**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF NEW YORK**

AMERICAN FEDERATION OF TEACHERS, AFL-CIO; UNITED FEDERATION OF TEACHERS; SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO; SEIU HEALTHCARE MINNESOTA & IOWA; SEIU COMMITTEE OF INTERNS AND RESIDENTS; UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO; UFCW LOCAL 135; UFCW LOCAL 2013; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO; IAM DISTRICT 160; AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, AFL-CIO; AFSCME COUNCIL 31; UNITED NURSES ASSOCIATIONS OF CALIFORNIA/UNION OF HEALTH CARE PROFESSIONALS; NATIONAL EDUCATION ASSOCIATION; OHIO EDUCATION ASSOCIATION; AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO; and AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS,

PLAINTIFFS,

v.

ANNA DAVIS, in her official capacity as Acting Director of the Federal Mediation and Conciliation Service; FEDERAL MEDIATION AND CONCILIATION SERVICE; UNITED STATES OF AMERICA; UNITED STATES OFFICE OF MANAGEMENT AND BUDGET; and RUSSELL T. VOUGHT, in his official capacity as the Director of the Office of Management and Budget,

DEFENDANTS.

Case No. 1:25-cv-03072-AS

**PLAINTIFFS' COMBINED REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT & RESPONSE IN OPPOSITION TO DEFENDANTS' CROSS-MOTION TO DISMISS, OR ALTERNATIVELY, FOR SUMMARY JUDGMENT**

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Plaintiffs demonstrated in their motion for summary judgment that Defendants' action to slash FMCS's services to well below the statutory minimum was arbitrary and capricious, contrary to statutory law, and in violation of the Constitution. In their opposition brief, Defendants do not contest that FMCS's adoption of a numerical threshold policy allowing mediation in only a narrow slice of labor disputes was entirely unreasoned and therefore arbitrary and capricious. Nor do Defendants undermine Plaintiffs' showing that FMCS is not providing—nor can it plausibly provide—its statutorily required services with a staff of just six mediators. Finally, Defendants do not dispute Plaintiffs' showing that dismantling a Congressionally created agency based on an executive order violates constitutional separation of powers principles and is *ultra vires*.

Instead, Defendants focus almost entirely on reviewability arguments, contending that this Court cannot review FMCS's undisputedly unlawful and unconstitutional action, and that this Court has no power to remedy Plaintiffs' harms. Defendants are wrong across the board. They fail to overcome the strong presumption of reviewability under the APA, and they offer no persuasive reasons this Court cannot adjudicate Plaintiffs' separate constitutional claims.

Plaintiffs are therefore entitled to summary judgment. With respect to the constitutional claims, Plaintiffs acknowledge that *Trump v. CASA, Inc.*, 606 U.S. ___ (2025), affects the scope of the appropriate injunction. But that decision has no effect on the appropriate relief for the APA claims at the core of Plaintiffs' suit. For those claims, the proper remedy is to set aside Defendants' unlawful agency action.

## I. The Court Has Jurisdiction over Plaintiffs' Claims.

Plaintiffs have Article III standing because they lost FMCS's mediation services in late March 2025 as a direct result of Defendants' actions, and they are currently engaged in

bargaining without help from FMCS, which is making bargaining more difficult, more delayed, and less successful. Opening Br. 10–13.

In arguing that Plaintiffs lack Article III standing, the government notably does not contest that Plaintiffs have suffered a concrete and particularized harm at the bargaining table due to the loss of FMCS's services. Opp'n 8 ("Plaintiffs may have standing to assert their individualized injuries stemming from FMCS not providing mediation services in their specific cases."). Instead, the government argues (1) that "Plaintiffs lack standing to bring this broad, prospective challenge to operations at FMCS," Opp'n 8, and (2) that Plaintiffs' potential additional future injuries render their claims unripe for the Court's review, Opp'n 12–13. Both arguments are wrong.[1]

*First*, in contending that Plaintiffs merely assert a generalized "interest in vindicating the proper operation of FMCS," Opp'n 9, the government ignores Plaintiffs' actual injury. Plaintiffs were receiving the free, expert assistance of FMCS mediators until late March 2025; now they are not, and bargaining is foundering as a result. Plaintiffs detailed their specific injuries at length in the preliminary injunction briefing. ECF No. 10 at 8–11; ECF No. 30 at 1–3; *see also* ECF No. 30 at 3–8. Plaintiffs' loss of the services they relied on is nothing like the generalized, inchoate interests that were held not to support Article III standing in the cases the government cites (Opp'n 9–10). *See Anderson v. State Univ. of N.Y.*, 2024 WL 3656551, at *2 (S.D.N.Y. July 29, 2024) (allegations "that the government is not informing the general public about the severity

[1] The government also argues that Plaintiffs cannot establish standing based on the employment-based claims of FMCS mediators, and that the Court has no "jurisdiction" over such personnel claims. Opp'n 10–12. But, as Plaintiffs have already said, ECF No. 30 at 3 n.1, Plaintiffs are not bringing any employment-based claim on behalf of those mediators, or any sort of personnel action at all. This case is about the harms to Plaintiffs' own collective-bargaining mission due to their lack of mediation services. None of the Plaintiff unions represent FMCS mediators.

of climate change" "are not concrete and particularized"); *Adim v. Bragg*, 2024 WL 4467193, at *2 (S.D.N.Y. Oct. 7, 2024) (Plaintiff's claim that "Trump's conviction was unconstitutional" was non-justiciable where Plaintiff did "not allege that he was personally injured by Trump's conviction"). That Plaintiffs seek agency-wide relief is a consequence of Defendants' agency-wide action and the resulting remedies afforded by the APA; it is not an obstacle to this Court's Article III jurisdiction. Thus, the government's arguments on standing are really a gripe with the scope of relief under the APA, which Plaintiffs address below in Part III.A.

*Second*, the government's ripeness argument is wrong: the cancelled, delayed and unproductive bargaining sessions, and the work under expired contracts or no contracts, are occurring right now. The fact that *additional* harms like strikes and lockouts could occur in the future does not make Plaintiffs' claims unripe. The "core question" in any APA case challenging agency action "is whether the result of the agency's decisionmaking process is one that will directly affect the parties." *NLRB v. Nexstar Media Inc.*, 133 F.4th 201, 204 (2d Cir. 2025). As Plaintiffs have shown at length in prior briefing, it has already done so here. *See* Opening Br. 7–8, 10–13.

## II. Plaintiffs' APA Claims are Reviewable.

The government does not contest—in fact, it hardly mentions—the merits of the APA claims at the core of Plaintiffs' motion for summary judgment. That concession is sensible; as shown in Plaintiffs' opening brief, FMCS gave no explanation for the numerical threshold policy *at all*, much less a reasoned explanation. Opening Br. 15–24. By not addressing the merits of Plaintiffs' APA claims, the government has conceded that FMCS's action adopting a numerical threshold policy to severely limit FMCS's services, and its resulting action to slash its workforce, was arbitrary and capricious, contrary to law, in excess of statutory authority, and contrary to constitutional power under § 706(2) of the APA.

Instead of defending FMCS's numerical threshold policy, the government makes a two-pronged contention that the Court cannot review the undisputedly unlawful adoption of the policy because (1) slashing FMCS's services was not a discrete agency action, and (2) the challenged action was committed to agency discretion. Opp'n 14–18. Neither argument is supported by the caselaw. Indeed, given that lack of caselaw support, it is unsurprising that Defendants did not make either of these arguments in opposing Plaintiffs' earlier motion for a preliminary injunction (ECF No. 29), where it raised the other threshold arguments it makes here.

**A. Plaintiffs Challenge a Discrete Reviewable Agency Action.**

As Plaintiffs demonstrated in their opening brief, Defendants' adoption of a general policy to limit FMCS's services to mediating *only* healthcare strikes in bargaining units above 250 members and disputes in non-healthcare units above 1,000 members constitutes final agency action, subject to judicial review under the APA. Opening Br. 14. The government claims for the first time that the challenged action is an unreviewable "programmatic challenge" or is a "plan[], strateg[y], and goal[]" that falls outside the purview of the APA. Opp'n 14–15, 17–18. But a review of the caselaw the government relies upon demonstrates that this case is nothing like those where a plaintiff's challenge was found unreviewable. Rather, the instant challenge to a discrete, specific agency action falls within the core of APA review.

Starting with first principles, a reviewable "agency action" is defined in the APA as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). A "rule," in turn, is described as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of . . .

services . . . or practices bearing on any of the foregoing." *Id.* § 551(4). Here, the numerical threshold policy is a "rule" of both current and future effect "designed to . . . prescribe . . . policy," or "describing the . . . practice requirements of an agency," namely what "services" the FMCS will provide. *Id.* Thus, on its face, the numerical threshold policy is plainly reviewable agency action under the APA. This is particularly so because the caselaw is clear that the definition of agency action in the APA is intentionally "expansive," and "meant to cover comprehensively every manner in which an agency may exercise its power." *Whitman v. Am. Trucking Ass'ns, Inc.,* 531 U.S. 457, 478 (2001).

The exceptions to the normal presumption of reviewability—for "programmatic" challenges or for agency "plans, strategies, and goals"—are narrow. In the seminal programmatic challenge case, *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), the plaintiffs brought an amorphous challenge to "the continuing (and thus constantly changing) operations of the [Bureau of Land Management] in reviewing withdrawal revocation applications and the classifications of public lands and developing land use plans as required by [statute]." *Id.* at 890. As the Supreme Court explained there, the challenged "program" was not a discrete, identifiable action, but a collection of hundreds of different actions of different types. Thus, the Supreme Court said, plaintiffs' challenge was analogous to a hypothetical challenge to a "'weapons procurement program' of the Department of Defense or a 'drug interdiction program' of the Drug Enforcement Administration." *Id.*

Here, Plaintiffs are not bringing an amorphous challenge to FMCS's mediation program as a whole, and they are not seeking improved or different services from FMCS. Rather, they challenge Defendants' adoption of a new and arbitrary numerical threshold policy that has caused specific consequences for them and their members. The fact that the challenged agency

action has had widespread *consequences* does not make the action itself any less discrete. Indeed, in rejecting *Lujan*'s "programmatic" challenge, the Supreme Court specifically recognized that where "there is in fact some specific order or regulation, applying some particular measure across the board to all individual [circumstances] . . . it can of course be challenged under the APA by a person adversely affected." 497 U.S. at 890 n.2. Plaintiffs' APA claim here is precisely such a challenge, as the District of Rhode Island has already concluded in a parallel suit. *Rhode Island v. Trump*, 2025 WL 1303868, at *8 (D.R.I. May 6, 2025) (States' APA challenges to unlawful dismantling of FMCS and other agencies are not "programmatic" and instead "are of the type deemed proper under *Lujan*").[2]

The handful of other cases the government cites (Opp'n 17–18) are just as far afield. In *Fund for Animals, Inc. v. U.S. Bureau of Land Management*, 460 F.3d 13, 19 (D.C. Cir. 2006), the plaintiffs sought APA review of the agency's budget request. But, as the D.C. Circuit explained, a budget proposal is not an agency action that has "an actual or immediately threatened effect" on individuals at all; it is merely a precursor to an agency action. *Id.* at 19–20. Only once the agency *implements* its proposals is APA review appropriate. *Id.* In a similar vein,

[2] Relatedly, the Supreme Court's stay of a preliminary injunction in *Trump v. Am. Fed. Gov't Emps.*, 606 U.S. ___, 2025 WL 1873449 (U.S. July 8, 2025), has no effect on Plaintiffs' request to set aside the agency action. The Supreme Court there granted the government's emergency application for a stay on the basis that the government was likely to succeed in showing that Executive Order 14210 and a related memorandum that directed "agencies to plan reorganizations and reductions in force 'consistent with applicable law,'" were lawful. *Id.* at *1; *id.* at *1 (Sotomayor, J., concurring) (citation omitted). But the Supreme Court "express[ed] no view on the legality of any Agency RIF and Reorganization Plan produced or approved pursuant to the Executive Order and Memorandum." *Id.* at *1 (majority opinion). Here, Plaintiffs acknowledge that the executive orders pertinent to FMCS are not themselves unlawful, and withdraw any request that the Court set aside the executive orders themselves. But the *implementation* of those executive orders at FMCS—namely, through the unconstitutional, unlawful, arbitrary and capricious adoption of the numerical threshold policy and resulting reduction-in-force—is unlawful, and Plaintiffs reiterate their request that the agency action be set aside and enjoined. *See* Sec. Am. Compl. (ECF No. 75) ¶¶ 159, 168, Prayer for Relief B, C, D.

the D.C. Circuit explained in *Independent Equipment Dealers Association v. E.P.A.*, 372 F.3d 420, 428 (D.C. Cir. 2004), that a letter to a party that merely reaffirmed existing law was not an agency action: "By *restating* EPA's established interpretation of the certificate of conformity regulation, the EPA Letter . . . left the world just as it found it, and thus cannot be fairly described as implementing, interpreting, or prescribing law or policy." *Id.* Here, in contrast to *Fund for Animals* and *Independent Equipment Dealers Association*, FMCS has already implemented its new rule, and has accordingly withdrawn the mediation services that Plaintiffs were actively using until late March 2025.

The government next cites *National Veterans Legal Services Program v. U.S. Department of Defense*, 990 F.3d 834, 841 (4th Cir. 2021), in which the agency was posting documents to an agency website, but not at the speed plaintiffs wanted. The court dismissed plaintiffs' challenge, explaining that the APA is not a vehicle to challenge an agency's "'performance' of its statutory duty," but rather is used to contest the agency's "'determination' of rights and obligations." *Id.* Here, Plaintiffs do not challenge, for instance, the quality of the mediation services they were receiving; they are challenging the agency's determination that they have no right to mediation services at all unless they meet a very high numerical threshold. That is precisely the type of APA challenge that courts have adjudicated for decades.

Finally, the government cites *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997), which dealt with the requirement that an agency action be "final." The government does not offer any actual argument that FMCS's action here was not final, nor could it, given the consequences that have already flowed from it—*i.e.*, the withdrawal of mediation services and mass reductions-in-force.

In short, the government's first set of arguments that Plaintiffs' challenge is unreviewable are all unsupported by any precedent.

**B. Defendants' Actions Are Not Committed to Agency Discretion.**

The government next turns to the argument that the challenged action is unreviewable because it is "committed to agency discretion." Opp'n 15–17. Here again, "[t]he APA establishes a basic presumption of judicial review for one suffering legal wrong because of agency action." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 17 (2020) (cleaned up). While the APA does exempt from judicial review an "agency action" that "is committed to agency discretion by law," 5 U.S.C. § 701(a)(2), the Supreme Court has interpreted that exception "quite narrowly . . . confining it to those rare administrative decisions traditionally left to agency discretion," such as an "agency's decision not to institute enforcement proceedings" of a given rule or regulation. *Regents*, 591 U.S. at 17 (cleaned up). As numerous cases make clear, the conferral of *some* discretion on an agency does not preclude judicial review under the APA; were it otherwise, courts could not "give effect to the [APA's] command that courts set aside agency action that is an abuse of *discretion*." *Dep't of Com. v. New York*, 588 U.S. 752, 772 (2019) (emphasis added).

The narrow exception to reviewability comes into play only where "there is no law to apply," *Westchester v. U.S. Dep't of Hous. & Urb. Dev.*, 778 F.3d 412, 419 (2d Cir. 2015), that is, where there are no "judicially manageable standards for judging an agency's exercise of discretion," *Salazar v. King*, 822 F.3d 61, 76 (2d Cir. 2016). But such circumstances are rare. "Agency regulations and guidance can provide a court with law to apply," as can an agency's "general policy by which its exercise of discretion will be governed." *Id.* (internal quotations omitted). An "agency's own actions" and its stated reasons for those actions "provide guidance to the court in judging whether the agency was arbitrary and capricious." *Id.* at 81. As Plaintiffs highlighted before, *see* Opening Br. 16, bedrock principles of administrative law require that "agencies offer genuine justification for important decisions, reasons that can be scrutinized by

courts and the interested public." *Dep't of Com.*, 588 U.S. at 785. It is thus unsurprising that one of the few Supreme Court cases to hold that a decision was committed exclusively to an agency's discretion—and thus unreviewable—was based upon statutory language authorizing the Director of the CIA "in his discretion" to "terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States." *Webster v. Doe*, 486 U.S. 592, 594 (1988) (quoting 50 U.S.C. § 403(c)).

Consistent with these principles, "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Salazar*, 822 F.3d at 75 (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986)). The agency bears a "heavy burden" in rebutting this "strong presumption" of reviewability. *Id.* (quoting *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975)). The government here has not carried its heavy burden for two key reasons.

***1.*** Under the APA, courts may review challenges to categorical policies that govern how agencies exercise their discretion, and ordinary principles of arbitrary and capricious review provide the law to apply to such challenges.

In *Regents*, 591 U.S. at 17–19, the Supreme Court held that the rescission of the Deferred Action for Childhood Arrivals (DACA) program was reviewable under the APA. Although individual decisions not to enforce immigration proceedings are traditionally unreviewable, DACA created a "clear and efficient process" to determine what enforcement would occur and what affirmative benefits would be provided: "The creation of that program—and its rescission—is an action that provides a focus for judicial review." *Id.* at 18 (cleaned up). Applying its well-trodden APA caselaw, the Supreme Court went on to hold that the rescission

of the program that guided the government's discretion was insufficiently reasoned and therefore arbitrary and capricious. *Id.* at 24–33.

Here, even though FMCS has some discretion over when to provide certain of its services, *see infra* pp. 12–13, its adoption of a categorical policy to cabin its discretion—much like the DACA program at issue in *Regents*—is subject to APA review. Judge Rakoff reached that conclusion when he rejected a non-reviewability argument much like the one the government asserts here. In *State v. U.S. Immigration & Customs Enforcement*, 431 F. Supp. 3d 377, 386 (S.D.N.Y. 2019) ("*ICE*"), the court held that a challenge to a directive from ICE to arrest undocumented immigrants in or near courthouses was reviewable under the APA because it involved "a categorical policy to conduct immigration arrests in particular places" where it had not conducted such arrests before. *Id.* at 385–86. Emphasizing that "civil immigration arrests by ICE officers in and around New York state courthouses increased by 1700 percent," the court concluded that a "change of this magnitude necessarily suggests that the Directive embodies ICE's novel interpretation of its statutory authority to conduct courthouse arrests, and not merely case-by-case guidance to individual officers." *Id.* at 387. And because "legal consequences" undoubtedly flowed from that novel interpretation, the court could review ICE's final agency action in issuing the directive. *Id.*

So too here. In adopting a categorical, numerical policy, FMCS has asserted a novel interpretation of Taft-Hartley that cabins its individualized discretion for determining when a labor dispute "threatens to cause a substantial interruption of commerce." 29 U.S.C. § 173(b). That novel interpretation has resulted in FMCS's slashing its services and workforce almost entirely, preventing the agency from providing its mediation services to employers and unions like Plaintiffs. Such a categorical policy is reviewable under the reasoning of *Regents* and *ICE*. It

is straightforward for the Court to apply traditional principles of review of agency decisionmaking here, so there is "law to apply." And, as Plaintiffs demonstrated in their opening brief, application of standard APA caselaw makes clear that the adoption of a numerical threshold policy violates the APA because the adoption of the policy was entirely unreasoned, ignored significant reliance interests, conflicted with the statute, and was not based on FMCS's own judgment concerning threats to interstate commerce, but instead on an apparently contrived, post-hoc justification from the Trump Administration and DOGE that had the goal of firing FMCS staff as quickly as possible. Opening Br. 15–22.

***2.*** The foregoing is sufficient to dispose of the government's argument, but that argument should also be rejected for the independent reason that the government exaggerates the discretion that FMCS has under the relevant statutes.

With respect to healthcare disputes, Congress did not grant FMCS *any* discretion in determining when to provide its services: "After notice is given to [FMCS]" of a labor dispute, "[FMCS] *shall* promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement." 29 U.S.C. § 158(d)(C) (emphasis added). Nor did Congress provide unions and employers the ability to opt out of an FMCS mediation: "The parties *shall* participate fully and promptly in such meetings as may be undertaken by [FMCS] for the purpose of aiding in a settlement of the dispute." *Id.*

The government contends that FMCS has discretion about whether to provide its services because the statute requires only that it "use its best efforts" to bring parties in the healthcare sector to agreement. Opp'n 16–17. That argument misreads the statute. No one contends that FMCS is required to bring parties in the healthcare sector to an actual agreement; but FMCS *is*

required to "communicate with the parties" and make its best efforts, through offering and providing mediation and conciliation services, to resolve the dispute.

For non-healthcare sector services, it is true that Taft-Hartley says that FMCS "may proffer its services in any labor dispute . . . whenever in its judgment such dispute threatens to cause a substantial interruption of commerce." 29 U.S.C. § 173(b). But use of "a permissive term such as 'may'" reflects only that "Congress intends to confer some discretion on the agency," not that a matter is "*committed* exclusively to agency discretion" for APA purposes. *Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1401 (D.C. Cir. 1995) (emphasis in original). Agencies often have some discretion; that discretion rarely takes them outside the bounds of APA review. *See Dep't of Com.*, 588 U.S. at 771 (APA review appropriate where certain statutory provisions "constrain[ed]" and "circumscribe[d]" agency authority, even though the statute "le[ft] much to the Secretary's discretion"); *Westchester*, 778 F.3d at 421–22 (statutes and regulations which "appear[ed] to give the agency unfettered discretion do[] not act to nullify the meaningful standards which exist in the governing statute").

In the Taft-Hartley Act, Congress explicitly cabined any FMCS discretion by requiring it to offer mediation services whenever "in its judgment" a labor "dispute threatens to cause a substantial interruption of commerce." 29 U.S.C. § 173(b). Here, the Court can judge whether the decision to adopt a categorical and numerical threshold policy instead of making a case-by-case judgment comports with the statute and the principles of reasoned decisionmaking, particularly in light of the undisputed evidence that the judgment was made by DOGE, not FMCS. *See Dep't of Com.*, 588 U.S. at 773. The Court can also judge whether FMCS's adoption of the numerical threshold policy has essentially shuttered the agency, for "[w]hen agency recalcitrance is in the face of a clear statutory duty or is of such magnitude that it amounts to an

abdication of statutory responsibility, the court has the power to order the agency to act to carry out its substantive statutory mandates." *Pub. Citizen Health Rsch. Grp. v. Comm'r, Food & Drug Admin.*, 740 F.2d 21, 32 (D.C. Cir. 1984).

In short, because the statute does not provide FMCS with unfettered discretion, and because FMCS adopted a categorical policy cabining the limited discretion it does have, the "committed to agency discretion" exception to the APA's strong presumption of reviewability does not apply. Defendants' unlawful action is reviewable and requires judicial relief, to which Plaintiffs turn next.

## III. Plaintiffs Are Entitled to the Relief They Seek Under the APA.

### A. Under § 706(2) of the APA, the Court Must "Set Aside" Defendants' Final Agency Action.

The government's next APA argument is the novel claim that the APA does not authorize vacatur of agency action. This argument is unsupported by the statutory text and decades of APA caselaw.

Since its enactment almost 80 years ago, the APA has granted courts the power to "hold unlawful and set aside agency action" that is arbitrary and capricious, contrary to law, in excess of statutory authority, or contrary to constitutional power. 5 U.S.C. § 706(2). From this authority, courts have long understood that "[i]n the usual case, when an agency violates its obligations under the APA, [the court] will vacate a judgment and remand to the agency to conduct further proceedings." *Guertin v. United States*, 743 F.3d 382, 388 (2d Cir. 2014). "Such has long been standard practice under the APA." *New York v. U.S. Dep't of Health & Hum. Servs.*, 414 F. Supp. 3d 475, 575–76 (S.D.N.Y. 2019) ("*HHS*") (collecting cases). "Moreover, because the statutory remedy is directed at the *entire* 'final agency action' that the APA subjects to judicial review, the 'normal remedy' is to set aside the agency action wholesale, not merely as it applies

to the particular plaintiff or plaintiffs who brought the agency action before the court." *New York v. U.S. Dep't of Com.*, 351 F. Supp. 3d 502, 672 (S.D.N.Y.), *aff'd in part, rev'd in part and remanded sub nom. Dep't of Com. v. New York*, 588 U.S. 752 (2019); *see also Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 830–31, 838 (2024) (Kavanaugh, J., concurring) (synthesizing APA caselaw on vacatur). The law in the Second Circuit is therefore clear: when faced with an APA violation, courts vacate the agency action. *See, e.g.*, *Nat. Res. Def. Council v. U.S. EPA*, 658 F.3d 200, 220 (2d Cir. 2011); *N.Y. v. Scalia*, 490 F. Supp. 3d 748, 792 (S.D.N.Y. 2020).

The government's new contention that "there is nothing in the APA that permits vacatur of agency action," Opp'n 20, and that "any equitable remedy applied in the nature of vacatur should apply only to the named parties," Opp'n 22, is thus a law review argument, not a caselaw argument. Because the caselaw clearly does not support the government's academic argument, the Court need not even address it. In any event, the only authority the government invokes in support of its departure from well-settled law is a concurring opinion, which merely "rais[es] questions" and "doubts" about whether "§ 706(2) authorizes vacatur of agency action." *United States v. Texas*, 599 U.S. 670, 701–02 (2023) (Gorsuch, J., concurring). Unsurprisingly, then, courts in this district have directly rejected the government's position before*, see, e.g.*, *HHS*, 414 F. Supp. 3d at 578–580; *Dep't of Com.*, 351 F. Supp. 3d at 674–75, and at least one court in this district has rejected the reasoning in Justice Gorsuch's *United States v. Texas* concurrence as "unpersuasive," *N.Y. Legal Assistance Grp. v. Cardona*, 2025 WL 871371, at *3 (S.D.N.Y. Mar. 20, 2025).

Contrary to the government's suggestions, no Supreme Court decision has ever disturbed the well-settled consensus that the APA authorizes vacatur of agency action. *Trump v. CASA*

(cited at Opp'n 1, 14, 22–23) held only that "under the Judiciary Act of 1789," federal courts do not "have equitable authority to issue universal injunctions." 2025 WL 1773631, at *5 (U.S. June 27, 2025). That decision said "[n]othing" about the ability of "federal courts to vacate federal agency action" under the APA, *id.* at *8 n.10, as the government itself concedes, Opp'n 14 n.5.[3] Likewise, *Gill v. Whitford*, 585 U.S. 48, 68 (2018) (cited at Opp'n 10) is inapposite. "*Gill* was a voting rights case, involving an allegedly unlawful statewide gerrymander, not a challenge to a nationally-applicable agency rule." *HHS*, 414 F. Supp. 3d at 579. "The Supreme Court there had no occasion to discuss the APA in general or the scope of a vacatur where APA violations affecting a rule on its face have been found." *Id.* (rejecting government's similar reliance on *Gill v. Whitford* to argue that "relief from [agency action] should be limited either to this District or to the specific plaintiffs"). Finally, *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975) (cited at Opp'n 20) was also not an APA case, and instead considered whether principles of federalism from *Younger v. Harris*, 401 U.S. 37 (1971), required a federal district court to abstain from interfering with state court criminal proceedings to enforce a town ordinance. It goes without saying that that decision—which did not once mention the APA—did not overhaul decades of well-settled administrative law. Accordingly, the APA's long-standing default remedy to "set aside" unlawful agency action has not been disturbed.

Finally, it is not entirely clear whether the government is arguing that Plaintiffs must show irreparable harm that would justify relief under the APA, Opp'n 27–34, but to be clear, no showing of irreparable harm is required for such relief under the APA. Where a "court has

[3] Even though he joined the majority in *Trump v. CASA*, Justice Kavanaugh wrote separately to clarify that "in the wake of the Court's decision," plaintiffs may still "ask a court to preliminarily 'set aside' a new agency rule" in "cases under the Administrative Procedure Act," citing his prior concurrence in *Corner Post* explaining that well-settled law. *Trump*, 2025 WL 1773631, at *19 (Kavanaugh, J., concurring).

Article III jurisdiction—as this Court does—and . . . the APA's other statutory requirements are satisfied—as they are here—a court has both the power and the duty to order the remedy Congress created." *Dep't of Com.*, 351 F. Supp. 3d at 675; *accord Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001). That APA remedy is required "whether or not [plaintiff] has suffered irreparable injury." *Am. Bioscience*, 269 F.3d at 1084. Indeed, courts regularly set aside agency action after finding that a plaintiff has proven its claim under the APA, without regard to irreparable injury. *See, e.g.*, *N.Y. Pub. Int. Rsch. Grp. v. Whitman*, 321 F.3d 316, 334–35 (2d Cir. 2003); *N.Y. Pub. Int. Rsch. Grp., Inc. v. Johnson*, 427 F.3d 172, 186 (2d Cir. 2005); *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 690 F. Supp. 3d 322, 355 (S.D.N.Y. 2023); *Bhd. of Locomotive Eng'rs & Trainmen v. Fed. R.R. Admin.*, 972 F.3d 83, 117 (D.C. Cir. 2020) ("When the reasons that an agency provided at the time it took the challenged action are inadequate the agency's action may not be sustained." (cleaned up)).

This Court should therefore set aside Defendants' unlawful policy limiting FMCS's services to mediating only a narrow slice of disputes. And as Plaintiffs explained before, setting aside Defendants' numerical threshold policy necessarily requires setting aside the agency's resulting action to implement a sweeping reduction-in-force (RIF). Opening Br. 27–28; *see also Somerville Pub. Sch. v. McMahon*, 139 F.4th 63, 73 (1st Cir. 2025) (mass RIF is an "agency action" for APA purposes) (injunction temporarily stayed by the Supreme Court without opinion, 2025 WL 1922626 (U.S. July 14, 2025)). The RIF was solely and explicitly premised upon Defendants' new policy to limit its services, *see* Opening Br. 5–6, and as a matter of common sense, the numerical threshold policy cannot actually be "set aside" in any meaningful sense without setting aside the resulting agency action of a mass RIF. The government has provided no evidence or even argument that FMCS can provide its pre-policy level of services with only six

mediators (along with fulfilling its other statutory duties). Rather, the only evidence in the record makes clear that FMCS could *not* do so. Ramirez Decl. ¶¶ 24–27; Kelleher Decl. ¶¶ 8–9 (ECF Nos. 21 & 22); *see also Rhode Island*, 2025 WL 1303868, at *13 ("[N]othing suggests that FMCS['s] remaining employees can continue to perform its statutory duties.").

This remedy does not require constant judicial monitoring of FMCS. It "simply undoes a recent departure from the agency's prior longstanding position and enforcement practices." *Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior*, 478 F. Supp. 3d 469, 489 (S.D.N.Y. 2020). It is not the judiciary's role to say what the Defendants can or must do if they wish to re-organize the agency's operations or reduce personnel; after the Court sets aside the undisputedly unlawful numerical threshold policy and the RIF that was explicitly described as a consequence of that policy, the agency may make such a determination in the first instance, so long as it provides a non-contrived, reasoned explanation for doing so. Opening Br. 28.

### B. Under § 706(1) of the APA, the Court Must "Compel" FMCS to Provide its Unlawfully Withheld Services.

Separately, the government contends that Plaintiffs' § 706(1) claim to compel withheld agency action (which is independent of the broader § 706(2) claim) fails because FMCS is not required by statute to provide any mediation services. Opp'n 18–19. The government also cites *Norton v. Southern Utah Wilderness All.* (*SUWA*), 542 U.S. 55, 62 (2004), which made clear that a court can only compel an agency action that is required by law, *i.e.*, by statute or regulation. The government ignores the actual crux of Plaintiffs' § 706(1) claim—that FMCS has unlawfully withdrawn services it already had decided *were* required by statute, or that are plainly required by the text of the statute itself.

It is undisputed that FMCS was providing mediation services to Plaintiffs and numerous other employers and unions nationwide in March 2025. Opening Br. 7–8; Opp'n 4–5. For non-

healthcare sector disputes, FMCS necessarily had already determined "in its judgment" that these labor disputes posed a substantial threat to interstate commerce. 29 U.S.C. § 173(b). Once FMCS made that judgment, the statute requires that "[w]henever [FMCS] does proffer its services in any dispute, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement." *Id.* § 173(b); *accord id.* § 158(d)(C); *see also* 29 C.F.R. § 1403.4 ("[FMCS] will assign one or more mediators to each labor-management dispute in which it has been determined that its services should [be] proffered."). In other words, where FMCS has started providing its services, it may not withdraw them until "its best efforts . . . to bring [the parties] to agreement" have been exhausted. 29 U.S.C. § 173(b); *accord id.* § 158(d)(C). Defendants violated this statutory command by abruptly withdrawing FMCS's services on March 26, 2025 without even pausing to consider the status of current negotiations or whether the labor disputes at issue still threatened interstate commerce.

Likewise, Defendants have violated a statutory command by refusing to provide mediation services in the healthcare sector unless the bargaining unit is more than 250 members. For all the reasons described *supra* at 11–12, the statute does not give FMCS that discretion. And for good reason: a strike by a unit of 200 registered nurses in an acute care hospital directly impacts every other employee in the facility, as well as every patient served.

Both with respect to healthcare sector mediations and all other mediations that were in progress or scheduled in March 2025, FMCS has thus contravened a "specific, unequivocal command" to provide its services. *SUWA*, 542 U.S. at 63. Under § 706(1), the Court should therefore "order[]" "a precise, definite act"—namely, that FMCS provide those services. *Id.* (quotation omitted).

## IV. Plaintiffs Are Entitled to Summary Judgment on Their Separation of Powers and *Ultra Vires* Claims.

As with the APA claims, the government largely does not contest the substance of Plaintiffs' constitutional claims, but instead argues that such claims are not reviewable. Opp'n 23–27. The government is incorrect.

Regarding the separation of powers, the government says nothing in response to Plaintiffs' showing that Defendants have unconstitutionally usurped Congress's Article I powers by dismantling a legislatively created agency, disregarding its statutory mandates, and refusing to spend its appropriated funds. Opening Br. 25–26. The government argues only that *Dalton v. Specter*, 511 U.S. 462 (1994), prevents Plaintiffs from bringing a standalone separation of powers claim where they also bring statutory claims challenging executive action. Opp'n 23. But that is wrong. "*Dalton*'s holding merely stands for the proposition that when a statute entrusts a discrete specific decision to the President and contains no limitations on the President's exercise of that authority, judicial review of an abuse of discretion claim is not available." *Chamber of Com. of U.S. v. Reich*, 74 F.3d 1322, 1331–32 (D.C. Cir. 1996); *accord Planned Parenthood of N.Y. City, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 337 F. Supp. 3d 308, 330 (S.D.N.Y. 2018). "*Dalton* is inapposite where," as here, "the claim instead is that the presidential action . . . independently violates . . . a statute that delegates no authority to the President" to do what he has done. *Reich*, 74 F.3d at 1332.

The government has made the same argument based on *Dalton* in other recent cases, and courts have repeatedly rejected it. *See, e.g.*, *Nat'l Treasury Emps. Union v. Vought*, 774 F. Supp. 3d 1, 40–42 (D.D.C. 2025); *Does 1-26 v. Musk*, 771 F. Supp. 3d 637, 677–78 (D. Md. 2025); *see also New York v. McMahon*, 2025 WL 1463009, at *21 (D. Mass. May 22, 2025) (injunction temporarily stayed by the Supreme Court without opinion, 2025 WL 1922626 (U.S. July 14,

2025)). The government has not even attempted to distinguish those cases. "Since there is no act of Congress that empowers the President to shut down [FMCS] in his discretion, *Dalton* does not apply, and the Court has jurisdiction to perform its traditional duty and consider both the statutory and constitutional claims." *Vought*, 774 F. Supp. 3d at 42.[4]

As for Plaintiffs' *ultra vires* claim, the government once again posits that such a claim is unavailable where there is a statutory review scheme such as the APA. Opp'n 25–26. But the government ignores several recent decisions considering the parallel dismantling of other agencies which have considered both APA and *ultra vires* claims together. *See, e.g.*, *Vought*, 774 F. Supp. 3d at 77 ("The same evidence that underlies [the *ultra vires* claim] also establishes a likelihood of success on the merits of the APA claims."); *McMahon*, 2025 WL 1463009, at *23–29 (finding likelihood of success on both *ultra vires* and APA claims).

The Supreme Court's recent decision in *NRC v. Texas*, 145 S. Ct. 1762 (2025) (cited in Opp'n 25), does not cast doubt on those decisions because it did not consider executive actions "to dissolve" a congressionally created agency with specific statutory mandates, and thus says nothing about the unprecedented situation where Defendants' actions to dismantle FMCS "are plainly beyond the bounds of what Defendants can do" under the law. *McMahon*, 2025 WL 1463009 at *23. Indeed, it is hard to imagine a more "extreme agency error where the agency has

[4] The government's argument that a standalone Take Care Clause claim is not justiciable, Opp'n 24–25, is inapposite because Plaintiffs have not brought such a claim. Rather, Plaintiffs invoke that clause to support the claim that Defendants' actions to dismantle FMCS "are contrary to constitutional . . . power" under the APA. *See* Opening Br. 23–24 (citing 5 U.S.C. § 706(2)(B)–(C)); *see also* Sec. Am. Compl. (ECF No. 75) (Count One, ¶¶ 156–164). Other courts have considered such claims. *See, e.g.*, *Widakuswara v. Lake*, 773 F. Supp. 3d 46, 55–57 (S.D.N.Y. 2025). Moreover, the government's contention that the Take Care clause does not apply to subordinate Executive Branch officials like Defendants, Opp'n 25, is unsupported; it is "well established that review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive." *Reich*, 74 F.3d at 1328 (cleaned up).

stepped so plainly beyond the bounds of its statutory authority, or acted so clearly in defiance of it, as to warrant the immediate intervention of an equity court." *Fed. Express Corp. v. U.S. Dep't of Com.*, 39 F.4th 756, 764 (D.C. Cir. 2022) (cleaned up) (explaining the basis for an *ultra vires* claim). That Executive Order 14238 directed Defendants to "eliminat[e] FMCS to the maximum extent consistent with applicable law" is of no moment where Defendants have adopted a policy that reduces FMCS's services *well below* the statutory minimum, according to the undisputed evidence. Congress established FMCS and charged it with several duties; by shirking those duties and reducing FMCS to a shell, Defendants have all but eliminated it. They have "plainly and openly crossed a congressionally drawn line in the sand." *Id.* at 765.

Moreover, the government's contention that *ultra vires* review is unavailable because Plaintiffs can seek review under the APA is in obvious conflict with its argument that APA review is *not* available for this type of agency action. The government cannot have it both ways and avoid review of their undisputedly unlawful actions under *any* theory.

Finally, Plaintiffs are entitled to a permanent injunction against Defendants' actions on the basis of their separation of powers and *ultra vires* claims because (1) they have "suffered an irreparable injury," (2) money damages are unavailable for these equitable claims, and (3) the balance of equities unequivocally tilts towards Plaintiffs given that there is no public interest in shuttering a legislatively created agency. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156–57 (2010) (explaining four-part standard for permanent injunction); *cf. Hartford Courant Co., LLC v. Carroll*, 986 F.3d 211, 224 (2d Cir. 2021) (noting that third and fourth factors merge when the government is a party).

*First*, Plaintiffs have submitted undisputed evidence of their irreparable harm through the numerous declarations in the record, which Plaintiffs have attached and incorporated in support

of their motion for summary judgment. *See* ECF No. 67. Plaintiffs have also explained at length, in connection with their earlier motion for preliminary injunction, why those undisputed injuries justify injunctive relief, and Plaintiffs incorporate those arguments here by reference. *See* ECF No. 10 at 24–27; ECF No. 30 at 3–8; ECF No. 43 at 1–5. In sum, caselaw establishes that unions are irreparably harmed whenever the collective bargaining process is impaired or delayed, as has occurred because of the mass withdrawal of FMCS mediators. "[D]elay is ultimately corrosive to the collective bargaining process itself," *Emhart Indus., Hartford Div. v. NLRB*, 907 F.2d 372, 379 (2d Cir. 1990), because it "impair[s] the union's ability to function effectively . . . giving the impression to members that a union is powerless." *NLRB v. WPIX, Inc.*, 906 F.2d 898, 901 (2d Cir. 1990); *accord Mattina v. Chinatown Carting Corp.*, 290 F. Supp. 2d 386, 394 (S.D.N.Y. 2003); *Small v. Avanti Health Sys., LLC*, 661 F.3d 1180, 1192 (9th Cir. 2011). That is especially so for unions negotiating a "first contract," where bargaining units are "highly susceptible to management misconduct." *Ahearn v. Jackson Hosp. Corp.*, 351 F.3d 226, 239 (6th Cir. 2003) (quotations omitted).

The government's arguments against irreparable harm ignore legal and factual realities. Its suggestion that the union and employer should simply renegotiate their contracts to delete references to FMCS mediators, or rely on state-law impossibility doctrines (Opp'n 31), both dismisses the parties' reliance interests and demonstrates a complete ignorance of federal labor law—which generally preempts state law and imposes onerous conditions on renegotiating contract provisions during the contract term.[5] The government's contention (Opp'n 32 n.7) that

[5] "Section 301 of the LMRA [Taft-Hartley Labor Management Relations Act] preempts [state-law] claims that are 'inextricably intertwined with consideration of the terms of [a] labor contract.'" *Wall v. Constr. & Gen. Laborers' Union, Loc. 230*, 224 F.3d 168, 178 (2d Cir. 2000) (quoting *Allis–Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985)). And Section 8(d) of the National Labor Relations Act provides, in relevant part: "the duties so imposed shall not be

any strike is within the power of a union to resolve does not acknowledge the equal likelihood of an employer lockout over which Plaintiffs, of course, have no control. It also ignores that a union's resort to the economic weapon of a strike is sometimes the only way to make progress in negotiations or bring a recalcitrant employer back to the bargaining table. Finally, in arguing that Plaintiffs can simply pay private mediators to replace the cost-free services of FMCS mediators, the government ignores how such costs add up quickly to the detriment of unions' very real limited budgets, *see, e.g.*, Dashefsky Decl. ¶¶ 9–11 (ECF No. 13), along with record evidence that, in one of the ongoing negotiations where Plaintiff UFT lost the services of an effective FMCS mediator, it had previously used a private mediator with no success at all. *See, e.g.*, Trager Decl. ¶¶ 15–16 (ECF No. 11).

*Second*, Plaintiffs cannot obtain money damages for their injuries because their separation-of-powers and *ultra vires* claims each derive from the judiciary's *equitable* power to restrain unconstitutional action. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010); *Am. Fed'n of Gov't Emps. v. U.S. Off. of Pers. Mgmt.*, 2025 WL 996542, at *19 (S.D.N.Y. Apr. 3, 2025). Courts thus regularly conclude that the unavailability of money damages from the government is a *per se* irreparable harm, justifying injunctive relief. *See, e.g.*, *United States v. New York*, 708 F.2d 92, 93 (2d Cir. 1983); *Chamber of Com. of U.S. v. Edmondson*, 594 F.3d 742, 770–71 (10th Cir. 2010) ("Imposition of monetary damages that

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construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract." 29 U.S.C. § 158(d). Thus, when a collective-bargaining agreement is in effect, a party is under no obligation to consent to, or even discuss, proposed midterm modifications of a contractual term, unless the agreement contains a reopener provision. *Smurf-it-Stone Container Enter. & Teamsters Dist. Council No. 2*, 357 NLRB 1732, 1733 (2011), *enforced sub nom.*, *Rock-Tenn Servs., Inc. v. NLRB,* 594 F. App'x. 897 (9th Cir. 2014).

cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury.").

*Third*, the government addresses the merged factors of public interest and balance of harms in only a conclusory paragraph, claiming that "any time a government is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." Opp'n 34 (cleaned up). But as Plaintiffs have shown, the government here is not *effectuating* duly enacted statutes; it is *violating* them. The public interest clearly favors Plaintiffs, for "there can be no doubt that the public interest favors requiring the government to comply with the law." *Velesaca v. Decker*, 458 F. Supp. 3d 224, 241 (S.D.N.Y. 2020).

Plaintiffs have thus demonstrated their entitlement to a permanent injunction on the basis of their separation of powers and *ultra vires* claims. But Plaintiffs acknowledge that, for these non-APA claims, *Trump v. CASA* does limit the Court's ability to issue universal injunctive relief and requires the Court to limit such relief to the parties. Plaintiffs UFT, SEIU Healthcare Minnesota & Iowa, SEIU Committee of Interns & Residents, UFCW Local 135, UFCW Local 2013, UNAC/UHCP, AFSCME Council 31, IAM District 160, OEA, IAM, and AFGE have each demonstrated an undisputed injury due to the withdrawal of FMCS mediators that merits injunctive relief. Trager Decl. (ECF No. 11); Trager Suppl. Decl. (ECF No. 38); Gulley Decl. (ECF No. 12); Dashefsky Decl. (ECF No. 13); Walters Decl. (ECF No. 14); Walters Suppl. Decl. (ECF No. 32) Pitman Decl. (ECF No. 35); Pitman Suppl. Decl. (ECF No. 70); Guzynski Decl. (ECF No. 18); Guzynski Suppl. Decl. (ECF No. 69); Thornton Decl. (ECF No. 17); Shepherd Decl. (ECF No. 15); Hemming Decl. (ECF No. 16); DiMauro Decl. (ECF No. 72); DiMaria Decl. (ECF No. 33); DiMaria Suppl. Decl. (ECF No. 71); Dahn Decl. (ECF No. 34); Glymph Decl. (ECF No. 19).

The members of these local unions are also members of the affiliated international union Plaintiffs. *See* Johnson Decl. ¶ 3 (AFT); Henderson Decl. ¶ 3 (SEIU); Haggerty Decl. ¶ 3 (UFCW); Siegel Decl. ¶ 3 (IAM); Paterson Decl. ¶ 4 (AFSCME); O'Farrell Decl. ¶ 3 (NEA); Cann Decl. ¶ 3 (AFGE). The international union Plaintiffs thus have associational standing on behalf of their injured members, *see* Opening Br. 13–14—a point the government does not contest. So too for Plaintiff AFL-CIO, which has associational standing on behalf of the injured members of the international union Plaintiffs, nearly all of which are affiliated with the AFL-CIO. *See N.Y. State Club Ass'n, Inc. v. City of N.Y.*, 487 U.S. 1, 8–10 (1988) ("consortium of . . . private clubs and associations" had "standing to sue on behalf of its member associations" because those "member associations would have standing to bring this same suit on behalf of their own individual members" who were injured); *see also* 13A Wright & Miller's Federal Practice & Procedure § 3531.9.5 (3d ed. 2025) ("Standing based on member injury may pass through one organization to another by derivation—an organization comprised of other organizations may establish standing based on injury to its members' members."); *see also* Sec. Am. Compl. (ECF No. 75) ¶¶ 23, 25, 28, 31, 33, 38 (specifying Plaintiffs' AFL-CIO affiliate status); Sharma Decl. ¶¶ 4–5 (ECF No. 20). Thus, an injunction should cover all members of Plaintiffs AFT, SEIU, UFCW, IAM, AFSCME, NEA, AFGE, and the members of the affiliates of the AFL-CIO as well.

## CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion for summary judgment and deny Defendants' cross-motion to dismiss, or alternatively, for summary judgment.

Dated: July 18, 2025

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**CERTIFICATION OF WORD COUNT COMPLIANCE**

Case Caption: American Federation of Teachers, AFL-CIO, *et al.* v. Goldstein, *et al.*

Case No: 1:25-cv-03072-AS

As required by Rule 7.1(c) of the Joint Local Rules, S.D.N.Y. and E.D.N.Y., I certify the document contains 8,409 words excluding the parts of the document that are excepted by the rule.

I declare under penalty of perjury that the foregoing is true and accurate.

Dated: July 18, 2025

*/s/ Elisabeth Oppenheimer*
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BREDHOFF & KAISER, P.L.L.C.