Nos. 25-3030, 25-3034, 25-3293

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

American Federation of Government Employees, AFL-CIO, *et al.*, *Plaintiffs-Appellees*, v. Donald J. Trump, *in his official capacity as President of the United States*, *et al.*, *Defendants-Appellants*.	Nos. 25-3030, 25-3293 On Appeal from the U.S. District Court for the Northern District of California D.C. No. 3:25-cv-03698-SI
In re Donald J. Trump, *in his official capacity as President of the United States, et al.*, *Petitioners-Defendants*.	No. 25-3034 On Petition for Writ of Mandamus to the U.S. District Court for the Northern District of California D.C. No. 3:25-cv-03698-SI

OPPOSITION TO SUPPLEMENTAL EMERGENCY MOTION FOR STAY PENDING APPEAL / PETITION FOR WRIT OF MANDAMUS

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INTRODUCTION[1]

Early in his second term, President Trump launched an unprecedented campaign to radically reorganize, and thereby dismantle, the federal government, calling this "large scale structural reform" the "Manhattan Project of our time."[2] Rather than cooperate with Congress through the legislative or budgetary process, the President issued a "Workforce Optimization" Executive Order, No. 14210 ("EO"), which unilaterally orders the dramatic restructuring and downsizing of every federal agency. The President's orders, which include eliminating any office or function he directs and "large-scale" workforce reductions, necessarily disregard agency function or need and replace reasoned decision-making with categorical directives.

The President enlisted the Office of Management and Budget ("OMB") and Office of Personnel Management ("OPM") to direct implementation of this EO government-wide on extraordinarily truncated timelines. In March and April, federal agencies chaotically began implementing their required Agency RIF and Reorganization Plans ("ARRPs"), to the detriment of the agencies, their

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[1] Plaintiffs submit this identical response in Case Nos. 25-3030, 25-3034, and 25-3293, although the TRO and mandamus appeals have been mooted. Defendants withdrew their Supreme Court application to stay the TRO (and discovery order) after the preliminary injunction decision mooted it. *AFGE v. Trump*, No. 24A1106 (U.S.) (stay requested May 16; withdrawn May 23). Plaintiffs also stand on their previous response in No. 25-3034, where the challenged discovery order is being reconsidered.

[2] Statement by President-elect Trump announcing Department of Government Efficiency, The American Presidency Project (Nov. 12, 2024), available at: https://www.presidency.ucsb.edu/documents/statement-president-elect-donald-j-trump-announcing-that-elon-musk-and-vivek-ramaswamy.

employees, and all those who rely on their services, including the many Plaintiff organizations, their members, and Plaintiff local governments.

As the District Court found, Congress—not the President—creates and determines the size and structure of the federal agencies. For a century, Presidents undertaking reorganization projects both between and within agencies have thus uniformly sought congressional authorization. But President Trump has obtained neither renewal of the reorganization authority (still codified at 5 U.S.C. §§901-912) that expired in 1984, nor any other congressional authorization for his actions. The EO and implementing OMB/OPM directives go far beyond any authority agencies may have to internally regulate their organization and workforce size.

Based on its conclusions that this unprecedented presidential assertion of reorganization authority and agency implementation were likely ultra vires and violate the Administrative Procedure Act ("APA"), and that federal courts have jurisdiction to hear these claims, the District Court properly enjoined implementation of the EO until the merits of this case may be resolved.

Faced with Plaintiffs' unchallenged and substantial evidence demonstrating that the President and his central agencies were dictating how and when agencies should transform themselves, causing ongoing and widespread harm, Defendants presented no evidence. The Court's injunction is no broader than necessary to maintain the status quo and prevent the unconstitutional dismantling of the government which, if permitted to resume, will be impossible to later undo.

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BACKGROUND

A. Federal Agency Organization and Authority

Pursuant to its constitutional authority, Congress establishes the existence, functions, structure, and size of federal agencies via authorization and appropriation legislation. U.S. Const., Art. I, Sec. 1, 7; *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd*., 561 U.S. 477, 499 (2010).[3] At times, Congress has delegated to the President specific authorization to reorganize the structure and size of the federal agencies. The District Court accurately recounted the history: for 100 years, every President who sought to alter the structure *of* and *between* federal agencies has obtained congressional authorization. Add.701-05; *see* Cong. Rsch. Serv., R44909, *Executive Branch Reorganization*, at 6 (Aug. 3, 2017); Larkin & Seibler*, The President's Reorganization Authority*, Heritage Foundation Legal Memorandum No. 210, at 1-3 (July 12, 2017).[4] Such delegations generally include

[3] "[T]he typical sequence is: (1) organic legislation; (2) authorization of appropriations …; and (3) the appropriation act." Gov't Accountability Office Report GAO-04-261SP, *Principles of Federal Appropriations Law: Third Ed.*, at 2-42 (Jan. 2004).

[4] *See also* John W. York & Rachel Greszler, *A Model for Executive Reorganization*, Heritage Foundation Legal Memorandum No. 4782, at 1-2 (Nov. 3, 2017) ("[S]weeping reorganization of the federal bureaucracy requires the active participation of Congress."), available at: https://www.heritage.org/political-process/report/model-executive-reorganization; *Limitations on Presidential Power to Create A New Exec. Branch Entity to Receive & Administer Funds Under Foreign Aid Legis*., 9 Op. O.L.C. 76, 78 (1985) (recognizing "need for reorganization legislation in order to restructure or consolidate agencies within the Executive Branch"); *President's Authority To Promulgate a Reorganization Plan Involving the Equal Employment Opportunity Commission*, 1 Op. O.L.C. 248, 250 (1977) ("reorganization plan may not transgress the limitations set forth" in reorganization legislation).

the "reorganization plan contents, the limitations on power, and the expedited parliamentary procedures."[5] *E.g.*, 5 U.S.C. §§901-903 (still codified).

Presidents have employed such statutory authority for reorganizations ranging from "relatively minor reorganizations within individual agencies" to "the creation of large new organizations." Cong. Rsch. Serv., *supra* n.5 at 2, 6.[6] Congress has also denied some requests for reorganization authority, as with Presidents Reagan in 1981, Bush in 2003, and Obama in 2012.[7] And it has rejected some presidential reorganization plans, including proposals to eliminate, merge, and consolidate agencies. *See*, *e.g.*, H.R. 714, 98th Cong. (1983); H.R. 1510, 115th Cong. (2017); S. 1116, 112th Cong. (2011); H.R. 609, 114th Cong. (2015).

The most recent Reorganization Act authority expired on December 31, 1984. Pub. L. No. 98-614, 98 Stat. 3192; *see* 5 U.S.C. §905(b). President Trump unsuccessfully sought renewal of this reorganization authority during his first term.

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[5] Cong. Rsch. Serv., R42852, *Presidential Reorganization Authority: History, Recent Initiatives, and Options for Congress*, at 2 (Dec. 11, 2012); *id*. at n.11 (collecting prior authorizations) & Tbl. 1 ("Reorganization Authority, by President").

[6] Other times, Congress has consolidated functions and reorganized agencies through regular legislation. *See*, *e.g.*, Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135. Congress has also sometimes delegated to the President limited authority to reorganize specific agencies, typically with expiration dates for the authority. *E.g.*, Pub. L. 105-277, div. G, subdiv. A, §§1601, 6601(e), 112 Stat. 2681-795 (1998) (USAID reorganization).

[7] *See* Cong. Rsch. Serv., *supra* n.5, at 29, 32-34; S. 2129, 112th Cong. (2012); H.R. 4409, 112th Cong. (2012).

Add.395; *see* Exec. Order No. 13781, 82 Fed. Reg. 13959 (Mar. 16, 2017);[8] H.R. 6787, 115th Cong. (2017-2018); S. 3137, 115th Cong. (2018). Congress also convened numerous hearings on President Trump's specific reorganization proposals, which were largely not enacted.[9]

To the agencies themselves, Congress has provided direction regarding their structure, function, and authority in their organic authorizing statutes, and agencies must act within those confines.[10] Agencies may not, without congressional authorization, eliminate authorized programs or transfer functions to another agency.[11] Congress has at times specifically delegated to an agency head the authority to internally reorganize, including by imposing conditions on such actions.[12] Congress has never delegated to agencies across the board plenary power to organize themselves in any manner, or to reduce the federal workforce

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[8] *See* OMB, *Delivering Government Solutions in the 21st Century* (June 2018) at 4 (conceding "significant changes will require legislative action"), available at https://www.whitehouse.gov/wp-content/uploads/2018/06/Government-Reform-and-Reorg-Plan.pdf.

[9] Add.464-65 (listing hearings); Cong. Rsch. Serv., *Trump Administration Reform and Reorganization Plan: Discussion of 35 "Government-Wide" Proposals*, at 1 (July 25, 2018).

[10] *E.g.*, *W. Virginia v. EPA*, 597 U.S. 697, 723 (2022) (Roberts, J.) ("Agencies have only those powers given to them by Congress, and enabling legislation is generally not an open book to which the agency may add pages and change the plot line.") (cleaned up); *accord City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 297 (2013).

[11] *Halverson v. Slater*, 129 F.3d 180 (D.C. Cir. 1997); *United States v. Giordano*, 416 U.S. 505 (1974).

[12] *E.g.*, 6 U.S.C. §452 (delegating authority and placing limitations on Department of Homeland Security reorganization).

size by eliminating authorized positions. Rather, Congress has delegated to agencies general "house-keeping" authority to "prescribe regulations for the government of [the] department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property," 5 U.S.C. §301, and to "employ such number of employees" that "Congress may appropriate for from year to year," *id.* §3101. Congress has also enacted retention preference statutes setting forth rules when a reduction in force ("RIF") is implemented, consistent with congressionally-authorized functions and budgets. *Id.* §§3501-3504.[13]

B. President Trump's Current Attempt to Transform the Government

On February 11, 2025, President Trump issued Executive Order No. 14210 requiring all federal agencies to "*commence*[] a critical *transformation* of the Federal bureaucracy." Add.205 §1 (emphases added). The accompanying "Fact Sheet" explained: "President Donald J. Trump is committed to reducing the size

[13] Congress has also, at times, specifically authorized the executive branch to reduce the size of the federal workforce. *See, e.g.*, Workforce Restructuring Act of 1994, 108 Stat. 111 (directing President to meet reduction targets for federal civilian workforce); Defense Authorization Amendments and Base Closure and Realignment Act, 102 Stat. 2623, 2627 (1988) (authorizing several rounds of closures of military installations that employed military and civilian personnel), as amended by 104 Stat. 1485, 1808-14 (1990), and by 108 Stat. 2626 (1994), and by 115 Stat. 1342 (2004); Federal Employees' Pay Act of 1945, Pub. L. 79-106, §607(b), 59 Stat. 295 (granting budget director authority to set agency personnel ceilings and order staffing reductions), repealed 64 Stat. 843 (1950). Congress has not granted such authority to President Trump.

and scope of the federal government," and "[t]he Order will significantly reduce the size of government."[14] Add.435.

To serve this "transformation" purpose, the EO requires that all federal agencies "*shall*" "promptly undertake preparations to initiate *large-scale reductions-in-force (RIFs)*" and "submit" a "reorganization plan" for what remains of the agency (within 30 days). Add.205-06 §§1, 3(c), (e) (emphases added).[15]

The EO imposes specific, mandatory parameters for the content of those RIF and reorganization plans, including that RIFs "*shall*" "prioritize[]" "[a]ll offices that perform functions not mandated by statute or other law," "all agency initiatives, components, or operations that *my Administration suspends or closes*" and "all components and employees performing functions" not required for government shutdown-level staffing. *Id.* §3(c) (emphases added); *see* Add.710. As to reorganization, the EO similarly orders agencies to identify for OMB any "statutorily required entities," and address "whether the agency or any of its subcomponents should be eliminated or consolidated." Add.206 §3(e). The EO permits (using "may") agency heads to exempt certain security positions. *Id.* §4(b), (c).

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[14] White House, *Fact Sheet: President Donald J. Trump Works to Remake America's Federal Workforce* (Feb. 11, 2025), available at: https://www.whitehouse.gov/fact-sheets/2025/02/fact-sheet-president-donald-j-trump-works-to-remake-americas-federal-workforce/.

[15] "It is generally clear that 'shall' imposes a mandatory duty." *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 172 (2016).

On February 26, OMB/OPM issued a Memorandum implementing the EO, which confirmed that the President "directed" and "required" agencies to commence RIFs and reorganizations. Add.209. OMB and OPM "instruct[ed]" each federal agency to "submit[]" a combined ARRP implementing the EO for OMB/OPM's "review and approval." Add.209, 211-12. The Memorandum explained: "Pursuant to the President's direction, agencies should focus on the maximum elimination of functions that are not statutorily mandated while driving the highest-quality, most efficient delivery of their statutorily-required functions." Add.210.[16]

The Memorandum thus makes clear that RIFs are the reorganization's *centerpiece*, requiring the submission *within two weeks* (by March 13) of "Phase 1 ARRPs," which "*shall focus on initial agency cuts and reductions.*" Add.211 (emphasis added).[17] Agencies were then required to submit Phase 2 ARRPs within another month (by April 14), that reorganize agencies around what remains after

[16] OMB/OPM also required agencies to work with DOGE in designing the RIFs, to "include positions not typically designated as essential during a lapse in appropriations" and to "refer to the functions that are excepted from the [2019 lapse plans] as the starting point for making this determination." Add.210. OMB/OPM also prohibited "agencies or components that provide direct services to citizens" from implementing "any proposed ARRPs" until OMB/OPM make particular certifications. Add.214.

[17] The Memorandum includes a "Sample RIF Timeline" requiring agencies to submit areas to RIF, "[d]raft RIF notices" within 30 days, and "[i]ssue official RIF notices" within 60 days (shortened to 30 with an OPM waiver). Add.215. Plaintiffs submitted former agency official declarations explaining the impossibility of preparing plans that properly account for agency requirements in such a condensed time frame. Add.186; ECF 37-60 to 62. "ECF" refers to the District Court docket.

these RIFs. Add.212-13. Defendants did not dispute Plaintiffs' showing that OMB and OPM have *rejected* certain agencies' ARRPs for failure to eliminate enough positions, Add.159, 569, 708-09, or that agencies commenced implementation soon after these submission deadlines. Add.674 n.1, 680-81.[18]

Plaintiffs assembled a substantial and unrebutted record of actions implementing the EO through RIFs and reorganizations, including, as the District Court found, substantial cuts to statutorily mandated programs. Add.674 n.1, 712; *see* Add.674 n.1, 680-81; Add.151-52 (HHS: "transformation," per EO, by cutting 10,000 positions, with more to come, at CDC, FDA and NIH, and eliminating entire programs like CDC office that monitors lead exposure in children); Add.152 (SBA: "will reduce its workforce by 43%"); Add.152 (VA: implementing EO by cutting *80,000 jobs* serving veterans).[19] Agencies across the government are eliminating functions (Add.674 n.1, 680-81);[20] the President is asserting that his

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[18] Notwithstanding ongoing implementation, the Administration has refused to disclose ARRPs to employees, their unions, the public, or Congress, Add.679, and is resisting revealing them to the federal courts, *see* 9th Cir. Case No. 25-3034.

[19] *See* Add.161 (*AmeriCorps*: nearly all staff RIF'd per EO); ECF 70-1 Exs. C-D (*EPA*: scientific research office cut per EO); ECF 37-14 at ¶¶9-12, Exs. A-D (*GSA*: RIFs and offices cut "[i]n support of the [EO]"); ECF 41-1 at ¶15, Ex. C (*HUD*: large-scale RIFs in "[c]ompliance with [EO]"); ECF 70-2 Exs. A-C (*Labor*: eliminating entire office per President order and RIF to all staff); Add.171 (*NSF*: cutting half of staff under "orders from the White House"); Add.172-73 (*SSA*: plans per EO include "abolishment of organizations and positions" and RIFs); Add.173-74 (*State*: consolidation, 15% reduction per EO); Add.174 (*Treasury*: 40% IRS cut per EO).

[20] *E.g.*, Add.151-52 (HHS); Add.161 (AmeriCorps); ECF 70-1 ¶¶6-7 (EPA Office of Research and Development, *see* 7 U.S.C. §5921(f); 15 U.S.C. §8962).

Executive Orders abolishing offices "eliminate[]" their "statutory and regulatory foundation";[21] and the reorganization is transferring functions and offices *between* agencies.[22]

The District Court rejected Defendants' suggestion that the EO and Memorandum be construed as "merely providing guidance about how agencies should conduct RIFs," finding that the record evidence "tells a very different story: that the agencies are acting at the *direction* of the President and his team." Add.708.

As detailed *infra*, these actions have caused substantial injury to Plaintiffs, their members, and the public.

STANDARD

A stay pending appeal is an "extraordinary request." *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 661 (9th Cir. 2021). Irreparable injury and likely success on appeal "are the most critical" factors. *Nken v. Holder*, 556 U.S. 418, 433 (2009). The Court also considers whether a stay will injure other parties and the public interest. *Id.* at 434. The applicant bears the burden of proof, and any factual findings are subject to "very deferential" clear-error review. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 794 (9th Cir. 2005).

[21] Add.710 (citing ECF 70-2 ¶¶4, 7, Exs. C, D).

[22] *E.g.*, ECF 70-1 ¶¶3-4 & Ex. A (Agriculture plans include consolidating functions with seven other agencies); ECF 37-26 ¶¶42-43 (Education student aid office will move to SBA).

ARGUMENT

I. Defendants Are Unlikely to Prevail on Appeal

A. The District Court correctly found that Defendants acted unlawfully

1. The EO exceeds the President's constitutional and statutory authority

The Constitution is predicated on the idea that Executive power is not unlimited: "The President's power, if any, to issue [an] order must stem either from an act of Congress or from the Constitution itself." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). Where, as here, Congress neither reauthorized reorganization authority nor otherwise delegated authority to the President to alter federal agency structure, organization, or staffing levels, his power is "at its lowest ebb." *Id.* at 637 (Jackson, J., concurring); *accord City & Cnty. of San Francisco v. Trump*, 897 F.3d 1225, 1234 (9th Cir. 2018); Add.701.

There is no real dispute that the President lacks authority to reorganize the federal government without congressional authorization. *E.g.*, Larkin & Seibler, *supra*, at 3 ("[T]he President does not have constitutional authority to reorganize the executive branch on his own."). Nor can there be any real dispute that this EO directs reorganization of the federal government—imposing a radical "transformation" of *all* federal agencies by eliminating programs and functions, transferring functions between agencies, and ordering agencies to restructure themselves through large-scale RIFs. *Supra* at 7-10; Add.118. While Defendants portray this case as solely about agencies' authority to conduct RIFs, the EO and

Memorandum require *every* federal agency to reorganize in a manner reflecting a dramatically reduced workforce through combined RIF/reorganization plans, and Defendants made no attempt to refute Plaintiffs' evidence bearing this out. *Supra* at 7-10. The actions the EO and Memorandum require fall squarely within 5 U.S.C. §903—the reorganization authority that expired in 1984—which defined "reorganization" to include changes between *and* within agencies, and consolidation or elimination of statutory *and* non-statutory functions. *Supra* at 3-4; Add.702.[23]

Even if this case were only about RIFs, the President's Article II power does not extend to terminating rank-and-file civil service employees, let alone ordering mass terminations government-wide. *E.g.*, *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 218 (2020); *Morrison v. Olson*, 487 U.S. 654, 673-75 (1988); *United States v. Perkins*, 116 U.S. 483, 485 (1886); *see Hilton v. Sullivan*, 334 U.S. 323, 332 (1948) ("seniority rights" during RIF "depend entirely upon congressional acts" and implementing regulations).[24]

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[23] 5 U.S.C. §§901, 903(a). Under the now-expired reorganization authority, Congress required the President to explain in detail how any proposed changes would comport with the agencies' statutory requirements and funding levels. *Id.* §903(b). Under Defendants' theory, the President requires no congressional authorization to order agencies to terminate all agency functions "not mandated by statute," Mot. 12-16, which would make the 1984 reorganization authority superfluous. *See* Add.675, 701-06.

[24] Indeed, the government recently told the Supreme Court that the President would be harmed by the inability to remove agency heads, because "*[a]gency heads*" (not the President) "*control hiring and firing decisions for subordinates*." *Bessent v. Dellinger*, No. 24A79 (U.S.) (Feb. 16, 2025 Application to Vacate and

Directing the structure and size of federal agencies is a legislative, not executive, function: "To Congress under its legislative power is given the establishment of offices ... [and] the determination of their functions and jurisdiction." *Myers v. United States*, 272 U.S. 52, 129 (1926); *see Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., OSHA*, 595 U.S. 109, 117 (2022) (federal agencies are "creatures of statute"); *Free Enter. Fund,* 561 U.S. at 500 ("Congress has plenary control over the salary, duties, and even existence of executive offices."). Defendants therefore rely solely on the President's general authority, pursuant to his Article II duty to take care that Congress's laws are faithfully executed, to supervise federal agencies' exercise of their *own* congressionally delegated authority. Mot. 14.[25] Defendants thus apparently concede that the President's authority extends no further than that of the agencies themselves. Mot. 12-16. But Defendants' argument that the EO and OMB/OPM Memorandum fall within agencies' existing statutory authority fails for at least the following reasons.

a. Without congressional authorization, agencies cannot transfer functions to *other* agencies, including to OMB, OPM, or DOGE. *Supra* at 3-6; *United States v.*

Request for Administrative Stay), at *27 (emphases added)). *Keim v. United States*, 177 U.S. 290, 295 (1900) (cited Mot. 3), is not to the contrary, and merely stands for the proposition that *agencies* have general authority, constrained by Congress, to make employment decisions.

[25] *Duenas v. Garland*, 78 F.4th 1069, 1072 (9th Cir. 2023), which Defendants cite for this supervisory power, Mot. 12, involved the President's Appointments Clause power to remove appointed officials. So did *Seila Law LLC v. CFPB*, 591 U.S. 197 (2020), on which *Duenas* relies. Neither can be stretched so far as to authorize the presidential directives at issue.

Giordano, 416 U.S. 505 (1974); *Halverson v. Slater*, 129 F.3d 180 (D.C. Cir. 1997). Yet the record is uncontroverted that functions and programs are being transferred between agencies (Add.294 n.3; Add.571; *see* Add.159-176), *and* that the President has transferred agencies' authority to OMB/OPM/DOGE, which have overridden numerous agencies' decisions (Add.657 & n.2 (OMB/OPM/DOGE rejected NLRB, AmeriCorps, NSF, and non-defendant agency ARRPs for insufficient cuts); Add.708-09). Defendants defend this transfer of agency authority based on the President's authority to supervise agencies and to delegate his own authority. Mot. 16-18. But the President cannot thereby circumvent the prohibition on transferring authority between agencies without congressional authorization. *Cf. San Francisco*, 897 F.3d at 1240 (rejecting "Administration's interpretation [that] simply lead[s] us into an intellectual cul-de-sac").

b. The President cannot lawfully order agencies to exceed, defy, or abuse their own statutory authority. *See*, *e.g.*, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 411 (1971) (discretion in implementing program does not include freedom to ignore applicable standards or reasoned decision-making). Yet, the EO and Memorandum reflect categorical decisions and impose these parameters on the agencies, requiring them to cut all programs/offices ordered by the President and anything not "required" by statute. Add.711-12 ("agencies have interpreted the directives from the President and OMB, OPM, and DOGE to require these cuts"). These parameters prevent reasoned decision-making, and necessarily require agencies to disregard their own governing authorities (including the APA) by imposing categorical requirements to cut programs and functions regardless of

whether they are statutorily authorized or funded by Congress, for the sole purpose of workforce reduction.[26] The EO imposes the requirement and instructs agencies to figure out how to implement it. That is backwards and unlawful. *E.g. New York v. Trump*, 133 F.4th 51, 68 (1st Cir. 2025) ("funding freezes [required by Executive Order] were categorical in nature, rather than being based on individualized assessments of their statutory authorities and relevant grant terms").

c. Defendants also misconstrue agencies' statutory authority to conduct RIFs. They contend this authority derives from 5 U.S.C. §3502, Mot. 12-15, but section 3502 merely requires agencies to use a particular order of retention when conducting RIFs, and does not purport to provide the underlying RIF authority or define the scope of that authority. 5 U.S.C. §3502; 5 C.F.R. Pt. 351.[27] The same is true of the historical statutes and case law Defendants cite. *E.g.*, Ch. 287, §3, 19 Stat. 143, 169 (Aug. 15, 1876); *see* Veterans' Preference Act of 1944, Pub. L. No. 78-359, §12, 58 Stat. 390 (predecessor of modern 5 U.S.C. §3502); *Hilton*, 334 U.S. at 338 (addressing veteran preference). When Congress has authorized the executive branch to significantly reduce the federal workforce, it has done so through specific legislation. *Supra* at 4 n.5.

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[26] The programs, functions, and positions that the EO and Memorandum require be eliminated have all been appropriated by Congress for this budget year.

[27] OPM's implementing regulations cannot grant greater RIF authority than the statute. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 391-92 (2024). Section 3502 assigns a single specific task to the President: shortening the length of the notice period upon written request by agency head. 5 U.S.C. §3502(e). When Congress wanted to delegate Section 3502 authority to the President, it did so explicitly.

Agencies' authority to conduct internal RIFs is *far* better understood as derived from—and thus limited by—their general discretion to establish positions to carry out their congressionally assigned and appropriated functions, consistent with the general "housekeeping" and "authority to employ" statutes. *E.g.*, 5 U.S.C. §§301, 3101. Thus, prior administrations have addressed large-scale workforce reduction not pursuant to this "housekeeping" authority, but rather as part of the budget dialogue with Congress—not unilaterally ordered government-wide RIFs, as Defendants inaccurately assert. Mot. 2-3. The cited 1993 action, *id.* at 3, directed reduction through attrition and buyouts, not RIFs,[28] and President Clinton obtained congressional authorization for the plans. Federal Workforce Restructuring Act of 1994, Pub. L. 103-226, 108 Stat. 111 (1994).

Section 3502 cannot reasonably be read to implicitly give agencies (or the President) authority to do what the EO requires: eliminate programs and functions without any real consideration of need or purpose. *See Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) (Congress does not "hide elephants in mouseholes") (cleaned up). The District Court therefore correctly recognized limitations on agencies' authority to conduct RIFs that threaten proper agency functions (which include not only "required" or "mandated" functions but also authorized or discretionary

[28] Exec. Order No. 12839, §1, 58 Fed. Reg. 8515 (Feb. 12, 1993) (to achieve personnel targets, positions "shall be vacated through attrition or early out programs established at the discretion of the department and agency heads"); House Rep. 103-386, 1994 U.S.C.C.A.N. 49, 52 (Nov. 19, 1993) (OMB "bulletin specified that neither it nor the Executive Order [No. 12839] … required agencies to undergo reductions-in-force.").

functions). Add.674 & n.1, 705 n.18, 712-13. The Government also overreads 5 U.S.C. §3502(d)(3), which does not purport to define the scope of underlying RIF authority. Mot. 14-15. Regardless of whether an agency could, after considering its appropriations and statutory requirements and authorizations, determine that a "large-scale" RIF is appropriate, that does not insulate *this* EO and Memorandum, which make that decision across-the-board *without* considering agency-specific factors.

d. Defendants also overread the general agency "housekeeping" statute, 5 U.S.C. §301, which does not grant agencies unfettered discretion over agency structure or organization unless *prohibited* by Congress. Mot. 13-14. Rather, Section 301 "authoriz[es] what the APA terms 'rules of agency organization procedure or practice' as opposed to 'substantive rules.'" *Chrysler Corp. v. Brown*, 441 U.S. 281, 310 (1979). Defendants misread *Bowsher v. Synar,* 478 U.S. 714 (1986), to suggest that "filling in [the] details" means whatever the agency wants (Mot. 14), but *Bowsher* plainly instructs that "[i]nterpreting a law enacted by Congress *to implement the legislative mandate* is the very essence of 'execution' of the law." 478 U.S. at 733 (emphasis added).

Defendants cite two examples of published internal agency reorganizations (in stark contrast with the lack of such procedures under this EO). Mot. 14. The first is a rulemaking authorized by a specific statutory delegation to the Attorney General (75 Fed. Reg. 70122 (Nov. 17, 2010)). The second (which is miscited, but appears to be 71 Fed. Reg. 42234 (July 25, 2006)), redefined the responsibility of the Assistant Secretary of Policy at the Labor Department, citing a *host* of statutory

authority, for the purposes of *enhancing* the Department's compliance programs: "[T]o avert and deter violations of wage, safety, employee benefits, and other laws …, the Department must offer strong, effective compliance assistance programs." *Id.* In implementing this EO, by contrast, Defendants are effectively eliminating the *entire* Office of Federal Contract Compliance Programs, ECF 70-2 ¶¶4-9—plainly not what "housekeeping" means.

Defendants also err in relying on *Nixon v. Fitzgerald*, which did not interpret Section 301 but involved only provisions under Title 10, governing military departments. The President's (greater) constitutional authority over military departments is not at issue here. 457 U.S. 731, 757 (1982) (citing former 10 U.S.C. § 8012(b), now 10 U.S.C. §9013(g)); *see* 5 U.S.C. §102 (defining military departments); *id.* §105 (defining agencies to exclude military departments).

e. Finally, the District Court correctly rejected Defendants' reliance on savings clause language. Add.711-13. As explained above, the EO asserts authority the President lacks and directs agencies to act unlawfully. *San Francisco*, 897 F.3d at 1231, 1239-40; *New York*, 133 F.4th at 69-70; Add.708-11. Defendants mischaracterize *San Francisco* (Mot. 13-14), which held that a general savings clause "does not and cannot override [the] meaning" of an Executive Order's more specific provisions. 897 F.3d at 1240.

The District Court therefore correctly held Plaintiffs likely to establish that the EO is unconstitutional and ultra vires. Add.699-706; *see State v. Su*, 121 F.4th 1, 13 (9th Cir. 2024); *San Francisco*, 897 F.3d at 1235; *Chen v. INS*, 95 F.3d 801, 805 (9th Cir. 1996) (all addressing executive orders). This conclusion does not

upend the Constitution but, as the District Court held, reestablishes the proper balance of authority between Congress and the executive branch. Add.701-04.

The precise scope of and limits on the President's *proper* exercise of Article II authority to direct agencies within their statutory duties is a question for another day. As the District Court noted, "in certain cases "[w]e have no need to fix a line …. It is enough for today that wherever that line may be, this [action] is surely beyond it." Add.722 (quoting *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 585 (2012)).[29]

2. OMB, OPM, and DOGE exceeded their authority

The District Court found that OMB and OPM assumed for themselves agencies' decision-making authority over reorganization and RIF plans, exceeding their statutory authority, and that DOGE has *no* statutory authority, including to direct agency actions. Add.706-08.

Defendants now reargue the facts to claim OMB/OPM merely provided "interagency dialogue" and "guidance." Mot. 6, 17-18. But Defendants' argument

[29] Implementation of this EO, which exceeds the President's constitutional authority, to reorganize the federal government presents a serious risk of disruptive consequences, as history reveals. The last large-scale reorganization suffered from a different constitutional problem (the procedures authorized included a legislative veto, later invalidated in *INS v. Chadha*, 462 U.S. 919 (1983)). The constitutional problem caused federal courts to be inundated with "numerous challenges" to agency enforcement actions. *E.g.*, *EEOC v. Merrill Lynch, Pierce, Fenner & Smith*, 677 F.Supp. 918, 920 (N.D. Ill. 1987); *EEOC v. CBS, Inc*., 743 F.2d 969 (2d Cir.1984); *EEOC v. Chrysler Corp*., 595 F.Supp. 344 (E.D. Mich. 1984); *EEOC v. Martin Indus., Inc*., 581 F.Supp. 1029 (N.D. Ala. 1984); *EEOC v. Pan Am. World Airways*, 576 F.Supp. 1530 (S.D.N.Y. 1984); *EEOC v. Allstate Ins. Co.*, 570 F.Supp. 1224 (S.D. Miss. 1983).

is unsupported by any evidence and disregards the mandatory language of the EO and Memorandum. Add.708-11; *supra* at 7-8. Further, Plaintiffs' uncontroverted evidence showed that OMB/OPM were *in fact* exercising authority to approve or reject agencies' plans, including based on OMB/OPM's view of whether they proposed sufficient cuts (Add.708-09; *supra* at 8-10), and the immediate implementation of ARRPs following OMB/OPM's deadlines for "approval." Add.569-71, 679-81, 708; *supra* at 8-10. Meanwhile, Defendants stated they "d[id] not make or rely on any factual representations" and that "no factual development is necessary." App.629. The District Court's findings that the Memorandum gives mandatory directives, not guidance, and requires OMB/OPM approval of agency plans, were not error.

3. OMB's and OPM's actions violate the APA

Because OMB and OPM acted without statutory authority, their actions also exceed statutory authority under the APA. Add.716; 5 U.S.C. §706(2)(A), (C).

The District Court correctly held that OMB/OPM's Memorandum and approvals of ARRPs are all final agency action. Add.714-15. Defendants do not dispute that with respect to ARRP approvals. Mot. 11. Their characterization of the Memorandum as mere precatory "guidance," Mot. 18, is at odds with the Memorandum's plain, mandatory terms and the record evidence of its implementation. *Supra* at 7-10; *see Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000) (self-styled agency "guidance" was final action because "it requires, it orders, it dictates" actions). The Memorandum's determination that OMB and OPM are the final decision-makers over agency

ARRPs is inconsistent with Congress's delegation of authority to agencies (5 U.S.C. §3101), OMB and OPM's statutory authority (5 U.S.C. §1101-1105; 31 U.S.C. §503), and OPM regulations, under which *agencies* are the decision-makers (5 C.F.R. §351.201). The Memorandum plainly alters the legal regime and "mark[s] the consummation of [OMB's and OPM's] decisionmaking process" on that question. *Prutehi Litekyan: Save Ritidian v. U.S. Dep't of Airforce*, 128 F.4th 1089, 1108 (9th Cir. 2025) (quotation omitted).

Defendants wrongly contend that the Memorandum itself must "directly affect" Plaintiffs. Mot. 11. "[A] federal agency's assessment, plan, or decision qualifies as final agency action even if the ultimate impact of that action [on plaintiffs] rests on some other occurrence—for instance, … a decision by another administrative agency[.]" *Prutehi Litekyan*, 128 F.4th at 1110; *see Env't Def. Ctr v. Bureau of Ocean Energy Mgmt*., 36 F.4th 850, 869 (9th Cir. 2022). Final agency actions include those that bind or direct how government officials act in subsequent proceedings that impact plaintiffs. *See New York*, 133 F.4th at 68; *Biden v. Texas*, 597 U.S. 785, 807-10 (2022); *Navajo Nation v. Dep't of Interior*, 819 F.3d 1084, 1091 (9th Cir. 2016). It is uncontroverted that the RIFs, reorganizations, and ARRPs do so. *Infra* at 28-30.

Because Plaintiffs challenge specific and "circumscribed, discrete agency actions" by OMB and OPM (the Memorandum and ARRP approvals), their claims are not an impermissible "programmatic attack." *Norton v. S. Utah Wilderness All*., 542 U.S. 55, 62 (2004).

Defendants' cursory argument that notice-and-comment rulemaking was not required because the Memorandum merely provides nonbinding "guidance," Mot. 18, is wrong for reasons previously discussed. The Memorandum plainly contains rules that must go through APA notice-and-comment rulemaking. Add.188-90.

B. Federal courts have subject matter jurisdiction to hear Plaintiffs' constitutional and APA claims

The District Court correctly held that Congress has not implicitly removed subject matter jurisdiction over Plaintiffs' claims. *See Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 383 (2012) ("[J]urisdiction conferred by 28 U.S.C. §1331 should hold firm against 'mere implication flowing from subsequent legislation.'"); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (describing "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them").

First, neither the Supreme Court nor this Court has endorsed Defendants' sweeping argument that, because Congress created administrative agencies to handle *some* employee claims involving their federal employment, *all* claims impacting federal employees are excluded from federal court.[30] To the contrary,

[30] Defendants' Supreme Court cases address employees' claims against their employing agencies, and do not purport to blanket the field of federal employment. *See Elgin v. Dep't of Treasury*, 567 U.S. 1, 10 (2012) (holding CSRA sent "covered employees appealing covered agency actions" to administrative adjudication); *United States v. Fausto*, 484 U.S. 439, 447-49 (1988) (same). While this Court has channeled individual employees suing employing agencies, it has never channeled claims by non-federal-employees or their unions; challenging a government-wide Executive Order or any other presidential directive or OMB or OPM action; or against any defendant besides the employing agency. *See Veit v.*

the Supreme Court recently cautioned, "a statutory review scheme [that precludes district court jurisdiction] does not necessarily extend to every claim concerning agency action." *Axon Enters., Inc. v. FTC*, 598 U.S. 175, 185 (2023); *Kerr v. Jewell*, 836 F.3d 1048, 1052-53 (9th Cir. 2016).

Plaintiffs do not seek to "evade" any applicable procedure, Mot. 9, but bring different claims than those the statutory schemes are designed to address. Defendants invoke the agency adjudication provisions of the Civil Service Reform Act ("CSRA") and Federal Labor-Management Relations Statute ("FSLMRS"), but Plaintiffs' constitutional and APA claims against the President, OMB, OPM, or DOGE, and involving a government-wide Executive Order and Memorandum, do not fall within those administrative schemes. Mot. 8-11.[31] Far more textual indication of congressional intent is needed before removing the "command" of

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Heckler, 746 F.2d 508 (9th Cir. 1984); *Saul v. United States*, 928 F.2d 829 (9th Cir. 1991) (individual employee); *Russell v. U.S. Dep't of the Army*, 191 F.3d 1016 (9th Cir. 1999) (same).

[31] *See* 5 U.S.C. §7701 (MSPB appeals limited to "employee" or "applicant" claims challenging agency actions), §7703 (appeal rights similarly limited), §7103(a)(1) (FLRA: grievances by individual, labor organization, against agency); §7118 (FLRA: unfair labor practice by labor organization or agency), §7123 (FLRA: appeal rights similarly limited). The FLRA expressly *cannot* hear disputes arising from "government-wide" action. *E.g.*, *NTEU and Dep't of Treasury, IRS*, 60 F.L.R.A. 783, 783 (2005); 5 U.S.C. §7117(a)(1). The grievance definition Defendants cite (Mot. 9) does not permit claims challenging the EO or Memorandum.

APA review. *Dep't of Commerce v. New York*, 588 U.S. 752, 771-72 (2019); *cf. Loper Bright*, 603 U.S. at 392-93 ("The text of the APA means what it says.").[32]

1. *Local Governments, Non-Profits, and Non-Federal Unions*. Defendants concede, as they must, that the Merit Systems Protection Board ("MSPB") and Federal Labor Relations Authority ("FLRA") could never hear these Plaintiffs' claims (which include labor unions SEIU and AFSCME as representatives of their non-federal members). Mot. 8-10. No governing authority supports the argument that Congress intended to send such plaintiffs to agencies that cannot hear these claims, or to foreclose these Plaintiffs altogether. *See AFGE v. OPM*, 2025 WL 914823, at *1 (9th Cir. Mar. 26, 2025) ("Nor have appellants demonstrated—under existing authority—that they are likely to establish that Congress has channeled the organizational plaintiffs' claims to administrative agencies."). Contrary to Defendants' representation (Mot. 10), *Fausto* does not foreclose third-party claims or claims involving government-wide action simply because they impact federal employment. 484 U.S. at 445. *Fausto* addressed the question whether Congress intended the "withholding of remedy" to particular employees identified expressly in the CSRA to foreclose additional relief using the

[32] Defendants' authorities do not preclude the type of claim in this case: 5 U.S.C. §7701 defines the appeal procedure; 5 C.F.R. §351.901 says employees "may" appeal to MSPB; and *Alder v. TVA*, 43 F.App'x 952, 956 (6th Cir. 2002) involved employees who "reframe[ed]" wrongful termination claims previously asserted at the MSPB against their employing agencies seeking the same remedies. *Id*.

Back Pay Act service, *id*.; nothing in *Fausto* suggests Congress intended to foreclose claims by any plaintiff *not* expressly identified in the statute.[33]

Implied doctrines cannot be so divorced from statutory text (which sets forth procedures Defendants admit these Plaintiffs "cannot invoke," Mot. 10). *E.g.*, *Loper Bright Enters.*, 603 U.S. at 391-92; *Saloojas, Inc. v. Aetna Health of California, Inc.*, 80 F.4th 1011, 1015 (9th Cir. 2023) (courts "presume that Congress expressed its intent through the statutory language it chose").[34] That would contravene APA precedent requiring that exceptions to judicial review be read narrowly. *Dep't of Commerce*, 588 U.S. at 771-72; *see U.S. Army Corps of Eng'rs v. Hawkes Co., Inc*., 578 U.S. 590, 601-02 (2016); *Weyerhaeuser Co. v. U.S.*

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[33] *Block v. Community Nutrition Institute*, which precluded consumers from challenging regulatory milk pricing market orders, is likewise inapposite. Mot. 9. That regulatory regime allowed only milk handlers and producers to participate in the regulatory and adjudicatory process; prohibited injunctions; and allowed consumers to participate by notice-and-comment. 467 U.S. 340, 348 (1984). The Court concluded that permitting consumers to sue would "nullify" the procedures established. *Id.* As the Supreme Court more recently explained: "'[T]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent.'" *Bowers v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 674 (1986); *accord Sackett v. EPA*, 566 U.S. 120, 129 (2012).

[34] *See also Axon Enters.*, 598 U.S. at 217 (Gorsuch, J., concurring) (addressing concerns with extending implied doctrine: "[r]espectfully, this Court should be done with the *Thunder Basin* project. I hope it will be soon."); *Elgin*, 567 U.S. at 24-25 (Alito, J., dissenting) ("When Congress creates an administrative process to handle certain types of claims, it impliedly removes *those claims* from the ordinary jurisdiction of the federal courts" but "petitioners' constitutional claims are a far cry from the type of claim that Congress intended to channel through the Board." (emphasis added)).

Fish & Wildlife Serv., 586 U.S. 9, 22-23 (2018). The Congress that enacted the CSRA and FSLMRS referenced the APA at least three times (5 U.S.C. §§1103, 1105, 7134) and cannot be said to have silently foreclosed the bedrock principle of APA review. *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 510 (2018) ("A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing a clearly expressed congressional intention that such a result should follow." (citation omitted)).

The District Court correctly declined to expand implied preclusion doctrine to these claims.

2. *Federal Sector Union Plaintiffs.* Nor did the court err in concluding that the *same* claims brought by federal union Plaintiffs (including AFGE, and SEIU and AFSCME as representatives of their federal members) are not channeled. Add.694-98. While employees or their unions can bring *certain* claims before these agencies, they cannot bring *these* claims involving constitutional separation-of-powers issues and APA challenges to the government-wide EO and Memorandum, for reasons previously explained, including because those claims are *not* against an employer agency. Add.695-98; *see also Feds for Med. Freedom v. Biden*, 63 F.4th 366, 375 (5th Cir. 2023) (en banc), *judgment vac'd as moot*, 144 S.Ct. 480 (2023) (holding that challenge by employee organizations, including union, to government-wide federal employee vaccination mandate was not channeled to MSPB or FLRA); *AFGE v. OPM*, 2025 WL 900057 (N.D. Cal. Mar. 24, 2025). Congress did not intend for these claims to be adjudicated by agencies that cannot hear them. *E.g.*, *Axon*, 598 U.S. at 195 ("agency adjudications are

generally ill suited to address structural constitutional challenges"); *Free Enterprise Fund*, 561 U.S. at 490.

Federal-sector union Plaintiffs can no more sue the President, OMB, OPM, or DOGE at the MSPB or FLRA than can the Plaintiffs discussed above. Nor is there any stronger textual basis to conclude that these Plaintiffs' APA claims were removed from the "command" of judicial review. Defendants' argument that the federal-sector union Plaintiffs' claims should be channeled to an agency that cannot hear them simply because they represent federal employees is not what Congress intended.

Defendants try to shoehorn Plaintiffs' claims into this doctrine by mischaracterizing them as challenging only specific RIFs by employing agencies. Mot. 8-9. But the shoe does not fit. The EO, Memorandum, and ARRPs are not covered employment actions, so the MSPB cannot hear challenges to them. And the FLRA cannot hear any claim challenging a "government-wide rule"—like in this case. *Supra*, 23 n.31. Even under *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207-13 (1994), claims cannot be channeled when that would prevent meaningful judicial review. Moreover, as the District Court concluded, there also can be no meaningful review when, after a prolonged administrative process, employees "would return to an empty agency with no infrastructure to support a resumption of their work." Add.696 (citation omitted). And even if these agencies could hear claims against the President, the Supreme Court's decision in *Trump v. Wilcox*, No. 24A966, 2025 WL 1464804 (U.S. May 22, 2025), holding the President likely to prevail on his constitutional challenge to for-cause removal

restrictions on members of independent agencies including the MSPB (which would apply to the FLRA), renders meaningless the review of claims *against the President* who has the power to fire the adjudicator.

Further, Plaintiffs' APA and "separation-of-powers claim[s]" are based on the President's and his implementing agencies' lack of authority, arbitrary and capricious actions, and failure to comply with required procedures—issues that are "wholly collateral" to the statute's review provisions. *Axon*, 598 U.S. at 191; *see also Feds for Med. Freedom*, 63 F.4th at 369. And the constitutional and administrative law issues that Plaintiffs raise fall far outside the MSPB and FLRA's labor-and-employment expertise. *Loper Bright*, 603 U.S. at 399; *Axon*, 598 U.S. at 190-96; *Free Enterprise Fund*, 561 U.S. at 490; *Carr v. Saul*, 593 U.S. 83, 92 (2021).

C. The District Court correctly found Plaintiffs faced irreparable injury

The District Court found that Defendants' actions have caused, and will continue causing, irreparable injury. Add.685-89, 717. More than 70 uncontroverted declarations showed widespread and devastating impacts to Plaintiffs and their members, including extensive losses and deterioration of services. Add.159-76, 191-93, 303-05, 381-83, 572-75, 609-14.

Defendants focus only on injuries to federal employees, and argue they may later be remedied through back pay. Mot. 19-20. But damages from those injuries cannot be recovered under the APA. Add.717 (citing *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018)). Moreover, "given the scale and speed of defendants'

actions, if the reorganization continues, the agencies will not easily return to their prior level of operations." Add.717. Back pay also could not remedy loss of "timely access to health care" benefits or the need to relocate. *Id.* (quoting *Golden Gate Rest. Ass'n v. City & Cnty. of San Francisco*, 512 F.3d 1112, 1125 (9th Cir. 2008)).

Defendants completely overlook the numerous "non-federal employee members" of Plaintiff unions, "who stand to lose their jobs as a result of federal workforce reductions" and could never obtain back pay. Add.685-86. Defendants also ignore the District Court's finding that local government plaintiffs face irreparable injuries for which they cannot recover damages. The District Court identified and "highlight[ed]" several "examples from the evidence" that demonstrate such injuries, including closure of Head Start programs, inability of farmers to obtain assistance, extended wait times and website problems for Social Security beneficiaries, and delayed processing and communication about grants for public health and capital projects. Add.674 n.1, 685-86, 688-89, 717.

Substantial record evidence supports those findings and establishes that essential federal government services, relied on by non-profit and local government plaintiffs as well as union Plaintiffs' non-federal-employee members, have and will continue to suffer. *See*, *e.g.*, ECF 37-39 ¶¶7-8, 11 (extreme Social Security delays will threaten benefits access if already understaffed agency cuts 7,000 employees as planned); ECF 37-37 ¶¶18-21, 40-41 (cuts to county-based offices and staff at Agriculture threaten survival of small and medium farms); ECF 37-44 ¶¶19-22 (harms to veterans' health care); ECF 37-38 ¶¶15-16 (same).

Counties have lost access to federal employees working at county clinics and to grant specialists, forcing reliance on stop-gap funding. Add.304 n.22. Pending Forest Service cuts will shift wildfire response burden to counties. ECF 37-49 ¶¶2-4; ECF 37-58 ¶24; *see also* Add.304 n.23; ECF 37-19 ¶¶8, 22 (localities rely on emergency response to hazardous materials threatened by EPA cuts). These cuts directly threaten residents' health and safety and local governments' finances, which cannot be redressed through "back pay" to separated employees. *See Harris v. Bd. of Supervisors*, 366 F.3d 754, 762 (9th Cir. 2004) (it is "not speculative to anticipate that reducing the resources available will further impede the County's ability to deliver medical treatment to plaintiffs in their times of need"); Add.159-76, 191-93, 303-05, 572-75, 381-83, 609-14.

D. The District Court did not err in the scope of relief ordered

The scope of relief is "sized to fit the problems presented by th[is] case, no more and no less." Add.719. The District Court properly enjoined specified agencies from taking further steps to implement or enforce two EO subsections, the Memorandum, and ARRPs effectuating that EO. Add.719-20. As the court acknowledged, an injunction must be as broad as necessary to give parties relief, Add.719 (citing *Bresgal v. Brock*, 843 F.2d 1163, 1170-71 (9th Cir. 1987)), including when "a showing of nationwide impact" is made, *California v. Azar*, 911 F.3d at 584. Plaintiffs submitted extensive evidence demonstrating harm to

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Plaintiffs and their members across the country, tied to each enjoined agency.[35] *See supra* at 9-10, 29-30; ECF 37-3 to 37-59, ECF 96-1, ECF 101-3 to 101-10 (68 declarations from 27 Plaintiffs); Add.609-614 (declaration chart). Where "'a case involve[es] plaintiffs that operate and suffer harm in a number of jurisdictions ... the process of tailoring an injunction may be more complex.'" Add.719 (quoting *City & Cnty. of San Francisco v. Barr*, 965 F.3d 753, 766 (9th Cir. 2020)).

Defendants' contention that the District Court "made no effort" to tailor relief, Mot. 20, is plainly wrong. The court found it would be "impracticable and unworkable" to attempt to grant piecemeal relief enjoining Defendants' unlawful reorganization of entire agencies only to the extent it affects Plaintiffs, but not otherwise. Add.719. The Supreme Court has long recognized that injunctions may properly benefit nonparties when "necessary to redress the [harm to the] complaining parties." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *see, e.g.*, *Allen v. Milligan*, 599 U.S. 1, 17 (2023) (affirming preliminary injunction of redistricting plan in challenge by Alabama citizens).

At the hearing, the District Court asked Defendants' counsel multiple times how it could issue an injunction limiting relief to the named plaintiffs: multiple times, the court received no answer, with Defendants conceding the undertaking

[35] Plaintiff unions and organizations collectively represent millions of members across the country and are not geographically limited. *See, e.g.*, Add.587 n.16 (citing AFGE, SEIU, APHA, and ARA declarations). Plaintiff cities' and counties' injuries derive not only or even mainly from termination of federal employees employed within their geographic boundaries. *Id.* (evidence from Harris County, San Francisco, King County, Santa Clara County, Chicago, and Baltimore).

would be difficult, while arguing it was "a compliance decision for the Government." Supp.Add.6:22-7:24, 8:11-17; *see also* Supp.Add.8:18-22 (District Court: "you haven't said how I could do it ... in the English language").[36] Because Plaintiffs demonstrated nationwide and indivisible harms, *see* Add.157-76, 664-65, the injunction is well within the District Court's discretion. *See also*, *e.g.*, ECF 37-27 ¶31 (showing interdependence of different positions at agency); ECF 37-31 ¶¶15-20 (similar).

Moreover, the APA's directive to "hold unlawful and set aside agency action" is not limited by "geographic boundaries." *E. Bay Sanctuary Covenant v. Garland*, 994 F.3d 962, 987 (9th Cir. 2020). The "ordinary result" in APA cases "is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Regents of Univ. of Cal. v. Dep't Homeland Sec'y*, 908 F.3d 476, 511 (9th Cir. 2018), *vacated in part on other grounds*, 591 U.S. 1 (2020) (cleaned up); *accord Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys*., 603 U.S. 799, 830-31 (2024) (Kavanaugh, J., concurring) ("[T]his Court has affirmed countless decisions that vacated agency actions ... rather than merely providing injunctive relief that enjoined enforcement of the rules against the specific plaintiffs.") (collecting cases). And as in *Regents*, "the government fails to explain how the district court could have crafted a narrower injunction that would provide complete relief to the plaintiffs, including the entity plaintiffs." 908 F.3d at 512 (citation

[36] Injunctive relief limited to federal employee members of union Plaintiffs would not remedy other Plaintiffs' injuries. Add.717. And rescinding individual employees' RIF notices would do little good if ongoing implementation meant there is no office or functioning agency to which employees can return.

omitted); *see also* 5 U.S.C. §705 (court may postpone agency action's effective date and preserve status quo).

II. Defendants Do Not Establish Irreparable Injury

A stay applicant "must show that a stay is necessary to avoid likely irreparable injury to the applicant while the appeal is pending." *Al Otro Lado v. Wolf*, 952 F.3d 999, 1007 (9th Cir. 2020) (citing *Nken*, 556 U.S. at 434). Without this threshold showing, "a stay may not issue." *Doe #1 v. Trump*, 957 F.3d 1050, 1058 (9th Cir. 2020). "The government cannot meet this burden by submitting conclusory factual assertions and speculative arguments that are unsupported in the record." *Id.* at 1059-60.

But that is precisely what Defendants submit here, asserting without evidence that "the injunction costs the government millions of dollars each week." Mot. 18-19. The District Court properly found that they failed to establish irreparable injury. Add.718-19. Defendants do not identify which employees "they would otherwise have let go in a reduction in force," Mot. 19, or show they are not providing important government services. And as the District Court explained, "the Constitution gives Congress the power—and responsibility—of the purse." Add.718. Congress exercised that power to appropriate the funds to employ these employees and maintain this level of government operations. As in *Community Legal Services in East Palo Alto v. U.S. Department of Health and Human Services*, 2025 WL 1393876, *6 (9th Cir. May 14, 2025), "[t]he Government has failed to demonstrate that spending congressionally appropriated funds as directed by Congress causes irreparable injury." *See also San Francisco*,

897 F.3d at 1232 ("Aside from the power of veto, the President is without authority to thwart congressional will by canceling appropriations passed by Congress. Simply put, 'the President does not have unilateral authority to refuse to spend the funds.'") (quoting *In re Aiken Cnty.*, 725 F.3d 255, 261 n.1 (D.C. Cir. 2013) (Kavanaugh, J.)).

Unlike in *Maryland v. USDA*, 2025 WL 1073657, *1 (4th Cir. Apr. 9, 2025) (cited Mot. 19), this injunction requires no reinstatement of any employees. Moreover, "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended … are not enough" to support a stay pending appeal. *Al Otro Lado*, 952 F.3d at 1008 (quoting *Sampson*, 415 U.S. at 90).

III. Equitable Factors Weigh Against a Stay

The District Court appropriately rejected Defendants' balance-of-equities and public-interest arguments. Add.718-19; *see Earth Island Inst. v. Carlton*, 626 F.3d 462, 475 (9th Cir. 2010) ("assignment of weight to particular harms is a matter for district courts to decide"). After rejecting multiple opportunities to present evidence, Defendants now assert that the injunction costs them "millions of dollars each week" and complain that the injunction interferes with their efficiency and workforce-streamlining efforts. Mot. 18-19. But the District Court correctly found such justifications undermined by the record, including "the fact that defendants have placed many employees on paid administrative leave" while continuing to pay them; "admissions from agency heads that cuts have been or might be made too fast," requiring reinstatement of many terminated employees; and evidence that many cuts will not achieve cost savings. Add.718. "[J]ust

because a district court grants preliminary relief halting a policy advanced by one of the political branches does not in and of itself an emergency make." *Washington v. Trump*, 2025 WL 553485, at *1 (9th Cir. Feb. 19, 2025) (Forrest, J. concurring); *see also supra* at 33-34 (spending congressionally-appropriated funds is not irreparable injury); *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983) ("preventable human suffering" outweighs "financial concerns").

Finally, "[t]here is generally no public interest in the perpetuation of unlawful agency action. To the contrary, there is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations." *League of Women Voters v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (citations omitted).

CONCLUSION

The Court should deny Defendants' motion.

DATED: May 27, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that this response complies with Federal Rule of Appellate Procedure 27(d)(1)(E) because it is proportionally spaced and has a typeface of 14 points. It contains 9000 words and is filed with a motion for leave to exceed the word limit pursuant to Circuit Rule 32-2(a). This response is a joint brief submitted by the separately represented parties of Plaintiff Organizations, the County of Santa Clara, and the City and County of San Francisco.

Dated: May 27, 2025

/s/ Stacey M. Leyton
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FILER'S ATTESTATION

Pursuant to Circuit Rule 25-5(f), the filer attests that all other signatories to this document concur in the content of, and have authorized, this filing.

Dated: May 27, 2025

/s/ Stacey M. Leyton
Stacey M. Leyton

Nos. 25-3030, 25-3034, 25-3293

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

American Federation of Government Employees, AFL-CIO, *et al.*, *Plaintiffs-Appellees*, v. Donald J. Trump, *in his official capacity as President of the United States*, *et al.*, *Defendants-Appellants*.	Nos. 25-3030, 25-3293 On Appeal from the U.S. District Court for the Northern District of California D.C. No. 3:25-cv-03698-SI
In re Donald J. Trump, *in his official capacity as President of the United States, et al.*, *Petitioners-Defendants*.	No. 25-3034 On Petition for Writ of Mandamus to the U.S. District Court for the Northern District of California D.C. No. 3:25-cv-03698-SI

SUPPLEMENTAL ADDENDUM TO OPPOSITION TO SUPPLEMENTAL EMERGENCY MOTION FOR STAY PENDING APPEAL / PETITION FOR WRIT OF MANDAMUS

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Susan Illston, Judge

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, et al.,	)	
Plaintiffs,	)	
VS.	)	**NO. 3:25-CV-03698-SI**
PRESIDENT DONALD J. TRUMP, in his official capacity as President of the United States, et al.,	)	
Defendants.	)	

San Francisco, California
Thursday, May 22, 2025

TRANSCRIPT OF PROCEEDINGS

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Thursday - May 22, 2025 **10:42 a.m.**

P R O C E E D I N G S

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THE COURTROOM DEPUTY: Audience and counsel, this is just another reminder that these proceedings are being recorded and streamed on Zoom. Any additional recording is strictly prohibited.

Now calling Civil Matter 25-cv-3698, American Federation of Government Employees, AFL-CIO, et al., versus Trump, et al.

Counsel, please approach the podium and state your appearances for the record, starting with the plaintiffs.

MS. LEONARD: Good morning, Your Honor. Danielle Leonard from Altshuler Berzon.

Here with me at counsel table are Corinne Johnson, Stacey Leyton, and B.J. Chisholm from Altshuler Berzon, and Tsuki Hoshijima from Democracy Forward, as well as Ravi Rajendra from the County of Santa Clara, and Alex Holtzman from the City and County of San Francisco.

THE COURT: Good morning.

MR. BERNIE: Good morning, Your Honor. Andrew Bernie from the Department of Justice on behalf of defendants. With me at counsel table is Emily Hall, also from the Department of Justice.

THE COURT: Good morning.

MR. BERNIE: Good morning.

THE COURT: We are here today to determine whether I should convert the two-week temporary restraining order that I issued almost two weeks ago into a permanent injunction -- a preliminary injunction for the balance of the case; that would be to continue the status quo until the case can be determined.

I appreciate what I believe to be the defendants' prompt response to the order as it stood from what I understand, and I'm grateful for that.

The preliminary injunction motion filed by plaintiffs requested it continue -- that the TRO continue, and some additional conditions are requested.

So I thought I would tell you what I'm thinking first, and then you can discuss the matter with me. We have had so much briefing, though, that I do have some questions I'll put to you first, and that would help me.

It is -- it is the case that presidents -- elections have consequences. Presidents can set policy priorities for the executive branch, and agency heads may implement them; nobody disputes that. But Congress creates the federal agencies, funds them, and gives them duties that, by statute, they must carry out.

At this stage of the case, the legal history seems clear. A president may not initiate a large-scale executive branch reorganization without partnering with Congress. To hold otherwise would be telling 9 presidents and 21 congresses that

they misunderstood the Constitution. I do not have that level of self-confidence.

And agencies may not conduct large-scale reorganizations and reductions in force in blatant disregard of Congress's mandates whether the President orders them to or not.

The role of the district court is to examine the facts and apply the law to the facts. And given the number of agencies named in the lawsuit, the scope of the -- the evidentiary scope of this case is very large.

By their own admission, defendants have opted not to rely on any factual representations in their oppositions. On the other side, plaintiffs have provided about 1,500 pages of evidentiary support.

The defendants did provide several agency plans for *in camera* review, which I appreciate. The contents of those plans does not dramatically change the Court's previous understanding of this case; and since defendants maintain that they are privileged, I won't be revealing any details in the discussions that we have here in open court today.

However, overall, I do believe the evidence before the Court suggests that plaintiffs will likely succeed on the merits of their claims that the President, the Office of Management and Budget, the Office of Personnel Management, and DOGE have exceeded their authority by directing large-scale reductions in force and reorganizations.

I believe injunctive relief, preliminary at this stage, remains necessary to preserve the status quo and protect the power of the legislative branch. So I'm inclined to continue the prospective relief with some refinement.

I've also considered, because plaintiffs have requested it, retrospective relief. And we can talk about that later.

What I'm considering doing is granting the retrospective relief, but staying it at this time. I'm concerned about the effect of all of this litigation on the lives of the people who are being affected, and being hired and rehired and furloughed; and I think we need to preserve as much order as we can for those -- for those people.

I want to emphasize that we're still at a very preliminary stage of this case. Upon receiving a fuller evidentiary record, my conclusions may change, but the evidence before the Court today strongly suggests that the recent actions of the executive branch usurp the constitutional powers of Congress.

So that's my thinking. And what I would like to do before we get into any general argument is, I have a couple of questions for you.

The first question I have is for the Government. You have asked that the Court limit any relief to the named parties. And the TRO limited relief to the -- just to the named defendants, but I don't know how you would limit it to the

plaintiffs.

So that's my first question to you is: How would you envision I limit relief to the named parties in some different way from what I've done?

MR. BERNIE: Well, Your Honor, in terms of the scope of the injunction, the belief that a nationwide injunction shouldn't issue, I think -- we think the Court should limit the injunction to any individual plaintiffs that the Court finds have standing in irreparable harm, perhaps members of the plaintiffs' union.

We acknowledge that it would be administratively -- I think we acknowledge that it would be administratively difficult to -- to -- for the Government to comply with the injunction just as to named parties.

But we would rely on, I think, Chief Judge Sutton's opinion for the Sixth Circuit that says that that is -- that that's a concern for the Government in terms of compliance; and if the Government chooses to -- chooses -- determines that the only administratively workable solution is to -- is to effectively provide the relief nationwide, that that's the Government's choice; but that as a general matter, the Court should limit its injunction to any named parties who have standing and have demonstrated entitlement to injunctive relief rather than issue a nationwide injunction. But --

THE COURT: But how would that work? I mean, how

would I say that? How would I say it's only the plaintiffs?

MR. BERNIE: I think -- I think -- I think the Court -- I think the Court could limit it to any -- to any individual members of the plaintiffs' union who have shown that they have standing that they're in imminent risk of being RIF'd.

And some of this gets into the substance of the injunction. As the Court is aware, we think that any injunction should not enjoin preparatory steps and stuff like that. I mean, that's a slightly related issue.

But as a general matter, we think the Court should limit it to any parties. And that, again, the Government might choose -- might choose to determine that the only administratively workable solution is to provide it to everyone. But as Chief Judge Sutton said in his opinion for the Sixth Circuit, that's ultimately a compliance decision for the Government.

THE COURT: Well, but you haven't said how I could do it, how I could do it in the English language, to say this order, if I find, is likely to be found to be unconstitutional and can't be implemented with respect to the agencies who are defendants in this case.

MR. BERNIE: Right. I think -- I think an injunction would say the agencies are -- obviously -- you're asking about the scope of the injunction. Obviously, we don't agree that

injunction is appropriate, but I -- we're not talking about that now; I understand.

But I think it would be limited to any individuals -- you know, members of -- members of the plaintiffs' -- of the plaintiff -- members of the plaintiff unions.

THE COURT: Okay. Well, I hear what you've said. I'm not sure that that's possible, but I hear what you've said.

MR. BERNIE: Fair enough. Did you want me to stay at the podium, or should I --

THE COURT: Oh, you may, sure.

MR. BERNIE: Okay.

THE COURT: I have a couple more questions.

MR. BERNIE: Okay.

THE COURT: So the next one is this: From your paper -- from the papers that you've submitted, it appears that the individual federal agencies would be permitted to submit an ARRP that calls for no RIFs?

MR. BERNIE: I'm sorry, Your Honor?

THE COURT: Well, you've indicated that these are guidances and encouragements to the agencies but that the agencies are making their own decisions on the RIFs.

So if an agency decided that it needed its employees and couldn't really afford to cut them --

MR. BERNIE: Sure.

THE COURT: -- could it say so in its ARRP and

presents that to OMB?

MR. BERNIE: I mean -- so I think so, Your Honor. If the agency determined that its -- that all of its functions were statutorily required and it couldn't -- and it couldn't implement the executive order consistent with applicable law and the other principles, I think it could -- it could do that. I'm not sure.

Our point for the ARRPs is -- and the workforce memorandum and the executive order itself, is the executive order is mandatory; we've never claimed otherwise. But the executive order leaves the agencies with very broad authority to look at their own organic statutes and own authorities, including the RIF statute and RIF regulation, determine what the law requires, and make determinations using their lawful authority that are consistent with the President's policy priorities as set forth in the executive order.

I don't want to make any representations that any individuals -- that any agency are or are not recommending no RIFs; but if the agency determined that it could not -- it could not engage in any RIFs consistent with applicable law, the executive order directs them to follow the law.

THE COURT: Well, didn't we have one example where that's what the agency said and OMB and OPM said, "Well, that just won't do"?

MR. BERNIE: So, Your Honor --

THE COURT: "Try again"?

MR. BERNIE: So, Your Honor, my -- so my understanding -- and I want to make sure I'm careful about the representations for the Court.

Our position in this case from the beginning -- and I understand the Court's concerned about the record evidence. But our concern in this case from the very beginning is that this is a global challenge to an executive order and workforce memorandum. It's not a challenge to individual agency actions. So we have not -- we don't think -- we think the question is what the executive order says on its face.

But I can try to answer the Court's question as best as I can, even though our client hasn't relied on it.

My understanding is that OMB and OPM, notwithstanding the review and approval function set forth in the memorandum, do not understand their role to be approving, vetoing, or formally signing off on ARRPs, and certainly not second-guessing the substantive determinations agencies make about how to implement the executive order consistent with their own statutory authorities.

So I don't think it's correct that OMB and OPM are rejecting ARRPs or directing RIFs that agencies don't make. But we have -- but as the Court acknowledged in -- in its opening presentation, and correct, we have not relied on factual representations in this case. I understand the Court

may disagree, but we don't -- we think, in a global challenge to the executive order in particular, what matters is what the executive order says.

That's consistent, I think, with the Ninth Circuit's decision in *San Francisco vs. Trump* -- which I think is the most relevant precedent before this Court -- which we think, even though the Court in that case disagreed with the substantive determination the executive made, is actually quite helpful to our position because it's exactly the type of inquiry we think the Court should be suggesting.

But we -- we haven't really made any factual representations, but that's my understanding of what OMB and OPM understand their -- their role to be.

Hopefully, that's responsive to the Court's question.

THE COURT: Well, I wonder if you could just say that again, because that was my next question, which is: What is the role of OPM and OMB in approving and/or disapproving ARRPs?

MR. BERNIE: So my understanding -- and, again, I want to caveat this. This hasn't been a significant part of my case. And, obviously, the federal government is obviously very large. There are hundreds of agencies. So I don't want to make representations about everything.

But my understanding is what OMB -- OMB and OPM do not view their role -- and I think we've said this in declarations -- as signing off on ARRPs. Agencies can begin

ARRP implementation without receiving OMB and OPM's approval.

You know, I mean, I think as a practical matter, if an agency submitted -- there's -- I think there's perhaps some back-and-forth if an agency submits an ARRP that doesn't have certain things, that -- that doesn't address certain topics that OMB and OPM have directed that agencies should address in considering how to implement the executive order.

But, you know, again, this hasn't been part of our presentation -- case. So I want to be careful with what I say. But I don't think -- I don't think that OMB and OPM view their role as substantively second-guessing agencies' determinations.

The whole process set forth by the workforce memorandum is a process consistent with, you know, OPM's role as the centralizing force for the federal government on personnel matters and OMB's role as the centralizing force for budget matters, to give the agencies guidance. They have this executive order which -- which, you know, like many executive orders on this subject, is vague and raises questions about agency compliance and gives agencies a framework for how to determine how they should implement the executive order.

And the workforce memorandum makes clear repeatedly that agencies should examine their own statutory authorities and determine what's lawful; that they should -- if any -- if they should determine what congressional engagement is necessary; that if any processes require notice and comment rulemaking,

that they will need to engage in that rulemaking.

THE COURT: And they should do all of that within the, like, three weeks that they were given to prepare their ARRPs?

MR. BERNIE: No, no, not necessarily, Your Honor.

So that is a timeline for submitting the ARRPs, which are agency planning documents; but as we have said -- as we have said, I think, in public filings, the agencies -- agencies are not obligated to take all of the steps set forth in the ARRPs. ARRPs are subjects to change.

If there are particular steps, like, you know, the most obvious example would be -- would be the notice period set forth by statute in OPM regulations for providing notice for employees who are subject to a reduction in force, the agencies have to -- the agencies have to follow that -- follow that; and nothing in the workforce executive order or the workforce memorandum says otherwise.

THE COURT: Same kind of question. The memo, based on the executive order, requires that the agencies certify that the ARRPs will have a positive effect on the delivery of direct services when direct services are at issue.

Have any such certifications been issued?

MR. BERNIE: I'm -- I'm not sure. But I meant to bring -- I meant to bring that up to the -- to the lectern with me.

THE COURT: Oh, you may, sure.

MR. BERNIE: Would the Court mind if I --

THE COURT: Go get it.

MR. BERNIE: Thank you.

So I think -- I think certain -- certain -- I think as part of the workforce memorandum, that the -- the workforce memorandum directs agencies to state whether they provide direct services to citizens -- some agencies do and some don't -- and say which direct services are they and then certify that it will not have a negative effect.

I think it directs -- and, again, I'm reluctant to get into privileged material that particular ARRPs direct, but I think that -- I think that the workforce memorandum directs that to be provided as part of Phase 2 ARRPs.

And so my understanding is that the Phase 2 ARRPs can include that, if the workforce --

THE COURT: Well, that was as of April 14th, I think.

MR. BERNIE: Correct. Yeah. The agencies should submit the Phase 2 ARRPs for review and -- for review and approval no later than April 14th. But, again -- and they should have that certification. And, again, these are provisional planning documents.

And I guess -- I guess the one thing -- the one thing I would say, Your Honor, is I can certainly appreciate the Court's -- the Court's concern that perhaps the workforce memorandum directs agencies to act under -- under expedited or

unreasonable time frames. I can -- I can understand the Court's concern.

I think a lot of that is ameliorated by the fact that these are just planning documents that outline steps in the future. The agency doesn't have to take them.

But if -- and I understand the Court has laid out its views and it's considered voluminous briefing.

But the one thing, if I can get sort of one thing across this morning, it -- it would be this, which is, there is a distinction between a challenge to an executive order and a memorandum and a challenge to individual agencies' decisions. If agencies do something that is unlawful, arbitrary and capricious, is no -- and is not reasonably considered, there are two possible -- there are two possible remedies for that.

The first, which we would say --

THE COURT: How do we know what the agencies are doing?

MR. BERNIE: Well, if the --

THE COURT: Who will tell us?

MR. BERNIE: Well, if the agency does -- does any- -- well, for things like -- for things that actually affect plaintiffs, like reductions in force, consolidations of offices, anything that actually has an effect on plaintiffs, those decisions will be disclosed when they're made. And when they're made, plaintiffs can challenge them.

And indeed, plaintiffs have challenged individual decisions. There was -- there was a hearing earlier this week in Rhode Island by a group of states challenging certain reorganizational and RIF matters at HHS.

My co-counsel was at a hearing earlier this week involving certain RIFs at DHS.

There was a decision issued last night -- I can provide copies of that decision to the -- to the Court and counsel -- involving a challenge to the -- could you just bring it -- involving a challenge to the Department of Education's RIFs and certain reorganizational activities pursuant to -- pursuant to -- pursuant in part due to the executive order.

I didn't -- didn't get a chance to put in a notice of supplemental authority because it came in last night and I was just flying in but -- in which Judge Friedman in the District of D.C. declined to issue a preliminary injunction against certain RIF-related matters at the Department of Education, which -- and I guess I would -- I would say that this illustrates two things that we think are very important in determining the Court's role in this case.

First of all, we think Judge Friedman's decision illustrates the sorts of things that a court would be doing in considering an individual agency action; namely, doing what he did in that case, which is looking to see if what the agency did is consistent with its organic statutes and prevents the

agency from performing its statutorily mandated functions.

But beyond that, plaintiffs' theory in this case -- and I think this has to be their theory because they're globally challenging the executive order -- which is that the executive order cannot be lawfully implemented, and that it's like the executive order in *City of San Francisco v. Trump*.

Well, in this case, I think you have a very able and experienced district judge concluding on the facts of that case that plaintiffs were unlikely to show that that particular implementation was lawful.

We don't think that this is -- this case is anything like the exec- -- the limited situation like in *City of San Francisco vs. Trump*. I could talk about that case briefly, but if the Court -- the Court indicated it had some questions for -- I mean, I don't want to step on any --

THE COURT: No, no. Go ahead.

MR. BERNIE: -- questions the Court had.

THE COURT: Talk about that.

MR. BERNIE: So -- I mean -- so in that case -- which we think is the most directly analogous case for how courts should review an executive order on an *ultra vires* theory with -- consistent with law clause, like this case -- the executive order had a provision purporting to withhold grants to cities that could not -- that willfully refused to comply with a federal statute. The Ninth Circuit held that that --

that that executive order was *ultra vires* and unlawful in all its applications because the executive branch, as a whole, had no power to add funding conditions that Congress had not prescribed.

And if you look at that decision, and Footnote 6 in particular, the Ninth Circuit made clear that there were absolutely zero grants the Department had identified to which this condition could be complied.

The court in that case declined to give effect to the savings clause because giving effect to the savings clause would mean that the executive order itself would have no meaning.

And I appreciate the Court's observation at the beginning, but I think this case is fundamentally different in that agencies do have authority to conduct, in certain cases, RIFs, including large-scale RIFs. We know that because 5 U.S.C. 3502 -- I think it's (d)(1)(B) -- recognizes the possibility of RIFs involving significant numbers of employees. OPM has codified that by regulation. They are not banned. They are simply subject to slightly -- to slightly evaluated notice requirements, a requirement that a state and the chief executive of a city be notified.

So I think -- by analogy, I think the Court can issue an injunction finding that this executive order is unlawful only if the executive branch, as a whole, has no authority to engage

in large-scale RIFs, and that's -- and we just don't think that -- we just don't think that's the case; they clearly do.

How an agency complies in particular cases, whether it -- whether it -- whether it's consistent with the governing statutes, whether its decisions are -- are arbitrary and capricious, those sorts of claims can be brought, again, in one of two ways. We would say through the administrative scheme prescribed in the CSRA and FSMR -- RS; but at most, in a federal district court that would decide the issue based on -- based on the -- based on the record in that case and what the agency specifically did.

The Court has also expressed concern about organiza- -- about -- about -- about the President's supposed lack of authority to broadly restructure federal agencies without the consent of Congress. I want to address that directly.

I mean, I think we may have -- you know, it's possible that we may have different views about the extent of the President's authority to restructure. But I don't think the Court needs to reach that in this case because, again, this is a global challenge to an executive order.

All the executive order says is for -- agencies should issue a report determining whether certain components should be abolished, consolidated, et cetera. Agencies may make different decisions, and those decisions can be considered on their merits.

I mean, we know that agencies have some housekeeping authorities to consolidate, to eliminate components that aren't statutorily required. I mean, I think examples of that are -- are legion.

I mean, just to take an example, I mean, I'm an employee of the Department of Justice's Environment and Natural Resources Division. I'm on detail to the Civil Division. During the Biden administration, ENRD -- there was an Office of Environmental Justice established in ENRD, and this administration eliminated it. There's -- an Office of Tribal Justice was founded within DOJ a few years earlier. Agencies make decisions all the time to consolidate certain HR functions at headquarters.

Again, there may be certain steps that an agency take that there will be debates about whether it goes beyond the agency's authority, and such that congressional involvement -- but the -- the -- the appropriate form for that is challenges to those cases.

I guess -- I guess the only thing I would say is that before taking the step -- and I understand that the Court has thought carefully about this case. Before taking the serious step of globally enjoining not just -- not just an action of the executive branch, but an executive order of the President, it's incumbent to do that based on what the executive order says, not on plaintiffs' allegations about how plaint- -- how

agencies are allegedly implementing it, and to do so only if the executive order has no valid applications.

And we respectfully submit that that is -- that that is simply not the -- that that is simply not the case here.

THE COURT: Why do you think in the past all those presidents have requested congressional authorization to reorganize the executive agencies?

MR. BERNIE: Your Honor, there -- I'm not -- I'm not saying that -- I'm not saying that there might not be some reorganizations down the road that do require -- that do require -- I'm not conceding that they are. But, like, again, the question before the Court is just whether -- from our perspective, is just whether President Trump acted *ultra vires* when he act- -- asked agencies to study these questions.

But I don't -- but to answer the Court's question --

THE COURT: When he asked agencies to study these questions? That's how you view this order?

MR. BERNIE: What's that?

THE COURT: You view this order as a request that agencies study the question?

MR. BERNIE: Well, no. I mean, I -- not just that. I mean, well, the report -- the executive order just -- just -- just asked the agencies to prepare a report determining whether any of their components or the agency itself should be abolished, consolidated, et cetera.

If the agency issues a report and concludes that they can take certain actions consistent with applicable law, then I think that they can do that.

But the executive -- my point is simply that the executive order itself, unless you think agencies -- agencies have no authority to engage in any reorganizational activity whatsoever, the executive order itself doesn't command action inconsistent with the law.

And, again, we think the solution to that is -- is to allow the agencies to implement the executive order and allow plaintiffs to challenge implementations that they dislike rather than --

THE COURT: Then they could find out what those implementations are after they're implemented. That's the plan?

MR. BERNIE: Well, I think -- I think that -- respectfully, Your Honor, I think that's -- that's the norm in every -- in almost every -- almost -- again, I'm not conceding that -- we have our channeling arguments. I'm not conceding there be APA.

But in almost every -- most of the time when an agency does something, it's -- whether it's an APA case or otherwise, it's a challenge to an agency -- to something the agency has done, not -- not a challenge to something the agency is thinking about doing or plans to do, subject to potentially

superseding plans in the future.

But, again, I mean, we -- as -- so we do think that the executive order here is lawful. And just with -- with respect to --

THE COURT: Well, I just would note it's entitled "Implementing The President's 'Department of Government Efficiency' Workforce Optimization Initiative"; right?

That's the name of it, "Implementing."

MR. BERNIE: Right.

THE COURT: It's not advising about how you might consider.

MR. BERNIE: Oh, no, no, no. Again, to be clear, like, the executive order requires implementation. We've never said that it's not -- we've never said that it's not mandatory.

But the question of whether it's mandatory is separate from the question of what it mandates. And it gives agencies broad authority to determine what their legal authority is and pursue it consistent with the President's policy preferences.

And we think, in terms of the President's authority, if an agency has lawful authority to do something, we think it's a basic -- basic in the structure of Article II that the President has authority to -- to direct the agencies -- as long as the President's directives don't direct the agency to violate the law, direct the agencies how to exercise their statutory authorities.

We think that's clear from a number of -- clear from the structure of the Constitution, but also the D.C. Circuit's decision in the *Alba* case, which we cite, in which the Ninth Circuit distinguished in -- distinguished in the *City of San Francisco* case but didn't disagree with. It's not binding on this Court, we recognize, but it's a unanimous decision by an ideologically diverse panel in that case.

And what you had in that case was a presidential condition requiring contractors and bidders -- prohibiting them from either requiring or -- or prohibiting entry into certain labor agreements. And the Court said two things which we think are directly relevant in this case.

First of all, the Court said that the Pres- -- that if agencies had authority to impose a requirement like this, the President has -- had authority, Article II, to direct the agency on the performance of their lawful duties.

And also the Court acknowledged that there might be certain agency-specific statutes that prohibited -- that prohibited following the President's directive. And it said that didn't mean that implementation of the executive order should be enjoined. It simply means, because there was a consistent with law clause in that case, like there is here, that the executive order directed the agencies to follow the law in that case, as it does here.

I'm happy to -- so -- and in terms of the workforce

memorandum, we continue to just think that -- first of all, we just don't think it's agency action. We think that the ARRPs -- I -- the Court said it didn't really influence your thinking about the case, and also don't really want to address -- address the details of that in open session.

But as we've said in public filings, we think the ARRPs themselves are pre-decisional and deliberative because -- because they don't bind the agency to anything.

But the workforce memorandum is a step beyond even -- even that, in that all it does is tell the agency what they should -- topics they should include in the ARRPs.

And I guess the one thing I would say about -- if the Court is still inclined, at the conclusion of this hearing, to follow its initial inclination on injunctive relief, is -- is any injunction should be limited to what plaintiffs are actually complain- -- complaining about and what the Court finds is problematic.

So what plaintiffs are really complaining about is that the review -- what they see as the review and approval requirement takes away agencies' discretion to decide for themselves.

As I just said, I don't think that's how this works. But, at most, we think that -- we think there's nothing wrong with OPM and OMB initiating this process which is calling for the ARRPs to include these topics.

So if the Court is still inclined to issue injunctive relief, I guess I would -- I would ask the Court to consider whether -- the only injunction we think, at most, would be necessary would be an injunction directing that OPM and OMB can't condition an agency's implementation of ARRPs on their approval.

I mean, I'm not -- we don't think that injunction is -- would be appropriate either. I'm not necessarily suggesting my OPM and OMB clients would be -- would be happy with that. But, I mean, it would certainly -- it's certainly -- I don't see any plausible argument that -- that outside that review and approval requirement, there's anything problematic about OMB and OPM setting forth guidance -- and we certainly don't think there's anything wrong with the substance of this guidance which doesn't tell agencies what to decide; it simply tells agencies what to include and -- and consistently tells them to make decisions consistent with their own statutory authorities.

And then -- so I know the Court originally called me up to ask questions. Were there any other --

THE COURT: No, that's fine.

MR. BERNIE: Okay.

THE COURT: That's fine. Thank you very much.

MR. BERNIE: Okay. Thank you very much. Appreciate it.

THE COURT: Ms. Leonard?

MS. LEONARD: Thank you, Your Honor. I'm going to take the questions about the merits issues that you were discussing with opposing counsel first, and then my colleague Ms. Leyton is going to take some of the questions about that -- where you started, regarding the scope of the inunction issues.

We have fundamental differences with what government counsel is presenting with respect to what this executive order says and what the OMB/OPM memorandum implementing that executive order says and what they do with respect to the agencies.

And our argument, unlike counsel's, is derived directly from the language of the orders and the record evidence before the Court of what is happening.

We don't live in the hypothetical world that the government counsel wants to litigate this case based on where OPM is just -- and OMB are just issuing a request for planning documents that may be implemented into the future and not directing what is happening at these agencies.

The real world that we live in, the record evidence is before this Court that OMB and OPM are making the decisions here. They are saying what to cut, when to cut, where to cut. And all they're asking the agencies to do is to come forward with a plan for how to implement the categorical directives that they've been given by the President and OMB and OPM.

One particular point with respect to the language of the

memorandum, counsel indicated that, once again, in this hypothetical world that they appear to be living in, that OMB and OPM are not making any decisions. The language on page 6 of the memorandum that I believe Your Honor was referring to says [as read]:

> "Finally, agencies or components that provide direct services to citizens shall not implement any proposed ARRPs until OMB and OPM certify that the plans will have a positive effect on the delivery of services."

How is that not approval, Your Honor? They cannot implement until we say that you can implement. And that is exactly what they're doing. They're not just doing it for the direct services, though the record is very clear that that is what they're doing. They're doing it across the board.

And the evidence before the Court shows that OMB and OPM, when the agencies are coming forward and saying "Our functions are statutorily required" -- NSF, AmeriCorps, others -- "Our functions are statutorily required" -- EPA -- "We want to keep them. Do not do this to us," OMB and OPM are saying: Cut and cut now.

Your Honor was absolutely correct in the TRO analysis that the President and OMB/OPM and DOGE lack any authority, whether under the Constitution or any statute, to order a large-scale reorganization like this. But there's a further unlawfulness

that I want to specifically address. The manner in which the agencies are being directed to act, not just the fact of the reorganization but the manner in which that that reorganization is being ordered to take place is a key to the unlawfulness of this order and the relief that plaintiffs are requesting.

And this is why: There are two specific things in the executive order and the OMB/OPM memorandum that provide categorical direction as to how to implement the President's orders, and I will identify both of them.

But if -- but as a sidenote, Your Honor, if there's any doubt as to what the executive order means, I think all you have to do is look at what OMB and OPM say it means in the memorandum to clarify that doubt.

I don't think there's any doubt that when the President says "Prioritize in large-scale RIFs to eliminate any functions or people that are not required by statute" -- when he says "prioritize" he means "do it."

And OMB and OPM put that into effect through their memorandum saying -- counsel says it only says "should." Well, "You should include this and bring it to us, and we have a review and approval power, and we'll reject it if you don't do it" means it's mandatory, Your Honor.

So the two things that agencies are categorically required to do: Number 1, eliminate any programs and offices that the President and his agents say to eliminate.

AmeriCorps, gone. The Office of Federal Contract Compliance and Labor, gone. The Office of Research and Development at EPA, gone.

That's Number 1. That is blatantly outside of authority. That does not rely on the agencies' own discretion and authority as they're trying to piggyback into the Article II power. That is blatantly outside of authority.

So that's Number 1. Categorical instruction: You must do this and then RIF anyone who is in those offices.

But Number 2 is equally important. Number 2 is the fundamental instruction that agencies must eliminate all non-mandatory functions and the people who perform them.

Over and over I just heard opposing counsel say, "If it's not required by statute" -- required -- "then agencies have the authority to cut it." Well, agencies do things that are authorized by statutes but not specifically required every day, Your Honor, and those are things that are crucial to the proper functioning of federal agencies.

The Government -- the President's order here mandates -- and through the OPM memorandum, it's very clear -- mandates cutting anything that is not statutorily required. It's page -- the best crystallization of this is on page 2 of the OMB memorandum where they talk about the principles to inform the ARRPs. They say [as read]:

"We want you to impose a significant reduction

in the number of full-time equivalent positions by eliminating positions that are not required."

Then right below that [as read]:

"Pursuant to the President's direction, agencies should focus on the maximum elimination of functions that are not statutorily mandated."

This is the categorical directive that is outside of the President/OMB/OPM's/DOGE authority and also is profoundly arbitrary and capricious for OMB and OPM to require every agency to engage in. It is profoundly arbitrary and capricious if the agencies did it on their own.

You cannot ignore what it takes for an agency to be a properly functioning agency in all of the ways that are authorized by Congress and strip to the bone, just to leave behind the functions that Congress specifically says are required. That's one of the most fundamental problems with this executive order.

And agencies engage, as I said, in non-statutory mandated functions all the time. Statutes don't often mention the people who clean the bathrooms, Your Honor, or --

THE COURT: But don't the agencies have the authority to cut back on those non-mandated functions if they want to?

MS. LEONARD: So if they engaged in reasoned decision-making and decided themselves that that was necessary, sure, they could do that. But that's not what's happened here.

They've been told: Cut all of them across the board.

They have not been allowed -- no one has made the decision with respect to the agencies' needs and functions as to whether that decision is necessary. They've been told to cut all of them, Your Honor. They are sacrificing agency function at the altar of workforce reduction.

The purpose of this is to cut, cut, cut, not to consider what agency function is really necessary. That's the fundamental problem with this, Your Honor.

It is not within the President's authority to order agencies to abuse their discretion. It is not within OPM or OMB's authority to order agencies to abuse their discretion. And that is exactly what they have done here.

The agencies cannot function properly without the people who fix the roof, who repair the cars, who file the paperwork, who do the trainings, who -- the list goes on and on and on of things that are not specifically mandated.

And we believe that what they are interpreting -- what OMB and OPM is -- and DOGE is interpreting "statutorily required" to mean is specifically mentioned by statute. Agencies do so much more than that and need so much more than that to be functioning, and they have ignored that and ordered them across-the-board, categorical: Eliminate all of those positions.

And this is very akin to the funding freeze case, *New York*

v. Trump, out of the First Circuit, where the Court -- the First Circuit said it matters not that there could have been under -- you know, any agency, if it had taken the time, could have looked at each of the grants and decided to put a pause for certain reasons. What this is, is a categorical directive that requires the agencies to defy that.

And how do we know that? Agencies are not permitted here, as counsel has suggested by these mandatory orders, to say no. They're not permitted to make the determination of whether eliminating those, what they call, discretionary functions is necessary for the -- for all the reasons that -- that agencies know to look at their statutes and what Congress has expected of them and wants of them and the proper functioning of the agency under the housekeeping statute and all of that.

They're not permitted to make that decision. They are being told: This is what you are cutting. Go figure out how.

And the ARRPs are the "go figure out how" to hit the categorical cuts that the administration is mandating.

And, of course, they're complicated. These are complicated, cabinet-level departments, very large, independent agencies like EPA. They're struggling to put together plans to achieve what OMB and OPM and DOGE are forcing them to do.

And when they -- as we've said and as the record reflects, when they have come forward and said, "We want to keep these -- these positions"; the NSF, "We want to keep our scientists,

because what we do is important to the functioning of the agency and is statutorily mandated," OMB, OPM, DOGE: No. RIF them now.

And that's exactly what's happened, Your Honor. That categorical directive of -- both parts, the cut all the offices and functions that we direct, and specifically non-statutorily required functions, that is outside the President, OMB/OPM/DOGE's authority, and it is part and parcel of why this executive order is so unlawful, in addition to what I would call the top-line argument that the President is engaging in an unconstitutional reorganization.

It's both the fact of that reorganization and how it's being implemented through this executive order that is so key.

It's also key to the scope of relief that we are asking for in the injunction aimed at the ARRPs and all the ways that these plans and directives -- these categorical directives are being implemented now by these agencies.

And as I said, my colleague will address the scope of relief questions further, but I wanted to make that link between that important argument and basis for saying why this is so unlawful, because when you order across an agency that all discretionary functioning be cut, what remains, Your Honor? Is it a functioning agency? Can people do the jobs that are mentioned by Congress in the specific statutes if there is no one to do the paperwork, make the travel arrangements, all the

other -- all the other functions?

And I'm not trying to say that it's only administrative jobs that are not mentioned specifically by statute; it's so much more than that. But I think that this administration discounts the value of that work and the need for that work to have a fully functioning agency, and I think that that is really, really profoundly problematic, Your Honor.

THE COURT: And you think that the declarations and other materials that you've supported -- that you've provided support what you just said as a matter of fact?

MS. LEONARD: I believe that they do, Your Honor, yes.

And I think that you can look at the face of the executive order as well and the OMB memorandum and see that categorical directive, and then supported by the evidence that we've shown which links it to the harm that -- that -- that those actions will have across the entire country. That is what we have attempted to do. The President cannot remove the agency's ability to make that assessment.

And now, if the President had stepped in and actually made that assessment himself for any particular agency -- okay, these are all the agencies' needs -- we might be having a different conversation. But what he did was impose a government-wide, categorical directive: Eliminate all of those functions later, and rearrange the pieces of the agencies afterwards to fit.

That is unlawful, Your Honor.

Briefly, on the *City and County of San Francisco*, just to respond -- I think we've addressed this clearly in our papers -- but what the Ninth Circuit said there is that a savings clause cannot -- it's not an escape clause to get out from under the specific language and directives of the executive order.

And what I've just described is the mandatory language in the executive order: Prioritize the offices and programs we're going to cut and all non-statutorily mandated functions going down, in the executive order, to government shutdown levels of staffing.

There is nothing more arbitrary and capricious than that, Your Honor. But that is the language of the executive order. OMB and -- OMB and OPM confirm it in their directive. And the savings clause of, "Oh, but also go comply with the law," if those things are in direct tension, which they are, then the savings clause doesn't save anything.

Final agency action. It is absolutely not the case that this Court, under the APA or otherwise, needs to wait until every single action implementing an unlawful directive has happened and made public in order to act to stop it. That is profoundly wrong.

The APA has never meant that, Your Honor. The APA looks at who's making the decision. And we have the decision-makers

here, Your Honor. We know who's making the decision under these -- this executive order and the memorandum because they've said it in the document itself. OMB/OPM, they're making the decisions about the contents of the plan and the timing.

We shouldn't forget the timelines for the actions implementing are -- a major part of the ARRP. That's in the memorandum. It says: Give us the timeline. What actions are you taking to hit the President's directives and when? And we'll approve that too.

That's what's happening here. The decisions have been made at the level of approving the ARRPs.

What the Government said to the Supreme Court when they went up on the stay from the TRO is that Your Honor's TRO stopped 40 RIFs at 17 agencies. Those had been approved, Your Honor.

There cannot be a shred of doubt that there are actual concrete actions under the ARRPs that go well beyond RIFs. Those ARRPs go well beyond RIFs. They're hitting reorganization and they're hitting reduction through specific concrete actions that have been approved. They're not pre-decisional. And that is absolutely something, under the APA and the equitable authority of this Court, that this Court can enjoin.

With that, unless Your Honor has any further questions

about the merits, I will happily turn things over to my colleague Ms. Leyton.

THE COURT: All right. That's fine. And I wanted to ask -- I'll hear from you in a second.

But, Mr. Bernie, have any federal employees been terminated by RIFs implemented under this executive order?

MR. BERNIE: Can I have a second, Your Honor?

THE COURT: Yeah.

(Co-counsel confer off the record.)

MR. BERNIE: So I think -- I think, Your Honor, that there have -- I mean, there have certainly been -- there have certainly been removals from service that are outside of this executive order, like the probationary litigation before Judge Alsup.

I don't think -- I'm not positive, but I don't think that any reduction -- I mean, RIF notices were issued, I think, but I don't think that any reductions in force were finalized before the Court's TRO.

Typically, there's a 60-day notice period, which can be -- which can be reduced to 30 days with OPM's permission under certain circumstances. I could -- I could check into that. But I don't think any RIFs pursuant to this executive order have been -- were -- were completed before the TRO, if that's --

THE COURT: Thank you.

MR. BERNIE: Yeah.

THE COURT: Ms. Leyton.

MS. LEYTON: Thank you, Your Honor.

I'd like to begin by addressing the question that Your Honor raised at the beginning of this hearing which was the appropriate question about what this Court would do if it were to limit the injunction to the named plaintiffs.

As Your Honor well knows, courts are not to issue vague injunctions where the defendant does not know how to comply, and the defendant has already raised some concern about their compliance questions.

And there is no possible way that this injunction could be limited to only the plaintiffs. And there's a reason why the Government has not suggested how that could happen because there is not a possible way to do that.

The scope of injunctive relief is dictated by the nature and extent of the violation and by the nature and extent of the injury to the plaintiffs. Here, both require an injunction -- stopping the ARRPs and the implementation of the EO and the memo at the agencies where we have shown harm.

There is an order that is an order that applies to all of these agencies, that requires the stripping down of the agencies to only what this administration views as their necessary statutory functions, that directs the agencies to strip down to lapse-related levels when there are gaps in

appropriations.

And the directive to those -- those directives cannot be remedied through pinpoint injunctive relief. These agencies are interdependent entities. If this Court were to order the restoration of the food inspectors for the Department of Agriculture, but not to order the -- but not to order a stop to the RIFs of those who are arranging the travel for those individuals, those who are arranging the inspections, then the harm cannot be remedied. And that is exactly why this Court should order the -- the preliminary injunction that we have requested.

I would also point out that this is the presumptive remedy under the Administrative Procedures Act. It's vacatur of the rule, and this circuit has held that that applies at the preliminary injunctive relief stage in cases like *East Bay Sanctuary*.

We've demonstrated multiple violations of the APA here. And so that, in addition to the fact that it is really just impossible to disentangle the harm -- and we've shown at each of the 19 agencies where we have sought injunctive relief, irreparable injury to plaintiffs in this case. Where we haven't shown irreparable injury, we have not sought injunctive relief as to that agency. And so that is relief that the plaintiffs have shown entitlement to.

I would also point out that the Government relied on an

opinion by Judge Sutton. That was not an opinion of the Sixth Circuit; that was a concurring opinion by Judge Sutton. He did author the majority decision, but the part that the Government is relying on was in his single-judge concurrence.

In the Ninth Circuit, this circuit has made clear that this Court does not need to close its eyes to the practical effects of how an injunction would be implemented.

In cases like *East Bay Sanctuary* and *City of San Francisco vs. Barr*, when deciding whether to geographically limit an injunction, for example, the Court looks at the nature of the injury to the plaintiff and whether an injunction is susceptible of neat geographic boundaries.

Here, it is not possible to impose those neat geographic boundaries, nor is it possible to impose boundaries based on the particular injuries to each of the -- of the multiple plaintiffs that we have demonstrated, and that's precisely why the Government does not suggest a way to do so.

I'd also like to address the Government's alternative suggested limit, which was, I believe, that the Court should prevent OMB and OPM from conditioning implementation of the ARRPs on their approval.

I'd like to just begin by saying --

THE COURT: Say that again.

MS. LEYTON: I believe that it was that the -- that

the alternative injunctive relief was that the agencies' implementation of the ARRPs would not be conditioned on whether they received OMB or OPM approval.

A fundamental problem with that suggestion is that OMB and OPM have already approved many of these ARRPs and have already rejected approval of a number of ARRPs.

I think this Court mentioned one of the examples. I would just like to point the Court's attention to the four examples that are in the record, not because defendants have disclosed these but because they have been disclosed through other means.

We have the example of AmeriCorps in the Daly declaration, which is 37-12 on the docket, that the agency did not want to terminate their employees and were told that they had to.

We have the National Labor Relations Board, and that is attached to the Chisholm declaration, Docket 36. We know that the National Labor Relations Board said that they could not reduce staff and that OMB sent back a memo saying, "Does not meet expectations." They were told that they could not -- they could not do what the agency wanted to do.

We have the National Science Foundation and the National Endowment for the Humanities. National Endowment for the Humanities is not a defendant we are seeking a TRO -- a preliminary injunction from, but NSF is. And those can be found in the Soriano declaration and the supplemental Soriano declaration at 37-32 and 96-1.

The agency did not feel that it could terminate the employees and engage in the RIFs that the administration wanted, and they were told that they had to.

The other problem, of course, is that the agencies are operating under an unlawful directive, the executive order. And so, even aside from the OPM/OMB-required approval, they are being directed to do what the President has -- has ordered, which is an unlawful order for a reorganization without Congressional approval.

We have evidence in the record that DOGE and -- that the -- that DOGE both -- DOGE has people within the agencies that are directing the agencies to make specific cuts, to consolidate specific offices, to -- to RIF employees. And OMB and OPM are telling them to do that while disclaiming that they are formally approving anything, even though that is required for the agencies to implement. So it would not be possible to remedy the plaintiffs' injuries by imposing that more limited injunction.

I would also just like to address the Court's questions about possibly issuing a stay. As this -- this -- my colleague has pointed out, the APA does not require plaintiffs to wait until after a cut has been made and after the impact is felt in order to pursue injunctive relief.

THE COURT: Well, what I was -- what I was thinking about was, you're requesting that people who have already been

put on administrative leave be taken off of that and put back in place to work, which, frankly, makes a lot of sense because -- it doesn't make sense to have employees sitting around and not working.

But leaving that aside, I'm concerned that there are a number of requests for stay. They've not been acted on, and I don't know what will happen. But for people who are being ping-ponged back and forth, I feel that's very difficult for them.

So prospective relief, which is what I granted two weeks ago, would not have quite that same effect. So I was wondering why you want me to grant relief to those who've already been put on furlough.

And then, so what I was thinking was grant -- if it's a matter of the time clock running, grant the relief you request, but stay it so that people just don't have to be moving around before they know what the final rules are going to be.

MS. LEYTON: And, Your Honor, we share the Court's concern about the ping-ponging of employees and their understanding of their job situation. And that is something that has occurred, even aside from any injunctions, where the Government has terminated or RIF'd people and then decided that it actually needed those individuals and brought them back. And we -- we share that concern.

THE COURT: Well, and there are statements from

Secretary Kennedy suggesting that that's what their plan was.

MS. LEYTON: Exactly. RIF everybody and then bring 20 percent back, possibly, acknowledging that that would be part of what would take place through the HHS RIFs.

What we would ask is that if there is any stay on implementation of some of the aspects of the preliminary injunction, that we -- that it be limited such that we have some opportunity to come back in to demonstrate ongoing harm from the placement of people on administrative leave to the extent that we could seek relief in -- in the future, even if there were a stay on some aspects of the injunctive relief.

Our position is that the status quo is that those people were in their jobs and not on administrative leave; but to the extent that the Court is concerned about that harm, we would want to be able to come in and demonstrate that their placement on administrative leave is causing harm to the plaintiff cities and counties, to the -- to the plaintiff organizations, particularly the HHS RIFs, which occurred very immediately and resulted in placement of people on administrative leave. So that -- that is what we would request.

And the other thing that I think would be key is, we've talked about what we've requested in terms of a preliminary injunction is that we need very detailed compliance reports. The Government has objected to any requirement that they meet and confer with the plaintiffs. We believe that that is the

most streamlined and efficient way for us to be able to present any disputes to this Court.

But as Your Honor knows, in response to the TRO, it was a mere two-page declaration stating -- or two-page submission saying: We directed our clients to comply.

We don't know what each agency has or has not done. We have some concerns that there may have been consolidation of offices or that some of the terminations of probationary employees were pursuant to ARRPs, were directed by DOGE and/or by OPM and OMB.

And the only way to be able to ensure compliance with this Court's order is to make sure that the defendants are submitting detailed compliance reports and that they are showing any ARRPs that have been approved, as my colleague argued, that we should be able to look at that so that we know what is happening pursuant to these ARRPs as opposed to pursuant to some other executive order or some other administrative action that we have not challenged.

And unless Your Honor has questions...

THE COURT: No. That's good.

Anything else you want to add?

MR. BERNIE: Just a few points, Your Honor.

First of all, respectfully, I believe Ms. Leonard stressed that the -- with respect to the executive order mandates -- mandates elimination of all statutorily required functions and

employees. Respectfully, that's just not what the executive order says.

What the executive order says is that all offices that perform functions not mandated by statute or other law shall be prioritized in the RIFs. And that makes sense --

THE COURT: Well, it says: Agencies should focus on the maximum elimination of functions that are not statutorily mandated.

MR. BERNIE: So that's -- that's from the workforce -- that's from the workforce memorandum. And "maximum elimination" doesn't mean elimination of everything.

It makes sense that in prioritizing certain areas for RIFs, the agency is focused on non-statutory and non-essential functions. It wouldn't make sense to focus on -- to focus on statutorily mandated functions. But that doesn't mean that every statute -- every employee that is non-essential, every component that is not statutorily mandated is going to be eliminated.

And on the same note, the reference to 2019 and shutdown levels, what the -- I think it's important to understand what the workforce memorandum says on this point.

What it says -- and this is on page 2 of the workforce memorandum. What it says is that [as read]:

"The agencies should determine competitive areas for positions not typically designated as essential

during a lapse in appropriations."

And what it says is that when making this determination, they should refer to the functions in the plan submitted to OMB in 2019 as the starting point for making this determination.

The reason it says 2019, I believe, is because in -- as the Court may recall, at 2018 into 2019, there was a prolonged shutdown in the federal government, so agencies had to make the determination. That doesn't mean that every competitive -- that every competitive area that is -- that is identified as non-essential, that all of the employees in those competitive areas, are necessarily going to be RIF'd.

And I think that that extrapolation points to a fundamental problem with this lawsuit, which is: Plaintiffs, respectfully, are trying to have it both ways -- or, respectfully, trying to do two things, but not fully doing either.

They're try- -- they want to challenge an executive order on its face, but they don't want to be constrained by the text of the executive order, which is what's required.

They also want to challenge what agencies are doing, but they don't want to develop any sort of granular assessment of -- they don't want to limit their relief to individual agency actions, and they don't want to make arguments or try to establish that agencies are acting in violation of their gov- -- of their governing statutes.

They have to pick one or the other, and they've chosen to bring a global claim. And we think that the executive order is lawful, and that's the end of it.

But the one thing I would say, Your Honor, is a lot of opposing counsel's presentation was directed at the workforce memorandum. We think the workforce memorandum is entirely lawful. We take the point. We haven't submitted evidence. We don't -- we don't think that what they're saying is -- reflects -- but -- but the point is, is even if they're right about all that, we don't think there should be any injunction.

But at the very least, we think the agencies should be allowed to implement the executive order on their own, because the executive -- because all of these complaints about what OPM and OMB are doing, are -- are -- are entirely -- are entirely divorced from the executive order.

The executive order -- which has to be judged, we think, on its text -- is lawful. So at the very least, agencies should be allowed to implement it. And if they do something that -- we don't think they will, but if they do something that is contrary to law, arbitrary and capricious, that can be potentially challenged either administratively or, if our channeling arguments are rejected, in a district court.

Finally, I want to address the pre- -- the compliance point with another aspect of the injunction. First of all, I think counsel mentioned that the opinion I referenced was a

concurrence. I apologize. I didn't realize -- it's not binding on the Court either way, but I apologize for that -- for that error. I didn't realize that.

We -- but a signif- -- and I understand the Court was acting on a short time frame last time, but a significant problem we have in the -- with the previous TRO entered by the Court is specifically the -- its application to preparatory steps.

I mean, if -- if we -- if an agency wants to take steps like drafting documents, having meetings where ARRPs are discussed, all of those sort of common internal agency steps are at least arguably covered by the injunction. And so we think if this Court is inclined to enter an injunction, it should -- it should extend to specific things that affect employees. I mean, we set that forth in our briefing. That way, it would be clear, like what the agency can and can't do.

And in terms of compliance, the -- the types of things they're talking about, like RIFs, consolidations, these are things that -- that agencies announce or plaintiffs will be aware of when they happen. And if the injunction is sufficiently clear, there's no need for the very complex compliance regime they're imagining.

I mean, I understand them to be criticizing the declaration we previously submitted. I don't think it would have been feasible for us to furnish 20-plus declarations under

that timetable telling exactly what the agencies are doing. But rest assured that we have invested considerable resources in complying with the previous TRO. And although we -- we don't think injunctive relief should issue, we will invest -- we will do the same for any order that the Court issues here.

Finally, the Court mentioned staying any -- any retrospective aspect of the preliminary injunction. If the Court does -- is inclined to enter a preliminary injunction of any kind, we would ask -- similar to we did at the last hearing, we would ask that it be stayed pending appeal. And if the Court doesn't -- isn't inclined to grant a stay pending appeal, that it note, like it did in the TRO opinion, that it was denying that relief.

I'm just -- there's been a lot -- been a lot of briefing in this case, so I'm just trying to save the parties and the Court from unnecessary motions practice.

Finally, there have, obviously, been a lot of other issues in the case, channeling jurisdiction, that we've briefed and we continue to adhere to. I assume the Court -- I assume that the Court doesn't want to get into any of that today, but if the Court has any questions --

THE COURT: I don't have questions on that.

MR. BERNIE: Okay. Or anything else. Okay.

All right. Well, we -- we certainly adhere to our previous arguments, but I don't think -- and our voluminous

briefing, but we don't have -- I don't think we have anything else. So, thank you.

THE COURT: Okay. Thank you.

Anything else?

MS. LEONARD: To the extent that opposing counsel for the Government and all of the agency defendants before this Court which he represents is suggesting what agencies could be doing to implement this executive order, I respectfully submit, Your Honor, that the defendants know exactly what they are doing, and they are refusing to put it before the Court.

There are actions with respect to -- the ARRPs Phase 1 and Phase 2 have been prepared. They've been submitted to OMB and OPM. We believe that they have been approved or rejected according to the process that they have set up, including, as my colleague mentioned, meets expectations or doesn't, expectations of OMB and OPM and DOGE and the President to implement the categorical directives they've been given.

And make no mistake, they are categorical, Your Honor. When you say "You should do this," and then the hammer is enforcement by OMB and OPM, that is a categorical directive, Your Honor.

And they've taken the decision-making away from the agencies. And they want to suggest, knowing very well what the agencies are doing, that they could potentially be doing

something other than what the President has told them to do. And that is just not an appropriate representation for counsel for these agency defendants to be making when they refuse to talk about the facts. There are facts. They just refuse to put them before the Court.

I think that's how -- that is all I would like to say in response to that.

Thank you very much, Your Honor.

THE COURT: All right. Thank you. Thank you. All. The matter is submitted.

We're adjourned.

THE COURTROOM DEPUTY: That concludes our calendar.

(Proceedings adjourned at 11:57 a.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Friday, May 23, 2025

Ana Dub

Ana Dub, RDR, RMR, CRR, CCRR, CRG, CCG

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