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25 UNITED STATES DISTRICT COURT
26 FOR THE NORTHERN DISTRICT OF CALIFORNIA
27 SAN FRANCISCO DIVISION

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

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity
as President of the United States, et al.,

Defendants.

Case No. 3:25-cv-03698-SI

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS
AMENDED COMPLAINT**

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INTRODUCTION

On April 28, 2025, in response to an “unprecedented attempted restructuring of the federal government and its operations,” *AFGE v. Trump*, 139 F.4th 1020, 1028 (9th Cir. 2025), Plaintiffs—a coalition of unions, nonprofits, and local governments—brought seven claims against Defendants President Donald J. Trump and the federal agencies that were implementing his orders. ECF 1; *see also* ECF 100 (Amended Complaint). Plaintiffs alleged that Defendants were engaged in ultra vires actions in excess of any statutory or constitutional authority, as well as violations of the substantive and procedural provisions of the Administrative Procedure Act (“APA”). ECF 100 ¶¶ 382-431 (Claims I – VII).

Defendants’ primary argument is that “all seven claims in the Amended Complaint depend on the assertion that the Workforce Executive Order, the Workforce Memorandum, or both are unlawful,” and therefore, in light of the Supreme Court’s stay decision, must be dismissed as a “matter of law.” ECF 216 at 2; *see Trump v. AFGE*, No. 24A1174, 2025 WL 1873449 (U.S. July 8, 2025). However, Defendants’ argument is premised on misconstructions of both Plaintiffs’ claims and the Supreme Court’s order.

Section I below explains why all of Plaintiffs’ claims survive the Supreme Court’s stay order and this motion, including for the reasons previously addressed by this Court. Plaintiffs’ claims are not limited to, and do not depend only on, facial challenges to Executive Order 14,210 (“EO”) and the implementing Memorandum from the Office of Management and Budget (“OMB”) and Office of Personnel Management (“OPM”). Five of Plaintiffs’ seven claims go beyond the facial challenges to the EO and OMB/OPM Memorandum to also challenge the manner in which OMB, OPM, the newly created Department of Government Efficiency (“DOGE”), and the Federal Agency Defendants have implemented the President’s directives, including by engaging in arbitrary and capricious and otherwise unlawful actions in violation of the APA. ECF 100 ¶¶389-431 (Claims II, III, IV, VI, and VII).¹

¹ “Federal Agency Defendants” refers to the agency defendants other than OMB, OPM, and DOGE. ECF 100 ¶65.

1 Moreover, this Court has already correctly rejected Defendants’ argument that the Supreme
2 Court stay order ends this case. ECF 214, 228, 242. The single sentence in the Supreme Court’s
3 stay order stating that the Government is “likely to succeed” in arguing that the EO and
4 Memorandum are “lawful” does not explain the legal or factual basis or rationale for that
5 conclusion, and is not a merits decision that requires dismissal of any claims for failure to state a
6 claim pursuant to Rule 12(b)(6). *AFGE*, No. 24A1174, 2025 WL 1873449 at *1; *see* ECF 214 at 4
7 n.3.

8 Alternatively, Defendants contend that Plaintiffs fail to state a claim because: 1) ARPPs are
9 not final agency action; 2) Plaintiffs challenge hypothetical future agency action; and 3) to the
10 extent that Plaintiffs have alleged actual and ongoing actions to implement the EO and
11 Memorandum, Plaintiffs have not explained why such actions violate any statutes. ECF 216 at 2.
12 For reasons explained below, these alternative arguments also miss the mark (including because
13 they, again, largely mischaracterize Plaintiffs’ claims and allegations and rest on factual assertions
14 that are in dispute) and provide no basis to dismiss the Amended Complaint. In particular,
15 Defendants’ view that ARPPs are merely planning documents and that Plaintiffs simply speculate
16 about future action does not warrant dismissal: Plaintiffs adequately alleged that at the time
17 Plaintiffs filed their complaint, Defendants’ actions to dismantle federal agencies were in fact
18 approved and being implemented. ECF 100 ¶¶195-283 (detailing actions being taken to downsize
19 and reorganize agencies); *id.* ¶¶420-431 (challenging implementing action as unlawful).
20 Defendants cannot obtain dismissal by contesting facts.

21 Next, in Section II, Plaintiffs address Defendants’ attempt to revisit this Court’s subject
22 matter jurisdiction by arguing that if any claims survive the Supreme Court order, they are aimed at
23 “garden variety challenges to the lawfulness of federal agency personnel actions” so are
24 administratively channeled. ECF 216 at 2-3, 20-22. Defendants concede, as they must, that the
25 Supreme Court’s order did not invoke channeling, or purport to disturb this Court or the Ninth
26 Circuit’s prior conclusions on jurisdiction. ECF 85 at 18-25, ECF 124 at 18-27; *AFGE*, 139 F.4th
27 at 1030-33. This Court’s and the Ninth Circuit’s prior conclusions with respect to jurisdiction were
28

1 correct and apply to all of Plaintiffs’ claims because Congress did not remove express federal
2 jurisdiction from this Court.

3 Finally, Section III explains why there is no basis to dismiss the claims against Defendant
4 DOGE, including those claims against DOGE that this Court and the Ninth Circuit previously
5 addressed. ECF 85 at 32-34, ECF 124 at 34-36; *AFGE*, 139 F.4th at 1037-38.

6 BACKGROUND

7 The President issued Executive Order 14,210 (“Implementing the President’s “Department
8 of Government Efficiency” Workforce Optimization Initiative”) on February 11, 2025. ECF 100 at
9 1; *see* 90 Fed. Reg. 9669, 2025 WL 486773 (Feb. 11, 2025). The EO directed agencies to
10 “commence[] a critical transformation of the Federal bureaucracy” by engaging in large-scale
11 reductions-in-force (“RIFs”) to downsize the federal civil service and by reorganizing the structure
12 of federal agencies. ECF 100 at 1. It directed agencies, as part of their “large-scale reductions in
13 force,” to strip away many of their functions, including “all agency initiatives, components, or
14 operations that my Administration suspends or close” and those not designated as essential during
15 government emergency shutdowns. ECF 100 at 9.²

16 Soon after, OMB and OPM issued a Memorandum to all federal agencies implementing
17 that EO. ECF 100 ¶160. The OMB/OPM Memorandum required agencies to submit Agency RIF
18 and Reorganization Plans (“ARRPs”) under tight deadlines, *id.* ¶¶163-70, and directed agencies to
19 achieve a “significant reduction in the number of full-time equivalent” government positions
20 through their ARRPs. ECF 100 ¶164. The Memorandum further required agencies to submit

21
22 ² The EO did not identify or rely on any specific statutory authority, including the statutory references
23 to retention preference during reductions-in-force that Defendants contend grants authority to RIF,
24 or agencies’ “housekeeping” authority. ECF 216 at 3-6; *see* 90 Fed. Reg. 9669. Plaintiffs disagree
25 with Defendants’ inaccurate recounting of the supposed statutory basis for agencies’ authority to RIF
26 set forth in the “Background” to Defendants’ Motion, for reasons previously explained in this case.
27 *See* ECF 101-1 at 35, ECF 120 at 5-6; *see also* Opp. to Supp. Emergency Motion for Stay 15-18,
28 *AFGE v. Trump*, No. 25-3293 (9th Cir. May 27, 2025), ECF 7.1. In short, no statute provides federal
agencies *unfettered* authority to engage in downsizing via RIFs. *See* 5 U.S.C. §3101 (authorizing
agencies to employ “such number of employees” that “Congress may appropriate for from year to
year”); 5 U.S.C. §3502 (permitting OPM to create rules for retention preferences, not the authority
to RIF itself). Likewise, the housekeeping authority has *never* permitted substantive changes. *See* 5
U.S.C. §301; *Chrysler Corp. v. Brown*, 441 U.S. 281, 310 (1979).

1 “Phase 1” ARPPs, which “shall focus on initial agency cuts and reductions,” to OMB and OPM
2 “for review and approval,” within two weeks, by March 13, 2025. ECF 100 ¶168. The
3 Memorandum also required agencies to submit “Phase 2” ARPPs, for the purpose of reorganizing
4 what remained of agencies after the initial large-scale cuts, to OMB and OPM “for review and
5 approval,” by April 14, 2025. *Id.* ¶169.

6 OMB, OPM, and DOGE each took specific actions to direct federal agencies in the
7 implementation of this EO. *Id.* ¶¶16, 22, 23. OMB and OPM required the submission of ARPPs
8 for approval “according to the parameters and requirements” that OMB and OPM imposed on the
9 agencies. *Id.* at ¶13. Plaintiffs specifically alleged that OMB and OPM were directing agencies
10 with respect to the implementation of the EO via reorganization and workforce reduction, including
11 by rejecting cuts that did not go deep enough. *E.g., id.* ¶¶197, 203, 248, 251, 275, 282, 404, 411.
12 With respect to DOGE (the Administration’s own term for this new “Department”), Plaintiffs
13 alleged that: “DOGE, for its part, has been dictating to each agency the required cuts to staffing
14 and programs, in the name of ‘fraud and waste.’” *Id.* ¶¶13, 15-16, 23, 175, 282, 404, 411.

15 Defendants shielded their reorganization and downsizing decisions from the public, federal
16 employees, their labor representatives, and even Congress. *Id.* ¶18. Following the deadlines for
17 submission of ARPPs to OMB and OPM, many agencies began implementing these directives
18 from the President, OMB, OPM, and DOGE by reorganizing and issuing RIF notices to their
19 employees. *Id.* ¶¶19-20, 22-23, 175, 196-227 (ongoing implementation via reorganization and
20 RIFs), 228-78 (imminent implementation via reorganization and RIFs), 279 (alleging that the
21 above actions are being implemented). In particular, agencies acted to meet “targets” that the
22 agencies themselves did not create for the number and extent of cuts. *Id.* ¶¶175-76, 248, 251, 282.

23 Plaintiffs filed suit on April 28, 2025 and the operative Amended Complaint on May 14,
24 2025. ECF 1, 100. Based on the factual allegations described above, Plaintiffs pled seven claims:

- 25 (1) that the EO was ultra vires, exceeding any statutory or constitutional authority of the
26 President, and intruded on Congress’s Article I authority;

- 1 (2) that the actions of OMB, OPM, and DOGE to implement the EO, including the
- 2 OMB/OPM Memorandum and also other directives and requirements imposed on
- 3 agencies, were ultra vires;
- 4 (3) that those actions of OMB, OPM, and DOGE were not in accordance with law and were
- 5 in excess of statutory authority, in violation of the APA, 5 U.S.C. §706(2)(A), (C);
- 6 (4) that those actions of OMB, OPM, and DOGE were arbitrary and capricious, in violation
- 7 of the APA, *id.* §706(2)(A);
- 8 (5) that OMB, OPM, and DOGE’s actions (including the OMB/OPM Memorandum and
- 9 any “directives ordering agencies to make staffing and spending cuts”) violated the
- 10 procedural requirements of the APA, *id.* §706(2)(D);
- 11 (6) that the actions of the Federal Agency Defendants were not in accordance with law, in
- 12 violation of the APA, *id.* §706(2)(A), (C); and
- 13 (7) that the actions of the Federal Agency Defendants were arbitrary and capricious, in
- 14 violation of the APA, *id.* §706(2)(A).

15 The scope of the complaint is commensurate with the breadth of this administration’s government-
16 wide scheme to restructure and downsize federal agencies.

17 This Court issued a temporary restraining order on May 9, 2025 and a preliminary
18 injunction on May 22, 2025. ECF 85, 124. In issuing the preliminary injunction, the Court
19 concluded that Plaintiffs were likely to succeed on the ultra vires claims (Claims I and II), the APA
20 contrary-to-law claim against OMB, OPM, and DOGE (Claim III), and the APA procedural claim
21 against OMB, OPM, and DOGE (Claim V). ECF 124 at 41, 44. The Court reserved its ruling on
22 the merits of the APA arbitrary-and-capricious claim against OMB, OPM, and DOGE (Claim IV)
23 and the APA claims against the Federal Agency Defendants (Claims VI and VII). ECF 124 at 44.

24 Defendants appealed the preliminary injunction and sought a stay, which the Ninth Circuit
25 denied in a published opinion. *AFGE*, 139 F.4th at 1040. First, the Ninth Circuit rejected
26 Defendants’ arguments that federal courts lacked jurisdiction over Plaintiffs’ ultra vires and APA
27 claims. *Id.* at 1030-33. The Ninth Circuit then held that Plaintiffs were likely to succeed on claims
28 that the President exceeded any statutory or constitutional authority. *Id.* at 1033-37. The Court

1 then turned to “the actions taken by OMB, OPM, and DOGE” and concluded both that these
2 agencies lacked statutory authority to take the actions the record revealed, and that both the
3 OMB/OPM Memorandum and any OMB/OPM approvals of ARRPs were final action for purposes
4 of the APA. *Id.* at 1037-39.

5 Defendants sought a stay of the preliminary injunction from the Supreme Court, which
6 granted the application on July 8, 2025. *AFGE*, No. 24A1174, 2025 WL 1873449. The Supreme
7 Court’s order stated that “[b]ecause the Government is likely to succeed on its argument that the
8 Executive Order and Memorandum are lawful—and because the other factors bearing on whether
9 to grant a stay are satisfied—we grant the application.” *Id.* at *1. The Court made clear that its
10 conclusion about likely success on the merits was limited to Plaintiffs’ facial challenge to the EO
11 and Memorandum, and that it was not reaching other issues: “We express no view on the legality
12 of any Agency RIF and Reorganization Plan produced or approved pursuant to the Executive Order
13 and Memorandum.” *Id.* As the Supreme Court explained, the legality of ARRPs was “not before
14 th[e] Court” because “[t]he District Court enjoined further implementation or approval of the plans
15 based on its view about the illegality of the Executive Order and Memorandum, not on any
16 assessment of the plans themselves.” *Id.* Thus, the Court expressly left for the District Court to
17 decide in the first instance the lawfulness of agencies’ ARRPs. *Id.* at *1 (Sotomayor, J.,
18 concurring) (confirming that the Supreme Court had “no occasion to consider whether [the
19 ARRPs] can and will be carried out consistent with the constraints of law” and “[e]ft the District
20 Court free to consider those questions in the first instance”).

21 STANDARD OF REVIEW

22 Rule 12(b)(6) allows for dismissal for “failure to state a claim upon which relief can be
23 granted.” In considering a Rule 12(b)(6) motion, the Court must “accept all factual allegations in
24 the complaint as true and construe the pleadings in the light most favorable” to the non-moving
25 party. *Rowe v. Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1029-30 (9th Cir. 2009) (quotation
26 omitted). In a “facial” attack on jurisdiction pursuant to Rule 12(b)(1), the Court must also take the
27 allegations in the complaint as true. *Jaiyeola v. Brundage*, 754 F. Supp. 3d 910, 912 (N.D. Cal.
28 2024).

ARGUMENT**I. None of Plaintiffs' Claims Should Be Dismissed for Failure to State a Claim as a Matter of Law**

Defendants' motion to dismiss all of Plaintiffs' claims rests on at least two erroneous premises: first, that the Supreme Court issued a merits decision; and second, that all of Plaintiffs' claims turn on the outcome of that merits decision. Because both premises are wrong, none of Plaintiffs' claims are foreclosed by the Supreme Court's stay order. For that reason, and because Defendants' attempt to reargue the issues is unpersuasive, Defendants' Rule 12(b)(6) motion should be denied in its entirety.

A. Defendants ignore applicable law to convert the stay order into a dispositive merits decision

Defendants argue that the Supreme Court stay order opining that the EO and Memorandum are "likely" lawful "precludes" this Court from relying on its earlier determination with respect to the merits of certain of Plaintiffs' claims and is "dispositive." ECF 216 at 8-15. That argument ignores governing law regarding the nature, purpose, and effect of decisions on stay motions.

A decision on a motion to stay an injunction pending appeal is not a dispositive ruling on the merits of plaintiffs' claims. As the Ninth Circuit has instructed, "[s]uch a predictive analysis should not, and does not, forever decide the merits of the parties' claims." *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 661 (9th Cir. 2021); *Sierra Club v. Trump*, 963 F.3d 874, 887 (9th Cir. 2020) (concluding that Sierra Club had available causes of actions despite Supreme Court emergency stay order suggesting otherwise), *vac'd and remanded on other grounds sub nom. Biden v. Sierra Club*, 142 S. Ct. 46 (2021); *cf. Trump v. Int'l Refugee Assistance Project*, 582 U.S. 571, 580 (2017) ("The purpose of such interim equitable relief is not to conclusively determine the rights of the parties [citation omitted] but to balance the equities as the litigation moves forward."). Thus, a stay decision determines only the "interim status of the law" during the "time it takes for the litigation process to run its course and reach a final merits ruling in the district court, court of

1 appeals, and potentially th[e Supreme] Court.” *Labrador v. Poe*, 144 S. Ct. 921, 928-29 (2024)
2 (Kavanaugh, J., concurring).³

3 In *Sierra Club*, the Supreme Court granted a stay pending appeal from partial summary
4 judgment, and in so doing opined that the Plaintiffs lacked a cause of action. *Trump v. Sierra Club*,
5 140 S. Ct. 1 (2019) (“[T]he Government has made a sufficient showing at this stage that the
6 plaintiffs have no cause of action to obtain review of the Acting Secretary’s compliance with
7 Section 8005 [of Defense Department Appropriations Act].”) The Ninth Circuit, in resolving the
8 merits of that appeal, “heed[ed] the words of the [Supreme] Court” but after “carefully analyz[ing]
9 Sierra Club’s arguments,” concluded that (contrary to the Supreme Court’s initial inclination) the
10 “Sierra Club has both a constitutional and an *ultra vires* cause of action.” *Sierra Club*, 963 F.3d at
11 887. And in *East Bay Sanctuary*, the Ninth Circuit explained why a decision resolving a request
12 for a stay pending appeal is not a dispositive merits decision (because the question on a stay motion
13 is “is an additional step removed from the underlying merits of the district court’s preliminary
14 injunction”). 993 F.3d at 661. Thus, a stay decision “should not and does not” resolve the merits.
15 *Id.* The Court explained further: “This sort of pre-adjudication adjudication would defeat the
16 purpose of a stay, which is to give the reviewing court the time to act responsibly, rather than
17 doling out justice on the fly.” *Id.* (quotations omitted).⁴ Defendants discuss neither of these Ninth
18 Circuit decisions (notwithstanding Defendant OPM’s own recent reliance on *East Bay Sanctuary* to
19 argue that a stay decision is not a binding merits decision (*supra* n.3)). ECF 216 at 12-13.
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21

22 ³ Indeed, Defendant OPM recently argued as much to the Ninth Circuit, relying on *East Bay*
23 *Sanctuary*, 993 F.3d at 660-62, to argue that “[s]tay orders issued at that ‘very preliminary state of
24 the proceedings’ reflect different considerations from a merits panel’s consideration of an appeal
25 from a preliminary injunction and are therefore not binding on a merits panel in the same case.”
Reply Br. for Appellants 16, *AFGE v. OPM*, No. 25-1677 (9th Cir July 11, 2025), Dkt. 71-1.

26 ⁴ See also *La Posta Band of Diegueno Mission Indians of La Posta Rsrv. v. Trump*, 828 F. App’x
27 489, 490 (9th Cir. 2020) (“assuming for now (before the Supreme Court definitively answers the
28 question) that La Posta has a cause of action”) (following Supreme Court grant of stay pending appeal
indicating lack of cause of action); *Nat’l Urb. League v. Ross*, 508 F. Supp. 3d 663, 683 (N.D. Cal.
2020) (denying motion to dismiss following unreasoned Supreme Court stay of injunction pending
appeal).

1 The Supreme Court has also recently reaffirmed that a stay decision is not intended to
2 resolve the underlying merits of the case, explaining that the ultimate merits question in a case is
3 different from application of the stay standard:

4 That is not how the *Nken* [*v. Holder*, 556 U.S. 418 (2009)] factors work. See 556
5 U.S. at 434, 129 S.Ct. 1749. For instance, when we are asked to stay an execution
6 on the grounds of a serious legal question, we ask whether the capital defendant is
7 likely to prevail on the merits of the issue before us, *not whether he is likely to*
8 *prevail on the merits of the underlying suit*. See, e.g., *Gutierrez v. Saenz*, 603
9 U. S. ____ (2024) (granting application for a stay based on a question implicating
the prisoner's standing to attempt to access DNA testing). The same is true when
an applicant seeks a stay in other contexts. See, e.g., *OPM v. AFGE*, 604 U. S.
____ (2025) (granting application for stay because the organizational plaintiffs'
allegations were "insufficient to support [their] standing").

10 *Trump v. CASA, Inc.*, 145 S. Ct. 2540, 2562 (2025) (emphasis added). The Court has explained
11 that issuing a stay requires assessing whether there is a "reasonable probability that four Justices
12 will consider the issue sufficiently meritorious to grant certiorari," and "a fair prospect that a
13 majority of the Court will vote to reverse the judgment below." *Hollingsworth v. Perry*, 558 U.S.
14 183, 190 (2010); *see also Does 1-3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in
15 denial of stay and cautioning: "Were the standard otherwise, applicants could use the emergency
16 docket to force the Court to give a merits preview in cases that it would be unlikely to take—and to
17 do so on a short fuse without benefit of full briefing and oral argument."). As against the long-
18 standing law that explains why stay decisions have never been understood to resolve the merits of
19 cases (as opposed to actions to protect the courts' ability to address the merits), Defendants offer
20 only a law review article. ECF 216 at 12.⁵

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22
23 ⁵ Defendants also cite the out-of-circuit *Vera Inst. of Just. v. U.S. Dep't of Just.*, No. 25-CV-1643
24 (APM), 2025 WL 1865160 (D.D.C. July 7, 2025), a recent decision from the District of Columbia
25 discussing a Supreme Court stay decision, for the proposition that courts "must listen" to a
26 Supreme Court stay order. ECF 216 at 12. However, that decision did not conclude that courts are
27 *bound* to reach the same conclusion as the Supreme Court's initial assessment; indeed, it
28 recognized that "[t]he Supreme Court's sparse reasoning in [the stay decision at issue] has sown
confusion in this jurisdiction," and noted that a recent en banc grant by the D.C. Circuit was
contrary to the Supreme Court's conclusion. *Id.* at *9. Further: "[n]or have judges in this District
been uniform in their application of [the stay order at issue]." *Id.* And: the stay decision "does not
displace other Supreme Court and D.C. Circuit precedent." *Id.* at *11.

1 Thus, this Court has correctly held that that the stay decision “do[es] not foreclose claims or
2 otherwise halt proceedings on the merits on any claim in this case.” ECF 214 at 4; *see also* ECF
3 214 at 4 n.3 (recognizing that in light of the lack of explanation, “this Court cannot say whether the
4 Supreme Court determined the claims underlying the preliminary injunction fail as a matter of law
5 or if the evidentiary record has not yet sufficiently developed to support the claims.”). Defendants
6 cannot convert this stay order into a dispositive merits determination that requires dismissal of any
7 of Plaintiffs’ claims for failure to state a claim.

8 **B. The Supreme Court stay order does not address the majority of Plaintiffs’**
9 **claims**

10 Even if the Supreme Court order did have binding effect, it could provide no basis to
11 dismiss Plaintiffs’ claims that were neither the basis for this Court’s injunction nor before the
12 Supreme Court—and the Supreme Court’s own order made this explicit. Defendants are mistaken
13 in arguing that Plaintiffs’ remaining claims depend on the facial legality of the EO for
14 Memorandum, as this Court has already concluded.

15 First, this Court issued a preliminary injunction based on Plaintiffs’ likelihood of success on
16 the ultra vires claims (Claims I and II) and exceeds-authority and procedural APA claims against
17 OMB, OPM, and DOGE (Claims III and V). ECF 124 at 41, 44. The preliminary injunction
18 decision expressly reserved this Court’s consideration of the APA arbitrary-and-capricious claim
19 against OMB, OPM, and DOGE (Claim IV) and the APA claims against Federal Agency
20 Defendants (Claims VI and VII), because the Court required a more developed factual record to
21 evaluate those claims, and Defendants’ secrecy over relevant documents clouded the full factual
22 picture. ECF 124 at 44. Thus, Claims IV, VI and VII were not before the Ninth Circuit or the
23 Supreme Court, and could not have been resolved by them. Hence, this Court correctly concluded
24 that the stay decision “did not have any bearing on” the claims that this Court did not address in its
25 preliminary injunction decision. ECF 214 at 4.

26 Second, the Supreme Court was explicit that its stay decision was not addressing claims
27 regarding the manner of implementation of the EO and Memorandum: it “express[ed] no view on
28 the legality of any Agency RIF and Reorganization Plan produced or approved pursuant to the

1 Executive Order and Memorandum.” *AFGE*, 2025 WL 1873449, at *1. Thus, the Supreme Court
2 left the District Court to decide the lawfulness of the ARRP’s “in the first instance.” *Id.* at *1
3 (Sotomayor, J., concurring).

4 Third, this Court previously correctly rejected Defendant’s argument that *all* of Plaintiffs’
5 claims turn on the “legality” of the EO and Memorandum considered by the Supreme Court. ECF
6 214, 228, 242. Nothing in Defendants’ Motion gives this Court reason to reconsider that
7 conclusion, for the following reasons.

8 a. No court has addressed the likelihood of success on Plaintiffs’ arbitrary-and-
9 capricious APA challenge to the OMB/OPM Memorandum. What both this Court and the Ninth
10 Circuit, however, have concluded is that the Memorandum is final agency action that is subject to
11 APA review. ECF 124 at 42-43; *AFGE*, 139 F.4th at 1038-39; *see infra* at 14. That claim plainly
12 survives dismissal.

13 b. Plaintiffs’ ultra vires and APA claims against OMB, OPM, and DOGE are also not
14 limited to challenging the OMB/OPM Memorandum. Plaintiffs challenge all actions and orders of
15 OMB, OPM, and DOGE to implement the Executive Order, “including but not limited to” the
16 Memorandum, “as well as any direction, approval, or requirement imposed with respect to any
17 ARRP’s that result from that Executive Order.” ECF 100 ¶¶396; *see also id.* ¶¶404, 411, 416
18 (similar, re: Claims III, IV, and V, asserting APA claims against OMB, OPM, and DOGE). That
19 includes “any decision ‘approving’ an ARRP, and DOGE’s directives ordering agencies to make
20 staffing and spending cuts.” *Id.* ¶405; *see also id.* ¶¶395, 403, 410, 416-18. Those claims do more
21 than “simply characterize the Memorandum itself,” ECF 216 at 17, and they are adequately
22 pleaded, *e.g.*, ECF 100 ¶¶13-15, 23, 197, 248, 251, 282. Thus, this Court has already correctly
23 concluded that the Supreme Court’s stay order does not “address the legality or scope of authority”
24 for the other OMB, OPM, and DOGE actions that Plaintiffs challenge. ECF 228 at 4 (“The Court
25 agrees with plaintiffs that the Supreme Court’s stay order does not ‘address the legality or scope of
26
27
28

1 authority for OMB, OPM, and DOGE’s decisions and directives with respect to implementing
2 workforce reduction or reorganization at any agency.”).⁶

3 c. Plaintiffs’ claims against the Federal Agency Defendants challenging the lawfulness
4 of implementation actions, including through RIFs and other reorganization steps, also do not
5 depend only on the lawfulness of the Executive Order or the Memorandum *per se*, but rather on
6 the manner in which they have been and are being implemented. ECF 100 ¶¶422, 429, 431.
7 Plaintiffs allege that the Federal Agency Defendants’ actions implementing these orders are
8 contrary to law and arbitrary and capricious because, among other reasons, they “disregard their
9 authorizing statutes, ... engage in large-scale RIFs that are necessarily contrary to agency’s ability
10 to maintain required function and authorizing statute, ... RIF according to Funding Lapse Plan
11 Staffing Levels, which necessarily and by definition cannot staff agencies at the level necessary to
12 adequately perform, ... abandon reasoned decision-making considering all relevant factors, ...
13 [and] act under unrealistic timeframes that necessarily will result in plans that are not supported by
14 rational reasoning or agencies’ considered judgment.” ECF 100 ¶¶424, 431; *see also* ECF 100
15 ¶¶20, 194-227 (characterizing implementing actions, including RIFs, that agencies across the
16 government had already begun to take as of the date of the complaint).

17 In particular, Defendants disregard Plaintiffs’ allegations that agencies *cannot* implement
18 these orders in the timeframes that were required and that they have not implemented them in a
19 manner that “complies with all of the federal agency’s statutory and regulatory requirements.”
20 ECF 100 ¶172, 431. Defendants also disregard all the facts pled by Plaintiffs in support of these
21 claims describing the actions being taken by the agencies. *Id.* at ¶¶196-227 (ongoing
22 implementation via reorganization and RIFs), 228-278 (imminent implementation via

23
24 ⁶ Defendants’ motion does not acknowledge that Plaintiffs’ claims against OMB, OPM, or DOGE
25 challenge actions other than those based on the Memorandum. ECF 216 at 17 (“All of these claims
26 simply characterize the Memorandum.”). The assertion that “[t]he Amended Complaint does not
27 identify, let alone adequately plead, any assertedly unlawful action by OPM and OMB other than
28 the issuance and implementation of the Workforce Memorandum,” *id.*, plainly mischaracterizes
Plaintiffs’ allegations, as discussed *supra* at 4-5, 10. To the extent that Defendants argue that the
claims must be dismissed because Plaintiffs have not identified any act by OMB, OPM, or DOGE
that is “logically” distinct from the challenge to the Memorandum, that is incorrect: Plaintiffs
challenge the directives these agencies have given other agencies. *Id.*

1 reorganization and RIFs), 279 (alleging that the above actions are being implemented). Plaintiffs
2 do not need to *argue* in a complaint why these facts establish arbitrary and capricious action, and
3 have sufficiently pled that these actions are being taken and decisions are being made without
4 taking into account the relevant factors including agency need and function (and Defendants have
5 made *no argument* that these facts regarding agency action are insufficient to support such a
6 claim). The manner in which the Federal Agency Defendants are implementing the EO through
7 their ARRPs is directly at issue in this case (the very issue the Supreme Court was clear it was not
8 addressing).

9 Moreover, Plaintiffs’ claims against the Federal Agency Defendants stand whether or not
10 they are taking actions consistent with the content of the EO or OMB/OPM Memorandum.
11 Defendants appear to interpret the Supreme Court’s statement that the EO and Memorandum are
12 likely “lawful” to mean that any action taken pursuant to the directions in those documents *must* be
13 lawful, but the Supreme Court was quite clear that it was *not* saying that: “We express no view on
14 the legality of any Agency RIF and Reorganization Plan *produced or approved pursuant to the*
15 *Executive Order and Memorandum.*” *AFGE*, No. 24A1174, 2025 WL 1873449 at *1 (emphasis
16 added). While the full basis for that language in the Supreme Court’s order is not clear, it does not
17 purport to require Plaintiffs to identify specific actions that are somehow in addition to, defiant of,
18 or contrary to the instructions they are being given in order to prevail on the merits (or, certainly, to
19 survive a motion to dismiss). Rather, the Supreme Court expressly left open the prospect that
20 action taken *pursuant to* these orders may be unlawful, as made explicit by the concurrence of
21 Justice Sotomayor. *Id.* at *1 (Sotomayor, J., concurring) (confirming that the Supreme Court had
22 “no occasion to consider whether [the ARRPs] *can and will* be carried out consistent with the
23 constraints of law” and “[e]ft] the District Court free to consider those questions in the first
24 instance” (emphasis added)).

25 **C. Defendants’ alternative arguments likewise lack merit**

26 While Defendants argue that none of Plaintiffs’ claims survive the Supreme Court order,
27 they argue in the alternative that if Plaintiffs can challenge agency action, those claims would fail
28

1 for three reasons. These arguments—the purported lack of final agency action, ripeness, and scope
2 of the challenge—also lack merit. ECF 216 at 2, 16-19.

3 *Final agency action.* Defendants’ final agency action argument is largely based on a
4 further misconstruction of Plaintiffs’ claims, as well as factual representations outside the
5 complaint regarding the status of ARRP approvals. ECF 216 at 19-20. Plaintiffs challenge the
6 OMB and OPM approvals of ARRPs and the actions of the Federal Agency Defendants in
7 implementing those ARRPs, both of which are final agency action for purposes of the APA.
8 Plaintiffs have pled that OMB, OPM, and DOGE are making decisions with respect to the content
9 and timing of agencies’ implementation of the President’s orders, and those facts support the legal
10 conclusion that those actions qualify as final. ECF 100 at ¶¶13, 15-16, 22-23, 175, 197, 203, 248,
11 251, 275, 282, 404, 411; *AFGE*, 139 F.4th at 1038-39; ECF 124 at 42-43; ECF 213 at 5 & n.3.

12 The Ninth Circuit and this Court have already correctly concluded that the Memorandum
13 and approvals of ARRPs are final agency action for purposes of the APA, which Defendants
14 simply ignore, and give no valid basis to question. ECF 124 at 42-43; *AFGE*, 139 F.4th at 1038-
15 39.⁷ Agencies’ implementations of approved ARRPs are also final because they mark the
16 consummation of the agencies’ decisionmaking processes and also have legal consequences.
17 *Bennett v. Spear*, 520 U.S. 154, 178 (1997). To the extent Defendants may seek in reply to rely on
18 the recent divided panel decision by the D.C. Circuit in *NTEU v. Vought*, a case challenging the
19 shutdown of the Consumer Financial Protection Bureau, the majority decision appears to endorse a
20 view that exempts agency action from review under the APA if it is done behind closed doors,
21 elevating form over substance and misreading that statute for all the reasons explained by Judge
22 Pillard’s well-reasoned dissent, which provides the more persuasive analysis—analysis that is more
23 consistent with this Court’s and the Ninth Circuit’s analysis, and applicable Supreme Court

24
25 ⁷ The Ninth Circuit’s published decision is, of course, also a decision resolving a stay motion, and
26 with respect to the merits of Plaintiffs’ claims, it also assessed the likelihood of success for
27 purposes of the stay standard, not as a final resolution. This Court may nonetheless consider the
28 Ninth Circuit’s reasoning in denying the stay, particularly on issues the Supreme Court did not
address, along with its own prior reasoning in granting the preliminary injunction, as persuasive in
determining whether Plaintiffs have stated a claim (just as the Ninth Circuit conducted its own
analysis on appeal following the stay pending that appeal in *Sierra Club*, 963 F.3d at 887).

1 precedent. No. 25-5091, 2025 WL 2371608 (D.C. Cir. Aug. 15, 2025), at *21-46 (Pillard, J.,
2 dissenting). As Judge Pillard explained, final agency actions are reviewable under the APA even
3 when an agency does not make any formal, published announcement of its policy decisions. *Id.* at
4 *30. Whether an agency has taken a final reviewable action is a factual question (and Plaintiffs
5 have certainly pled that they have here). *Id.* at *32-33. Where an agency has taken action within
6 the APA’s “expansive statutory definition,” an agency may not avoid judicial review by
7 “conceal[ing] its reasons for acting” and “obfuscat[ing] what it is doing while it acts.” *Id.* at *39.

8 *Ripeness.* Defendants further argue that Plaintiffs cannot state claims now, but must “await
9 specific RIFs and reorganizations,” ECF 216 at 1, 20, and that Plaintiffs “simply speculate[] about
10 future agency actions,” *id.* at 2. Defendants cannot rely on factual assertions contrary to Plaintiffs’
11 allegations in support of a motion to dismiss. Plaintiffs have pled that Defendants had already
12 taken action to implement the EO, Memorandum and ARRs at the time the complaint was filed.
13 ECF 100 ¶¶ 20, 194-227. This Court has already “recognize[d] that plaintiffs have specifically
14 identified specific actions taken by some agencies to implement reductions in force or
15 reorganizations.” ECF 242 at 3; *see also* ECF 124 at 42-43; *AFGE*, 139 F.4th at 1038-39 (OPM
16 and OMB have approved ARRs and approvals are final agency action).

17 On the face of Plaintiffs’ allegations, OMB and OPM approvals of ARRs and subsequent
18 agency actions implementing ARRs are not, as Defendants claim, vague future possibilities.
19 Rather, they are final actions that agencies have taken, or are taking, with real-world consequences
20 for Plaintiffs and their members. Defendants make no argument that actions that had been or were
21 being implemented at the time of the complaint (and thus, for which a final approval decision had
22 been made) are not “final” for purposes of the APA. ECF 216 at 19-20.

23 *Scope of claims.* Finally, although Defendants complain about the “sprawling” nature of
24 this lawsuit, ECF 216 at 20, the scope of this case reflects the unprecedented scope of this
25 administration’s actions to dismantle, reduce, and reorganize the federal government. No
26 administration has ever tried to reorganize the government at this scale without congressional
27 authorization to do so, or in such a compressed timeframe, including through an Executive Order
28 addressed to all federal agencies (which number in the hundreds). That Defendants have taken

1 many actions to implement this scheme does not insulate Defendants from judicial review. *See*
2 *New York v. Trump*, 133 F.4th 51, 68 (1st Cir. 2025) (“[W]e are not aware of any supporting
3 authority for the proposition that the APA bars a plaintiff from challenging a number of discrete
4 final agency actions all at once.”). It only heightens the need for careful judicial review upon
5 further factual development.

6 **D. Defendants’ efforts to reargue the merits of Plaintiffs’ claim challenging the**
7 **EO and Memorandum are unpersuasive**

8 Finally, Defendants suggest this Court should revisit its earlier conclusions with respect to
9 Plaintiffs’ Claims I and II challenging the EO and Memorandum as ultra vires, contrary to
10 authority and procedurally improper, because they are not “sound.” ECF 216 at 9. This Court
11 need not accept this invitation to revisit these conclusions for purposes of this motion to dismiss,
12 where there has been no intervening merits determination on appeal. The rationale previously
13 provided by this Court (and the Ninth Circuit) certainly establishes that Plaintiffs have at least
14 stated a claim, even if the Supreme Court has questioned whether Plaintiffs will ultimately prevail.
15 For all the reasons previously argued by Plaintiffs to this Court, and the rationale previously
16 provided by this Court, Plaintiffs have, at the very least, stated a cognizable legal theory
17 challenging the EO and the Memorandum (in Claims I and II) that survives dismissal. ECF 37-1 at
18 29-36; ECF 70 at 3-7; ECF 101-1 at 11-16; ECF 120 at 1-11; ECF 124, 85; *AFGE*, 139 F.4th at
19 1033-39.

20 Were this Court to engage with Defendants’ efforts to reargue the merits of Plaintiffs’ legal
21 challenges to the EO and Memorandum, none persuade any more now than they did when
22 Defendants made these arguments at the preliminary injunctive stage:

- 23 • Defendants hang their hats on agencies’ authority to conduct RIFs. ECF 216 at 9.
24 But the fact that agencies have authority to conduct RIFs in certain circumstances
25 does not mean that such authority conclusively, as a matter of law, permits the
26 President, OMB or OPM to order *these* RIFs, to be conducted in the manner and for
27 the purposes directed here. *See* ECF 101-1 at 11-16; ECF 124 at 27-41.

- 1 • Defendants also invoke agencies’ house-keeping authority, which has *never* been
2 construed to be substantive. *See* ECF 120 at 5-7; *supra* n.2.
- 3 • Neither RIF nor housekeeping statutes authorize the President to order a
4 government-wide reorganization when Congress has withheld that power from the
5 President (after specifically conferring such authority on the President at certain
6 previous times in history).⁸ *See* ECF 120 at 5-7; ECF 124 at 28-34.
- 7 • Nor do OMB, OPM, or DOGE have the statutory authority themselves to impose
8 directives on agencies to make deep cuts when Congress gave them no such
9 authority over agencies.⁹ *See* ECF 120 at 3-5; ECF 124 at 34-36.
- 10 • None of these authorities permits OMB and OPM to violate the substantive or
11 procedural requirements imposed by the APA, which plainly apply to the
12 Memorandum. *See* 5 U.S.C. §§1103, 1105; ECF 101-1 at 16; ECF 124 at 44.

13 For the above reasons, this Court has already recognized that “plaintiffs have cogently laid
14 out why their *ultra vires* claims, and not only their Administrative Procedure Act claims, remain
15 live following the Supreme Court’s stay order.” ECF 228 at 4. The Court should deny the motion
16 to dismiss and allow Plaintiffs’ claims to be decided on the merits, on a full factual record.

17 **II. This Court Has Jurisdiction Over Plaintiffs’ Ultra Vires and APA Claims**

18 This Court and the Ninth Circuit have previously resolved this Court’s subject matter
19 jurisdiction and rejected Defendants’ arguments that Congress implicitly precluded judicial review
20 of Plaintiffs’ *ultra vires* and APA claims. ECF 85 at 18-25; *AFGE*, 139 F.4th at 1033 (“[T]he
21 district court below correctly determined that Plaintiffs’ claims were properly raised in that court.”).
22

23 _____
24 ⁸ Defendants continue to point to President Clinton’s Executive Order 12,839, which called for a
25 gradual decrease in the civilian workforce numbers over three years, without acknowledging the
26 language that “[t]he positions shall be vacated through attrition or early out programs established at
27 the discretion of the department and agency heads” rather than through RIFs. ECF 216 at 4, 9.
28 Defendants’ continued overreaching to manufacture a historical analogue only underscores the
truly unprecedented nature of this administration’s reorganization scheme.

⁹ Neither OPM’s authority to prescribe general RIF regulations nor OMB’s authority to establish
“general management policies,” ECF 216 at 14-15, authorize them to require agencies to cut their
workforce and functions.

1 Defendants make no argument that the Supreme Court’s order addressed the issue of jurisdiction,
2 because it plainly did not (notwithstanding Defendants’ arguments to that Court on this issue).
3 ECF 216 at 20-22; *AFGE*, No. 24A1174, 2025 WL 1873449 at *1.¹⁰ Instead, Defendants reduce
4 their characterization of Plaintiffs’ remaining claims to a challenge only to “specific RIFs,” and
5 then claim that those are personnel actions channeled to administrative agencies. ECF 216 at 20-
6 22. Defendants’ attempt to revisit jurisdiction misses the mark on many levels.

7 First, as discussed *supra*, even beyond the legality of the EO and the Memorandum,
8 Plaintiffs bring ultra vires and APA claims that address actions that go far beyond any particular
9 decision regarding how to apply a RIF to any individual federal employee. Plaintiffs challenge the
10 legality of the OMB and OPM approvals of ARRP; OMB, OPM, and DOGE directives to
11 agencies to cut functions, programs and people; and Federal Agency Defendants’ actions taken to
12 implement those directives. Defendants do not argue that this Court lacks jurisdiction with respect
13 to Plaintiffs’ claims aimed at these actions because they limit their argument to RIFs. Even if they
14 did, moreover, as Plaintiffs have previously established (ECF 70 at 9-12; ECF 101-1 at 20) that
15 none of these actions is a covered personnel action for purposes of the Civil Service Reform Act
16 (“CSRA”), even if they could lead to personnel actions that impact individual employees, and this
17 Court and the Ninth Circuit’s analysis directly applies. ECF 85 at 18-25; *AFGE*, 139 F.4th at
18 1030-33; *cf. Feds for Med. Freedom v. Biden*, 63 F.4th 366, 375 (5th Cir. 2023) (en banc),
19 *judgment vac’d as moot*, 144 S. Ct. 480 (2023) (holding that challenge by employee organizations,
20 including union, to government-wide federal employee vaccination mandate was not channeled to
21 MSPB or FLRA).

22 Second, the prior jurisdictional analysis by the Ninth Circuit and this Court applies directly
23 to all of Plaintiffs’ claims against OMB, OPM, and DOGE, and Defendants give this Court no
24 reason to reach a different result now. There is no discernable difference, for purposes of this
25

26 _____
27 ¹⁰ None of the Supreme Court’s stay decisions this term in cases impacting federal employees have
28 accepted the Government’s repeated invitation to address administrative channeling, including *OPM*
v. AFGE, 145 S. Ct. 1914 (2025) (granting stay on other grounds) and *McMahon v. New York*, 145
S. Ct. 2643 (2025) (granting stay with no analysis).

1 jurisdictional analysis, between the substantive exceeds authority and procedural APA claims
2 addressed by this Court for purposes of the preliminary injunction, and the arbitrary and capricious
3 APA claim against those agencies on which the Court reserved decision. Again, this Court and the
4 Ninth Circuit’s analysis defeats any argument this Court lacks jurisdiction. ECF 85 at 18-25;
5 *AFGE*, 139 F.4th at 1030-33.

6 Third, the rationale of the Ninth Circuit and this Court’s prior jurisdictional rulings reach
7 Plaintiffs’ APA claims against Federal Agency Defendants as well. ECF 85 at 18-25; *AFGE*, 139
8 F.4th at 1030-33. In particular, the same Congress that referred to the APA no less than three times
9 in the CSRA (*see* 5 U.S.C. §1103; §1105; §7134) did not *implicitly* remove federal court
10 jurisdiction over APA claims involving agency actions simply because they impact federal
11 employees. Far more is needed to remove express federal jurisdiction. *See Mims v. Arrow Fin.*
12 *Servs., LLC*, 565 U.S. 368, 383 (2012) (“[J]urisdiction conferred by 28 U.S.C. §1331 should hold
13 firm against ‘mere implication flowing from subsequent legislation.’”); *Colo. River Water*
14 *Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (describing “virtually unflagging
15 obligation of the federal courts to exercise the jurisdiction given them”). And, as this Court
16 previously concluded, even with respect to an agency’s decision to implement a RIF, the text of the
17 CSRA indicates that Congress did *not* intend for the administrative agencies to provide exclusive
18 review (because Congress did not provide for administrative review of separations resulting from
19 RIFs at all, *see* 5 U.S.C. §7512(B)). ECF 124 at 25.¹¹

21 ¹¹ To the extent Defendants seek to rely on *Vought*, No. 25-5091, 2025 WL 2371608, at *5-6, that
22 recent decision’s channeling analysis suffers from various errors, including those previously
23 identified by Judge Pillard in another agency dismantling case before the same panel. *See*
24 *Widakuswara v. Lake*, No. 25-5144, 2025 WL 1288817, at *7-8 (D.C. Cir. May 3, 2025) (Pillard,
25 J., dissenting); (cited in ECF 85 at 23-24). Those errors include at least: i) conflating agency
26 decisions regarding programs and functions that are *not* covered personnel actions under the CSRA
27 with the application of those decisions to individual employees; ii) ignoring the command of
28 judicial review in the APA and Supreme Court precedent regarding the high hurdle of removing
APA judicial review and iii) ignoring the text of the CSRA, which indicates that Congress did not
intend administrative agencies to review agency-level decisions that result in terminations for
programmatic reasons as compared to separations for individual performance and conduct (5
U.S.C. §7512 (excluding from MSPB jurisdiction separations resulting from agency decisions to
RIF and agency national security determinations)).

1 With respect to the federal employee union Plaintiffs, the analysis of the factors under
2 *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), with respect to the claims against Federal
3 Agency Defendants is conclusive:

- 4 • First, the Court’s conclusion that APA claims are “wholly collateral” to the statutory review
5 scheme applies equally to the APA claims against Federal Agency Defendants. *AFGE*, 139
6 F.4th at 1031 (concluding “[n]either body [the MSPB or FLRA] has the authority to address
7 the type of constitutional and statutory claims raised by Plaintiffs.”). Plaintiffs’ APA
8 claims are not, as the Ninth Circuit recognized, the type of claim pursuant to the CSRA that
9 Congress designed those agencies to adjudicate. *Id.* The agency decisions at issue here are
10 not individual personnel actions covered by the CSRA, and are therefore collateral. *See*
11 *Feds for Med. Freedom*, 63 F.4th at 370-373.
- 12 • Second, the Ninth Circuit’s conclusion that the MSPB and FLRA lack expertise with
13 respect to APA claims applies equally to APA claims against the Federal Agency
14 Defendants. *Id.*
- 15 • Third, the Ninth Circuit’s analysis of the lack of meaningful judicial review also applies
16 equally to these APA claims. As that Court explained: “the APA’s presumption of judicial
17 review is not overcome merely because Defendants can point to a theoretical alternative
18 path for an aggrieved party to seek review.” *Id.* at 1032; *see also Dep’t of Com. v. New*
19 *York*, 588 U.S. 752, 771-72 (2019); *Dep’t of Homeland Sec. v. Regents of the Univ. of*
20 *California*, 591 U.S. 1, 17 (quoting *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 586
21 U.S. 9, 23 (2018)); *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 578 U.S. 590, 601-02
22 (2016). Likewise, the Ninth Circuit’s concern with the dramatic nature of the actions
23 challenged in this case, and resulting practical impact on employees’ ability to ever seek
24 review, applies equally to agency implementation. 139 F.4th at 1032 (“[W]e agree with the
25 district court that such a path to the federal courts would be meaningless where, as here,
26 entire offices and functions are being eliminated from federal agencies.”).

27 Finally, with respect to the non-union organizations and local government Plaintiffs and all
28 of their claims, Defendants make no new argument that this Court and the Ninth Circuit have not

1 directly rejected: those Plaintiffs cannot bring any action before the MSPB or the FLRA, and there
2 is no valid basis to conclude the Congress intended to silently *preclude* federal jurisdiction over
3 their ultra vires and APA claims. ECF 85 at 25; *AFGE*, 139 F.4th at 1032-33.

4 Defendants' arguments regarding jurisdiction boil down to the incorrect assertion that this
5 Court's and the Ninth Circuit's previous rationale applied *only* to challenges to the EO and
6 Memorandum. ECF 216 at 22 (arguing "that reasoning no longer applies because Plaintiffs cannot
7 anchor their claims in a challenge to the Executive Order or Memorandum"). For all the reasons
8 just explained, this is incorrect, and the reasoning fully applies across all of Plaintiffs' claims.
9 Defendants have given this Court no reason to conclude Congress has taken away federal
10 jurisdiction, and the Rule 12(b)(1) Motion should be denied.

11 **III. Plaintiffs Have Adequately Pleaded a Claim against DOGE**

12 Plaintiffs sued DOGE and its nominal and actual agency head, and pleaded that DOGE
13 made final decisions directing agencies to cut the federal workforce. ECF 100 ¶¶13-16, 23, 175,
14 182, 197, 233, 239, 241, 251, 268, 282-83. This Court previously concluded, and the Ninth Circuit
15 affirmed, that DOGE actions were likely ultra vires (which the Supreme Court did not address).
16 ECF 124 at 34-36; ECF 85 at 32-34; *AFGE*, 139 F.4th at 1038. Moreover, these alleged actions are
17 final because they result in actual legal consequences, making them subject to APA review.
18 5 U.S.C. §704; *Bennett v. Spear*, 520 U.S. 154, 175, 178 (1997); *AFGE*, 139 F.4th at 1038-39.

19 Defendants cannot dispute these conclusions, so they ignore them. Instead, Defendants
20 make three arguments, but none has merit. First, Defendants argue that Plaintiffs have not alleged
21 that DOGE was involved in the OMB/OPM Memorandum, which is a red herring in light of all of
22 the other allegations involving DOGE. *Supra*, at 4.

23 Second, Defendants argue that DOGE is not a proper defendant, because it is an "umbrella"
24 term for a government-wide initiative, ECF 216 at 22, and that one of its component parts (the U.S.
25 Digital Service, or "USDS") is not an "agency" for purposes of the APA. *Id.* at 23.¹²

26 _____
27 ¹² To the extent Defendants argue that the part of "DOGE" that involves DOGE teams embedded at
28 agencies cannot be sued, that issue has been previously briefed and addressed. ECF 218 at 13-15.
Plaintiffs do not dispute that the actions of DOGE teams at agencies can be attributed to the

1 However, the APA applies broadly to any “authority of the Government of the United
2 States.” 5 U.S.C. §701(b)(1). The component parts of DOGE, including the USDS and related
3 Temporary Service, qualify under this broad definition. *AFL-CIO v. Dep’t of Lab.*, 778 F. Supp 3d
4 56, 89 n.19 (D.D.C. 2025); *AFL-CIO v. Dep’t of Lab.*, 766 F. Supp. 3d 105, 111-12 (D.D.C.
5 2025).¹³ Defendants argue that “DOGE” is an initiative created by Executive Order, but that does
6 not preclude it from meeting the broad APA definition of authority. *E.g., Nat’l Broiler Council,*
7 *Inc. v. Fed. Lab. Rel. Council*, 382 F. Supp. 322, 325 (E.D. Va. 1974) (finding entity created by
8 Executive Order to be an agency under the APA); *Amalgamated Meat Cutters & Butcher Workmen*
9 *of N. Am., AFL-CIO v. Connally*, 337 F. Supp. 737, 761 (D.D.C. 1971) (same). Although
10 Defendants argue that USDS has only “a limited set of advisory responsibilities” and thus is not an
11 agency within the meaning of the APA, ECF 216 at 24, that defies the factual record and
12 allegations. Defendants’ characterization of a limited advisory role for USDS is inconsistent with
13 the facts as plausibly alleged regarding actions actually taken by DOGE, under which DOGE
14 (including USDS) has directed agencies to make cuts to their workforce and functions. The nature
15 of the actual authority that DOGE exercised over agencies is a disputed issue of fact, and claims
16 against DOGE cannot be dismissed at the pleadings stage based on unsubstantiated assertions by
17 Defendants that attempt to minimize DOGE’s role.

18 To the extent the USDS or the Temporary Service were providing orders to DOGE teams or
19 to others at agencies requiring how much, who, and when to cut (which the record evidence
20 supports), those are final decisions subject to the APA. That the complaint pleads allegations
21 against DOGE as a whole rather than against USDS or the Temporary Service specifically, ECF
22 216 at 25, does not make the allegations implausible or insufficient. Particularly in the context
23 where Defendants’ own extreme secrecy prevented more specific allegations, the allegations that
24 are in the operative complaint suffice for this case to proceed beyond the pleading stage.

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agencies themselves; this does not render “DOGE” an improper Defendant.

27 ¹³ Defendants cite cases they characterize as raising the issue of whether USDS is subject to FOIA
28 or the APA, ECF 216 at 25 n.15, but none that supports their position (some of which are brought,
like this one, against the “Department” created by Executive Order).

1 **CONCLUSION**

2 For all the foregoing reasons, Plaintiffs respectfully request the Court deny Defendants’
3 motion to dismiss in its entirety.

4
5 DATED: August 18, 2025

Respectfully submitted,

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