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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-
11 CIO; AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-
12 CIO TSA LOCAL 1121;
COMMUNICATIONS WORKERS OF
13 AMERICA, AFL-CIO; and
ASSOCIATION OF FLIGHT
14 ATTENDANTS-CWA, AFL-CIO,

15 Plaintiffs,

16 v.

17 KRISTI NOEM; U.S. DEPARTMENT
OF HOMELAND SECURITY; HA
18 NGUYEN MCNEILL; and
TRANSPORTATION SECURITY
19 ADMINISTRATION,

20 Defendants.
21

CASE NO. C25-451 MJP

ORDER DENYING MOTION TO
DISMISS

22 This matter comes before the Court on Defendants' Motion to Dismiss. (Dkt. No. 37.)
23 Having reviewed the Motion, Plaintiffs' Response (Dkt. No. 42), the Reply (Dkt. No. 43), the
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Supplemental Authority (Dkt. Nos. 44, 46), and all supporting materials, the Court DENIES the Motion. Having already held oral argument on Plaintiffs’ Motion for Preliminary Injunction, which presented overlapping issues, the Court finds this matter suitable for decision without oral argument.

BACKGROUND

Plaintiffs AFGE, an AFGE Local, and two other labor unions challenge the February 27, 2025 determination of Kristi Noem, Secretary of DHS, to end collective bargaining and rescind the 2024 CBA entered into between AFGE and the TSA. Plaintiffs contend the Noem Determination violates the Administrative Procedure Act, constitutes First Amendment retaliation, and violates the Fifth Amendment by failing to accord the AFGE and its members with any due process. Plaintiffs sought and obtained a preliminary injunction to stop the enforcement of the Noem Determination and ensure the 2024 CBA remains in place for the duration of this litigation and, ultimately, for its full seven-year term. Defendants now seek dismissal of the Complaint. To orient the reader, the Court reviews the relevant background regarding the parties, the TSA’s historic approach to collective bargaining for TSOs, the Noem Determination, and allegations of anti-AFGE animus behind the Noem Determination.

A. Parties

Plaintiffs include: (1) AFGE; (2) AFGE TSA Local 1121; (3) the Communications Workers of America (CWA); and (4) the Flight Attendants-CWA, AFL-CIO (AFA). (Complaint ¶¶ 15, 20, 22, 24 (Dkt. No. 1).) AFGE is the largest federal union, representing approximately 800,000 federal civilian employees through its affiliated councils and locals in every state in the United States, which includes “security officers protecting our airports and airplanes[.]” (*Id.* ¶¶ 15-16.) AFGE TSA Local 1121 is a labor organization and unincorporated association residing

1 in Kent, Washington that represents transportation security officers, including those at Sea-Tac
2 International Airport. (Id. ¶ 20.) CWA is a labor union that represents approximately 30,000
3 workers including some who work in airports across the nation who handle ticketing, luggage,
4 and other customer services. (Id. ¶ 22.) Plaintiff AFA is a labor union that represents over 55,000
5 flight attendants who rely on TSOs to help ensure safe and secure airport screening. (Id. ¶¶ 24-
6 25.) Plaintiffs pursue their claims on behalf of their members, and the AFGE national and local
7 bring claims on their own behalf. (Id. ¶¶ 15, 19, 21, 23, 26.)

8 Plaintiffs bring claims against DHS and its Secretary, Kristi Noem, and TSA, and its
9 acting Administrator, Ha Nguyen McNeill (who was substituted for Adam Stahl, named in the
10 Complaint) (Compl. ¶¶ 27-30.)

11 **B. Background to 2024 CBA**

12 Passed in 2001, the Aviation and Transportation Security Act (ATSA) created the TSA to
13 be led by an Administrator appointed by the President with the advice and consent of the Senate
14 for a five-year term. 49 U.S.C. § 114(a), (b). Unlike other federal employees, TSA employees are
15 governed by a personnel management system established by the administrator of the Federal
16 Aviation Administration, subject to modifications made by the TSA Administrator. 49 U.S.C. §
17 114(n). As to Transportation Security Officers (TSOs), the Administrator “may employ, appoint,
18 discipline, terminate, and fix the compensation, terms, and conditions of employment.” ATSA §
19 111(d), 49 U.S.C. § 44935 note. Congress provided the Administrator “shall establish levels of
20 compensation and other benefits for individuals so employed.” Id.

21 In 2003, James M. Loy, the Under Secretary of the Department of Transportation,
22 determined that the newly-formed TSA’s screeners would not be permitted to engage in
23 collective bargaining. See Am. Fed’n of Gov’t Emps., AFL-CIO v. Loy, 281 F. Supp. 2d 59, 61
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1 (D.D.C. 2003), aff'd, 367 F.3d 932 (D.C. Cir. 2004). The Court refers to this as the Loy
2 Determination. But in 2011, TSA Administrator John S. Pistole established a collective
3 bargaining structure for TSOs. (Compl. ¶ 39.) Pistole based his decision on employee surveys,
4 workforce data, and “many views in the context of considering TSA’s mission requirements.”
5 (Id.) The determination “set forth a ‘comprehensive structure . . . that will provide for genuine,
6 binding collective bargaining on specified subjects at the national level with the union, if any,
7 that prevails in an election process.’” (Id. (quoting Feb. 4, 2011 Decision Mem., John S. Pistole
8 (“2011 Determination”), at 2-5.)).)

9 In June 2011, TSOs elected AFGE to be their exclusive representative, and AFGE began
10 bargaining collectively with TSA. (Compl. ¶ 41.) In November 2012, the parties signed their first
11 binding CBA. (Id. ¶ 42.) TSA and AFGE agreed to new CBAs in 2016 and 2020. (Id. ¶ 43.) In
12 late 2022, the TSA Administrator David Pekoske, who was appointed by President Trump,
13 issued a new determination on collective bargaining. (Id. ¶ 44 (citing Determination from
14 Pekoske on Transp. Sec. Officers and Collective Bargaining (Dec. 30, 2022) (“2022
15 Determination”).) Pekoske noted that his determination “recogniz[ed] that TSA’s dedicated
16 employees are critical to the success of our mission.” (Id.) The 2022 Determination expanded
17 collective bargaining rights to TSOs, but did not permit bargaining over compensation. (Id. ¶¶
18 45-48.)

19 In May 2024, AFGE and TSA signed their current CBA—the “2024 CBA”. (Compl. ¶¶
20 50-51.) The 2024 CBA sets certain terms and conditions of employment for TSOs. (Id.) The
21 2024 CBA recognized AFGE as TSOs’ exclusive representative. (Id. ¶ 54.) It also gave TSOs a
22 right to have a union representative present in disciplinary interviews (Weingarten rights), and it
23 granted AFGE the right to be present at formal discussions about grievances or conditions of
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1 employment. (Id. ¶ 56.) The 2024 CBA also provided that discipline or adverse actions “may be
2 taken for just cause and only for reasons that will promote the efficiency of the service.” (Id. ¶ 55
3 (quoting 2024 CBA Art. 27(C)).) The CBA was agreed to “remain in full force and effect” for
4 seven years. (Id. ¶ 61 (quoting 2024 CBA Art. 37(B)).) And while no TSO is required to join the
5 union or pay dues, if a TSO voluntarily chooses to pay dues through their paycheck, the 2024
6 CBA guarantees that TSA would deduct those dues and remit them to AFGE. (Id. ¶¶ 57-58.) The
7 2024 CBA also established a binding grievance and arbitration process allowing parties to
8 challenge CBA violations or other violations affecting conditions of employment. (Id. ¶¶ 55-57.)
9 “At the signing ceremony, TSA Administrator Pekoske stated that ‘[i]f we didn’t have this CBA,
10 if we didn’t have this pay package, I would submit to you, we probably wouldn’t have a TSA in
11 five or 10 years,” noting “[t]hat’s how important it is.” (Id. ¶ 52 (citation omitted).)

12 **C. Rescission of the 2024 CBA**

13 On February 27, 2025, Secretary Noem issued a memorandum to Adam Stahl, the senior
14 official performing the duties of the Administrator of TSA, entitled “Supporting the TSA
15 Workforce by Removing a Union That Harms Transportation Security Officers” (“Noem
16 Determination”). (Compl. ¶ 68.) The Noem Determination states that “[e]ffective immediately,”
17 she rescinded the 2022 Determination and claimed that the 2024 CBA is “no longer applicable or
18 binding and is hereby rescinded.” (Id. ¶¶ 70-71.) She wrote that “AFGE is no longer the
19 exclusive representative” of TSOs and discontinued the ability for TSOs to pay voluntary dues
20 from their paychecks. (Id. ¶ 71.) Plaintiffs did not receive notice of Noem’s intent to sign the
21 determination and Defendants did not follow the bargaining procedures set out in the 2024 CBA.
22 (Id. ¶ 76.)
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Noem stated in her memo “that the more than a decade of TSA Determinations that permitted collective bargaining were ‘misplaced directives’ that ‘have solely benefited the American Federation of Government Employees (AFGE) at TSOs’ expense.” (Compl. ¶ 69.) In a follow-on press release, DHS stated that “TSOs are losing their hard-earned dollars to a union that did not represent or protect their interests.” (*Id.* ¶ 79.) The press release includes a statement from a DHS spokesperson: “Thanks to Secretary Noem’s action, Transportation Security Officers will no longer lose their hard-earned dollars to a union that does not represent them. The Trump Administration is committed returning to merit-based hiring and firing policies.” (*Id.* ¶ 80.)

D. Alleged Animus

Plaintiffs cite to various evidence of the Defendants’ claimed animus against AFGE. First, Plaintiffs note that Noem Determination itself attacks AFGE by name, stating the prior determinations and CBA “have solely benefited the American Federation of Government Employees (AFGE) at TSOs’ expense.” (Compl. ¶ 69.) Second, Plaintiffs note that the Noem Determination follows AFGE’s litigation efforts to push back against the Trump Administration’s decision to terminate federal workers and limit their collective bargaining rights. *See, e.g., AFGE v. Trump*, No. 1:25-cv-00264 (D.D.C.); *AFGE v. Ezell*, No. 1:25-cv-10276 (D. Mass.); *AFGE v. OPM*, No. 3:25-cv-01780 (N.D. Cal.); (Compl. ¶ 65). Plaintiffs highlight that on February 27, 2025 (the same day of the Noem Determination), a district court issued a temporary restraining order against the Office of Personnel Management, in favor of AFGE. (Compl. ¶ 67 (citing *AFGE v. OPM*, 2025 WL 660053, at *14 (N.D. Cal. Feb. 28, 2025) (referencing Feb. 27 oral order)).) Third, Plaintiffs assert that President Trump issued a memorandum for agency heads targeting litigants like AFGE, stating “[i]n recent weeks, activist

1 organizations . . . have obtained sweeping injunctions . . . undermining the democratic process.”
2 (See Compl. ¶ 77.) Fourth, Plaintiffs point out that unions the President believes will “work with
3 him,” still have collective bargaining rights, which undermines the justification advanced in the
4 Noem Determination. See Order, 90 Fed. Reg. 16427 (Apr. 17, 2025) (expressly restoring
5 bargaining rights to specific unions).

6 ANALYSIS

7 A. Legal Standard

8 Defendants move to dismiss for lack of subject matter jurisdiction and for failure to state
9 a claim. Under Federal Rule of Civil Procedure 12(b)(1), a defendant may move to dismiss for
10 lack of subject matter jurisdiction. Upon such a motion, the plaintiff party bears the burden of
11 establishing the court’s jurisdiction. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375,
12 377 (1994). In contrast, a motion to dismiss for failure to state a claim tests the legal sufficiency
13 of the claims under Federal Rule of Civil Procedure 12(b)(6). “Dismissal under Rule 12(b)(6) is
14 appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to
15 support a cognizable legal theory.” Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097,
16 1104 (9th Cir. 2008). In ruling on a Rule 12(b)(6) motion, the Court must accept all material
17 allegations as true and construe the complaint in the light most favorable to the non-movant.
18 Wyler Summit P’Ship v. Turner Broad. Sys., Inc., 135 F.3d 658, 661 (9th Cir. 1998). To survive
19 dismissal, the complaint “must contain sufficient factual matter, accepted as true, to ‘state a
20 claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing
21 Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)).
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1 After considering standing, the Court reviews Defendants’ jurisdictional challenges under
2 Rule 12(b)(1) and then considers their Rule 12(b)(6) challenges to Plaintiffs’ Due Process and
3 First Amendment claims.

4 **B. Plaintiffs Have Standing**

5 Although Defendants do not contest Plaintiffs’ standing, the Court briefly reviews the
6 issue. Both AFGE and the AFGE Local have organizational standing, as the Noem
7 Determination here “perceptibly impair[s] their ability to perform the services they were formed
8 to provide.” E. Bay Sanctuary Covenant v. Biden, 993 F.3d 640, 663, 677 (9th Cir. 2021). These
9 same Plaintiffs have standing to represent their members, who had grievances terminated and
10 have lost protections including “just cause” protections and union representation in investigatory
11 interviews. See Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ., 82
12 F.4th 664, 681 (9th Cir. 2023) (en banc) (describing representational standing requirements).

13 **C. The Court has Jurisdiction Over Plaintiffs’ Claims Notwithstanding the FLRA**

14 Defendants argue that the Court lacks jurisdiction because Congress has “implicitly
15 precluded district courts from reviewing the agency action at issue,” the dispute must be
16 presented to the Federal Labor Relations Authority (FLRA). This argument rests on a very
17 limited jurisdictional preclusion theory announced in Thunder Basin Coal Co. v. Reich, 510 U.S.
18 200, 207 (1994). The Court continues to disagree with Defendants’ argument, finding that the
19 agency action here is not of the kind committed to the FLRA’s limited review.

20 To unpack the arguments, the Court reviews the scope and function of the FLRA, the
21 contours of Thunder Basin preclusion, and the question of whether the claims here must be
22 brought before the FLRA.

1 **1. The FLRA**

2 “In 1978, Congress enacted the Federal Service Labor-Management Relations Statute
3 (the “Statute” or FSLMRS) to govern labor relations between the executive branch and its
4 employees.” Am. Fed’n of Gov’t Emps., AFL-CIO v. Trump, 929 F.3d 748, 752 (D.C. Cir.
5 2019). The Statute is set forth in Title VII of the Civil Service Reform Act (CSRA) and codified
6 at 5 U.S.C. §§ 7101-35. Id. (citing Pub. L. No. 95-454, § 701, 92 Stat. 1111, 1191-1216 (1978)).
7 “The Statute also establishes a scheme of administrative and judicial review” through “the
8 Federal Labor Relations Authority (FLRA), a three-member agency charged with adjudicating
9 federal labor disputes, including ‘negotiability’ disputes and ‘unfair labor practice’ disputes.” Id.
10 (citing 5 U.S.C. § 7105(a)). “In negotiability disputes, the FLRA determines whether agencies
11 and unions must bargain over certain subjects.” Id. (citing 5 U.S.C. §§ 7105(a)(2)(E),
12 7117(c)(1)). And “[i]n unfair labor practice proceedings, the FLRA resolves whether an agency
13 must bargain over a subject, violated the duty to bargain in good faith, or otherwise failed to
14 comply with the Statute.” Id. (citing 5 U.S.C. §§ 7105(a)(2)(G), 7116(a), 7118). Any decision
15 from the FLRA may be appealed to the D.C. Circuit Court of Appeals. Id. (citing 5 U.S.C. §
16 7123(a), (c)).

17 **2. Thunder Basin Preclusion**

18 District courts generally have jurisdiction over claims arising under federal law. See 28
19 U.S.C. § 1331. But “[a] special statutory review scheme, this Court has recognized, may
20 preclude district courts from exercising jurisdiction over challenges to federal agency action.”
21 Axon Enter., Inc. v. Fed. Trade Comm’n, 598 U.S. 175, 185 (2023) (citing Thunder Basin Coal
22 Co. v. Reich, 510 U.S. 200, 207 (1994)). Congress may explicitly remove jurisdiction for certain
23 claims or it may do so “implicitly, by specifying a different method to resolve claims about
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1 agency action.” Id. As examples of implicit jurisdictional preclusion, the Supreme Court has
2 cited the Exchange Act and FTC Act’s inclusion of an agency review process followed by
3 review in a court of appeals. Id. But a comprehensive statutory review process alone does not
4 necessarily mean that every claim concerning agency action falls outside the district court’s
5 jurisdiction. Id.

6 To determine whether Congress implicitly sought to preclude general federal jurisdiction,
7 the Court generally asks “whether the particular claims brought were ‘of the type Congress
8 intended to be reviewed within this statutory structure.’” Axon, 598 U.S. at 186 (quoting
9 Thunder Basin, 510 U.S. at 208). There are “three considerations designed to aid in that inquiry,
10 commonly known now as the Thunder Basin factors.” Id. at 186. First, could precluding district
11 court jurisdiction “foreclose all meaningful judicial review” of the claim? Thunder Basin, 510
12 U.S. at 212–213. This “first Thunder Basin factor recognizes that Congress rarely allows claims
13 about agency action to escape effective judicial review.” Axon, 598 U.S. at 186. Second, is the
14 claim “wholly collateral to [the] statute’s review provisions”? Thunder Basin, 510 U.S. at 212
15 (internal quotation marks omitted). Third, is the claim “outside the agency’s expertise”? Id. “The
16 second and third [considerations] reflect in related ways the point of special review provisions—
17 to give the agency a heightened role in the matters it customarily handles, and can apply
18 distinctive knowledge to.” Axon, 598 U.S. at 186. Ultimately, “[w]hen the answer to all three
19 questions is yes, we presume that Congress does not intend to limit jurisdiction.” Id. (citation and
20 quotation omitted). “But the same conclusion might follow if the factors point in different
21 directions.” Id. “The ultimate question is how best to understand what Congress has done—
22 whether the statutory review scheme, though exclusive where it applies, reaches the claim in
23 question.” Id.

1 **3. The Claims Are Not Subject to FLRA Jurisdiction under Thunder Basin**

2 The three Thunder Basin considerations here weigh against finding implicit jurisdictional
3 preclusion.

4 The first Thunder Basin consideration weighs in favor of this Court’s jurisdiction.
5 Although Defendants are correct that FLRA decisions can be appealed to the D.C. Court of
6 Appeals, that fact alone does not mean that the claims here can be brought before the FLRA.
7 Defendants’ argument falls apart because the 2011 and 2022 Determinations and the Noem
8 Determination expressly bar FLRA review in the first instance. The 2011 Determination, which
9 established TSOs’ first collective bargaining structure, “set forth . . . a comprehensive structure
10 that is different and distinct, separate and independent, from that provided in 5 U.S.C. Chapter
11 71[.]” (2011 Determination at 5.) The 2011 Determination explained that except for “an election
12 conducted by the FLRA . . . [the] ATSA § 111(d) supersedes the Federal Services Labor-
13 Management Relations statute (5 U.S.C. Chapter 71) in all other respects and therefore Chapter
14 71 shall not apply, or afford any rights, to management, unions, or covered employees that are
15 not expressly provided in this Determination.” (*Id.* at 6.) The 2022 Determination similarly
16 eschewed adoption of FLRA jurisdiction, stating that “[a]s jurisdiction on FLRA cannot be
17 conferred administratively, any provision of Chapter 71 or its implementing regulations
18 regarding FLRA are not adopted by this Determination.” (2022 Determination § 9.) And, lastly,
19 Noem’s Determination rejected incorporating FSLMRS or FLRA jurisdiction: “This
20 Determination does not incorporate by reference any provisions of Chapter 71 of Title 5 of the
21 United States Code or its implementing regulations for these employees, any union, or TSA
22 management.” (Noem Determination at 3.) Thus, by the plain language of these three
23 Determinations, Plaintiffs would not be permitted to pursue their claims before the FLRA.
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1 Defendants have contended that AFGE could bring its claims as an unfair labor practice by
2 asking for review under 5 U.S.C. § 7118(a). But as Plaintiffs noted, this requires petitioning the
3 General Counsel of the FLRA to investigate the claim, 5 U.S.C. 7118(a), and there is no right to
4 appeal the General Counsel’s refusal to commence proceedings, see 5 U.S.C. § 7123(a). See Am.
5 Fed’n of Gov’t Emps., AFL-CIO v. United States Off. of Pers. Mgmt., No. C 25-01780 WHA,
6 2025 WL 900057, at *5 (N.D. Cal. Mar. 24, 2025). And there is currently no General Counsel of
7 the FLRA, as the position remains vacant. The Court is persuaded by Plaintiffs’ arguments that
8 undermine Defendants’ position.

9 The second Thunder Basin consideration also weighs in favor of this Court’s jurisdiction
10 because the claims are collateral to and far afield of the FLRA’s core agency review. Defendants
11 argue that the FSLMRS “‘establishes a scheme of administrative and judicial review’ for labor
12 relations disputes between the Executive Branch and unions representing federal employees.”
13 (Defs. Mot. at 5 (citing AFGE v. Trump, 929 F.3d 748, 752 (D.C. Cir. 2019))). But the FLRA has
14 a far narrower review mandate, principally designed to hear disputes about negotiability and
15 unfair labor practices. AFGE, 929 F.3d at 752. Here, Plaintiffs’ challenge to the Noem
16 Determination does not implicate negotiability—whether TSA must bargain with a union—or
17 unfair labor practices. Rather, it challenges the legality of Noem’s decision to rescind a fully-
18 bargained-for CBA before its term has expired. The present dispute falls far afield of the core
19 function of the FLRA.

20 Defendants argue that the FLRA has exclusive jurisdiction for the same reasons the D.C.
21 District Court found that challenges to the 2003 Loy Determination barring collective bargaining
22 were subject to exclusive agency review. (Defs. Mot. at 6-7 (citing Am. Fed’n of Gov’t Emps.,
23 AFL-CIO v. Loy, 281 F. Supp. 2d 59, 64–65 (D.D.C. 2003), aff’d, 367 F.3d 932 (D.C. Cir.

2004)).) The Court disagrees, given certain fundamental distinctions between the Loy Determination and the Noem Determination. In response to the Loy Determination, AFGE filed petitions with the FLRA to hold union elections, and filed suit in district court, lodging constitutional and APA challenges to the Loy Determination. See Loy, 281 F. Supp. 2d at 61-62. The District Court found that the claims brought before it could have been included in the FLRA action, though it considered them on their merits. Id. at 64-65. On appeal, the D.C. Circuit affirmed dismissal of the action, noting that the constitutional and statutory claims should have been presented to the FLRA. AFGE v. Loy, 367 F.3d 932, 936-37 (D.C. Cir. 2004). While the Loy Determination concerned elections and negotiability that the parties agreed were subject to the FLRA’s jurisdiction, the Noem Determination focuses on an agency action to rescind a fully-bargained-for CBA that was already in effect and had nothing to do with elections, negotiability, or unfair labor practices. Nothing in Loy suggests that the Noem Determination falls within the FLRA’s core competencies, and Defendants have not explained why it would.

Defendants cite to two additional cases where the court found jurisdictional preclusion concerning union claims that had to be brought before the FLRA. (Defs. Mot. at 5-6, 8 (citing AFGE v. Trump, 929 F.3d 748 (D.C. Cir. 2019); Nat’l Treasury Emps. Union v. Trump, 770 F. Supp. 3d 1 (D.D.C. 2025).) The Court finds neither case persuasive as to the issues raised by the present litigation. Both cases involve challenges to the subjects of collective bargaining or to termination of union members covered by a CBA, not the distinct agency action of terminating an entire CBA. The Court briefly reviews both cases to highlight their distinctive differences.

First, in AFGE v. Trump, the plaintiffs challenged three executive orders that: “(1) direct[ed] agencies to refuse to bargain over ‘permissive’ subjects based on 5 U.S.C. § 7106(b)(1); (2) establish[ed] government-wide rules for employee and agency conduct, which

1 may have the effect of removing mandatory subjects from bargaining based on 5 U.S.C. §
2 7117(a)(1); and (3) set goals that agencies must pursue during bargaining.” Id., 929 F.3d at 753.
3 The Court explained that these Executive Orders could be challenged before the FLRA because
4 they could form the basis of a “bad-faith bargaining” claim or claim that the Government was
5 ignoring topics of bargaining that must be included under the FSLMRS. Id. at 757-58. But here,
6 the challenge to the rescission of a CBA does not implicate bargaining or elections. Rather, the
7 challenge here is solely to the action of rescinding a CBA, which does not fall within the FLRA’s
8 core functions concerning “negotiability” or any other Congressionally-mandated expertise.

9 Second, in NTEU, the plaintiff unions challenged several executive orders that Trump
10 issued to terminate probationary employees, prepare for large-scale reductions in force, and to
11 offer deferred resignation. Id., 770 F. Supp. 3d at 3. Unlike here, the unions conceded that they
12 could bring their claims before the FLRA, and the Court found that the FLRA provided for
13 meaningful review, possessed at least some agency expertise, and the collateral claims were not
14 “far afield from the agency’s usual review.” Id. at 8-11. Here, the challenge is not to the
15 termination of employees or deferred resignation. The question is whether the Noem
16 Determination to rescind the CBA is permissible and has caused constitutional harms. The
17 question of whether to rescind a CBA is not akin to the question of whether individual
18 employees may be fired or asked to retire. And Defendants have offered no explanation of how
19 the facts here align.

20 The final Thunder Basin factor also favors finding no claim preclusion because there is
21 no apparent expertise in the FLRA to determine whether a rescission decision violates the APA
22 or the constitution.
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1 On balance, the Court finds that the Thunder Basin considerations all point to allowing
2 the case to proceed in this Court. There is little evidence that Congress implicitly intended the
3 FLRA to handle a dispute over an agency decision to rescind a CBA.

4 **D. Plaintiffs' APA Claim Is Reviewable**

5 Defendants argue the Noem Determination is not reviewable under the APA because it is
6 “committed to agency discretion by law” and therefore exempt under 5 U.S.C. § 701(a)(2).
7 (Defs. Mot. at 11-16.) The Court disagrees.

8 “The Administrative Procedure Act embodies a ‘basic presumption of judicial review,’
9 Abbott Laboratories v. Gardner, 387 U.S. 136, 140, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), and
10 instructs reviewing courts to set aside agency action that is ‘arbitrary, capricious, an abuse of
11 discretion, or otherwise not in accordance with law,’ 5 U.S.C. § 706(2)(A).” Dep't of Com. v.
12 New York, 588 U.S. 752, 771 (2019). “Most—but not all—final agency actions are reviewable,”
13 subject to two exceptions. Trout Unlimited v. Pirzadeh, 1 F.4th 738, 751 (9th Cir. 2021).
14 Defendants highlight one exception to APA’s presumption of judicial review—for “agency
15 action is committed to agency discretion by law.” 5 U.S.C. § 701(a)(2).

16 The Supreme Court has “read the § 701(a)(2) exception for action committed to agency
17 discretion quite narrowly, restricting it to those rare circumstances where the relevant statute is
18 drawn so that a court would have no meaningful standard against which to judge the agency’s
19 exercise of discretion.” Dep’t of Com., 588 U.S. at 772 (citation and quotation omitted). The
20 APA expressly contemplates judicial review of an agency’s ordinary discretionary judgments by
21 authorizing review of an agency’s action for “abuse of discretion.” 5 U.S.C. § 706(2)(A). The
22 Section 701(a)(2) exception therefore applies only “if no judicially manageable standards are
23 available for judging how and when an agency should exercise its discretion.” Trout Unlimited, 1
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1 F.4th at 751 (quoting Heckler v. Chaney, 470 U.S. 821, 830 (1985)). “Only where there is truly
2 no law to apply have we found an absence of meaningful standards of review.” Perez Perez v.
3 Wolf, 943 F.3d 853, 861 (9th Cir. 2019) (internal quotation marks omitted). “So long as the
4 regulations provide a ‘meaningful standard’ by which a court could review the [agency's] actions
5 and our review of the agency's compliance with those regulations does not infring[e] any of the
6 [agency’s] prerogatives under the statute, then we have jurisdiction, pursuant to the APA, to
7 review the agency’s compliance with its own regulations.” Trout Unlimited, 1 F.4th at 752
8 (citation and quotation omitted).

9 Judicially-manageable standards against which to measure agency action can derive from
10 a variety of sources, not just regulations and statutes. “In order to assess whether the court has a
11 meaningful standard against which to judge the agency’s exercise of discretion[,] we first look at
12 the statute itself.” ASSE Int’l, Inc. v. Kerry, 803 F.3d 1059, 1069 (9th Cir. 2015) (cleaned up).
13 The Court may also look to agency regulations or agency practices to determine a meaningful
14 standard against which to review its exercise of discretion. Id. at 1069 (“Even where statutory
15 language grants an agency unfettered discretion, its decision may nonetheless be reviewed if
16 regulations or agency practice provide a meaningful standard by which this court may review its
17 exercise of discretion.”). Similarly, the Ninth Circuit has found that agency memoranda
18 implementing policies to provide a meaningful standard against which to test agency action.
19 Alcaraz v. I.N.S., 384 F.3d 1150, 1161 (9th Cir. 2004).

20 The Parties here agree that § 111(d) of the ATSA gives DHS broad discretion to
21 determine whether or not to engage in collective bargaining. (Mot. at 12; Pls. Opp. at 15.)
22 Specifically, Section 111(d) gives the TSA Administrator authority to “employ, appoint,
23 discipline, terminate, and fix the compensation, terms, and conditions of employment of Federal
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1 service” for security screeners. 49 U.S.C. § 44935. Nonetheless, Plaintiffs argue that the 2024
2 CBA offers sufficient agency policy standards against which to measure Noem’s exercise of
3 discretion.

4 The Court agrees with Plaintiffs that the 2024 CBA is a “self-imposed restriction on
5 agency discretion” that provides a meaningful standard by which the Court may review Noem’s
6 exercise of discretion. (Pls. Opp. at 15-16.) The CBA also conferred a benefit to TSOs by
7 allowing them to collectively bargain, to have certain procedural rights. And the CBA allowed
8 AFGE to act as a representative for its TSO member in various proceedings. The outcome here is
9 similar to that in ASSE, 803 F.3d at 1069-70. There, the agency had full discretion to create—or
10 not—an exchange visitor programs, and once it adopted regulations creating such a program, it
11 created a judicially reviewable standard. ASSE, 803 F.3d at 1069-70. Here, although TSA has
12 discretion in how it employs TSOs, once it entered into the CBA, it set a policy and practice
13 against which to measure Noem’s exercise of discretion and it conferred rights on TSOs that they
14 would not have otherwise enjoyed. And while the CBA here is not a regulation, it has the same
15 force of one, as it is a statement of policy and a practice, which the Ninth Circuit has found
16 sufficient to form a legal standard for review. See Alcaraz, 384 F.3d at 1161; ASSE, 803 F.3d at
17 1069. This follows the Ninth Circuit’s explanation in Trout Unlimited, that an agency
18 determination made under broad discretionary authority can nevertheless cabin agency discretion
19 to make it reviewable under the APA, much like the public duty doctrine—while “a person has
20 no duty to undertake a rescue but, once a rescue is attempted, the rescuer is held to a duty of
21 care.” Trout Unlimited, 1 F.4th at 756.

22 Defendants argue that the Noem Determination is unreviewable as a form of non-
23 enforcement decision that the Supreme Court has exempted from review. (See Defs. Mot. at 14
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1 (citing Dep't of Homeland Sec. v. Regents of the Univ. of California, 591 U.S. 1 (2020)).) This is
2 not convincing. Defendants are correct that the Supreme Court has recognized a “limited
3 category of unreviewable actions [that] includes an agency’s decision not to institute
4 enforcement proceedings[.]” Regents, 591 U.S. at 17 (citing Heckler, 470 U.S. at 831–32). For
5 example, in Heckler the Supreme Court recognized that the FDA’s refusal to institute
6 enforcement actions against two States to prevent their use of certain drugs for lethal injection
7 was beyond review because a “refusal to act” does not “provide[] a focus for judicial review.” Id.
8 at 832. But the Supreme Court has since distinguished Heckler in considering DACA, finding the
9 immigration program to be not only a non-enforcement policy, but also one that conferred
10 various benefits to immigrants who fit within the program. Regents, 591 U.S. at 18-19 (noting
11 that “[u]nlike an agency's refusal to take requested enforcement action, access to these types of
12 benefits is an interest “courts often are called upon to protect” (cleaned up)). As explained in
13 Regents, an agency determination that includes both non-enforcement and which confers benefits
14 falls within APA review. Here, like the DACA program in Regents, the CBA confers benefits on
15 TSOs and the Union, set a policy of engaging in collective bargaining for the agency itself, and
16 ultimately set a meaningful standard against which to assess the Noem Determination under the
17 APA. As such, the Court rejects Defendants’ argument that CBA is akin to a non-enforcement
18 policy that cannot be reviewed.

19 **E. No Merit to Defendants’ Tucker Act Arguments**

20 Defendants argue that the APA bars Plaintiffs’ claims because they are essentially breach
21 of contract claims that must be brought before the Court Federal Claims under the Tucker Act,
22 28 U.S.C. § 1491(a)(1). (Defs. Mot. at 16-20.) This argument misconstrues Plaintiffs’ claims in
23 an errant effort to shoehorn them into a jurisdictional exclusion.
24

1 As is relevant here, the APA’s waiver of sovereign immunity “does not apply to claims
2 for ‘money damages’ or claims ‘expressly or impliedly forbid[den]’ by another statute granting
3 consent to suit.” Tucson Airport Auth. v. Gen. Dynamics Corp., 136 F.3d 641, 645 (9th Cir.
4 1998) (citing 5 U.S.C. § 702). Instead, only “[a]gency action made reviewable by statute and
5 final agency action for which there is no other adequate remedy in a court” are subject to judicial
6 review. 5 U.S.C. § 704. As the Ninth Circuit has explained, “the APA waives sovereign
7 immunity for . . . claims only if three conditions are met: (1) its claims are not for money
8 damages, (2) an adequate remedy for its claims is not available elsewhere and (3) its claims do
9 not seek relief expressly or impliedly forbidden by another statute.” Tucson Airport, 136 F.3d at
10 645.

11 Defendants argue that APA’s waiver of sovereign does not reach the claims here because
12 they are all forms of contract claims over which Tucker Act provides an adequate remedy. But
13 Plaintiffs correctly note that the CBA is not a contract over which the Tucker Act confers
14 jurisdiction. “The government’s consent to suit under the Tucker Act does not extend to every
15 contract.” Rick's Mushroom Serv., Inc. v. United States, 521 F.3d 1338, 1343 (Fed. Cir. 2008).
16 For the Act to apply, there must be a “money-mandating” feature of the contract that would give
17 a substantive right to recover damages in the event of breach. Id. at 1344. For example, a cost-
18 sharing agreement between the government and a private company was not a money-mandating
19 contract sufficient to confer Tucker Act jurisdiction. Id. Here, the CBA is not a money-
20 mandating agreement—it merely sets forth various agreements about the terms of employment,
21 bargaining rights, and union representation rights. To the extent the CBA allows the union to
22 collect contributions, those payments come from the members, not the government, such that it
23 cannot be found to be a money-mandating contract. And as the Ninth Circuit has acknowledged,
24

1 “[a]n action for specific performance is not an action for “money damages” under APA § 702,
2 even if the remedy may actually require a payment of money by the government.” Tucson, 136
3 F.3d at 645. Defendants do not argue that the CBA is a money-mandating contract, but cite
4 instead to cases involving claims that the Federal Court of Claims denied, and were nonetheless
5 barred by review in the District Courts. (Mot. at 19.) But none of these cases held that an
6 agreement falling outside the Tucker Act are also precluded from review by the District Court.
7 The Court finds no merit in Defendants’ argument.

8 The Court also finds no merit in Defendants’ argument that the Tucker Act precludes
9 Plaintiffs’ First Amendment claim (Count III). (Mot. at 18 (citing Tucson Airport, 136 F.3d at
10 647).) Defendants argue that Plaintiffs’ First Amendment claim is an empty label applied to hide
11 what is simply a contract-based claim. But Defendants have not explained why this supposition
12 is true. While the retaliatory acts concern the CBA, the First Amendment claim stands apart and
13 alone from the contract itself. Nor does Tucson Airport, the sole authority Defendants cite,
14 support the argument. In that case, the Court merely held that due process, takings, and public
15 debt claims seeking money damages which all “ar[ose] from a contract with the United States
16 government” were subject to the Tucker Act. See Tucson Airport, 136 F.3d at 647. Even if one
17 might frame Plaintiffs’ First Amendment claim as arising out of a contract, the claim does not
18 seek money damages and the CBA lacks the dispositive money-mandating feature for the Tucker
19 Act to apply.

20 Defendants fail to demonstrate that the APA and Tucker Act preclude jurisdiction over
21 Plaintiffs’ claims.
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1 **F. Plaintiffs Have Adequately Pleaded a Due Process Claim**

2 Defendants contend that Plaintiffs have not adequately pleaded their Due Process claim
3 on the theory that the CBA did not confer any protected property interest. The Court disagrees.

4 Plaintiffs argue that they were denied Fifth Amendment Due Process when Noem
5 rescinded the CBA and all outstanding grievances without notice or process. The Court finds
6 Plaintiffs likely to succeed on this claim.

7 In order to have a Fifth Amendment claim, Plaintiffs must demonstrate a constitutionally-
8 protected property interest. “[I]t has long been settled that a contract can create a constitutionally
9 protected property interest.” San Bernardino Physicians’ Servs. Med. Grp., Inc. v. San
10 Bernardino Cnty., 825 F.2d 1404, 1407–08 (9th Cir. 1987). A “constitutionally protectible
11 entitlement may arise from contractual language providing for discharge from employment only
12 for ‘cause,’ or even from the mere fact that a contract provides for continued employment during
13 a fixed term.” Id. (citation omitted). But not every contract provision creates an enforceable
14 right. In order to have a property interest in a benefit, a person must demonstrate that he or she
15 has a legitimate claim of entitlement to it, not merely a unilateral expectation. Board of Regents
16 of State Colleges v. Roth, 408 U.S. 564, 577 (1972).

17 Plaintiffs have adequately pleaded a claim that the CBA provides a legitimate entitlement
18 to certain rights in “their continued employment at TSA” and that this conferred a
19 constitutionally-protected Due Process right. Plaintiffs note that under the CBA, “Disciplinary
20 and/or Adverse Actions may be taken for just cause and only for reasons that will promote the
21 efficiency of the service.” (2024 CBA Art. 27(C)(3); Compl. ¶¶ 54-56.) The Court finds that
22 these allegations suffice to show that the CBA confers an entitlement that has been affected by
23 the termination of the CBA without any process. See San Bernardino, 825 F.2d at 1408.

1 Additionally, Plaintiffs have also identified a right to file grievances, which confers an
2 entitlement to benefits that are more than a unilateral expectation. (Compl. ¶¶ 56, 74, 78, 101,
3 130.) And, more importantly, Plaintiffs have alleged that these rights were infringed when the
4 CBA was terminated and they were afforded no notice and no process before termination of the
5 grievances. (Id. ¶ 130.) These allegations are adequate to state a Due Process claim.

6 The Court also notes that the sole case Defendants cite remains distinguishable in
7 material aspects. Ortloff v. Trimmer, No. C16-1257RSL, 2018 WL 2411755, at *3 (W.D. Wash.
8 May 29, 2018), aff'd, 773 F. App'x 903 (9th Cir. 2019). Ortloff concerned probationary
9 employees who were required by a collective bargaining agreement to be given “bona fide
10 reasons” for termination before the end of the probationary period. Id. The Court found that
11 probationary employees had no protected right because the agreement imposed only a
12 “reasonableness” or “good faith” standard and it did not confer an interest in continued
13 employment. Here, the CBA confers specific rights affecting the terms of employment, imposes
14 a “just cause” basis for termination, and gives members the right to file grievances, far beyond
15 the limited standards at issue in Ortloff.

16 **G. Plaintiffs Have Adequately Pleaded a First Amendment Claim**

17 The Court finds that Plaintiffs have sufficiently pleaded a First Amendment retaliation
18 claim.

19 To state a claim for First Amendment retaliation, the Plaintiff must show “that (1) [the
20 plaintiff] was engaged in a constitutionally protected activity, (2) the defendant’s actions would
21 chill a person of ordinary firmness from continuing to engage in the protected activity and (3) the
22 protected activity was a substantial or motivating factor in the defendant’s conduct.” O’Brien v.
23 Welty, 818 F.3d 920, 932 (9th Cir. 2016) (internal quotations omitted). “If an official takes
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1 adverse action against someone based on that forbidden motive, and non-retaliatory grounds are
2 in fact insufficient to provoke the adverse consequences, the injured person may generally seek
3 relief by bringing a First Amendment claim.” Nieves v. Bartlett, 587 U.S. 391, 398 (2019)
4 (quotation omitted). “In assessing whether this causal element is met, courts have also given
5 weight to circumstantial evidence such as a proximity in time between the protected speech and
6 the adverse action, the defendant's expression of opposition to the protected speech, and evidence
7 that the defendant proffered false or pretextual explanations for the adverse action.” Boquist v.
8 Courtney, 32 F.4th 764, 777 (9th Cir. 2022).

9 Although Defendants only challenge the adequacy of the alleged animus and causation,
10 the Court reviews all of the necessary elements.

11 As to the first undisputed element, it is apparent that AFGE has been involved in at least
12 three lawsuits against the Trump Administration to stop Trump’s efforts to downsize the federal
13 workforce. See, e.g., AFGE v. Trump, No. 1:25-cv-00264 (D.D.C.); AFGE v. Ezell, No. 1:25-
14 cv-10276 (D. Mass.); AFGE v. OPM, No. 3:25-cv-01780 (N.D. Cal.). As such, it has been
15 engaged in protected activity. As to the second element, a person of ordinary firmness would
16 reasonably be deterred from engaging in further litigation if he or she feared loss of job-related
17 benefits.

18 As to animus and causation, there are adequate allegations that the Noem Determination
19 comes from the Trump Administration’s dislike for AFGE as a union pushing back against its
20 federal employment policies and asserting its rights to petition the Courts. The Noem
21 Determination attacks AFGE by name, stating the prior Determinations and CBA “have solely
22 benefited the . . . AFGE[] at TSOs’ expense.” (Compl. ¶ 69; see also id. ¶¶ 68, 79-80.) This
23 statement highlights a direct antipathy towards AFGE, and Plaintiffs’ allege that the statement is
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1 false. (Compl. ¶ 121.) The Noem Determination also follows closely AFGE’s litigation efforts to
2 push back against the Trump Administration’s attacks on federal workers. (Compl. ¶¶ 65-67.)
3 Plaintiffs highlight that on February 27, 2025 (the same day of the Noem Determination), a
4 district court issued a temporary restraining order against the Office of Personnel Management,
5 in favor of AFGE. (Comp. ¶ 67 (citing AFGE v. OPM, 2025 WL 660053, at *14 (N.D. Cal. Feb.
6 28, 2025)).) Plaintiffs also note that President Trump issued a memorandum for agency heads
7 targeting litigants like AFGE, stating “[i]n recent weeks, activist organizations . . . have obtained
8 sweeping injunctions . . . undermining the democratic process.” (Compl. ¶ 77). While those acts
9 are not directly tied to Noem personally, they are nevertheless relevant to assessing animus in the
10 context of executive branch actions and a pattern of ongoing retaliation. See Adetuyi v. City of
11 San Francisco, 63 F.Supp.3d 1073, 1090 (N.D. Cal. 2014). And they are not merely
12 coincidental—they fall within a pattern of specific hostility directed towards AFGE. These
13 allegations suffice to show animus and a causal link between the animus and the actions taken to
14 terminate the CBA. See Boquist, 32 F.4th at 777.

15 Accordingly, the Court finds the claim adequately pleaded and disagrees with
16 Defendants’ contention that the allegations are “nothing more than rank speculation.” (Reply. at
17 12.)

18 CONCLUSION

19 Defendants have failed to convince the Court that it lacks jurisdiction over Plaintiffs’
20 claims. There is no basis on which to find Thunder Basin preclusion. Additionally, the APA
21 claims are reviewable and the Tucker Act poses no bar to any of Plaintiffs’ claims. As to the
22 adequacy of the pleadings, the Court disagrees with Defendants’ argument that the Due Process
23 and First Amendment claims suffer from pleading deficiencies. Both claims are adequately
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1 pleaded, and Defendants do not otherwise challenge the sufficiency of the any other claims. In
2 sum, the Court finds no merit to Defendants' Motion and DENIES it.

3 The clerk is ordered to provide copies of this order to all counsel.

4 Dated August 13, 2025.

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6 Marsha J. Pechman
7 United States Senior District Judge
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