IN 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

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO STAY THIS COURT'S PRELIMINARY INJUNCTION

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INTRODUCTION

Before this Court is the Defendants' motion for a stay of the preliminary injunction pending appeal. It is a "cardinal principle" that a party seeking such relief should ordinarily move for it first in the District Court and the proceed to the the Court of Appeals only after such a motion is denied. 16A Wright & Miller, *Federal Practice and Procedure* § 3954 (5th ed. 2025); *see also* Fed. R. App. P. 8(a)(2)(A) (mandating that a motion in the Court of Appeals must "state that, a motion having been made, the district court denied the motion or failed to afford the relief requested" or "show that moving first in the district court would be impracticable"). But, here, the Government has moved for a stay before this Court *and* before the Court of Appeals. On September 2, 2025, in response to the appellate motion, the Court of Appeals entered an administrative stay of the preliminary injunction and ordered expedited brief on the Government's motion. *See* Order, *Fed. Educ. Ass'n v. Trump*, No. 25-5303 (D.C. Cir. Sep. 2, 2025) (per curiam).

This Court should deny Defendants' motion. Most importantly, denial of the motion is appropriate for the simple reason that the Government fails make the requisite showing to justify a stay. But also, because the Defendants' application in the Court of Appeals is at present "patently procedurally defective," *Whole Woman's Health v. Paxton*, 972 F.3d 649, 653 (5th Cir. 2020), denial of the motion will presumably cure those defects and facilitate resolution of this matter on appeal.

ARGUMENT

I. This Court Correctly Ruled That It Has Subject Matter Jurisdiction Over Plaintiffs' Challenge to EO 14,251

In its motion to stay, the Government continues to press its misguided claim (Doc. 39 at 4-6) that this Court lack jurisdiction to address Plaintiffs' challenge to EO 14,251's exclusion of

DODEA from the entirety of the Federal Service Labor Management Relations Statute, 5 U.S.C. §§ 7101-7135 ("FSLMRS"), because Congress intended that such a challenge be brought before the Federal Labor Relations Authority "(FLRA") pursuant to the "specialized review scheme" established by the FSLMRS. The Government now relies on the recent decision in *Nat'l Treasury Emps. Union v. Vought*, No. 25-5091, 2025 WL 2371608 (D.C. Cir. Aug. 15, 2025), while continuing to disregard the basic fact that, as this Court has ruled in this and other pending challenges to EO 14,251, the FSLMRS's "administrative review scheme … is not available to challenge the Executive Order's exclusions of the agencies and subdivisions subject to the Executive Order for the simple reason that those agencies and subdivisions have been excluded from the FSLMRS's coverage by the very Executive Order at issue here." *Fed. Educ. Ass'n v. Trump*, No. 25-cv-1362 (PLF), 2025 WL 2355747, at *5 (D.D.C. Aug. 14, 2025) (quoting *Nat'l Treasury Emps. Union v. Trump*, 780 F.Supp.3d 237, 249 (D.D.C. 2025) ("*NTEU I*")).

Vought is simply inapposite. That case did not address a challenge to an order excluding the plaintiffs from the relevant administrative review schemes. Rather, it involved two federal unions that challenged agency actions to dismantle the Consumer Financial Protection Bureau ("CFPB"), resulting in the actual or imminent firing of CFPB employees represented by those unions under the FLMRS. The *Vought* Court concluded that, because the plaintiff unions' injuries "flow from their members' loss of employment …, which will harm the employees and decrease [their] revenue," and because those injuries were redressable by both the FLRA and the Merit Systems Protection Board ("MSPB"), "a specialized-review scheme governs such claims and ousts the district courts of their arising-under jurisdiction." 2025 WL 2371608, at *5. In short, the *Vought* Court found the plaintiffs' claims precluded because the FLRA and MSPB were available to redress the plaintiffs' injuries.

But, here, FLRA proceedings are simply not available to the Plaintiffs by reason of the very Executive Order at issue in this litigation. As the Court made clear in *Elgin v. Dep't of Treasury*, 567 U.S. 1 (2012), a case arising under the Civil Service Reform Act ("CSRA"), channeling is mandated only where "a *covered* [party] challenges a *covered action*," *id.* at 13 (emphasis added). While *Elgin* is dispositive, it is worth addressing the Government's peculiar contention, raised for this first time in this motion, that "channeling through the FSLMRS's special statutory scheme is still required" (Doc. 39 at 5) even where executive action has stripped the FLRA of jurisdiction to resolve any charge or grievance against DODEA. In the Government's view, Congress intended that Plaintiffs raise their challenges to an executive order excluding them from the statute's coverage with the FLRA by filing an unfair labor practice charge or initiating grievance proceedings with DODEA and then seeking review in the Court of Appeals of an FLRA order dismissing the proceedings for lack of jurisdiction. Running this altogether pointless gantlet would, as the Government sees it, provide meaningful judicial review of Plaintiffs' challenges to EO 14, 251. But that view is badly mistaken.

First of all, as this Court reasoned when the Government advanced the same argument in *NTEU I*, this "misses 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]." 780 F.Supp.3d at 251. This obvious conclusion is buttressed by legislative history of Section 7103(b), which affirmatively demonstrates that Congress did *not* intend that the FLRA have any role in determining whether agencies can be excluded from the statute's coverage. The House bill that would become the FSLMRS initially provided that any agency could apply to the FLRA to "be excluded from any provision or requirement" and the FLRA would be empowered to make exclusion decision based

on the same determinations that that are now set forth in Section 7103(b)—to wit, the determinations that 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, s*ee id.* at 907, and that amended provision was enacted as Section 7103(b), *see* Pub. L. 95-454, Section 701, Oct. 13, 1978, 92 Stat. at 1195.

Requiring that a union excluded by executive order from the FSLMRS's coverage to bring its challenge to the executive order before the FLRA—simply to obtain an FLRA order dismissing the challenge for lack of jurisdiction—would be a pointless exercise that runs contrary to the very purpose of requiring administrative channeling and exhaustion in the first place, namely, "'to allow an administrative agency to perform functions within its special competence—to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies,'" *Akiachak Native Cmty. v. U.S. Dep't of Interior*, 827 F.3d 100, 114 (D.C. Cir. 2016) (quoting *Parisi v. Davidson*, 405 U.S. 34, 37 (1972)). The FLRA would perform none of the "functions within its special competence" by simply dismissing any notional unfair labor practice complaint or arbitration appeal challenging EO 14,251. It would not create a factual record or apply its expertise with respect to labor relations law, and its decision would not moot any judicial controversy. Accordingly, any judicial review of such a decision would hardly

be meaningful, especially given that there would be no factual record at all, much less one of the kind developed here, which is necessary for establishing Article III standing and irreparable injury.[1] Requiring such a futile and counterproductive exercise is plainly not what Congress intended. *See McBride Cotton & Cattle Corp. v. Veneman*, 290 F.3d 973, 982 (9th Cir. 2002) (holding that "[r]equiring exhaustion would be an idle act" where the relevant administrative forum "lacks authority to resolve the claims presented by the plaintiffs"); *Republic Indus., Inc. v. Cent. Pa. Teamsters Pension Fund*, 693 F.2d 290, 296 (3d Cir. 1982) ("To subject litigants to the processes of an impotent administrative tribunal would be to undermine public confidence in the administrative procedures the doctrine seeks to promote. The law should never command a litigant to perform a useless action.").

Beyond that, as detailed in our Reply Memorandum in Support of Plaintiffs' Motion for Summary Judgment (Doc. 29 at 10-16), so long as EO 14,251 is in effect, it is vanishingly unlikely that any unfair labor practice charges or grievances would ever culminate in an FLRA order that is subject to judicial review. As to the former, given that an agency "may not simply disregard an Executive Order," *Sherley v. Sebelius*, 689 F.3d 776, 784 (D.C. Cir. 2012), the FLRA General Counsel would almost certainly decline to issue a complaint on any unfair labor practice charge challenging EO 14,251, which, as the Government acknowledges, is an action that is not subject to judicial review. And as to the latter, prosecuting a grievance through to an

[1] The absence of factfinding cannot be remedied on appeal, as it is axiomatic that "'[f]actfinding is the basic responsibility of district courts, rather than appellate courts,'" *Wye Oak Tech., Inc. v. Republic of Iraq*, 24 F.4th 686, 703 (D.C. Cir. 2022), quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 291-92 (1982).

arbitrator's decision cannot be accomplished unless DODEA participates in the grievance and arbitration process, which it refuses to do so long as the Executive Order is in effect.[2]

II. The Defendants Have Failed to Show That They Are Likely to Succeed on the Merits of their Appeal

In arguing that it is likely to succeed on the merits of its appeal, the Government gives pride of place to the D.C. Circuit special panel's unpublished order in *Am. Foreign Serv. Ass'n, v. Trump*, No. 25-5184, 2025 WL 1742853 (D.C. Cir. June 20, 2025) ("*AFSA*"), staying this Court's preliminary injunction in that related challenge EO 14,251, which, the Government contends, is "binding on the application of the stay factors." (Doc. 39 at 3.) While that order applied an "exceedingly deferential," 2025 WL 1742853 at *3, standard of review to find that EO 14,251 would likely survive *ultra vires* review in that case, which challenged EO14,251 as *ultra vires* under a similar but not identical statute, as we show in the following, contrary to the

[2] The Government is wildly misguided in its suggestion (Doc. 39 at 5) that channeling doctrine required FEA—in response to the FLRA's order to show cause why proceedings an unfair labor practice complaint issued by the FLRA General Counsel in 2021 should not be dismissed by reason of EO 14,251 (Doc. 22-2, Tarr Decl. at 13-14)—to somehow re-purpose those pending unfair labor practice proceeding so as to raise its challenges to EO 14,251. The Government's notion that a union, as a charging party, has the ability to recast an existing unfair labor practice complaint issued by the FLRA General Counsel betrays either disingenuousness or ignorance of the FLRA processes that the Government asserts must be pursued here. When a party files an unfair labor practice charge, the FLRA General Counsel is solely responsible for issuing (or declining to issue) an unfair labor practice complaint and for prosecuting any such complaint. *See* 5 U.S.C. § 7104(f)(2)(A) & (B); 5 C.F.R. §§ § 2423.8, 2423.10. Accordingly, only the FLRA General Counsel can amend an existing complaint. 5 C.F.R. § 2423.20(c). Nor can a charging party file amended charges after a complaint issues. 5 C.F.R. § 2423.9. Thus, even leaving aside the fact that EO 14,251 divests the FLRA of jurisdiction to entertain unfair labor practice charges levelled against DODEA, the Government's imagined route to judicial review via a years-old unfair labor practice proceeding does not exist: FEA has no ability to expand the issues raised in an unfair labor practice complaint issued by the FLRA General Counsel—much less this one, which has already been heard and decided by an administrative law judge in 2024, whose decision was on appeal to the FLRA well before EO 14,251 issued. (Doc. 22-2, Tarr Decl. at 13-14.)

Government's assertion, that order is not binding authority, and its sparse reasoning is unpersuasive and conclusively answered by this Court's preliminary injunction opinion.

1. It is necessary to point out at the threshold that the Government is wrong in asserting that the motions panel's unpublished order in *AFSA* is binding here. The only authority the Government offers for this proposition is the Supreme Court's order staying a permanent injunction in *Trump v. Boyle*, 145 S. Ct. 2653 (2025), but *Boyle* held nothing of the kind. To the contrary, the *Boyle* Court stated that "[a]lthough our interim orders are *not* conclusive as to the merits, they inform how a court should exercise its equitable discretion in like cases." *Id.* at 2654 (emphasis added). That is a long way from the Government's assertion that stay orders—even those coming from the Supreme Court—are "binding on the application of the stay factors." (Doc. 39 at 1.)

Moreover, whatever may be the case as to stay orders issued by the full Supreme Court, it is clear from the D.C. Circuit's precedents and rules that unpublished orders staying preliminary injunctions are not binding precedent. As a general matter, "the decision of a trial or appellate court whether to grant or deny a preliminary injunction does not constitute the law of the case," *Berrigan v. Sigler*, 499 F.2d 514, 518 (D.C. Cir. 1974), and therefore is not binding in further proceedings in the case in which the decision is made.[3] The principal reason for this general rule against binding the parties even to the Circuit's own rulings on preliminary injunctions is that

[3] *See also Belbacha v. Bush*, 520 F.3d 452, 458 (D.C. Cir. 2008) (rejecting the Government's argument that a merits panel "should affirm on the basis of the order of a motions panel of this court denying … a temporary stay pending this appeal"). The D.C. Circuit has recognized a narrow exception to this principle where it has made a preliminary injunction ruling "that was established in a definitive, fully considered legal decision based on a fully developed factual record and a decisionmaking process that included full briefing and argument without unusual time constraints." *Sherley*, 689 F.3d at 782. *AFSA* was not issued under such circumstances: it was issued with a brief explanation on highly abbreviated briefing and a very tight timetable.

"the court of appeals must often consider such preliminary relief without the benefit of a fully developed record and often on briefing and argument abbreviated or eliminated by time considerations." *Sherley*, 689 F.3d at 782. It follows *a fortiori* that an unpublished order staying a preliminary injunction pending appeal is not binding in *other* cases. Such "non-controlling orders" may "be persuasive for their reason and authority to the extent applicable in any new context," *Berrigan,* 499 F.2d at 518, but are not precedential. Circuit Rule 36(e)(2) confirms this basic point: "a panel's decision to issue an unpublished disposition means that the panel sees no precedential value in that disposition."

2. The Government first relies on the *AFSA* order to suggest that "'it is unclear whether *ultra vires* review is available at all,' to challenge Executive Order 14,251." (Doc. 39 at 6, quoting 2025 WL 1742853, at *2.) But even setting the non-precedential nature of the *AFSA* panel's stay order to one side for now, it is readily apparent that the *AFSA* panel did not even commit to the proposition that *ultra vires* review of EO 14,251 is unavailable. Rather, after spending a substantial portion of its brief decision casting doubt on the viability of the plaintiff's *ultra vires* claim, the *AFSA* panel elected to proceed "assuming th[e] case is justiciable." 2025 WL 1742853 at *2-*3.

Moreover, that *dicta* runs contrary to a raft of actually binding D.C. Circuit precedent establishing that executive actions, including executive orders and proclamations, are reviewable for compliance with statutory limits. *See Glob. Health Council v. Trump*, No. 25-5097, 2025 WL 2480618, at *8 n.14 (D.C. Cir. Aug. 13, 2025) (making clear that "*ultra vires* review remains available to test presidential action alleged to violate any spending or other statute"); *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002) ("Courts remain obligated to determine whether statutory restrictions have been violated [by executive actions]."); *Chamber*

of Com. of U.S. v. Reich, 74 F.3d 1322, 1339 (D.C. Cir. 1996) ("[W]e think it untenable to conclude that there are no judicially enforceable limitations on presidential actions, besides actions that run afoul of the Constitution or which contravene direct statutory prohibitions, so long as the President *claims* that he is acting pursuant [to statutory authority]."). *See also Dart v. U.S.*, 848 F.2d 217, 224 (D.C. Cir. 1988) ("When an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority. Rarely, if ever, has Congress withdrawn courts' jurisdiction to correct such lawless behavior….").[4]

2. Pivoting from the untenable position that *ultra vires* review is unavailable, the Government, again leaning on *AFSA*, contends that any "'review [of EO 14,251] must be exceedingly deferential'" and that EO 14,251 survives such review under *Trump v. Hawaii*, 585 U.S. 667 (2018). (Doc. 34 at 6, quoting 2025 WL 1742853 at *3.) The *AFSA* panel's reasoning on this score was the posit that "[w]hen a statutory delegation invokes the President's discretion in exercising core Article II responsibilities, there is little for a court to review," followed by this limited description of the *Hawaii* case as an illustration of that posit:

> in *Trump v. Hawaii*, the Supreme Court said it was "questionable" whether the President's national-security determinations under the Immigration and Nationality Act were subject to judicial review. Nonetheless, it assumed that "some form of review [was] appropriate," and it upheld the President's determination in a single sentence that did not inspect the President's rationale.

[4] Illustrating the perils of making decisions on " preliminary relief without the benefit of a fully developed record and often on briefing and argument abbreviated or eliminated by time considerations," *Sherley*, 689 F.3d at 782, the *AFSA* panel, in considering the availability of *ultra vires* review of EO 14,251, alluded to the fact that "the President is not an agency" and that "courts generally lack authority to enjoin the President." *Id.* at *3. This is a *non sequitur* for two reasons. First, whether the president can be enjoined is a separate issue from whether an executive order is subject to *ultra vires* review, a question that the cases cited in the text above answer in the affirmative. Second, President Trump was *not* enjoined in the *AFSA* case. As in this case, the preliminary injunction only applied to agencies and agency officials in their official capacities.

2025 WL 1742853, at *3 (citation omitted).

The *AFSA* panel did not discuss Section 7103(b)(1)'s two narrow conditions on the President's authority to exclude agencies and agency subdivisions from the FSLMRS's coverage, much less compare them to the Court's analysis of the statute at issue in *Hawaii*. But in granting the preliminary injunction here, this Court did address Section 7103(b)(1) in relation to the Supreme Court's analysis of the statute at issue in *Hawaii* in relation to—as well as its analysis of those at issue in other cases in which the Supreme Court exercised limited review, namely, *Bouarfa v. Mayorkas*, 604 U.S. 6 (2024), *Dalton v. Specter*, 511 U.S. 462 (1994), *Webster v. Doe*, 486 U.S. 592 (1988)—and correctly found that "Section 7103(b)(1) … is far narrower than the broad grants of statutory authority at issue in those cases." *Fed. Educ. Ass'n*, 2025 WL 2355747, at *8. This Court's reasoning is a complete answer to the *AFSA* panel's conclusory treatment of the question and merits quotation at some length:

> In *Trump v. Hawaii*, the Supreme Court analyzed 8 U.S.C. § 1182(f), which provides:
>
> > Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.
>
> The Supreme Court determined that Section 1182(f) also "exudes deference to the President in every clause." In *Bouarfa v. Mayorkas*, the Supreme Court determined that a statutory provision providing that the Secretary of Homeland Security "may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any [visa] petition" was a "broad grant of authority" that similarly "fairly exudes deference." In *Dalton v. Specter*, the Supreme Court determined that judicial review was inappropriate where the statutory provision at issue did not "prevent the President" from taking the particular action "for whatever reason he saw fit."

Fed. Educ. Ass'n, 2025 WL 2355747, at *8 (cleaned up). Having canvassed this caselaw, this Court soundly concluded that "Section 7103(b)(1) plainly does not confer the same 'broad' grant of authority as was at issue in any of these cases" as it "contains not one, but two fairly exacting limitations on the President's authority to invoke the statutory provision," which "create a 'clear and specific statutory mandate' that is 'susceptible to *ultra vires* review.'" *Id.* at *9 (quoting *Nat'l Ass'n of Postal Supervisors v. USPS*, 26 F.4th 960, 971 (D.C. Cir. 2022). This careful analysis—which the Government fails to engage at all—leaves no room for the Government's reliance on the perfunctory appraisal of the issue set out in the *AFSA* panel's non-precedential order.

What is more, neither the *AFSA* panel nor the Government in the instant motion cited, much less addressed, *Cole v. Young*, 351 U.S. 536 (1956), which, as this Court recognized, is the most relevant precedent regarding how the President's exercise of the narrow authority granted by Section 7103(b)(1) should be reviewed, *see Fed. Educ. Ass'n*, 2025 WL 2355747, at *11 n.7, 13; *Am. Foreign Serv. Ass'n v. Trump*, No. 25-cv-1030, 2025 WL 1387331, at *8, 11-13 (D.D.C. May 14, 2025); *Nat'l Treasury Emps. Union v. Trump*, 780 F. Supp. 3d 237, 261-62 (D.D.C. 2025). Unlike *Bouarfa*, *Hawaii*, *Dalton*, and *Webster*, the *Cole* decision could hardly be more apposite here, as it invalidated the termination of an agency employee under a statute allowing executive branch officials to supersede statutory employment protections—by summarily suspending and discharging agency employees "whenever [such officials] shall determine such termination necessary or advisable in the interest of the national security of the United States," 351 U.S. at 541. And in so doing, the Court concluded that "national security" must be given a "narrow meaning"—one "comprehend[ing] 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." *Id.* at 544, 547.

That definition is fatal to EO 14,251, as the only concept of "national security" that could support its exclusion of two-thirds of the federal workforce would be one that is so elastic and unbounded that "all positions in the Government could be said to be affected with the 'national security,'" *id.* at 547, such that narrow authority granted by Section 7103(b)(1) would provide no limiting principle at all.[5]

4. After consuming pages arguing for limited review that effectively is tantamount to no review at all—while ignoring binding Circuit precedent on *ultra vires* review and the *Cole* decision—the Government's effort to explain why EO 14,251 is within the authority granted by Section 7103(b)(1) consists of two brief paragraphs that boil down to the uncontested premise that "DoD … has a national security mission," from which the Government draws the erroneous conclusion that "the Court should have looked at the President's determination with respect to DoD (the agency), rather than questioning the Executive Order's exclusions as a whole or DoDEA in particular." Doc. 39 at 8.

First of all, there is no warrant for the Court blind itself to the staggering overbreadth of EO 14,251 as a whole, which "removed collective bargaining rights from approximately two-thirds of the federal workforce," or for ignoring the "that the entire Executive Order likely was

[5] This point is underscored by the fact that on August 28, 2025, President Trump signed an executive order excluding even more agencies having no meaningful connection to national security work from the FSLMRS, including the National Weather Service, the Office of the Commissioner for Patents, and the International Trade Administration. *See* Executive Order, Further Exclusions from the Federal Labor-Management Relations Program (August 28, 2025), https://perma.cc/UF24-LPHL. All told, the two executive orders strip collective bargaining rights from nearly half a million federal workers. *See* Eileen Sullivan, "Trump Orders Have Stripped Nearly Half a Million Federal Workers of Union Rights," *New York Times* (Sept. 1, 2025), https://www.nytimes.com/2025/09/01/us/politics/trumps-unions-federal-workers.html.

motivated by considerations outside of those identified in the statute"—namely, the White House's own statements showing that "the exclusions were intended as retaliation against labor organizations that have opposed President Trump or in furtherance of unrelated policy goals"—which "infect every one of the Executive Order's myriad exclusions." *Fed. Educ. Ass'n*, 2025 WL 2355747, at *1, *12 (cleaned up). An executive action that is *ultra vires*—particularly one that is thoroughgoingly unmoored from statutory authority as this one—is void. *See, e.g., 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"). The Government has pointed to no authority suggesting that a court can salvage an *ultra vires* order by positing a hypothetical order that is not overbroad or tainted by improper motives.[6] As this Court has pointed out, "while the President may have authority to exclude a series of 'agenc[ies] or subdivision[s]' from the FSLMRS, the 'order' the President

[6] The Government's assertion that viewing these features of the order as a whole is "odds with the D.C. Circuit's approach in *AFSA*, which appropriately considered only the defendant agency's national security purpose" (Doc. 39 at 8) is unavailing, as the plaintiff's challenge in *AFSA* was directed at the EO 14,251's exclusion of the State Department as a whole for the simple reason that the statute at issue in that case, the Foreign Service Labor-Management Relations Statute, explicitly allows the President to exempt only subdivisions of the State Department, not the whole agency. That statute provides as follows:

> The President may by Executive order exclude *any subdivision of the Department* from coverage under this subchapter if the President determines that—
>
> (1*) the subdivision* has as a primary function intelligence, counterintelligence, investigative, or national security work, and
>
> (2) the provisions of this subchapter *cannot be applied to that subdivision* in a manner consistent with national security requirements and considerations.

22 U.S.C. § 4103 (emphasis added).

issues pursuant to Section 7103(b)(1) may be *ultra vires* if the order—as here—reflects an utter disregard for the Section 7103(b)(1) limitations through its all-encompassing set of exclusions *Fed. Educ. Ass'n*, 2025 WL 2355747, at *15.

Second, Section 7103(b)(1) does not authorize EO 14,251's exclusion of the entirety of DOD, even if it is considered in isolation, because the DOD includes myriad subdivisions including like DODEA that are not engaged in national security work under *Cole*'s definition of "national security" or any other meaningful one. As this Court reasoned, the fact that DODEA's "[p]re-kindergarten to 12th grade educators and support staff may have a function that tangentially benefits 'national security work,'" that tangential relationship to national security cannot justify DODEA's exclusion from the FSLMS. *Fed. Educ. Ass'n*, 2025 WL 2355747, at *12. The statute establishes two conjunctive limits on the President's authority to exclude agencies and agency subdivisions: the agency or subdivision must have "as a primary function intelligence, counterintelligence, investigative, or national security work, *and* … the provisions of [the FSLMRS] *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). The Government's view—that 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—fails to give effect to the provision's second, more stringent limiting condition, *viz.*, that the collective bargaining provisions of the statute "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) (emphasis added). If that second condition is to have effect, 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 within that agency in a manner

consistent with national security requirements and considerations. Thus, if collective bargaining *can* be conducted by subdivisions of an agency consistent with national security, it is untenable to conclude that the FSLMRS "*cannot be applied to that agency* … in a manner consistent with national security requirements and considerations." *Id.* § 7103(b)(1)(B) (emphasis added).[7]

III. The Government Has Failed to Show that the Preliminary Injunction Causes Irreparable Harm to the Defendants or to the Public Interest

The Government, relying on the *AFSA*, as well as the unpublished stay order in *NTEU v. Trump*, No. 25-5157, 2025 WL 1441563 (D.C. Cir. May 16, 2025) ("*NTEU II*"), urges that "the 'preliminary injunction inflicts irreparable harm on the President by impeding his national-security prerogatives, which were explicitly recognized by Congress.'" (Doc. 39 at 12, quoting 2025 WL 1441563, at *2.) This contention is meritless because it simply assumes the conclusion that the President acted on the basis of *bona fide* national security considerations for purposes of the irreparable harm analysis—even though, as the District Court found, EO 14,251's staggering overbreadth and the White House's contemporaneous statements evincing improper motives both show otherwise. Consequently, these "'vague assertions of harm dependent on the merits of the

[7] 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 [the FSLMRS]" upon their certification that the provisions of the statute "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 the FSLMRS "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 here—that order further demonstrates that this administration acknowledges that collective bargaining can be conducted consistent with national security within components of DOD.

dispute are insufficient to show irreparable injury.'" *Fed. Educ. Ass'n*, 2025 WL 2355747, at *18 (quoting *NTEU II*, 2025 WL 1441563, at *5 (Childs, J., dissenting)).

The Government points to costs it will incur in complying with its obligations under the FSLMRS and under collective bargaining agreements that it has entered into and that continue in force by their terms and offers vague and wholly unsupported assertions that the preliminary injunction "threatens DoD's ability to attract and retain military personnel, and also potentially causes stress and distraction to current military members." Doc. 39 at 9-10. These assertions ring hollow because, as we have shown, Plaintiffs have been bargaining with DODEA under the FSLMRS for nearly half a century, and during that time DODEA schools have flourished; as this Court pointed out, "the preliminary injunction would merely require the government to function as it has for over half a century." *Fed. Educ. Ass'n v. Trump*, 2025 WL 2355747, at *19

IV. This Court Correctly Ruled that Plaintiffs Will Suffer Irreparable Harm Absent the Preliminary Injunction

The Government's perfunctory claim that Plaintiffs will suffer no irreparable harm from a stay of the preliminary injunction fails to contend with our showing—and this Court's findings—that DODEA's implementation of EO 14,251 has caused the Plaintiff and their members grave harms by, among other things, "discontinu[ing] negotiations over successive collective bargaining agreements; ceas[ing] participation in grievance proceedings [and] engaging in arbitral proceedings on various grievances; disallow[ing] union representation during employee disciplinary meetings and investigatory interviews; and eliminat[ing] official time and use of agency office spaces to conduct representation activities." *Fed. Educ. Ass'n*, 2025 WL 2355747, at *16. Furthermore, as the record shows and this Court found, Plaintiffs' "collective bargaining agreements have been effectively terminated" in that DODEA has acknowledged "disregarding key provisions in the collective bargaining agreements." *Id.* And "DoDEA has argued that the

FLRA—the body responsible for adjudicating complaints under the collective bargaining agreements—lacks jurisdiction over cases involving the collective bargaining agreements." *Id.*

In light of the factual record and this Court's findings, there is simply no room for the Government's assertion that "Plaintiffs' allegations of harm through loss of bargaining power are purely speculative and remediable." (Doc. 39 at 12.) These harms are occurring, and as this Court found, they are irreparable because "the loss of statutory protections resulting from the Executive Order strikes at the heart of the Union Plaintiffs' primary purpose and mission, thereby posing an existential threat to the union." *Id.* at *17 (cleaned up). And "a favorable ruling cannot, for example, retroactively help the member who has gone into a disciplinary meeting without the counsel of their union." *Id.*

In addition, DODEA's implementation of EO 14,251 has caused financial harm to the Plaintiffs even as it has gutted their core functions of collective bargaining, contract enforcement, and workplace representation. While this Court found that this harm was irreparable only as to FEA, which has lost a significant percentage of its income due to DODEA's cancellation of payroll deduction of members' dues payments, *id.*, it cannot be denied that even lesser financial harms compound the irreparable harm caused by the loss of Plaintiffs' core function.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' motion to stay this Court's preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2025, the foregoing document 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