No. 24A1063

IN THE

Supreme Court of the United States

SOCIAL SECURITY ADMINISTRATION, *et al.*

Applicants,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO, *et al.*

OPPOSITION TO APPLICATION FOR A STAY OF THE INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND AND REQUEST FOR AN ADMINISTRATIVE STAY

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INTRODUCTION

The Social Security Administration is entrusted with vast quantities of sensitive, personally identifiable information. Beyond just Social Security numbers, it maintains systems of records that include medical and mental health information, family court and children's school records, and other highly sensitive information. The Agency is obligated by the Privacy Act and its own regulations, practices, and procedures to keep that information secure—and not to share it beyond the circle of those who truly need it.

Since its founding, SSA has been committed to living up to its data security obligations. But in a sudden and striking departure from generations of precedent spanning more than a dozen presidential administrations, the Agency now seeks to throw open its data systems to unauthorized (and often unvetted) personnel who have no demonstrated need for the personally identifiable information ("PII") they seek.

To protect Respondents from irreparable harm during proceedings taking place at "breakneck speed" (Dist. Ct. Doc. 162 at 1), the district court entered a limited preliminary injunction to preserve the *status quo ante* and safeguard the public's private information. The district court supported its preliminary injunction with a 148-page opinion, supplying extensive findings of fact and demonstrating that its interim relief was appropriately narrow. The Fourth Circuit denied an emergency request to stay the injunction pending appeal.

As the Fourth Circuit recognized, this case presents no emergency—at least not for the Agency, which devotes just one paragraph to the irreparable harm it will

allegedly suffer absent a stay. Now, SSA asks this Court to get involved simply because a lower court has interfered with something the Executive Branch wants to do. But that has never been the standard for emergency relief, and the Court should not adopt it now.

The government's application is, at bottom, a premature and unwarranted request for correction of nonexistent errors. There is no emergency meriting intervention by the Court at this early stage, and the district court's injunction is both narrow in scope and necessary to protect Respondents from irreparable harm while the legality of the Agency's actions is assessed. In any event, Respondents have more than adequately demonstrated a likelihood that they are entitled to preliminary injunctive relief. The government's application should be denied.

FACTUAL AND PROCEDURAL BACKGROUND

I. FACTUAL BACKGROUND

A. SSA'S COLLECTION AND PROTECTION OF DATA

SSA was established in 1935 and is now the government's largest benefits-paying agency. Gov't App. 35a. In addition to overseeing essential programs including Old-Age, Survivors, and Disability Insurance ("OASDI" or "Social Security") and Supplemental Security Income ("SSI"), it helps administer programs run by other agencies, including Medicare, Medicaid, and SNAP. *Id.* 36a.

To effectuate its own and other agencies' programs, SSA collects and stores some of the most sensitive information a person may have. Along with names, birth dates, driver's license numbers, and addresses—already sensitive information often used by malicious actors to commit serious fraud—SSA records include, among other

things, Social Security numbers; employment and wage histories; financial data, including tax return information and bank account and credit card numbers; marriage certificates; school records; family court records; citizenship, immigration, and naturalization records; and medical records documenting information such as evaluations, hospitalizations, treatment, diagnoses, and disabilities, whether they relate to physical or mental health. *Id.*

From the beginning, both SSA and Congress have understood the importance of protecting the confidentiality of this sensitive, personal information. The first regulation SSA published included a "commitment to the public to safeguard the personal information [people] entrust" to SSA. *Id.* 165a; 2 Fed. Reg. 1256 (June 18, 1937). The Agency's website advertises that SSA maintains "the highest level of privacy protections possible." Gov't App. 165a (citation omitted). And SSA is bound by laws and regulations—including, as relevant here, the Privacy Act of 1974—that restrict the use and disclosure of data both within and outside the Agency.

The Privacy Act limits access to agency records to those employees who have a need to access those records in the performance of their job duties. 5 U.S.C. § 552a(b). Congress enacted the Act specifically to "protect the privacy of individuals identified in information systems maintained by Federal agencies." *Doe v. Chao*, 540 U.S. 614, 618 (2004) (quoting Privacy Act of 1974, Pub. L. No. 93-579, § 2(a)(5), 88 Stat. 1896 (1974)). The statute represented an effort to repair the breach of the public trust that occurred during the Nixon Administration and a renewed commitment by government agencies and departments to safeguard the sensitive data they store.

SSA itself has an "entrenched, longstanding policy and practice . . . of guarding the confidentiality and privacy of PII, except as needed, and, when needed, allowing only tailored access." Gov't App. 114a. That includes "the policy of 'least privilege,' by which 'a user [is] given no more privileges than those necessary to perform their job.'" *Id.* The Agency emphasizes the importance of least-privilege access in part because "[u]nlimited rights and access can equate to unlimited potential for damage," and "[t]he more privileges an account or user has, the greater potential for abuse or errors." *Id.* 115a. SSA's Information Security Policy ("ISP") thus "instructs managers to '[r]estrict access to information systems to the minimum level required to perform assigned duties.'" *Id.* The ISP also directs managers to "ensure adequate 'separation of duties' within the roles of Information Systems." *Id.* 116a (citation omitted). Segregation of duties "'is the idea that no user should have enough privileges to misuse a system on their own.'" *Id.* 117a.

B. EXECUTIVE ORDER NO. 14,158

On January 20, 2025, President Trump issued an executive order creating the "Department of Government Efficiency" and setting forth its agenda: "modernizing [f]ederal technology and software to maximize governmental efficiency and productivity." Exec. Order No. 14,158 § 1, 90 Fed. Reg. 8441 (Jan. 20, 2025) (the "E.O."). The E.O. renamed the United States Digital Service the "United States DOGE Service (USDS)" and reorganized it within the Executive Office of the President. *Id.* § 3(a). USDS contains within it "the U.S. DOGE Service Temporary Organization," which is "dedicated to advancing the President's 18-month DOGE

Agenda." *Id.* § 3(a)–(b). Respondents refer to USDS and the U.S. DOGE Service Temporary Organization collectively as "DOGE."

The E.O. directed the heads of every federal agency to establish "DOGE Team[s]," with the leaders of those teams selected "in consultation with" the USDS Administrator and directed to "coordinate their work with USDS." *Id.* § 3(c). Agency heads were also instructed to "take all necessary steps, in coordination with the USDS Administrator and to the maximum extent consistent with law, to ensure USDS has full and prompt access to all unclassified agency records, software systems, and IT systems." *Id.* § 4(b); *see also id.* § 4(a). Like most executive orders, the E.O. states that it "shall be implemented consistent with applicable law." *Id.* § 5(b); *id.* § 5(a)(i) (stating that nothing in the E.O. affects "the authority granted by law to an executive department or agency, or the head thereof").

C. DATA ACCESS AT SSA

DOGE began its work at SSA on January 30, demanding immediate access to systems, data, and source code—without articulating a need for such expansive access. Gov't App. 46a–48a. Sensitive to the requirements of the Privacy Act and the Agency's own regulations, practices, and policies, Agency leadership offered to provide anonymized and read-only data that would enable DOGE to pursue its work without exposing PII. *Id.* 47a. The resulting standoff ultimately led to the resignation of top SSA officials who had refused to provide data on DOGE's terms. *Id.* Leland Dudek, an SSA employee who had been put on leave for unauthorized data sharing, was designated acting commissioner. Ken Thomas, *The Newly Elevated Acting Head*

of Social Security Covertly Helped DOGE, Wall Street J. (Feb 20, 2025) https://perma.cc/F3V3-XG9R.[1] The Agency then granted DOGE unfettered access to SSA data systems containing enormous quantities of sensitive, private, and personally identifiable records. Gov't App. 48a; *see also* 25a (quoting counsel for the government's acknowledgment during a hearing that SSA had "provide[d] DOGE affiliates with access to a 'massive amount' of records"). Doing so ran counter not just to the Privacy Act but also to longstanding regulations and agency policies regarding the principles of least-privilege access and segregation of duties. *Id.* 7a–8a, 117a–18a.

II. PROCEDURAL BACKGROUND

Respondents are two national labor and membership associations and one grassroots advocacy organization. They filed suit against SSA and three other defendants on February 21, 2025, on behalf of their members, and amended their complaint to reflect the rapidly changing facts on March 7. Respondents simultaneously moved for a temporary restraining order, supporting their motion with ten declarations. *See id.* 44a (summarizing and citing declarations).

After holding a lengthy hearing on Respondents' motion, the district court issued a temporary restraining order supported by a 137-page opinion. Dist. Ct. Docs. 48–49. The temporary restraining order, which was entered on March 20, barred the disclosure of PII to DOGE personnel at the Agency under certain circumstances and, *inter alia*, required the same personnel to disgorge and delete any PII previously obtained. Dist. Ct. Doc. 48.

[1] Frank Bisignano replaced Mr. Dudek as Commissioner on May 7.

Hours after issuance of the temporary restraining order, then-Acting Commissioner Dudek threatened to cease Agency operations.[2] *See* Dist. Ct. Doc. 51. The district court docketed two letters directing the government to contact chambers if it had any concerns about the text of the Order or needed clarification thereof. Dist. Ct. Docs. 51, 52. The government did not. Instead, it purported to appeal the temporary restraining order to the Fourth Circuit, which dismissed the appeal for lack of appellate jurisdiction. *See* No. 25-1291, Doc. No. 20 (Apr. 1, 2025).

The government consented to an extension of the temporary restraining order for 14 days to allow for briefing on Respondents' motion for a preliminary injunction, which they filed on April 4. Dist. Ct. Docs. 68, 110. Respondents there supplemented the record with eleven additional declarations, including those of former Agency leadership and industry experts. Defendants produced the administrative record but did not submit any declarations in connection with their opposition to a preliminary injunction. *Id.* And while the district court indicated that it would be helpful for Acting Commissioner Dudek to appear at the preliminary injunction hearing to address "the various SSA projects that Mr. Dudek has referenced in his [previous] declarations, and for which he claims the DOGE Team requires access to PII," the government elected to "stand on the record in its current form," Gov't App. 32a,

[2] Lisa Rein & Maegan Vazquez, *Federal judge pushes back on acting Social Security head over threat to close agency*, Wash. Post (Mar. 22, 2025), https://perma.cc/LB4F-FBFB ("Dudek first made his threat to close down the agency during a Bloomberg News interview Thursday night."). In a subsequent interview with the Washington Post, Dudek acknowledged his "about-face" and said, "The White House did remind me that I was out of line and so did the judge. And I appreciate that." *Id.*

leaving the record barren of credible evidence that the DOGE Team had any need for the massive amount of information it wanted to access. *See id.* 7a (noting the district court's finding that "the evidentiary record establishes no need for such access"). On April 17, two days after a lengthy hearing on Respondents' motion, the district court issued a preliminary injunction. *Id.* 169a–74a. As the Fourth Circuit noted, the injunction was accompanied by a 148-page memorandum opinion that addressed the "extensive evidence" in the case in addition to "refining the pertinent legal analysis" set forth in the district court's prior opinion. *Id.* 4a.

The district court acknowledged that "rooting out possible fraud, waste, and mismanagement in the SSA is in the public interest" but emphasized that the government cannot "flout the law" to do so. *Id.* 165a. Regarding the government's argument that an injunction would cause it irreparable harm, the district court determined that the government's sudden desire to take actions it had been considering for years but had not "gotten around to" was insufficient to establish the requisite need-to-know. *Id.* (quoting statements by Acting Commissioner Dudek during a telephone conference with the district court). Critically, the district court—after spending more than 30 pages on a detailed review of the Administrative Record, declarations from both parties, and statements by counsel and Acting Commissioner Dudek, *see, e.g.*, *id.* 143a–154a—found that the government had "not provided the Court with a reasonable explanation for why the entire DOGE Team needs full access to the wide swath of data maintained in SSA systems" and had run "roughshod over SSA protocols for proper hiring, onboarding, training, and, most important, access

limitations and separation of duties," *id.* 157a–58a, 154a (describing the Agency's explanations of need as "imprecise, contradictory, and insufficient"). The district court concluded that Respondents are likely to succeed on their claims that the Agency's actions violate the Privacy Act and Administrative Procedure Act and had met their burden with respect to the remaining preliminary injunction factors. *Id.* 166a.

The preliminary injunction is narrow and, contrary to the government's assertions, permits SSA to disclose both anonymized and non-anonymized data to DOGE Team members. The Agency may provide DOGE Team members access to redacted or anonymized information when (a) the persons to whom access is given have completed training and background checks comparable to those typically required for SSA employees with similar data access; (b) inter-agency detailing agreements are completed for members of the SSA DOGE Team; and (c) all ordinarily required Agency paperwork is completed. *Id.* 170a–71a. And the injunction permits the Agency to provide the DOGE Team with access to "discrete, particularized, and non-anonymized" information once the Agency also obtains a written statement from the relevant DOGE Team member explaining the need for the record and why anonymization is not feasible. *Id.* 171a. That condition reflects the requirements of the Privacy Act, SSA regulations, and longstanding Agency practice and policy.

The same day the injunction issued, the government appealed and moved for a stay pending appeal from the district court; it filed a motion for a stay in the Fourth Circuit the following day. The district court denied a stay on April 22, and the Fourth

Circuit did the same on April 30. The Fourth Circuit subsequently ordered the underlying appeal to be heard by the full court sitting en banc. App. 10a. The government's brief is due on June 9, with Respondents' following shortly thereafter. *Id.* 7a.

The government filed the instant application on May 2.

ARGUMENT

"A stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (cleaned up). This Court, therefore, will stay a decision under review in a court of appeals "only in extraordinary circumstances" and "upon the weightiest considerations." *Williams v. Zbaraz*, 442 U.S. 1309, 1311 (1979) (Stevens, J., in chambers) (citation omitted); *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320 (1994) (Rehnquist, C.J., in chambers) (citation omitted). The government bears "an especially heavy burden" where, as here, it seeks an emergency stay in this Court after the court of appeals denied such relief. *Edwards v. Hope Med. Grp. For Women*, 512 U.S. 1301, 1302 (1994) (Scalia, J., in chambers) (quoting *Packwood*, 510 U.S. at 1320 (Rehnquist, C.J., in chambers)).

To obtain a stay pending appeal, the government bears the burden to establish (1) "a reasonable probability" that this Court would eventually grant certiorari on the question presented in the stay application, (2) a fair prospect that the Court will reverse the decision below, and (3) a likelihood that irreparable harm will result from

the denial of a stay. *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 572 U.S. 1301 (2014) (Roberts, C.J., in chambers) (citation omitted). The Court must also consider whether a stay would substantially injure the other parties interested in the proceedings and whether it would serve the public interest. *Ohio v. EPA*, 603 U.S. 279, 291 (2024).

The government falls far short of meeting this standard. The application does not present an issue meriting this Court's review, the government cannot show a likelihood of success on the merits, and the equities tilt decisively against disturbing the status quo in this posture.

I. THIS CASE DOES NOT WARRANT DISCRETIONARY REVIEW

To begin, the application does not present a question meriting this Court's discretionary review. *See* S. Ct. R. 10; *Does 1-3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in the denial of application for injunctive relief) ("When this Court is asked to grant extraordinary relief, [its decision is] a discretionary judgment about whether the Court should grant review in the case."). As the government acknowledges, it must show that it presents such a question to obtain relief here. Gov't Br. at 14; *Teva Pharms.*, 572 U.S. at 1301. It has not done so.

First, the issues raised in this application have generated no opinion from any court of appeals apart from the Fourth Circuit, let alone created a circuit conflict. This is the only case challenging DOGE data access at SSA. Cases challenging DOGE data access at other agencies, which implicate different factual contexts, are

percolating in the lower courts.[3] The only other case even before a court of appeals is also pending in the Fourth Circuit. *See Am. Fed'n of Teachers v. Bessent*, No. 25-1282 (4th Cir.). In that case, which involves a factually distinct challenge to data access at the Office of Personnel Management and the Departments of Treasury and Education, the district court's injunction was stayed by a Fourth Circuit motions panel after that court denied initial hearing of the stay motion en banc. *See id.* Doc. No. 17 (Apr. 7, 2025).

This case and others raise complex legal issues on specific factual records that "could benefit from further attention in the courts of appeals." *Spears v. United States*, 555 U.S. 261, 270 (2009) (Roberts, C.J., dissenting). That the courts of appeals have not yet addressed the issues presented in this case or others raising similar legal claims "counsels against a grant of extraordinary relief in this case." *Does 1-3*, 142 S. Ct. at 18 (Barrett, J., concurring) (denying application for injunctive relief in case that "is the first to address the questions presented"). This Court is one of final, not first, review. *See Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (citation omitted). And this case involves no reason to deviate from that principle.

Second, the lower courts in this case did not depart from judicial norms, and certainly did not do so in a way meriting this Court's supervision. In granting the

[3] See *All. for Retired Ams. v. Bessent*, No. 1:25-cv-313 (D.D.C.); *Am. Fed'n of Gov. Emps. v. Office of Personnel Mgmt.*, No. 1:25-cv-1237 (S.D.N.Y.); *Am. Fed'n of Lab. v. Dep't of Lab.*, No. 1:25-cv-339 (D.D.C.); *Ctr. for Taxpayer Rts. v. IRS*, No. 1:25-cv-457 (D.D.C.); *Elec. Priv. Info. Ctr. v. Office of Personnel Mgmt.*, No. 1:25-cv-255 (E.D.V.A.); *Gribbon v. Musk*, 1:25-cv-422 (D.D.C.); *Nemeth-Greenleaf v. Office of Personnel Mgmt.*, No. 1:25-cv-407 (D.D.C.); *New York v. Trump*, No. 1:25-cv-1144 (S.D.N.Y.).

preliminary injunction, the district court "carefully and thoughtfully examined the evidence and legal issues." Gov't App. 4a. In denying the government's stay application, the Fourth Circuit implicitly determined, among other things, that the district court's analysis on the merits was, at least, reasonable, and that the government would not be irreparably harmed by the preliminary injunction remaining in place while that court considered the injunction. *See generally id.* 1a–15a. Those decisions reflect nothing more than the ordinary judicial process, into which this Court need not intervene.

Third, the government does not identify, as it must, any question of law warranting this Court's review. Respondents bring a routine challenge to an agency's actions that are contrary to law (including the Privacy Act), represent a drastic shift in policy, and are otherwise arbitrary and capricious. *See Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986). The government may disagree with the lower courts' handling of those legal questions, but absent unusual circumstances not present here, the application of settled legal principles to a new factual circumstance does not warrant this Court's review.

The government's application for a stay—"on a short fuse without benefit of full briefing and oral argument," *Does 1-3*, 142 S. Ct. at 18 (Barrett, J., concurring)—lacks any argument that this case is the type warranting this Court's review. This Court should decline the government's application on that basis alone.

II. THE GOVERNMENT IS UNLIKELY TO SUCCEED ON THE MERITS

The government contends that the district court erred by finding that Respondents are likely to prevail as to four issues: the existence of Article III standing; the presence of final agency action; the merits of their Privacy Act claim; and the merits of their APA claim. Those arguments fail across the board.

The government has not made the requisite "strong showing that [it] is likely to succeed on the merits." *Nken*, 556 U.S. at 434. The opposite is true: Respondents have already demonstrated that they are likely to prevail on each of these issues. The government's application should be denied.

A. RESPONDENTS HAVE STANDING

The government is not likely to prevail on its argument that individuals do not have standing to seek injunctive relief when the government grants unauthorized, unlawful access to their most private data.

Article III's concreteness requirement does not necessitate a "tangible" harm; intangible harms are concrete if they bear "a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 425 (2021). Plaintiffs challenging a statutory violation can therefore establish standing by "identif[ying] a close historical or common-law analogue for their asserted injury" for which courts have "traditionally" provided a remedy. *Id.* at 424 (citing, *inter alia*, *Gadelhak v. AT&T Services, Inc.*, 950 F.3d 458, 462 (7th Cir. 2020) (Barrett, J.), *cert denied*, 141 S. Ct. 2552 (2021)). Here, that common-law analogue is the tort of intrusion upon seclusion.

1. *TransUnion*, the seminal case concerning the concreteness of intangible harms, expressly identified the tort of intrusion upon seclusion as one traditionally recognized as providing a basis for lawsuits in American courts. *Id.* at 425. Intrusion upon seclusion is rooted in the common law right to privacy, the broad contours of which were outlined by Samuel Warren and Louis Brandeis in 1890. Samuel Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). Warren and Brandeis defined the right to privacy as the right "to be let alone" and emphasized that privacy violations involve an "injury to the feelings." *Id.* at 195, 197. Modern privacy law was subsequently shaped by William Prosser, who described the invasion of privacy as "not one tort, but a complex of four." William L. Prosser, *Privacy*, 48 Cal. L. Rev. 382, 389 (1960). Prosser defined the four versions as:

> (1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs;
> (2) public disclosure of embarrassing private facts about the plaintiff;
> (3) publicity which places the plaintiff in a false light in the public eye; and
> (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

Id. According to Prosser, those four torts "are tied together by the common name [*i.e.*, invasion of privacy], but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff . . . 'to be let alone.'" *Id.* (quoting Thomas M. Cooley, *A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract* 29, Callaghan & Co. (1st ed. 1879)). The *Restatement (Second) of Torts* adopts that understanding of the tort, as have many states and the District of Columbia. *Restatement (Second) of Torts* § 652B (Am. Law. Inst. 1977) ("*Restatement*"); Gov't App. 76a–77a (collecting cases).

The *Restatement* defines the tort of intrusion upon seclusion thusly: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of privacy, if the intrusion would be highly offensive to a reasonable person." *Restatement* § 652B; *see* Eli A. Meltz, *No Harm, No Foul: Attempted Invasion of Privacy and the Tort of Intrusion Upon Seclusion*, 83 Fordham L. Rev. 3431, 3440–41 (May 2015) (approximately thirty-eight states have explicitly adopted the *Restatement*'s formulation or one closely mirroring it).

2. Intrusion upon seclusion occurs where someone "intentionally intrudes, physically *or otherwise*, upon the solitude or seclusion of another or his private affairs or concerns . . . if the intrusion would be highly offensive to a reasonable person." *Restatement* § 652B (emphasis added). For example, intrusion upon seclusion may occur by an "investigation or examination into [the plaintiff's] private concerns, as by opening his private and personal mail, searching his safe or his wallet, examining his private bank account, or compelling him by a forged court order to permit an inspection of his personal documents." *Id.* § 652B cmt. b.

Intrusion upon seclusion does not require physical ingress. *See, e.g.*, *Yates v. Com. Index Bureau, Inc.*, 861 F. Supp. 2d 546, 552 (E.D. Pa. 2012) (intrusion upon seclusion covers not just physical intrusion but also "some other form of investigation or examination into [a] plaintiff's private concerns"); *Broughton v. McClatchy Newspapers, Inc.*, 588 S.E.2d. 20, 27 (N.C. Ct. App. 2003) ("Generally, there must be a physical or sensory intrusion or an unauthorized prying into confidential personal

records to support a claim for invasion of privacy by intrusion."). The tort also applies when the information is stored electronically rather than in a specific physical location. *See, e.g.*, *Garey v. James S. Farrin, P.C.*, 35 F.4th 917, 921–23 (4th Cir. 2022) (plaintiffs had standing to pursue a claim that defendants obtained their names and addresses from state motor vehicle records). That comports with the origin and history of the tort, the "touchstone" of which is "[a] legitimate expectation of privacy." *Fletcher v. Price Chopper Foods of Trumann, Inc.*, 220 F.3d 871, 877 (8th Cir. 2000).

Intrusion upon seclusion also does not require the use or disclosure of the confidential information obtained. *See, e.g.*, *Restatement* § 652B cmt. b; *Nayab v. Cap. One Bank (USA), N.A.*, 942 F.3d 480, 491–92 (9th Cir. 2019) (explaining that when a third party obtains a consumer's credit report, "the consumer is harmed because he or she is deprived of the right to keep private the sensitive information about his or her person"); *Bohnak v. Marsh & McLennan Cos.*, 79 F.4th 276, 286 (2d Cir. 2023); *Persinger v. Sw. Credit Sys., L.P.*, 20 F.4th 1184, 1193 (7th Cir. 2021); *Am. Fed'n of Lab. & Cong. of Indus. Orgs. v. Dep't of Lab.*, No. 1:25-cv-339, 2025 WL 1129227, at *6 (D.D.C. Apr. 16, 2025) (Bates, J.) (citing, as an example, *Froelich v. Adair*, 213 Kan. 357, 359–61 (Kan. 1973)). Disclosure of private information is a separate tort, and its requirements are irrelevant here. *See, e.g.*, *O'Leary v. TrustedID, Inc.*, 60 F.4th 240, 245–46 (4th Cir. 2023) (considering intrusion upon seclusion and disclosure of private information separately).

3. The district court properly concluded, based on extensive fact-finding, that the harm Respondents suffer is analogous to that addressed by intrusion upon

seclusion. Gov't App. 98a–105a. SSA's records contain the same sensitive information traditionally found and kept in a home ("tax records," "birth certificates"), bank or wallet ("financial and bank information"), physician's office ("medical and mental health records," "hospitalization records"), or other secluded location ("work and earnings history"). *Id.* 5a, 83a–84a. The government's unauthorized disclosure of that "trove of medical and mental health records," *id.* 98a, would be highly offensive to any reasonable person. The same is true of the detailed, personally identifiable financial information in the Agency's records. *See Persinger*, 20 F.4th at 1192 (deeming unauthorized access to personal financial information analogous to intrusion upon seclusion).

The American people who "handed over" their sensitive, personal information to SSA had "every reason to believe that the information would be fiercely protected" due to the Agency's longstanding commitment to data privacy and security. Gov't App. 6a; *id.* 4a–6a (relying on the "extensive evidence proffered by the parties" and "carefully and thoughtfully examined" by Judge Hollander). In light of these factual findings, the government has failed to make the requisite "strong showing" that Respondents do not have standing. *See Nken*, 556 U.S. at 434.

Congress's enactment of the Privacy Act only underlines that conclusion. This Court has explained that "[i]n determining whether a harm is sufficiently concrete to qualify as an injury in fact, . . . Congress's views may be 'instructive.'" *TransUnion*, 594 U.S. at 425 (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016)). Congress can "'elevat[e] to the status of legally cognizable injuries concrete, de facto injuries

that were previously inadequate in law.'" *Spokeo*, 578 U.S. at 341 (alteration in original) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 578 (1992)). And Congress enacted the Privacy Act specifically to "protect the privacy of individuals identified in information systems maintained by Federal agencies." *Chao*, 540 U.S. at 618 (quoting Privacy Act of 1974, Pub. L. No. 93-579, § 2(a)(5)). As District Judge John Bates recently summarized, Congress "'identified' an individual's interest in his information being viewed only by the federal agency that maintains it—and even then, only by those employees with a need to view it—as 'a modern relative of a harm with long common law roots.'" *Am. Fed'n of Lab.*, 2025 WL 1129227, at *6 (Bates, J.) (quoting *Gadelhak*, 950 F.3d at 462 (Barrett, J.)); *cf. Carpenter v. United States*, 585 U.S. 296, 392–93 (2018) (Gorsuch, J., dissenting) (discussing, in the Fourth Amendment context, why legislators are well-suited to understand privacy concerns).

With respect to agency systems of records, the Privacy Act effectively "created a new sphere in which individuals not only expect privacy, but have a right to it—*i.e.*, a sphere of seclusion." *Am. Fed'n of Lab.*, 2025 WL 1129227, at *6. Intrusion upon that sphere causes injury similar in kind to the intrusion upon other private spheres, such as one's home. *Id.*

That the intruders here are government employees makes no difference to the analysis. Congress identified a person's interest in their information being viewed "only by those employees with a need to view it." *Id.* (quoting *Gadelhak*, 950 F.3d at 462 (Barrett, J.)). The evidentiary record establishes that DOGE Team members have no need for "unbridled access to the [personally identifiable information] of countless

Americans." Gov't App. 7a. Their intrusion into that sphere of seclusion thus violates Respondents' right to privacy.

The government's provision of unauthorized access to confidential records is, of course, different from federal personnel "surreptitiously invading plaintiffs' hotel rooms or monitoring their private communications," Gov't App. 19, and Respondents have not claimed otherwise. But this Court has never required "[a]n exact duplicate in American history and tradition." *TransUnion*, 594 U.S. at 424. And SSA's decision to disclose to DOGE, without establishing need, "all records of [the Agency], records that include the highly sensitive personal information of essentially everyone in our Country," Gov't App. 3a, inflicts the same *type* of harm, which is sufficient.

The government has not met its "heavy burden" to show that Respondents are unlikely to prevail on this point. Respondents have standing to pursue their claims, and the Court should deny the government's application for a stay pending appeal.

B. RESPONDENTS CHALLENGE A FINAL AGENCY ACTION

As the district court concluded after a detailed review of extensive record evidence, Respondents are likely to succeed on their claim that SSA's adoption of a new policy of access to systems of records, *exclusively* applicable to DOGE Team members, was final agency action reviewable under the Administrative Procedure Act, 5 U.S.C. § 704. The government cannot make the requisite strong showing otherwise. *See Nken*, 556 U.S. at 434.

1. By adopting a new policy to provide unfettered access to SSA systems of records to DOGE Team members, SSA has taken a discrete "agency action" within

the meaning of 5 U.S.C. § 704. As the district court explained, Respondents "do not challenge individual [access] decisions . . . their view is that the decisions, collectively, amount to a change in SSA policy, and the change [in policy] constitutes a final agency action." Gov't App. 112a. The government's assertions to the contrary are little more than a series of red herrings demonstrating that individual grants of access—which are not the target of Respondents' APA challenges—pursuant to the changed policy would not constitute agency action.

Based on the Administrative Record and other evidence before it, the district court determined that, as a factual matter, SSA's decision to provide any member of the DOGE Team with expansive access to SSA systems of records (without signed detail agreements, adequate training, completed background investigations, executive work forms, or actual or articulated need) constituted a "sea change" in SSA's practice and policies. *Id.* 125a. Respondents' APA claims challenge *that* agency action: a sweeping and significant change to SSA access policies.

Agency actions "include[] the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent" thereof. 5 U.S.C. § 551(13). The APA defines "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." *Id.* § 551 (4). On these definitions, it is readily apparent that an agency's "decision . . . to adopt a policy of disclosing confidential information" is an agency action within the meaning of the APA. *Venetian Casino Resort, LLC v. EEOC*, 530

F.3d 925, 931 (D.C. Cir. 2008); *see also Am. Fed'n of Lab.*, 2025 WL 1129227, at *12 (treating nearly identical access policy changes at other agencies as final agency action and collecting cases).

The government's sparse arguments to the contrary only prove the point. The government principally argues that access decisions as to individual employees do not constitute "agency action" for purposes of the APA. Gov't Br. at 22–23. But the government "miss[es] the mark when it comes to defining plaintiffs' alleged agency action. [Respondents] do not challenge the *individual decisions* to give particular . . . personnel access to agency systems." *Am. Fed'n of Lab.*, 2025 WL 1129227, at *12 (emphasis in original). Instead, Respondents challenge the Agency's adoption of a new access *policy*—by definition, that entails review of an unusual, "circumscribed, discrete agency action[]," *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62 (2004), an eminently typical and workable role for federal district courts. Agencies may *follow* their access policies "thousands" of times daily, Gov't Br. 22, but they adopt or change those policies far less frequently, and reviewing *those* actions is a far cry from "general judicial review of [agencies'] day-to-day operations," *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 899 (1990).

2. SSA's decision to adopt wholesale changes to its prior access policies was also "final" under the APA. Agency action is final when it (1) "mark[s] the 'consummation' of the agency's decisionmaking process," *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (quoting *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)) and (2) is "one by which 'rights or obligations have been determined'

or from which 'legal consequences will flow,'" *id.* (quoting *Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). The government does not contest that the Agency's action meets the first *Bennett* prong, and it plainly satisfies the second as well.

Under the "'pragmatic' approach [this Court] has long taken to finality," *U.S Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 591 (2016) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)), SSA's access policy decision "determine[s] the rights of those whose information is being disclosed and the obligations of the [SSA] defendants," *Am. Fed'n of Lab.*, 2025 WL 1129227, at *13. This Court has previously recognized that regulations permitting disclosure of information "certainly affect individual . . . confidentiality rights of those who submit [that] information." *Chrysler Corp. v. Brown*, 441 U.S. 281, 303 (1979).

This case is on all fours with *Venetian Casino*, in which the D.C Circuit held that an agency's decision to adopt a policy of disclosing confidential information without notice was final agency action for purposes of the APA. *See* 530 F.3d at 931. In an effort to distinguish *Venetian Casino*, the government suggests that, in reaching its finality determination in that case, the D.C. Circuit relied in some way on the "direct and immediate consequences" of third-party disclosure for the plaintiffs. Gov't Br. at 24. But the D.C. Circuit did no such thing.

The government separately relies on two inapposite authorities to suggest that third-party disclosure is a necessary component for finality. Gov't Br. at 24. Both *TransUnion* and *Hunstein v. Preferred Collection & Management Services, Inc.*, 48

F.4th 1236 (11th Cir. 2022) (en banc) concerned the question of whether third-party disclosure was necessary to establish standing on the basis of harm analogous to torts that required third-party disclosure. That question has no bearing on finality, and indeed, does not bear on this case, nor upon intrusion upon seclusion, at all.

C. RESPONDENTS ARE LIKELY TO PREVAIL ON THE MERITS OF THEIR PRIVACY ACT CLAIM

SSA's decision to allow the DOGE Team access to the full array of SSA's systems of records without need for such access is wholly inconsistent with past agency practices regarding information access and violates the Privacy Act. "[I]n order to protect the privacy of individuals identified in information systems maintained by Federal agencies," the Privacy Act "regulate[s] the collection, maintenance, use, and dissemination of information by such agencies." Pub. L. No. 93-579, § 2(5), 88 Stat. 1896 (1974). Under the Privacy Act, agencies, including SSA, may not "disclose" records except in certain enumerated circumstances, none of which is present here. 5 U.S.C. § 552a(b).

The government argues exclusively that SSA's disclosure of Privacy Act records to DOGE Team members is permitted by the "need-to-know" exception of 5 U.S.C. § 552a(b)(1). Gov't Br. at 24–27. The government is wrong. The need-to-know exception applies only to those employees "who have a need for the record in the performance of their duties." *Id.* The members of the SSA DOGE Team do not meet this standard for individual SSA systems of records, let alone *all* SSA records, nor did SSA make any effort to assess whether DOGE Team members had need for the access they received. Further, only employees of the agency that controls disclosed records

are properly subject to the need-to-know exception, and the members of the SSA DOGE Team are not properly considered employees of SSA.

1. The government has never shown—as it must to avail itself of the need-to-know exception—that SSA DOGE Team members have a need to access SSA's systems of record. The Privacy Act requires the government to show that *each* disclosure was supported by a need: Each time a DOGE Team member was given access to a system of records, he must have accessed the system only "in connection with the performance of the duties assigned to him and [must have] had to do so in order to perform those duties properly." *Bigelow v. Dep't of Def.*, 217 F.3d 875, 877 (D.C. Cir. 2000). The government has never identified, and the DOGE Team never had, such a need for unfettered access to any SSA system. In its application, it does not even make an effort to do so, except with regard to systems accessed in the course of "investigating whether the government has made improper expenditures." Gov't Br. at 27. Instead, the government baldly asserts that access to systems is "necessarily required to" modernize them. Gov't Br. at 26. The government makes no effort to explain why access to Privacy Act-protected information within those systems is needed for those purposes. That is fatal under the Privacy Act.

Nor does the government's one limited articulation of need—"investigating whether the government has made improper expenditures," Gov't Br. at 27, hold up. The government has made no effort to address Respondents' unrefuted declaration that "when analysts or auditors review agency data for possible payment issues, including for fraud, the review process would start with access to high-level,

anonymized data based on the least amount of data the analyst or auditor would need." Dist. Ct. Doc. 39-1, ¶ 4. If indicia of fraud are identified, those analysts or auditors would then, consistent with the Privacy Act, be able to access non-anonymized data pertaining *only* to suspicious records. *Id.* In other words, even the anti-fraud work the government now characterizes as creating a need for sweeping access in fact only provides a need for access to a limited subset of records, after initial review is conducted on anonymized data. "[F]ull, non-anonymized access of individual data on every person who has a social security number or receives benefits from Social Security is unnecessary at the outset of any anti-fraud or other auditing project." *Id.*

The government primarily relies on the E.O. and Exec. Order No. 14,243, 90 Fed. Reg. 13681 (Mar. 20, 2025), to establish its purported need, *see* Gov't Br. at 26, but Executive Orders cannot supersede a duly enacted statute and do not demonstrate that any DOGE Team member needs access to any record "in order to perform [his] duties properly." *Bigelow*, 217 F.3d at 877 (describing requirements to satisfy Privacy Act need-to-know exception). Executive Order 14,158 created the President's "DOGE Agenda," of "modernizing Federal technology and software to maximize governmental efficiency and productivity," E.O. § 1, including through a "Software Modernization Initiative." *Id.* § 4. Executive Order 14,243, which was not issued until *after* SSA changed its access policies, identified "Administration priorities related to the identification and elimination of waste, fraud, and abuse."

Exec. Order No. 14,243 § 3.[4] These Executive Orders purport to provide a reason for agency DOGE Teams' work, but such generalized direction to the whole of government is not sufficient to meet the Privacy Act's standard that individual agencies determine the *need* for various individuals to access to any given system, let alone to permit unfettered access to all systems in that agency. The government's interpretation would eliminate Privacy Act requirements for those implementing the DOGE agenda across the government.

The government's representation that sweeping access is needed to pursue anti-fraud work is at odds not just with the long-standing standard practice described above, but with the facts of this case. Based on its review of the Administrative Record, the district court determined as a matter of fact that the DOGE Team did not *need* access to Privacy Act-protected information but would merely be able to work faster with that information. *See* Gov't App. 149a. The government has never disputed that characterization and instead now suggests that an agency's determination of the speed at which it wishes to do its work constitutes "need" for Privacy Act purposes. But this is directly contrary to established law that the need-to-know exception can only authorize disclosure when the recipient of the information "had to" view the information to do their job. *Bigelow*, 217 F.3d at 877. And, in any event, there is no indication that the government engaged in that particular analysis

[4] The government points to both the E.O. and Exec Order No, 14,243's instructions that agency heads provide broad systems access to DOGE Teams and others. Gov't Br. 26. Such instructions do not bear on whether those employees need that access in connection with their duties. Each executive order expressly required that agencies only grant that access "consistent with law." E.O. § 4(b); Exec. Order 14,243 § 3(c).

before granting unfettered access to DOGE Team members, which is fatal to the government.

Finally, Executive Orders, by themselves, cannot "license the defendants to violate the Privacy Act." *Parks v. IRS*, 618 F.2d 677, 681 (10th Cir. 1980). Allowing generalized Executive Orders to supply a "need" for access under 5 U.S.C. § 552a(b)(1) would specifically frustrate the Privacy Act, which was "designed to prevent the kind of illegal, unwise, overbroad, investigation and record surveillance of law-abiding citizens produced in recent years from actions of some over-zealous investigators and the curiosity of some government administrators." S. Rep. No. 1183, 93d Cong (1974). If two broad and general Executive Orders can be read to provide adequate "need" for access to agency systems of record generally, the Privacy Act will no longer guarantee any such protections.

2. The members of the SSA DOGE Team are not employees of SSA for purposes of the Privacy Act. This, too, independently closes off the need-to-know exception, which "applies only to *intra-agency* disclosures." *Britt v. Naval Investigative Serv.*, 886 F.2d 544, 547 (3d Cir. 1989) (emphasis added). The district court did not reach this issue, instead relying on the factual determination that the DOGE Team had no need for access. Gov't App. 138a.

To determine which agency, "as a practical matter," *Jud. Watch, Inc. v. Dep't of Energy*, 412 F.3d 125, 132 (D.C. Cir. 2005), employs an individual federal employee, it is appropriate to consider "all the circumstances," *id.* at 131 (quoting *Spirides v.*

Reinhardt, 613 F.2d 825 (D.C. Cir. 1979)), including the matters on which an employee works and who supervises them, *id.* at 131–32.

The members of the SSA DOGE Team perform DOGE work and are functionally supervised by USDS. The government's own characterization of their work relies entirely on the Executive Orders, Gov't Br. at 25–28, which exclusively pertain to work on the DOGE Agenda and the government-wide work required by Exec. Order No. 14,243. Neither E.O. provides any indication that DOGE Teams perform work for their host agencies.

Indeed, Exec. Order No. 14,158 requires DOGE Teams to "coordinate their work with" USDS, while requiring only that they "advise" their host agency heads, *id.* § 3(c). To "coordinate" their work with USDS means that the SSA DOGE Team must "bring into a common action, movement, or condition" or "harmonize" their work with USDS. "Coordinate," *Webster's Third New International Dictionary* 501 (1971). Because *every* agency DOGE Team is subject to E.O. 14,158, it would be impossible to read the E.O. as requiring DOGE Teams to be supervised by each agency and simultaneously harmonized in their work. Coordination can therefore only mean that DOGE Teams are required to work in a way that "harmonizes" with the instructions and expectations of USDS. In contrast, those same teams are required only to "advise" agency heads, which requires neither supervision by agency heads, nor even any form of alignment with them. In practice, in order to comply the with E.O., the SSA DOGE Team must be taking direction from and reporting not to the SSA Administrator, but to USDS.

Separate from its position that the DOGE Team's access falls within the need-to-know exception, the government makes several unavailing arguments that it has not violated the Privacy Act. First, the government notes the district court's observation that the need-to-know exception usually applies to a small number of records and suggests that extending the district court's logic would endanger non-DOGE Team SSA employees' access to SSA information. This argument ignores the importance of the district court's point: the need-to-know exception generally applies to relatively few records because employees seldom have a need for expansive access to protected information. *See* Gov't App. 138a–39a (discussing scale of access in light of limited purposes justifying "need').

In addition, the government advances a novel theory that the Privacy Act does not protect information contained within a record so long as an employee has a need for the record itself. This interpretation of the Privacy Act misapprehends the nature of "records" and directly contradicts long-standing OMB guidance on the implementation of the Privacy Act, which explains that a record is "any item of information about an individual that includes an individual identifier; [i]nclud[ing] any grouping of such information . . . [and] can include as little as one descriptive item about an individual." 40 Fed. Reg. 28951, 28951–52 (July 9, 1975). "A record, by this definition, can include another record." *Id.* at 28952. And so, the relevant statutory question—whether the employee needs access to the personally identifiable information within a larger record, not whether the employee needs access to the larger record itself—is the exact opposite question from what the government asks,

see Gov't Br. at 28. Even if the government could make out an argument (which it has not) that the SSA DOGE Team has a need for any given "entire record in the conventional sense (such as a record in a computer system)," 40 Fed. Reg. at 28952, it has not shown the DOGE Team to have a need to access each piece of identifying information—*i.e.*, each record—contained within those records.

D. RESPONDENTS ARE LIKELY TO PREVAIL ON THE MERITS OF THEIR ARBITRARY AND CAPRICIOUS CLAIM

SSA granted unprecedented and sweeping access to the most sensitive information held by the government, doing so without acknowledging the sea change in their own practices and policies, without considering the reliance interests millions of Americans have in SSA continuing to preserve the confidence of their information, and without acknowledging or considering the risks posed by unauthorized DOGE Team access. Any one of these bases is sufficient for Respondents to prevail on their claim that SSA acted arbitrarily and capriciously in modifying their existing access policies to grant the DOGE Team such unprecedented access to SSA systems. *See Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2018) ("When an agency changes its existing position, it . . . must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)); *id.* at 221–22 ("In explaining its changed position, an agency must also be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" (quoting *Fox Television*, 556 U.S. at 515)); *see Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (agency action is

arbitrary and capricious where agency "failed to consider an important aspect of the problem").

The government does not dispute any of those bases, instead repeating its view that SSA provided a reasonable explanation for the access it granted the SSA DOGE Team and pointing to a *post hoc* justification for the Agency's action provided by a judge of the Fourth Circuit in a concurring opinion in another case involving other agencies and so, necessarily, other reasoning. Gov't App. at 29. This is no answer to SSA's arbitrary and capricious failures to comply with the minimum requirements of the APA.

III. THE REMAINING FACTORS FAVOR DENIAL

The remaining factors likewise favor denial, as the government will not suffer irreparable harm during the pendency of expedited appellate review, Respondents will be harmed absent the injunction, and the public interest favors maintaining the injunction pending further proceedings.

A. THE GOVERNMENT WILL NOT SUFFER IRREPARABLE INJURY

Emergency intervention by this Court is unnecessary because the government will not sustain irreparable injury while the Fourth Circuit completes its review of the district court's preliminary injunction. The government bears the burden to show irreparable injury, and its conclusory assertion that the district court "issued sweeping injunctive relief," Gov't Br. at 1, falls far short. This is another independent basis for denying the stay.

1. The preliminary injunction is far from "sweeping." It governs SSA's grant of data access to a narrow group of parties and individuals: DOGE, including

the U.S. DOGE Service and the U.S. DOGE Service Temporary Organization, and its leaders; members of the DOGE Team at SSA; and those working with the DOGE Team to fulfill the "DOGE agenda" at the Agency. Gov't App. 169a, 173a–174a. The injunction refers to the "DOGE Team" rather than specific individuals because "the members of the DOGE Team and the number of people on the DOGE Team may change," *id.* 173a, but the government has repeatedly represented to the Court that the SSA DOGE Team includes only eleven individuals, *see, e.g.*, *id.* 24a. And, as the Fourth Circuit noted, the injunction "includes language clarifying that it does not apply to SSA employees who are not 'working on the DOGE agenda' and that it 'has no bearing on the ordinary operations of SSA.'" *Id.* 9a.

2. The "host of judicially imposed conditions" referenced by the government actually numbers closer to two. The injunction permits the Agency to provide the DOGE Team with access to redacted or anonymized data and records once DOGE Team members "have 'received all training that is typically required of individuals granted access to SSA data systems' and have undergone standard background investigations and paperwork." *Id.* 8a. As discussed above, *see* s*upra*, the government has not shown that redacted or anonymized data is insufficient for DOGE's purposes. The preliminary injunction nonetheless allows SSA to provide DOGE affiliates access to "discrete, particularized, and non-anonymized data" when the Agency complies with the previous requirements and obtains a written explanation from the DOGE Team member regarding their need for the record. *Id.*

171a. That condition reflects the longstanding requirements of both the Privacy Act and SSA regulations, practices, and policy.

3. The government's application for a stay pending appeal is rife with assertions that the preliminary injunction prevents DOGE affiliates from carrying out their mandate to modernize federal data systems. *See, e.g.*, Gov't Br. at 2, 31. That focus is a new development: the overwhelming majority of the government's briefing before the district court and the Fourth Circuit emphasized anti-fraud initiatives. *See* App. 5a–6a (When asked how DOGE access to sensitive information maintained by the Agency would further its "mission," counsel for the government responded that "the SSA DOGE team . . . is broadly charged with looking at fraud at the agency.").

Regardless, the preliminary injunction in no way "forc[es] the Executive Branch to stop employees charged with modernizing government information systems from accessing the data in those systems." *See* Gov't Br. at 2. First, the injunction on its face applies only to DOGE Team members who have yet to receive the training typically required of individuals granted access to SSA data systems or complete standard background investigations and paperwork. Gov't App. 8a. Once they receive that training and the paperwork is complete, access may be granted. Second, as the Fourth Circuit noted in its opinion rejecting the government's application for a stay pending appeal, "the evidence demonstrates that DOGE's work could be accomplished largely with anonymized and redacted data, along with discrete pieces of non-anonymized data in limited, appropriate circumstances—as has

long been typical at SSA for the type of technology upgrades and waste, abuse, and fraud detection that DOGE claims to be doing." *Id.* 7a.

4. Despite the "critical" importance of demonstrating it will suffer irreparable harm absent a stay, *Nken*, 556 U.S. at 434, the government dedicates only one short paragraph to describing the alleged harms it faces from the preliminary injunction, *see* Gov't Br. at 31. That is telling. Keeping the preliminary injunction in place while the Fourth Circuit considers the merits of the appeal would not cause irreparable harm to the government. Even if it did, this case would not present a scenario warranting the rare exercise of this Court's discretion to stay an injunction pending appeal to prevent such harm. *See Nken*, 556 U.S. at 433–34.

First, the stay application summarily claims that the preliminary injunction prevents the President from directing the workforce, overseeing government information systems, and enacting its DOGE agenda. Gov't Br. at 31. But neither the stay application nor the record below substantiates that assertion. To succeed on this factor, a stay applicant must do more than "simply show[] some 'possibility of irreparable injury.'" *Nken*, 556 U.S. at 434 (quoting *Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998)). It must point to evidence that supports its assertions of irreparable harm. *See, e.g.*, *Hollingsworth v. Perry*, 558 U.S. 183, 195 (2010) (setting out detailed evidence that party seeking stay provided that "substantiated their concerns"). The government points to no such evidence, which alone warrants denial of a stay.

Second, despite the government casting this case as one of constitutional proportions, the preliminary injunction permits SSA to search for fraud, as the

Agency has done since its inception, and allows DOGE Team members to implement the "DOGE agenda" at SSA. That the injunction also requires SSA to abide by the requirements of the Privacy Act and the Agency's long-held practices and regulations does not frustrate these efforts.

The preliminary injunction allows DOGE work to continue at the Agency, including in a manner that Acting Commissioner Dudek, in a declaration to the district court, deemed acceptable: by examining anonymized data in the first instance and then looking at PII where anomalies or trends are identified. *See* 152a (quoting Dist. Ct. Doc. 74-1). That such a process might take more time than granting DOGE "unfettered access to SSA systems of record," Gov't App. 6a, might be an inconvenience, but is not an irreparable harm.

Certainly, the injunction inflicts no harm of the type meriting this Court's rare intervention. *See Nken*, 556 at 433–44 (a "stay is not a matter of right" even where "irreparable injury may otherwise result," but rather an "exercise of judicial discretion," and the party moving for one must "show[] that the circumstances justify" such an exercise). This conclusion is reinforced by the Acting Commissioner's admission to the district court that at least some of the DOGE projects are "work [SSA has] never gotten around to as an agency," Gov't App. 163a (quoting Dist. Ct. Doc. 73 (Mar. 27, 2025 Tr.)), as well as the government's agreement to extend the temporary restraining order, *see id.* These both belie the assertion that the government will be irreparably harmed by waiting for a decision from the Fourth Circuit.

B. RESPONDENTS WILL SUFFER IRREPARABLE HARM

By contrast, a stay would "substantially injure" Respondents' members, *Nken*, 556 U.S. at 434, because it would allow the government to violate their privacy in violation of both SSA's well-established practices and laws, including the Privacy Act. As the district court found, and the government does not contest, the data SSA houses is among the most sensitive in government records, including "extensive medical and mental health records" and family records. *See* Gov't App. 162a. The invasion of privacy that Respondents' members suffer from unfettered DOGE access to this information cannot be subsequently remedied by damages. *See id.* Nor could the court adequately fashion after-the-fact relief, as the core harm stems from the invasion of privacy itself, and the attendant harms if data are compromised are apt to metastasize quickly in a way that would be difficult for a court to rectify later. Each day the DOGE Team has unfettered access to non-anonymized, sensitive data at SSA, the harm compounds.

The government's arguments to the contrary do not alter this analysis. First, irreparable harm can result from an invasion of privacy even without public disclosure of sensitive information. Indeed, the Privacy Act exists to prevent the harm that can result from both intra-governmental and intra-agency disclosures. *See Overview of the Privacy Act: 2020 Edition*, Dep't of Just. (Oct. 4, 2022) ("Enacted in the wake of the Watergate and the Counterintelligence Program (COINTELPRO) scandals . . . the Privacy Act sought to restore trust in government and to address what at the time was seen as an existential threat to American democracy."). Second, the likelihood of irreparable harm is not reduced merely because, as the government

suggests, Gov't Br. 32, those accessing information purport to follow confidentiality obligations. This argument is contrary to the logic and structure of the Privacy Act itself, which expressly authorizes disclosures within the government only when those disclosures meet the conditions of 5 U.S.C. § 552a(b) or one of its enumerated exceptions. The Act *prohibits* disclosures within the government that do not meet those conditions—even disclosures within the same agency—even though government recipients in those hypothetical situations would still be subject to government confidentiality obligations.

Any minor inconveniences the government may face from the limited preliminary injunction pale in comparison to the harms that will befall Respondents' members if the preliminary injunction is lifted. That is especially so since the injunction here—as the temporary restraining order did before it—requires DOGE Team members to disgorge any data with PII obtained in contravention of agency practice and the law. This case is not one in which immediate relief came too late to "forestall[] impending events that would be difficult to reverse." *Am. Fed'n of Tchrs. v. Bessent*, No. 25-1382, 2025 WL 1023638 (4th Cir. Apr. 7, 2025) (Richardson, J., concurring). Staying the preliminary injunction, however, would allow DOGE Team members to run roughshod over Respondents' members' privacy interests until the Fourth Circuit decides the merits of the preliminary injunction appeal. That harm would be quite challenging, if not impossible, to reverse later. This factor favors Respondents.

C. THE PUBLIC INTEREST FAVORS DENIAL OF A STAY

The government does not argue that the public interest favors a stay—because it does not. While allowing the President to effectuate his agenda is important, and searching for fraud and waste in the government may, as the district court noted, be a "laudable" goal, *see* Gov't App. 166a, the Executive Branch is required to follow the law. "[O]ur system does not permit agencies to act unlawfully even in pursuit of desirable ends," *Alabama Ass'n of Realtors v. HHS*, 594 U.S. 758, 766 (2021) (per curiam) (citation omitted). Indeed, there "'is generally no public interest in the perpetuation of unlawful agency action.'" Gov't App. 130a (quoting *Louisiana v. Biden*, 55 F.4th 1017, 1035 (5th Cir. 2022)); *accord League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). In contrast, there is a strong public interest in "having governmental agencies abide by the laws that govern their existence and operations." *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994); *accord Roe v. Dep't of Def.*, 947 F.3d 207, 230–31(4th Cir. 2020).

That is especially true here, where privacy—a right protected since the country's founding, *see Carpenter*, 585 U.S. at 304–05, and embodied in the Constitution and laws including the Privacy Act—is at stake and where millions have relied on SSA's commitments to keep their sensitive information private for nearly a century. The public interest in presidential policy priorities must be tempered by other, valuable interests, and would be better weighed and considered by the Fourth Circuit in short order.

CONCLUSION

The application should be denied.

Respectfully submitted.

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

AMERICAN FEDERATION OF STATE, COUNTY and MUNICIPAL EMPLOYEES, AFL-CIO, et al.,

Plaintiffs,

v.

SOCIAL SECURITY ADMINISTRATION, et al.,

Defendants.

CASE NUMBER: 1:25-cv-00596-ELH

TRANSCRIPT OF PROCEEDINGS - PRELIMINARY INJUNCTION
BEFORE THE HONORABLE ELLEN L. HOLLANDER
UNITED STATES DISTRICT JUDGE
Tuesday, April 15, 2025

A P P E A R A N C E S

FOR THE PLAINTIFFS:

BY: ALETHEA ANNE SWIFT, ESQUIRE
EMMA R. LEIBOWITZ, ESQUIRE
MARK B. SAMBURG, ESQUIRE
DEMOCRACY FORWARD
[redacted]
Washington, DC 20005

FOR THE DEFENDANTS:

BY: BRADLEY HUMPHREYS, ESQUIRE
ELIZABETH J. SHAPIRO, ESQUIRE
MARIANNE KIES, ESQUIRE
SAMUEL S. HOLT, ESQUIRE
DEPARTMENT OF JUSTICE - CIVIL DIVISION
1100 L Street NW
Washington , DC 20005

Also Present:
Jessica Vollmer, Social Security Administration
Mark Steffensen, Social Security Administration

Proceedings Recorded by Mechanical Stenography
Transcript Produced by Computer-Aided Transcription

P R O C E E D I N G S

(10:08 a.m.)

THE COURTROOM DEPUTY: The matter now pending before this Court is Civil Matter ELH-25-00596, American Federation of State, County and Municipal Employees, AFL-CIO, et al., v. Social Security Administration, et al. This matter comes before this Court for the purpose of a Preliminary Injunction hearing.

Counsel for the record, starting with the plaintiff.

MS. SWIFT: Good morning, Your Honor. My name is Anne Swift. I'm here for plaintiffs. I'm joined by my colleagues, Emma Leibowitz and Mark Samburg.

THE COURT: Good morning. And you may have a seat. Thank you.

MR. HUMPHREYS: Good morning, Your Honor.

THE COURT: And our visitors may have a seat, of course. Before defense counsel introduce themselves, just a reminder, absolutely no cell phone usage at any time. Absolutely no recording of anything that transpires in the Court.

And counsel.

MR. HUMPHREYS: Thank you, Your Honor. Bradley Humphreys on behalf of the defendants. I have with me Elizabeth Shapiro of the Department of Justice; Jessica Vollmer of the Social Security Administration; Mark Steffensen

of the Social Security Administration; Marianne Kies of the Department of Justice; and Samuel Holt of the Department of Justice.

THE COURT: All right, good morning to everyone and welcome. You may have a seat. Let me just give a brief overview so we'll have some context for today's hearing.

The plaintiffs are the American Federation of State, County and Municipal Employees, AFL-CIO, sometimes called "AFSCME"; the Alliance for Retired Americans, sometimes called "ARA" or "Alliance"; and the American Federation of Teachers.

Plaintiffs filed suit on February 21 of 2025; that would be ECF-1. The suit was lodged against the Social Security Administration and three other defendants challenging the decision of SSA to provide what was alleged to be unlimited access to an enormous quantity of sensitive personal protected and confidential information belonging to millions of Americans. The plaintiffs amended their suit on March 7 of 2025 at ECF-17. Among other things, that amended Complaint added three defendants.

The defendant are the Social Security Administration. I refer to the Social Security Administration either as "SSA" or the "Agency"; Leland Dudek in his official capacity. According to plaintiffs, it's their word, "purported" Acting Commissioner of the SSA; Michael Russo in his official capacity as Chief Information Officer of the Agency, although

of records and it gives you more than you need is what you're telling me. So you're only going to be accessing what you need. And what you need to do, one of these projects might not require you to look at someone's health records.

MR. HUMPHREYS: That's right. You get -- I think in any job you get access to a system, or at least in a job in the Federal Government, more broadly than you may need. Because you should not have to go back to -- up your management chain or in this case, to the head of the agency.

THE COURT: I mean, what is the goal here? There's these allegations of rampant fraud and that the DOGE team is going to uncover all this fraud and save the taxpayers all this money and that's to be commended.

I just was curious because Mr. -- Acting Commissioner Dudek says in ECF-60-1, paragraph 4, The SSA DOGE team partners with SSA's antifraud offices to address fraud costing taxpayers and Social Security beneficiaries up to $521 billion annually. And the support was a link from the Government accountability office. And it was a pie chart. And it didn't even have Social Security as one of the -- part of the pie. They were, I assume, in the one called "other." And it was for a period, I think it was -- excuse me, 2019 or maybe 2018 to 2023 for the entire U.S. Government.

So that was a complete inaccuracy to suggest that this $521 billion annually for Social Security beneficiaries, the

fraud for them was costing the taxpayers that sum. And that was the maximum as I said across the United States Government in its entirety for a period of years, not specifically Social Security. And this I found very concerning. And I was trying to understand.

It seems like the overarching theme here, you can call the projects what you will. The Death Data Update, the Fraud Detection and the Are You Alive, they're all related to an effort to weed out fraud. And I was trying to understand how the production or access to all these records is going to enable that to be accomplished.

MR. HUMPHREYS: I mean, I think --

THE COURT: They have auditors. There's people whose job it has been all along to do this.

As I said last time, I think in my career here and I certainly am just estimating, but I may have had around three cases, but people are prosecuted if they are caught with receipt of benefits that belong to someone else. I've had those cases.

MR. HUMPHREYS: Your Honor, this starts to feel like a policy disagreement.

THE COURT: No, I'm just asking. Could you explain to me how this is going to further that mission?

MR. HUMPHREYS: Well, the SSA DOGE team I think you're correct, Your Honor, is broadly charged with looking at

fraud at the agency. And of course just because you have one auditor doesn't make it illegal to have another. But, you know, so I think that you can look at the administrative record at AR-5 to 6 which describes the decision approved by the head of the agency to grant access to DOGE team members in order to review concerns about -- I'm reading it right now -- potentially large scale fraud and improper payments related to data systems in payment files SSA sends to BFS. And concerns that those potential issues in those payment files may relate in part to SSNs without associated dates of death in SSA's Numident master files.

THE COURT: So I guess I'm trying to get you to explain to me how the access furthers that need. Because need is relevant. The Privacy Act says "need." And I was trying to understand. And that's why I'm sorry if it sounds like I'm a broken record, but I don't feel I understand it.

MR. HUMPHREYS: I think if you --

THE COURT: I don't understand the way in which this works that producing all these records will help further that need. I'm just going with what the statute says.

MR. HUMPHREYS: Again, I don't think it's producing the records. It's giving access to then go in and look at the record if it's part of the job duties. Just like --

THE COURT: I guess the reason I'm struggling -- and I do take offense at your comment because I'm just trying to

Filed: April 30, 2025

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEFING ORDER - CIVIL/AGENCY

No. 25-1411, American Federation of State, County and Municipal v. SSA
1:25-cv-00596-ELH

Briefing shall proceed on the following schedule:

JOINT APPENDIX due: 06/09/2025

BRIEF [Opening] due: 06/09/2025

BRIEF [Response] due: 07/09/2025

BRIEF [Reply] (if any) due: Within 21 days of service of response brief.

The following rules apply under this schedule:

- Filings must conform to the **Fourth Circuit Brief & Appendix Requirements** as to content, format, and copies. The Requirements are available as a link from this order and at **www.ca4.uscourts.gov**. FRAP 28, 30 & 32. **NOTE: The Court's preferred typefaces are Times New Roman, Century Schoolbook, and Georgia. The Court discourages the use of Garamond.**
- The joint appendix must be paginated using Bates page numbering and the JA or J.A. format required by the **Fourth Circuit Appendix Pagination & Brief Citation Guide**. Appendix citations in the parties' briefs must use the same format. Local Rules 28(g) & 30(b)(4).
- All parties to a side must join in a single brief, even in consolidated cases, unless the court has granted a motion for leave to file separate briefs. Local Rules 28(a) & 28(d).
- Motions for extension of time should be filed only in extraordinary

circumstances upon a showing of good cause. Local Rule 31(c).

- If a brief is filed in advance of its due date, the filer may request a corresponding advancement of the due date for the next brief by filing a motion to amend the briefing schedule.
- If a brief is filed after its due date, the time for filing subsequent briefs will be extended by the number of days the brief was late.
- Failure to file an opening brief within the scheduled time may lead to dismissal of the case and imposition of sanctions against counsel. Local Rules 45 & 46(g).
- Failure to file a response brief may result in loss of the right to be heard at argument. FRAP 31(c).
- If a case has not been scheduled for a mediation conference, but counsel believes such a conference would be beneficial, counsel should contact the Office of the Circuit Mediator directly at 843-731-9099, and a mediation conference will be scheduled. In such a case, the reason for scheduling the conference will be kept confidential. Local Rule 33.
- The court may, on its own initiative and without prior notice, screen an appeal for decision on the parties' briefs without oral argument. Local Rule 34(a).
- If a case is to be scheduled for argument, counsel will receive prior notice from the court.

/s/ NWAMAKA ANOWI, CLERK
By: Rachel Phillips, Deputy Clerk

FILED: May 6, 2025

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 25-1411
(1:25-cv-00596-ELH)

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO; ALLIANCE FOR RETIRED AMERICANS; AMERICAN FEDERATION OF TEACHERS

Plaintiffs - Appellees

v.

SOCIAL SECURITY ADMINISTRATION; LELAND DUDEK, in his official capacity as purported Acting Commissioner, Social Security Administration; MIKE RUSSO, in his official capacity as Chief Information Officer, Social Security Administration; ELON MUSK, in his official capacity as Senior Advisor to the President and de facto head of DOGE; U.S. DOGE SERVICE; U.S. DOGE SERVICE TEMPORARY ORGANIZATION; AMY GLEASON, in her official capacity as DOGE Acting Administrator

Defendants - Appellants

O R D E R

A majority of judges in regular active service and not disqualified having voted in a requested poll of the Court to grant initial hearing en banc on the merits

of this appeal,

IT IS ORDERED that initial hearing en banc is granted.

For the Court

/s/ Nwamaka Anowi, Clerk