No. 24A

In the Supreme Court of the United States

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, ET AL., APPLICANTS

v.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, ET AL.

APPLICATION TO STAY THE INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA AND REQUEST FOR AN IMMEDIATE ADMINISTRATIVE STAY

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PARTIES TO THE PROCEEDING

Applicants (defendants-appellants below) are United States Office of Personnel Management; Scott Bessent, Secretary of Treasury; Pamela Bondi, United States Attorney General; Bureau of Land Management; Doug Burgum, Secretary of the Interior; Robin Carnahan, Administrator of General Services; Department of Defense; Doug Collins, Secretary of Veterans Affairs; Sean Duffy, Secretary of Transportation; Department of Veterans Affairs; Leland Dudek, Acting Commissioner of Social Security; Charles Ezell, in his official capacity as Acting Director of the U.S. Office of Personnel Management; Pete Hegseth, Secretary of Defense; Robert F. Kennedy, Jr., Secretary of Health and Human Services; Kelly Loeffler, Administrator of the Small Business Administration; Howard W. Lutnick, Secretary of Commerce; Linda McMahon, Secretary of Education; Vince Micone, Acting Secretary of Labor; National Aeronautics and Space Administration; National Park Service; National Science Foundation; Kristi Noem, Secretary of Homeland Security; Office of Management and Budget; Sethuraman Panchanathan, Director of the National Science Foundation; Janet Petro, NASA Acting Administrator; Brooke Rollins, Secretary of the U.S Department of Agriculture; Social Security Administration; Scott Turner, Secretary of Housing and Urban Development; Marco Rubio, Secretary of State; United States Department of Agriculture; United States Department of Commerce; United States Department of Education; United States Department of Energy; United States Department of the Interior; United States Department of Justice; United States Department of Health and Human Services; United States Department of Homeland Security; United States Department of Housing and Urban Development; United States Department of Labor; United States Department of State; United States Department of Transportation; United States Department of the Treasury; United States Envi-

ronmental Protection Agency; United States General Services Administration; United States Small Business Administration; United States Department of Veterans Affairs; Russell Vought, Director of OMB; Chris Wright, Secretary of Energy; and Lee Zeldin, EPA Administrator.

Respondents (plaintiffs-appellees below) are American Federation of Government Employees, AFL-CIO; American Federation of Government Employees Local 1216; American Federation of Government Employees Local 2110; American Federation of State County and Municipal Employees, AFL-CIO; American Geophysical Union; American Public Health Association; Association of Flight Attendants—CWA AFL-CIO; Climate Resilient Communities; Coalition to Protect America's National Parks; Common Defense Civic Engagement; Main Street Alliance; Point Blue Conservation Science; the State of Washington; United Nurses Association of California—Union of Health Care Professionals, AFSCME, AFL-CIO; Vote Vets Action Fund, Inc.; and Western Watersheds Project.

RELATED PROCEEDINGS

United States District Court (N.D. Cal.):

AFGE v. *OPM*, No. 25-cv-1780 (Feb. 27, 2025) (TRO)

AFGE v. *OPM*, No. 25-cv-1780 (Mar. 13, 2025) (preliminary injunction)

United States Court of Appeals (9th Cir.):

AFGE v. *OPM*, No. 25-1677 (Mar. 17, 2025) (administrative stay)

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Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, the Acting Solicitor General—on behalf of applicants United States Office of Personnel Management, et al.—respectfully files this application to stay the preliminary injunction issued by the U.S. District Court for the Northern District of California (App., *infra*, 1a-24a), pending the consideration and disposition of the government's appeal to the U.S. Court of Appeals for the Ninth Circuit and, if the court of appeals affirms the injunction, pending the timely filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court. In addition, the Acting Solicitor General respectfully requests an immediate administrative stay of the district court's order pending the Court's consideration of this application.

The district judge in this case spontaneously issued a preliminary injunction ordering a half-dozen departments and agencies to immediately offer reinstatement to over 16,000 probationary employees who had been lawfully terminated. The district court did so in a suit filed not by the employees themselves (whose claims Con-

gress has channeled through special administrative procedures), but by a group of nonprofits who claimed that these layoffs could contribute to downstream harms from less-robust governmental services. And the court issued this sweeping relief on the theory that the agency decisionmakers wrongly believed that OPM had directed the terminations—even though OPM clarified otherwise in response to the court's TRO, and even though the six enjoined agencies subsequently chose to stand by the terminations. The court's preliminary injunction thus let third parties hijack the employment relationship between the federal government and its workforce. And, like many other recent orders, the court's extraordinary reinstatement order violates the separation of powers, arrogating to a single district court the Executive Branch's powers of personnel management on the flimsiest of grounds and the hastiest of timelines. That is no way to run a government. This Court should stop the ongoing assault on the constitutional structure before further damage is wrought.

Throughout February 2025, as part of the Administration's efforts to streamline the federal workforce and address unsustainable federal expansion, multiple agencies terminated thousands of employees in probationary status, *i.e.*, those who have yet to establish their qualification for continued service and remain in their one- or two-year trial periods. Some of those employees have since filed complaints with the Office of Special Counsel, which, at one of the agencies, pursued administrative relief before the Merit Systems Protection Board. But no employees are plaintiffs in this suit. The respondents whose claims formed the basis for the injunction are instead nonprofit organizations whose members use government services that have, at best, only distant connections to the terminated employees. Yet they have now parlayed such alleged harms as the late opening of a national park's bathroom facility or supposedly dilatory Freedom of Information Act (FOIA) responses into a sweeping,

nationwide preliminary injunction ordering six federal agencies to immediately reinstate, to full duty status, more than 16,000 terminated probationary employees.

That injunction is especially remarkable given that respondents did not even move for it; the court issued an oral preliminary injunction from the bench at the end of an evidentiary hearing, later followed by a written opinion. The district court thus spontaneously expanded relief far beyond its initial temporary restraining order, which had simply required the Office of Personnel Management (OPM) to update its guidance to make clear that it does not have authority to direct personnel actions at the agencies (a principle that the government does not contest).

The notion that immediate reinstatement of thousands of probationary employees is the way to improve customer service at national park bathrooms also underscores fatal flaws with respondents' theory of Article III standing—flaws that should have foreclosed any relief. To call respondents' theory of standing attenuated is charitable. They speculate that OPM's original guidance, not the agencies' own assessments of whether retaining these probationary employees is necessary, prompted agencies to terminate probationary employees, thereby hampering specific services (like bathroom access and FOIA responsiveness) that would have been unaffected without the terminations. Those inferences cannot establish Article III standing. Nor can respondents link their theory of illegality—that OPM lacked the authority to direct terminations at particular agencies—to the injury they assert. If organizations could establish Article III standing just by positing that fewer government employees will translate into less-optimal government services for some of their members, then anyone anywhere with any contact with the federal government could second-guess any agencies' personnel decisions, down to which federal employees work which hours.

Declaring open season on challenges to federal personnel management is especially unsound because Congress has created an entirely different framework for resolving legal challenges to the terminations of federal employees. As this Court has held, challenges to terminations of federal employees must proceed, if at all, under the reticulated process Congress set out in the Civil Service Reform Act of 1978 (CSRA). Allowing strangers to the federal-employment relationship to head straight to district court and raise claims that the affected federal employees themselves cannot raise would upend that entire process.

This Court should not allow a single district court to erase Congress's handiwork and seize control over reviewing federal personnel decisions—much less to do so by vastly exceeding the limits on the scope of its equitable authority and ordering reinstatements en masse. This Court has recognized that the judicially compelled reinstatement of even a single government employee represents a substantial intrusion on the Executive. This Court has required a heightened showing before permitting that remedy, so as to preserve the Executive's traditional "latitude in the dispatch of its own internal affairs," *Sampson* v. *Murray*, 415 U.S. 61, 83 (1974) (citation and internal quotation marks omitted). Moreover, no statute—certainly not the Administrative Procedure Act (APA) that forms the basis of this suit—authorizes the use of reinstatement to redress downstream harm to the potential beneficiaries of the services generated by a particular employer-employee relationship. Nor have respondents come close to making a heightened showing that mass reinstatement of 16,000 probationary employees is necessary, especially after the government had already remedied the supposed legal mistake by making it clear that OPM cannot, and is not seeking to, direct terminations at other federal agencies.

The district court's extraordinarily overbroad remedy is now inflicting ongoing,

irreparable harm on the Executive Branch that warrants this Court's urgent intervention. Every day that the government remains subject to the injunction inflicts intolerable harm on the functioning of the Executive Branch. The district court has compelled the government to embark on the massive administrative undertaking of reinstating, and onboarding to full duty status, thousands of terminated employees in the span of a few days. Exacerbating the burden, the district court has insisted that employees must be returned to full duty status and staffed so as to restore the services that respondents seek to use. And the government is required to reinstate employees to active-duty status and provide them with assignments, all subject to the ongoing supervision of the district court. The injunction appears to prevent the agencies from terminating those employees based on the agencies' independent judgment or even on newly arising grounds, at least absent clarification or permission from the district court. The ensuing financial costs and logistical burdens of ongoing compliance efforts are immense.

Given those profound harms—made particularly intolerable by the injunction's sheer scale—the government sought an administrative stay and requested a decision by the court of appeals on its emergency motion for a stay pending appeal by 12 p.m. Pacific Time on Friday, March 21. The court of appeals denied an administrative stay, over the partial dissent of Judge Bade, and as this application is being filed on Monday, March 24, the court of appeals has yet to rule on the government's stay motion. Every additional day the injunction remains in effect is a day that six executive agencies are effectively under the district court's receivership, necessitating immediate relief from this Court.

This preliminary injunction also contributes to an untenable trend. In the two months since Inauguration Day, district courts have issued more than 40 injunctions

or TROs against the Executive Branch. Whereas "district courts issued 14 universal injunctions against the federal government through the first three years of President Biden's term," they issued "*15* universal injunctions (or temporary restraining orders) against the current Administration in February 2025 alone." Appl. at 26, *Trump* v. *CASA, Inc.* (No. 24A884) (filed Mar. 13, 2025); see *District Court Reform: Nationwide Injunctions*, 137 Harv. L. Rev. 1701, 1705 (2024). This situation is unsustainable. Emboldened by the lack of prompt appellate review (often occasioned by the use of the TRO mechanism), district courts have now issued dozens of orders without sufficient regard for limits on their own jurisdiction or to defects in plaintiffs' representations about the law and the underlying facts. Those orders have sown chaos as the Executive Branch scrambles to meet immediate compliance deadlines by sending huge sums of government money out the door, reinstating thousands of lawfully terminated workers, undoing steps to restructure Executive Branch agencies, and more. The lower courts should not be allowed to transform themselves into all-purpose overseers of Executive Branch hiring, firing, contracting, and policymaking. Only this Court can end the interbranch power grab.

STATEMENT

1. a. OPM assists the President in overseeing the federal workforce. Congress has instructed OPM to, among other things, "aid[] the President * * * in preparing such civil service rules as the President prescribes, and otherwise advis[e] the President on actions which may be taken to promote an efficient civil service * * *, including recommending policies relating to the selection, * * * tenure, and separation of employees." 5 U.S.C. 1103(a)(7).

Federal law provides that "[t]he President may * * * provide * * * for a period of probation" for federal employees "before an appointment in the competitive service

becomes final." 5 U.S.C. 3321(a)(1); see 5 U.S.C. 7511(a)(1). Pursuant to that authority, OPM has issued rules defining the probationary term and specifying that an agency "shall utilize the probationary period as fully as possible to determine the fitness of the employee and shall terminate his or her services during this period if [he] fails to demonstrate fully his or her qualifications for continued employment." 5 C.F.R. 315.803(a); see 5 C.F.R. 315.801, 315.802.

b. The Civil Service Reform Act (CSRA) "establishe[s] a comprehensive system for reviewing personnel action taken against federal employees." *United States* v. *Fausto*, 484 U.S. 439, 455 (1988). Under the CSRA, most civilian employees of the federal government can appeal a major adverse personnel action—including a removal, suspension for more than 14 days, or furlough of 30 days or less—to the Merit Systems Protection Board (MSPB). 5 U.S.C. 7512, 7513(d), 7701. The MSPB can order relief to prevailing employees, including reinstatement. 5 U.S.C. 1204(a)(2), 7701(g). The Federal Circuit has exclusive jurisdiction to review final decisions of the MSPB. 5 U.S.C. 7703(b)(1).

Federal employees in their probationary period generally do not have a right to appeal to the MSPB. 5 U.S.C. 7511(a)(1); see 5 C.F.R. 315.806 (permitting probationary employees to appeal to the MSPB only on specific issues). In certain circumstances, probationary employees may file a complaint with the Office of Special Counsel, which may in turn pursue administrative relief before the MSPB. See 5 U.S.C. 1212, 1214.

The CSRA includes the Federal Service Labor-Management Relations Statute, which governs labor relations between the Executive Branch and its employees. See 5 U.S.C. 7101-7135; *American Fed'n of Gov't Emps.* v. *Trump*, 929 F.3d 748, 752 (D.C. Cir. 2019). The Federal Labor Relations Authority (FLRA) is charged with adjudi-

cating federal labor disputes. 5 U.S.C. 7105(a)(2). Congress has authorized review of the FLRA's decisions in the courts of appeal. 5 U.S.C. 7123(a).

2. a. On January 20, 2025, President Trump acted to optimize the size of the federal workforce and limit hiring to mission-critical positions. The President issued a memorandum instituting a hiring freeze of federal civilian employees, and ordering agencies to identify ways to reduce the size of the federal government. D. Ct. Doc. 111-6, at 1-2 (Mar. 12, 2025); see also Exec. Order No. 14,210, 90 Fed. Reg. 9669 (Feb. 14, 2025) (clarifying terms of the hiring freeze).

The same day, OPM Acting Director Charles Ezell transmitted to Executive Branch agencies a memorandum "providing * * * guidance * * * regarding critical potential personnel actions." D. Ct. Doc. 111-1, at 1 (Mar. 12, 2025). The memorandum explained that "[p]robationary periods are an essential tool for agencies to assess employee performance and manage staffing levels." *Ibid.* It stated that agencies "should identify all employees on probationary periods" and "should promptly determine whether those employees should be retained at the agenc[ies]." *Ibid.*

On February 12, OPM sent agency Chiefs of Staff an email titled "Probationary Employee Actions." D. Ct. Doc. 111-5, at 1 (Mar. 12, 2025). The email instructed the agency Chiefs of Staff to "partner with your [agency Chief Human Capital Officer] to action those [employees] you know you wish to separate from * * * using the attached template letter." *Ibid.* (emphasis omitted). The email requested that the agencies provide OPM with a tracker reflecting "[w]hich probationary employees have been terminated and which [the agencies] plan to keep." *Ibid.*

On February 14, OPM sent an email to an agency forum that provided additional guidance to agencies. D. Ct. Doc. 111-2 (Mar. 12, 2025). OPM explained that "[a]n appointment is not final until the probationary period is over," and that "[u]ntil

the probationary period has been completed, a probationer has the burden to demonstrate why it is in the public interest for the Government to finalize [his] appointment to the civil service." *Id.* at 1 (citation and internal quotation marks omitted). OPM advised that "[a]n employee's performance must be measured in light of the existing needs and interests of government," and that employees would have the requisite "qualifications for continued employment" only if they are "the highest-performing * * * in mission critical areas." *Id.* at 1-2 (citation omitted).

On February 24, OPM again emailed the interagency forum, noting that it had received numerous questions "[a]s agencies continue to make decisions on whether to retain probationary employees." D. Ct. Doc. 111-4 (Mar. 12, 2025). OPM provided a frequently-asked-questions document "[t]o assist agencies in carrying out their decisions." *Ibid.* None of those communications directed agencies to terminate any particular probationary employees; rather, OPM instructed agencies to engage in a review of probationers based on how their performance was advancing the agencies' mission. See, *e.g.*, D. Ct. Doc. 111-3, at 1 (Mar. 12, 2025) (asking "How should agencies evaluate the performance of an employee serving a probationary or trial period?") (emphasis omitted).

b. Beginning on February 13, federal agencies terminated numerous federal employees serving in their probationary periods. The Department of Veterans Affairs, for example, dismissed "more than 1,000 employees," consistent with "a government-wide Trump Administration effort to make agencies more efficient, effective and responsive to the American People." D. Ct. Doc. 111-9, at 1-2 (Mar. 12, 2025). The Department of Agriculture announced that it "is pursuing an aggressive plan to optimize its workforce," including "by eliminating positions that are no longer necessary." D. Ct. Doc. 111-10, at 2 (Mar. 12, 2025). And the Department of Defense

announced that it "is re-evaluating [its] probationary workforce, consistent with the President's initiative to reform the Federal workforce to maximize efficiency and productivity"; the Department noted that it "believe[s] in the goals of the program" and touted Secretary Hegseth's view that "it is simply not in the public interest to retain individuals whose contributions are not mission-critical." D. Ct. Doc. 111-11, at 1 (Mar. 12, 2025).

c. On March 4, OPM revised its guidance to clarify that "OPM is not directing agencies to take any specific performance-based actions regarding probationary employees." D. Ct. Doc. 64-1, at 2 (Mar. 7, 2025). OPM emphasized that "[a]gencies have ultimate decision-making authority over, and responsibility for, such personnel actions. *Ibid.* (citation omitted); see D. Ct. Doc. 78 (Mar. 10, 2025) (revised OPM guidance dated March 4, 2025).

3. a. Four labor unions filed this action on February 19, 2025. D. Ct. Doc. 1 (Feb. 19, 2025). Respondents filed an amended complaint adding as plaintiffs five additional organizations: Main Street Alliance, a network of small businesses; Coalition to Protect America's National Parks, a non-profit organization comprising individuals associated with the National Park Service; Western Watersheds Project, an environmental conservation group; and Vote Vets Action Fund Inc. and Common Defense Civic Engagement, organizations that work on behalf of veterans. D. Ct. Doc. 17, at 5-7 (Feb. 23, 2025). The action was brought against OPM and Acting OPM Director Ezell. *Id.* at 1. Respondents primarily alleged that OPM acted in excess of its statutory authority, and in contravention of agencies' own statutory authority to hire and manage their workers, by "order[ing] federal agencies" to terminate employees. *Id.* at 1-2, 24-28. Respondents moved for a temporary restraining order. D. Ct. Doc. 18 (Feb. 23, 2025).

b. On February 27, the district court issued a temporary restraining order from the bench. D. Ct. Doc. 41. In a written order the next day, the court determined that it likely lacks jurisdiction to hear the union respondents' claims because the claims in this case "'are the vehicle by which they seek to reverse the removal decisions, to return [members] to federal employment, and to [collect] the compensation they would have earned but for the adverse employment action,'" and that Congress has "channeled" such claims "to the FLRA and MSPB." App., *infra*, 11a-12a (quoting *Elgin* v. *Department of the Treasury*, 567 U.S. 1, 22 (2012)). But the court took a different view as to the organizational respondents, whose members are end-users of government services. As to those respondents, the court took the view that it likely had subject-matter jurisdiction because organizational respondents' claims—such as the assertion that OPM's actions "undermined the [agency's] ability to respond to [a respondent's member's] FOIA requests" and the "frustration of [a respondent's] ecological mission"—are "ill-suited to adjudication by a *labor* board." *Id.* at 13a. The court recognized that the organizational respondents asserted that their injuries occurred "*because*" the termination of the probationary employees was "unlawful[]." *Ibid.* It nonetheless determined that, because organizational respondents were not entitled to proceed before the FLSA and MSPB, they could bring their challenge to the legality of the terminations in district court. *Ibid.*

The district court also reasoned that the organizational respondents have standing. App., *infra*, 13a-22a. The court found standing for claims against four of the agencies based on organizational respondents' assertions that their members may suffer delays or disruption in government services as a result of the terminations. See *id.* at 14a-19a. As to the two remaining agencies, the court found standing for the organizational respondents themselves, crediting their assertion that the re-

spondents would feel forced to divert resources to counteract the impacts of a potential reduction in services caused by the terminations. See *id.* at 20a-21a.

On the merits, the district court observed that OPM "concedes that it lacks the authority to direct firings outside of its own walls." App., *infra*, 8a. But it rejected OPM's factual contention that it did not direct the firings, determining that the agencies likely terminated employees at the direction of OPM. *Id.* at 8-9.

The district court also determined that the organizational respondents are likely to suffer irreparable harm due to "loss of access to national recreational areas," and diminished government services, and because respondents had diverted significant resources to responding to the hardships created by the terminations. App., *infra*, 22a-23a. The court's temporary restraining order deemed OPM's January 20 memorandum and February 14 email "illegal" and "invalid"; directed that it "must be stopped and rescinded"; and required OPM to provide written notice of the order to six agencies. *Id.* at 24a (citation omitted).

c. OPM promptly complied with the court's temporary restraining order—rescinding the relevant communications and notifying the specified agencies. D. Ct. Doc. 75, at 3 (Mar. 10, 2025); D. Ct. Doc. 76, at 1 ¶ 4 (Mar. 10, 2025). Moreover, on March 4, OPM revised its earlier guidance as discussed above to clarify that it is not directing agencies to take any specific actions against probationary employees. D. Ct. Doc. 64-1, at 2; D. Ct. Doc. 78 (revised OPM guidance).

Respondents subsequently filed a second amended complaint adding several plaintiffs and naming 22 additional federal agencies as defendants "for relief purposes only." D. Ct. Doc. 90, at 5-17.

4. On March 13, the district court held an evidentiary hearing, at the conclusion of which it issued a preliminary injunction—even though respondents had

never filed a motion for that relief and defendants never had an opportunity to respond to such a motion. D. Ct. Doc. 115; App., *infra*, 38a-39a.

The district court ordered the Departments of Veterans Affairs, Agriculture, Defense, Energy, Interior, and Treasury to "immediately"—without waiting for a written order—"offer reinstatement to any and all probationary employees terminated on or about February 13th and 14th 2025"; "cease any termination of probationary employees at the direction of * * * OPM"; cease using a template termination notice provided by OPM; and submit, within seven days, a list of all probationary employees who were terminated, "with an explanation as to each of what has been done to comply with" the court's order. App., *infra*, 37a-38a. The court further stated that it may "extend[] the relief * * * to other agencies." *Id.* at 38a. The court also opened discovery and ordered the deposition of an OPM official. *Ibid.*

The district court issued a written preliminary injunction ruling the following day. It reiterated that it was ordering relief based solely on the claims made by the organizational respondents. App., *infra*, 47a. It incorporated its prior standing analysis, citing additional declarations asserting that the organizational respondents have felt compelled to divert resources to address problems caused by the terminations. *Id.* at 51a. On the merits, it again rejected applicants' factual contention that OPM did not issue a directive. *Id.* at 49a. The court then denied the applicant's request for a stay pending appeal. See D. Ct. Doc. 133 (Mar. 15, 2025). The court subsequently ordered the agencies to provide updates about the onboarding process, and it specified that "rehir[ing]" probationary employees "but then plac[ing] them on administrative leave" is "not allowed by the preliminary injunction, for it would not restore the services the preliminary injunction intends to restore." D. Ct. Doc. 138; see D. Ct. Doc. 140.

5. On March 14, the government sought a stay pending appeal and an immediate administrative stay from the court of appeals. On March 17, the court of appeals denied the administrative stay, over the partial dissent of Judge Bade. App., *infra*, 54a-65a. In the course of briefing the emergency motion for stay, the government requested a decision by 12 p.m. Pacific Time on Friday, March 21. As this application is being filed on Monday, March 24, the court of appeals has yet to rule on the government's motion.

ARGUMENT

Under Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, the Court may stay a preliminary injunction entered by a federal district court. See, *e.g.*, *Trump* v. *International Refugee Assistance Project*, 582 U.S. 571 (2017) (per curiam); *Brewer* v. *Landrigan*, 562 U.S. 996 (2010); *Brunner* v. *Ohio Republican Party*, 555 U.S. 5 (2008) (per curiam). To obtain such relief, an applicant must show a likelihood of success on the merits, a reasonable probability of obtaining certiorari, and a likelihood of irreparable harm. See *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam). In "close cases," "the Court will balance the equities and weigh the relative harms." *Ibid.* Those factors overwhelmingly support a stay here.

A. The Government Is Likely To Succeed On The Merits

Respondents are nonprofit organizations who challenge the legality of various agencies' personnel decisions by claiming that terminations hamper their members' ability to access national-park bathrooms and other federal facilities or benefits. The district court responded by issuing a preliminary injunction forcing the government to re-hire and immediately re-employ 16,000 federal probationary employees. The government is likely to succeed on the merits of its challenge to that extraordinary order.

1. Organizations whose members use government services lack Article III standing to challenge the terminations of government employees

a. The courts do not sit to adjudicate the public's views about how the government should be run, but to redress legally cognizable injuries to specific protected interests. Under Article III, federal courts "do not exercise general legal oversight of the Legislative and Executive Branches." *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190, 2203 (2021). Instead, a plaintiff must establish an injury that is both "legally and judicially cognizable." *Raines* v. *Byrd*, 521 U.S. 811, 819 (1997). "This requires, among other things, that the plaintiff have suffered 'an invasion of a legally protected interest which is * * * concrete and particularized,' and that the dispute is 'traditionally thought to be capable of resolution through the judicial process.'" *Ibid.* (citations omitted).

To establish standing, "a plaintiff must demonstrate (i) that she has suffered or likely will suffer an injury in fact, (ii) that the injury likely was caused or will be caused by the defendant, and (iii) that the injury likely would be redressed by the requested judicial relief." *FDA* v. *Alliance for Hippocratic Med.*, 602 U.S. 367, 380 (2024). An organization may establish standing by establishing (in addition to other requirements) the standing of its members, *Hunt* v. *Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977), or by identifying "'injuries [the organizations themselves] have sustained,'" and establishing "injury in fact, causation, and redressability" as to those injuries, *Alliance*, 602 U.S. at 393-394 (quoting *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 379, n.19 (1982)).

In granting the preliminary injunction, the district court relied exclusively on the standing of organizational respondents whose members are end-users of government services. See App., *infra*, 39a, 47a. Significantly, in entering relief against two

of the enjoined agencies, the court appeared to rely solely on the theory that the organizations themselves suffered an injury by having to "divert" organizational resources to "counteract[]" the effects of the agencies' actions. See App., *infra*, 20a (citation omitted); see *id.* at 20a-21a; see also D. Ct. Doc. 18-7, ¶ 11; D. Ct. Doc. 18-3, ¶ 6. That standing theory is squarely foreclosed by this Court's decision in *Alliance for Hippocratic Medicine*, which held that "divert[ing] [organizational] resources in response to a defendant's actions" is not an Article III injury-in-fact. 602 U.S. at 395.

And the district court's remaining standing analysis is hardly better. The court determined that organizational respondents may suffer indirect harms from agencies' termination of probationary employees because the terminations might cause delays or disruptions in government services. But the organizations offered only speculation that the terminations will impair or delay specific government services. One respondent, for instance, asserts that terminated employees at the Small Business Administration "will make access to [certain] financial assistance slower and less reliable," which is "likely to have ripple effects" across the economy. See D. Ct. Doc. 18-16, ¶¶ 8-9. Another alleges that Yosemite National Park "will likely have to stop specific functions and close park areas" because "[w]hen there was a partial government shutdown in 2018, visitors trashed scenic viewpoints" and "trampled sensitive ecological areas." D. Ct. Doc. 18-15, ¶ 5. And the district court found Article III injury from the possibility that, given reduced available staff, the Bureau of Land Management may be unable to provide timely "land health assessments" and that the Fish and Wildlife Service may be unable to meet deadlines in separate litigation. App., *infra*, 17a-18a (citation omitted).

The organizations identified only a handful of concrete examples of alleged delays in government services, including alleging that a bathroom facility in Joshua

Tree National Park, "remained closed well after its scheduled opening time" during one organizational member's visit, D. Ct. Doc. 39-3, ¶ 4 (Feb. 26, 2025), and that a staff member at the Bureau of Land Management identified "staffing issues" as the reason it was unable to respond to a respondent's Freedom of Information Act request, D. Ct. Doc. 18-13, ¶ 7. Those allegations are a far cry from establishing that the challenged terminations *themselves* caused a particular reduction in services affecting the organization's members, let alone that they would continue to do so going forward, or that the particular services respondents' members use would resume to their liking if the employees were reinstated. Respondents' claims of redressability are particularly attenuated because the district court correctly recognized that "[e]ach agency had (and still has) discretion to hire and fire its own employees." App., *infra*, 52a (emphasis omitted); see, *e.g.*, D. Ct. Doc. 111-11, at 1 (press release from the Department of Defense explaining that a "re-evaluation of probationary employees is being done across government" and that the Department "believe[s] in the goals of the program" and reiterating its Secretary's view that "it is simply not in the public interest to retain individuals whose contributions are not mission-critical"). In other words, even without OPM's involvement, agencies could have (and, as discussed below, would have) carried out the terminations to effectuate the President's priorities about Executive Branch staffing, and could (absent the injunction) choose to re-terminate the probationary employees at any time.

At a minimum, the handful of particularized allegations that individual members of respondents' organization suffered some delay or disruption in a government service cannot justify sweeping relief reinstating thousands of employees across multiple agencies. Cf. *Alliance*, 602 U.S. at 402 (Thomas, J., concurring) ("Because no party should be permitted to obtain an injunction in favor of nonparties, I have diffi-

culty seeing why an association should be permitted to do so for its members."). To take just one example, the injunction has required the reinstatement of more than 1,000 seasonal employees at the Forest Service who were not in pay status nor performing work at the time of their terminations due to the off-season, D. Ct. Doc. 144-8, ¶ 10 (Mar. 20, 2025); that relief could not have redressed any certainly impending injury. More fundamentally, ordering the reinstatement of more than 16,000 employees is an absurd way to remedy an injury from a delayed bathroom opening.

Respondents have also failed to identify any "case or historical practice" offering precedent for the notion that courts can micromanage federal personnel policies in order to produce particular downstream effects. *United States* v. *Texas*, 599 U.S. 670, 677 (2023). On the district court's theory of harm, any plaintiff purportedly aggrieved by deficient government services might even seek to compel terminations of underperforming employees and then compel the government to hire better workers in their place. See 5 U.S.C. 706(1) (authorizing a court to "compel agency action unlawfully withheld or unreasonably delayed"). The kind of injury that plaintiffs assert is plainly not one "traditionally thought to be capable of resolution through the judicial process." *Texas*, 599 U.S. at 676 (citation omitted).

b. The district court's theory of standing is particularly untenable because the central claim in this case is that OPM unlawfully directed other agencies to fire probationary employees without statutory authority to do so. But, in response to the district court's temporary restraining order, OPM has already issued revised guidance to all agencies clarifying that "OPM is not directing agencies to take any specific performance-based actions regarding probationary employees," and that "[a]gencies have ultimate decision-making authority over, and responsibility for, such personnel actions." D. Ct. Doc. 78, at 2; see also D. Ct. Doc. 75, at 3. At least one agency did

subsequently rescind some probationary employees' terminations. See App., *infra*, 28a.

For that reason, any alleged harms experienced by respondents from the downstream effects of the terminations of probationary employees are not plausibly traceable to any extant directive by OPM; rather, they are traceable, at most, to each agency's independent decision to adhere to prior terminations. And for the same reason, those harms are not redressable by relief the district court could properly order on respondents' claims: deeming invalid the original OPM guidance will not restore the jobs and lead to the provision of services that respondents seek to use, especially when that guidance has already been withdrawn. See D. Ct. Doc. 75, at 3.

2. The district court lacked subject-matter jurisdiction to assess the legality of government personnel actions

The district court issued an injunction based on its determination that the dismissal of the government employees was unlawful based on OPM's involvement in the dismissal decision. But it lacked jurisdiction to assess the legality of the Executive's personnel actions. Congress has "established a comprehensive system for reviewing personnel action[s] taken against federal employees" that provides the "exclusive means" for review. *Elgin* v. *Department of the Treasury*, 567 U.S. 1, 5, 8 (2012) (citation omitted). The Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, which includes the Federal Service Labor-Management Relations Statute for federal labor-management relations, 5 U.S.C. 7101-7135, sets out an "integrated scheme of administrative and judicial review" for challenges to personnel actions taken against members of the civil service. *United States* v. *Fausto*, 484 U.S. 439, 445 (1988). That scheme permits some, but not all challenges, with some challenges limited to certain types of employees; channels those challenges to agencies; and grants exclusive juris-

diction to the Federal Circuit over appeals from final agency action. See *Elgin*, 567 U.S. at 5-6 & n.1; 5 U.S.C. 7703(b)(1); 5 U.S.C. 7105(a)(2), 7123(a); see also 5 U.S.C. 1101 *et seq.*

If end-users of government services could challenge the legality of personnel actions and obtain reinstatement of terminated employees without the constraints that apply to the aggrieved employees and to unions that represent them, that would turn "upside down" the structure of the CSRA by privileging end-users of government services who are, at most, indirectly affected by a termination over the employees whom the legislative scheme seeks to protect. *Fausto*, 484 U.S. at 449. Allowing separate litigation by such end-users would "seriously undermine[]" "[t]he CSRA's objective of creating an integrated scheme of review," *Elgin*, 567 U.S. at 14, and harm "the development * * * of a unitary and consistent Executive Branch position on matters involving personnel action," *Fausto*, 484 U.S. at 449.

The district court acknowledged Congress's comprehensive system and recognized that it foreclosed claims by the union respondents. App., *infra*, 11a-12a. But the court took the view that the CSRA likely poses no obstacle to the organizational respondents' suit because the organizations whose members are end-users of government services are not entitled to administrative or judicial review under the CSRA. See *id.* at 12a-13a.

That gets it exactly backwards. The "exclusion" of end-users of government services "from the provisions establishing administrative and judicial review for personnel action" of the type challenged here "*prevents* [them] from seeking review" under other provisions. *Fausto*, 484 U.S. at 455 (emphasis added); see also, *e.g.*, *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 347 (1984) (recognizing that where a statute omitted a "provision for participation" by dairy consumers, but allowed par-

ticipation by dairy producers and handlers, "Congress intended to foreclose consumer participation in the regulatory process" and "intended a similar restriction of judicial review"); see also, *e.g.*, *Grosdidier* v. *Chairman*, 560 F.3d 495, 497 (D.C. Cir.) ("[T]he CSRA is the exclusive avenue for suit even if the plaintiff cannot prevail in a claim under the CSRA."), cert. denied, 558 U.S. 989 (2009). The exclusion of plaintiffs like the organizational respondents reflects Congress's considered judgment about the limitations of who should be permitted to challenge a personnel decision, rather than providing a carte blanche for tangentially affected parties to sue without using the CSRA's comprehensive system.

3. Ordering the government to reinstate thousands of employees was an unlawful remedy

The government is also likely to prevail because the district court badly exceeded the scope of its equitable authority by ordering reinstatement—on a mass scale—for the perceived legal violation it identified. Reinstatement is not an available remedy under the APA because it goes beyond the bounds of a court's historical authority in equity. And even where reinstatement is a permissible remedy, this Court has recognized that it requires an elevated showing, a showing that petitioners' threadbare theory of injury does not come close to satisfying. That sweeping remedy is all the more unwarranted because, in response to the court's temporary restraining order, OPM has clarified its role, redressing any harm from the legal violation that the district court (wrongly) believed had occurred.

a. The district court's remedy also exceeded the scope of its equitable powers. Respondents invoke the remedies available under the Administrative Procedure Act, see C.A. Opp'n 25-26. But the APA authorizes a court to grant injunctive relief subject to traditional equitable limitations. See 5 U.S.C. 702(1). Absent express stat-

utory authority, a federal court may grant only those equitable remedies that were "traditionally accorded by courts of equity." *Grupo Mexicano de Desarrollo S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 (1999). Reinstatement is not a remedy that was traditionally available at equity. See *Sampson* v. *Murray*, 415 U.S. 61, 83 (1974). To the contrary, courts of equity lacked "the power * * * to restrain by injunction the removal of a [public] officer." *In re Sawyer*, 124 U.S. 200, 212 (1888); see, *e.g.*, *Baker* v. *Carr*, 369 U.S. 186, 231 (1962) (decisions that "held that federal equity power could not be exercised to enjoin a state proceeding to remove a public officer" or that "withheld federal equity from staying removal of a *federal* officer" reflect "a traditional limit upon equity jurisdiction"); *Walton* v. *House of Representatives*, 265 U.S. 487, 490 (1924) ("A court of equity has no jurisdiction over the appointment and removal of public officers."); *Harkrader* v. *Wadley*, 172 U.S. 148, 165 (1898) ("[T]o sustain a bill in equity to restrain * * * the removal of public officers, is to invade the domain of the courts of common law, or of the executive and administrative department of the government."); *White* v. *Berry*, 171 U.S. 366, 377 (1898) ("[A] court of equity will not, by injunction, restrain an executive officer from making a wrongful removal of a subordinate appointee, nor restrain the appointment of another.").

The creation of new remedies is "a legislative endeavor," *Egbert* v. *Boule*, 596 U.S. 482, 491 (2022), and courts of equity lack "the power to create remedies previously unknown to equity jurisprudence," *Grupo Mexicano*, 527 U.S. at 332. Accordingly, where Congress departs from equitable tradition, it does so expressly. In the CSRA, Congress authorized the Merit Systems Protection Board to award "reinstatement," as well as "backpay" to prevailing employees, and it has authorized review of the MSPB's decision in the Federal Circuit. *Elgin*, 567 U.S. at 6 (citing 5 U.S.C. 1204(a)(2), 7701(g), and 7703(b)(1)); 5 U.S.C. 1214(g); see also, *e.g.*, 42 U.S.C. 2000e-

5(g) (empowering courts to grant "reinstatement" as well as "back pay" as remedies for employment discrimination). But respondents are neither entitled to proceed under the CSRA nor did they follow the required CSRA procedures. And neither the courts below nor respondents have identified any statute that authorizes a court to reinstate public employees in order to restore government services to third parties—let alone a statute that allows a court to do so based on a purported illegality in the employees' termination, rather than based on a statutory entitlement by those third parties to the services sought. Accordingly, the district court lacked the power to grant the reinstatement remedy here.

b. Even where Congress has authorized reinstatement, this Court has recognized that a grant of preliminary injunctive relief in government personnel cases requires an elevated showing. *Sampson*, 415 U.S. at 84. The Court emphasized the historical denial of reinstatement power by courts of equity, "the well-established rule that the Government has traditionally been granted the widest latitude in the dispatch of its own internal affairs, and the traditional unwillingness of courts of equity to enforce contracts for personal service," instructing that a plaintiff in a "Government personnel case[]" must, "at the very least * * * make a showing of irreparable injury sufficient in kind and degree to override these factors cutting against the general availability of preliminary injunctions." *Id.* at 83-84 (citation and internal quotation marks omitted). The district court plowed through those principles here by awarding reinstatement to thousands of employees to redress speculative potential harms—such as delays in processing a FOIA request or reduced hours at a park facility—to users of government services. To the extent that those harms met the bare minimum required for Article III (and for the reasons already explained, they do not do even that), the attenuated disruptions in end-users' preferred government services

cannot be the basis for reinstating thousands of government employees that executive agencies have chosen to dismiss.

c. The district court's sweeping order was particularly unjustified because it was badly out of step with the illegality that respondents asserted. Respondents' central claim has been that OPM lacks statutory authority to direct other agencies to terminate probationary employees. The government agrees with that legal principle, but disputes that OPM in fact directed any such firings (a dispute that the Court need not address at this preliminary stage).

To the extent that any preliminary relief was appropriate in this case, therefore, it was limited to instructing OPM to clarify that it has no power to direct personnel actions at the agencies, and to give agencies the opportunity to rescind terminations if it acted based on confusion about OPM's authority. When the district court granted respondents a temporary restraining order, it ordered that relief, directing OPM to rescind certain communications to agencies and notify agencies of the court's decisions. OPM complied with the court's order and, further, issued clarifying guidance. OPM has now made clear that "[a]gencies have ultimate decision-making authority over, and responsibility for," performance-based personnel actions against probationary employees. D. Ct. Doc. 64-1, at 2. Any confusion was therefore cleared up, and agencies were left to make their own politically accountable decisions. At least one agency did rescind some probationary employees' terminations after OPM's clarification. See App., *infra*, 42a. Most did not. See, *e.g.,* D. Ct. Doc. 127-3, ¶¶ 7-9. That result is to be expected—the President directed agencies to optimize the federal workforce, and agencies may and should make employment decisions against the backdrop of that policy choice. See Exec. Order No. 14,210 § 3. And it illustrates both that any perceived direction from OPM was not the cause of respondents' asserted

injury, and that any appropriate remedial order would have been limited to clarifying OPM's role rather than reversing terminations that the agencies would have made had OPM's initial guidance been even clearer about OPM's limited authority and the agencies' ultimate discretion.[1]

B. The Other Factors Support Relief From The District Court's Order

In deciding whether to grant emergency relief, this Court also considers whether the underlying issues warrant its review, whether the applicant likely faces irreparable harm, and, in close cases, the balance of equities. See *Hollingsworth*, 558 U.S. at 190. Those factors overwhelmingly support relief here.

1. The issues raised by this case warrant this Court's review

The district court's order directs agencies to reinstate more than 16,000 terminated employees at six agencies. What is more, it requires the employees to be reinstated to active-duty status and provided with assignments, apparently such that the services respondent organizations seek to benefit from are provided in the manner the respondents wish. This Court has repeatedly intervened in cases in which lower courts have attempted to direct the functioning of the Executive Branch. See, *e.g.*, *Heckler* v. *Lopez*, 463 U.S. 1328, 1329 (1983) (Rehnquist, J., in chambers) (granting stay of district court order requiring Secretary of Health and Human Services "immediately to reinstate benefits to the applicants" and mandating that the Secretary then make certain showings "before terminating benefits"); cf. *Trump* v. *Sierra Club*, 140 S. Ct. 1 (2019) (granting stay of district court order enjoining the Department of

[1] In the court of appeals, respondents argued that, despite the March 4 clarification, the case is not moot because they lack assurance "that the alleged violation will [not] recur." C.A. Opp'n 23 (citation omitted). But regardless of whether the case is moot in light of OPM's action, the fact that the alleged illegality has been corrected and is inflicting no continuing harm on respondents is reason enough to reject the sweeping injunction ordered by the district court pending full resolution of the issues.

Defense from undertaking any border-wall construction using funding the Acting Secretary transferred pursuant to statutory authority); *INS* v. *Legalization Assistance Project*, 510 U.S. 1301, 1305-1306 (1993) (O'Connor, J., in chambers) (granting stay of district court order requiring INS to engage in certain immigration procedures, as "an improper intrusion by a federal court into the workings of a coordinate branch of the Government"). This case involves intrusions on a far greater scale. It therefore necessarily presents an issue that would similarly warrant this Court's intervention.

2. The district court's injunction causes irreparable harm to the Executive Branch

a. The district court's order causes extraordinary and irreparable harm to the Executive Branch by ordering the reinstatement—to full duty status, complete with work assignments—of more than 16,000 employees the Executive has chosen to terminate. This Court has recognized that "the Government has traditionally been granted the widest latitude in the dispatch of its own internal affairs." *Sampson*, 415 U.S. at 83 (citation omitted). And the Court has expressed concern about the intrusion inflicted by a court order directing the reinstatement of a single government employee. See *id.* at 91-92. An order directing reinstatement of thousands of employees across six agencies is intolerable. The injunction appears to prevent the agencies from terminating the employees based on an exercise of the agencies' independent judgment—and would even seem to prevent the employees' termination based on newly arising grounds like new instances of poor performance or misconduct without, at a minimum, obtaining permission from the district court. That is a profound invasion of the Executive's ability to manage its internal affairs—especially given the injunction's application to more than 16,000 employees. Magnifying the harm, the district court has made clear that the employees—employees whom the Executive

Branch has specifically chosen to terminate—must be returned to full duty status and provided with work assignments. See D. Ct. Doc. 140.

The practical burdens of implementing the preliminary injunction have been, and continue to be, enormous. In response to the injunction, agencies have contacted thousands of terminated employees and offered them reinstated employment—itself a substantial administrative burden, *e.g.*, D. Ct. Doc. 127-2, ¶ 9. Those efforts are ongoing. See, *e.g.*, D. Ct. Doc. 141-1, ¶¶ 4-5 (declaration from the Department of Defense indicating that the Department successfully reinstated or revoked pending termination notices for 65 employees and is attempting to reinstate 299 others). And the agencies continue to work on onboarding employees who accept reinstatement. That onboarding process is an extensive one, and includes assigning workspace, issuing appropriate credentials, enrolling in benefits programs, and completing required training. See, *e.g.*, D. Ct. Doc. 141-1, ¶ 6; D. Ct. Doc. 127-5, ¶ 9. The reinstatements have involved logistical burdens due to their scale, requiring substantial resources to address various issues, including effectuating reinstatement across multiple systems and pay periods, addressing issues such as the reinstatement of a terminated probationary employee who had pleaded guilty to a crime relating to covering up a murder and another found to be a foreign national from a country of particular concern. See, *e.g.*, D. Ct. Doc. 144-8, ¶ 12. In addition, the obligation to pay terminated employees inflicts massive financial costs that cannot be recouped.

And those burdens continue to be staggering for every day the injunction remains in effect because the sweeping injunction entered by the district court requires employees to be returned in a manner that "restore[s] the services the preliminary injunction intends to restore." D. Ct. Doc. 140. That suggests that, beyond reinstatement, the injunction also requires the employees the agencies had terminated to be

given the same work assignments they had been given before February 13—regardless of other changes to work assignments that the agencies might have made between the terminations and the issuance of the preliminary injunction ordering reinstatement on March 13. Adding to the chaos, agencies have to make assignment decisions in the shadow of the serious uncertainty about the legality of the court's order, and in light of its potential reversal—and the ensuing re-termination of the probationary employees—once the appellate process has had a chance to unfold.

Making matters worse, the district court apparently intends to superintend the continuing assignments to the reinstated employees and has repeatedly ordered the agencies to provide updates about the onboarding process. See, *e.g.*, D. Ct. Docs. 138, 140. Each day the preliminary injunction remains in effect subjects the Executive Branch to judicial micromanagement of its day-to-day operations.[2]

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[2] Five of the six agencies at issue in this case are also required to reinstate employees under the temporary restraining order issued in *Maryland* v. *U.S. Dep't of Agriculture*, No. 25-cv-748 (D. Md. Mar. 13, 2025). That order does not reduce the irreparable harm to the government from the preliminary injunction in this case because that order could be lifted at any time. See Order at 2, *Maryland* v. *U.S. Dep't of Agriculture*, No. 25-1248 (Mar. 21, 2025) (denying the government's motion for emergency relief from the TRO "[g]iven the district court's stated intention to hold a [preliminary injunction] hearing on March 26, 2025"). In any event, the *Department of Agriculture* order expressly permits reinstated employees to be placed on administrative leave, meaning that the preliminary injunction here inflicts additional practical and administrative burdens even while the *Department of Agriculture* order remains in effect.

The U.S. Department of Agriculture (USDA), which is one of the five agencies covered by the *Department of Agriculture* order is subject to an additional order by the MSPB, staying the termination of its probationary employees until April 18. That order does not reduce the irreparable harm at the USDA for similar reasons, both because it can be lifted and because it does not entail judicial supervision of work assignments. See *Doe* v. *U.S. Dep't of Agriculture*, No. CB-1208-25-20-U-1 (M.S.P.B. March 5, 2025). Indeed, to the extent that the MSPB order is unlikely to be lifted, it shows that respondents failed to show extant irreparable harm from USDA terminations and that the district court in this case erred by ordering reinstatement of USDA employees in the preliminary injunction.

3. The balance of equities weighs strongly in favor of the government

The balance of the equities also weighs strongly in favor of the government. Respondents have asserted possible disruptions in their members' use of discrete government services. See, *e.g.*, D. Ct. Doc. 18-13, ¶ 7 (request for records under the Freedom of Information Act); D. Ct. Doc. 18-16, ¶¶ 7-8 (application for financial assistance from the Small Business Association); D. Ct. Doc. 39-2, ¶¶ 3-4 (activities involving endangered species); see also App., *infra*, 22a (invoking the potential "degradation" of wildlife and natural parks). Even if those attenuated injuries suffice for purposes of Article III (and, as explained above, they do not do even that), they cannot outweigh the government's authority to manage its own internal affairs. That is particularly so because reinstatement, while incredibly burdensome for the government, has at best an attenuated impact on any specific services respondents' members seek to utilize. Restoration of any services that were in fact affected by the terminations relies on the independent judgment of employees (who are not parties in this suit) to accept reinstatement to full duty status, and on agencies' independent decisions about how to deploy reinstated employees in light of agency priorities and the continuing uncertainty about those employees' status. As Judge Bade observed below in dissenting from the denial of an administrative stay, respondents "offer no reason to believe that *immediate* offers of reinstatement would cure" the potential defects in government services; instead, the efforts to onboard employees and redistribute work assignments—all under the continuing uncertainty of the likely vacatur of the district court's order on appellate review—"would likely draw (already depleted) agency resources away from their designated service functions." App., *infra*, 64a (Bade, J., dissenting).

C. This Court Should Grant An Administrative Stay

The Acting Solicitor General respectfully requests that this Court grant an administrative stay while it considers applicants' submission that ensures that applicants are not required to take additional steps beyond those already taken to comply with the preliminary injunction. That would leave matters as they currently lie, with the probationary employees the district court required to be reinstated remaining reinstated in at least a paid administrative leave status. But it would relieve agencies of the obligation of continuing efforts to onboard employees to full duty status; and it would relieve applicants of any obligation to provide work assignments to the onboarded employees or to file additional reports documenting those measures in district court. Each additional day of such superintendence of personnel matters is intolerable and warrants immediate relief while the Court considers the government's broader request.

CONCLUSION

This Court should stay the district court's preliminary injunction. In addition, the Acting Solicitor General respectfully requests an immediate administrative stay of the district court's order pending the Court's consideration of this application.

Respectfully submitted.

SARAH M. HARRIS
Acting Solicitor General

MARCH 2025

APPENDIX

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, et al.,

Plaintiffs,

v.

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, et al.,

Defendants.

No. C 25-01780 WHA

MEMORANDUM OPINION AND ORDER AMENDING TRO

STATEMENT

On January 20, 2025, Acting Director of the Office of Personnel Management Charles Ezell, defendant, issued a memo to department and agency heads directing them to identify all employees serving probationary periods by January 24, and to "promptly determine whether those employees should be retained at the agency." Probationary employees are those who have served less than one year in the competitive service or less than two in the excepted service.

On February 13 OPM communicated with the heads of several federal agencies in a private conference call. Neither the participants nor the contents of that call are directly in the record.

T e next day, OPM sent an email to federal agencies' chief human capital officers (and their deputies) stating:

> Over the past several days, agencies have worked to review, clean up, and finalize their lists of probationary employees they wish to keep, and wish to terminate, and begin taking action.
>
> We have asked that you separate probationary employees that you have not identified as mission-critical no later than end of the day Monday, 2/17. We have attached a template letter. The separation date should be as soon as possible that is consistent with applicable agency policies (including those in CBAs).

(Dkt. No. 37-1).

The large-scale termination of probationary employees from myriad federal agencies followed. Plaintiffs contend that those employees were terminated at the direction of OPM.

Dr. Andrew Frassetto, for example, was hired as a program director at the National Science Foundation on September 9, 2024 (Frassetto Decl. ¶3). Dr. Frassetto and over 100 other NSF employees were terminated *en masse* during a Zoom meeting on February 18 (*id.* ¶ 10; Evans Decl. ¶28). A time-stamped transcript of that meeting, generated by an automated closed captioning system, is attached to Dr. Frassetto's declaration (Exh. B). In response to inquiries by the terminated employees, NSF's chief management officer, Micah Cheatham, stated that "[w]e were directed last Friday [February 14] by OPM to terminate all probationers except for a minimal number of mission critical probationers" (*id*. at 18). Asked if NSF had attempted to negotiate with the administration to minimize the number of terminations, Cheatham responded: "There's no negotiation" (*id*. at 25).

In fact, when the NSF officials orchestrating the firings were confronted by the terminated probationers, they stated that "[u]p until Friday [February 14]. Yes. We were told by OPM it was the agency's discretion whether to remove probations or not. *We chose to retain them all*" (*id*. at 17). But "late Friday night," "[t]hey told us that they directed us to remove probationers" (*ibid.*). "[T]here was no limited discretion. *This is not a decision the agency made. This is a direction we received*" (*id*. at 12) (emphasis added).

Plaintiffs further allege that OPM ordered agencies to use template notices — supplied by OPM — to implement the ordered terminations, and that those templates falsely premised the *en masse* terminations on individual performance. The Department of Agriculture, National Science Foundation, Federal Aviation Administration, Department of Veterans Affairs, and Department of Health and Human Services each issued substantially similar letters (Bachelder Decl., Exh. 1; Evans Decl., Exh. B; Ronneberg Decl., Exh. 1; Schwarz Decl., Exh. A). Each stated that the recipient was fired because "[t]he Agency finds, *based on your performance*, that you have not demonstrated that your further employment at the Agency would be in the public interest" (*ibid.* (emphasis added)). The empty template provided to DOD by OPM likewise declares — despite empty "[NAME]" "[TITLE]" and "[ORGANIZATION]" fields — that "the Agency finds, based on your performance, that you have not demonstrated that your further employment at the agency would be in the public interest" (Schwarz Decl., Exh. D).

Dr. Frassetto is again illustrative. In a February 13 performance review — *five days* before he was terminated "based on [his] performance" — Dr. Frassetto's supervisor reported:

> [H]is role [is] mission critical. Dr. Frassetto has been an outstanding program director, and he has taken the lead role in overseeing this important and complicated portfolio for the division. Dr. Frassetto came to NSF with a unique skill set in interdisciplinary scientific research . . . . He has already demonstrated an outstanding ability to balance the various aspects of his job responsibilities and is highly effective at organizing and completing all his work in an accurate and timely manner.
>
> . . .
>
> Dr. Frassetto's work on this portfolio has been outstanding and he has brought important experience to the role and has demonstrated highly competent project management and oversight. He is a program director who has needed minimal supervision and eagerly seeks special assignments at higher levels of difficulty. He has been an outstanding contributor to the division, directorate, and agency.

(Frassetto Decl., Exh. A).

The NSF officials who fired Dr. Frassetto (and over 100 of his peers) via Zoom on February 18 stated: "The cause comes from boilerplate we received from OPM. The cause

says that the agency finds based on your performance that you have not demonstrated that your further employment at the agency would be in the public interest" (Frassetto Decl., Exh. B at 21).

On February 26, 2025, Civilian Personnel Policy Council members at the Department of Defense (DOD) stated by email: "In accordance with direction from OPM, beginning February 28, 2025, all DOD Components must terminate the employment of all individuals who are currently serving a probationary or trial period" (Schwarz Decl., Exh. C at 1).

Tracey Therit, chief human capital officer for the VA, testified under oath at a congressional hearing before the House Committee on Veterans Affairs on February 25:

> **RANKING MEMBER TAKANO**: So nobody ordered you to carry out these terminations?·
>
> You did it on your own?
>
> **MS. THERIT**: There was direction from the Office of Personnel Management.

(Walls Decl. (Reply), Exh. A at 8).

On February 14, a probationer terminated by the Foreign Agricultural Service asked USDA's deputy chief human capital officer by email about the "specific details of my performance that were evaluated and found to be insufficient" (Blake Suppl. Decl., Exh. A at 1). The response: "[A]gencies were directed to begin providing termination notices . . . and directed [*sic*] the use of a specific template and language for the notice beginning immediately upon OPM notification" (*id.* at 2).

In a "town hall" for IRS employees on February 21, the IRS's chief human capital officer (CHCO) stated:

> I'm not sure why it's happening . . . . Regarding the removal of the probationary employees, again, that was something that was directed from OPM. And even the letters that your colleagues received yesterday were letters that written by OPM, put forth through Treasury, and given to us . . . . I cannot explain to you why this has happened. I've never seen OPM direct people at any agency to terminate.

(Lezra Decl., Exh. A at 4–5).

The IRS had to "get permission" to make even minor alterations to the template OPM termination letter:

> There was a modification because we created our own email box for employees to send questions to HR directly after they separate. We felt it was important to have an avenue of communication open for them if they had questions about their final paycheck, or benefits, or leave payouts. So we did get permission to add that email in there.

(*id*. at 4–5). The IRS CHCO continued:

> And our actions are being watched by OPM. So that's, again, something else that's unprecedented. . . . Everything we do is scrutinized. Everything is being looked at twice. Any changes that are made in our system that show any type of action that has been deemed impermissible, we have to respond to why it happened.

(*id*. at 3–4).

A termination letter received by a probationer at the Bonneville Power Administration (within the Department of Energy) stated: "*Per OPM instructions*, DOE finds that your further employment would not be in the public interest. For this reason, you are being removed from your position with DOE and the federal civil service effective today" (Schwarz Decl., Exh. B at 10 (emphasis added)).

As many as 200,000 probationary federal employees are at risk of termination (Br. at 19). Those already terminated rank somewhere in the tens of thousands (*ibid*.). OPM and the federal agencies involved have not disclosed the number or identity of those terminated (even to their unions) (*ibid*.).

The ongoing, *en masse* termination of probationary employees across the federal government's agencies has sown significant chaos. By way of example, Major General (Ret.) Paul Eaton states that the termination of over 1,000 employees across the VA has crippled the agency's administration of the Veterans Crisis Line (Eaton Decl. ¶¶ 8–9). When functioning as intended, the VCL offers our veterans, who suffer from high rates of post-traumatic stress disorder and suicide, 24/7 mental health care in moments of crisis (*ibid*). Don Neubacher,

formerly the Superintendent at Yosemite National Park, states that the ongoing firing of National Park System probationers will inflict immediate, foreseeable harm onto our national parks and the habitats and animals therein (Neubacher Decl.). The Western Watershed Project, meanwhile, has already had its ecological mission frustrated, as terminations at BLM have rendered that agency unable to respond to the Project's FOIA requests (Molvar Decl. ¶ 7).

* * *

Plaintiffs in this action fall into two groups. *First*, the union plaintiffs: American Federation of Government Employees, AFL-CIO (AFGE); American Federation of Government Employees Local 1216; American Federation of Government Employees Local 2110; American Federation of State County and Municipal Employees, AFL-CIO; and United Nurses Associations of California/Union of Health Care Professionals, AFSCME, AFL-CIO. *Second*, the organizational plaintiffs: Main Street Alliance, Coalition to Protect America's National Parks, Western Watersheds Project, Vote Vets Action Fund Inc., and Common Defense Civic Engagement.

Plaintiffs filed a complaint for declaratory and injunctive relief on February 19, 2025 (Dkt. No. 1). Four days later, on February 23, they filed an amended complaint and moved for a temporary restraining order (Dkt. Nos. 17, 18).

First, plaintiffs argue that OPM directed federal agencies to fire probationary employees, and that the action was an *ultra vires* act because it exceeded the scope of OPM's statutory authority, intruded upon the statutory authority of the individual federal agencies and their heads, violated the Civil Service Reform Act's (CSRA) provisions governing agency terminations based on performance and reductions in force (RIFs), and violated the General Authority to Employ enacted by Congress (Dkt. No. 17 at 25–26). *Second*, plaintiffs argue that the OPM directive to terminate probationary employees constituted a final agency action that violated the APA because it exceeded the agency's statutory or constitutional authority, was otherwise unlawful, was arbitrary and capricious, and did not undergo the necessary notice and comment process (*id.* at 26–30).

Plaintiffs' motion for a TRO seeks an order enjoining defendants from taking any actions to effectuate OPM's probationary employee termination directive.

ANALYSIS

The standard for a temporary restraining order is the same as that for a preliminary injunction. *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). "A plaintiff seeking a preliminary injunction must establish that [1] he is likely to succeed on the merits, that [2] he is likely to suffer irreparable harm in the absence of preliminary relief, that [3] the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

1. LIKELIHOOD OF SUCCESS ON THE MERITS.

A. PLAINTIFFS' ULTRA VIRES *CLAIM.*

Plaintiffs argue that OPM's termination directive constituted an *ultra vires* act that violated, and — unless recalled — continues to violate the scope of its and all impacted agencies' statutory authority as established by Congress.

"The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015). "Equitable actions to enjoin *ultra vires* official conduct do not depend upon the availability of a statutory cause of action; instead, they seek a 'judge-made remedy' for injuries stemming from unauthorized government conduct, and they rest on the historic availability of equitable review." *Sierra Club v. Trump*, 963 F.3d 874, 890–91 (9th Cir. 2020) (citing *Armstrong*, 575 U.S. at 327), *vacated and remanded on other grounds (mootness)*, 142 S. Ct. 46 (2021).

Plaintiffs are likely to succeed on their *ultra vires* claim. No statute — anywhere, ever — has granted OPM the authority to direct the termination of employees in other agencies. "Administrative agencies [like OPM] are creatures of statute. They accordingly possess only the authority that Congress has provided." *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 595

U.S. 109, 117 (2022). Congress's statutory scheme grants to each agency head the authority to manage their own affairs, including the hiring and firing of employees. 5 U.S.C. § 3101 ("Each Executive agency, military department, and the government of the District of Columbia may employ such number of employees of the various classes recognized by chapter 51 of this title as Congress may appropriate for from year to year."); 5 U.S.C. § 301 ("The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees . . . ."); *see also, e.g.,* 38 U.S.C. §§ 303, 510 (VA); 10 U.S.C. § 113 (DOD).

The same is true of OPM. Congress has vested its director with the authority to "secur[e] accuracy, uniformity, and justice in the functions of the Office," "appoint[] individuals to be employed by the Office, and "direct[] and supervis[e] employees of the Office." 5 U.S.C. § 1103(a)(1)–(3). But that's it. OPM did not have the authority to direct the firing of employees, probationary or otherwise, in any *other* federal agency.

OPM concedes that it lacks the authority to direct firings outside of its own walls and argues, instead, that it "did not direct agencies to terminate any particular probationary employees based on performance or misconduct, and did not create a 'mass termination program'" — it merely "asked agencies to engage in a focused review of probationers based on how their performance was advancing the agencies' mission, and allowed them at all times to exclude whomever they wanted" (Ezell Decl. ¶ 7). OPM's factual contention rests entirely on the Ezell Declaration.

Plaintiffs, meanwhile, have mustered a mountain of evidence that points in the other direction, from a broad range of federal agencies: "In accordance with *direction* from OPM . . . all DOD Components must terminate the employment of all individuals who are currently serving a probationary or trial period" (DOD), "[t]here was *direction* from the Office of Personnel Management" (VA), "agencies were *directed* to begin providing termination notices . . . immediately upon OPM notification" (USDA), "that was something that was *directed* from OPM" (IRS), "[w]e were *directed* last Friday by OPM" (NSF), "[t]hey told us that they *directed* us to remove probationers" (NSF) (emphases added). A full accounting is above. The

weight of the evidence supports plaintiffs' contention that OPM exceeded the bounds of its authority by unlawfully directing the mass termination of probationary employees across a wide range of federal agencies.

OPM's Article II argument likewise rests on the factual contention that OPM's actions constituted mere "guidance," and is rejected on the facts (Opp. at 26). Article II, moreover, is irrelevant here. Congress's statutory scheme *created* the agency, *vested the agency with authority*, and *defined the bounds of that authority*. It is an OPM action that is being challenged and, as explained above, the evidence supports the contention that OPM's direction to other agencies fell outside its limited statutory authority.

B. PLAINTIFFS' APA CLAIMS.

Plaintiffs have also shown that their APA claims are likely to succeed.

Under the APA, only "final agency action[s]" — those that "mark the consummation of the agency's decisionmaking process" and determine "rights or obligations . . . from which legal consequences will flow" are subject to judicial review. *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (cleaned up) (citing 5 U.S.C. § 704). OPM's direction to the other agencies constituted a final agency action for the purposes of the APA. Plaintiffs have marshalled significant evidence from numerous agencies stating that they were acting at the direction of OPM.

As explained above, OPM's direction to other agencies was not supported by any statutory authority. Plaintiffs are therefore likely to show that OPM's directive constituted an agency action that was "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" that must be "[held] unlawful and set aside." 5 U.S.C. § 706(2)(C).

Plaintiffs are also likely to show that the OPM directive was an arbitrary and capricious action. *Id*. § 706(2)(A). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). "Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the

choice made.'" *Ibid.* (quoting *Burlington Truck Lines v. United States,* 371 U.S. 156, 168 (1962)). The key fact here is that the template letters sent from OPM to the directed agencies stated: "[T]he Agency finds, *based on your performance*, that you have not demonstrated that your further employment at the Agency would be in the public interest" (Schwarz Decl., Exh. D). *First*, it is unlikely, if not impossible, that the agencies themselves had the time to conduct *actual* performance reviews of the thousands terminated in such a short span of time (Archuleta Decl. ¶ 14). It is even less plausible that *OPM alone* managed to do so. In at least one instance, a terminated scientist had received a glowing review — "[h]e has been an outstanding contributor to the division, directorate, and agency" — five days before he was terminated "for [his] performance" (Frassetto Decl., Exh. A at 1; Exh. C at 1). "Reliance on facts that an agency knows are false at the time it relies on them is the essence of arbitrary and capricious decisionmaking." *Missouri Serv. Comm'n v. Fed. Energy Regul. Comm'n*, 337 F.3d 1066, 1075 (D.C. Cir. 2003).

Lastly, plaintiffs are likely to show that OPM failed to comply with notice and comment rulemaking. "'Rule' means 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 . . . ." 5 U.S.C. § 551(4). Rules are subject to the notice and comment process prior to enactment. 5 U.S.C. § 553. OPM's January 20 memo and February 14 email are likely to constitute a "rule" under the APA (*see, e.g.,* Dkt. No. 37-1 at 2) ("OPM believes 'qualifications for continued employment' in the current context means that only the highest-performing probationers in mission-critical areas should be retained."). It is beyond cavil that they did not go through notice and comment rulemaking.

OPM's counters on this point rely on the jurisdictional "channeling" of the organizational plaintiffs or the factual contention that OPM did not issue a directive and are rejected on those grounds.

C. SUBJECT-MATTER JURISDICTION.

First, it is likely that the undersigned lacks jurisdiction to hear the union plaintiffs' claims for the reasons stated in recent denials of similar claims made by unions representing federal employees. *See, e.g.*, *Nat'l Treasury Emps. Union v. Trump*, No. 25-CV-420 (CRC), 2025 WL 561080, at *5–8 (D.D.C. Feb. 20, 2025) (Judge Christopher Cooper) (denying TRO); *Am. Foreign Serv. Ass'n, Inc. v. Donald Trump*, No. 1:25-CV-352 (CJN), 2025 WL 573762, at *8–11 (D.D.C. Feb. 21, 2025) (Judge Carl Nichols) (dissolving TRO); *Am. Fed'n of Gov't Emps. v. Ezell*, No. CV 25-10276-GAO, 2025 WL 470459, at *2 (D. Mass. Feb. 12, 2025) (Judge George O'Toole, Jr.) (dissolving TRO).

"Congress may preclude district court jurisdiction by establishing an alternative statutory scheme for administrative and judicial review." *Am. Fed'n of Gov't Emps. v. Trump*, 929 F.3d 748, 755 (D.C. Cir. 2019). Congress set forth such statutory schemes by way of the Federal Service Labor-Management Relations Statute (FSLMRS) and the CSRA. The relevant statutory background has been summarized in *National Treasury*:

> The Federal Service Labor-Management Relations Statute ("the Statute" or "FSLMRS"), set forth in Title VII of the Civil Service Reform Act ("CSRA"), governs labor relations between the executive branch and its employees. It grants federal employees the right to organize and bargain collectively, and it requires that unions and federal agencies negotiate in good faith over certain matters. The Statute further establishes a scheme of administrative and judicial review. Under that scheme, the Federal Labor Relations Authority ("FLRA"), a three-member agency charged with adjudicating federal labor disputes, reviews matters including negotiability and unfair labor practice disputes. When reviewing unfair labor practice complaints, the FLRA resolves whether an agency must bargain over a subject, violated the duty to bargain in good faith, or otherwise failed to comply with the Statute.
>
> Direct review of the FLRA's decisions is available in the courts of appeals. 5 U.S.C. § 7123(a).
>
> . . .
>
> Separately, the CSRA also established a comprehensive system for reviewing personnel action taken against federal employees. If an agency takes a final adverse action against an employee — removal, suspension for more than 14 days, reduction in grade or pay, or furlough for 30 days or less — the employee may appeal to the Merit Systems Protection Board ("MSPB"). The MSPB may order relief to prevailing employees, including reinstatement,

> backpay, and attorney's fees. Probationary employees, however, generally do not enjoy a right to appeal to the MSPB. Employees may appeal final MSPB decisions to the Federal Circuit, which has exclusive jurisdiction over such appeals. This statutory review scheme, too, is exclusive, even for employees who bring constitutional challenges to federal statutes.

Nat'l Treasury, 2025 WL 561080, at *4–5 (cleaned up).

Under *Thunder Basin Coal Co. v. Reich*, a claim may fall outside of the scope of a special statutory scheme where "a finding of preclusion could foreclose all meaningful judicial review," the claims considered are "wholly 'collateral'" to a statute's review provisions, or the claims are "outside the agency's expertise." 510 U.S. 200, 212–13 (1994). "These considerations do not form three distinct inputs into a strict mathematical formula. Rather, they serve as general guideposts useful for channeling the inquiry into whether the particular claims at issue fall outside an overarching congressional design." *Trump*, 929 F.3d at 755 (cleaned up).

The union plaintiffs' attempts to distinguish their instant claims from those channeled to the FLRA and MSPB in *National Treasury*, *American Foreign Service*, and *Ezell* are unconvincing, and the analysis laid out in those decisions applies with equal force here: The union plaintiffs and their members must adjudicate their claims through the FLRA and MSPB. The union plaintiffs' claims "are the vehicle by which they seek to reverse the removal decisions, to return [members] to federal employment, and to [collect] the compensation they would have earned but for the adverse employment action." *Elgin v. Dep't of Treasury*, 567 U.S. 1, 22 (2012); *Heckler v. Ringer,* 466 U.S. 602, 614 (1984). That the FLRA or MSPB may lack the authority to adjudicate the union plaintiffs' constitutional and APA claims does not constitute a foreclosure on all meaningful judicial review: Those issues can be "'meaningfully addressed in the Court of Appeals' that Congress [has] authorized to conduct judicial review." *Elgin*, 567 U.S. at 17 (quoting *Thunder Basin*, 510 U.S. at 215). Both schemes "provide[] review in . . . an Article III court fully competent to adjudicate [plaintiffs'] claims." *Ibid.*

Second, OPM argues that the CSRA and FSLMRS intended to channel *all* disputes that touch on a federal employment relationship to administrative review, *no matter the party*

bringing such a dispute. But a claim brought by Western Watersheds Project (WWP), for example, against OPM, alleging that the latter issued an unlawful, arbitrary and capricious rule that undermined the BLM's ability to respond to WWP's FOIA requests, does not feature a federal employee, their union representative, or their federal employer (in this example BLM). The plaintiff's injury — frustration of its ecological mission — is equally ill-suited to adjudication by a *labor* board. True, the termination of a federal employee remains embedded within the dispute: WWP's injury, it argues, occurred *because* OPM demanded, unlawfully, that the probationary employees at BLM be terminated. That, standing alone, is not enough to bring a claim within the scope of the statutory schemes created for the resolution of bargaining disputes and employee claims. Asked to provide a single example of a claim brought by a third party, against a third party, that had been administratively channeled via *Thunder Basin*, OPM could not. Such a rule would stretch that doctrine too far.

In sum, it is unlikely that this Court has jurisdiction over the union plaintiffs, but it likely does have jurisdiction to hear the claims of the organizational plaintiffs. This order moves to consider whether the latter group has standing.

D. STANDING.

The Supreme Court has set the bar for standing as follows:

> [T]he irreducible constitutional minimum of standing contains three elements. *First*, the plaintiff must have suffered an injury in fact — an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. *Second*, there must be a causal connection between the injury and the conduct complained of — the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court. *Third*, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (cleaned up; emphases added). Where plaintiff seeks prospective injunctive relief, he "must demonstrate that he has suffered or is threatened with a concrete and particularized legal harm, coupled with a sufficient likelihood that he will again be wronged in a similar way." *Fellowship of Christian Athletes v. San Jose*

U ified Sch. Dist. Bd. of Educ., 82 F.4th 664, 680–81 (9th Cir. 2023) (en banc) (quoting *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc)). "[I]n an injunctive case this court need not address standing of each plaintiff if it concludes that one plaintiff has standing." *Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 523 (9th Cir. 2009). Given the nature of this action and the injunction requested, however, it is necessary that standing be evaluated as to each organizational plaintiff.

"An organization has standing to bring suit on behalf of its members ["representational standing"] if '(1) at least one of its members would have standing to sue in his own right, (2) the interests the suit seeks to vindicate are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Fellowship of Christian Athletes*, 82 F.4th at 681 (quoting *Fleck & Assocs., Inc. v. City of Phoenix*, 471 F.3d 1100, 1105–06 (9th Cir. 2006)).

An organization has direct organizational standing, meanwhile, "where it establishes that the defendant's behavior has frustrated its mission and caused it to divert resources in response to that frustration of purpose." *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 663 (9th Cir. 2021). "Of course, organizations cannot manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all, but they can show they would have suffered some other injury had they not diverted resources to counteracting the problem." *Ibid.* (internal quotation marks omitted); *see also FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 384–86 (2024). At bottom, the test is whether an organization's ability to perform the services they were formed to provide has been "perceptibly impaired" by the challenged action. *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 765 (9th Cir. 2018) (cleaned up).

(i) The Coalition to Protect America's National Parks (The Coalition) and Main Street Alliance (MSA).

"Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal

protection through the judicial process." *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972). In *Desert Citizens Against Pollution v. Bisson*, for example, BLM sought to exchange 1,745 acres of federal land in Imperial County for a 2,642-acre parcel in the Santa Rosa and Little Chuckwalla Mountains owned by Gold Fields, a mining company. 231 F.3d 1172, 1175 (9th Cir. 2000). Gold Fields aimed to turn the Imperial County tract into a landfill; the members of Desert Citizens aimed to save it from that grim fate via an APA action. *Ibid*. Our court of appeals held that the members' continued use of the federal lands established an injury in fact: "The recreational or aesthetic enjoyment of federal lands is a legally protected interest whose impairment constitutes an actual, particularized harm sufficient to create an injury in fact for purposes of standing." *Id*. at 1176 (citing *Sierra Club*, 405 U.S. at 734).

The National Park Service has terminated close to 1,000 newly hired employees (Neubacher Decl., Exh. A). Coalition board member Don Neubacher, the former Superintendent at Yosemite National Park (2010–2016) and Point Reyes National Seashore (1995–2010) submitted a declaration stating:

> The Coalition to Protect America's National Parks ("Coalition") is a non-profit organization made up of over 3,400 members, all of whom are current, former, and retired employees and volunteers of the National Park Service. Together, they have accumulated over 50,000 years of experience caring for America's most valuable natural and cultural resources. . . . *Our members and their families are regular and avid users of the National Park System who would be adversely affected by any degradation of the parks or the programs of the NPS to preserve and protect the parks and make them available to visitors. Based on my experience as a park Superintendent, the termination of so many NPS employees at once will have an immediate adverse impact on the parks and park visitors.* For example, at Yosemite, the park will likely have to stop specific functions and close park areas. There is no way to accommodate current visitation levels without additional staff support during the upcoming peak season. When there was a partial government shutdown in 2018, visitors trashed scenic viewpoints, defecated outside locked restrooms and trampled sensitive ecological areas with their vehicles and dogs. The park receives annual visitation of over 4 million people.

(Neubacher Decl. ¶¶ 2–5 (emphasis added)). In a separate declaration, Jonathan B. Jarvis, the former Director of the National Parks Service, underscores the immediacy and scope of the harm to park operations, environmental protection, and natural resource monitoring (Dkt. No.

18-11). Some of the likely, imminent harms laid out above have already come to pass. A member of the Coalition reported this week that they and their party were forced to abandon a trip to Joshua Tree National Park because the Black Rock Nature Center, which ordinarily provides shelter and commodes to the public, remained unstaffed and closed well after its scheduled opening time (Neubacher Suppl. Decl. ¶ 4).

The Coalition has standing. Its members' continued use and enjoyment of our national parks will likely be, and in at least one case already has been, injured by the terminations that have taken place at the National Parks Service.

Main Street Alliance likewise has representational standing. MSA is a "national network of small businesses, with approximately 30,000 members throughout the United States. MSA helps small business owners realize their full potential as leaders . . . with the aim of creating an economy where all small business owners have an equal opportunity to succeed" (Phetteplace Decl. ¶¶ 2–3). "MSA's small business members rely on the U.S. Small Business Administration ('SBA') for a variety of valuable services that help small businesses succeed. These services include loans, loan guarantees, and grants; disaster relief; assistance in connecting small businesses with government contracting opportunities; and a national network of some 1,000 Small Business Development centers that provide counseling and training to help entrepreneurs start their own businesses" (*id.* ¶ 4). A February 20 letter from the Ranking Member of the Senate Committee on Small Business and Entrepreneurship to the Administrator of the SBA cited reporting that hundreds of probationary SBA employees had been terminated across the country and stated that "through our own investigation and public reporting, we have learned that the fired employees included those supporting disaster assistance and oversight of loan programs" (*id.* Exh. A). MSA asserts that the mass terminations at the SBA are likely to impair disaster relief, the provision of loan guarantees, and other services necessary for MSA's members to open a business or stay float (*id.* ¶ 9). Some members who already have entered into contracts with the expectation of obtaining timely loan guarantees "are likely to be on the hook for expenses owed to contractors and suppliers without the ability to pay amounts owed" (*id.* ¶ 8).

(ii) The Western Watersheds Project (the Project).

In *Havens Realty Corp. v. Coleman*, an organization "whose purpose was to make equal opportunity in housing a reality in the Richmond Metropolitan Area," HOME, brought a Fair Housing Act claim against Havens Realty, which owned and operated apartment complexes in Richmond. 455 U.S. 363, 368 (1982) (internal quotation marks omitted). HOME asserted that Havens Realty's unlawful "racial steering" — providing false information regarding the availability of housing to black individuals to maintain a segregated property — had frustrated its mission and, critically, its housing counseling service. *Id.* at 367, 369. The Supreme Court rejected Haven Realty's standing challenge, holding:

> If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low-and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities — with the consequent drain on the organization's resources — constitutes far more than simply a setback to the organization's abstract social interests.

Id. at 379 (citing *Sierra Club*, 405 U.S. at 739).

The Project has standing to challenge OPM's directive to fire probationary employees at BLM and the U.S. Fish and Wildlife Service. Erik Molvar, a wildlife biologist formerly employed by the U.S. Forest Service and Army Corps of Engineers, and now the Project's Executive Director, states that it "is a non-profit environmental conservation group that works to influence and improve public lands management" (Molvar Decl. ¶¶ 3–4). Founded in 1993, the group has some 14,000 members, with field offices in Idaho, Montana, Wyoming, Arizona, Nevada, and Oregon. The group is primarily focused on "the negative impacts of livestock grazing" (*ibid.*). The group is also an active litigant in the federal courts, where it advocates against commercial grazing on public lands. *See, e.g., W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472 (9th Cir. 2011); *W. Watersheds Project v. Abbey*, 719 F.3d 1035 (9th Cir. 2013); *W. Watersheds Project v. Interior Bd. of Land Appeals*, 62 F.4th 1293 (10th Cir. 2023); *W. Watersheds Project v. U.S. Forest Serv.*, 603 F. App'x 612 (9th Cir. 2015) (mem.).

First, the Project has shown *actual* harm, namely that its ecological mission has been perceptibly impaired by the termination of employees at the BLM:

> This mass termination of employees will have an immediate adverse effect on the ability of the [Project] to accomplish its mission.
>
> For example, I was told by a federal employee on February 20, 2025, that because of staffing issues the Bureau of Land Management is unable to respond to a Freedom of Information Act request submitted by the [Project]. Our work depends on timely access to public records.

(Molvar Decl. ¶¶ 7–8). The termination of range managers and biologists, meanwhile, will diminish BLM's ability to provide timely "land health assessments to monitor the impact of cattle and sheep grazing on public lands," further undercutting the Project's ability to pursue its stated goals (*id.* ¶ 8).

Second, the Project has shown harm to both its members' protected interests in and its own efforts to advocate on behalf of endangered species. The Project is a party in an ongoing litigation in the District of Montana (Molvar Suppl. Decl. ¶ 3). *Ctr. for Biological Diversity v. Haaland,* No. 23-cv-02-BU-DLC (D. Mont.) (Judge Dana Christensen). There, the Project (and its co-plaintiffs) challenged a 2020 finding from the FWS concerning the Missouri River Distinct Population Segment of Arctic grayling, a freshwater fish with precious little habitat left, under the Endangered Species Act (Molvar Suppl. Decl. ¶ 3). Following a partial grant of summary judgment in the plaintiffs' favor, Judge Christensen ordered FWS to make a new finding regarding the status of the upper Missouri River Basin Distinct Population Segment of Arctic grayling by August 2025. *Haaland*, No. 23-cv-02-BU-DLC, Dkt. No. 52 at 53. On February 12 the FWS sought and received an extension of that deadline to February 2027 (Molvar Suppl. Decl. at ¶ 3). In a declaration to Judge Christensen, the FWS conditioned their ability to meet that new deadline on the "assumption[]" that "the Service will continue to have the authority to hire and retain sufficient listing program staff to be able to carry out the specified commitments." *Haaland*, No. 23-cv-02-BU-DLC, Dkt. No. 63-1 ¶ 15. The Project

represents that, as of February 26, some 400 FWS employees have been terminated (Molvar Suppl. Decl. ¶ 3).

Executive Director Molvar, himself a member of the Project, frequently fishes for Arctic grayling in the lakes of the Sapphire Mountains, in Glacier National Park, and in Alaska (*id*. at ¶ 9). He plans to do so again during a planned July 2025 trip to Alaska (*ibid.*). Under *Sierra Club* and its progeny, therefore, the Project has standing to vindicate its members' legally protected interest in the recreational enjoyment of federal lands and the flora and fauna therein.

(iii) Vote Vets Action Fund Inc. (VoteVets) and Common Defense Civic Engagement (Common Defense).

In *Fellowship of Christian Athletes*, an international student ministry challenged the defendant school district's decision to bar its local chapter from formal "recognition" as a student-run organization by the Associated Student Body (ASB). 82 F.4th at 681. The FCA stated it was an international "ministry group formed for student athletes to engage in various activities through their shared Christian faith" that operates through more than 7,000 local chapters. *Id*. at 671–72. Their stated mission was to equip "student athletes from all backgrounds for fellowship, spiritual growth, and service on their campuses." *Ibid.* FCA required that students serving in a leadership capacity affirm certain religious beliefs through a "Statement of Faith" (stating, among other things, that "marriage is exclusively the union of one man and one woman") and a "Sexual Purity Statement." *Id*. at 672–73. The defendant school district, citing the "discriminatory nature" of both statements, first stripped the club of its recognition as an official student club, and then imposed new "non-discriminatory criteria" for all student clubs, under which the local FCA chapter would be denied recognition in future years. *Id*. at 675, 678–79. While FCA's local chapter remained on campus, it lost out on certain campus privileges. *See id*. at 673.

Our court of appeals, sitting en banc, held that the FCA's national office had direct organizational standing because the local chapter's exclusion from the benefits associated with ASB recognition — access to fundraisers, the student yearbook, priority access to meeting spaces, and so on — "undoubtedly hampered," *id.* at 683, the FCA's mission "to lead every

coach and athlete into a growing relationship with Jesus Christ and His church," *id.* at 672. The FCA's national office moreover, "had to 'divert[] resources' in 'counteracting the problem' posed by the derecognition," including "a huge amount of staff time, energy, effort, and prayer that would normally have been devoted to preparing for school or ministry." *Ibid.*

Plaintiff VoteVets has standing. VoteVets is a "non-partisan, non-profit organization" that has "nearly 2 million supporters . . . with whom it regularly communicates about issues affecting veterans, including the operations, programs, and services available through the U.S. Department of Veterans Affairs" (Eaton Decl. ¶3). The VA has "dismissed over 1,000 probationary employees," "rais[ing] concerns about potential staffing shortages and the quality of care provided to veterans" (*id.* ¶ 8). For example, "the layoffs have hindered the recruitment of essential support staff for VCL positions such as trainers and quality assurance personnel" (*id.* ¶ 9). This shortage "has overwhelmed existing supervisors and affected the VCL's ability to provide timely assistance to veterans in crisis." Major General Eaton attests that:

> The February 2025 probationary terminations have had a significant impact on the organizational activities of VoteVets. The time of VoteVets' staff and consultants has been diverted from VoteVets' regular activities to field and respond to inquiries from veterans and their families and to connect them with case workers in congressional offices. This has taken almost all of our resources since the probationary terminations began, and has prevented us from performing our regular activities to meet the needs of veterans and their families.

(*id.* ¶ 11). VoteVets' members' access to services critical to the organization's mission has been hampered, and VoteVets itself has been forced to divert "almost all of [their] resources" in "counteracting the problem," depriving the organization of its ability to continue to provide services to its members (*ibid.*).

Plaintiff Common Defense likewise has standing. Common Defense is a "grassroots membership organization of progressive veterans, military families, and civilian supporters" (Arbulu Decl. ¶ 2). With approximately 33,187 members in California (about 2,000 of them veterans), Common Defense "mobilize[s] veterans to support and advocate for policies that help veterans, military families, and all working families," offers training and helps members

begin issue campaigns, and otherwise engages in legislative and political advocacy (*id.* ¶¶ 3–5, 11). Military veterans compose a large percentage of federal employees, and widespread termination — particularly at the VA and DOD — have had a disproportionate impact on persons whom Common Defense typically serves:

> As a result of these developments, Common Defense has had to devote considerable resources to responding to requests from our members and providing guidance about the mass probationary terminations. Many members believe that the termination of their employment may be imminent, and understandably have asked questions — by email, by phone, and on our members' slack channel — about what the letter means for their rights as employees Responding to members questions, and working to determine what answers we can give to those members, diverts resources from Common Defense's advocacy mission and core priorities, including working to expand ballot access at the state level, advancing initiatives to address climate change, and training and educating members.

(*id.* ¶ 6). Common Defense, like VoteVets, has diverted considerable resources otherwise intended for the pursuit of its advocacy mission to the problems presented to its members, and its mission, by mass terminations, particularly at the VA and DOD.

* * *

First, OPM counters that plaintiffs fail on causation: There was no direction, merely a request; that request was carried out by some agencies; it was those agencies' independent, intervening actions that are the proximate cause of plaintiffs' alleged harm. This argument rests on OPM's broader factual position that its memos and other communications to agencies regarding probationary employees constituted mere guidance, not direction. But plaintiffs have assembled a mountain of evidence supporting their more concise causal chain: OPM directed mass firings and plaintiffs each likely will be (or have been) injured as a result. Plaintiffs have each established a sufficient causal link between the mass termination of employees at the implicated agencies, and the imminent, foreseeable, and in some cases actual injuries that they face.

Next, OPM argues redressability:

> They ask the Court to order agencies to rescind probationary removals and reinstate removed employees. But, apart from OPM, no other federal agency is a party here, leaving the Court without the power to order those agencies to take any action. Thus, Plaintiffs cannot show that an order of this Court would likely grant their requested relief, rendering their claimed injuries non-redressable here.

(Dkt. No. 33 at 13). Plaintiffs fairly allege that they have been harmed by OPM's *direction* to other agencies to fire their probationary employees. Declaratory and injunctive relief enjoining OPM from issuing such a directive — one request among many made by plaintiffs — will likely redress their alleged injuries.

2. IRREPARABLE HARM.

"[P]laintiffs may not obtain a preliminary injunction unless they can show that irreparable harm is likely to result in the absence of the injunction." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). They have done so here.

"[T]he Supreme Court has instructed us that '[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.,* irreparable.'" *Ibid*. (alterations in original) (quoting *The Lands Council v. McNair*, 537 F.3d 981, 1004 (9th Cir. 2008) (en banc)). Relatedly, "deprivation of a source of personal satisfaction and tremendous joy can constitute an irreparable injury." *Ft. Funston Dog Walkers v. Babbitt*, 96 F. Supp. 2d 1021, 1039 (N.D. Cal. 2000) (citing *Chalk v. U.S. Dist. Ct.*, 840 F.2d 701, 709 (9th Cir. 1988)). That is true as to loss of access to national recreational areas. *Ibid.* The partial closure and degradation of national parks constitutes likely, irreparable harm due to both environmental injury and loss of access (*see* Neubacher Decl. ¶¶ 2–5). In at least one instance, a closure at Joshua Tree has resulted in actual harm (*see* Neubacher Suppl. Decl. ¶ 4). And the Arctic grayling, if it goes, is not coming back (*see* Molvar Suppl. Decl. ¶ 3–9). The Coalition and the Project have established irreparable harm.

Loss of access to essential government services also constitutes likely, and in some cases actual, irreparable harm. For example, the Veterans Crisis Line — an indispensable resource for our veterans in times of crisis — has been "overwhelmed" and its ability to provide care

diminished for lack of staff (Eaton Decl. ¶ 9). Loss of access to that critical resource, standing alone, constitutes irreparable harm to VoteVets' members. Its failure to meet the needs of our veterans presents the further likelihood of tragic results. MSA's members' access to crucial SBA services, including the provision of loan guarantees, is likely to be diminished (Phetteplace Decl. ¶¶ 5–9), and the Western Watersheds Project's access to FOIA production already has been impacted (Molvar Decl. ¶¶ 7–8).

Finally, plaintiffs face irreparable harm because they have diverted significant or even all present resources to responding to the hardships created by the mass termination of probationary employees (*see, e.g.*, Arbulu Decl. ¶ 6; Eaton Decl. ¶ 11).

MSA, the Coalition, the Project, VoteVets, and Common Defense have each established irreparable injury.

OPM's rebuttals, tailored largely to the union plaintiffs, are moot (Dkt. No. 33 at 10). OPM's assertion, meanwhile, that "[p]laintiffs have produced no credible evidence that terminations of federal employees have caused a disruption in critical government services" (*ibid.*) is refuted by the record, discussed at length in this memorandum's consideration of standing.

3. THE BALANCE OF THE EQUITIES AND THE PUBLIC INTEREST.

Because OPM is a party in this action, the balance of the equities and the public interest merge. *See Nken v. Holder,* 556 U.S. 418, 435 (2009). Here, they strongly favor plaintiff. "The preservation of the rights in the Constitution and the legality of the process by which government agencies function certainly weighs heavily in the public interest." *Nat'l Treasury Emps. Union v. U.S. Dep't of Treasury*, 838 F. Supp. 631, 640 (D.D.C. 1993) (Judge Harold Greene). Plaintiffs have presented real harms, detailed above, to their organizations, their members, and their missions, while OPM has not provided a substantive opposition (Dkt. No. 33 at 22–23).

In sum, each *Winter* factor favors granting a limited injunction.

C NCLUSION

Based on the foregoing, the Court granted the following relief at the close of the February 27 argument:

> That OPM's January 20 memo, February 14 email, and all other efforts to direct the termination of employees at NPS, BLM, VA, DOD, SBA, and NSF are illegal, invalid and must be stopped and rescinded. That OPM must communicate that decision to those agencies by the next day, February 27.

(Dkt. No. 41).

This memorandum amends the bench order to address two errors (the inclusion of the NSF, and the exclusion of FWS). The Court's TRO is accordingly **AMENDED** to the following:

It is **ORDERED** that:

> OPM's January 20 memo, February 14 email, and all other efforts by OPM to direct the termination of employees at NPS, BLM, VA, DOD, SBA, and FWS are unlawful, invalid, and must be stopped and rescinded.
>
> OPM shall provide written notice of this order to NPS, BLM, VA, DOD, SBA, and FWS.

The evidentiary hearing described at the February 27 motion hearing shall occur on **MARCH 13, 2025, AT 8 AM**. The hearing will be in person in Courtroom 12.

Dated: February 28, 2025.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable William Alsup, Judge

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, et al.,

Plaintiffs,

VS.

NO. 25-cv-01780-WHA

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, et al.,

Defendants.

San Francisco, California
Thursday, March 13, 2025

TRANSCRIPT OF PROCEEDINGS

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Thursday - March 13, 2025 8:01 a.m.

P R O C E E D I N G S

---oOo---

THE COURTROOM DEPUTY: All rise. Court is now in session. The Honorable William Alsup is presiding.

THE COURT: Good morning, everyone.

ALL: Good morning, Your Honor.

THE COURT: Please be seated.

THE COURTROOM DEPUTY: Calling Civil Action 25-1780, American Federation of Government Employees, et al. v. U.S. Office of Personnel Management, et al.

This hearing -- people on the Zoom -- attendees -- no recording, whether by audio or video or screenshot, is allowed. It's prohibited -- it's prohibited.

THE COURT: That was unclear. You said "allowed."

THE COURTROOM DEPUTY: No. No recording.

THE COURT: You said "prohibited." Which is it?

THE COURTROOM DEPUTY: No recording, audio or screenshots, are allowed.

Counsel, please approach the podium and state your appearances for the record, beginning with counsel for plaintiffs.

MS. LEONARD: Good morning, Your Honor. Danielle Leonard, Altshuler Berzon, for the plaintiffs. With me at counsel table are Stacey Leyton and Eileen Goldsmith from Altshuler Berzon, Norm Eisen from the State Democracy Defenders Fund, and Tera Heintz from the Attorney General's Office of the State of Washington.

THE COURT: Welcome.

MR. HELLAND: And good morning, Your Honor. Assistant United States Attorney Kelsey Helland for the Government.

THE COURT: Thank you. Welcome.

All right. We're here on a motion for preliminary injunction, and we'll hear some argument.

Are there any other items that we need to address? Let's hear first from plaintiffs.

MS. LEONARD: Thank you, Your Honor.

I'm happy to provide argument on the preliminary injunction. I do think that there are some additional items to address that we can --

THE COURT: Well, just --

MS. LEONARD: -- get to after we --

THE COURT: -- let me hear what -- let's make a list of whatever it is you have in mind. I don't want to hear the arguments on them yet, but let's -- tell me what needs to be decided.

MS. LEONARD: We have a pending request that a certain additional declaration be struck from the record that was filed yesterday.

We also --

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THE COURT: Is that Noah Peters?

MS. LEONARD: Yes, Your Honor.

THE COURT: All right. So let's -- what else?

MS. LEONARD: There is also the issue of Mr. Ezell's failure to appear in response to your court order that he appear on Monday.

THE COURT: What else? There was some --

MS. LEONARD: That's --

THE COURT: -- somebody from the IRS wanted to come and testify but wanted immunization, which I can't give. So I -- is that person here and wants to testify or is that moot?

MS. LEONARD: So it's not moot, Your Honor. But just for clarification, it wasn't necessarily immunization. It was just a court order enforcing the subpoena to provide --

THE COURT: No, you don't need a court order to enforce a subpoena. That's what the subpoena itself is.

MS. LEONARD: Your Honor, there's --

THE COURT: No. I'm not going to do that.

MS. LEONARD: Okay.

THE COURT: I know what's going on there. Some lawyer wants to be able to say that Judge Alsup has immunized her and given her a blank check to say whatever she wants and not be punished for it. No. If she wants to come and testify, I will hear what she has to say. But, no, you don't need a court order. I'm not going to do that.

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MS. LEONARD: Okay. I very much appreciate that clarification, Your Honor, but I also for -- just to clarify, that the person wanted protection against retaliation.

THE COURT: I can't give her that in advance.

MS. LEONARD: Okay.

THE COURT: Do you understand that?

MS. LEONARD: I --

THE COURT: This is a sideshow. Why are you going of into a sideshow?

MS. LEONARD: Because we --

THE COURT: All right. Is she here and does she want to testify?

MS. LEONARD: She's not here today.

THE COURT: Okay, then it's moot. All right. Let's move on.

What else is on your list?

MS. LEONARD: I think that's it, Your Honor.

THE COURT: All right. We will deal with Noah Peters and Ezell's failure to appear in the course of general argument. You get to go first.

MS. LEONARD: Thank you, Your Honor.

Your Honor, many of the issues that are raised by our request for a preliminary injunction have already been addressed in your Court's -- in the orders thus far in the case, including the order resolving the TRO and the recent --

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more recent order on granting leave to amend.

And so those legal issues I'm happy to address further if there is a need, but I'm going to try to keep this focused on the issues that are still in play.

And what we have before the Court is record evidence that conclusively establishes that OPM directed the terminations at issue. We have a very unusual circumstance where the Government has not mounted -- has attempted to say they factually dispute that. But as Your Honor is very familiar with the course of events here, have actually withdrawn the declaration by which they were attempting to dispute that. And there is no record evidence on the other side by which they've disputed this fact and the mountain of evidence that Your Honor recognized at the TRO stage.

THE COURT: Well, but then they substituted Noah Peters. So what is the -- your opinion on that and what is the law that backs it up?

MS. LEONARD: So they have not substituted Mr. Peters' declaration, Your Honor, because he -- that testimony was not presented for cross-examination and should not be considered by the Court. It was presented with an *ex parte* motion to stop this hearing today, Your Honor. That is the purpose for which they presented that declaration, to slide it into the record.

Out of an abundance of caution, we asked them to withdraw that declaration because they are not making Mr. Peters

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available to be cross-examined, just like all of the other Government witnesses that we tried to present to the Court to have the truth of what has happened come out and that they have refused and blocked from appearing here. They have not presented --

THE COURT: I tend to agree with you on that. And the Government, I believe, has tried to frustrate the Judge's ability to get at the truth of what happened here and then set forth sham declarations to -- a sham declaration -- they withdrew it, then substitutes another. That's not the way it works in the U.S. District Court. I'm going to talk to the Government about that in a minute.

I had expected to have an evidentiary hearing today in which these people would testify. And if they wanted to get your people on the stand, I was going to make that happen too. It would be fair. But, instead, we've been frustrated in that.

But I still -- we're here on a preliminary injunction. And if you want me to just wait until months go by, until we ever get the evidentiary hearing, I will do that. But we do have a record here, and I'd like to hear your views on what relief should be issued today -- T-O-D-A-Y -- today.

MS. LEONARD: Thank you, Your Honor.

We are aligned in wanting that to happen, as well, and believing that these issues are a distracting sideshow, however important the truth is.

The record before Your Honor absolutely supports the issuance of a preliminary injunction today. And the reason is, even if the Peters' declaration's considered, which it shouldn't be for all those reasons, it's not credible. There's a mountain of evidence before the Court that OPM directed it. OPM's actions were unlawful. The plaintiffs have standing. And there is irreparable harm that is occurring every minute. And it is snowballing.

So the real question here, Your Honor, is remedy. And we are happy to go straight to that point rather than repeating some --

THE COURT: All right. Tell me what remedy you want.

MS. LEONARD: Okay. So my colleague, Ms. Leyton, is actually going to address the remedy issues, so I'm going to turn it over to her.

THE COURT: Okay.

MS. LEYTON: Thank you, Your Honor.

As a remedy, we would request vacatur of the OPM action, rescission of the directive to the agencies, and rescission of the terminations that were carried out pursuant to that directive.

OPM issued the directive. Our belief is that the evidence in the record establishes that. There is no credible contrary evidence that it's caused the widespread loss and deterioration of Federal Government services, including, as documented by the

declarations, habitat and conservation harms, national parks harms, veterans' services, a variety of harms that are illustrated by the tens of declarations that we have submitted. And it's causing injury to a variety of plaintiffs.

So the only appropriate relief is to order both OPM to rescind its directives and the agencies to rescind the actions that they took pursuant to the unlawful directive in implementation of that directive.

The voluntary cessation cases, which we cited in our reply brief, provide some guidance. There, the question there is whether the Government has done enough that the Court should no -- no longer need act in order to remedy the relevant injuries.

The first prong of the voluntary cessation injury is about a different subject. It's about whether we can be assured --

THE COURT: All right. Well, let me ask you --

MS. LEYTON: Yes.

THE COURT: -- this.

Are there -- I've read through some of the papers submitted to me that some of the people who were terminated were rehired; is that true?

MS. LEYTON: Yes, Your Honor. After this Court issued an order, some were rehired pursuant to that, and then there has been some public outcry over things like the loss of the nuclear safety people.

THE COURT: All right. But have there been others who were terminated who have not yet been rehired?

MS. LEYTON: Most have not been rehired, Your Honor.

THE COURT: Can you give me some examples?

MS. LEYTON: The examples where they were rehired included the Department of Labor rescinded the terminations that had not taken effect. All of the other agencies that we have documented -- the Forest Service, the Department of Agriculture, the Department of Education, the Department of Labor -- most of the agencies have not rehired people.

The ones where we are aware, where the probationary employees were rehired, were the National Science Foundation, which occurred fairly quickly after this Court's order; the CDC rescinded some of the terminations; the Department of Labor rescinded terminations that had not yet happened; the Department of Agriculture has taken steps but has not yet rescinded the -- has not yet brought people back to work, is our understanding. And that was addressed in some of the declarations that we submitted earlier this week.

THE COURT: All right. Where does it stand with relief being sought from the Merit Systems Protection Board by terminated employees?

MS. LEYTON: The Merit Systems Protection Board initially addressed six individual employees and ordered those employees back to work. Then there was a class of Department

of Agriculture employees -- 6,000 Department of Agriculture employees -- who were ordered back to work. That's what our most recently submitted declarations address.

Our understanding is that those people are not yet back to work. The Office of Special Counsel, Hampton Dellinger, was terminated after that order issued, after he sought that class relief, and so we are not aware that those individuals have actually been brought back to work to restore the services that they were providing, which is the injury that this Court is seeking to redress.

THE COURT: I'm going to have some more questions later about that whole process, but I want to hold up for a moment and stick with the main things.

Okay. What else by way of relief are you seeking today?

MS. LEYTON: That is the key relief.

We would also ask that there be a compliance report from the Federal Government. Our understanding, as this Court noted in its order, is that OPM should have a list of all of the probationary employees who were terminated. And so we would like confidential reports from OPM as to which probationary employees have been brought back to their job so that those Government services can be restored. We would ask for a timeline and for reports to this Court.

Under either our *ultra vires* claim or the APA claim, the appropriate remedy is to restore the status quo. Vacatur is

supposed to unwind the unlawful agency action, and injunctive relief is available under both the APA and our *ultra vires* claim in order to redress the injuries that have occurred.

And in order to do that, this Court needs to be assured that those actions that were taken pursuant to the unlawful order have been fully unwound, meaning that people have been brought back to work so that the services can be restored.

THE COURT: All right. Thank you.

Let's hear from the Government.

MS. LEYTON: Thank you, Your Honor.

MR. HELLAND: Thank you, Your Honor.

I didn't hear counsel address any of the evidence that we submitted yesterday, including contemporaneous statements from agency heads saying that they were the ones who made the decision to terminate probationary employees.

We submitted, yesterday, press releases from the VA, from the Department of Defense, from the USDA, including statements from the Senate-confirmed officials or high-ranking career officials in those departments saying these were tough decisions, but ultimately it's the right thing to do. Or the USDA press release. USDA is pursuing an aggressive workforce optimization plan.

This is set against the backdrop of the February 11th Executive Order, where the President directed agencies to dramatically improve workforce efficiency to shrink

the size of the Federal Government, and the White House fact sheet from that same date, February 11th, that said that shrinking the size of the federal workforce is one of the Administration's top priorities.

At the TRO hearing, Your Honor was, I think, looking for a reason, other than OPM's mandate, that all of these agencies would be taking this same action at the same time. I submit that this backdrop, including the evidence that we submitted yesterday, shows the obvious alternative explanation.

This was a priority for the Administration. The political leadership of these agencies were taking this action themselves. In fact, we previously pointed out to Your Honor that on February 7th, before the OPM communications that plaintiffs have put at the center of this case, the SBA had already started terminating probationary employees. That was reported in the media.

I don't think plaintiffs have yet acknowledged this evidence that these were the actions of the political leadership of these agencies in response to a priority -- a clearly communicated public priority -- of the Administration rather than an order from OPM.

That's first, Your Honor. Your Honor, has -- may I speak to a couple of questions that Your Honor had?

THE COURT: Go ahead.

MR. HELLAND: So, first, Your Honor, with respect to

the MSPB actions, it's my understanding that there's not just one class petition pending, but there are several from almost -- I don't know if it's almost all, but many of the agencies that are here. There's a website, in fact, that lists the class petitions by agency. So many of the agencies involved here are covered by those.

As far as I know, Your Honor, the MSPB has not yet decided whether to accept those as class actions, but those requests are pending. There's still time for that to play out.

And then going to the probationary employees who were reinstated, Your Honor, I think NSF here is the exception that proves the rule. All of these other agencies -- after receiving Your Honor's order, after OPM amended its guidance on March 4th to clarify that it hadn't been and still was not directing terminations -- virtually all of them decided not to bring back the probationary employees that their leadership had decided to terminate. NSF did bring them back. That was within its prerogative do so. But virtually no other agency did. Maybe a couple others. So I think that that actually shows that --

THE COURT: Well, maybe that's why we need an injunction that tells them to rehire them. You will not bring the people in here to be cross-examined. You're afraid to do so because you know cross-examination would reveal the truth.

MR. HELLAND: Respectfully --

THE COURT: This is the U.S. District Court. Whenever you submit declarations, those people should be submitted to cross-examination, just like the plaintiffs' side should be. And we -- then we get at the truth of whether that's what -- your story is actually true. I tend to doubt it. I tend to doubt that you're telling me the truth whenever we hear all the evidence eventually.

Why can't you bring your people in to be cross-examined or to be deposed at their convenience? I said two hours for Mr. Ezell, a deposition, at his convenience. And you withdrew his declaration rather than do that? Come on. That's a sham.

Go ahead. I'm -- it upsets me. I want you to know that. I've been practicing or serving in this court for over 50 years, and I know how we get at the truth. And you're not helping me get at the truth. You're giving me press releases, sham documents.

All right. I'm getting mad at you and I shouldn't. You're trying to do your best, and I apologize.

All right. Go ahead. I do have a question, though. I want you to answer on the --

MR. HELLAND: Thank you, Your Honor.

THE COURT: Just a minute. I'm going to let you respond.

But all of those -- see, they give me so much stuff, I can't find the thing that I wanted now. But the letter that --

that template letter, which I don't have here anymore -- the template letter said to the employees that got terminated that "You may" -- it didn't say "you do," it said, "You may have rights to appeal to the MSP." "You may have" -- I'll quote it now. I have it here. Quote, "You may have a right to file an appeal with the Merit Systems Protection Board" -- may have -- "on the limited" -- limited -- "grounds set forth in 5 C.F.R. 315806."

Well, I looked at that to see what that was, and it is limited to circumstances that existed prior to their employment. Did you realize that when you told me that they had the right to go to the MSPB?

MR. HELLAND: Well, Your Honor, these probationary employees -- many of them -- are going to the MSPB, including on grounds that --

THE COURT: Yes, but the letter -- your own letter says that they have only a right to do so on grounds that things that existed prior -- if the termination was based on something prior to their employment.

MR. HELLAND: I cannot speak to whether the letter that you're referring to is limited in advising these --

THE COURT: Here. I'll let you look at it. It is limited. Take a look at it. The appeal rights that were referred to there just call out that one thing. And when you actually look at the regulation, it has nothing to do with this

case. It's a sham, in my opinion.

Now, it could be that some employees are trying -- it is true that some employees have tried to go to the MSPB. That is true. And some relief -- and, by the way, the President fired the special counsel; true?

MR. HELLAND: I believe that's true.

THE COURT: Yeah, he fired him. So there is no special counsel anymore for the MSPB. And then one of the -- one of the members was either fired or retired.

In the prior Administration in 2017 to 2022 -- or 2020 -- there was not a quorum of the MSPB. Do you remember that? So there was no way to get relief from the MSPB during that four-year period. I have a feeling that's where it's headed now, is to decimate the MSPB, get rid of the special counsel, and these employees will have no recourse even under that limited sentence.

That troubles me. It makes me wonder whether I got misled on saying there was no jurisdiction because I relied on you. You said there was a remedy at the MSPB; and, therefore, I said the unions didn't have subject-matter jurisdiction. I question that. I'm going to ask for briefing on that after today, because I believe I got misled by the U.S. Government on the efficacy of the MSPB.

Yes, in statute theory, it may be. But based on that regulation and based on that letter and based on the

cannibalization of the Office of Special Counsel and the MSPB today, I -- there's not much of a remedy there. Possibly I'm wrong, but I'm going to ask for briefing on it.

But I'll let you give me your response to that concern. Please go ahead.

MR. HELLAND: Thank you, Your Honor.

I am aware that employees have been reinstated pursuant to MSPB orders. I believe there was a widespread stay issued as against the Department of Agriculture that affected a large number of probationary employees at that agency. So I do not think it is the case that the MSPB is without ability to grant relief to affected probationary employees. I think that's happening.

I do not know what's going to happen down the road. And that may well be an appropriate subject for further briefing or reconsideration. But as it stands now, Your Honor, I think the MSPB is capable of granting this relief.

I --

THE COURT: Just a minute. Just a second.

The Administration has -- the member of the -- on March 5th, 2025, board member, Cathy Harris, granted a second 45-day stay request on probationary employees at USDA. So you're correct about that; however, the President has attempted to fire her, but Judge Rudolph Contreras granted summary judgment in her favor and held that the removal by the

Administration was unlawful. Is that correct?

MR. HELLAND: I have no reason to doubt that.

THE COURT: Well, we won't decide the efficacy of the MSPB today, but we're going to have to look at that again. And maybe we do have subject-matter jurisdictions after these unions if there's -- if the channel through which Congress sought to move those grievances by employees has been decimated.

MR. HELLAND: Your Honor, briefly.

THE COURT: Yes.

MR. HELLAND: The unions, of course, would go through the FLRA, not the MSPB, so --

THE COURT: Not the unions, yes, but the employees --

MR. HELLAND: Sure.

THE COURT: -- the employees who they represent.

Okay.

MR. HELLAND: May I respond to Your Honor's concerns about the declarations and --

THE COURT: Please, yes. I'd like to hear it.

MR. HELLAND: Thank you.

Your Honor, I respectfully disagree that we have submitted false evidence or have withdrawn evidence in an attempt to frustrate Your Honor's efforts to find the truth.

We prepared the Ezell declaration within the two days that we had to respond to the TRO thinking that that would be an

authoritative statement of the agency's position of what happened.

If you review that declaration again -- I understand that it's stricken. I'm not relying on it for its truth. But if you review that declaration again, he says, in the opening paragraph, that the materials reflected therein were based on his personal knowledge as well information provided to him. We were presenting it in his capacity as the acting director of that agency.

The paragraphs in that declaration talking about the February communications do not say that Mr. Ezell personally said anything or took any action. Those paragraphs are framed as coming from OPM. That's in contrast to the January 20th memo that he did personally author and send out. So, again, we put that forward in the TRO context on expedited briefing.

We understood coming out of the TRO hearing that Your Honor wasn't interested in the agency's summary of what happened. Your Honor wanted to know what was actually communicated on the February 13th call or February 14th call.

Well, Mr. Ezell was not on those calls. He was not on the February 13th call at all. And from what we understand, he was at the beginning of the February 14th call and then left. So he is not the person with firsthand knowledge of those events. Others are, and we -- I -- I expect Your Honor will be frustrated to hear this, but we continue to look forward to

presenting our case in terms of what was actually communicated on those calls.

But this is an APA case, Your Honor. There's a procedure for generating an administrative record, which we are working on and have started to submit to Your Honor, including the February 12th email, which I understand was basically read as a script on the February 13th call.

THE COURT: You know, your Noah Peters declaration -- nowhere does he -- does he ever say he was personally present during the call?

MR. HELLAND: Noah Peters is on the list of participants of the February 13th call that we shared with plaintiffs' counsel.

THE COURT: That's not the same thing. Does he say under oath that he was on the call? No.

MR. HELLAND: Honestly, Your Honor, I thought that he did. And it may not be in that declaration.

THE COURT: Oh, maybe I read it too quickly.

MR. HELLAND: So, Your Honor, we are in the process of compiling the administrative record. The procedure in APA cases is for the agency to prepare a record, for gaps in that record to be litigated, to be supplemented by oral testimony if necessary. The Government believes that that's the procedure to follow here.

We're not trying to frustrate the ability to find the

truth. We think that this is an APA case. And the way the record is developed in APA cases is through the process that I just described.

THE COURT: Yes, but you haven't given me any administrative record, and I -- so I have to go based -- they need emergency relief.

And I have a few words to say about administrative records. Would you like to hear those?

MR. HELLAND: I will just submit, Your Honor, that we have said the things that we filed yesterday as documentary evidence will be in the administrative record, including the February 12th email, the February 14th email, the FAQs that followed those. This is the essence of the administrative record that is being compiled.

THE COURT: I'm going to tell you, I think this is a good point because this is a recurring problem in APA cases -- about the administrative record. The rest of -- I see people in the gallery -- their eyes are glazing over because they hear something called "administrative record" and it just puts them to sleep. Well, it's exceedingly important.

It is generally true that under the Administrative Procedure Act, if you sue to set aside agency action, the agency provides the record on which the decision was made, and then the Court looks at that and decides -- rules according to the law based on that record. And there -- that is the normal

rule. And sometimes you get to go outside that and take additional discovery, but most cases are decided on the administrative record.

Now, back when I was in the Justice Department -- this was in '78, '79, and '80, in the Stone Age -- I was in the Solicitor General's Office. I reviewed a lot of administrative records. And then, in those days, everything that was before the agency or at least those people -- not just the decision-maker but the people reporting to the decision-maker -- even the bad memos -- those -- or deliberative memos -- those were all included. Now, as time goes on, though, that became inconvenient to very -- in future years.

And to fast-forward, in recent years, sometimes the Government lawyers present a sanitized record. It only has the good stuff that supports the agency action. It omits all of the bad stuff.

You think I'm making this up. It's absolutely true.

Now, whenever President Obama was President, I had a case. And it just -- and there was a question about the adequacy of the record. And it turned out that your department, the Justice Department, had actually put out a good memo that required the agencies to include much more than just the stuff that the decision-maker saw. I don't know, that's probably been deep-sixed by now. But that was the rule back around

2008. And so that gave a little bit of sunshine into what had actually happened in the agency.

But after that, we went back to the Dark Ages, and there's nothing -- these agency records are just sanitized to allow the decision to be upheld with only the documents that support it and none of the other material that would undercut the agency action that was in play in the agency at the time the thing was being decided.

So I say to you, I have -- I want you -- if you're going to give me an administrative record, let's do an honest one and a complete one and not one that is sanitized. That's my advice to the Government.

And that history, I believe you'll find, is actually 100 percent true as I have -- so I have some frustration with administrative records. And I'm skeptical of them, because I think they go to some trouble to sanitize and not give me the true administrative record.

Okay. But right now, even if you gave me a perfect administrative record, you have it. And these people over here want immediate relief. And they are entitled to get a ruling on the record that I do have. So that's the answer on that part.

MR. HELLAND: May I speak to that briefly, Your Honor?

THE COURT: Yes, you may. Please go ahead.

MR. HELLAND: We, as you know, have offered to

stipulate to continue the TRO pending further development of the factual record.

So, furthermore, our position being that OPM didn't and hasn't been, since the TRO, direct these terminations. We don't see the urgency demanding relief that plaintiffs are putting forward. We think that the Court's order from the TRO is clear, that agencies have been complying with it, and that provides time for further factual development.

THE COURT: Well, that's not quite true. I don't quite agree with what you just said.

All right. What else would you like to say?

MR. HELLAND: I want to pause just for one more moment on Acting Director Ezell, just because I think the agency's reasons for not wanting him to submit to a deposition are broader than just the limited facts of the TRO that we put forward.

Every Presidential Administration in modern history has jealously guarded their agency heads against being forced to give testimony. That's since the *Morgan* case about 80 years ago now. So that is not something unique to this Administration. It is not something about Secretary Ezell's testimony. That is just an Executive Branch prerogative to --

THE COURT: Is he a secretary?

MR. HELLAND: He's an acting director.

THE COURT: Director -- acting director -- but he's

not a secretary of the Department?

MR. HELLAND: No, correct.

THE COURT: Okay.

MR. HELLAND: But I think he is the highest-level official at that Department.

THE COURT: At that agency?

MR. HELLAND: At that agency.

THE COURT: Yes, okay. All right.

MR. HELLAND: The only other thing, then, I --

THE COURT: Yes, but you chose to submit his declaration.

MR. HELLAND: Yes, in the context of the TRO.

THE COURT: And then you said, "No, but he can't be cross-examined." So you must submit -- you can't just give me -- you can't just say, "Here's the declaration. You have to accept it without question whenever there is a question."

MR. HELLAND: Absolutely, Your Honor. And so the -- as you know, the purpose of a TRO is an expedited process. Both sides put together what evidence they can in a very short time frame. And then the period between the issuance of the TRO and the further preliminary injunction is supposed to flesh out the facts.

So that is the stage that we are in now. We're compiling the administrative record. We've publicly filed several of the documents that would go into that administrative record.

Our purpose, again, for submitting the declaration for the TRO was to submit an authoritative statement from the agency in very expedited circumstances. But it is not supposed to shield the agency from review of its actions. It's to articulate and provide some evidence for a TRO decision on a couple days' notice.

I note my opposing counsel discussed relief very briefly, Your Honor, and I want to speak to that.

THE COURT: I want to hear your argument. Please go ahead.

MR. HELLAND: Thank you.

Well, so, first of all, again, we have stipulated that the TRO can continue as a preliminary injunction as is. So we agree already, to that extent, of further relief.

I don't think that ordering the rescissions of the terminations is an appropriate thing either on this record or for Your Honor to be granting. Again, the MSPB, the FLRA -- those administrative agencies have the authority to stay terminations, to order reinstatements, to issue that form of relief. I don't think that that's appropriate there. I certainly don't think it's appropriate when the agencies that were added as parties two days ago have not had the chance to file any briefing or to -- plaintiffs have not even moved for relief against those new defendants. They moved against OPM two weeks ago.

So I think there's a further process that would have to happen, which would include briefing on the authority for Your Honor to even issue that relief.

To the extent any further relief beyond the TRO is appropriate in the near term, we would submit that it should be limited to something like each agency performing an independent review of the decisions previously made, reaffirming that they were done under the agency's authorities, not OPM's direction. I think that's more appropriate and consistent with Your Honor's authority and jurisdiction as well as the factual record here.

THE COURT: Okay.

Response?

MS. LEONARD: The terminations were not done at the agency's discretion, and they were not done properly in accordance with the law on the basis of performance, Your Honor.

The suggestion that opposing counsel just made, that somehow the agency should be able to rereview the decision to fire probationary employees on mass at the direction of OPM is somehow an appropriate remedy is divorced from reality and the record that's before this Court.

But to address some specific -- to pointedly address some of the specific points that -- and quickly -- that opposing counsel made, there was an exchange about appeal rights to the

MSPB. And I think this is incredibly important, Your Honor, because from the very first moment -- on the first day of this Administration -- that OPM started directing agencies through the January 20th memorandum to collect and list -- something that had never happened before in the history of this country -- compile and submit to OPM a list of all your probationary employees so you can get ready to fire them. They told them they don't have appeal rights. "We are firing them because they don't have appeal rights." That's how insidious this action was.

THE COURT: Read that -- where do you get that? I'm trying to remember where I saw that before. Read that to me again.

MS. LEONARD: Yes. That's in the January 20th memo, which was originally attached, Your Honor, as an attachment to the now withdrawn Ezell declaration. But they've just resubmitted all the documents that he submitted without a declaration. But we don't contest that that's actually what --

THE COURT: Read to me the sentence you're talking about.

MS. LEONARD: [As read]:

> "Probationary periods are an essential tool for agencies to assess performance. Employees on probationary periods can be terminated during that period without triggering appeal rights to the Merit

> Systems Protection Board."

That is Mr. Ezell --

THE COURT: Is that an exact quote?

MS. LEONARD: That is an exact quote.

THE COURT: From the January 20 memo by who?

MS. LEONARD: By Mr. Ezell, OPM, to the agencies. This has been the plan from the very beginning: Fire them all because they can't appeal, Your Honor. That is what OPM has consistently said to the agencies in every single communication that's before this Court.

It was not just a February 13th phone call and a February 14th CHCO meeting. And they say, "Oh, but Mr. Ezell was not on that." We don't know if that's true or not, Your Honor. We would like to get to the truth. But what's in front of this Court is every single communication, including the ones that they have now belatedly tried to say are the administrative record.

They have said: Terminate everyone who's not mission critical because they cannot appeal. That's the plan. That's what OPM has done here, and that is profoundly --

THE COURT: How many employees -- probationary employees -- were terminated on or about February 14th?

MS. LEONARD: We don't know, Your Honor. We believe --

THE COURT: Give me an estimate.

MS. LEONARD: I believe it is far higher than 10,000 employees, Your Honor. We know that at least by February 14th, more than five agencies had terminated. On February 13th, the VA terminated.

And the press releases that they have cited -- they were in our complaint, Your Honor. He said we are not addressing them? They were in our complaint, Your Honor, because they actually show that this was a centralized effort.

The VA press release that they're saying shows agency discretion says, I quote [as read]:

> "The dismissals announced today are part of a government-wide Trump Administration effort to make agencies more efficient, effective, and responsive to the American people."

OPM told them to do this, Your Honor. And we have proven it on the record. They have not put anything in, in response to that, other than press releases that actually support plaintiffs. It's profoundly unlawful, Your Honor.

And with respect to the representations regarding the -- that's the importance of the appeal rights. It's twofold. It's both a factual matter to show how centralized this was and the reasons for it, which are incredibly disturbing, frankly, for the U.S. Government to be terminating these employees because they have no appeal rights.

But also it goes straight to the point that Your Honor is

raising about channeling. And we welcome -- and I was prepared here to try to -- try to -- try to beg for one more chance, Your Honor, to address this issue, because I think it is absolutely right -- what Your Honor raised at the TRO hearing -- the question about these mass actions with respect to so many employees.

Is that really what Congress intended when it set up these agencies? And now that it is, these agencies are being dismantled. And, by the way, the President has fired the members of the FLRA too. They say, "Oh, the unions can go to the FLRA." The President fired them too.

THE COURT: How many members -- I didn't know about that part.

MS. LEONARD: It's --

THE COURT: How many members are there on the FLSB or whatever it is?

MS. LEONARD: So the MSPB I believe the President removed one so that there is not a majority -- so it's a one-one split. And that --

THE COURT: Well, that person --

MS. LEONARD: Got put back.

THE COURT: -- demoted them but did not remove them. Demoted them from vice chair; right?

MS. LEONARD: But one was removed. That's now tied up. And the Government is fighting in the D.C. Circuit to off

them.

And then the FLRA, I believe it's also one additional member has been -- has been --

THE COURT: And one --

MS. LEONARD: I'm looking at my cocounsel, Mr. Eisen, who might have better facts than I do on this.

But one member has been removed by the President to stymie that agency from actually doing anything, Your Honor. And they're fighting that in the D.C. Circuit. They're opposing the orders that have -- that is an unlawful order. They're fighting those orders to put those people back. The OSC is gone.

THE COURT: All right. One out of three? One out of five? How many -- how many?

MS. LEONARD: Three. One out of three removed.

THE COURT: All right. And this is the FL --

MS. LEONARD: RA. The Federal Labor -- the Federal Labor Relations Authority, Your Honor, which is the board set up by the FSLMRS, which is the labor relations statute for federal employees. So they removed them.

The OSC is gone. The pattern is very clear. This is all centralized action, of course, from this Administration. The pattern is clear to -- there is no channel, Your Honor. There is no channel.

THE COURT: All right. But let me ask you, Congress

did pass the Reduction in Force Act, which, by definition, contemplates that there can be a reduction in force within an agency; isn't that true?

MS. LEONARD: That's part of this -- there are reduction in force statutes as part of the CSRA, absolutely. But they're ignoring them and eviscerating them, Your Honor.

THE COURT: Well, I know you say they have not been followed. And possibly that's true. But I wouldn't want anyone listening to this call on the Zoom to think that this case is about stopping the termination of anybody from the Government, even when it's in the hundreds, because there is a statute that allows that, called the Reduction in Force Act, if the steps that are required by statute are followed.

MS. LEONARD: Absolutely, Your Honor.

THE COURT: That's true; isn't it?

MS. LEONARD: It is for agencies to decide to do reduction in force. And what we have here absolutely, Your Honor, on the record before the Court, is not agencies' decisions to terminate anything. It's OPM's. And that's a question for another day, whether OPM can order RIFs. That's a question for another day, Your Honor. And maybe that day is coming very soon. OPM cannot order those either. But agencies can make those decisions. But OPM here ordered this.

THE COURT: All right. Maybe. But if it's done right, there can be a reduction in force within an agency.

That has to be true.

MS. LEONARD: There's -- absolutely. There's a statute that allows it and regs that set up the many steps, including notice and notice to states and local governments who are affected. There are many steps. And it requires -- it takes years of planning, actually, Your Honor. It can't be done in a day.

THE COURT: It can't be done in one day, but there's a lot of ground between one day and years. So I -- okay. But that, as you say, is for another day.

But Congress itself has said you can have -- an agency can do a reduction in force if it's done correctly under the law. So I -- I want everyone to be aware of that.

Your lawsuit is not challenging that proposition. Your lawsuit is saying these terminations were in violation of other laws and *ultra vires*, and that's a separate point.

All right.

MS. LEONARD: That is right.

THE COURT: What else would you like to say?

MS. LEONARD: Just one second to make sure I'm covering all the -- I did want to clarify one other factual point that I feel like we, in our TRO papers, perhaps didn't present as clearly as we could have to the Court. And I think it's incredibly important and don't want it to be lost.

It's not just employees who were hired right out of

college or at the outset of their careers who were affected by these unlawful terminations. Anyone who received a promotion is a probationary employee. Directors of entire departments were gone in a day, Your Honor.

This action by OPM made swiss cheese of the federal agencies at every level. That is why that is directly connected to the level of harm that this is causing. Because it's not just new folks -- they can go find a career somewhere else -- it is -- they're the future of the American workforce, and I don't mean to undermine their importance. But it is people with decades of federal service. The most experienced people. If they have been promoted from acting director to director of their particular division, they were gone. That is --

THE COURT: All right. You mean --

MS. LEONARD: -- the problem here.

THE COURT: -- they don't go back to their original position? They're just terminated?

MS. LEONARD: They're gone, Your Honor, within hours.

THE COURT: How long were they terminated?

MS. LEONARD: Turn in your keys.

THE COURT: Even though they worked for 30 years?

MS. LEONARD: Even though they worked for 30 years, Your Honor. That is why the harm is so widespread and so profound. It is -- this action was intended to cripple these

agencies, and that is what it has done. And it is profoundly problematic.

And we didn't want that to be lost on the Court, because I think, in our TRO papers, we didn't -- we didn't make that as prominent as we, perhaps, should have. And that is absolutely established in the record here.

"Probationary" means -- and the formal director of OPM, who submitted a declaration in support of this preliminary injunction -- it's in that dec., as well, and other declarations we've submitted in support -- it's anyone who was new to their position, Your Honor, not just to the Federal Government.

THE COURT: I did not appreciate that point. Thank you.

What else would you like to say?

MS. LEONARD: One more point of clarification about the OSC because I think there's been a further implication, perhaps, from something that opposing counsel said. Only the OSC, who isn't there anymore --

THE COURT: OSC?

MS. LEONARD: Office of Special Counsel.

THE COURT: Oh, all right.

MS. LEONARD: -- can initiate a stay request with the MSPB. Only the OSC can do that. The only class stay request -- "stay" meaning reinstate the employees pending

resolution -- the only class one that was actually initiated by Hampton Dellinger before he was fired was U.S. -- well, during his period of reinstatement before he was then fired again by the D.C. Circuit -- was with respect to USDA.

He did not -- the other six -- the other five agencies of the original six employees -- there were not class requests that had been filed yet. So the idea that those are pending before the MSPB is not correct, Your Honor. There were no class stay requests.

And with respect to the USDA, I want the record to be very clear about what's happened. They are not complying with the MSPB's order to reinstate. What they did was they put people back on pay -- they just announced this, I believe, yesterday, in a press release, a week after the reinstatement order -- they put people back on pay, but they haven't put them back in their position.

So what they've done is they're waiting out the 45 days. It's a temporary stay. It's going to expire. There's no OSC to ask for it to be extended.

This is the announcement. This is the Forest Service directly to the union: On March 5th, the MSPB issued a 45-day stay of the termination of U.S. Department of Agriculture probationary employees.

By Wednesday, March 12th, the Department will place all terminated probationary employees in pay status and provide

them with backpay.

That's great. Happy about that.

The Department will quickly develop a phased plan for the return to duty. And while those plans materialize, all probationary employees will be paid.

We do not believe that they are going to return any of these employees to actual service, Your Honor. They certainly haven't yet. This is the record before the Court. They haven't restored the services, Your Honor, when they were directly ordered by the MSPB to reinstate those employees to service.

THE COURT: In the Office of Special Counsel, are -- they got rid of Dellinger; right?

MS. LEONARD: Yes.

THE COURT: But are there other acting special counsels that are --

MS. LEONARD: There's been one appointed, Your Honor, and he is the head of the VA. The head of an agency is the new whistleblower protector.

THE COURT: The head of the what?

MS. LEONARD: The Veterans Administration.

THE COURT: Has been moved over to be -- and is no longer the head of the VA?

MS. LEONARD: No. He's also still the head of the VA.

THE COURT: All right.

MS. LEONARD: I don't understand how it could possibly be that the head of the defendant agency is the person who is supposed to protect the whistleblowers, Your Honor. But that is what this Administration has done.

THE COURT: Are there subordinate lawyers in that unit?

MS. LEONARD: In the OSC?

THE COURT: Yeah.

MS. LEONARD: I am sure that there are. He -- I'm sure the OSC has people who work for him. They've probably actually had all of their probationary employees fired too, just like the FLRA did and the MSPB did.

But setting that aside, Your Honor -- that's true --

THE COURT: You don't know that --

MS. LEONARD: I --

THE COURT: You're just guessing at that.

MS. LEONARD: They're on the list. They're on the list of people who had probationary employees, but -- and they're on the CHCO directive from February 14th. There's a representative of the small agency counsel -- the FLRA, MSPB, OSC -- they're all part of that.

THE COURT: Well, are they -- were there -- were there lawyers who were non-probationary working in the unit?

MS. LEONARD: I am sure that there are, Your Honor.

THE COURT: All right.

MS. LEONARD: I'm sure that there are. But they don't have the authority to move for a stay. Only the OSC has that.

THE COURT: So you're telling me that a probationary employee in some random agency cannot directly go to the MSPB? Is that true?

MS. LEONARD: They can. They can file their individual -- they can file their individual action against their employer agency at the MSPB. Some of them can. Some of the probationary employees -- this is very complicated. It's -- who has the appeal rights where is exceptionally complicated, depending on the category of service. Some of them can only go to the OSC. A big portion of them can only go to the OSC.

THE COURT: Well, what's the difference between those that can only go to the OSC versus those that can go straight to the Merit Systems Protection Board?

MS. LEONARD: It depends on the category of service, Your Honor, and the reason that they're invoking. And the best -- the best place that I have seen summarizing this -- people have been writing a lot of material about -- to try to explain this. The best place is the OSC intake -- it's like -- as a union lawyer, I'm very familiar with the unfair labor practice form at the NLRB where you check the boxes. The OSC has the same thing.

And so the OSC has an intake form where -- it's like

three pages long -- where you have to identify all the sort of ins and outs whether you qualify to go to the OSC or not. So I cannot recite that here today, Your Honor, full candor. It depends on whether you're in competitive service or in what category and what you're basing your allegations on, if it's discrimination or not. It's an incredibly complicated sort of if then, who gets to go there or not. Some -- at a highest level, some can go to the OSC, and that's their only avenue, and now that avenue is gone.

We are very happy to brief this further if Your Honor would like further briefing on -- particularly as you've invited on the channeling issues, whether it's at this point. We obviously do not want to delay any injunction. And what I would -- we would propose is there is no need, Your Honor, for purposes of this preliminary injunction, to reach the channeling issue, even with respect to the unions.

We would invite and ask for another chance to convince Your Honor that the channeling argument that was presented by the Government and the representations were not correct. And that the claims against OPM are not channeled, Your Honor, even for my union clients. And we would invite another chance to convince Your Honor of that.

But for purposes of the PI today, the other organizations and the State of Washington have standing -- irreparable harm -- more than enough to issue that PI without reaching and

making further law with respect to the channeling.

I would -- one further point about that, Your Honor. I do believe that your TRO order actually extends the law further than it has been in the Ninth Circuit. Not just applying it, but extends it. No case has ever channeled a claim against OPM over a Government-wide rule in the Ninth Circuit. No case has ever channeled a procedural APA claim in the Ninth Circuit. Your TRO order was the first, and we would respectfully welcome another chance.

And we don't want that TRO decision to take on a life of its own, Your Honor, and we would welcome another chance to try to convince you that these claims are not channeled. Because, as Your Honor has indicated here today, the channel's gone, Your Honor.

THE COURT: Let me give the defendants a chance to respond. You had a long talk there.

Go ahead. Please, let's hear from the defense.

MR. HELLAND: Thank you, Your Honor.

Taking the very last point first, I think the "in the Ninth Circuit" caveat there is doing a lot of work. There's of course many decisions from outside the Ninth Circuit, including the D.C. Circuit, the Federal Circuit, the First Circuit. These have been, you know, addressed in the papers on the TRO briefing.

To the extent Your Honor is reconsidering its initial

channeling decision, we agree further briefing would be appropriate.

THE COURT: Yeah, that's -- I'm not going to do it today, but I want to raise the issue and ask for briefing. So I agree with you on that.

Go ahead.

MR. HELLAND: Thank you.

I come back to a point I made at the outset. The press releases that we've submitted show that the independent political appointment -- the political leadership of these agencies were taking credit publicly for the decisions.

We do not deny that OPM had a role in coordinating these efforts. I think the documents that we've put forward are very clear about that.

But plaintiffs' theory of this case isn't just that OPM coordinated this; it's that OPM ordered it. That the agencies didn't think that they had the authority not to do it. Well, if that's the case, why would the leaders of these agencies be issuing press releases the same day or shortly after these decisions were made? They wouldn't. The reason --

THE COURT: Well, I would like to see some depositions taken on that, but you stonewalled me on it. I would like to know -- maybe -- maybe the press release was an orchestrated thing. It wouldn't be the first time.

MR. HELLAND: It starts to sound a bit

conspiratorial --

THE COURT: Yeah.

MR. HELLAND: -- to think that these press releases coming out of multiple agencies when, again, the Administration has just put out Executive Orders and fact sheets making clear that this is an agenda priority for the Administration.

I think the pretty obvious alternative explanation is everybody knew the new Administration was prioritizing this. And the political appointments wanted to comply with that Administration priority.

THE COURT: Okay.

MR. HELLAND: Finally, Your Honor, the additional documents that we put forward, which, again, will be part of the administrative record in this case, including specifically the February 12th email, I invite you to look closely at the language of that. I think you'll see it is not an OPM order. The language of that reflects that OPM had asked agencies to prepare lists and asked them, with a please, "Separate those that you know you want to separate by a date certain." Right? It put it to the agencies, "those that you know you want to separate."

This was not an order from OPM. The Administration record will show, and it does show on the record that we've put before Your Honor, that OPM was coordinating this, was asking for information, was asking that action be taken by certain times,

but the decisions on these employment actions were made by the agencies and were fully endorsed by their political leadership.

Thank you, Your Honor.

THE COURT: Okay. Give me a moment.

The Court is going to grant some additional relief by way of preliminary injunction. I want to give some background.

Congress, in the Reduction in Force Act, makes it clear that an agency can engage in a reduction in force. So I want everyone to be completely aware that if an agency decides to do a reduction in force, it can do so, so long as it complies with the several requirements of the Reduction in Force Act.

So this should not -- the words that I give you today should not be taken as some kind of criticism that a wild and crazy judge in San Francisco has said that the Administration cannot engage in a reduction in force. I'm not saying that at all. Of course, if it does, it has to comply with the statutory requirements, the Reduction in Force Act, the Civil Service Act, the Constitution, maybe other statutes. But it can be done if it's done in accordance with the law.

This case is not about that. What this case is about is really an attempt to do a reduction in force, but to force it through the OPM, Office of Personnel Management, to have the OPM direct agencies to terminate probationary employees as an easy way to get a reduction in force underway.

Because, as counsel pointed out, its own memo says they

don't have appeal rights -- probationary employees don't have appeal rights -- and so let's get started with the process by just terminating all probationary employees except those that are mission critical.

Now, I went through the evidence last time. I'm not going to go through it quite as extensively, but I am going to touch on some of the points. Something new came in by the -- from the plaintiffs. It involved the Forest Service.

On February 13th, 2025, a Forest Service briefing paper from Human Resources Management at the Forest Service says this -- or said this -- quote [as read]:

> "All" -- that's spelled A-L-L -- "All federal agencies, including the Department of Agriculture, were notified on February 12th, 2025, by the Office of Personnel Management to terminate all employees who have not completed their probationary or trial period."

That then led to the termination of a lot of people, but one in particular I'll give as an example. Leandra Bailey was a physical science info specialist in Albuquerque. In September of last year, she had received a performance review in which she was, quote, "fully successful," closed quote, in every category. Not just some; every category. On February 13th, she was terminated using the OPM template letter.

In addition to directing these terminations, OPM gave a proposed letter. The letter said -- I'm reading from it -- Memorandum for Leandra Bailey, February 13, from Deedra Fogle, Director Human Source Management, U.S. Forest Service. This is just one sentence, quote [as read]:

> "The agency finds, based on your performance, that you have not demonstrated that your further employment at the agency would be in the public interest," closed quote.

This despite the fact that her most recent review was fully successful in every category.

Now, how could it be, you might ask, that the agency could find that based on her performance when her performance had been stellar? The reason that OPM wanted to put this based on performance was, at least in part, in my judgment, a gimmick to avoid the Reduction in Force Act. Because the law always allows you to fire somebody for performance.

So OPM was thinking: Okay, if we tell them to use this template letter, then that will give us an argument against the Reduction in Force Act or maybe some other act -- Civil Service Reform Act.

Now, this -- what I'm about to say is not the legal basis for what I'm going to order today, but I just want to say, it is sad -- a sad day -- when our Government would fire some good employee and say it was based on performance when they know

good and well that's a lie.

Excellent in all -- fully -- what was the phrase? I don't want to misstate it. "Fully successful in every category," yet they terminate her based on performance. That should not have been done in our country. It was a sham in order to try to avoid statutory requirements.

It also happens to be that whenever you fire somebody based on performance, then they can't get unemployment insurance. So that makes it even worse, doesn't it?

And then it makes it even worse because the next employer is going to say, "Well, have you ever been terminated based on performance?" They're going to have to say, "Yes," to thousands of people.

Now, the reason this is not a basis for the ruling today is that the -- that is a grievance that goes to the employee, and the -- and we still haven't decided -- I mean, I have decided but I'm going to take another look at it, as to whether they're channeled -- that grievance has to be channeled through the Merit Systems Protection Board.

But it is illustrative of the manipulation that was going on by OPM to try to orchestrate this Government-wide termination of probationary employees.

I'm going to go back to what I read [as read]:

> "All" -- this is from the Forest Service -- "All federal agencies, including the Department of

> Agriculture, were notified on February 12th by the Office of Personnel Management to terminate all employees who have not completed their probationary or trial period."

Now, there's more evidence than that. Some of that I went over last time.

Department of Energy sent a termination letter saying [as read]:

> "Per OPM instructions, Department of Energy finds your further employment would not be in the public interest."

Another termination letter from the Bonneville Power Administration per OPM instructions, Civilian Personnel Policy Counsel, Department of Defense in accordance with direction from OPM and before Congress, Chief Human Capital Officer for the Veterans Administration testified under oath recently, February 25th [as read]:

> "**QUESTION**: So nobody ordered you to carry out these terminations? You did it on your own?
>
> "**WITNESS**: There was direction from the Office of Personnel Management, the USDA."

Quote, [as read]:

> "Agencies were directed to begin providing termination notices."

So the Court finds that OPM did direct all the agencies to

terminate probationary employees with the exception of mission-critical employees. The Court rejects the Government's attempt to use these press releases and to read between the lines to say that the agency heads made their own decision with no direction from OPM.

The relief that's going to be granted as is follows:

The temporary restraining order well be extended. In addition, relief defendant Veterans Administration shall immediately offer reinstatement to any and all probationary employees terminated on or about February 13th and 14th, 2025.

This order finds that all such terminations were directed by defendants' OPM and Acting Director Ezell and were unlawful because OPM and Ezell had no authority to do so.

Further, relief defendant Veterans Administration shall cease any and all use of the template termination notice provided by defendant OPM and/or Acting Director Ezell to the VA and to other agencies on or about February 13th and 14th and shall immediately advise all probationary employees terminated on or about February 13 and 14 that the notice and termination have been found to be unlawful by the United States District Court for the Northern District of California.

Relief defendant Veterans Administration shall cease any termination of probationary employees at the direction of defendants OPM and Acting Director Ezell.

To repeat, this order holds that OPM and Acting

Director Ezell have no authority whatsoever to direct, order, or require in any way that any agency fire any employee.

Now, given the arguments and the facts in this case, namely, that defendants have attempted to recast these directives as mere guidance, this order further prohibits defendants from giving guidance as to whether any employee should be terminated.

Any terminations of agencies' employees must be made by the agencies themselves, if made at all, and must be made in conformity with the Civil Service Reform Act and the Reduction in Force Act and any other Constitutional or statutory requirement.

In seven calendar days, relief defendant VA shall submit a list of all probationary employees terminated on or about February 13th and 14th with an explanation as to each of what has been done to comply with this order.

Now, this order so far has only mentioned the Veterans Administration, but the same relief is extended -- and I'm not going to repeat it, but I rely on the good faith of the Government -- I'm extending the same relief to the Department of Agriculture, Department of Defense, Department of Energy, Department of the Interior, Department of Treasury. And those are the ones where I believe the record is the strongest that relief is necessary. And so it's the VA plus those other agencies.

And this is without prejudice to extending the relief later in the future to other agencies and it's without prejudice to shrinking the relief in the future upon a proper showing.

Okay. I will try to get out a short memorandum opinion that elaborates on this order, but this is the order and it counts effective immediately. Please don't say, "Oh, I'm waiting for the written order." This is the order from the bench.

Okay. I want -- I'm giving the plaintiffs authority promptly to depose, in Washington, Noah Peters, who submitted this other declaration. I am -- discovery is now open. And, within reason, you can, on both sides, take depositions and ask for documents, but be reasonable.

The easiest mistake you plaintiffs can make is to be unreasonably broad in your discovery. I promise you, I won't allow that. But narrowly directed, reasonable discovery is in order in this case to get at the truth because the Government is saying one thing and you're saying another.

Right now your record is the strongest, and I think that your position is correct on the facts. But it deserves to be tested by discovery.

Finally, I believe that the channeling argument -- I believe that the channeling argument that I relied on that says that all employee grievances should be channeled through the

MSPB might have been in error because -- I'm not making a ruling now -- I'm going to invite briefing -- because the whole point of the January 20 memorandum was to say the probationary employees have no appeal rights. And the letter that was sent -- the template letter -- said, "You may have a right to file an appeal with the Merit Systems Protection Board on the limited grounds set forth in 5 C.F.R. 315806," which I looked up, and that has nothing to do with this case. It gives you a right to appeal if you get terminated based on something that happened before your employment. Let's say that you were a convicted felon and didn't disclose that. Well, that's not this case.

So if there is no ability to appeal and get not just some limited -- I mean, a real effective way to undo the harm to these individual employees, I don't see how this could be channeled. So the -- to the extent that the unions here were seeking to vindicate the rights of their employees, you know, like I thought you were, I may have made an error.

Now, I did rely upon the Government's representations that the MSPB was an effective remedy. I thought it was. And I'm not yet ready to say it wasn't. But I didn't know all this at the time I made that ruling.

So I would like to give you each an opportunity to brief this. I'll give you, say, one week to brief this. I'll give you until the end of next week, to Friday at noon, to brief

whether or not the unions have standing based upon the fact that the channel has been destroyed. So no channeling because no channel -- no effective channel.

Now, this -- and then if you want to make the same argument for the Federal Labor Relations Board -- or Authority --

MS. LEONARD: Authority.

THE COURT: -- whatever it is, you can brief that too, all within the 10 pages.

I'm ordering the Government to make this guy, Noah, available soon, within the next two weeks.

If you want to appeal to the Court of Appeals, God bless you. I want you to because I'm tired of seeing you stonewall on trying to get at the truth. Instead of giving me snippets, I want somebody to go under oath and tell us what happened in these phone calls and at other times was it really an agency -- so you can depose some people in the agencies if they really are claiming they did it on their own and was not influenced by OPM. We should get it, but be reasonable in the discovery.

The only one I'm ordering for sure is Noah Peters within the next two weeks. You've got to go to Washington to take his deposition. And it can be two hours. All right?

So, see, the way the Government does it, they want to come in with an *ex parte* and just stall, stall, stall. Just go ahead and take your appeal. We've got a preliminary injunction

now. I've ordered some discovery. Just go ahead and put it up there on appeal and see if the Court of Appeals feels that what I have done here today by way of relief is unjustified. I'm -- that's fine.

I'm doing the best I can with the record I got, and this is a quick-moving time frame. These people have been terminated. I want to make it clear that, right now, I'm just ruling based on services -- these organizational plaintiffs -- and I'm not considering the State of Washington.

The organizational plaintiffs that got the TRO are complaining about the deprivation of services by these agencies and resources that they count on, and that is still the basis for their standing and the basis for the subject-matter jurisdiction. But I am raising the question whether or not the additional subject-matter jurisdiction exists because the channel that Congress wanted to be effective has been ruined.

All right. Anything further today?

MS. LEONARD: Yes, Your Honor. Two points of clarification.

First of all, I believe Mr. Peters is a lawyer, and I would ask for three hours, Your Honor. We all know how hard it is to depose lawyers.

THE COURT: Three hours.

MS. LEONARD: Thank you.

THE COURT: Okay. But the three hours of airtime, all

right?

MS. LEONARD: Thank you. For our questioning?

THE COURT: For your questioning.

MS. LEONARD: Thank you, Your Honor.

But more seriously, actually, not that that's not a serious issue, to clarify, the evidence that plaintiffs have presented with respect to other agencies and the harm -- and I know Your Honor's very familiar with the record -- I just want to clarify because there is extensive irreparable harm with respect to NOAA, NIH, FAA that is incredibly urgent. How do we get in front of you the -- I have a list that we have prepared. I'm happy to give to the Government a copy of every agency and every plaintiff that they're connected with. And we're happy to give you the declarations --

THE COURT: Can I see what you're talking about?

MS. LEONARD: Sure. It's every agency and every plaintiff that has shown harm through the declarations with respect to that agency.

And we're happy to submit this by later today with the declaration cites. I believe we already have that prepared as well. This was just my cheat sheet, Your Honor, if that would assist you.

THE COURT: Well, does counsel object if I keep this cheat sheet?

MR. HELLAND: No.

THE COURT: Thank you.

I -- this is not good enough for -- I mean, you'd have to connect the dots better than this, but I see where you're going.

You can submit more, but I am not promising -- I'm basing it based on my understanding of the present record of who has standing and who is suffering irreparable harm, so -- but I could be wrong on one or two. I was wrong last time on one issue, so I -- you can submit something more and we'll consider it.

MS. LEONARD: Thank you very much, Your Honor.

THE COURT: Anything on your side?

MR. HELLAND: No. Thank you, Your Honor.

THE COURT: All right.

All right. I want to make it clear that I don't think counsel for the Government has done anything dishonorable. I've given him a hard time. He's doing the best he can with the case he's got. And thank you for your service in the Justice Department.

Okay. I think we're done for today.

THE COURTROOM DEPUTY: Court is adjourned.

(Proceedings adjourned at 9:30 a.m.)

---oOo---

CERTIFICATE OF REPORTER

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

DATE: Thursday, March 13, 2025

Kendra Steppler

Kendra A. Steppler, RPR, CRR

Official Reporter, U.S. District Court

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, et al.,

Plaintiffs,

v.

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, et al.,

Defendants.

No. C 25-01780 WHA

MEMORANDUM

INTRODUCTION

Each federal agency has the statutory authority to hire and fire its employees, even at scale, subject to certain safeguards. The Office of Personnel Management has no authority to hire and fire employees in another agency. Yet that is what happened here — *en masse*. OPM directed all (or at least most) federal agencies to terminate all probationary employees for "performance." Because the organizational plaintiffs in this case have shown they will suffer irreparable harm resulting from the immediate impairment of public services (and meet other tests), they are entitled to a preliminary injunction. The Court granted it from the bench — ordering the reinstatement of probationary employees at the relevant agencies.

S ATEMENT

First, OPM directed other agencies to fire their probationary employees.

A "Forest Service Briefing Paper" circulated by its human resource management to "Supervisor[s]/Leader[s]" stated:

> All federal agencies, including the Department of Agriculture, were notified on February 12, 2025, by the Office of Personnel Management (OPM) to terminate all employees who have not completed their probationary or trial period. . . . OPM *directed* agencies to separate Probationary employees starting 2/13/25 . . . . Based on this *direction* it is necessary to start providing notices of separation to employees in probationary and trial period positions starting 2/13/25.

(Dkt. No. 71 at 16 (emphasis added) (February 13, 2025)).

Then, in February 13 and 14 phone calls, OPM discussed probationary employee terminations with leadership from other agencies. Defendants have not provided transcripts of those calls nor declarations from any person who attests to having participated on one.

On February 13, the Department of Energy sent a probationary business cost analyst a termination letter stating: "*Per OPM instructions*, DOE finds that your further employment would not be in the public interest" (Dkt. No. 70-14 at 15 (emphasis added)).

That same day, a probationer at the Bonneville Power Administration (within the DOE) received a termination letter that stated: "*Per OPM instructions*, DOE finds that your further employment would not be in the public interest. For this reason, you are being removed from your position with DOE and the federal civil service effective today" (Dkt. No. 39-4 at 10 (emphasis added)).

On February 14, a probationer terminated by the Foreign Agricultural Service asked the Department of Agriculture's deputy chief human capital officer by email about the "specific details of my performance that were evaluated and found to be insufficient" (Dkt. No. 39-6 at 5–6). The response: "[A]gencies were *directed* to begin providing termination notices . . . beginning immediately upon OPM notification" (*ibid.*).

On February 18, meanwhile, the National Science Foundation fired its probationers *en masse* via Zoom. During that call, NSF officials stated: "We were *directed* last Friday

[February 14] by OPM to terminate all probationers except for a minimal number of mission critical probationers" (Dkt. No. 18-9 at 27 (emphasis added)). When confronted by the terminated probationers, the officials continued: "Up until Friday [February 14]. Yes. We were told by OPM it was the agency's discretion whether to remove probations or not. We chose to retain them all" (*id*. at 26). But "late Friday night," "[t]hey told us that they *directed* us to remove probationers" (*ibid.* (emphasis added)). "[T]here was no limited discretion. This is not a decision the agency made. This is a *direction* we received" (*id*. at 21) (emphasis added). Asked if NSF had at least *attempted* to negotiate with OPM to minimize the number of terminations, NSF responded: "There's no negotiation" (*id*. at 34). Defendants concede that on March 3, three days after the undersigned issued a memorandum opinion and amended the temporary restraining order, NSF's director re-hired nearly all the probationers terminated February 18.

In a February 21 Internal Revenue Service "town hall," IRS Chief Human Capital Officer Traci DiMartini stated:

> I'm not sure why it's happening . . . . Regarding the removal of the probationary employees, again, that was something that was *directed* from OPM. And even the letters that your colleagues received yesterday were letters that were written by OPM, put forth through Treasury, and given to us . . . . I cannot explain to you why this has happened. I've never seen OPM *direct* people at any agency to terminate.

(Dkt. No. 39-5 at 8–9 (emphasis added)).

She continued:

> And our actions are being watched by OPM. So that's, again, something else that's unprecedented. . . . Everything we do is scrutinized. Everything is being looked at twice. Any changes that are made in our system that show any type of action that has been deemed impermissible, we have to respond to why it happened.

(*id*. at 7–8).

On February 25, Tracey Therit, chief human capital officer for the Department of Veterans Affairs, testified under oath at a congressional hearing before the House Committee on Veterans Affairs:

> **RANKING MEMBER TAKANO**: So nobody ordered you to carry out these terminations?
>
> You did it on your own?
>
> **MS. THERIT**: There was *direction* from the Office of Personnel Management.

(Dkt. No. 39-1 at 13 (emphasis added)).

On February 26, members of the Civilian Personnel Policy Council at the Department of Defense stated by email: "In accordance with *direction* from OPM, beginning February 28, 2025, all DOD Components must terminate the employment of all individuals who are currently serving a probationary or trial period" (Dkt. No. 39-4 at 14 (emphasis added)).

In a March 6 sworn declaration filed in the District of Maryland and introduced into the record by plaintiffs, meanwhile, IRS CHCO DiMartini stated:

> I attended several virtual meetings with Trevor Norris and other Human Capital Officers at Treasury agencies (which include the Office of the Comptroller of the Currency, the Bureau of Engraving and Printing, and the U.S. Mint) during which we discussed the *directive* to conduct mass terminations of probationary employees.
>
> . . . .
>
> Mr. Norris informed us that Charles Ezell, the Acting Director of OPM, Amanda Scales, Mr. Ezell's Chief of Staff, and Noah Peters, were the individuals spearheading the termination of probationary employees at OPM.
>
> . . . .
>
> Mr. Norris specifically instructed me and the other Human Capital Officers at Treasury that *OPM would not allow us to exempt military veterans from the probationary terminations*.

(Dkt. No. 94-1 at 3–4 (emphasis added)).

Second, OPM directed agencies to fire those employees under the pretense of "performance."

In early February, OPM disseminated a template termination letter to agency chief human capital officers (Dkt. No. 87-1). The OPM template was largely generic, with placeholder text to be filled out by each respective agency (its image reproduced here, in two excerpts):

> [DATE], 2025
>
> MEMORANDUM FOR [EMPLOYEE], [TITLE], [ORGANIZATION]
>
> FROM: [NAME]
[TITLE]
>
> SUBJECT: Notification of Termination During Probationary Period
>
> REFERENCES: 5 U.S.C. § 7511
[5 U.S.C. § 3321(a)]
[5 C.F.R. §§ 315.803 and 804]
[5 C.F.R. § 316.304]
[INSERT AGENCY POLICY]
>
> This is to provide notification that the Agency is removing you from your position of [TITLE] and federal service consistent with the above references.
>
> On [INSERT DATE OF APPOINTMENT], the Agency appointed you to the position of [TITLE]. As documented on your appointment Standard Form 50 (SF-50), you appointment is subject to a probationary/trial period. The agency also informed you of this requirement in the job opportunity announcement for the position.

(*ibid.*).

While it did not account for the specific employee (or even agency), the OPM template *did* articulate a specific reason for termination:

> The Agency finds, based on your performance, that you have not demonstrated that your further employment at the Agency would be in the public interest. For this reason, the Agency informs you that the Agency is removing you from your position of [TITLE] with the Agency and the federal civil service effective [insert date and time, if necessary].

(*ibid.* (highlighting added)).

From IRS CHCO DiMartini:

> My colleagues and I asked Mr. Norris what the termination letter for affected probationary employees should consist of, and they informed me that OPM had drafted a letter, Treasury made a few modifications, and that we were instructed to send this letter out.

(Dkt. No. 94-1 at 3–4).

The IRS did not consider probationer performance:

> My office did not review or consider the actual job performance or conduct of any IRS probationary employee when issuing the termination notices. I also know that Treasury did not review or consider the actual job performance or conduct of any IRS probationary employee when issuing the termination notices. I know this because this fact was discussed openly in meetings. Practically speaking, it would take weeks or months to evaluate the job performance of 6,700 probationary employees.

(*id*. at 4).

The Department of Agriculture used the OPM template to terminate probationers "based on [their] performance" (Dkt. No. 18-5 at 11 (emphasis added)). USDA's deputy chief human capital officer stated OPM "*directed* the use of a specific template and language for the notice beginning immediately upon OPM notification" (Dkt. No. 39-6 at 6 (emphasis added)). The Department of Transportation informed probationers that "based on your performance you have not demonstrated that your further employment at the DOT FAA would be in the public interest" (Dkt. No. 18-17 (emphasis added)). The Department of Defense circulated the OPM template to its civilian personnel policy council members, "[a]s provided by OPM, and for your convenience" (Dkt. No. 39-4 at 15).

On February 13, Leandra Bailey, a Physical Science Information Specialist for the Forest Service, was terminated (Dkt. No. 71). In her most recent performance review, she received the highest mark possible in every category (*id.* at 11). The OPM template she received nevertheless stated: "The Agency finds, based on your performance, that you have not demonstrated that your further employment at the Agency would be in the public interest" (*id*. at 13 (emphasis added)).

On February 18, Dr. Andrew Frassetto, a probationer terminated by the NSF, received the OPM template (Dkt. No 18-9 at 38). In a February 13 performance review — *five days* before he was terminated "*based on* [*his*] *performance*" — Dr. Frassetto's supervisor reported in a performance review:

> [H]is role [is] mission critical. Dr. Frassetto has been an outstanding program director, and he has taken the lead role in overseeing this important and complicated portfolio for the division. Dr. Frassetto came to NSF with a unique skill set in interdisciplinary scientific research . . . . He has already demonstrated an outstanding ability to balance the various aspects of his job responsibilities and is highly effective at organizing and completing all his work in an accurate and timely manner.
>
> . . . .
>
> Dr. Frassetto's work on this portfolio has been outstanding and he has brought important experience to the role and has demonstrated highly competent project management and oversight. He is a program director who has needed minimal supervision and eagerly seeks special assignments at higher levels of difficulty. He has been an outstanding contributor to the division, directorate, and agency.

(*id*. at 7–8).

NSF said: "The cause comes from boilerplate we received from OPM. The cause says that the agency finds based on your performance that you have not demonstrated that your further employment at the agency would be in the public interest" (*id.* at 30 (emphasis added)).

Other agencies made slight tweaks to OPM's language — but maintained the central pretense. For example, the Department of Health and Human Services reworded the OPM template's "performance" language — "based on your performance, [] you have not demonstrated that your further employment at the Agency would be in the public interest" — to "fitness": "Unfortunately, the Agency finds that *you are not fit for continued employment* because your ability, knowledge, and skills do not fit the Agency's current needs . . . ." (Dkt. No. 18-10 (emphasis added)). They otherwise stayed true to the OPM template, down to the footnotes (*ibid*.).

OPM directed agencies to fire their probationers under the pretense of "performance" to, at least in part, circumvent statutory and regulatory reduction in force procedures and foreclose

appeal to the Merit Systems Protection Board. In defendant Ezell's words: "Employees on probationary periods can be terminated during that period without triggering appeal rights to the Merit Systems Protection Board (MSPB)" (Dkt. No. 37 at 1).

Virtually all the foregoing facts were uncovered by counsel for plaintiffs. Defendants have provided virtually no transparency.

* * *

Plaintiffs filed their complaint on February 19, 2025 (Dkt. No. 1). Four days later, they amended that complaint and moved for a temporary restraining order (Dkt. Nos. 17, 18). The undersigned ordered expedited briefing and held a hearing on February 27, during which a temporary restraining order was granted. A memorandum opinion and an amended TRO followed the next day (Dkt. No. 28). As part of that order, the undersigned required that defendant Ezell, who had volunteered his own declaration in support of defendants' opposition to a TRO, be cross-examined during a forthcoming evidentiary hearing on preliminary injunction. Plaintiffs, meanwhile, subpoenaed several agency employees to testify. Defendants were afforded the opportunity to request the production of any number of plaintiffs' declarants but did not. On March 10, three days before the evidentiary hearing, defendants moved to vacate that hearing, quash all subpoenas, and be relieved from having to produce defendant Ezell and other witnesses for deposition (Dkt. No. 75-1). The Court denied the motion to vacate, granted in part the motion to quash the subpoenas to appear, but denied relief as to defendant Ezell, who uniquely was a party and had volunteered his own testimony (Dkt. No. 89 at 2). Defendants ultimately withdrew Ezell's declaration and he did not appear. Finally, also on March 11, plaintiffs filed a second amended complaint that added several federal agencies (and their heads) as relief defendants, bringing them within this Court's ability to grant relief.

The March 13 hearing went ahead, and the undersigned issued a preliminary injunction from the bench, on the record to date and counsels' argument. As stated at the hearing, the preliminary injunction flows only from claims made by organizational plaintiffs.

A ALYSIS

"A plaintiff seeking a preliminary injunction must establish that [1] he is likely to succeed on the merits, that [2] he is likely to suffer irreparable harm in the absence of preliminary relief, that [3] the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

First, OPM's directive constituted an *ultra vires* act that violated its and all impacted agencies' statutory authority.

"The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015). "Equitable actions to enjoin *ultra vires* official conduct do not depend upon the availability of a statutory cause of action; instead, they seek a 'judge-made remedy' for injuries stemming from unauthorized government conduct, and they rest on the historic availability of equitable review." *Sierra Club v. Trump*, 963 F.3d 874, 890–91 (9th Cir. 2020) (citing *Armstrong*, 575 U.S. at 327), *vacated and remanded on other grounds (mootness)*, 142 S. Ct. 46 (2021).

No statute — anywhere, ever — has granted OPM the authority to direct the termination of employees in other agencies. "Administrative agencies [like OPM] are creatures of statute. They accordingly possess only the authority that Congress has provided." *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 595 U.S. 109, 117 (2022).

Instead, Congress's statutory scheme grants to each agency head the authority to manage its own affairs, including the hiring and firing of employees. 5 U.S.C. § 3101 ("Each Executive agency, military department, and the government of the District of Columbia may employ such number of employees of the various classes recognized by chapter 51 of this title as Congress may appropriate for from year to year."); 5 U.S.C. § 301 ("The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees . . . ."); *see also, e.g.,* 42 U.S.C. § 7231 (DOE) (re employees); *id.* § 7253 (re reorgs.); 38 U.S.C. §§ 303, 510 (VA); 10 U.S.C. § 113 (DOD).

The same is true of OPM. Congress has vested its director with the authority to "secur[e] accuracy, uniformity, and justice in the functions of the Office," "appoint[] individuals to be employed by the Office," and "direct[] and supervis[e] employees of the Office." 5 U.S.C. § 1103(a)(1)–(3). But that's it. OPM did not have the authority to direct the firing of employees, probationary or otherwise, in any *other* federal agency.

Defendants concede as much. Their opposition to relief rests instead on the factual contention that OPM did not issue a directive. The sanitized record provided in support — press releases and a feeble start to a yet-to-come "administrative record" (Dkt. Nos. 110, 111) — is unpersuasive.

For example, defendants point to a February 14 OPM memo where OPM "asked" the agencies to select for termination only those probationers they did "*not* identif[y] as mission-critical no later than end of the day Monday, 2/17" (Dkt. No. 111-2 at 1 (emphasis added)). But the balance of the record shows the actual situation was not as this memo would make it seem. *First*, even the fig leaf of agency discretion allowed for in the letter was illusory. As the NSF officials implementing the OPM directive stated: "Up until Friday [February 14]. Yes. We were told by OPM it was the agency's discretion whether to remove probations or not. We were told by OPM it was the agency's discretion whether to remove probations or not. *We chose to retain them all*" (Dkt. No. 18-9 at 26). But "late, late Friday night," "[t]hey told us that they *directed* us to remove probationers" (*ibid.* (emphasis added)). "[T]here was no limited discretion. *This is not a decision the agency made*. This is a *direction* we received" (*id*. at 21) (emphasis added). An "ask," followed by a directive, is a directive. *Second*, even if the agency discretion were real (it wasn't), the February 14 OPM memo directed that discretion towards evaluating who was "mission-critical," not who was high-performing (Dkt. No. 111-2 at 1). The OPM template letter used to effectuate those terminations — "[t]he Agency finds, *based on your performance*, that you have not demonstrated that your further employment at the Agency would be in the public interest" (Dkt. No. 87-1 at 1 (emphasis added)) — was an obvious pretext intended to obstruct appeal

and avoid statutory and regulatory reduction-in-force procedures (for example, the honoring of veteran preferences in the order of retention) (Dkt. No. 94-1 at 3–5).

The declaration of OPM senior advisor Noah Peters fares no better (Dkt. No. 77). *First*, Peters does not claim personal knowledge as to *anything* in his declaration. *Second*, Peters does not state that he participated in *any* of the calls he describes. Defense counsel argued, as to Acting Director Ezell's declaration, that *agency heads* "lack[ ] specific knowledge of disputed issues of fact," and "such declarations are based on information obtained by the official in course of performing his or her official duties and provide background information and summarize agency decision making reflected in other, sometimes lengthy or complex official documents" (Dkt. No. 75 at 8). Peters is not an agency head, he is a "senior advisor" who joined OPM two months ago. Peters' concluding paragraph — "At no point on these calls did OPM direct or require any agencies to terminate probationary employees. At all times, the tone was friendly, cordial, and cooperative." — is hearsay within hearsay (Dkt. No. 77 at 3 (emphasis added)). Defendants concede that *someone* from OPM *was* present on each of the calls described but have refused to provide the Court with declarations from *any* such employee with direct knowledge of the facts. *Finally*, Peters' assertion that there was no directive is cabined to "these calls." Nowhere does he state that OPM did not issue a directive *at all* (*ibid*.).

Plaintiffs have nourished the record with a mountain of countervailing evidence (agency memos, termination letters, congressional testimony, meeting transcripts, emails, and more) including, for example: "In accordance with *direction* from OPM . . . all DOD Components must terminate the employment of all individuals who are currently serving a probationary or trial period" (DOD), "[t]here was *direction* from the Office of Personnel Management" (VA), "agencies were *directed* to begin providing termination notices . . . immediately upon OPM notification" (USDA), "that was something that was *directed* from OPM" (IRS), "[t]hey told us that they *directed* us to remove probationers" (NSF), "OPM *directed* agencies to separate Probationary employees starting 2/13/25" (Forest Service) (emphases added).

Also on the merits, plaintiffs' APA claims are likely to succeed for much the same reason. OPM's *ultra vires* directive is likely to constitute an unlawful final agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," and "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (C), (D).

Based on the full record at the time of injunction, some of it excerpted here, defendants' opposition is rejected (except to the extent addressed next on jurisdiction and standing).

As to jurisdiction, the conclusions in the February 28 memorandum stand (for now). Facts not before the court during the TRO hearing suggest that the FLRA and MSPB may be alternative channels in theory alone (if at all). The undersigned ordered further briefing on that point and will not yet disturb the prior conclusion, which is incorporated here.

Standing was also set out in the February 28 memorandum, with that legal analysis also incorporated here. To be clear, no employees bring claims in this action, and unions' claims on their behalf have not yet been determined to be the sort that can be heard in district court (as above). But the organizational plaintiffs themselves face concrete harms. These flow from the way the unlawfully directed terminations disable the federal agency services on which they or their members depend, or otherwise imperil their organizational mission or membership — such as by requiring the organizations to steal resources from their existing work to solve new problems entirely of OPM's making. For example, Vote Vets Action Fund Inc., has diverted resources from its complementing array of veterans' services to cover primary needs newly unmet by VA services with slashed staffing, like the short-staffed Veterans Crisis Line (*see* Dkt. No. 45 at 20–23). Nearly all the plaintiffs that the TRO found likely to have standing (*id.* at 13–22) have added support to our record since (Coalition to Protect America's National Parks (Dkt. No. 70-19), Common Defense Civic Engagement (Dkt. No. 70-17), Main Street Alliance (Dkt. No. 70-20), and Western Watersheds Project (Dkt. No. 70-18)). Plus, other organizational plaintiffs have shown likely harms at OPM's hand (relevantly, Point Blue Conservation Science (Dkt. No. 70-15), and American Geophysical Union (Dkt. No. 70-16)).

Second, irreparable harms are imminent for these plaintiffs if not enjoined. Fresh record evidence shows that the harms outlined in the TRO go on despite the TRO. And, the record shows those harms come by more paths than previously understood. For example, we already knew that slashes to staffing at the USDA's Forest Service were wreaking havoc on Western Watershed Project. That harm continues, with problems mounting from the Los Padres National Forest to the Sawtooth Valley National Recreation Area (Dkt. No. 70-18 ¶¶ 7–8, 10). But now, plaintiffs tell us about more problems from USDA staffing cuts, this time at the Natural Resources Conservation Service. Because staff was cut in grants administration, nonprofit Point Blue Conservation Science has not been paid for work; and, because future project approvals are likewise stalling, Point Blue will likely be frustrated in its ability to improve forestry, agriculture, and wildlife management with the USDA (Dkt. No. 70-15 ¶¶ 4–6). The American Geophysical Union points to other problems also emanating from terminations at the USDA, and to still others emanating from the Department of Energy (Dkt. No. 70-16). Similarly, we already knew about the imminent harms to VoteVets and Common Defense (and to those whom they serve) by way of OPM-directed terminations at the DOD and VA. Now, through a statement made against interest, we see that the Department of Treasury sought to retain its veterans who were probationers — only to be rebuffed by OPM (Dkt. No. 94-1 ¶ 12). Because stiffer evidence did not shore up the irreparable harms flowing from the unlawful directive to the other proposed agencies, the preliminary injunction did not extend to them.

Each agency had (and still has) discretion to hire and fire its *own* employees. Here, the agencies were *directed* by OPM to fire all probationary employees, and they executed that directive. To staunch the irreparable harms to organizational plaintiffs caused by OPM unlawfully slashing other agency's staff required immediately reinstating those employees.

Finally, the balance of the equities and the public interest (which merge when the government is the defendant) plainly favor the organizational plaintiffs. "The preservation of the rights in the Constitution and the legality of the process by which government agencies function certainly weighs heavily in the public interest." *Nat'l Treasury Emps. Union v. U.S.*

Dep't of Treasury, 838 F. Supp. 631, 640 (D.D.C. 1993) (Judge Harold Greene); *see Nken v. Holder*, 556 U.S. 418, 435 (2009).

Each *Winter* factor favored the granting of the injunction.

The Court found security — which defendant did not request — to be proper in the amount of $0.

CONCLUSION

For the reasons stated from the bench, and further explained above, the Court granted the injunction.

Dated: March 14, 2025.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

United States District Court
Northern District of California

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 17 2025

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO; et al.,

Plaintiffs - Appellees,

v.

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT and CHARLES EZELL, in his official capacity as Acting Director of the U.S. Office of Personnel Management,

Defendants - Appellants,

and

HOWARD W. LUTNICK, Secretary of Commerce; et al.,

Defendants.

No. 25-1677

D.C. No.
3:25-cv-01780-WHA
Northern District of California,
San Francisco

ORDER

Before: SILVERMAN, BADE, and DE ALBA, Circuit Judges.
Order by Judges SILVERMAN and DE ALBA; Partial Dissent by Judge BADE.

The court has received the emergency motion to stay. The request for an immediate administrative stay is denied. *See Doe #1 v. Trump*, 944 F.3d 1222, 1223 (9th Cir. 2019). Given that the district court found that the employees were wrongfully terminated and ordered an immediate return to the status quo ante, an administrative stay of the district court's order would not preserve the status quo. It

would do just the opposite -- it would disrupt the status quo and turn it on its head. *See National Urban League v. Ross*, 977 F.3d 698, 700-01 (9th Cir. 2020).

The response to the emergency motion is due March 18, 2025. The optional reply in support of the motion is due March 20, 2025.

Am. Fed'n of Gov't Emps., AFL-CIO, et al. v. U.S. Off. of Pers. Mgmt., et al., No. 25-1677

BADE, Circuit Judge, dissenting:

The government requests an emergency temporary stay (also referred to as an administrative stay) of the district court's March 14, 2025 preliminary injunction that requires six federal agencies[1] to "immediately offer reinstatement to any and all probationary employees terminated on or about February 13th and 14th, 2025." *Am. Fed'n of Gov't Emps., AFL-CIO, et al., v. U.S. Off. of Pers. Mgmt., et al.*, No. 25-1780, Dkt. 132 (N.D. Cal. Mar. 14, 2025) (Dist. Dkt.); Dist. Dkt. 120, p. 52–53 (Mar. 13, 2025, preliminary injunction hearing transcript).[2] The district court also ordered the government to produce lists of those employees within seven days.[3] Dist. Dkt. 120, p. 53. The government also seeks a stay of the preliminary injunction pending appeal. Plaintiffs oppose both motions. Only the

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[1] Namely, the Veterans Administration, Department of Agriculture, Department of Defense, Department of Energy, Department of the Interior, and Department of the Treasury.

[2] The district court's preliminary injunction order incorporates its reasoning stated from the bench at the hearing on March 13, 2025. Dist. Dkt. 132, p. 14.

[3] The district court further prohibited the Office of Personnel Management (OPM) from "giving guidance as to whether any employee should be terminated" and required that any terminations of the agencies' employees be "made by the agencies themselves," if at all, and in conformity with the Civil Service Reform Act and Reduction in Force Act. Dist. Dkt. 120, p. 53. I would not administratively stay these portions of the preliminary injunction.

request for an administrative stay is before us now. Because I would grant a limited administrative stay, I respectfully dissent.

I

After the termination of federal probationary employees beginning on February 13, 2025, Plaintiffs filed a complaint for declaratory and injunctive relief on February 19. Dist. Dkt. 1. Four days later, Plaintiffs moved for a temporary restraining order (TRO) to halt any further terminations of federal probationary employees, require the government to identify the terminated employees, rescind OPM's termination directive, and restore the agencies and their employees to their status prior to the directive. Dist. Dkt. 18. In their response, filed February 26, the government argued, in part, that OPM did not direct agencies to terminate any probationary employees but instead asked agencies to review probationary employees based on how their performance advanced each agency's mission. Dist. Dkt. 33, p. 4–6, 21–22.

On February 27, the district court issued an oral TRO from the bench, declaring that OPM's "efforts to direct the termination of employees" at the six agencies were "illegal, invalid and must be stopped and rescinded" and requiring that OPM communicate that decision to the agencies by the following day. Dist. Dkt. 45, p. 24. On February 28, the district court amended the February 27 bench

order to require that OPM provide the agencies with written notice of the TRO. Dist. Dkt. 45, p. 24.

On March 13, the district court held a hearing on the preliminary injunction request. Dist. Dkt. 120, p. 4. The parties disputed whether OPM "directed" the February 13 and 14 terminations or whether the agencies independently terminated probationary employees. *See, e.g.*, Dist. Dkt. 120, pp. 7, 14. Plaintiffs insisted that the "only appropriate relief" was "rescission of the terminations" allegedly carried out in accordance with OPM's instructions. Dist. Dkt. 120, pp. 9–10. The government stipulated that the TRO "can continue as a preliminary injunction as is." Dist. Dkt. 120, p. 28; *see also* Dist. Dkt. 75, p. 1. At the conclusion of the hearing, the district court orally granted the preliminary injunction from the bench and filed a written order the next day.[4] Dist. Dkt. 120, p. 52; Dist. Dkt. 132.

After the hearing, the government filed a notice of appeal from the district court's order granting the preliminary injunction and filed an emergency motion with this court requesting (1) a stay pending appeal and (2) an administrative stay pending disposition of the stay motion. Dist. Dkt. 119.

[4] The district court concluded that it likely had jurisdiction only over the claims of the organizational plaintiffs and, therefore, the TRO and subsequent preliminary injunction address only the claims of those plaintiffs. Dist. Dkt. 45, p. 13.

II

"When considering the request for an administrative stay, our touchstone is the need to preserve the status quo." *Nat'l Urb. League v. Ross*, 977 F.3d 698, 702 (9th Cir. 2020). An administrative stay is limited in nature and duration—it is intended to "minimize harm while an appellate court deliberates" and lasts "no longer than necessary to make an intelligent decision on the motion for a stay pending appeal." *United States v. Texas*, 144 S. Ct. 797, 798–99 (2024) (Barrett, J., concurring); *see also Nat'l Urb. League*, 977 F.3d at 700–01 (explaining that "an administrative stay 'is only intended to preserve the status quo until the substantive motion for a stay pending appeal can be considered on the merits'" (quoting *Doe #1 v. Trump*, 944 F.3d 1222, 1223 (9th Cir. 2019))); *Nken v. Holder*, 556 U.S. 418, 427 (9th Cir. 2009) (explaining that the authority to enter an administrative stay "allows an appellate court to act responsibly"). "Once the court is equipped to rule" on the merits of the motion, it is obligated to do so. *Texas*, 144 S. Ct. at 799 (Barrett, J., concurring).

Given its limited nature, an administrative stay "does not constitute in any way a decision as to the merits of the motion for stay pending appeal." *Doe #1*, 944 F.3d at 1223. Therefore, the court "defer[s] weighing the *Nken* factors until the motion for stay pending appeal is considered." *Nat'l Urb. League*, 977 F.3d at 702 (footnote omitted). *But see Texas*, 144 S. Ct. at 799 (Barrett, J., concurring)

(noting that "judges have cited the underlying merits as a reason to grant an administrative stay").

Applying these principles to the government's request for an administrative stay, the key considerations are (1) the relevant status quo, and (2) whether a temporary stay is necessary to preserve that status quo. As for the first consideration, "status quo" is an ill-defined concept, but previous published orders from our court, while not entirely consistent, provide some guidance. For example, in *Doe #1*, we denied the government's request for an administrative stay of a district court's nationwide injunction suspending a Presidential Proclamation because "the status quo would be disrupted by granting the temporary stay request." 944 F.3d at 1223. The Presidential Proclamation at issue provided for "major and unprecedented" changes to American immigration policy and had not yet "gone into effect." *Id.* Therefore, the "status quo" was the state of affairs without the Proclamation in effect. *See id.* (also reasoning that, because the government only alleged "long-term" harms, there was an "absence of a sufficient exigency to justify *changing* the status quo" (emphasis added)).

In *Al Otro Lado v. Wolf*, we granted an administrative stay of a district court's injunction that prevented the government from enforcing an asylum regulation against members of a provisionally certified class. 945 F.3d 1223, 1224 (9th Cir. 2019). The enjoined regulation had been in effect for about five months,

and we determined that prohibiting its application "could cause complications at the border in the period before the motion for stay pending appeal is decided." *Id.* Together, *Doe #1* and *Al Otro Lado* establish that the status quo is anchored to the time immediately preceding the issuance of the preliminary injunction.[5]

The majority's order relies on *National Urban League* to conclude that an administrative stay would upend the status quo. There, we declined to grant an administrative stay of a district court's preliminary injunction staying a replan schedule for the census. 977 F.3d at 700, 703. Under the replan, the Census Bureau announced plans to complete field work and data collection by September 30, 2020. *Id.* at 700. On September 5, the district court entered a TRO, and on September 24, the district court entered a preliminary injunction preventing the

[5] Plaintiffs define "status quo" as the "legally relevant relationship between the parties before the controversy arose," *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 684 (9th Cir. 2023) (en banc) (citation omitted), or the "last uncontested status" before the "pending controversy," *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000) (citation omitted). Therefore, they argue that the status quo here refers to the time before the terminations occurred. But Plaintiffs cite cases addressing the status quo relevant to preliminary injunctions, not administrative stays. *See Fellowship of Christian Athletes*, 82 F.4th at 683–84; *GoTo.com, Inc.*, 202 F.3d at 1210. Instead of a preliminary injunction, a better proxy to determine the status quo that is relevant here is a stay pending appeal, which "suspend[s] *judicial alteration* of the status quo." *Nken*, 556 U.S. at 429 (emphasis added) (quoting *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)). In other words, the status quo is the state of affairs immediately before the underlying judicial action (here, the preliminary injunction).

Bureau from implementing the September 30 deadline. *Id*. Even though the Bureau had begun winding down field operations in anticipation of the September 30 deadline, we concluded that an administrative stay would "upend the status quo, not preserve it" because it would allow the process of disbanding census workers to resume, thereby eliminating the Bureau's future ability to conduct field work. *Id.* at 701. We also concluded that a temporary stay could moot the underlying lawsuit because the census needed to be completed by a specific date. *Id.* at 702.

Here, the six agencies identified in the preliminary injunction have completed the challenged terminations. The preliminary injunction will change that status quo by requiring those agencies to "immediately offer reinstatement to any and all probationary employees terminated on or about February 13th and 14th, 2025," and it seeks to facilitate that change by requiring the agencies to "submit a list of all probationary employees terminated on or about February 13th and 14th with an explanation as to each of what has been done to comply with" the injunction.[6] Dist. Dkt. 120, pp. 52–53. A limited administrative stay would briefly

[6] The other provisions of the preliminary injunction do not change the status quo or at least have a far more minor effect on it. First, the TRO was already in place; the injunction extended it. Dist. Dkt. 120, p. 52. Second, Plaintiffs allege relatively minimal use of the OPM "template letter" after February 13th and 14th. *See* Dist. Dkt. 90, pp. 2 ¶ 5, 26 ¶ 120, 33 ¶ 131, 34 ¶ 135 & n.50. *But see* Dist. Dkt. 90, p. 36 ¶ 143. Therefore, prohibiting the agencies from using the OPM template letter does not significantly change the status quo. Third, the government represents that OPM has not been directing agencies to terminate employees, *see, e.g.*, Dist.

pause that change while we decide the merits of the motion for stay pending appeal. And the concerns over mootness in *National Urban League* are not present here.

As for whether an administrative stay is necessary to preserve the status quo, the government persuasively argues that the district court's preliminary injunction order imposes a substantial administrative burden. That order requires the six agencies to offer reinstatement to thousands of terminated employees, who may accept and require onboarding, credentialing, and other human resources or administrative action. Dist. Dkt. 120, p. 52. The agencies must also submit a list of all probationary employees who were terminated on February 13 and 14 along with "an explanation" of what has been done to comply with the court's order by Thursday, March 20. Dist. Dkt. 120, p. 53. What is more, these undertakings would cause further confusion and uncertainty if this panel later determines that the *Nken* factors are satisfied and grants the motion for a stay pending appeal, and

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Dkt. 120, pp. 15, 26, 29, so the injunction's order for the agencies to cease termination of employees at OPM's direction should have minimal effect. At most, it holds the government to its representations about the existing state of affairs. Fourth, the injunction's prohibition on "defendants . . . giving guidance as to whether any employee should be terminated," Dist. Dkt. 120, p. 53, still allows the agencies to lawfully terminate their own employees and is therefore simply another order not to act at the direction of OPM or another agency. Because the government represents that terminations are not being ordered by other agencies, *see, e.g.*, Dist. Dkt. 120, pp. 29, 46–47, these provisions of the injunction either do not affect the status quo or hold the government to its word.

then be all for naught if this court vacates the preliminary injunction. A temporary stay would at least mitigate this potential whiplash effect.

Plaintiffs do not contest these assertions. They argue that government services upon which they and their organizational members rely have been thrown into chaos by the terminations and that they will continue to be injured by the government's inability to render services. But Plaintiffs offer no reason to believe that *immediate* offers of reinstatement would cure these harms. Instead, the administrative undertaking of immediately reinstating potentially thousands of employees would likely draw (already depleted) agency resources away from their designated service functions.

Finally, granting an administrative stay now would allow us to resolve the motion for a stay pending appeal with the time necessary for careful deliberation, and before the government is required to take action that could be rendered unnecessary by a subsequent decision on the merits of the motion.

III

In sum, a limited administrative stay is necessary to preserve the status quo as it existed prior to the district court's preliminary injunction. Doing so will allow us to rule on the motion for a stay pending appeal without potentially subjecting the government and the terminated employees to whiplash caused by diverging downstream decisions. Therefore, I conclude that we should grant a temporary,

limited administrative stay of the portions of the preliminary injunction that (1) require the government to "immediately offer reinstatement to any and all probationary employees terminated on or about February 13th and 14th, 2025"; and (2) require the government to "submit a list of all probationary employees terminated on or about February 13th and 14th with an explanation as to each of what has been done to comply with" the preliminary injunction by March 20, 2025. Dist. Dkt. 120, pp. 52–53. I respectfully dissent.