No. 24A904

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.,

Respondents.

RESPONDENTS' RESPONSE TO THE APPLICATION FOR A STAY OF INJUNCTION

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April 3, 2025

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PARTIES TO THE PROCEEDINGS AND RELATED PROCEEDINGS

Applicants 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 Veteran Affairs; Sean Duffy, Secretary of Transportation; 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 Environmental Protection Agency; United States General Services Administration; United States Small Business

Administration; United States Department of Veteran Affairs; Russell Vought, Director of the Office of Management and Budget; Chris Wright, Secretary of Energy; and Lee Zeldin, Environmental Protection Agency Administrator.

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

The proceedings below were:

United States District Court for the Northern District of California:

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

AFGE v. OPM, No. 25-cv-1780 (Feb. 28, 2025) (Memorandum Opinion and Order Amending TRO)

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

AFGE v. OPM, No. 25-cv-1780 (Mar. 14, 2025) (memorandum supporting preliminary injunction)

AFGE v. OPM, No. 25-cv-1780 (Mar. 15, 2025) (denial of stay pending appeal of preliminary injunction)

United States Court of Appeals (9th Cir.)

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

AFGE v. OPM, No. 25-1677 (Mar. 26, 2025) (denial of stay pending appeal of preliminary injunction).

INTRODUCTION

As the government concedes in its stay application to this Court, the Office of Personnel Management ("OPM") has no authority to direct other federal agencies to fire employees. Yet the unrebutted factual record conclusively demonstrates, and the district court correctly found, that OPM directed the firing of tens of thousands of federal employees beginning in early February, on the false pretense that the employees' performance was deficient. After Respondents filed this suit, the government continued its falsehoods, denying that OPM had directed the firings, but later withdrawing evidence it submitted to support that claim.

Unable to defend its illegal actions on the merits, the government now seeks the extraordinary relief of a stay on other grounds. Its arguments are meritless.

First, the government incorrectly claims that the many nonprofit organizations that filed this suit all lack standing to pursue it. But the district court made detailed and well-supported findings to the contrary, and the Government comes nowhere close to showing clear error. For example, the Government's decimation of probationary employees from the already understaffed Department of Veterans Affairs has already had and will imminently continue to have serious negative consequences for members of Respondent Vote Vets Action Fund ("VoteVets"), including delays in receiving prosthetic limbs, mental health counseling, and other vital services. Similarly, cuts to the Forest Service and Bureau of Land Management have already harmed and will continue to harm the ability of Respondent environmental and outdoor organizations to enjoy and protect a wide range of federal lands and resources. The Government's arguments in response offer only magical thinking, not real evidence.

Second, the Government incorrectly contends that *no one* can challenge the illegal mass firing of federal employees by OPM, because the only way to challenge termination of federal employees is by individual employee claims against each

employer agency before the Merit Systems Protection Board ("MSPB"). No court has ever so held, and this spurious argument provides no basis for a stay. The idea that Respondents may seek relief only in an administrative agency that cannot hear their claims—or that Congress implicitly stripped federal court jurisdiction over statutorily authorized claims—is ludicrous. And it is inconsistent with the Government's own conduct in another case, where it has filed suit in federal court, rather than going before the MSPB, to argue the legality of a recent executive order purporting to end collective bargaining rights for certain federal workers.

Finally, the government claims that the district court exceeded its authority by ordering the reinstatement of fired workers. But the district court's order simply restored the status quo that existed prior to OPM's illegal conduct, and reinstatement is a routine remedy in the face of illegal termination.

In short, there is no legal basis to stay the district court's order. And the equities weigh strongly against a stay. The Government illegally fired tens of thousands of public servants, significantly degrading crucial services on which the public and members of Respondent organizations rely. The Government makes no showing of any irreparable harm and just told the district court that it has already substantially complied with the preliminary injunction. A stay should be denied.

BACKGROUND

A. Statutory and Regulatory Background

OPM "lacks statutory authority to direct other agencies to terminate probationary employees," as the Government concedes. App. 24; *see also generally* 5 U.S.C. §§ 1101-1105; *cf.* 5 U.S.C. § 1103(a)(1)-(3) (setting forth OPM's authority over its *own* employees). That is because OPM's statutory role in relation to other agencies is limited to providing human resources support, including by publishing

government-wide rules in compliance with the APA, 5 U.S.C. §§ 1103(b), 1105, and giving technical assistance, *id*. §§ 4304, 4305, 7514.

Congress instead authorized the head of each agency created by statute to manage the agency's affairs, including over employment decisions such as the hiring and firing of employees. *See* 5 U.S.C. § 3101 (granting "General Authority to Employ" to each agency head). Each agency's authorizing statutes delegate exclusive authority over employment decisions to the federal agencies themselves—specifically, to agency heads. *See, e.g.*, 38 U.S.C. §§ 303, 510 (Veterans Affairs); 10 U.S.C. § 113 (Defense); D. Ct. Doc. 90 ¶¶81-82.

When it enacted the Civil Service Reform Act of 1978 ("CSRA"), Congress imposed statutory limits on agencies' authority to terminate federal employees, including employees in probationary status. By statute, agencies may downsize and eliminate positions only by implementing a "reduction-in-force" ("RIF"), under a regulatory scheme that provides order of termination and bumping rights, and requires notice to employees, affected states, and local governments. *E.g.*, 5 U.S.C. § 3502; 5 C.F.R. §§ 351.402, 351.801-803. Aside from a RIF, probationary employees may be terminated only "because [their] *work performance or conduct* during this period fails to demonstrate [their] fitness or . . . qualifications for continued employment." 5 C.F.R. § 315.804(a) (emphasis added); *see also* 5 U.S.C. § 2301(b)(6). Further, each employee must be "notif[ied] in writing as to why he is being separated," and that notice must, "as a minimum, consist of the agency's conclusions as to the inadequacies of [the employee's] performance or conduct." 5 C.F.R. § 315.804(a). No statute or regulation authorizes the termination of probationary employees based on whether their position is "mission critical."

The CSRA, which contains the Federal Service Labor-Management Relations Statute ("FSL-MRS"), also created two agencies for resolving disputes between

agency employers and their employees or employee representatives: the Merit Systems Protection Board ("MSPB"), which hears employee appeals from agency employment actions, 5 U.S.C. §§ 7701, 7703, and the Federal Labor Relations Authority ("FLRA"), which hears labor disputes between employer agencies and labor representatives, 5 U.S.C. §§ 7103, 7118, 7123.

As the Government now concedes, neither the MSPB nor FLRA provides *any* avenue for administrative or judicial review of claims brought by third parties like the organizational plaintiffs or States. App. 19-21. Nor can either the MSPB or FLRA hear claims challenging the legality of government-wide actions or rules by OPM, regardless of who asserts them.[1]

B. OPM's Mass Termination of Probationary Federal Employees

Beginning in early February, OPM directed federal agencies across the government to terminate tens of thousands of employees in probationary status under the false pretense of performance deficiencies. Although the Government contends that the agencies themselves decided to terminate probationary employees, App. 3, the district court found, based on a "mountain of evidence," that "OPM directed other agencies to fire their probationary employees" *en masse*, with no advance notice, wreaking havoc across the federal government. App. 8a, 41a.

In making this central factual finding, Judge Alsup relied on numerous agency admissions in the record that confirm OPM ordered the terminations:

- Department of the Interior, Forest Service: *"All federal agencies*, including the Department of Agriculture, *were notified* on February 12,

[1] The Government argued the contrary to the district court, that "[t]he non-union organization plaintiffs . . . can be heard" with respect to their claims against OPM before the MSPB and FLRA. D. Ct. Doc. 44 at 38:7-11. That argument was plainly wrong under the statutes limiting MSPB and FLRA claims and judicial review to employees, employee representatives, and the actions of employing agencies, rather than government-wide rules. *See* 5 U.S.C. §§ 7103(a)(1), 7117(a)(1), 7118, 7123, 7701, 7703.

> 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." App. 41a (emphasis added) (citing D. Ct. Doc. 71 at 16).

- Department of Agriculture (USDA): "[A]gencies were *directed* to begin providing termination notices . . . beginning immediately upon OPM notification." App. 41a (citing D. Ct. Doc. 39-6 at 5-6).

- National Science Foundation (NSF): "We were *directed* last Friday *by OPM* to terminate all probationers except for a minimal number of mission critical probationers… This is not a decision the agency made." App. 41a-42a (second emphasis added) (citing D. Ct. Doc. 18-9 at 27).

- Department of Treasury, Internal Revenue Service (IRS): "[T]he removal of the probationary employees, again, that was something that was *directed from OPM*." App. 42a (emphasis added) (citing D. Ct. Doc. 39-5 at 8-9); *see also* App. 43a (citing D. Ct. Doc. 94-1 at 3-4) (declaration from IRS Human Capital Officer).

- Department of Energy: termination was "*[p]er OPM instructions."* App. 41a (citing D. Ct. Doc. 39-4 at 10).

- Department of Veterans Affairs: "There was *direction* from the Office of Personnel Management." App. 43a (citing D. Ct. Doc. 39-1 at 13 (testimony to Congress).

- Department of Defense: "*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." App. 43a (emphasis added) (citing D. Ct. Doc. 39-4 at 14).

The court further found that OPM decided which employees, if any, agencies could exempt from termination. *E.g.,* App. 42a (citing D. Ct. Doc. 18-9 at 26-27 (NSF statement that it initially "chose to retain … all" probationary employees, but then OPM "told us that they directed us to remove probationers")); App. 43a (citing D. Ct. Doc. 94-1 at 3-4 (IRS statement that "OPM would not allow us to exempt military veterans from the probationary terminations")).

The few documents that the Government submitted, the district court found, actually supported the conclusion that OPM had directed the terminations. App. 49a-

50a. A February 12 OPM email directed federal agencies to "separate" employees "by the end of the day tomorrow" and to "us[e] the attached template." D. Ct. Doc. 111-5. A February 14 email from OPM to federal agencies again directed agencies to "separate probationary employees that you have not identified as mission-critical," and purported to redefine "qualifications for continued employment" (as used in 5 C.F.R. § 315.803) to "mean[] that only the highest-performing probationers in mission-critical areas should be retained." D. Ct. Doc. 111-2 at 1-2.[2]

The district court also found that "OPM directed agencies to fire [probationary] employees under the pretense of 'performance,'" using an OPM-drafted "template termination letter" that 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." App. 44a (citing D. Ct. Doc. 87-1) (emphasis added). But at the same time, OPM instructed all federal agencies that "[e]mployees do not need to have received any particular performance rating previously to be separated." D. Ct. Doc. 111-5.

Thus, this "pretense," the district court found, was false, and its purpose was, "at least in part, [to] circumvent statutory and regulatory reduction in force procedures and foreclose appeal to the Merit Systems Protection Board." App. 46a-47a. The court credited evidence that the OPM-directed terminations were not actually based on, and did not consider, employees' performance. App. 45a-46a (citing, *e.g.*, D. Ct. Doc. 94-1 at 4); D. Ct. Doc. 71 at 11-13; D. Ct. Doc. 18-9 at 7-8, 30, 38); *see also* App. 36a-37a (discussing specific example).

The court found that OPM caused "tens of thousands" of terminations, with "[a]s many as 200,000 . . . [remaining] at risk." D. Ct. Doc. 45 at 2, 5.

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[2] The Government's Statement describes the February 14 email without mentioning or acknowledging these parts. App. 8-9.

C. The Mass Terminations Cause Widespread Irreparable Injury

Respondents submitted dozens of declarations documenting harm caused by these *en masse* terminations, carried out without notice and throughout the country, across numerous agencies. *See, e.g.*, D. Ct. Doc. 122 (collecting record citations).

The terminations were carried out without any advance notice to employees or their representatives. Some agencies terminated employees within hours of OPM's directives, and others within days. *See, e.g.*, D. Ct. Doc. 111-9. Employees were locked out of systems and escorted from buildings, unable to communicate or provide direction regarding their work to those who remained to pick up the pieces. *E.g.*, D. Ct. Doc. 18-8 ¶35, 18-9 ¶24. Because probationary employees include not only those new to the government but also those recently promoted, agencies lost experienced individuals and directors of programs and were left with arbitrary and unexpected gaps in critical functions. *E.g.*, D. Ct. Docs. 18-4, 70-11.

The reverberations throughout agencies and impacts on services were dramatic and immediate. The district court found Respondents had shown "concrete harms . . . flow[ing] 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." App. 51a. It found that some of these injuries had already occurred, and others were "imminent." App. 51a-52a.

Respondents documented, and the court credited, widespread ongoing and imminent harm. App. 22a-23a, 51a-52a. For example, the court found that there have been and will continue to be widespread impacts on services for military veterans, including members of Respondent organizations, such as on "mental health research, cancer treatment, addiction recovery, prosthetics, and burn pit exposure studies," transportation services, and administrative services that facilitate veterans' access to treatment. D. Ct. Docs. 18-3, 18-7, 18-12, 18-17, 18-18, 70-13. Terminations of

probationary employees at the Federal Aviation Administration "introduced unnecessary risk and stress that distracts from the mission of safe flight for civil and military operations," injuring flight attendant members of a Respondent organization. D. Ct. Docs. 18-3, 18-7, 18-12, 18-17, 18-18, 70-13. Respondent conservation groups and others documented extensive harm to services provided to the public and fragile ecosystems in national parks and other public lands. D. Ct. Docs. 18-11, 18-13, 18-15, 39-2, 39-3, 70-10, 70-15, 70-18, 70-19. And the decimation of probationary staff at federal science agencies has impaired data security concerning disease research; scientific research; environmental conservation; fisheries and water management; and local public health work. D. Ct. Docs. 18-8, 18-9, 18-10, 18-13, 39-2, 70-2, 70-3, 70-4, 70-5, 70-9, 70-10, 70-11, 70-12, 70-15, 70-16, 70-18. At a time when fire prevention and management are of utmost importance, unplanned cuts also eliminated firefighters and others actively engaged in preparing for the coming fire seasons. D. Ct. Docs. 18-8, 18-11, 18-12, 70-7.

D. Procedural Background

In response to the widespread harms caused by the mass terminations, Respondents filed suit on February 19, challenging OPM's acts as ultra vires and invalid under at least four different APA provisions. D. Ct. Doc. 1. Respondents are a coalition of veterans, environmental, small business, and labor organizations harmed by the probationary firings.[3] Respondents promptly moved for a temporary

[3] Respondents include Main Street Alliance (a network of small businesses), Coalition to Protect America's National Parks (an organization dedicated to protecting national parks), Western Watersheds Project (an environmental conservation group), VoteVets (a veterans organization), Common Defense Civic Engagement (a veterans organization), American Public Health Association (an organization devoted to public health), Association of American Flight Attendants (a private-sector labor union), American Geophysical Association (a membership association for Earth and space scientists), Climate Resilient Communities (an organization committed to environmental justice), and Point Blue Conservation Science (an environmental conservation organization).

restraining order ("TRO") and order to show cause why a preliminary injunction should not issue on February 23, 2025. D. Ct. Doc. 18. The District Court set a briefing schedule and TRO hearing.

In response to the TRO application, the Government submitted a single declaration from Acting OPM Director Charles Ezell, which summarily denied that OPM directed any terminations. D. Ct. Doc. 34. The declaration, which was withdrawn by the Government two weeks later (*see infra* at 11), attached OPM's January 20 memorandum ordering agencies to compile and submit to OPM the names of all probationary employees and to prepare to fire them, and its February 14 email directing agencies to separate all non-"mission critical" probationary employees. D. Ct. Docs. 34, 37, 37-1. The Government submitted no evidence from any agency official to support its contention that the agencies had decided independently to terminate these employees; no evidence rebutting Respondents' showing of harm; and no evidence of harm to the Government from the proposed injunction.

The court held a lengthy TRO hearing on February 27, 2025, at which it issued an oral TRO, Supp. App. 73a-84a, followed the next day by a written decision, App. 1a-24a. At the TRO hearing, the Government's counsel welcomed an evidentiary hearing and expressed "confiden[ce]" that hearing testimony would show that OPM did not order the terminations. Supp. App. 30a-31a.

The court found that Respondents "mustered a mountain of evidence" showing that OPM had ordered agencies to terminate their probationary employees, which all parties agreed it lacked authority to do. App. 8a-9a. The court also analyzed and rejected the Government's jurisdictional challenges. App. 13a-23a. However, the court granted only "limited [TRO] relief" because agencies other than OPM were not parties, and allowed Respondents to file a motion to amend the complaint to add those agencies as Rule 19 relief defendants. Supp. App. 73a, 83a.

The Government's representations that "respondents did not even move for" a preliminary injunction and so the district court "spontaneously" issued one, and that OPM "never had an opportunity to respond," are inconsistent with the record. App. 1, 3, 12-13. Respondents' proposed TRO order asked that their motion be treated as their preliminary injunction moving papers. D. Ct. Doc. 18-2. All parties were on notice that the court would decide whether to issue a preliminary injunction at the March 13 hearing.[4] At no point did the Government ask the court for an opportunity to submit further briefing in opposition to a preliminary injunction. And at every point after the TRO hearing, the Government actively resisted—rather than seeking—the opportunity to present additional evidence.

A week after the TRO issued, OPM amended the January 20 memorandum by adding two sentences stating that it was "not directing agencies to take any specific performance-based actions regarding probationary employees" and that "[a]gencies have ultimate decision-making authority over . . . such personnel actions." D. Ct. Doc. 64-1. Contrary to the Government's suggestion, App. 2, OPM did not "rescind[]" all relevant communications, App. 12, nor ensure any employees were restored to service, nor submit any evidence that "the six enjoined agencies . . . chose to stand by the terminations," App. 2. It is only counsel's assertion, not evidence, that "each agency" made an "independent decision to adhere to prior terminations." App. 19.

Respondents moved to amend their complaint to add Rule 19 relief defendants and additional plaintiffs. D. Ct. Doc. 49. That motion also sought permission to join the new plaintiffs to the "pending motion for preliminary injunction," which the

[4] *See also* D. Ct. Doc. 33 at 30 (OPM urging that if "preliminary injunction is appropriate" its scope should be limited); D. Ct. Doc. 65 at 9, 25 (referring to upcoming "PI" or "preliminary injunction" hearing); Supp. App. 25a (court opening to March 13 hearing: "We're here on a motion for a preliminary injunction, and we'll hear some argument.").

Government did not oppose. *Id.* at 2.[5] OPM responded that "any additional further award of preliminary injunctive relief" was precluded because its addition of two sentences to the January memorandum mooted the case. D. Ct. Doc. 63 at 4. In the course of granting the motion to amend, the district court rejected OPM's mootness argument, noting that OPM did not "submit[] any evidence suggesting that it has rescinded or revised the other communications imparting its unlawful directive" besides the January 20 memorandum, and had presented "no evidence suggesting that federal agencies . . . are now acting at their own discretion." Supp. App. 4a. The Court granted Respondents leave to amend and added the new parties and evidence.

The Government then moved to cancel the preliminary injunction hearing, arguing, again, that its actions taken to comply with the TRO eliminated any need for further relief. D. Ct. Doc. 75 at 1, 6-7. And notwithstanding Government counsel's statements at the TRO hearing, it sought to avoid making Mr. Ezell available to testify regarding the facts the Government had put at issue. *Id.* at 7-11; D. Ct. Doc. 65 at 5-6. After the court refused to cancel the hearing, the Government withdrew the Ezell declaration (rather than make him available for deposition or cross-examination), attempted to substitute a declaration from a different OPM official (whom it also did not make available for testimony or deposition), and declined to present any live witnesses at the upcoming hearing. D. Ct. Docs. 77, 97.[6]

On March 13, the court held a hearing and orally granted preliminary injunctive relief. App. 36a-38a. The district court found that "all such terminations

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[5] That motion repeatedly referenced the upcoming "March 13, 2025 preliminary injunction hearing." *Id.* at 1 (caption), 2, 3, 4, 6, 7 & n.2, 11. OPM's opposition registered no objection to that characterization of the upcoming hearing.

[6] The district court required both sides to make their declarants available for cross-examination at the March 13 hearing (or alternatively, if more convenient for the Government's declarant, in a deposition in Washington D.C.). The Government declined to call any of Respondents' declarants for cross-examination at the hearing.

were directed by . . . OPM and Acting Director Ezell and were unlawful because OPM and Ezell had no authority to do so." App. 37a. The court also found that the Government, I believe, has tried to frustrate the Judge's ability to get at the truth of what happened here" by filing, and then withdrawing, the Ezell declaration and then substituting another. App. 26a. Therefore, the court ordered OPM and six relief defendants for which the strongest irreparable harm evidence had been presented to cease terminations, to restore services by reinstating employees to their positions, to notify employees that their terminations had been held unlawful, and to report on compliance by March 20. App. 37a-38a, 52a. Although an appeal was discussed, the Government did not orally move for a stay pending appeal. App. 38a-39a.

The court followed the next day with a written decision finding that every preliminary injunction factor favored Respondents. App. 53a. The court found that the organizational plaintiffs "ha[d] shown they will suffer irreparable harm resulting from the immediate impairment of public services" and had met other requirements for injunctive relief. App. 40a. It found that "[v]irtually all the . . . facts [in the case] were uncovered by counsel for Plaintiffs," and that "Defendants have provided virtually no transparency." App. 47a. It rejected OPM's new, substituted declaration of an OPM senior advisor as of "scant evidentiary value" because the declarant did "not claim personal knowledge as to *anything* in his declaration." Supp. App. 10a; *see also* App. 50a. And OPM's remaining documents—consisting of "press releases and a feeble start to a yet-to-come 'administrative record'"— were "unpersuasive." App. 49a.

The preliminary injunction decision made clear that "[e]ach agency had (and still has) discretion to hire and fire its *own* employees," but that injunctive relief was required because they had been "*directed* by OPM to fire all probationary employees, and they executed that directive." App. 52a. During the injunction hearing, the district court had similarly been explicit that agencies retain discretion to "decide[]

to do a reduction in force, . . . so long as it complies with the several requirements of the Reduction in Force Act." App. 36a.[7]

The Government appealed the preliminary injunction, and the Ninth Circuit set an expedited briefing schedule, with the opening brief due on April 10. 9th Cir. Doc. 2.1. The Government then moved for a stay in the district court, filing six new declarations (including from individuals it had earlier refused to make available for deposition or testimony). D. Ct. Docs. 127, 127-1–127-6. Without awaiting the court's ruling, the Government filed an emergency motion for an administrative stay and stay pending appeal in the Ninth Circuit. 9th Cir. Doc. 7.1 at 20.

On March 15, the district court rejected the Government's stay request, criticizing its numerous efforts throughout trial court proceedings "to frustrate fact-finding" and characterizing its new declarations as "a last-ditch attempt to relitigate those orders on a new, untested record." Supp. App. 10a. Judge Alsup further concluded that the new declarations asserted mere administrative burdens, not that the agencies "are . . . incapable of rehiring recently terminated probationers," and pointed out that OPM had never identified "any other way to avoid the irreparable injuries flowing from the unlawful terminations except to reinstate the employees." Supp. App. 9a, 11a. The court concluded that "[e]ach 'harm' stems from the unwinding of the unlawful act and the return to the status quo." Supp. App. 11a. Finally, Judge Alsup rejected OPM's false "suggestion" that the preliminary injunction prohibited all OPM guidance to agencies on personnel matters, noting that "[t]he meaning of the order is plain: OPM cannot direct another agency to fire an employee simply by dressing up the directive as guidance." Supp. App. 11a-12a. The Ninth Circuit denied an administrative stay. 9th Cir. Doc. 14.

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[7] Thus, contrary to the Government's claim, the injunction does not "prevent the agencies from terminating [probationary] employees based on the agencies' independent judgment or even on newly arising grounds." App. 5.

In the meantime, a different district court also granted a TRO enjoining the unlawful probationary employee terminations. *State of Maryland v. U.S. Dept. of Agriculture et al.*, No. JKB-25-0748, 2025 WL 800216 (D. Md. March 13, 2025). After the deadline to comply with that TRO, the Government filed a motion for stay in the Fourth Circuit, which that court denied on March 21. *State of Maryland v. U.S. Dept. of Agriculture et al.*, No. 25-1248 (4th Cir.), Docs. 8, 20. The Maryland District Court subsequently granted a preliminary injunction, which applied to probationary employees at twenty federal agencies who reside or are employed in the states that were plaintiffs in that case. No. JKB-25-0748, Docs. 112, 115, 125, 126.

On March 20, the Government filed a reply in support of its Ninth Circuit emergency stay application, in which it requested a decision by 12 p.m. the next day to allow it to seek relief from this Court. 9th Cir. Doc. 20.1 at 2. Although the Ninth Circuit had not yet ruled, on March 24 the Government filed its stay application here. On March 26, the Ninth Circuit denied the Government's emergency motion to stay the preliminary injunction pending appeal. 9th Cir. Doc. 27.1. The Ninth Circuit rejected the Government's jurisdictional challenges and held that the Government was not likely to succeed on the merits. *Id.* It further held that the Government's "claimed administrative burdens" did not demonstrate irreparable harm. *Id.*

The same day that the Ninth Circuit denied a stay pending appeal, Respondents filed a motion to compel compliance. D. Ct. Doc. 155. On March 31, the Government filed its response and supporting declarations, taking the position that it was making progress toward returning employees to full duty status and had "substantially complied with the Court's order . . . ." D. Ct. Doc. 168 at 1.

ARGUMENT

"A stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right, even if irreparable injury

might otherwise result to the appellant." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (cleaned up). While stays are "rarely granted," *Heckler v. Redbud Hosp. Dist.*, 473 U.S. 1308, 1312 (1985) (Rehnquist, J., in chambers) (internal quotation marks omitted), the Government has "an especially heavy burden" here "[b]ecause this matter is pending before the Court of Appeals, and because the Court of Appeals denied [the Government's] motion for a stay." *Packwood v. Senate Select Comm. On Ethics*, 510 U.S. 1319, 1320 (1994) (Rehnquist, C.J., in chambers). The Court's "[r]espect for the assessment of the Court of Appeals is especially warranted when"—as here—"that court is proceeding to adjudication on the merits with due expedition." *Doe v. Gonzales*, 546 U.S. 1301, 1308 (2005) (Ginsburg, J., in chambers).

To obtain a stay pending appeal from this Court, the Government must show (1) "a reasonable probability" that this Court would eventually grant certiorari on the question presented in the stay application, (2) a fair prospect that the Court will reverse the decision below, and (3) a likelihood that irreparable harm will result from the denial of a stay. *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 572 U.S. 1301 (2014) (Roberts, C.J. in chambers) (cleaned up). Additionally, the Court must "balance the equities—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J. in chambers) (internal quotation marks omitted).

The Government comes nowhere close to meeting its "especially heavy burden." As it tacitly acknowledges, there is no circuit split or conflict on any issue justifying a grant of certiorari. Each of the district courts to have considered OPM's mass terminations of probationary employees has determined that the terminations were unlawful. And the Ninth Circuit has denied the stay the Government seeks and is proceeding expeditiously to review the merits of its appeal of the preliminary injunction. Even if this Court were to cast aside its normal certiorari standards and

grant review, the Government has not shown that the district court erred such that this Court would likely reverse the decision below.

The Government has also entirely failed to show that it will suffer irreparable injury absent a stay. For one thing, any burden that arises from reinstating illegally fired employees is self-inflicted, and self-inflicted wounds are not irreparable injury. Even if the harms were not self-inflicted, it beggars belief that returning employees to work would cause irreparable harm to the Government when these employees had the same workspace, credentials, benefits, and training days or weeks ago.

In short, because the Government cannot show a likelihood of success and suffers no irreparable injury from the district court's restoration of the status quo, and because all of the equities weigh against a stay, this Court should deny the stay.

I. The Government Will Not Succeed in Overturning the Injunction.

The district court's factual findings, including that OPM ordered the unplanned and chaotic *en masse* termination of probationary employees on the pretext of unsatisfactory "performance," *supra* at 6, 10, are supported by overwhelming evidence and subject to "deferential" clear error review. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 577 (1985). In light of these findings, Respondents are very likely to prevail on the merits.

A. There Is No Real Dispute that OPM Violated the Law.

The Government concedes that OPM lacks authority to order other agencies to terminate their employees. App. 12. In light of its factual findings, the district court correctly found Respondents were likely to succeed on claims that OPM's actions were ultra vires because no statute "anywhere, ever" granted OPM authority to fire other agencies' employees. App. 7a, 48a; *see also* App. 7a-9a, 48a-50a (terminations were in "excess of statutory authority").

The court also correctly held that OPM's acts likely violated the APA because they were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" as well as "without observance of procedure required by law." App. 51a (quoting U.S.C. § 706(2)(A), (C), (D)). Besides violating the APA by issuing a directive that exceeded its jurisdiction, OPM also relied on facts it knew to be false by directing the agencies to say their terminations were "based on . . . performance" even though that was not true. App. 9a-10a, 51a. And OPM's directive was a "rule" that failed to comply with notice-and-comment rulemaking, *id.* (which Defendants did not even contest, D. Ct. Doc. 33 at 10-11; D. Ct. Doc. 39 at 12).

In short, there is no serious question that OPM broke the law.

B. The District Court Correctly Found Standing.

The district court's detailed findings that the Respondent organizations have standing, App. 13a-19a, 51a-52a; Supp. App. 78a-79a, are firmly grounded in the evidence, and the factual underpinnings cannot be set aside unless clearly erroneous. *E.g., Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985); *Doe v. Horne*, 115 F.4th 1083, 1100-01 (9th Cir. 2024).

To establish Article III standing, a plaintiff must show "(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." *Food and Drug Admin. v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 380 (2024). Organizations may satisfy standing in two ways: "Either the organization can claim that it suffered an injury in its own right or, alternatively, it can assert 'standing' solely as the representative of its members." *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181, 199 (2023) (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975)).

Most Respondents are membership organizations and have shown that their members face concrete injury and a substantial risk of future injury. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) ("An allegation of future injury may suffice if the threatened injury is certainly impending or there is a substantial risk that the harm will occur.") (citations and internal quotations omitted). Among the district court's findings of harm or threatened harm that would be suffered by members of Plaintiff organizations were the following:

- decreased staffing that undercut the ability of the Veterans Crisis Line, operated by the Department of Veterans Affairs, to provide timely assistance to veterans in crisis, including members of Respondent VoteVets, App. 20a.
- likely impairment of disaster relief, provision of loan guarantees, and other services necessary for small businesses (including members of Respondent Main Street Alliance) to open a business or stay afloat, App. 16a.
- likely failure to obtain timely loan guarantees, resulting in small businesses (such as members of Respondent Main Street Alliance) that have already made commitments in reliance on timely loan guarantees having the rug pulled from under them, App. 16a.
- closure of National Park facilities due to lack of staffing, likely damage to sensitive ecological areas within national parks, and likely harm to national park operations, environmental protection, and natural resource monitoring, all of which harm members of Respondent Coalition to Protect America's National Parks, App. 15a-16a.
- threat to recreational fishing activities by members of Respondent Western Washington Watershed Project, App. 18a.

In contrast to this voluminous evidence, the Government abandoned any attempt at developing a factual record. The Government submitted only two

declarations: the first it withdrew entirely to avoid questioning of its witness, and the second was properly rejected by the district court as not credible because it was not attested as based on the declarant's personal knowledge. *See* App. 50a. The Government did not submit any declarations rebutting Respondents' harm evidence, nor did it accept the district court's offer to cross-examine any of Respondents' witnesses.

Rather than address these multiple, significant threatened and already occurring harms caused by OPM's illegal actions, the Government focuses on a strawman, suggesting that Respondents argue for reinstatement of thousands of federal employees to prevent the closure of a single bathroom. *E.g.,* App. 2, 16-17. But just because the Government chooses to ignore the record evidence does not mean this Court should. The district court's findings of harm and causation are entitled to deference. App. 21a ("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.").

The district court also correctly found standing based on the impact of the challenged actions on Respondents' organizational activities. App. 13a-21a, 51a; *see Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982); *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 682-83 (9th Cir. 2023) ("An organization has direct standing to sue 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.") (cleaned up). In *Havens*, for example, an issue-advocacy organization had standing to challenge a housing complex's alleged racial steering practices because it interfered with the organization's ability to engage in housing counseling services. 455 U.S. at 378-379. So too here. Respondents documented the direct impact the terminations had on their ability to perform their

own work, D. Ct. Docs.18-13, 39-2, 70-4, 70-15, 70-18; *see* App. 17a-19a, 51a, as well as other core activities and purposes, App. 19a-20a, 51a; D. Ct. Docs. 18-3, 18-7, 18-15, 18-16, 39-3, 70-3, 70-13, 70-16, 70-17, 70-19.

Among those organizational harms found by the district court were:

- diversion of almost all regular organizational activities of VoteVets to field and respond to inquiries from veterans who were terminated or who are concerned with reductions in resources available to them due to inadequate Veterans Affairs staffing, App 20a.
- failure to provide citizens timely access to public records due to staffing issues, and diminished ability of the Bureau of Land Management to assess land health, inhibiting Plaintiff Western Watersheds Project's ability to accomplish its mission, App. 18a.
- failure to pay Plaintiff Point Blue Conservation Science and likely failure to approve projects due to staff cuts in grant administration at the Department of Agriculture, which will frustrate the organization's mission to improve forestry, agriculture, and wildlife management, App. 52a.
- likely reduction in availability of data and analysis previously conducted by federal agencies that are relied on by the organization and members of the American Geophysical Union, whose mission is to advance discovery in Earth and space sciences and its benefit for humanity and the environment, App. 52a.
- statements by the Fish and Wildlife Service that it may not be able to comply with court-ordered deadlines regarding preservation of freshwater fish if it cannot hire or retain sufficient staff, threatening the organizational mission of the Western Watersheds Project, App. 18a.

The Government waves away these organizational harms with an overly broad and selective reading of this Court's opinion in *Food & Drug Administration v.*

Alliance for Hippocratic Medicine, 602 U.S. at 395. App. 16. But this Court did not suggest, let alone hold, that diverting organizational resources in response to a defendant's actions *never* constitutes Article III injury-in-fact, as suggested by the Government. *See id.* Instead, the Court held that a plaintiff could not establish injury based on mere opposition to a government policy and diversion of organizational resources opposing that policy. 602 U.S. at 394.

Here, by contrast, expending organizational resources to counteract the effects of illegal government action that impedes an organization's ability to perform core business activities establishes Article III injury, as *Alliance for Hippocratic Medicine* itself explicitly states. *Id.* at 395 (discussing *Havens*, 455 U.S. at 378). Respondents allege not mere disagreement with government policy, but interference with their core business purposes that inflicts injury: *e.g.*, VoteVets expending almost all its resources in fielding calls and finding solutions for veterans illegally terminated from their employment, scientists unable to receive timely data or approval for projects, and organizations unable to receive timely responses to government service requests or firm commitments to comply with court-ordered deadlines. The injuries here are far more like those in *Havens* than those in *Alliance for Hippocratic Medicine*.

The Government also argues that these harms are not traceable to its illegal action and that the injunction would not remedy Respondents' injuries because OPM, after it illegally directed the mass firings of federal employees, issued "revised guidance" to agencies stating that the agencies had decision-making authority. App. 17-19. But this argument ignores the district court's findings and the record evidence that numerous agencies terminated employees only *because of* OPM's illegal directive. *E.g.,* App. 5a (discussing agency statements that they were required to terminate employees despite preferences to retain employees and despite employees receiving highly favorable evaluations). Further, OPM never revised its instruction

to agencies to use the false template and to retain only mission critical employees, even though the court had found Respondents were likely to succeed in proving that OPM had engaged in unlawful rulemaking (in addition to unlawfully terminating all probationary employees). Supp. App. 4a, 7a. And the district court found that the Government failed to show that after it issued revised guidance the agencies ceased acting at OPM's direction. Supp. App. 4a.

The Government also fails to grapple with the purpose and effect of the remedial action ordered by the district court. As with almost all preliminary injunctions, restoring the status quo addresses the harm caused by the unlawful action; whether other actors might later cause similar harms is immaterial.

In any event, the Government's argument that the rehired workers might be put to different tasks than the agency had assigned them just weeks ago is not supported by any evidence. The Government has presented no evidence that this has occurred or is likely to occur at any agency, nor that it would be done in a manner that would have relevant impacts on services, so this is pure speculation. Unlike other instances when this Court has found no redressability because of speculation about the actions of third parties, the government agencies have been added as defendants here. *Cf. Murthy v. Missouri*, 603 U.S. 43, 73-74 (2024) (finding no redressability because even if the government were ordered to refrain from attempting to influence private social media companies, the third-party companies might still behave in ways causing the harm). Here, there is no basis to assume that the Government would seek to subvert the court's reinstatement order by assigning probationary employees to entirely different tasks or projects than those they were working on before their recent termination. In short, by requiring the Government to reinstate wrongfully terminated employees to their former positions, the preliminary injunction is likely to redress Respondents' injuries.

C. Respondents Are Not "Channeled" to Administrative Agencies.

The Government's second subject-matter jurisdiction argument—that Congress silently foreclosed Respondents' claims in federal court—is also wrong. Respondents cannot bring their claims in the administrative agencies the Government cites, rendering the district court exactly the right place for Respondents to challenge OPM's unlawful action.

The Government's argument would require a novel and dramatic expansion of *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207-13 (1994). In *Thunder Basin*, the plaintiff's claims "[were] of the type Congress intended to be reviewed" within a statutory system of agency adjudication, rather than initially in federal court. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.,* 561 U.S. 477, 489 (2010) (quoting *Thunder Basin*, 510 U.S. at 212–13). The *Thunder Basin* doctrine has been applied to "channel" claims brought by federal employees challenging adverse actions by their employing agencies to the MSPB, the agency created by Congress to hear such claims. *See Elgin v. Dep't of the Treasury*, 567 U.S. 1, 10 (2012) (applying channeling doctrine to "*covered* employees appealing *covered* agency actions") (emphasis added). But Respondents are third parties—not federal employees or unions acting in a representative capacity.[8] And Respondents assert claims against OPM, challenging OPM's government-wide action and rules as unlawful—not against employing agencies, challenging those agencies' personnel actions.[9]

As the Government now concedes, neither the CSRA nor the FSL-MRS authorizes administrative resolution or judicial review of such third-party claims, or claims against OPM challenging government-wide rules. App. 20. Indeed, only

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[8] The preliminary injunction was not entered in favor of the public-sector labor union plaintiffs.

[9] As noted, the six enjoined agencies, which implemented OPM's unlawful directive, are Rule 19 relief defendants only, and no claims are asserted against them. D. Ct. Doc. 90.

employees and their labor representatives may challenge employing agencies' personnel actions before the MSPB and FLRA; third-party organizations may not, and *no* party can challenge the unlawfulness of OPM's government-wide actions or rules in those forums. *See supra* at 3-4. The Government would read the boundaries of these adjudicative agencies' authority as silently implying that other types of claims may not be heard in court. But the Government cites no authority applying *Thunder Basin* to require third parties to seek relief in an administrative agency that cannot hear their claims and against defendants that cannot be brought before the agency, because no such authority exists. And the Government similarly ignores the broad presumption in favor of APA judicial review. *Dep't of Commerce v. New York*, 588 U.S. 752, 771-72 (2019).

The poor fit between channeling doctrine and the Government's position is highlighted by the Government's failure to apply the factors set forth in *Thunder Basin* to Respondents' claims or to engage with this Court's recent *Thunder Basin* jurisprudence. *See Axon Enter., Inc. v. Fed. Trade Comm'n*, 598 U.S. 175, 189 (2023); *Free Enter. Fund*, 61 U.S. at 489. On the first factor, channeling claims that cannot be heard by these agencies would foreclose meaningful judicial review. *See supra* at 3-4. Second, Respondents' APA and "separation-of-powers claims[s]" are based on OPM's lack of statutory authority, arbitrary and capricious actions, and failure to comply with required procedures—issues that are "wholly collateral" to the statute's review provisions. *Axon*, 598 U.S. at 191; *see also Feds for Med. Freedom v. Biden*, 63 F.4th 366, 369 (5th Cir. 2023). And third, the constitutional and administrative law issues Respondents raise fall far outside the labor-and-employment expertise of the MSPB and FLRA. *See Axon*, 598 U.S. at 194-95 ("'[A]gency adjudications are generally ill suited to address structural constitutional challenges' . . . like those maintained here.") (quoting *Carr v. Saul*, 593 U.S. 83, 92 (2021)).

Because OPM now concedes that the CSRA and FLRA provide no mechanism to bring these claims, it argues that this exclusion from the administrative regime was intentional, and that Congress intended implicitly to preclude *any* judicial review of these claims against OPM. App. 20 (citing *United States v. Fausto*, 484 U.S. 439, 454 (1988)). But neither the CSRA, the FSL-MRS, nor any other statute strips federal courts of jurisdiction to hear Respondents' ultra vires and APA claims against OPM. Nor could they, because *Fausto*, like any implied doctrine, cannot be interpreted to contradict statutory text. *See*, *e.g.*, *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 391-92 (2024); *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001).

When the 1978 Congress enacted the CSRA and FSL-MRS and created the MSPB, FLRA, and OPM, the APA was a well-established mechanism for obtaining judicial review of government action. 5 U.S.C. § 702. And Congress expressly made OPM subject to the APA. 5 U.S.C. § 1103(b) (requiring OPM Director to comply with APA in promulgating rules beyond OPM's own employees); *id.* § 1105 (same, and expressly waiving section 553(a)(2), which otherwise exempts "personnel" matters from APA); *see also id.* § 7134 (same, for FLRA). Those APA provisions expressly authorize judicial enforcement. 5 U.S.C. §§ 701-706. The Congress that required OPM to comply with the APA when it engages in government-wide action surely did not mean to impliedly exempt OPM from APA review. *See, e.g.*, *Loper Bright*, 603 U.S. at 393 ("The text of the APA means what it says.").

Indeed, this Court has frequently characterized the APA's judicial review provisions as a "command," and warned against expanding implied exceptions as the Government now urges. *Dep't of Commerce*, 588 U.S. at 771-72; *see also U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 578 U.S. 590, 601-02 (2016) (APA's "presumption" of judicial review is strong and exceptions must be construed narrowly); *accord Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 586 U.S. 9, 22-23 (2018). In particular,

even when an agency adjudication scheme established by Congress provides a path to eventual judicial review, this Court has refused impliedly to preclude judicial review of allegedly unlawful government action: "[I]f the express provision of judicial review in one section of a long and complicated statute were alone enough to overcome the APA's presumption of reviewability for all final agency action, it would not be much of a presumption at all." *Sackett v. EPA*, 566 U.S. 120, 129 (2012); *see also Bowers v. Michigan Academy of Family Physicians*, 476 U.S. 667, 674 (1986) ("'[T]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent.'") (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967)).[10] Construing Congressional silence as an implied revocation of federal court subject-matter jurisdiction over claims asserted against OPM by environmental, veterans, public health, small business, and scientific organizations would contravene this principle.

OPM's argument also ignores that, unlike *Fausto*, 484 U.S. 442-43, this case does not present the need to reconcile the CSRA with a prior statute authorizing remedies for an individual employee's monetary claims against the federal government (there, arising from termination for misuse of a government vehicle). App. 19-20. This case involves something else entirely: government-wide action by a federal agency far exceeding its own statutory authority, and in direct contravention to Congress's express application of the APA to OPM.

Underscoring the spurious nature of the argument that the district court lacks jurisdiction over the claims at issue here, the Government itself is currently taking a

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[10] This Court has instructed, "we begin with 'the "strong presumption" in favor of judicial review.' . . . To overcome that presumption, . . . this Court's precedents require '*clear and convincing indications*' that Congress meant to foreclose review." *SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 370 (2018) (emphasis added); *see also Board of Governors of Federal Reserve System v. MCorp. Financial, Inc.*, 502 U.S. 32, 44 (1991).

wholly contradictory position in *U.S. Department of Defense v. American Federation of Government Employees*, No. 65:25-cv-119 (W.D. Tex. filed March 27, 2025). In that case, the Government seeks a declaratory judgment that certain federal agencies may, under the CSRA and FSL-MRS, terminate their collective bargaining agreements pursuant to an Executive Order entitled *Exclusions from Federal Labor-Management Relations Programs*, issued the same day the complaint was filed. While the Government argues to the Western District of Texas that it has jurisdiction to interpret and apply the CSRA and FSL-MRS, it argues to this Court that the CSRA and FSL-MRS entirely divest district courts of jurisdiction over any claim relating to federal employment. App. 20-21. The Government cannot have it both ways.

For each of these reasons, the Court should decline OPM's invitation to issue a stay based on a novel and unprecedented expansion of implied channeling doctrine.

D. The District Court Lawfully Restored the Status Quo

The district court also acted well within its authority under both the APA and its intrinsic equitable powers to reverse OPM's unlawful terminations and require the reinstatement of federal employees. Under the APA, courts are empowered to "'set aside' [unlawful] agency action," which is "more than a mere non-enforcement remedy." *Griffin v. HM Florida-ORL, LLC*, 144 S. Ct. 1, 2 n.1, (Mem) (2023) (Kavanaugh, J., concurring in the denial of the application for stay). As this Court and the lower courts (in which these issues usually arise) have repeatedly explained, the "set aside" remedy also encompass "the power to 'strike down' an agency's work," so that "the disapproved agency action is treated as though it had never happened." *Id.*; *see also Monsanto v. Geertson Seed Farms*, 130 S. Ct. 2743, 2756-2577 (2010) (recognizing vacatur as a presumptively appropriate remedy for APA violation); *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) ("The ordinary practice is to vacate unlawful agency action."); *United*

States ex rel. O'Keefe v. McDonnell Douglas Corp., 132 F.3d 1252, 1257 (8th Cir.1998) (5 U.S.C. § 706 authorizes courts to "strike down" as ultra vires agency action falling outside the agency's statutory authority); *Data Mktg. P'ship, LP v. U.S. Dep't of Lab.*, 45 F.4th 846, 859-60 (5th Cir. 2022) (the "ordinary practice is to vacate unlawful agency action"); *Sierra Club v. EPA*, 60 F.4th 1008, 1021 (6th Cir. 2023) ("Reviewing courts certainly have the power to vacate an agency action they find unlawful.").

"Vacatur [of agency action] retroactively undoes or expunges a past [agency] action. . . . [V]acatur unwinds the challenged agency action." *Driftless Area Land Conservancy v. Valcq*, 16 F.4th 508, 522 (7th Cir. 2021). Thus, "[u]nder prevailing precedent, § 706 'extends beyond the mere non-enforcement remedies available to courts that review the constitutionality of legislation, as it empowers courts to "set aside"—i.e., formally nullify and revoke—an unlawful agency action.'" *Data Mktg. P'ship*, 45 F.4th at 859 (quoting Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 950 (2018)). As a result, in this case, the standard remedy of vacatur includes the reinstatement of unlawfully fired probationary employees, because only reinstatement will actually "undo[]" or "expunge[]" the unlawful agency action. *Driftless Area Land Conservancy*, 16 F.4th at 522.[11]

To preserve a court's ability to issue full relief, to protect the status quo, and to prevent harm, the APA specifically empowers courts to reverse all of the effects of allegedly unlawful action pending resolution of a case. In arguing otherwise, the Government simply ignores 5 U.S.C. § 705's broad grant of authority to "issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings" to "the

[11] To the extent that the remedy of vacatur does not effectuate reinstatement, an injunction requiring reinstatement is appropriate. *See Monsanto*, 561 U.S. at 165-66 (injunctive relief in addition to vacatur is appropriate where the vacatur is not "sufficient to redress respondents' injury").

extent necessary to prevent irreparable injury." 5 U.S.C. § 705. For the Respondents that continue to be harmed by the deterioration of services caused by the unlawful terminations of tens of thousands of employees, fixing OPM's direction to agencies going forward is no interim remedy at all—particularly given the district court's finding that OPM's "clarifying guidance" failed to dissipate the effects of OPM's unlawful directive. *See supra* at 11-13.

Nor did the Government ever identify "any other way" that the district court could issue injunctive relief that would be less burdensome while still "avoid[ing] the irreparable injuries flowing from the unlawful terminations except to reinstate the employees." Supp. App. 9a. A district court "is not obligated to undertake the task of chiseling from the government's across-the-board ban a different policy the government never identified, endorsed, or defended." *J.D. v. Azar*, 925 F.3d 1291, 1335-36 (D.C. Cir. 2019). Although injunctions must be no broader than necessary, that rule "does not require district courts enjoining unconstitutional government policies to fashion narrower, ostensibly permissible policies from whole cloth." *Id.* at 1335.

Given the meaning of vacatur, and this statutory authority to "preserve status or rights" pending Respondents' APA challenge, the Government's argument that the district court lacked equitable authority to restore the status quo is both irrelevant and wrong. It is irrelevant because *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 (1999), does not limit preliminary injunctive relief authorized by statute, and the Government cites no case or principle limiting any relief under the APA. *See* App. 22. In any event, the Government's unsupported insistence that remedies like reinstatement are categorically beyond the scope of those "traditionally accorded by courts of equity" ignores that equity jurisprudence has traditionally been defined by flexibility. *See Hecht Co. v. Bowles,* 321 U.S. 321,

329-330 (1944) ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.").

And contrary to the Government's overwrought hypotheticals, a court's authority to preserve the status quo pending resolution of the legality of government-wide actions and rules does not provide unlimited license to dictate personnel decisions. Reversing the effects of a government-wide order allows the parties to restore the status quo ante—mirroring the presumptive remedy for invalidating unlawful government action under the APA—after a showing that agencies across the federal government implemented an unlawful order by OPM.

The Government's challenge to the district court's authority to reinstate affected employees is also refuted by its own cited cases. *Sampson v. Murray,* 415 U.S. 61, 80 (1974), for example, explicitly rejected the argument that district courts were divested of equitable authority to grant reinstatement of probationary employees even in a case brought by an employee. While this Court cautioned that courts should give due weight to the Government's countervailing interests in "the equitable balancing process which attends the grant of injunctive relief," *id*. at 80, the district court's order meets this standard. This is truly an extraordinary case: OPM admittedly had no lawful authority to direct the termination of tens of thousands of federal employees *en masse*, while claiming the terminations were "based on performance when they know good and well [that was] a lie." App. 37a. The district court had clear statutory and equitable authority to restore the status quo in the face of OPM's unlawful and deceptive agency action—particularly when the Government elected not to introduce any evidence of countervailing harm that would result from the requested injunction. *See Califano v. Yamasaki*, 442 U.S. 682, 702

(1979) (concluding that an injunction should not be unduly burdensome, but must provide "complete relief to the plaintiffs" before the court).

The Government's other cited cases are inapposite, addressing entirely different circumstances regarding the appointment of *state* officers. *See, e.g., In re Sawyer*, 124 U.S. 200, 210-12 (1888) (holding, on a writ of habeas corpus, that circuit court lacked authority to direct marshal to hold *state* officer because, at the time, courts of equity were "limited to the protection of rights of property"); *Baker v. Carr*, 369 U.S. 186, 231 (1962) (citing cases about "enjoin[ing] a *state* proceeding to remove a public officer" in a case challenging apportionment of *state* legislative offices) (emphasis added); *Walton v. House of Representatives of Okl.*, 265 U.S. 487, 489-90 (1924) (holding that the district court did not have "jurisdiction over the appointment and removal of *state* officers") (emphasis added); *Harkrader v. Wadley*, 172 U.S. 148, 165-70 (1898) (declining to enjoin a *state* criminal proceeding).

Reflecting the weakness of the Government's authority, numerous courts have reinstated federal employees to their positions or prevented their removal from taking effect. *Vitarelli v. Seaton*, 359 U.S. 535, 546 (1959) ("[P]etitioner is entitled to the reinstatement which he seeks."); *Pelicone v. Hodges*, 320 F.2d 754, 757 (D.C. Cir. 1963) (holding that plaintiff was "entitled to reinstatement"); *Paroczay v. Hodges*, 219 F. Supp. 89, 94 (D.D.C. 1963) (holding that, because plaintiff "was never legally separated," the court "will therefore order plaintiff's reinstatement"); *see also Garcia v. Lawn*, 805 F.2d 1400, 1405 (9th Cir. 1986) (district court erred in not forestalling a federal employee's transfer because employee met *Sampson* standard in claiming retaliation for exercise of Title VII rights, which would "have a deleterious effect on the exercise of these rights by others"). And there is no question that federal courts have the equitable power to grant injunctive relief "with respect to violations of federal law by federal officials." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S.

320, 327 (2015) (citing *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902)). None of the Government's cited cases suggest that the district court lacked authority to restore the status quo here.

While the Government complains that the reinstatement of more than 16,000 employees at the six covered agencies is an "enormous" task that would interfere with agency functioning (without presenting evidence supporting that assertion), the scale of the task is simply a reflection of the scale of the Government's own unlawful action and its "move fast and break things" ethos. Accepting the Government's argument would mean that it can act lawlessly as long as it acts quickly and destructively enough that restoring the status quo would be an "enormous" task. That is not and cannot be the law. *See Califano*, 442 U.S. at 702 ("'[T]he scope of injunctive relief is dictated by the extent of the violation established."). Rather, when "the Government has engaged in an illegal scheme spanning broad swaths of the federal workforce," *Maryland*, 2025 WL 800216, at *25, restoring the status quo—here, by remedying the harms to government services caused by OPM's unlawful acts—is warranted.

E. The District Court Properly Rejected OPM's Efforts to Paper Over Its Unlawful Terminations

The district court also appropriately rejected the Government's unsupported factual assertions that OPM had resolved any harm from its unlawful terminations by issuing a corrective OPM notice. This argument not only conflicts with facts found by the district court, but also with settled law governing the scope of APA relief and the voluntary cessation doctrine.

At the outset, the Government's argument depends on disputed facts that the district court rightly rejected as not credible. As discussed *supra* at 4-9, the district court found that Respondents had submitted a "mountain" of evidence from federal agencies, terminated employees, and their supervisors that uniformly showed—and which the Government's own contemporaneous documents corroborated—that OPM

directed the mass terminations of federal employees based on false assertions of employee performance issues. App. 44a-47a. In contrast to that record, the Government *withdrew* its only substantive declaration stating that the agencies, not OPM, decided to terminate those employees. App. 47a. The Government submitted no evidence from any agency official stating that the terminations were directed by each agency rather than conducted at OPM's direction. Rather, as the district court found, "the evidence available at the time" the preliminary injunction issued "showed that the relief agencies wished to retain their employees and terminated them only because OPM directed them to do so." Supp. App. 11a.

Even after the TRO was entered and OPM issued its revised memorandum, the Government still presented no evidence that the agencies were now aware that they, rather than OPM, had authority to decide whether to terminate probationary employees. The district court made a specific finding about the absence of such proof: "OPM submits no evidence suggesting that the federal agencies—some of which have continued to terminate probationers—are now acting at their own discretion." Supp. App. 4a. Thus, as the district court found, the Government's assertion that its after-the-fact memorandum resolved any harms from its unlawful act "ask[ed] that the [court] accept OPM's factual contentions—supported only by counsel's say-so—as true." Supp. App. 4a. The district court correctly rejected that assertion as unsupported. There is no basis for the Government to ask this Court to accept as true unsupported factual assertions that the agencies "make their own politically accountable decisions," App. 24, which the district court rejected on the record.

The Government's challenge to a district court's factual determinations do not warrant this Courts' attention. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985) (a court's rejection of a factual contention that is "contradicted by extrinsic evidence" and "internally inconsistent" is almost never determined to be clear error);

S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, *Supreme Court Practice* § 5.12(c)(3), p. 5–45 (11th ed. 2019) ("error correction . . . is outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of certiorari."). Tellingly, the Government cites no case law supporting its bald assertion that the district court was required to accept OPM's claims of remediation. And the Government's arguments that the district court was required to accept OPM's addition of two sentences to a single memorandum as a complete cure for its illegal conduct conflicts with established law regarding the scope of APA remedies.

The Government's argument also conflicts with this Court's settled precedent governing voluntary cessation by a litigant. Although the Government does not use the word "mootness," its argument amounts to an assertion that the case is moot. But the district court rightly rejected the notion that OPM's memorandum mooted the controversy or remediated the harm OPM caused. It found that OPM's "two-sentence revision to one memo among several held likely to constitute an unlawful directive . . . 'could be easily abandoned or altered in the future.'"[12] Supp. App. 5a (quoting *Fikre v. Federal Bureau of Investigation*, 904 F.3d 1033, 1038 (9th Cir. 2018)); *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (quotations omitted) (voluntary cessation of illegal action generally will not moot an action).

"Along with its power to hear the case, the court's power to grant injunctive relief survives discontinuance of the illegal conduct." *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953). In this regard, it is a court's "duty" to "beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when

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[12] In this context, Respondents note an Executive Order issued on March 20, 2025, purporting to grant OPM the authority to make employee suitability decisions and to direct agencies to terminate employees. President Donald J. Trump, Executive Order, Mar. 20, 2025, available at https://www.whitehouse.gov/presidential-actions/2025/03/strengthening-the-suitability-and-fitness-of-the-federal-workforce/.

abandonment seems timed to anticipate suit, and there is probability of resumption." *Id.* at 632 n.5. Consistent with this duty, this Court does not accept ex post efforts by the Government to change its reasons for dismissing a federal employee to circumvent judicial review of unlawful terminations. In *Vitarelli v. Seaton*, 359 U.S. 535, 545–46 (1959), this Court rejected the Government's effort to revise the grounds for termination and ordered reinstatement of the wrongfully terminated employee. *Id.*

Were the voluntary cessation rule more forgiving, "a defendant might suspend its challenged conduct after being sued, win dismissal, and later pick up where it left off; it might even repeat 'this cycle' as necessary until it achieves all of its allegedly 'unlawful ends.'" *Fed. Bureau of Investigation v. Fikre,* 601 U.S. 234, 241 (2024). A "federal court's constitutional authority cannot be so readily manipulated." *Id.* The district court here properly rejected OPM's efforts to moot this controversy without unwinding the harm from its unlawful action.

II. The Government Does Not Establish Irreparable Injury.

Under this Court's precedent, the Government's failure to establish irreparable injury—and reliance, instead, solely on various administrative burdens that would accompany reinstatement of terminated probationary employees—require rejection of its stay request. An applicant for a stay pending appeal must show that a stay is necessary to avoid *likely* irreparable injury to the applicant while the appeal is pending. *Nken*, 556 U.S. at 434 (noting that "possibility of irreparable injury" is insufficient). If an applicant fails to make a threshold showing of irreparable injury, a stay may not issue, regardless of the other stay factors. *Id.*

Here, the Government did not even attempt to show irreparable harm when the district court was considering a TRO or preliminary injunction. And while the Government submitted declarations in support of a stay *after* the district court entered a preliminary injunction, the district court reviewed the Government's

proffered evidence and found no irreparable harm. Supp. App. 10a-11a. The court's finding that the Government's alleged harms "fail to persuade" was not clear error. *Id.* The court correctly found that any "administrative harm" posed by contacting and onboarding unlawfully terminated employees was not irreparable and "stems from the unwinding of the unlawful act and the return to the status quo." Supp. App. 11a. As the district court pointed out, "the government . . . wholly failed to argue there is any other way to avoid the irreparable injuries flowing from the unlawful terminations except to reinstate the employees." Supp. App. 9a.

Indeed, the Government does not (and cannot) argue that complying with the injunction is impossible. As of the time the injunction issued, several agencies "ha[d] rehired large swaths of terminated workers for myriad reasons," and the Government nowhere claimed to be "uniquely incapable of rehiring recently terminated probationers." Supp. App. 11a. Over the past few weeks, the steps taken by the Government to comply with a TRO issued in *Maryland*, 2025 WL 800216 at *27, which required the reinstatement of terminated probationary employees by March 17, establishes that any claimed administrative burden is not irreparable. *See* 9th Cir. Doc. 9-1 ¶¶3-7, Exs. A-D. And the Government devotes only a single unsupported sentence to its argument that paying the employees at issue in this case while its preliminary injunction appeal is pending constitutes irreparable harm.

The Government emphasizes that the Maryland TRO permitted reinstatement to administrative leave without return to service, App. 28 n.2, but neglects to inform this Court that agencies have already returned many workers to service as a result of the March 13 injunctions and that others are in the process of returning terminated employees to full duty status. *See* 9th Cir. Doc. 9-1 ¶4, Ex. A; D. Ct. Doc. 168 at 1. To date, several agencies have onboarded previously terminated employees or taken the same steps that the Government now claims threaten manifest irreparable harm. 9th

Cir. Doc. 9-1 ¶7, Ex. D; Mot. at 20. Indeed, as of March 31, the Government represents to the district court that it "ha[s], at a minimum, substantially complied with the Court's order by taking all reasonable steps to comply," and filed supporting declarations setting forth the enjoined agencies' steps toward returning employees to full duty status. D. Ct. Docs. 168 at 1, 168-1, 168-5, 168-6.

Nor do the "logistical burden[s]" from reinstating unlawfully terminated employees constitute irreparable harm. App. 27. First, "self-inflicted wounds are not irreparable injury" and any burden from reinstatement stems from the Government's own unlawful terminations. *Second City Music, Inc. v. City of Chicago*, 333 F.3d 846, 850 (7th Cir. 2003); *see also Hirschfeld v. Bd. Of Elections in City of New* York, 984 F.2d 35, 39 (2d Cir. 1993) (concluding the government's asserted harm is largely self-inflicted, which "severely undermines" its claims for equitable relief); *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3d Cir. 1995). Second, even if they were not self-inflicted, administrative burdens are not generally "cognizable irreparable injur[ies]" that support a stay pending appeal. *Al Otro Lado v. Wolf*, 952 F.3d 999, 1008 (9th Cir. 2020) ("'Mere injuries, however substantial, in terms of money, time and energy necessarily expended . . . are not enough'") (quoting *Sampson*, 415 U.S. at 90). It strains credulity that returning employees to work would cause irreparable harm to the Government when these employees had the same workspaces, credentials, benefits, and training just a few weeks ago.

Indeed, the Government's arguments are largely directed to conceptual "intrusion" into its internal affairs caused by an order reversing the effects of unlawful terminations on executive function. App. 4, 26. To the extent the Government is grounding this point in Presidential authority, this is greatly overstated. There is no evidence (nor assertion) of Presidential involvement in OPM's hasty and sloppy orders, and resolving this stay does not require the Court to address

anything novel. As this Court very recently reiterated, while the President typically has Article II power to remove executive officers, this Court has long recognized an exception to that rule for "inferior officers with limited duties" whose positions are created and governed by Article I legislative authority. *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. 197, 218 (2020); *see also Morrison v. Olson*, 487 U.S. 654, 673-75 (1988); *United States v. Perkins,* 116 U.S. 483, 485 (1886). Judicial enforcement of compliance by federal agencies with the statutes that Congress created to govern those agencies (including OPM) is commonplace, and does not intrude on executive power. *Franklin,* 505 U.S. at 802 (1992); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

Contrary to the Government's argument, as relevant here, courts have entered injunctive relief against subordinate federal officials and restored unlawfully removed presidential appointees to their offices. *See, e.g., Swan v. Clinton*, 100 F.3d 973, 976-81 (D.C. Cir. 1996) (effectuating reinstatement by requiring colleagues of a removed board member to "giv[e] him access to his former office, record[] his votes as official votes of a Board member, [and] [a]llow[] him to draw the salary of a Board member."); *Severino v. Biden*, 71 F.4th 1038, 1042-43 (D.C. Cir. 2023) (affirming the court could "enjoin 'subordinate executive officials' to reinstate a wrongly terminated official 'de facto,' even without a formal presidential []appointment."). And this Court has frequently enjoined federal officers from executing unlawful regulations or orders. *See, e.g.*, *Trump v. Int'l Refugee Assistance Project (IRAP)*, 582 U.S. 571, 574 (2017) (enjoining an executive order's instruction to the Secretary of State to "implement whatever additional procedures are necessary" to carry out the unconstitutional executive order); *Franklin v. Massachusetts*, 505 U.S. 788, 802, (1992) ("[I]injunctive relief against executive officials like the Secretary of Commerce is within the courts' power . . . .").

The Government's reliance on *Sampson v. Murray, Heckler v. Lopez*, and *I.N.S. v. Legalization Assistance Project* does not save its argument. As previously discussed, *supra* at 34-36, the Court in *Sampson* expressly recognized the authority of district courts to grant reinstatement of probationary employees in cases—like this one—that "so far depart from the normal situation" as to satisfy the usual standard for injunctive relief. 415 U.S. at 92 n.68. *Heckler* was a single-Justice opinion that was not concerned with judicial review of unlawful government terminations at all, but instead, the right to disability benefits. 463 U.S. 1330 (1983). And *I.N.S. v. Legalization Assistance Project*, 510 U.S. 1301 (1993), is another single-Justice opinion, this time staying an injunction that required the Immigration and Naturalization Service to adjudicate amnesty applications for organization members who were present unlawfully. Neither *Heckler* nor *I.N.S.* involved an injunction that sought to restore injured parties to the status quo.

Although the Government suggests that the district court's injunction "appears to prevent the agencies from terminating the employees based on an exercise of the agencies' independent judgment," App. 26, that is flatly wrong. No one—not the district court, not Respondents, and certainly not the Government—believes the Government has lost the ability to terminate its employees in compliance with applicable law. *See* App. 33a (district court notes injunction does not undermine the Government's ability to terminate employees "if it's done in accordance with the law."); *accord* App. 36a, 52a.

Finally, this Court should reject the Government's stay application because "the status quo would be seriously disrupted by an immediate stay[.]" *Nat'l Urb. League v. Ross*, 977 F.3d 698, 701 (9th Cir. 2020). The status quo ante is the period "before the law went into effect." *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2496 (2021) (Roberts, C.J., dissenting)*; see also Nken*, 556 U.S. at 429. Likewise here,

the last uncontested status before the controversy arose, which was before OPM's unlawful order to agencies to fire their employees, was that thousands of probationary employees were fully employed and providing essential services to Respondents and the public. The preliminary injunction restores that status quo. In other words, the district court's reinstatement merely orders the Government to return to the situation that existed before it embarked on illegal mass termination of probationary employees. If there are "practical burdens" associated with the return to the status quo, they are of the Government's own making.

III. Equitable Factors All Weigh Against a Stay

The equities and the public interest overwhelmingly disfavor a stay pending appeal. The district court did not abuse its discretion in rejecting the Government's balance-of-equities and public-interest arguments. App. 52a-53a; *see Benisek v. Lamone*, 585 U.S. 155, 160-61 (2018) (Court reviews preliminary injunctions for abuse of discretion). As against Respondents' showing of ongoing and irreparable harm, the Government submitted no evidence of real harm. *Supra* at 9-11.

Moreover, as the district court held, "[t]he 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." App. 52a-53a (internal quotation marks omitted). Indeed, the public has an interest in ensuring that "statutes enacted by [their] representatives" are not imperiled by illegal government action. *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (internal quotations omitted).

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motion for a stay pending appeal.

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Respectfully submitted,

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