THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL EDUCATION ASSOCIATION, *et al.*, *Plaintiffs*, v. DONALD J. TRUMP, *et al.*, *Defendants*.	Civil Action No. 1:25-cv-1362

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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I. EO 14,251 is Reviewable

A. It is within the jurisdiction of this Court—not the FLRA—to review Plaintiffs' constitutional challenge to EO 14,251

The Government argues (Doc. 27 pp. 9-14) that Chapter 71 deprives this Court of jurisdiction to review Plaintiffs' claims and that those claims must instead by channeled to the FLRA for resolutions as unfair labor practice complaints or exceptions to arbitration decisions resolving grievances. But, as this Court has already concluded, declining jurisdiction on such a ground is unwarranted, given that Chapter 71's "administrative review scheme…. is not available to challenge EO 14,251's exclusions of the agencies and subdivisions subject to EO 14,251 for the simple reason that those agencies and subdivisions have been excluded from [Chapter 71's] coverage by the very Executive Order at issue here." *Nat'l Treasury Emps. Union v. Trump*, No. 25-cv-0935, 2025 WL 1218044, at *5 (D.D.C. Apr. 28, 2025) ("*NTEU I*"); *see also Am. Foreign Serv. Ass'n v. Trump*, No. 25-cv-1030, 2025 WL 1387331, at *6 (D.D.C. May 14, 2025) ("*AFSA I*") (same); *Am. Fed'n of Gov. Emps. v. Trump*, No. 25-cv-03070, 2025 WL 1755442 at *8-*9 (N.D. Cal. Jun. 24, 2025) (*AFGE I*) (same).

The Government tries to avoid this conclusion by arguing (Doc. 27 at 9) that, because Plaintiffs' position is that "Executive Order 14,251 is invalid," this Court must act as if EO 14,251 has already been invalidated and presume that "the agencies and subdivisions identified in the Executive Order remain subject to the FSLMRS, and [that] the CBAs with DoDEA are valid and binding." But this "odd suggestion," *AFGE I*, 2025 WL 1755442, at *9, has also been rejected already by this Court. *See AFSA I*, 2025 WL 1387331, at *6 ("'[A]ssum[ing] that [AFSA] will prevail on the merits of [its] claim' does not change the fact that there is no dispute between the parties that the agency subdivisions at issue in this case currently are excluded from the Statute as a result of the Executive Order."); *see also AFGE I*, 2025 WL 1755442, at *9

("The question of the Court's jurisdiction is not answered by the plaintiffs' or defendants' beliefs about the merits of the case. It is answered by the plain language of the [statute].").

This Court's earlier analyses in *NTEU I* and *AFSA I* are therefore enough to confirm that Congress did not intend to give the FLRA authority to determine the lawfulness of an executive order excluding agencies from Chapter 71. Nevertheless, the Government relies on a misreading of relevant case law and a misapplication of the factors set forth in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), to urge this Court to reach a different result here.

The Government's heavy reliance (Doc. 27 at 9-10) on *Am. Fed'n of Gov. Empls. v. Trump*, 929 F.3d 748, 754 (D.C. Cir. 2019) ("*AFGE v. Trump*") is misplaced. The challenged executive orders at issue there were leagues removed from EO 14,251. That is, the orders challenged in *AFGE v. Trump* directed agencies to take particular bargaining positions *when engaging in collective bargaining negotiations* pursuant to Chapter 71.[1] In other words, those orders obviously presupposed that Chapter 71's coverage would remain intact: they directed *how* agencies would approach bargaining under Chapter 71, a matter that is within in the heartland of the statute's substantive regulations and administrative review scheme. By contrast, EO 14,251 categorically excludes agencies, and thus the unions representing their workforces, entirely from the statute's coverage.

The Government's reliance (Doc. 27 at 22-23) on *Elgin v. Dep't of Treasury*, 567 U.S. 1 (2012), suffers from the same flaw. That case involved a suit by federal employees raising

[1] Specifically, the orders at issue in *AFGE v. Trump* directed that agencies engaged in Chapter 71 bargaining (a) decline to negotiate over subjects that, under Chapter 71, are not mandatory bargaining subjects; (b) seek to limit authorizations of release time in CBAs; and (c) seek to exclude from the scope of contractual grievance-and-arbitration proceedings disputes over discharges for misconduct or unacceptable performance and disputes over employee ratings and incentive pay. 929 F.3d at 753.

constitutional challenges to their discharge. *See id.* at 6-7. In concluding that the plaintiffs were required to bring their claims through the administrative process of the Civil Service Reform Act ("CSRA"), the Court repeatedly emphasized that preclusion applied because the case was one in which "a *covered* employee challenges a *covered action*." *Id.* at 13 (emphasis added).[2] Hence, far from supporting the Government's position, *Elgin* underscores the obvious point that channeling through a statutory administrative review scheme only applies where the party bringing the challenge is within the statute's coverage.

The Government also misapplies the three factors articulated by *Thunder Basin Coal* for determining whether "claims are of the type Congress intended to be reviewed within [a] statutory structure." 510 U.S. at 212. Based on "the statute's language, structure, and purpose"—as well as its "legislative history," *Id.* at 207[3]—all of the relevant factors point toward recognizing this Court's jurisdiction to hear Plaintiffs' challenges to EO 14,251.

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[2] *See* 567 U.S. at 6 (cataloging the CSRA's procedures "[w]hen an employing agency proposes a covered action against a covered employee"); *id.* at 20 ("When a covered employee appeals a covered adverse action, the CSRA grants the MSPB jurisdiction over the appeal."); *id.* at 29 (explaining the hearing rights available "when a covered employee appeals a covered adverse employment action").

[3] Legislative history is particularly compelling in showing that Congress did not intend Chapter 71's administrative review scheme to have any role in determining whether agencies can be excluded from the statute's coverage. The House bill that would become Chapter 71 initially provided that any agency could apply to the FLRA to "be excluded from any provision or requirement" based on whether the agency "has as a primary function intelligence, counterintelligence, investigative, or national security work," and whether any requirement or provision of the law cannot be applied to the agency " in a manner consistent with national security requirements and considerations." H.R. 11280, as reported July 31, 1978, Section 701, reprinted in Subcommittee on Postal Personnel and Modernization of the House Committee on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978* 386 (1979). An amendment to the bill revised that provision to take that authority away from the FLRA and grant it to the President. *See id.* at 907 (Udall substitute amendment to title VII, and that amended provision was enacted as Section 7103(b), *see* Pub. L. 95-454, Section 701, Oct. 13, 1978, 92 Stat. at 1195).

1. The first factor, whether "a finding of preclusion could foreclose all meaningful judicial review" of the claims, *id.* at 212-13, is "the most important factor in the *Thunder Basin* analysis," *Bennett v. SEC*, 844 F.3d 174, 183 n.7 (4th Cir. 2016). And on that score, the Government's breezy assertion (Doc. 27 at 11) that Plaintiffs can obtain meaningful judicial review of their challenges to EO 14,251 by filing unfair labor practice charges with the FLRA or grievances with DODEA cannot withstand inspection.

With respect to unfair labor practice charges, the Government simply ignores the critical fact that the FLRA has repeatedly held, in cases in which the FLRA General Counsel has issued unfair labor practice complaints against agencies that were subsequently excluded from coverage by executive orders under Section 7103(b)(1), that an agency's exclusion from Chapter 71's coverage is "a jurisdictional bar to its consideration of unfair labor practice complaints raised under the Statute." *U.S. Dep't of the Air Force*, 66 F.L.R.A. 589 (Apr. 20, 2012); *U.S. Attorney's Off.*, 57 F.L.R.A. 750, 750 (Apr. 25, 2002) (same). These decisions are unsurprising given that the FLRA, no less than other agencies, is "bound to follow binding executive orders unless rescinded or overridden through lawful procedures." *N. Am.'s Bldg. Trades Unions v. Dep't of Def.*, No. 25-cv-1070, 2025 WL 1423610, at *11 (D.D.C. May 16, 2025).

Thus, even assuming that an unfair labor practice charge challenging the constitutionality of EO 14,251 would even reach the FLRA—which for the reasons discussed below is not one that can be indulged here—the filing of such a charge would be an exercise in futility. Indeed in *NTEU I*, the Government judicially admitted "that the FLRA likely would determine that it lacks jurisdiction over NTEU's case challenging the Executive Order," but nonetheless insisted that the plaintiff "must" go through the pointless exercise of "bring[ing] its claim to the FLRA—which the FLRA will dismiss for lack of jurisdiction—and then appeal[ing] the FLRA's

dismissal to a United States court of appeals, where NTEU can raise its arguments related to the validity of the Executive Order." 2025 WL 1218044, at *6. This Court correctly rejected this argument as "miss[ing] the point" that "the administrative process of the [Chapter 71] cannot and does not govern here because the Executive Order at issue removed the agencies and subdivisions in question from coverage of the [Chapter 71]." *Id.*

Of equal importance, it is certain that requiring Plaintiffs to pursue their challenge through unfair labor practice charges would result in prolonged delays that would inflict irreparable injuries on Plaintiffs and thus deprive them of meaningful judicial review. Such proceedings are initiated by the filing by a of a charge that an agency has engaged in an unfair labor practice prohibited by the statute, which the FLRA's General Counsel, who investigates the charge and has the sole authority to "file and prosecute complaints," 5 U.S.C. § 7104(f)(1) and (2), which initiate proceedings that can lead to hearings before administrative law judges and ultimately decisions of the FLRA itself, *see id.* § 7105(a)(2)(G).

The fact that the FLRA General Counsel position is vacant[4] (and has been since 2017[5]) means that no unfair labor practice complaints can issue until and unless the President nominates a candidate for General Counsel and the Senate confirms such nomination.[6] And even if a General Counsel were to be nominated and confirmed, it is vanishingly unlikely that unfair labor practice charges challenging EO 14,251 will ever reach the FLRA. Given EO 14,251's exclusion

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[4] *See* FLRA, Office of General Counsel Biographies, https://perma.cc/8BD6-3UNP.

[5] *See* Gov't Accountability Office, *Violation of the Time Limit Imposed by the Federal Vacancies Reform Act of 1998: General Counsel, Federal Labor Relations Authority* 2-3 (Feb 8, 2023), https://www.gao.gov/products/b-334563#:~:text=BACKGROUND,President%20Biden%20nominated%20Kurt%20T.

[6] FLRA, *Unfair Labor Practice Case Processing in the Absence of a General Counsel* (March 3, 2008) ("Unfair labor practice complaints may only be issued when the FLRA has a General Counsel."), https://perma.cc/7RSX-TQQE.

of DOD, the FLRA's case law clearly holding that an executive order excluding an agency from Chapter 71 divests the FLRA of jurisdiction over complaints against excluded agencies, as well as the general principle that agencies are bound by executive orders until and unless such orders are invalidated through judicial processes, any future FLRA General Counsel would almost certainly decline to issue a complaint raising challenges to EO 14,251. Such action by the FLRA General Counsel forecloses judicial review altogether because it is an exercise of prosecutorial discretion, not a final decision of the FLRA. *See Turgeon v. FLRA*, 677 F.2d 937, 940 (D.C. Cir. 1982) ("Congress clearly intended the General Counsel of [FLRA] to have unreviewable discretion to decline to issue unfair labor complaints. … [T]here is thus no 'final order of the Authority' subject to judicial review under section 7123 of the Act.").

Given Plaintiffs' exhaustive showing that EO 14,251 has already caused and will continue to cause irreparable harm to Plaintiffs and their members (Doc. 22-1 at 6-26, 42-45), any relief that could eventually come from a reviewing court at the end of this process would come far too late to afford meaningful judicial review, given that this is an "area where relief, if it is to be effective, must come quickly," *In re Am. Fed'n of Gov't Emps.*, 790 F.2d at 117-18. Indeed, the Supreme Court has long held that "'the presence of constitutional questions, coupled with a sufficient showing of inadequacy of prescribed administrative relief and of threatened or impending irreparable injury flowing from delay …, has been held sufficient to dispense with exhausting the administrative process before instituting judicial intervention.'" *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 527 (1977), quoting *Aircraft & Diesel Equip. Corp. v. Hirsch*, 331 U.S. 752, 773 (1947). *See also Nat'l Laws. Guild v. Brownell*, 215 F.2d 485, 486 (D.C. Cir. 1954) (same).

This point is further reinforced by the Fourth Circuit's recent decision in *Nat'l Ass'n of Immigr. Judges v. Owen*, 139 F.4th 293 (4th Cir. 2025), a case arising under the CSRA. The court explained that *Thunder Basin* preclusion presupposes the CSRA's "functioning as Congress intended," meaning that the MSPB and Special Counsel (whose function is similar to that of the FLRA General Counsel) "function such that they fulfill their roles prescribed by the CSRA." *Id.* at 304, 305. If, however, "the Senate-confirmed roles in the MSPB and Special Counsel go unfilled, or if the agencies fail to perform their duties such that covered employees' claims are not adequately processed, then the framework of the CSRA would be thwarted": "[e]ither situation would defeat congressional intent, as Congress enacted the CSRA for the express purpose that the merit system function and that claims be addressed adequately and efficiently." *Id.* at 305. "If claims are not so processed," the court continued, "then turning to the MSPB or Special Counsel through the CSRA would be futile." *Id.*

The scenario of agency dysfunction set out in *Owen* precisely describes the state of the FLRA. The agency has been without a General Counsel for the better part of eight years, exacerbating the FLRA's documented history of delays. The membership of the FLRA has been in considerable turmoil since President Trump's February 11, 2025, dismissal of Member Tsrui Grundmann.[7] While the FLRA now has a quorum of two members, they are divided on party lines, as the third tie-breaking seat on the FLRA is vacant,[8] which further impedes expeditious

[7] Grundmann was reinstated on March 12, 2025 by the order in *Grundmann v. Trump*, 770 F. Supp. 3d 166, 190 (D.D.C. 2025), which was then stayed on July 3, 2025, *Grundmann v. Trump*, No. 25-5165, 2025 WL 1840641, at *1 (D.C. Cir. July 3, 2025), *reconsideration en banc denied*, No. 25-5165, 2025 WL 1995785 (D.C. Cir. July 16, 2025). Grundmann's term expired on July 1 of this year.

[8] *See* 5 U.S.C. § 7104(a) ("The Federal Labor Relations Authority is composed of three members, not more than 2 of whom may be adherents of the same political party."); FLRA, *FLRA Leaders*hip [as of July 27, 2025], https://perma.cc/WVD7-63AJ .

resolution of cases. It thus cannot be said that the FLRA is functioning as Congress intended so as to justify preclusion.

Nor would filing grievances raising Plaintiffs' challenges to EO 14,251 result in meaningful judicial review. Under Chapter 71, judicial review in the grievance setting is available only when the FLRA has issued a decision on a party's exceptions to an arbitrator's decision, and the order involves an unfair labor practice. *See* 5 U.S.C. §§ 7105(b)(2)(H), 7122(a), 7123(a)(1). Leaving aside whether challenges to an executive order excluding agencies from Chapter 71 constitute a grievance or an unfair labor practice—which is at least doubtful—EO 14,251's exclusion of DOD from Chapter 71 would stymie judicial review entirely or at best delay it for such a prolonged period of time as to render it meaningless. That is because a reviewable FLRA order on a grievance can only come after a sequence of required steps has been completed, namely: (1) after the union files a grievance with the agency, the union and agency have processed the grievance throughout the initial steps of the CBA's grievance procedure and the agency has made a determination on the grievance; (2) the union has invoked arbitration and the parties have presented their cases to the arbitrator; and (4) an arbitrator has held hearings and issued an award.[9]

But as extensively documented in our opening brief (Doc. 22-1 at 20-23) DODEA has, by reason of EO 14,251, ceased participating in the grievance-and-arbitration process under its CBAs, cancelled pending arbitrations, told arbitrators in pending cases that they have no jurisdiction to render decisions and that the unions no longer have representative status, and

[9] *See* 5 U.S.C. §§ 7121, 7123(a)(1); Doc. 22-2 at 57-65 (grievance and arbitration provisions of CBA between FEA and DODEA); *id.* at 289-303 (grievance and arbitration provisions of CBA between FEA-SR and DODEA); Doc. 22-4 at 101-108 (grievance and arbitration provisions of CBA between ACEA and DODEA).

cancelled arbitrators' contracts while making clear that DODEA would not honor its contractual obligations to pay its share of the arbitrators' fee for any work performed after the issuance of EO 14,257 (through *ex parte* communications, no less). Consequently, any grievance raising Plaintiffs' challenge to EO 14,251 would not get past the initial steps of the parties' grievance procedures, which require DODEA to participate in processing and resolving grievances at the agency level before arbitration can be invoked,[10] much less would it reach an arbitral award.

2. The Government's contention that "Plaintiffs' claims are within the statutory scheme and not collateral to it" (Doc. 27 at 23) rests not only on the erroneous proposition that Plaintiffs remain subject to Chapter 71 but also on a mischaracterization of Plaintiffs' claims. Defendants assert that "Plaintiffs challenge DoDEA's refusal to abide by provisions of their CBAs with respect to various actions they have taken" and "complain that by following the Executive Order, DoDEA has not complied with FSLMRS requirements" which, in the Government's telling, are nothing more than Chapter 71 grievances and unfair labor practices. (Doc. 27 at 23-24.) To the contrary, Plaintiffs challenge President Trump's executive order as *ultra vires* and in violation of the Constitution's separation of powers and its First and Fifth Amendments. While the harms that Plaintiffs have demonstrated in support of their standing and entitlement to injunctive relief arise from DODEA's implementation of EO 14,251—which involves abrogating its CBAs with Plaintiffs in manifold ways and engaging in conduct that would constitute unfair labor practices if Chapter 71 still applied—this in no way converts those harms into grievable CBA violations or

[10] *See* Doc. 22-2 at 60-61 (provisions of CBA between FEA and DODEA prescribing initial grievance steps); *id.* at 291-94 (provisions of CBA between FEA-SR and DODEA prescribing initial grievance steps); Doc. 22-4 at 102-05 (provisions of CBA between and DODEA prescribing initial grievance steps).

FLRA-cognizable unfair labor practice claims. Those harms are all downstream of EO 14,251, which is the focus of Plaintiffs' claims.

3. The Government's perfunctory contention that Plaintiffs' claims implicate the FLRA's expertise on labor-relations issues (Doc. 27 at 24) is unavailing because, once again, the executive order at issue removed DODEA, and thus Plaintiffs and their members, from Chapter 71's labor-relations framework. And the Government has failed to show that the FLRA has ever contended with constitutional issues and questions of presidential authority of the kind raised here, and its claim of general constitutional expertise rests on citations to a small handful of FLRA decisions dealing with individual employees' constitutional employment claims or incidentally addressing constitutional provisions (Doc. 27 at 24-25), which can hardly be said to credential the FLRA as an authority on constitutional law. *Cf. Ampersand Pub., LLC v. NLRB*, 702 F.3d 51, 55 (D.C. Cir. 2012) ("We owe no deference to the Board's resolution of constitutional questions.").

B. The President's exercise of the authority granted by Section 7103(b) is not insulated against judicial review

The Government insists (Doc. 27 at 33-35) that President Trump's exercise of the authority granted by Section 7103(b) is not subject to any judicial review. But this argument is without merit.

1. The Government leads with the broad claim that "[t]he D.C. Circuit has repeatedly recognized that § 7103(b)(1) entrusts the relevant determinations to the President alone, without interference from courts or other actors." (Doc 27 at 32.) The primary authority that the Government relies on for this sweeping claim is *Am. Fed'n of Gov't Emps. v. Reagan*, 870 F.2d 723 (D.C. Cir. 1989) ("*AFGE v. Reagan*"). But that case held nothing of the kind.

In *AFGE v. Reagan*, the D.C. Circuit reversed a district court decision invalidating President Reagan's executive order amending President Carter's initial Section 7103(b) order to exclude subdivisions of the U.S. Marshals Service. 870 F.2d at 725. The sole ground for the district court's decision was that President Reagan's failure to expressly recite that he had made the determinations set forth in Section 7103(b) rendered the order invalid. 870 F.2d at 725. On appeal, the D.C. Circuit did *not* rule that the validity of a Section 7103(b) order is nonreviewable. To the contrary, the court reversed on the merits: it held that because the statute "does not expressly call upon the President to insert written findings into an exempting order," and because '[t]he executive order under review cited accurately the statutory source of authority therefor, and purported to amend an earlier order that indubitably was a proper exercise of that authority," neither the district court nor the union plaintiff had rebutted the presumption of regularity, pursuant to which "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *Id.* at 726-27 (citation and quotation marks omitted).

The only other D.C. Circuit precedent the Government offers to support its contention that that court has "repeatedly recognized" the purported non-reviewability of the President's determinations under Section 7103(b) is *Dep't of Def. v. FLRA*, 685 F.2d 641 (D.C. Cir. 1982) ("*DOD v. FLRA*"), which the Government reduces to a misleadingly cropped three-word snippet. *See* Doc. 27 at 34 (stating that the court has "emphasized that the statutory determination is entrusted to 'the President alone,'" quoting 685 F.2d at 650). But that decision, too, did not hold that Section 7103(b) determinations are unreviewable; indeed, it did not involve review of a Section 7103(b) order at all.

In *DOD v. FLRA*, the court upheld an FLRA decision concluding that army regulations dealing with the conduct of DOD personnel stationed abroad and with the rationing of goods offered at post exchanges and the registration of vehicles owned by Army personnel were mandatory subjects for collective bargaining under Chapter 71. 685 F.2d at 647-48. The court's reference to Section 7103(b) came at the close of its opinion, where it addressed the Army's claim that the FLRA's order should be set aside because, in the Army's view, bargaining over the subjects described above would "cause difficulties in relations with our military allies." *Id.* at 650. In rejecting that claim, the court noted that Section 7103(b) "provides a specific remedy" that addresses "whatever conflicts may arise between the policy in favor of collective bargaining by federal employees and the interest in preserving our national security." 685 F.2d at 650. It was in that context that the court said the following:

> But when collective bargaining is asserted to interfere with those efforts, and consequently to pose a threat to national security interests, *it is for the President alone to invoke the protective provisions of the statute*. *The Army, like any other federal employer, may not arrogate to itself the President's power in this regard*; it must adhere to its statutory duty to bargain in good faith with its civilian employees. [*Id.* (emphasis added).]

The court's full statement shows that the three words "the President alone" had nothing to do with judicial review of an order issued under Section 7103(b), or with the courts at all, but simply meant that the Army cannot make its own Section 7103(b) determinations.[11]

2. The Government also argues that the President's exercise of authority under Section 7103(b) is unreviewable for two doctrinal reasons: (a) because the statue makes that exercise

[11] The Government (Doc. 27 at 34) also cites an unpublished decision from this District, *Nat'l Treasury Emps. Union v. Reagan*, No. 80-cv-606, 1981 WL 150530 (D.D.C. Sept. 3, 1981), but even that non-binding decision stopped short of ruling that Section 7103(b) orders are entirely unreviewable by acknowledging that such orders are "reviewable to the extent they involve 'instances of constitutional dimension or gross violation of the statute,'" *id.* at *3, quoting *Int'l Bhd. of Teamsters. v. Bhd. of Ry., Airline & S. S. Clerks*, 402 F.2d 196, 205 (D.C. Cir. 1968).

wholly discretionary and (b) because it involves national security determinations. Neither is accurate.

(a) The leading Supreme Court case on the question whether a statute commits such unfettered discretion to the President as to preclude judicial review is *Dalton v. Specter*, 511 U.S. 462 (1994), a case discussed in our opening brief (Doc. 22-1 at 44, 46-47) but cited nowhere in the Government's brief. At issue in *Dalton* was a statute empowering the President to approve or disapprove a commission's recommendations as to military base closures that "d[id] not at all limit the President's discretion in approving or disapproving the Commission's recommendations." 511 U.S. at 476. Because the statute established no limiting conditions or criteria, the Court found plaintiffs' challenge to the President's adoption of such a commission's recommendations non-reviewable, stating that "nothing in [the statute] prevents the President from approving or disapproving the recommendations for whatever reason he sees fit." *Id.* Indeed, in *Chamber of Com. of U.S. v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996), the D.C. Circuit, in the course of invalidating an executive order because it conflicted with federal labor law, rejected the Government's argument that the President's use of his procurement authority was unreviewable under *Dalton*, stating: "*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." *Id.* at 1331-32. The statute here, by contrast, establishes two narrow limitations on the President's statutory authority; hence, even assuming that the exercise of that authority involves some discretion, it is not such untrammeled discretion that "judicial review of an abuse of discretion claim is not available." *Id.*

While bypassing *Dalton*, the Government seeks to make much of the Court's observation in *Bouarfa v. Mayorkas*, 604 U.S. 6, 13 (2024), a case involving the Secretary of Homeland Security's visa-revocation authority, that "the word 'may' clearly connotes discretion." The Government urges that this passage, in isolation, compels the conclusion that EO 14,251 is unreviewable by virtue of Section 7103(b)'s use of the phrase "may issue." Doc. 27 at 33. But once again, the Government has omitted critical context and reasoning. While the *Bouarfa* Court ruled that the visa-revocation statute at issue was committed to agency discretion by law under the Administrative Procedure Act, that conclusion did not turn on the use of the word "may" alone. The statute at issue in *Bouarfa* provides that "the Secretary may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any [visa] petition," 8 U.S.C. § 1155, and the Court relied on all of that permissive language in reaching its decision:

> Congress has in no way prescribed how that discretion must be exercised. There are no conditions that the Secretary must satisfy before he can revoke the agency's approval; he may do so "at any time," for whatever reason "he deems to be good and sufficient cause." That broad grant of authority "fairly exudes deference." [604 U.S. 6, 13-14 (citations omitted).]

Needless to say, Section 7103(b) does prescribe conditions on how the President may exercise his authority to exclude agencies and subdivisions from Chapter 71, and it has none of the broadly permissive language the Court relied on in the passage above. *See also Amador Cnty., Cal. v. Salazar*, 640 F.3d 373, 381 (D.C. Cir. 2011) (rejecting a similar argument by the Government and concluding that "the use of 'may'" in the statute at issue was "best read to limit the circumstances" in which the Secretary may act).

(b) This brings us to the Government's suggestion (Doc. 27 at 34-35) that the fact that EO 14,251 purports to invoke "national security" insulates it from judicial scrutiny. This suggestion, first of all, is contrary to *Cole v. Young*, 351 U.S. 536 (1956), which exercised judicial review over a federal employee's challenge to his dismissal under a statute authorizing

agency heads to summarily suspend, and eventually discharge, federal employees "in the interest of the national security of the United States." 351 U.S. at 541. Defendant's view that the words "national security" ward off any judicial review is incompatible with the *Cole* Court's having exercised review.

The Government once again overreaches in its reading of the primary authority on which it relies, *Trump v. Hawaii*, 585 U.S. 667 (2018), which concerns the President's authority under a statute authorizing him to suspend the entry of aliens that, as discussed below, is drawn in vastly more permissive terms than Section 7103(b) is. In the *Hawaii* case, the Government sought to avoid judicial review of President Trump's 2017 executive order barring entry of persons from six countries, by asserting the especially potent doctrine of "consular non-reviewability," 585 U.S. at 682, which is peculiar to the immigration setting and is based on the political branches' plenary power over the admission or exclusion of foreign nationals, *see Dep't of State v. Muñoz*, 602 U.S. 899, 907-08 (2024). But the Court declined to apply that doctrine, and instead "assume[d] without deciding" that plaintiffs' claims were reviewable. *Id.* at 682-83. While the Court went on to apply a deferential standard of review, it did so because it found that the statute "exudes deference to the President in every clause":

> It entrusts to the President the decisions whether and when to suspend entry ("[w]henever [he] finds that the entry" of aliens "would be detrimental" to the national interest); whose entry to suspend ("all aliens or any class of aliens"); for how long ("for such period as he shall deem necessary"); and on what conditions ("any restrictions he may deem to be appropriate"). [*Id.* at 864, quoting 8 U.S.C. § 1182(f).]

Hence, *Trump v. Hawaii* fails to support the Government's attempt to avoid judicial review altogether. And at the same time, the Government's reliance on *Trump v. Hawaii* to support its plea that any review of EO 14,251 must follow the kid-gloves approach in that case (Doc. 27 at 34, 36, 40, 43) is fatally undermined by the fact that the immigration provision at issue there is vastly more permissive than the narrow conditions imposed by Section 7103(b).

II. Plaintiffs' Claim that EO 14,251 is *Ultra Vires* and Violates the Separation of Powers Is Likely to Succeed

A. The Government's primary response to our showing that EO 14,251 is *ultra vires* to such an extent that it violates the separation of powers (Doc. 22-1 at 39-47) is the contention that the President acted within his statutory authority by excluding DOD as a whole, because Section 7103(b) authorizes the President to exclude entire agencies as well as agency subdivisions that have national security as "a primary function" and DOD qualifies as an "agency" (Doc. 27 at 28-29). That contention is misguided for two reasons.

First, the Government's effort to narrow attention on DOD in isolation is unavailing, as the staggering overbreadth of EO 14,251, coupled with the President's contemporaneous statements showing that reasons unrelated to national security interests (including the altogether improper motive of retaliation against federal unions for their use of Chapter 71's provisions and other constitutionally protected speech and petitioning), render the executive order, as a whole, void.[12] Not only does the overbreadth of EO 14,251 invalidate the executive order in its entirety, but the improper motives that the President baldly set forth in his contemporaneous justifications for EO 14,251 infect every one of its myriad exclusions. Even if we indulge the assumption that a hypothetical executive order that excluded only DOD would be a proper application of Section 7103(b)(1)—which for the reasons discussed below is not the case—the Government cannot salvage this executive order by positing an entirely different and narrower one.

[12] *See Manhattan Gen. Equip. Co. v. Comm'r of Internal Revenue*, 297 U.S. 129, 134 (1936) ("A regulation which … operates to create a rule out of harmony with the statute, is a mere nullity."); *Transohio Sav. Bank v. Dir., Off. of Thrift Supervision*, 967 F.2d 598, 621 (D.C. Cir. 1992) (holding that "agency actions beyond delegated authority are '*ultra vires*,' and courts must invalidate them"); *E.E. v. Norris Sch. Dist.*, 4 F.4th 866, 872 (9th Cir. 2021) ("An agency that exceeds the scope of its statutory authority acts *ultra vires* and the act is void.").

Second, Section 7103(b) does not authorize EO 14,251's exclusion of the entirety of DOD, even if it is considered in isolation. Section 7103(b) establishes two conjunctive limits on the President's authority to exclude agencies and agency subdivisions from Chapter 71: the agency or subdivision must have "as a primary function intelligence, counterintelligence, investigative, or national security work, *and* … the provisions of [Chapter 71] cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations." 5 U.S.C. § 7103(b)(1)(A) and (B) (emphasis added). In the Government's view, it is enough to say that the statute authorizes the exclusion of "agencies" and that a primary function of DOD, an agency, is national security. Doc. 27 at 28-29.

But that view does not give effect to the provision's second, more stringent limiting condition, *viz.*, that collective bargaining "cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations." 5 U.S.C. § 7103(b)(1)(B). If that second condition is to mean anything, it must mean that the President cannot exclude an entire agency that has national security as a primary purpose if collective bargaining *can* be conducted by agencies and subdivisions of that agency in a manner consistent with national security requirements and considerations. The verb "cannot" is a strong one, admitting of no wiggle room. Thus, if collective bargaining *can* be conducted by subdivisions of an agency consistent with national security, it is untenable to conclude that the provisions of Chapter 71 "*cannot be applied to that agency* … in a manner consistent with national security requirements and considerations." *Id.* § 7103(b)(1)(B) (emphasis added).[13]

[13] EO 14,251 implicitly acknowledges that exclusion is unwarranted as to some agencies and agency subdivisions within DOD, as it delegates to the Secretary of Defense the authority to "suspend[] the application" of EO 14,251's exclusion "to any subdivisions of the departments they supervise, thereby bringing such subdivisions under the coverage of [Chapter 71]" upon
(*footnote continued . . .*)

This reading gives full effect to the text of the statute's second condition. It also carries out Congress's purpose in enacting Chapter 71, which, as detailed in our opening brief (Doc. 22-1 at 39-41), is to extend collective bargaining to agency employees to the maximum extent consistent with national security, and is confirmed by the practice of every President who has invoked his Section 7103(b) prior to the issuance of EO 14,251, including President Trump in his first term, who issued targeted orders excluding agencies and agency subdivisions that are clearly engaged in sensitive intelligence and/or national security work (Doc. 22-1 at 20-21, 41-43). By contrast, the Government's position—that the President can exclude any agency (including a Cabinet Department) so long as it has national security as a primary purpose and it includes *any* sub-agency or agency subdivision in which collective bargaining cannot be conducted consistent with national security—is inconsistent with all of these indicia of Section 7103(b)(1)'s meaning.

B. The Government's alternative argument—that DODEA actually *is* engaged in national security because the "ability to provide high-quality education" to the children of DOD personnel helps recruitment and retention of staff (Doc. 27 at 21)—is meritless. As we have shown (Doc. 22-1 at 39-41), and as this Court recognized in *NTEU I*, 2025 WL 1218044 at *15, *Cole v. Young*, *supra*, is the key precedent addressing claims involving whether executive actions are justified by national security in the context of federal employee protections. Cole defines

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their certification that the provisions of Chapter 71 "can be applied to such subdivision in a manner consistent with national security requirements and considerations." 90 Fed. Reg. 12,553, 14,555-56 (March 27,2025). And Secretary Hegseth exercised that authority to restore collective bargaining to "federal wage system employees in the trades" who work in four DOD subdivisions on, the finding that Chapter 71 "can be applied … in a manner consistent with national security requirements and considerations" with respect to those employees. DOD, *Executive Order 14251 Certification*, 90 Fed. Reg. 17,052 (April 23, 2025). While the radically underinclusive nature of Secretary Hegseth's order is a matter to be ligated in connection with Plaintiffs' Administrative Procedure Act claims—which are not at issue in this motion—that order further demonstrates that this administration acknowledges that collective bargaining can be conducted consistent with national security within components of DOD.

"national security" in this context as "to comprehend only those activities of the Government that are *directly* concerned with the protection of the Nation from internal subversion or foreign aggression, and not those which contribute to the strength of the Nation only through their impact on the general welfare." 536 U.S. at 544 (emphasis added).[14] Important though it is, the provision of education services to children of both uniformed and civilian DOD personnel within the U.S. and abroad is manifestly not an activity that is "directly concerned with the protection of the Nation from internal subversion or foreign aggression." DODEA's effects on the recruitment and retention of DOD personnel bear far too attenuated relationship with national security to justify stripping DODEA educators of the collective bargaining rights that they have exercised for more than half a century.

III. Plaintiffs' Claim that EO 14,251 Violates the First Amendment is Likely to Succeed

As detailed in our opening brief, Plaintiffs FEA and FEA-SR satisfied the three traditional elements of a First Amendment retaliation claim. As to the first element (protected activity) we showed, with copious evidentiary support, that they engaged in the exact protected activity targeted by the President, speech and petitioning activities in opposition to President Trump's policies including litigation, appeals to legislators, and grievances. (Doc. 22-1 at 19-20, 47-48.) We further showed that FEA and FEA-SR met the second and third elements (retaliatory

[14] In a half-hearted effort to resist the applicability of *Cole*, the Government urges that "[t]he President's discretion under § 7103(b)(1) is not constrained by the *Cole* Court's interpretation of 'national security' because the Court "*Cole* Court did not purport to announce a generally applicable definition of 'national security' across the United States Code." Doc. 27 at 30. That is a *non sequitur* because the *Cole* decision is the Court's only definitive word on the meaning of "national security" in the context of statutes governing the employment rights of federal employees, and the FLRA has looked to *Cole* in deciding issues under Chapter 71 that touch on whether federal employees are engaged in national security work, *see U.S. Dep't of Just.*, 52 F.L.R.A. 1093, 1100 (Mar. 14, 1997); *Dep't of Energy, Oak Ridge Operations*, 4 F.L.R.A. 644, 656 (Nov. 12, 1980). Hence, regardless of whether *Cole* has any broader application, it most certainly applies here.

action and causation) because their protected speech and petitioning activities placed them squarely in the class that President Trump described, in his Fact Sheet explaining the reasons for EO 14,251, as "hostile Federal unions" that "declared war on President Trump's agenda" by "filing grievances to block Trump policies," thus showing the causal between their protected activities and the President's retaliatory action—the executive order stripping them, along with a host of other federal employee unions, of their collective bargaining rights. (Doc. 22-1 at 47-48).

With respect to ACEA, which did not engage in activities placing it within the class of "hostile Federal unions" identified by the President but was nonetheless swept up in the dragnet of President Trump's retaliatory executive order, we made an alternative showing that the under the principles set forth in *Heffernan v. City of Paterson, N.J.*, 578 U.S. 266 (2016), and *Welch v. Ciampa*, 542 F.3d 927, 939 (1st Cir. 2008), the First Amendment protects against retaliation directed at a broad swath of federal unions for the speech and petitioning activities of some of those unions because the retaliatory action, and the motivation behind it, chill the speech of all impacted unions. (Doc. 22- 1 at 48-49)

All this being so, there is no basis for the Government assertion (Doc. 27 at 37) that "Plaintiffs fail to establish any element necessary to prove a retaliation claim." Right out of the gate, the Government falsely asserts that "Plaintiffs do not demonstrate that they engaged in protected conduct." (Doc. 27 at 38.) The Government also erroneously avers that Plaintiffs "acknowledge that the President did not have any of the Plaintiffs in mind when he issued the Executive Order" when we did nothing of the kind, and "make no attempt to establish a causal connection between Plaintiffs' actual or perceived conduct and the Executive Order." (Doc. 27 at 37.) Our opening brief, as summarized above, puts paid to these contentions. We pause only to make two further points.

First, the Government's suggestion that the White House's Fact Sheet is insufficient to show either retaliatory motive or causation (Doc. 27 at 38) was roundly rejected in *AFGE I*. Noting that in establishing causation, "it is sufficient for the plaintiffs to demonstrate circumstances connecting the defendant's retaliatory intent to the suppressive conduct," the court reasoned as follows:

> the Fact Sheet expressed a clear point of view that is hostile to federal labor unions and their First Amendment activities. The Fact Sheet called out federal unions for vocal opposition to President Trump's agenda. It condemned unions who criticized the President and expressed support only for unions who toed the line. It mandated the dissolution of long-standing collective bargaining rights and other workplace protections for federal unions deemed oppositional to the President. All of this is solid evidence of a tie between the exercise of First Amendment rights and a government sanction. [2025 WL 1755442, at *11 (citations and quotation marks omitted.)[15]]

Second, the Government fails entirely to engage with our showing that ACEA clearly fits within the reasoning of *Heffernan*, which stressed that "the government's reason for" its adverse action, rather than whether the plaintiff had engaged in protected activity, "is what counts," 578 U.S. at 270, and *Welch*, which found "no principled basis for holding that an employee who supports an opposition group is protected by the First Amendment but one who chooses to remain neutral is vulnerable to retaliation," 542 F.3d at 939.

IV. Plaintiffs' Claim that EO 14,251 Violates the Fifth Amendment's Equal Protection Guarantee Is Likely to Succeed

The Government responds to Plaintiffs' equal protection claim with a baseless assertion that Plaintiffs have not "identified any discernible class," followed by an irrelevant excursus on

[15] Given that the plaintiffs in *AFGE I* are six federal unions, this passage combined with the court's holding that the plaintiffs were likely to succeed on their retaliation claims, not only support causation here but also refute the Government's curious insistence (Doc. 27 at 38) that only a union that is indirectly identified in the Fact Sheet or that can otherwise demonstrate "that the President had [it] in mind when issuing the Executive Order" can show such a causal connection.

Plaintiffs' putative failure to established the prerequisites for a "class-of-one" equal protection claim. But Plaintiffs most certainly have identified a class of unions that received favorable treatment under the executive order: as we made clear, EO 14,251 was peculiarly gerrymandered to exclude "75% of all union-represented federal employees across multiple Cabinet Departments and independent agencies, while providing a blanket exception for agency police and firefighters," whose patterns of political support clearly favored President Trump. (Doc. 22-1 at 50.) Accordingly, Plaintiffs' claim, as made clear in our opening brief (Doc. 22-1 at 49-50), is based on the long line of Supreme Court authority holding that even under rational basis review, "[t]he Constitution's guarantee of equality must at the very least mean that a bare … desire to harm a politically unpopular group cannot justify disparate treatment of that group." *U.S. v. Windsor*, 570 U.S. 744, 770 (2013) (cleaned up) (striking down federal law denying recognition of same-sex marriages).[16] As the Government has made no serious effort to justify the blatantly discriminatory nature of EO 14,251, while addressing at length a class-of-one claim that we have not made, we need say no more on this point.

V. Plaintiffs' Claims that EO 14,251 Violates the Fifth Amendment's Protections Against Takings and the Deprivation of Property Without Due Process of Law Are Likely to Succeed

The Government's response to our showing that EO 14,251 violates the Fifth Amendment by nullifying CBAs lawfully entered into by the Government, EO 14,251 violates the Fifth Amendment's protection against improper takings and/or its protection of substantive

[16] *See also City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (invalidating zoning action against group home resting on an "irrational prejudice" against disabled persons); *Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534-35 (1973) (holding that legislation denying nutrition assistance benefits to non-traditional households "clearly cannot be sustained" on Congress's stated purpose of "prevent[ing] so-called 'hippies' and 'hippie communes' from participating in the … program").

due process as well as its guarantee of procedural due process (Doc. 22-1 at 50-52) hinges on its demonstrably erroneous contention that Plaintiffs' CBAs give rise to no "property interest" protected by the Fifth Amendment (Doc. 27 at 44).

For more than 90 years, the Court has affirmed that the Fifth Amendment protects against the Government's retroactive abrogation of its contracts. In *Lynch v. U.S.*, 292 U.S. 571, 579 (1934), the Court held that "[v]alid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States" and that as such, contracts with the Government are protected by the Takings Clause and the Due Process Clause. The Court repeatedly reaffirmed this principle in the decades that followed. *See Cherokee Nation of Okl. v. Leavitt*, 543 U.S. 631, 646 (2005); *U.S. v. Winstar Corp.*, 518 U.S. 839, 875-76 (1996). We further detailed how EO 14,251, as implemented by DODEA, has abrogated CBAs lawfully entered into with the Government and retroactively extinguished vested rights under them, including FEA's and FEA-SR's unresolved pay grievances on behalf of more than 900 educators and employees' rights to draw on donated leave hours provided in the sick leave bank established by ACEA's CBA with DODEA. (Doc. 22-1 at 50-52.)

Against all this, the Government offers two lower-court decisions (Doc. 27 at 44), neither of which, as we show in the margin, comes close to undermining those precedents.[17] In light of that deficient response it also bears emphasis here that that nowhere in the Government's

[17] The first is *Nat'l Urban League v. Trump*, 25-cv-471, 2025 WL 1275613, at *18 (D.D.C. May 2, 2025), stating that "ordinary or routine government contracts do not, by themselves, give rise to ... an interest that due process protects." This unpublished decision obviously cannot undermine nearly a century's worth of Supreme Court precedent, even if it could be said that CBAs are "ordinary of routines." The second is wholly inapposite, as it says no more than that "a simple breach of contract does not amount to an unconstitutional deprivation of property." *Redondo-Borges v. U.S. Dep't of Hous. & Urb. Dev.*, 421 F.3d 1, 10 (1st Cir. 2005). We are not here dealing with a simple breach of contract but the wholesale abrogation of CBAs that governed the terms and conditions of employment of many thousands of DODEA educators.

brief does it acknowledge, much less address, our showing (Doc. 27 at 48) that DODEA's wholesale abrogation of its CBAs has, among other things, scuttled grievance-and-arbitration proceedings on behalf of more than 900 educators, a bizarre concession by omission, particularly in light of its preposterous assertion (*id.*) that "DOD has yet to take any action to terminate a CBA."

VI. Plaintiffs and Their Members Are Suffering Irreparable Harm

The Government's primary response to our extensive and meticulously documented showing of ongoing and imminent irreparable harm to Plaintiffs and their members by reason of EO 14,251 (Doc. 22-1 at 25-35, 51-54), is its assertion that Plaintiffs have waited too long to seek preliminary relief (Doc. 27 at 46-47). This claim is as ironic as it is misguided. Had Plaintiffs filed sooner, the Government surely would have argued that we filed too soon—which the Government successfully did before the special panel in *Nat'l Treasury Emps. Union v. Trump*, No. 25-cv-5157, 2025 WL 1441563 (D.C. Cir. May 16, 2025) ("*NTEU II*")—and even now the Government urges that Plaintiffs here have filed too soon. (Doc 27 at 48 (asserting that "any loss of clout or related loss of bargaining power is too speculative a basis for granting relief at this stage" and that "DoD has yet to take any action to terminate a CBA—so any loss of members is not certain or imminent"). In any event, Plaintiffs can hardly be faulted for taking the time needed to prepare a robust record on irreparable harm so as to avoid a result such as that in *NTEU II*, especially since (1) Plaintiffs suffered harms well after EO 14,251 issued, including DODEA's unilateral reorganization which occurred after the complaint was filed;[18] and (2)

[18] Even with respect to the loss of payroll deduction, the full brunt of those harms has yet to be felt. When DODEA cut off deductions on April 8, 2025, all of the dues payments of FEA's overseas members for the 2024-25 school year had already been deducted, while three pay cycles for FEA's and FEA-SR's stateside members remained. (Doc. 22-2 at 9.) FEA and FEA-SR made

(*footnote continued . . .*)

"[c]omplicated labor disputes like this one require time to investigate and litigate." *Muffley v. Spartan Mining Co.*, 570 F.3d 534, 544 (4th Cir. 2009).[19]

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' motion for a preliminary injunction.

Respectfully submitted,

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extensive efforts to convince members to continue their membership by signing up for electronic dues payment, but those efforts were only partially successful, leading to a shortfall of more than $65,000 for the past school year. (*Id.*) As substantial a financial blow as that is, it pales in comparison to what will occur after the 2025-26 school year begins.

[19] As to the balance of the Government's arguments regarding Plaintiffs' harms and its own purported harms, we rest on our opening brief. That said, we would be remiss if we did not object in the strongest terms to the Government's request for a bond of either $1,152,000 or $15,000,000, depending on whether the Court issues an injunction in favor of Plaintiffs and their members (as we have requested) or one that applies throughout DOD (which we have not). As Professor Erwin Chemerinsky points out, "federal courts understandably rarely require that a bond be posted by those who are restraining unconstitutional federal, state, or local government actions" because "[t]hose seeking such court orders generally do not have the resources to post a bond and insisting on it would effectively immunize unconstitutional government conduct from judicial review." Erwin Chemerinsky, "A Terrible Idea," Just Security (May 19, 2025), https://www.justsecurity.org/113529/terrible-idea-contempt-court/. Furthermore, the declaration the Government submitted in support of these sums (Doc 27-1 at 16-17) fails to substantiate them. No justification is stated for the facially outrageous $15,000,000 figure, which in any event is purportedly keyed to a DOD-wide injunction we have not sought. And while the Government's declaration asserts that $1,152,000 is needed to compensate for DODEA's costs in covering any restored release-time obligations, it does not explain how it arrived at the figure of 8 full-time educators, why the average educator salary was chosen (when substitutes are typically at the lower end of the pay scale) or what period is covered. Consequently, we respectfully request that if the Court is considering setting a compensatory bond, instead of the nominal one we have requested, order the Government to substantiate its figures fully so that we have an opportunity to evaluate them and raise any further objections as appropriate.

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2025, the foregoing Reply in Support of Plaintiffs' Motion for a Preliminary Injunction was electronically filed with the Clerk of Court using the CM/ECF system and that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/Philip Hostak
Philip Hostak