direction" and "instructions" for ICE staff (including both agency counsel and non-attorney Enforcement and Removal Operations

[5] Because the three Broadcast Messages were from agency counsel to the agency, rather than the other way around, the other category of privileged material—"confidential communications from clients to their attorneys made for the purpose of securing legal advice or services," *Tax Analysts*, 117 F.3d at 618—plainly does not apply.

personnel) to follow—in other words, "directives from the Chief Counsel, written with a clearly implied expectation that they are to be followed." *Schlefer*, 702 F.2d at 240. The D.C. Circuit has long required that an agency "disclose orders and interpretations which it actually applies in cases before it." *Id.* at 244 (quoting *Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 708 (D.C. Cir. 1971)). Generally applicable instructions to government agents cannot be withheld just because they came from an attorney or relate to litigation. *See, e.g.*, *Jud. Watch*, 926 F. Supp. 2d at 146 (rejecting privilege claim over "guidance on the prioritization of cases and instructions regarding scenarios under which ICE attorneys should, or should not, exercise prosecutorial discretion").

The attorney-client privilege does not protect the remaining two Broadcast Messages for the same reason. Defendants concede that both the January 31 Broadcast and the March 5 Broadcast are "guidance" containing "instructions." Ex. 3. Defendants also describe the January 31 Broadcast—but, notably, not the March 5 Broadcast—as containing "legal considerations." *Id.* But that is not dispositive: "[s]imply because the documents contain legal advice does not necessarily mean that the attorney-client privilege applies to the documents … ." *EPIC*, 584 F. Supp. 2d at 80; *see also, e.g.*, *Coastal States*, 617 F.2d at 863 (privilege does not cover "question and answer guidelines which might be found in an agency manual"); *Am. Immig. Council*, 905 F. Supp. 2d at 223 ("[G]enerally applicable legal advice will rest on none of the factual particularities conveyed in a typical confidential communication by a client.").

Defendants thus have no basis for withholding the documents pursuant to the attorney-client privilege.

II. The Broadcast Messages Are Not Protectable Attorney Work-Product

Defendants' reliance on the work-product doctrine fares no better. Where government enforcement actions are concerned, the D.C. Circuit distinguishes "memoranda that could be

protected by the work-product privilege because they advised [agency lawyers] how to proceed with specific investigations of suspected wrongdoers" from more general guidance. *In re Sealed Case*, 146 F.3d 881, 885 (D.C. Cir. 1998); *see also Coastal States*, 617 F.2d at 865 ("[T]he documents must at least have been prepared with a specific claim supported by concrete facts which would likely lead to litigation in mind."); *Jud. Watch*, 926 F. Supp. 2d at 140-44 (applying *In re Sealed Case* and *Coastal States* to OPLA guidance to ICE attorneys).

The Broadcast Messages, by their very nature, are not specific to individual, specific cases. Rather, they set out broadly applicable guidance and policies for agency staff to apply universally. *See, e.g.*, *Jordan*, 591 F.2d at 775 ("general standards to guide the Government lawyers" are not work-product); *Jud. Watch*, 926 F. Supp. 2d at 142 (documents "promulgated as 'general standards' to instruct ICE staff attorneys in determining whether to exercise prosecutorial discretion in specific categories of cases" not work-product); *Am. Immig. Council*, 905 F. Supp. 2d at 222 (documents "convey[ing] routine agency policies" regarding the conduct of litigation not work-product). Thus, even assuming that a document discussing the application of the Broadcast Messages to an individual case might be protectable work-product, *see, e.g.*, *Tax Analysts*, 117 F.3d at 620, the overarching policies in the Broadcast Messages cannot be.

Even if the work-product doctrine did apply—and it does not—full withholding of the Broadcast Messages would remain inappropriate. A party may obtain attorney work-product documents upon a showing that it "has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." Fed. R. Civ. P. 26(b)(3)(ii); *see also Coastal States*, 617 F.2d at 864. That is manifestly the case here: Plaintiffs cannot file a meaningful summary judgment brief showing how policies violate the Administrative Procedure Act without knowing the specific content of the policies. Nor do Plaintiffs have any

other reasonable avenue to obtain the policies. Plaintiffs thus have a "substantial need" for the Broadcast Messages, and the lack of any other announcement of the policies in the administrative record shows that there is no "substantial equivalent." Fed. R. Civ. P. 26(b)(3)(ii). Worse still, Defendants' attempt to keep the policies secret would also hamstring the Court, which already noted that it "cannot properly evaluate" the parties' arguments without "a complete administrative record." MTD Op. at 14 (quoting *Vassiliades v. Rubio*, 792 F. Supp. 3d 1, 21 (D.D.C. 2025)).

This is especially the case for Plaintiffs' challenges to the Expanded Expedited Removal Guidance and the Concurrent Proceedings Guidance, which are brought under 8 U.S.C. § 1252(e)(3). As this Court has recognized, the Immigration and Nationality Act "explicitly permits" it "to review whether written policies related to expedited removal are lawful." MTD Op. at 16. That review covers challenges not just to formal regulations but also to any other "written policy directive, written policy guideline, or written procedure" that is issued to implement expedited removal. 8 U.S.C. § 1252(e)(3)(ii). The plain language of this statutory provision makes clear that Congress authorized review of policy guidance and procedures, including the documents at issue here. Defendants' attempt to keep the challenged policies secret would therefore stymie judicial review that Congress explicitly authorized. The result is that, even if Defendants could somehow rely on work-product doctrine, this is the kind of exceptional case in which Plaintiffs' (and the Court's) need for the documents overwhelmingly outweighs the interests underlying the doctrine.

III. If the Court Has Any Doubt, It Should Require Production for *In Camera Review*

For the foregoing reasons, the Court can reject Defendants' arguments on their face and require production of the three Broadcast Messages in full. But to the extent the Court has any doubt about the resolution of this motion, it should require Defendants to produce them for the

Court's evaluation *in camera*. *See, e.g.*, *CREW*, 2024 WL 2110141, at *8 ("[C]ourts often assess agencies' privilege claims through privilege logs or *in camera review*.") (collecting cases). It can then determine whether any portion of the Broadcast Messages can permissibly be redacted.

CONCLUSION

For the foregoing reasons, the Court should order Defendants to produce unredacted versions of the three Broadcast Messages to Plaintiffs.

Dated: June 2, 2026

Respectfully Submitted,

s/ Joshua M. Salzman

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