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15  
16 **UNITED STATES DISTRICT COURT**  
17 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
18 **SAN FRANCISCO DIVISION**

19 AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES, *et al.*  
20  
21 Plaintiffs,  
22 v.  
23 UNITED STATES OFFICE OF PERSONEL  
MANAGEMENT, *et al.*,  
24 Defendants.

Case No. 3:25-cv-1780-WHA

**DEFENDANTS’ OPPOSITION TO  
PLAINTIFFS’ MOTION FOR A  
TEMPORARY RESTRAINING ORDER  
AND TO SHOW CAUSE;  
MEMORANDUM OF POINTS AND  
AUTHORITIES**

Hearing Date: February 27, 2025  
Time: 1:30 pm  
Judge: Hon. William H. Alsup  
Place: San Francisco Courthouse  
Courtroom 12

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## INTRODUCTION

1  
2 Upon his reelection to office, President Trump set to work to transform the federal work  
3 force. Among other things, he issued directives to require a return to in-person work, restore  
4 accountability for federal workers who have policy-making authority, and reform the federal  
5 hiring process to focus on merit. Animating these and other critical reforms is the recognition  
6 that the federal workforce must be streamlined to be more efficient and to better serve the  
7 American people. In furtherance of those objectives, the U.S. Office of Personnel Management  
8 (“OPM”) issued a January 20, 2025 memorandum to the heads and acting heads of Executive  
9 Branch departments and agencies directing them to identify all employees on “probationary”  
10 periods—generally, those members of the Competitive Service with less than one year of federal  
11 service and those members of the Excepted Service with less than two years of federal service—  
12 and directing each agency to “promptly determine whether those employees should be retained at  
13 the agency.” Following further OPM guidance over the following weeks, several federal  
14 agencies (none named in this suit, other than OPM) began removing certain probationary  
15 employees on February 13, 2025.

16 This action followed. Plaintiffs—five federal labor unions and five non-union  
17 organizations—allege that OPM’s guidances to federal agencies constitute an “order” to agencies  
18 “requiring them to terminate all probationary workers” and now seek a temporary restraining  
19 order that would (1) halt any further terminations of probationary federal employees; (2) identify  
20 the employees who have been fired under this program; and (3) rescind OPM’s termination  
21 directive and restore agencies and their employees to their status prior to this order.

22 Plaintiffs’ TRO request should be denied on multiple grounds. First, despite making six  
23 separate assertions of irreparable harm, they fail to establish any of them sufficient to obtain the  
24 extraordinary remedy of immediate temporary relief. Second, Plaintiffs fail to establish a  
25 likelihood of success on the merits of their claims. Plaintiffs lack standing to pursue many of  
26 their claims because their asserted harms are far too speculative and they cannot seek injunctive  
27 relief on behalf of third-party federal employees who are not before this Court. Nor can Plaintiffs  
28 pursue their claims in federal district court; instead Congress has provided the Federal Labor



1 Relations Authority and the Merit Systems Protection Board as the sole administrative avenues  
2 before which challenges to federal employee terminations may be brought. Plaintiffs also fail to  
3 show that OPM's challenged actions are ultra vires or violate the separation of powers. Plaintiffs  
4 additionally fail to show that their APA claims would succeed on the merits.

5 Likewise, the balance of equities and the public interest favor Defendants, as Plaintiffs'  
6 requested TRO would interfere with the President's ability to manage, shape, and streamline the  
7 federal workforce to more closely reflect policy preferences and the needs of the American  
8 public.

9 Finally, if the Court is inclined to enter injunctive relief, it should be limited in scope to  
10 only these Plaintiffs, rather than constitute the essentially nationwide injunction Plaintiffs seek.

11 At bottom, Plaintiffs fail to establish any of the requirements entitling them to a  
12 temporary restraining order, and Plaintiffs' motion should be denied; failing that, any injunctive  
13 relief should be narrowly tailored to encompass Plaintiffs only.

## 14 BACKGROUND

### 15 I. Statutory and Regulatory Background

16 The Federal Service Labor-Management Relations Statute ("the Statute" or "FSLMRS"),  
17 set forth in Title VII of the Civil Service Reform Act of 1978 ("CSRA"), Pub. L. No. 95-454,  
18 § 701, 92 Stat. 1111, 1191-1216 (codified at 5 U.S.C. §§ 7101-35), governs labor relations  
19 between the executive branch and its employees. The Statute further "establishes a scheme of  
20 administrative and judicial review." *Am. Fed'n of Gov't Emps., AFL-CIO v. Trump*, 929 F.3d  
21 748, 752 (D.C. Cir. 2019) ("*AFGE v. Trump*"). Under that scheme, the Federal Labor Relations  
22 Authority ("FLRA"), a three-member agency charged with adjudicating federal labor disputes,  
23 reviews matters including "negotiability" and "unfair labor practice[]" disputes or claims. *See* 5  
24 U.S.C. § 7105(a). When reviewing unfair labor practice complaints, it is "the FLRA [that]  
25 resolves whether an agency must bargain over a subject, violated the duty to bargain in good  
26 faith, or otherwise failed to comply with the Statute." *AFGE v. Trump*, 929 F.3d at 752 (citing 5  
27 U.S.C. §§ 7105(a)(2)(G), 7116(a), 7118)). Direct review of the FLRA's decisions on unfair labor  
28 practice and negotiability issues is available in the courts of appeals. 5 U.S.C. § 7123(a).

1 The CSRA “establishe[s] a comprehensive system for reviewing personnel action taken  
2 against federal employees.” *Elgin v. Dep’t of the Treasury*, 567 U.S. 1, 5 (2012) (citation  
3 omitted). If an agency takes a final adverse action against an employee no longer in his or her  
4 probationary period—including removal, suspension for more than 14 days, reduction in grade or  
5 pay, or furlough for 30 days or less, 5 U.S.C. § 7512—the employee may appeal to the Merit  
6 Systems Protection Board (“MSPB”). *Id.* § 7513(d). The MSPB may order relief to prevailing  
7 employees, including reinstatement, backpay, and attorney’s fees. *Id.* §§ 1204(a)(2), 7701(g).  
8 Non-probationary employees may appeal final MSPB decisions to the Federal Circuit, which has  
9 “exclusive jurisdiction” over such appeals. 28 U.S.C. § 1295(a)(9). This statutory review  
10 scheme, too, is “exclusive, even for employees who bring constitutional challenges to federal  
11 statutes.” *Elgin*, 567 U.S. at 13. Federal employees employed during their probationary period  
12 generally do not enjoy a right to appeal to the MSPB, as they are not considered “employee[s]”  
13 for purposes of the CSRA’s Chapter 75, 5 U.S.C. § 7511(a)(1), but remain properly considered  
14 as “applicants” for employment under an extended hiring and evaluation period. *See* 5 U.S.C.  
15 § 7511(a)(1)(A)-(B) (one-year trial period), (C) (two-year trial period); 5 C.F.R. § 315.801,  
16 301.806. However, many of the protections of the CSRA’s Chapter 23 extend to both “applicants  
17 and employees.” *See, e.g.*, 5 U.S.C. § 2302(a)(2)(A)(i)–(xii) (identifying “personnel action[s]”  
18 that may form the basis for alleged prohibited personnel practices “with respect to an employee  
19 in, or applicant for, a covered position in any agency”).

20 CSRA regulations set out the terms and conditions for an initial appointment to a career  
21 position in the federal government. *See* 5 C.F.R. subpart H. In particular, the regulations provide  
22 that, for such employees, the first year or first two years for certain employees is a probationary  
23 or trial period. *See id.* § 315.801, 315.802. Those regulations further provide for employing  
24 agencies to use the probationary period “as fully as possible to determine the fitness of the  
25 employee and shall terminate his or her services during this period if the employee fails to  
26 demonstrate fully his or her qualifications for continued employment.” *Id.* § 315.803(a). When  
27 an agency decides to terminate an employee covered by these regulations because his or her  
28 work performance or conduct during the probationary or trial period fails to demonstrate his or

1 her fitness or his qualifications for continued employment, it must notify the employee and  
2 provide “the agency’s conclusions as to the inadequacies of his [or her] performance or  
3 conduct.” *Id.* § 315.804(a).

4 Covered employees may appeal their removals to the MSPB if they allege that the  
5 removal was based upon one of the reasons set forth in the regulations. *See id.* § 315.806.  
6 Generally, employees may appeal adverse MSPB decisions to the Court of Appeals for the  
7 Federal Circuit. *See* 5 U.S.C. § 7703. Probationary employees do not have a right to appeal  
8 removals to the MSPB under the CSRA’s Chapter 75, but may in appropriate circumstances  
9 pursue relief by filing complaints alleging certain prohibited personnel practices with the Office  
10 of Special Counsel, which may in turn pursue administrative relief before the MSPB.<sup>1</sup>

## 11 **II. Factual Background**

### 12 **A. OPM’s Guidance Memorandum on Probationary Periods**

13 On January 20, 2025, OPM Acting Director Charles Ezell transmitted a guidance memo  
14 to Executive Branch agencies directing them, in pertinent part, to “identify all employees on  
15 probationary periods, who have served less than a year in a competitive service appointment, or  
16 who have served less than two years in an excepted service appointment, and send a report to  
17 OPM listing all such employees[.]” Mem. from Charles Ezell, Acting Director, U.S. Office of  
18 Personnel Management, to Heads and Acting Heads of Departments and Agencies, titled  
19 “Guidance on Probationary Periods, Administrative Leave and Details,” at 1 (Jan. 20, 2025)  
20 (“OPM Mem.”); *see also* Decl. of Charles Ezell ¶ 3, attached as Ex. 1 (a copy of the  
21 Memorandum is attached as Ex. A to the Ezell Declaration). Further, the OPM Memorandum  
22 directed agencies to “promptly determine whether those employees should be retained at the  
23 agency.” OPM Mem. at 1.

24 On February 14, 2025, OPM provided additional information to agencies through the  
25 Chief Human Capital Officers (CHCO) Council, an interagency forum to advise and coordinate

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26 <sup>1</sup> Congress also created the Office of Special Counsel to, among other things, protect  
27 employees, applicants for employment, and former employees. 5 U.S.C. § 1212. The Special  
28 Counsel may receive and investigate complaints of prohibited personnel practices and may  
petition the MSPB for a stay of the personnel actions pending investigation, and based on the  
results of an investigation, seek corrective action from the Board. *Id.* § 1214.

1 on federal human resources matters. *See id.* ¶ 4 (a copy of that message is attached as Ex. B to  
2 the Ezell Declaration). Citing publicly available guidance from OPM and the MSPB, that  
3 message explained that “[a]n appointment is not final until the probationary period is over,” and  
4 the probationary period is part of “the hiring process for employees.” *Id.* The message further  
5 explained that a probationer is still an applicant for a finalized appointment to a particular  
6 position as well as to the Federal service. *Id.* “Until the probationary period has been completed,”  
7 a probationer has “the burden to demonstrate why it is in the public interest for the Government  
8 to finalize an appointment to the civil service for this particular individual.” *Id.*

9 On February 24, 2025, OPM issued guidance on evaluating performance of an employee  
10 during probationary periods. *See id.* ¶ 5 (a copy of the FAQs on Probationary Periods is attached  
11 as Exs. C & D to the Ezell Declaration]. The FAQs guidance explained that an employee’s  
12 performance “must be viewed through the current needs and best interest of the government, in  
13 light of the President’s directive to dramatically reduce the size of the federal workforce.” *Id.* ¶ 6.

#### 14 **B. Executive Order 14210**

15 On February 11, 2025, the President issued an Executive Order, “Implementing the  
16 President’s ‘Department of Government Efficiency’ Workforce Optimization Initiative.” Exec.  
17 Order No. 14210, <https://public-inspection.federalregister.gov/2025-02762.pdf> (“EO 14210”).  
18 Section 3, titled “Reforming the Federal Workforce to Maximize Efficiency and Productivity,”  
19 identified directives under the headings “*Hiring Ratio*” (subpart a), “*Hiring Approval*” (subpart  
20 b), “*Reductions in Force*” (subpart c), and “*Rulemaking*” (subpart d). *Id.* Subpart c directs  
21 “Agency Heads [to] promptly undertake preparations to initiate large-scale reductions in force  
22 (RIFs), consistent with applicable law, and to separate from Federal service temporary  
23 employees and reemployed annuitants working in areas that will likely be subject to the RIFs.”  
24 *Id.* Further, it directs that “[a]ll offices that perform functions not mandated by statute or other  
25 law shall be prioritized in the RIFs, including all agency diversity, equity, and inclusion  
26 initiatives; all agency initiatives, components, or operations that my Administration suspends or  
27 closes; and all components and employees performing functions not mandated by statute or other  
28 law who are not typically designated as essential during a lapse in appropriations as provided in

1 the Agency Contingency Plans on the Office of Management and Budget website.” *Id.* Finally, it  
2 directs that “[t]his subsection shall not apply to functions related to public safety, immigration  
3 enforcement, or law enforcement.” *Id.* EO 14210 further provides that agency heads “may  
4 exempt from this order any position they deem necessary to meet national security, homeland  
5 security, or public safety responsibilities[,]” *id.* § 4(b), and that it “shall be implemented  
6 consistent with applicable law and subject to the availability of appropriations.” *Id.* § 5(b).

### 7 **C. Terminations of Certain Probationary Employees**

8 Beginning on February 13, 2025, OPM, as well as some other federal agencies who are  
9 not named parties to this action, terminated a number of federal employees serving in their  
10 probationary or trial periods. *See, e.g.,* Mem. Op. & Order at 3, *Nat’l Treasury Emps. Union v.*  
11 *Trump*, No. 1:25-cv-420 (D.D.C. Feb. 20, 2025), ECF No. 28 (noting the termination of certain  
12 other probationary employees working at other federal agencies). OPM did not direct agencies to  
13 terminate any particular probationary employees based on performance or misconduct, and did  
14 not create a “mass termination program.” Ezell Decl. ¶ 7. Rather, OPM asked agencies to engage  
15 in a focused review of probationers based on how their performance was advancing the agencies’  
16 mission, and allowed them at all times to exclude whomever they wanted. *See id.* Agencies made  
17 their own decisions about which probationary employees they wished to keep and which  
18 probationary employees they wished to terminate, and agencies took their own actions to  
19 terminate employees the agencies did not wish to retain. *See id.* Additionally, it was the  
20 responsibility of each agency to apply OPM and MSPB guidance, as well as applicable laws and  
21 regulations, as they made their own determinations to terminate or retain their probationary  
22 employees. *See id.*

23 On February 21, 2025, the Special Counsel requested a stay of the termination of six  
24 probationary employees. *See* Special Counsel’s Initial Request for Stay or Personnel Action,  
25 *Special Counsel ex rel. Doe v. OPM*, No. CB-1208-25-17-U-1 (MSPB) (attached as Ex. 2) On  
26 February 25, 2025, the MSPB granted that request for a stay. *See* Non-Precedential Stay Oder,  
27 *Special Counsel ex rel. Doe v. OPM*, No. CB-1208-25-17-U-1 (MSPB) (attached as Ex. 3).

### III. Procedural History

1 Plaintiffs, five employee unions and five organizations, sued on February 19, 2025, *see*  
2 Compl., ECF No. 1, and filed an amended complaint and a motion for temporary restraining  
3 order and to show cause of on February 23, 2025. *See* First Am. Compl, ECF No. 17 (“Am.  
4 Compl.”); *Ex Parte* Mot. for TRO and Order to Show Cause, ECF No. 18 (Pls.’ TRO Mot.”).  
5 Plaintiffs challenge the termination of certain probationary employees. *See generally* Am.  
6 Compl. The union Plaintiffs allege that the terminations have prevented them from representing  
7 employees in federal bargaining units in collective bargaining and providing counseling, advice,  
8 and representation to represented employees in the event of adverse employment actions. *Id.*  
9 ¶¶ 79-80. The union Plaintiffs further allege that have had to divert resources as a result of the  
10 terminations. *Id.* ¶ 81. The non-union Plaintiffs allege that they face imminent harm as a result of  
11 anticipated reductions and delays in services, or otherwise impair or disrupt the quality of  
12 services . *See, e.g., id.* ¶¶ 84–85, 87–88.

13 Plaintiffs allege that the termination of certain probationary employees violates: (i) the  
14 separation of power and is ultra vires; (ii) the APA because it is contrary to law and exceeds  
15 statutory authority; (iii) the APA because it is arbitrary and capricious; and (iv) the APA because  
16 OPM did not engage in notice and comment rulemaking. *See id.* ¶¶ 104–42 (Counts I – V).  
17 Plaintiffs seek declaratory and injunctive relief, including an order setting aside OPM’s alleged  
18 order as unlawful, requiring OPM and others acting in concert with the agency to cease  
19 terminating probationary employees, and requiring OPM to rescind prior terminations of  
20 probationary employees. *See id.*, Prayer for Relief.

21 Plaintiffs’ TRO motion alleges an additional harm to the union Plaintiffs not contained in  
22 their amended complaint—that OPM’s terminations have “precluded the Unions from  
23 performing their authorized role to represent employees in RIF proceedings.” *Compare* Pls.’  
24 TRO Mot. at 22 *with generally* Am. Compl.

25 On February 25, 2025, this Court issued a Request for Information to Defendants. *See*  
26 Request for Info., ECF No. 26. In that request, the Court posed a number of questions and asked  
27  
28

1 Defendants to respond in this Opposition. The Court’s questions and Defendants’ answers are  
2 provided below:

3 To what extent did OPM or individuals within OPM direct other agencies to  
4 terminate probationary employees based on performance or misconduct? If any  
such direction (or advice) is in writing, please provide the documents to the Court.

5 *Id.* ¶ 1.

6 OPM did not direct agencies to terminate probationary employees, based either on  
7 performance or misconduct. *See* Ezell Decl. ¶ 10. Rather, OPM reminded agencies of the  
8 importance of the probationary period in evaluating applicants’ continued employment and  
9 directed agencies to identify all employees on probationary periods and promptly determine  
10 whether those employees should be retained at the agency. *See id.* Agencies were responsible for  
11 reviewing probationers’ performance, and agencies were responsible for deciding which  
12 probationary employees to keep and to terminate. *See id.* Agencies were responsible for taking  
13 action to terminate their own employees they no longer wished to retain, and agencies were  
14 responsible for taking that action in accordance with all applicable laws and regulations. *See id.*  
15 The documents relevant to this question are described above and are attached to the Ezell  
16 Declaration as Exhibits A–D.

17 How can an agency lawfully terminate a probationary employee on the basis of  
18 “performance” if that employee’s performance was in fact satisfactory?

19 Request for Info. ¶ 2.

20 Probationers are applicants for employment with the burden to demonstrate their fitness  
21 for continued employment; there is no presumption that they will be retained. *See* Ezell Decl.  
22 ¶ 11. Agencies are obligated to use the probationary period to determine the fitness of  
23 probationary employees and must terminate employees’ services if they fail to demonstrate fully  
24 their qualifications for continued employment. *See id.* This determination must take into account  
25 the existing needs and interests of government. *See id.* The probationary period is part of the  
26 hiring process; agencies are not required to hire every employee whose performance is  
27 “satisfactory.” *Id.* An agency may determine, and OPM has determined, that only the highest-  
28

1 performing probationers in mission-critical areas demonstrate the necessary fitness or  
2 qualifications for continued employment. *See id.*

### 3 STANDARD OF REVIEW

4 Fed. R. Civ. P. 65 empowers district courts to issue temporary restraining orders. *See*  
5 Fed. R. Civ. P. 65(b). Like a preliminary injunction, a TRO is “an extraordinary remedy never  
6 awarded as of right.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008); *see also*  
7 *Washington v. Trump*, 847 F.3d 1151, 1159 n.3 (9th Cir. 2017) (standards applicable to TROs  
8 and preliminary injunctions “substantially identical” (quoting *Stuhlberg Int’l Sales Co. v. John*  
9 *D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001)). A court should not “mechanically” grant  
10 an injunction for every violation of law. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313  
11 (1982). Instead, plaintiffs must establish that (1) they are “likely to succeed on the merits,”  
12 (2) they are “likely to suffer irreparable harm in the absence of preliminary relief,” (3) “the  
13 balance of equities tips in [their] favor,” and (4) “an injunction is in the public interest.” *Winter*,  
14 555 U.S. at 20. The mere “possibility” of irreparable harm is insufficient; instead, the moving  
15 party must “demonstrate that irreparable injury is *likely* in the absence of an injunction.” *Id.* at  
16 22.

### 17 ARGUMENT

18 Plaintiffs ask for a temporary restraining order on the theory that OPM’s actions are  
19 causing them irreparable harm by forcing them to divert resources. But that alleged injury does  
20 not constitute irreparable harm. Nor can Plaintiffs show that their claims fall within district-court  
21 jurisdiction or that they would prevail even if so, and thus they cannot establish the requisite  
22 likelihood of success to warrant relief. This Court should accordingly deny their motion.

#### 23 I. Plaintiffs Cannot Show Irreparable Harm Absent a TRO.

24 Plaintiffs fail to establish that, absent a TRO, they will suffer irreparable harm. They first  
25 claim that the deprivation of a constitutional right constitutes irreparable harm. *See* Pls.’ TRO  
26 Mot. at 27. But Plaintiffs fail to show that their claimed deprivation of rights is in any way a  
27 harm personally happening to them rather than the general public. *Accord W. Mining Council v.*  
28



1 *Watt*, 643 F.2d 618, 623 (9th Cir.1981) (Article III injury in fact requires the plaintiff to have a  
2 “personal stake in the outcome of the controversy.”).

3 Second, Plaintiffs claim irreparable harm based on the terminated federal employees’ loss  
4 of employer-provided health benefits. *See* Pls.’ TRO Mot. at 28. Again, this is not a harm to  
5 Plaintiffs, and they cannot maintain claims on behalf of third parties not before this Court. *See*  
6 *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (“[A] [party] generally must assert his own legal  
7 rights and interests, and cannot rest his claim to relief on the legal rights or interests of third  
8 parties.”). Additionally, neither loss of employment nor resulting effects constitute irreparable  
9 harm. *See, e.g., Graphic Commc’ns Conf.—Int’l Bhd. of Teamsters Loc. 404M v. Bakersfield*  
10 *Californian*, 541 F. Supp. 2d 1117, 1125 (E.D. Cal. 2008); *see also Goldie’s Bookstore, Inc. v.*  
11 *Superior Ct. of State of Cal.*, 739 F.2d 466, 471 (9th Cir. 1984) (“[m]ere financial injury . . . will  
12 not constitute irreparable harm if adequate compensatory relief will be available in the course of  
13 litigation.”).

14 Third, Plaintiffs claim irreparable harm based on the supposedly impending loss of  
15 critical government services. *See* Pls.’ TRO Mot. at 28. This claim is far too speculative to  
16 support a finding of irreparable harm. *See Pom Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1133  
17 (9th Cir. 2014) (plaintiff “must establish a likelihood of irreparable harm that is grounded in  
18 evidence, not in conclusory or speculative allegations of harm.”); *In re Excel Innovations, Inc.*,  
19 502 F.3d 1086, 1098 (9th Cir. 2007) (“Speculative injury cannot be the basis for a finding of  
20 irreparable harm.”). Plaintiffs have produced no credible evidence that terminations of federal  
21 employees have caused a disruption in critical government services; nor have they established a  
22 right to receive such services.

23 Fourth, Plaintiffs allege an irreparable injury to their organizational missions because  
24 they have not been able to comment on forthcoming RIF notices. *See* Pls.’ TRO Mot. at 29. But,  
25 as Plaintiffs themselves admit, the terminations thus far were not undertaken pursuant to RIFs;  
26 nor have Plaintiffs come forward with any evidence that OPM will in fact deny them their right  
27 to comment on any such notices. This claim is also too speculative to support a finding of  
28 irreparable harm.

1 Finally, Plaintiffs contend that their claimed monetary harms are irreparable because they  
2 seek relief under the APA. *See id.* at 30. But Plaintiffs fails to show how those claimed violations  
3 have caused any personal injury to them.

## 4 **II. Plaintiffs Cannot Show a Likelihood of Success on the Merits of their Claims.**

5 Likewise, Plaintiffs cannot establish likelihood of success on the merits for at least three  
6 reasons: they lack standing; their claims are statutorily channeled away from district-court  
7 review; and they are unlikely to prevail on the merits in any event.

### 8 **A. Plaintiffs Lack Standing to Pursue Many of Their Claims.**

9 Plaintiffs lack standing because their claimed injuries are far too speculative to satisfy  
10 Article III’s standing elements. To establish standing, a plaintiff must show: (i) an “injury in  
11 fact,” that is, a violation of a legally protected interest that is “concrete and particularized” and  
12 “actual or imminent, not conjectural or hypothetical”; (ii) a causal connection between the injury  
13 and the defendant’s conduct such that the injury is “fairly . . . traceable to the challenged action”;  
14 and (iii) that it is “likely, as opposed to merely speculative that the injury will be redressed by a  
15 favorable decision.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (cleaned up). As the  
16 party invoking federal jurisdiction, Plaintiffs “bear[] the burden of establishing these elements,”  
17 and therefore “must clearly . . . allege facts demonstrating each element.” *Spokeo, Inc. v. Robins*,  
18 578 U.S. 330, 338 (2016) (citation omitted).

19 To establish injury in fact, a plaintiff must show that the defendant’s action affects him or  
20 her in a “personal and individual way,” *Lujan*, 504 U.S. at 560 n.1, rather than being a  
21 “generalized grievance,” *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 381  
22 (2024). A plaintiff must show more than a “possible future injury”; he or she must show that  
23 harm has actually occurred or is “certainly impending.” *Whitmore v. Arkansas*, 495 U.S. 149,  
24 158 (1990) (citation omitted). And “threatened injury must be *certainly impending* to constitute  
25 injury in fact, and that [a]llegations of *possible* future injury are not sufficient.” *Clapper v.*  
26 *Amnesty Int’l USA*, 568 U.S. 398, 409 (2013) (citation omitted).

**1. The Non-Union Plaintiffs Lack Standing.**

1 The non-union Plaintiffs fail to show injury in fact. Their claims of injury are instead  
2 based on nothing more than a chain of unsupported and conclusory inferences that the  
3 termination of probationary employees will somehow lead to “anticipated reductions and delays  
4 in services,” Am. Compl. ¶¶ 84–85, “imminent harm to [their] mission to protect and restore  
5 wildlife and public lands,” *id.* ¶ 86, “likely . . . impair[ment of] the quality of . . . services,” *id.*  
6 ¶ 87, or “the risk of severe disruptions to . . . services,” *id.* ¶ 88. None of these speculative and  
7 conclusory assertions is sufficient to show that a harm has actually occurred or is “certainly  
8 impending.” *Accord Whitmore*, 495 U.S. at 158 (citation omitted). Absent such a showing, the  
9 non-union Plaintiffs lack standing to maintain this action and therefore will not be able to  
10 succeed on their claims.

**2. Plaintiffs Lack Standing to Pursue their Claim of a Procedural Injury.**

11 Plaintiffs lack standing to pursue their procedural injury claim. As a preliminary matter,  
12 they assert that that they have been deprived of a right to comment on a notice of proposed RIFs.  
13 *See* Pls.’ TRO Mot. at 29. But their complaint includes no such allegations. *See generally* Am.  
14 Compl. Courts have repeatedly denied TRO motions based on allegations and claims for relief  
15 unrelated to the underlying complaint. *See, e.g., Allen v. Reid*, No. 15-cv-1905, 2016 WL  
16 3136859, at \*4 (D. Minn. June 3, 2016) (“[T]o the extent that [plaintiff] seeks injunctive relief  
17 for alleged mistreatment and retaliation that are unrelated to the claims in his Amended  
18 Complaint, he is not entitled to such relief.”); *Clark v. Bank of Am. N.A.*, No. 14-cv-232, 2015  
19 WL 1433834, at \*8 (D. Idaho Mar. 27, 2015); *Dennis v. Thomas*, No. 09-1317, 2010 WL  
20 3927488, at \*1 (D. Or. Oct. 4, 2010). This Court should do so here as to this theory.

21 Additionally, Plaintiffs lack standing to pursue such a claim. Plaintiffs fail to make any  
22 showing, beyond their own say so, that the termination of probationary employees thus far was  
23 carried out pursuant to a RIF. Likewise, Plaintiffs fail to make any showing that, when RIF  
24 notices are issued, they will be denied the opportunity to comment then. Their procedural injury  
25 claim arising from an alleged deprivation of any right to comment on future RIFS thus is too  
26 speculative to support standing. *Accord Clapper*, 568 U.S. at 409.  
27  
28

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

7 **B. The FSL-MRS and the CSRA Preclude District-Court Jurisdiction Over Plaintiffs’**  
8 **Claims.**

9 Neither the union Plaintiffs nor the non-union Plaintiffs can show that their challenge to  
10 the termination of certain probationary employees can be heard in federal district court.

11 1. The union Plaintiffs cannot show that district courts have jurisdiction over their claims.  
12 *See AFGE v. Trump*, 929 F.3d at 752; Mem. Op. at 10–16, *Nat’l Treasury Emps. Union*  
13 *(“NTEU”) et al. v. Trump et al.*, No. 25-cv-420 (D.D.C. Feb. 20, 2025); Mem. Op. at 2-5,  
14 *AFGE, et al., v. Ezell, et al.*, No. 25-cv-10276 (D. Mass. Feb. 12, 2025), ECF No. 66.

15 In *AFGE v. Trump*, numerous federal unions asserted broad constitutional and statutory  
16 challenges to a set of three Executive Orders issued by President Trump during his first  
17 administration that would have enacted substantial changes to the way federal unions operated.  
18 On the government’s appeal from a district court decision largely in the unions’ favor, the D.C.  
19 Circuit reversed the underlying decision on jurisdictional grounds, holding that the FSL-MRS’s  
20 comprehensive, reticulated administrative-judicial review scheme channeled jurisdiction entirely  
21 away from the federal district courts, requiring that federal labor disputes be heard through the  
22 Federal Labor Relations Authority (“FLRA”) review scheme, with judicial review to be provided  
23 in a federal court of appeals following the conclusion of administrative proceedings before the  
24 FLRA. *See AFGE v. Trump*, 929 F.3d at 754–61. Applying the logic of that holding, two district  
25 courts addressing challenges to almost these exact same presidential and agency actions as those  
26 before this Court have concluded that the courts the FSL-MRS likewise channeled jurisdiction  
27 away from federal district courts and instead required the unions to pursue their claims before the  
28 FLRA. *See NTEU v. Trump, supra*, at 10–16; *AFGE v. Trump, supra*, at 2–5.

1 The same jurisdictional outcome should obtain here. Similar to the plaintiff unions' broad  
2 challenge to the three labor EOs at issue in *AFGE v. Trump*, the union Plaintiffs here contend  
3 that the OPM actions and EO 14210 have caused them to divert resources. *See* Pls.' TRO Mot. at  
4 13. But Plaintiffs make no effort to distinguish *AFGE v. Trump*, *see id.*, which should amount to  
5 an effective concession that its holding applies with full force here.

6 2. The non-union Plaintiffs also fail to show that their claims can be heard in federal  
7 district court. The CSRA provides the exclusive means of redressing employment disputes  
8 involving federal employees, *see United States v. Fausto*, 484 U.S. 439, 455 (1988)), even when  
9 those disputes involve constitutional claims. *See Elgin*, 567 U.S. at 10–15. Even if the non-union  
10 Plaintiffs could establish standing to challenge probationary removals, such claims must be  
11 pursued before the MSPB (if at all). The CSRA thus imposes an “implied preclusion of district  
12 court jurisdiction,” *id.* at 12, and “precludes courts from providing supplemental remedies,”  
13 *Lampon-Paz v. OPM*, 732 F. App'x 158, 161 (3d Cir. 2018). This is the exact conclusion the  
14 Ninth Circuit reached in *Veit v. Heckler*, 746 F.2d 508, 510-11 (9th Cir. 1984). Instead of trying  
15 to distinguish the facts of their case from those of *AFGE v. Trump*, *Fausto* or *Elgin*, Plaintiffs  
16 suggest that *Veit* is no longer controlling after the Supreme Court's opinion in *Thunder Basin*  
17 *Coal Co. v. Reich*, 510 U.S. 200 (1994). *See* Pls.' TRO Mot. at 26. Plaintiffs' contention is  
18 without merit.

19 Plaintiffs first contend that the claims of their non-union members cannot be channeled  
20 before the FLRA because they are not unions. *See* Pls.' TRO Mot. at 25. But Plaintiffs ignore the  
21 fact that, under the CSRA, Congress has provided for all challenges to federal agency  
22 employment proceed before the FLRA *or* the MSPB, unless a more specific statutory scheme  
23 applies. Thus, even if the non-union Plaintiffs have standing and can maintain a cause of action  
24 challenging the termination of probationary employees, Congress has, contrary to Plaintiffs'  
25 assertion, *see id.*, established an agency to hear such claims.

26 Plaintiffs also contend that their claims cannot be channeled before the FLRA or the  
27 MSPB because they are not suing the agencies that terminated the probationary employees. *See*  
28 *id.* But that suggests nothing more than that Plaintiffs have brought suit against the wrong party.

1 Plaintiffs’ reliance on *Feds for Med. Freedom v. Biden*, 63 F.4th 366, 375 (5th Cir.) (en banc),  
2 *judgment vac’d on other grounds*, 144 S. Ct. 480 (2023) (mem.), *see* Pls.’ TRO Mot. at 25, is  
3 thus inapposite.

4 In arguing that their federal labor claims can be heard in district court notwithstanding the  
5 *Thunder Basin* doctrine—and the squarely on-point *AFGE v. Trump*—Plaintiffs try to analogize  
6 their claims to the sort of “structural” constitutional challenge the Supreme Court held in *Axon*  
7 *Enters., Inc. v. Fed. Trade Comm’n*, 598 U.S. 175, 180, 195-96 (2023), not to be channeled away  
8 from district court jurisdiction. But that attempt fundamentally misses the mark; even post-*Axon*,  
9 the sort of claims that Plaintiffs raise remain properly channeled away from district court.

10 Congress has broadly empowered the judiciary to hear “claims ‘arising under’ federal  
11 law” “by way of 28 U.S.C. § 1331’s grant of jurisdiction[.]” *Axon*, 598 U.S. at 185. Nonetheless,  
12 “[a] special statutory review scheme, ... may preclude district courts from exercising jurisdiction  
13 over challenges to federal agency action.” *Id.* Thus, when a statute sets out “a particular  
14 procedure and time period” for challenging agency actions, a plaintiff may be precluded from  
15 relying on a district court suit. *See N.Y. Republican State Comm. v. SEC*, 799 F.3d 1126, 1135–  
16 36 (D.C. Cir. 2015). Where Congress has done so implicitly, courts determine whether it  
17 intended to preclude particular claims by assessing whether “(i) such intent is ‘fairly discernible  
18 in the statutory scheme,’ and (ii) the litigant’s claims are ‘of the type Congress intended to be  
19 reviewed within [the] statutory structure.’” *Jarkesy v. SEC*, 803 F.3d 9, 15 (D.C. Cir. 2015)  
20 (quoting *Thunder Basin*, 510 U.S. at 207, 212).

21 The first step under *Thunder Basin*—Congress’s intent to preclude—is satisfied here:  
22 Congress established a detailed statutory scheme for adjudicating federal labor disputes. The  
23 FSL-MRS provides for “administrative and judicial review” regarding disputes between  
24 employees and their federal employers and disputes between unions representing those  
25 employees and the federal government. *AFGE*, 929 F.3d at 752. Congress decided, through the  
26 FSL-MRS, that federal labor disputes must first be administratively exhausted before the FLRA.  
27 Judicial review, if any, is available only in a court of appeals. *See id.* (citing 5 U.S.C. §§ 7105,  
28 7123(a), (c)); *see also* 5 U.S.C. § 7703(b) (judicial review in Federal Circuit or other court of

1 appeals). “Congress typically chooses . . . review in a court of appeals following the agency’s  
2 own review process” when designing an implicit preclusion scheme. *Axon*, 598 U.S. at 185. That  
3 is exactly what this scheme includes. Accordingly, as the D.C. Circuit has repeatedly recognized,  
4 the FSL-MRS precludes jurisdiction in the district courts over federal union disputes. *See AFGE*,  
5 929 F.3d at 754. This “enormously complicated and subtle scheme to govern employee relations  
6 in the federal sector” does not permit a district court runaround. *See id.* at 755 (quoting *AFGE v.*  
7 *Sec’y of the Air Force* (“*Air Force*”), 716 F.3d 633, 636 (D.C. Cir. 2013)). The same is true for  
8 the CSRA. *See Elgin*, 567 U.S. at 10–15; *Fausto*, 484 U.S. at 455.

9 Turning to the second *Thunder Basin* step—whether particular claims are of the type  
10 Congress intended to be reviewed in this scheme—the Court must consider “three considerations  
11 designed to aid in that inquiry, commonly known now as the *Thunder Basin* factors.” *Axon*, 598  
12 U.S. at 900. The factors are: (i) “could precluding district court jurisdiction foreclose all  
13 meaningful judicial review of the claim”; (ii) “is the claim wholly collateral to the statute’s  
14 review provisions”; and (iii) “is the claim outside the agency’s expertise?” *Id.* (internal quotation  
15 marks, citation, and alteration omitted). These “considerations” are ultimately merely guideposts  
16 to “best [] understand what Congress has done—whether the statutory review scheme, though  
17 exclusive where it applies, reaches the claim in question.” *Id.*

18 All three *Thunder Basin* factors are satisfied here. Both statutory schemes provide  
19 meaningful judicial review over Plaintiffs’ claims. This is so even if the schemes do not allow  
20 the unions “to obtain ‘pre-implementation’ review” “or immediate relief barring all agencies  
21 from implementing” probationary removals. *See, e.g., AFGE v. Trump*, 929 F.3d at 755; *NTEU*  
22 *v. Trump, supra*. Indeed, meaningful judicial review is still available for purposes of this prong  
23 even if the scheme “ma[kes] it *impossible* to obtain particular forms of review or relief.” *AFGE*  
24 *v. Trump*, 929 F.3d at 756. Here, as in *AFGE v. Trump*, parties can bring certain claims through  
25 the administrative process “in the context of concrete . . . disputes.” *Id.* at 757.

26 Similarly, if any Plaintiff thinks that probationary removals conflict with any federal rule,  
27 guidance, or statute, it may assert that within one of the review schemes. *See, e.g., Marshall v.*  
28 *HHS*, 587 F.3d 1310, 1318 (Fed. Cir. 2009) (reversing based on an erroneous statutory

1 interpretation); *Lyons v. Dep't of Veteran's Affairs*, 273 F. App'x 929, 931 (Fed. Cir. 2008)  
2 (considering whether a regulation was violated); *Fed. L. Enf't Officers Ass'n v. Ahuja*  
3 (*"FLEOA"*), 62 F.4th 551, 560 (D.C. Cir. 2023) (noting challenges to OPM guidance through the  
4 MSPB system).

5 Additionally, contrary to Plaintiffs' suggestion, their asserted claims are not wholly  
6 collateral. This Court must "examine whether the action 'at bottom' seeks a substantive  
7 determination that falls within the statutory regime's exclusive scope." *FLEOA*, 62 F.4th at 563  
8 (D.C. Cir. 2023) (quoting *Heckler v. Ringer*, 466 U.S. 602, 614 (1984)). As the Supreme Court  
9 recently explained, a claim may be sufficiently collateral when the "claims do not relate to the  
10 subject of the [administrative] actions[.]" *Axon*, 598 U.S. at 193. There, the Court noted that  
11 "separation-of-powers claims" brought against the administrative agency were entirely unrelated  
12 to the "auditing practices," and "business merger" that constituted the subject matter of the  
13 agency actions. *See id.* Nor were they related to the "procedural or evidentiary matters an agency  
14 often resolves on its way to a merits decision." *Id.* No such separation exists here. Plaintiffs  
15 challenge certain probationary removals. But those are all the kinds of federal labor issues that  
16 lie at the heart of the FSL-MRS and the CSRA.

17 Third, and for similar reasons, the agency may bring its expertise to bear on many of the  
18 questions raised. Indeed, *Elgin* directly addresses the point in the adjacent CSRA context. As the  
19 Court noted: "preliminary questions unique to the employment context" include fact questions  
20 about a "resignation" (there whether it "amounted to a constructive discharge") as well as  
21 "statutory or constitutional claims that the MSPB routinely considers[.]" *Elgin*, 567 U.S. at 22–  
22 23. Even if some of the claims could move beyond the administrative expertise of the FLRA or  
23 the MSPB, these "threshold questions" may "alleviate [the other] concerns." *Id.*

### 24 **C. Plaintiffs' *Ultra Vires* and Separation of Powers Claims Lack Merit.**

25 Plaintiffs' ultra vires and separation of powers claims lack merit. Plaintiffs assert that  
26 certain probationary removals are ultra vires because OPM has no constitutional or statutory  
27 authority to undertake such terminations. *See* Pls.' TRO Mot. at 15. They also assert that the  
28 challenged actions violate the separation of powers. *See id.* Neither assertion has merit.



1 Courts have recognized that an equitable cause of action for *ultra vires* review may be  
2 available in instances where, because Congress has failed to provide a cause of action, “the  
3 individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative  
4 officer, whose action is unauthorized by any law, and is in violation of the rights of the  
5 individual.” *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902); *see also*  
6 *Leedom v. Kyne*, 358 U.S. 184, 189 (1958). That cause of action is not available, however, where  
7 there is some other “meaningful and adequate opportunity for judicial review,” or “clear and  
8 convincing evidence that Congress intended to deny . . . District Court jurisdiction[.]” *Bd. of*  
9 *Governors of the Fed. Rsrv. Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 43–44 (1991).

10 These principles apply straightforwardly here to make *ultra vires* review unavailable to  
11 Plaintiffs. First, the FSL-MRS and CSRA establish exclusive procedures for review of  
12 employment claims against the federal government. *See Elgin*, 567 U.S. at 10; *AFGE*, 929 F.3d  
13 at 756. This precludes courts from providing supplemental remedies, including through *ultra*  
14 *vires* review. And second, the exclusive review procedures of the FSL-MRS and CSRA will  
15 provide Plaintiffs with a meaningful and adequate opportunity for judicial review of their claims.  
16 *See Elgin*, 567 U.S. at 21 (finding “constitutional claims can receive meaningful review within  
17 the CSRA scheme”); *AFGE*, 929 F.3d at 757 (“[U]nions here are not cut off from review and  
18 relief. Rather, they can ultimately obtain review of and relief from the executive orders by  
19 litigating their claims through the statutory scheme in the context of concrete bargaining  
20 disputes.”). Thus, there is no basis for this Court to entertain Plaintiffs’ claim for non-statutory  
21 *ultra vires* review in this case.

22 Even if Plaintiffs could surmount those problems, their *ultra vires* claim would still fail.  
23 To prevail on an *ultra vires* claim, a plaintiff must establish that a government official “acted in a  
24 blatantly lawless manner or contrary to a clear statutory prohibition.” *Hindes v. FDIC*, 137 F.3d  
25 148, 164 (3d Cir. 1998); *accord Lundeen v. Mineta*, 291 F.3d 300, 312 (5th Cir. 2002) (noting  
26 that *ultra vires* action must involve “a plain violation of an unambiguous and mandatory  
27 provision of the statute” that “is of a summa or magna quality”). Allegations of constitutional  
28 error do not establish *ultra vires* action. *See Eagle Tr. Fund v. USPS*, 365 F. Supp. 3d 57, 68 n.6

1 (D.D.C. 2019) (Jackson, J.), *aff'd*, 811 F. App'x 669, 670 (D.C. Cir. 2020) (“[A] constitutional  
2 claim is separate from an ultra vires claim.”). Neither do claims that “simply involve a dispute  
3 over statutory interpretation.” *Lundeen*, 291 F.3d at 312 (quoting *Kirby Corp. v. Pena*, 109 F.3d  
4 258, 269 (5th Cir. 1997)). Rather, an officer may be said to act *ultra vires* “only when he acts  
5 ‘without any authority whatever.’” *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89,  
6 101-02 n.11 (1984); *see also Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 689  
7 (1949) (suit must allege that official is “not doing the business which the sovereign has  
8 empowered him to do”). This is a “very stringent standard,” rendering ultra vires claims  
9 “essentially a Hail Mary pass” that “in court as in football, . . . rarely succeeds.” *Nyunt v.*  
10 *Chairman, Broad. Bd. of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009) (Kavanaugh, J.).

11 Plaintiffs cannot meet this high bar because the Executive Order and OPM’s guidance do  
12 not violate any clear statutory restriction on the President’s or OPM’s authority, and instead  
13 constitute a lawful exercises of the President’s and OPM’s well-established constitutional and  
14 statutory authority to regulate the federal workforce. “Under our Constitution, the ‘executive  
15 Power’—all of it—is ‘vested in a President,’ who must ‘take Care that the Laws be faithfully  
16 executed.’” *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020)  
17 (quoting U.S. Const. art. II, § 1, cl. 1; *id.* § 3). That power includes “general administrative  
18 control of those executing the laws.” *Id.* at 2197-98 (quoting *Myers v. United States*, 272 U.S.  
19 52, 163–64 (1926)). Accordingly, absent congressional action purporting to limit his authority,  
20 the President has inherent constitutional authority under Article II to act as chief executive  
21 officer of the Executive Branch, determining how best to manage the Executive Branch,  
22 including whom to hire and remove, what conditions to place on continued employment, and  
23 what processes to employ in making these determinations. Indeed, the EO expressly instructed  
24 agencies to comply with existing law. *See* EO 14210, *supra*. Likewise, OPM was acting well  
25 within its authority to issue guidance on how agencies should carry out the President’s directive.  
26 Plaintiffs’ *ultra vires* claims fail.

27 Plaintiffs’ separation of powers claims likewise fail. First, “claims simply alleging that  
28 the President has exceeded his statutory authority are not ‘constitutional’ claims.” *Dalton v.*

1 *Specter*, 511 U.S. 462, 473 (1994). In *Dalton*, the Supreme Court rejected the proposition that  
2 “whenever the President acts in excess of his statutory authority, he also violates the  
3 constitutional separation-of-powers doctrine.” *Id.* at 471. Rather, the Court explained that not  
4 “every action by the President, or by another executive official, in excess of his statutory  
5 authority is *ipso facto* in violation of the Constitution.” *Id.* at 472. In reaching this conclusion,  
6 the Court carefully “distinguished between claims of constitutional violations and claims that an  
7 official has acted in excess of his statutory authority.” *Id.* (collecting cases). It explained that the  
8 Constitution is implicated only if executive officers rely on it as an independent source of  
9 authority to act or if the officers rely on an unconstitutional statute. *Id.* at 473 & n.5.

10 This case thus sharply contrasts with *Youngstown Sheet & Tube Co. v. Sawyer*, in which  
11 the President had directed the Secretary of Commerce to seize the nation’s steel mills relying  
12 solely upon “the aggregate of his powers under the Constitution,” and conceded the absence of  
13 statutory authority. 343 U.S. 579, 585-87 (1952). Plaintiffs have not suggested that either OPM’s  
14 regulations or its statutory authority for promulgating these regulations are themselves  
15 unconstitutional. *Dalton*’s reasoning thus applies here and refutes Plaintiffs’ argument that they  
16 are likely to succeed on their separation-of-powers claim. *See Ctr. for Biological Diversity v.*  
17 *Trump*, 453 F. Supp. 3d 11, 51-54 (D.D.C. 2020) (rejecting separation-of-powers claim based on  
18 Appropriations Clause under *Dalton* because “[a]t bottom, this is just an allegation that  
19 [executive officials] exceeded their statutory authority”). This case concerns “simply” whether  
20 Defendants have “exceeded [their] statutory authority” and “no constitutional question whatever  
21 is raised”—“only issues of statutory interpretation.” *Dalton*, 511 U.S. at 473-74 & n.6 (citation  
22 omitted).

23 In contending that the challenged actions violate the separation of powers, Plaintiffs are  
24 advancing the same argument the Supreme Court rejected in *Dalton*. Plaintiffs’ alleged  
25 separation-of-powers claims hinge entirely on, respectively, whether Defendants acted in  
26 accordance with OPM regulations regarding agency reductions in force (and their concomitant  
27 statutory authorization), and whether Section 3(c) on its face is inconsistent with existing  
28 statutes. The outcome of these questions depends on resolution of statutory and regulatory claims

1 rather than any unique separation-of-powers principles. If Plaintiffs’ argument were accepted,  
2 then every garden-variety action by a federal agency alleged to be in violation of a statutory  
3 provision could also for the same reason be alleged to violate the constitutional separation of  
4 powers. “Under *Dalton*, [Plaintiffs] cannot recast these types of claims as constitutional.” *Ctr.*  
5 *for Biological Diversity*, 453 F. Supp. 3d at 53; *see Dalton*, 511 U.S. at 474 (stating that the  
6 “distinction between claims that an official exceeded his statutory authority, on the one hand, and  
7 claims that he acted in violation of the Constitution, on the other, is too well established to  
8 permit this sort of evisceration.”).

9 **D. Plaintiffs’ APA Claims are Unlikely to Succeed.**

10 Plaintiffs cannot maintain their APA claims because the CSRA provides the exclusive  
11 remedy for federal employment claims, *see Fausto*, 484 U.S. at 455; *see also FLEOA*, 62 F.4th at  
12 557–67; *Fornaro v. James*, 416 F.3d 63, 66–69 (D.C. Cir. 2005), and because the APA does not  
13 supply a cause of action for their claims. The APA only authorizes judicial review of “final  
14 agency action for which *there is no other adequate remedy in a court.*” 5 U.S.C. § 704 (emphasis  
15 added); *see also U.S. Army Corps of Eng’rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1815 (2016)  
16 (“Even if final, an agency action is reviewable under the APA only if there are no adequate  
17 alternatives to APA review in court”). If a plaintiff has an adequate legal remedy, the APA does  
18 not provide a cause of action. *See, e.g., Dresser v. Meba Med. & Benefits Plan*, 628 F.3d 705,  
19 709 (5th Cir. 2010) (affirming the dismissal of APA claim because plaintiff had an adequate  
20 remedy). In this case, Plaintiffs have an adequate remedy because the union Plaintiffs can  
21 proceed before the FLSA and the non-union Plaintiffs, to the extent they can have standing to  
22 maintain any cause of action at all, can only challenge employee terminations before the MSPB.  
23 The APA thus does not supply a cause of action for Plaintiffs to maintain their claims.

24 Nor would Plaintiffs’ arbitrary and capricious claims be likely to succeed. As a  
25 preliminary matter, the CSRA precludes district court review of APA arbitrary and capricious  
26 claims. *See FLEOA*, 62 F.4th at 561–62. Moreover, under the APA, a court “may not substitute  
27 its own policy judgment for that of the agency.” *FCC v. Prometheus Radio Project*, 141 S. Ct.  
28 1150, 1158 (2021). The termination of probationary employees is a policy judgment of each

1 agency. OPM did not direct agencies to terminate any particular probationary employees based  
2 on performance or misconduct, and did not create a “mass termination program.” Ezell Decl. ¶ 7.  
3 Rather, OPM asked agencies to engage in a focused review of probationers based on how their  
4 performance was advancing the agencies’ mission, and allowed them at all times to exclude  
5 whomever they wanted. *See id.* Agencies made their own decisions about which probationary  
6 employees they wished to keep and which probationary employees they wished to terminate, and  
7 agencies took their own actions to terminate employees the agencies did not wish to retain. *See*  
8 *id.* Additionally, it was the responsibility of each agency to apply OPM and MSPB guidance, as  
9 well as applicable laws and regulations, as they made their own determinations to terminate or  
10 retain their probationary employees. *See id.*

11 Moreover, probationary employees are applicants for employment with the burden to  
12 demonstrate their fitness for continued employment; there is no presumption that they will be  
13 retained. *See id.* ¶ 11. Agencies are obligated to use the probationary period to determine the  
14 fitness of probationary employees and must terminate employees’ services if they fail to  
15 demonstrate fully their qualifications for continued employment. *See id.* This determination must  
16 take into account the existing needs and interests of government. *See id.* The probationary period  
17 is part of the hiring process; agencies are not required to hire every employee whose  
18 performance is “satisfactory.” *Id.* An agency may determine, and OPM has determined, that only  
19 the highest-performing probationers in mission-critical areas demonstrate the necessary fitness or  
20 qualifications for continued employment. *See id.* Thus, even if the termination of probationary  
21 employees was subject to the APA’s arbitrary and capricious standard of review (which it is not),  
22 the agencies would be able to articulate a rational basis for their decisions.

23 Finally, even if Plaintiffs had standing to pursue their notice and comment claim, the  
24 CSRA also precludes district court review of that claim as well. *See FLEOA*, 62 F.4th at 562–63.  
25 Plaintiffs’ APA claims are thus likely to fail.

### 26 **III. The Public Interest Does Not Favor an Injunction.**

27 Plaintiffs’ asserted harms are outweighed by the harm to the government and public  
28 interest that would result from the requested relief. *See Nken v. Holder*, 556 U.S. 418, 435 (2009)

1 (noting that the balancing of harms and public interest requirement for emergency injunctive  
2 relief merge when “the Government is the opposing party”).

3 **IV. Any Relief Should Be Limited.**

4 For the reasons above, the Court should deny Plaintiffs’ motion in its entirety. But even if  
5 the Court determines that a preliminary injunction is appropriate, it should limit its scope in at  
6 least three ways. Nationwide relief would be improper because “injunctive relief should be no  
7 more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.”  
8 *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (citation omitted). Relying on  
9 that principle, the Ninth Circuit has repeatedly vacated or stayed nationwide injunctions. *See*,  
10 *e.g.*, *E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029 (9th Cir. 2019); *California v.*  
11 *Azar*, 911 F.3d 558, 584 (9th Cir. 2018). To prevent ordering “the government to act or refrain  
12 from acting toward nonparties in the case,” *Arizona v. Biden*, 40 F.4th 375, 396 (6th Cir. 2022)  
13 (Sutton, C.J., concurring), the Court should limit any relief to any party before it that is able to  
14 establish its entitlement to preliminary injunctive relief.

15 **CONCLUSION**

16 For the foregoing reasons, the Court should deny Plaintiffs’ motion for a temporary  
17 restraining order and to show cause.

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Respectfully submitted,

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