IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, *et al.*, *Plaintiffs*, *vs.* SOCIAL SECURITY ADMINISTRATION, *et al.*, *Defendants*.	Civil Action No. 1:25-cv-00596

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO LIFT STAY AND AUTHORIZE LIMITED DISCOVERY

As Plaintiffs previously detailed, *see* Motion, ECF 200, Defendants' self-styled "Notice of Corrections to the Record" admits that several sworn statements by SSA leadership, which Defendants submitted to this Court and relied on in opposing the motions for a temporary restraining order and later preliminary injunction, were untrue. Defendants also admit that they violated this Court's TRO on numerous occasions. Now, Defendants ask the Court to believe that these revelations change nothing and that the Court is bound by the contours of a plainly incomplete record and lacks authority to ascertain the details of noncompliance with its own orders. *See, e.g.*, Response, ECF 204, at 10 ("The circumstances that justified the Court's stay order are still present today.").[1] But the principle of record review does not require this kind of ignorance, nor does it bar discovery of information that only Defendants possess regarding Plaintiffs' injuries or the actual details of a challenged policy, especially not where the record is

[1] Where applicable, citations in this filing refer to a document's ECF pagination.

shown to be incomplete and inaccurate, or when bad faith is so plainly established. Defendants, who have neither attempted to claw back the information they unlawfully disclosed nor answered the many questions raised in their Notice—including regarding the extent of their noncompliance with the TRO—cannot credibly claim otherwise.

Plaintiffs seek to take this discovery promptly. Defendants' failures meant that the record before the Court in connection with the preliminary injunction, while fulsome, could and should have contained additional relevant information. Defendants' repeated refrain of the restrictions of record review would freeze this inaccurate record as it stands, even for future proceedings in this matter. ECF 204 at 14-15. But however the Fourth Circuit resolves the pending appeal of the preliminary injunction, this matter will be back before this Court on dispositive motion briefing, briefing that Defendants suggest should also proceed on this admittedly incomplete and inaccurate record. *Id.* at 12. That profoundly unfair outcome would allow Defendants to benefit from their own prior inaccurate statements. There is no reason to delay moving forward with this information gathering—especially given the ongoing risk of spoliation. *See, e.g.*, ECF 197 at 2 ("Despite ongoing efforts by SSA's Chief Information Office"—*i.e.*, the team led by Mr. Russo—SSA has been unable to access the file to determine exactly what it contained.).

I. There is good cause to lift the stay, and the record rule does not bar extra-record discovery in this matter.

There is good cause for this Court to lift the stay for the exclusive purpose of authorizing the limited discovery Plaintiffs seek. Defendants' late-breaking admissions raise serious concerns about the type and extent of the ongoing harm that Plaintiffs' members continue to suffer, raise critical factual questions relevant to Plaintiffs' standing and the merits of their claims, and show that Defendants repeatedly disregarded this Court's TRO. ECF 200 at 7–10. Any one of these

reasons would provide good cause for the Court to lift the stay to the extent necessary to grant the limited discovery Plaintiffs seek.

Defendants do not credibly dispute the good cause identified in Plaintiffs' opening brief, nor do they grapple with the presumption that litigation should proceed. *Cf. Sierra Club v. Nat'l Marine Fisheries Serv.*, 711 F. Supp. 3d 522, 533 (D. Md. 2024) ("defendants bear the burden of justifying staying the litigation"). And Defendants' meager protestations as to the significance of the information are unavailing. Their position that "most of the corrections clarified SSA's compliance with an earlier TRO and the scope of access that certain 'DOGE' employees had prior to that restraining order," ECF 204 at 12, is inaccurate. *See* ECF 197, at 2–3 (admitting that the DOGE Team attached a file likely containing SSA data to an email sent to the DOGE umbrella organization and DOGE personnel at two federal agencies);[2] *id.* at 3 (concerning a March 26, 2025, grant of access to a DOGE Team member and a separate grant of access to a call center profile allowing access to PII that began in April and was not revoked until June 11); *id.* at 4–5 (disclosing that a DOGE Team member executed a data-sharing agreement with an advocacy group seeking to overturn state election results on March 24). Indeed, Defendants themselves cited the untruthful declarations in their opposition to a preliminary injunction, and the Court relied on those declarations in granting that relief. *See* PI Opp'n, ECF 113, at 5, 7, 23, 29, 31 (citing the declarations identified in the Notice); PI Mem. Op., ECF 146, at 1, 17, 25, 29–31, 38, 92, 94, 103, 138 (same).

While Defendants rely heavily on the principle of record review in an APA case, it would be an extreme overreading of that principle to prevent discovery into relevant matters unrelated to the record of agency decision (such as standing and court order compliance), or to prevent

[2] *Contra* TRO Hearing Trans., ECF 45, at 27:19-25 ("[T]he USDS service has not received any data from SSA . . . . no, SSA does not transmit information to USDS.").

information gathering where there has been a "strong showing of bad faith or improper behavior." *Mayor & City Council of Balt. v. Trump*, 429 F. Supp. 3d 128, 138 (D. Md. 2019) (quoting *Dep't of Com. v. N.Y.*, 588 U.S. 752, 781 (2019)); *see also Valley Citizens for a Safe Env't v. Aldridge*, 886 F.2d 458, 460 (1st Cir. 1989) (Breyer, J.) ("The fact that review sometimes or often focuses on the initial administrative record does not mean it must, or always, will do so."). Defendants refuse to substantively address this standard. Instead, their response cherry-picks quotes from a welter of unpublished and out-of-circuit authorities, which Defendants enlist primarily to suggest that Plaintiffs are engaged in a "fishing expedition." That is, of course, incorrect. It is also unsupported by the cases Defendants cite. *See* ECF 204 at 19–20; *Al-Saidi v. Noem*, 23-CV-4979, 2025 WL 959094, at *3 (S.D.N.Y. Mar. 31, 2025) (rejecting "naked assertions" that were based only on "information and belief" as grounds for a finding of bad faith); *Skull Valley Band of Goshute Indians v. Cason*, 07-CV-0526, 2009 WL 10689787, at *22–23 (D. Utah Mar. 2, 2009) (granting a protective order because the discovery requests sought "information on meetings that may or may not have occurred").

A. The record rule is irrelevant to discovery regarding Plaintiffs' injuries.

Defendants' disclosures reinforce this Court's prior findings regarding Plaintiffs' injuries, and the record rule does not bar discovery into newly revealed information about the scope and nature of those injuries. Plaintiffs are injured both by the improper disclosure of their sensitive SSA information to DOGE *and* by any further misuse of that information. The revelations contained in the Notice bear on both. Defendants seek to constrain Plaintiffs only to the details about injuries of which Plaintiffs were aware upon initiating litigation, ECF 204 at 16–17, but it would be absurd to prevent Plaintiffs from establishing the complete factual basis for their injuries because they were not previously aware of information that Defendants actively concealed.

Defendants cannot actually contest that extra-record discovery related to standing can be appropriate. Because the issue of relief is generally not addressed by the administrative record, extra-record evidence is often used to assess plaintiffs' injuries—including the type and extent of those injuries and whether they suffer irreparable harm. *See Eco Tour Adventures, Inc. v. Zinke*, 249 F. Supp. 3d 360, 369 n.7 (D.D.C. 2017).

Instead, Defendants argue that the newly revealed misconduct in the Notice has no bearing on Plaintiffs' injuries. That is also incorrect, as Defendants conceded during oral argument at the Fourth Circuit:

Wilkinson, J.:	Was there any evidence of an illicit distribution or publication of any of these records?
Government:	That's right. There's no evidence that any third party has gained access . . .
Wilkinson, J:	What if there were evidence or what if evidence appears that there's been some kind of illicit distribution or illicit publication of these very private records? If we had evidence of that, this would be a different case?
Government:	I certainly agree with that. I think it would be a different case from the intrusion-upon-seclusion analogue . . .
Wilkinson, J:	So your position hinges on the fact that there has been no illicit distribution or illicit publication. But if evidence develops that either of those things is no longer true and that there has been illicit publication or distribution, then we would have a different case?
Government:	Yes, that is certainly true.

En Banc Oral Argument at 47:02–48:11, available at https://perma.cc/M885-YRQ9.

Defendants now admit that the DOGE Team attached a file "likely" containing SSA data to an email sent to the DOGE umbrella organization and DOGE personnel at two federal agencies. ECF 197 at 2–3. It also executed a data-sharing agreement with a third-party political group seeking to overturn state election results, which is so far beyond the scope of acceptable use that

Defendants were forced to initiate Hatch Act referrals as a result. ECF 197 at 5. Both incidents evidence concrete injury.[3] More details regarding their scope will shed critical light on the harms Plaintiffs suffer and the risk of additional injury. The same is true of the DOGE Team's newly revealed transmission of data using an external server that is "not approved for storing SSA data"[4]; SSA's apparent inability or unwillingness to manage the DOGE Team's access to data; and the extent to which only a portion of the DOGE Team's work was (and is now) geared toward modernizing agency systems and identifying fraud. Indeed, Defendants concede that the statements about the DOGE Team's need for access to SSA records are, even today, only "largely" accurate. *Id.* at 5.

Plaintiffs' motion does not, as Defendants suggest, pertain to "new claims" not brought in this litigation. ECF 204 at 10, 17. Plaintiffs seek discovery into the *injuries* associated with their existing claims. Plaintiffs allege and have consistently argued that their members suffer injury-in-fact because Defendants' disclosure of Plaintiffs' members' sensitive, personally identifying information exposes them to an increased and non-speculative risk of identity theft. *See* Am. Compl., ECF 17, ¶¶ 46, 97; TRO Brief, ECF No. 39, at 2, 7; PI Brief, ECF No. 110-1, at 26–28; PI Reply, ECF 122, at 3 (PI Reply). Defendants wholly ignore that theory of injury in their brief. But the Notice establishes that Plaintiffs' claimed injuries arising from misuse of their data are not speculative, and further discovery is warranted to uncover the scale and specific impact of those injuries. The propriety of this limited discovery is further supported by Defendants' exclusive control over the information Plaintiffs seek, as "[c]ourts place greater weight on the need for

[3] The government's treatment of the data as revealed in the Notice was so cavalier that it led the Idaho Secretary of State to conclude that he "cannot take [the] now-apparent risk" of sharing Idaho's voter registration data with the federal government. Phil McGrane, Letter to Eric Neff, 1 (Feb. 26, 2025), https://perma.cc/L2KQ-HPQM.
[4] *Contra* ECF 113 at 31 (citing ECF 36-1 while asserting that Defendants maintained "reasonable restrictions on access to data").

discovery 'when the relevant facts are exclusively in the control of the opposing party.'" *Bergmann v. Smithsonian Inst.*, 2021 WL 1087084 at *3 (D. Md. Mar. 22, 2021).

B. Defendants' bad faith and improper behavior warrant extra-record discovery.

Plaintiffs have also made the requisite "strong preliminary showing" of bad faith sufficient to justify extra-record discovery.[5] As described above and detailed below, *see infra* pages 8–11, the record was already replete with evidence suggesting that Defendants engaged in bad faith or improper behavior when adopting and explaining the new policy of granting DOGE Team members at SSA unfettered access to the PII in agency systems of record.[6] The Notice provides additional and new information that the putative reasons for disclosing information to the SSA DOGE Team were at least in part pretextual. Mot. at 8–9 (explaining that Defendants' sworn statements that the purpose of access is modernization of systems and detection of fraud, waste and abuse cannot be reconciled with the newly revealed "Voter Data Agreement."). Defendants have no answer to Plaintiffs' argument.

Consistent with the Supreme Court's decision in *Department of Commerce v. New York*, where the evidence told a story that did "not match the explanation the Secretary gave for his

[5] A strong preliminary showing of bad faith is sufficient. *See, e.g.*, *Inforeliance Corp. v. United States*, 118 Fed. Cl. 744, 748 (2014) ("A plaintiff seeking supplementation or discovery need not, however, meet the same burden of proof that it ultimately must carry on the merits, and '[t]he test for supplementation is whether there are sufficient well-grounded allegations of bias to support' supplementation.) (citation omitted); *Kravitz v. United States Dep't of Com.*, 366 F. Supp. 3d 681, 743 (D. Md. 2019) (referencing a previous conclusion that "Plaintiffs had made a strong preliminary showing of bad faith or pretext sufficient to warrant discovery beyond the Administrative Record" and noting that its previous conclusion had subsequently "matured into a factual finding."); *see also Sokaogon Chippewa Cmty. (Mole Lake Band of Lake Superior Chippewa) v. Babbitt*, 961 F. Supp. 1276, 1281 (W.D. Wis. 1997) ("Although a court can require plaintiffs to present significant evidence of wrongdoing before allowing them to conduct extra-record discovery, it cannot require them to come forward with conclusive evidence of political improprieties at a point when they are seeking to discover the extent of those improprieties.").

[6] Defendants' assertion that their disclosures have no bearing on whether disclosures to DOGE constitute final agency action, ECF 204 at 7, is absurd. Insofar as Defendants have routinely characterized their systemic grants of unchecked access to DOGE as a series of individual workaday access decisions, further evidence of the unchecked and unlimited nature of those decisions makes all the clearer that the grants were in fact applications of the new DOGE-specific access policy Plaintiffs have alleged.

decision," 588 U.S. at 784, looking beyond the record is necessary to understand the basis for Defendants' decision. *See also id*. at 781 (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971)) ("[A] strong showing of bad faith or improper behavior" can justify extra-record discovery.); *cf. Alliance for Retired Ams. v. Bessent*, No. 25-0313, 2025 WL 1114350, at *3 (D.D.C. Mar. 20, 2025) (information that contradicts prior sworn statements may establish an inference of bad faith or improper behavior; no such clear contradiction had been established).[7]

C. Discovery is appropriate regarding Defendants' noncompliance with this Court's order.

There is no basis to treat APA cases as exempt from basic principles of courts' inherent authority to investigate noncompliance with their own orders, and Defendants' citations do not actually suggest otherwise. *Compare* ECF 204 at 15 (describing the cases cited in Plaintiffs' motion as "not APA cases [that] do not govern the Court's analysis on the propriety and timing of discovery here."), *with Abrego Garcia v. Noem*, 777 F. Supp. 3d 501, 517 (D. Md. 2025) ("Abrego Garcia is likely to succeed on the merits of the APA claim"). In addition to being inaccurate, Defendants' characterization of *Abrego Garcia* misapprehends the point: "[S]ignificant questions regarding noncompliance with a court order" are sufficient to justify limited discovery into that noncompliance, regardless of whatever merits-related discovery the parties may seek. *Abrego Garcia v. Noem*, 348 F.R.D. 589, 591 (D. Md. 2025) (citation omitted)); *Palmer v. Rice*, 231 F.R.D. 21, 25 (D.D.C. 2005) (allowing discovery where, "without [it], plaintiffs will not be able to determine whether the government has complied with the court's injunctions"). Otherwise, the government would enjoy the ability to ignore judicial orders *carte blanche* in APA cases.

[7] *Compare Alliance for Retired Ams. v. Bessent*, 2025 WL 1114350, at *3 (identifying a plausible explanation reconciling potential inconsistency between a declaration and a later supplement to administrative record), *with AFSCME*, 778 F. Supp. 3d at 771 n.55 (reviewing source material and explaining that an assertion in a declaration from former SSA Acting Commissioner Leland Dudek "appears to be inaccurate").

"The Constitution does not tolerate willful disobedience of judicial orders — especially by officials of a coordinate branch who have sworn an oath to uphold it." *J.G.G. v. Trump*, 778 F. Supp. 3d 24, 31 (D.D.C. 2025), *mandamus granted, order vacated on other grounds*, 147 F.4th 1044 (D.C. Cir. 2025). Defendants exhibited that disregard with respect to timely compliance with the Court's TRO, namely "a desire to outrun the equitable reach of the Judiciary." *See J.G.G.*, 778 F. Supp. 3d at 53.

The Notice leaves unanswered questions about the noncompliance it disclosed, and although Defendants complain that Plaintiffs have not filed a motion for compliance, ECF 204 at 11, answering those questions is prudent initial step. First, Defendants assert the Notice merely "clarified the exact timing of Defendants' compliance with the TRO." ECF 204 at 10. What the Notice actually disclosed is that, contrary to then current SSA Chief Information Officer Michael Russo sworn declaration, SSA failed to terminate the DOGE Team's access to PII in agency records until March 24, when they were forced to certify compliance with the Court's March 21 order—*i.e.*, days after the TRO took effect. *See* ECF 197 at 2 ("DOGE Team members' access to all PII within SSA systems was terminated on or about Noon that same day on March 24, 2025"). But Defendants failed to submit an affidavit from Mr. Russo or any additional evidence at all in connection with their disclosures. And the Notice never states that Mr. Russo and then Acting Commissioner of SSA Leland Dudek, who also authored a declaration corrected by the Notice, thought their untrue statements were true at the time they were made. Instead, it repeatedly states that "*SSA* believed those statements to be accurate at the time they were made." *Id.* at 4 (emphasis added).

The suggestion that the inaccuracies in Mr. Russo and Mr. Dudek's statements to the Court were the result of a genuine misunderstanding of the facts strains credulity and are contradicted by

the very declarations in question. Mr. Dudek averred that his role required "assigning duties and authority to act to officers and employees of the agency, including information and systems access by SSA's DOGE Team." Dudek Decl., ECF 56-1 ¶ 2. Mr. Russo attested that he was "responsible and accountable for the effective implementation of information technology (IT) management responsibilities, such as developing, maintaining, and facilitating the implementation of a sound, secure, and integrated information technology architecture for SSA" and overseeing "grants of permissions to access SSA systems." Russo Decl., ECF 36-1 ¶ 2. Both Mr. Russo and Mr. Dudek swore that their statements were based on their "personal knowledge, discussion with SSA staff, and review of documents and information."[8] *Id.* ¶ 3, ECF 56-1 ¶ 3. And Mr. Russo attested that he was "responsible and accountable for the effective implementation of information technology (IT) management responsibilities, such as developing, maintaining, and facilitating the implementation of a sound, secure, and integrated information technology architecture for SSA." ECF 36-1 ¶ 2. In his words, Mr. Russo was "responsible for oversight of grants of permissions to access SSA systems." *Id.*

Defendants' Response also leaves unanswered questions about timing relevant to Defendants' compliance and their candor to the Court, including the more than a month-long delay between counsel learning of the inaccuracies and informing this Court. The Response states that the Notice was prompted by "information that SSA shared with undersigned counsel in December 2025." ECF 204 at 9. That disregards that SSA itself learned some of the relevant information in November, not December. ECF 197 at 5. And it is in tension with public reports based on a whistleblower that the DOGE Team's improper access to data and violation of the TRO were "being investigated by Agency oversight authorities and the Chief of Security and Resiliency" as

[8] *See also* ECF 113 at 23 ("All ten [members of the SSA DOGE Team] have been subject to supervision by Mr. Dudek directly or other employees at SSA.") (citing ECF 36-1, ECF 36-2, and AR-000001–30).

early as last summer, and that the access from March 21–23 was not inadvertent, but purposeful. *Addendum to the Complaint of Prohibited Personnel Practice and Other Prohibited Activity by the Social Security Administration Submitted by Charles "Chuck" Borges*, at 6, https://perma.cc/DW89-BF5Y.

II. Plaintiffs seek limited discovery into the disclosures contained in the Notice and the review on which the Notice is based.

Defendants' assertion that Plaintiffs propose discovery that is "similarly broad" to the discovery Plaintiffs sought last year, ECF 204 at 6, is absurd.[9] Among other things, Plaintiffs ask Defendants to identify the individual who ran PII searches on SSA's copy of the Numident on March 24, as described in Part I of the Notice; to identify the "DOGE-affiliated employee at the Department of Labor" described in Part II of the Notice; and to identify the DOGE Team member who "was granted access to a call center profile that allowed access to PII after the TRO's issuance." Proposed Discovery Requests, ECF 200-1, at 4–5. Many of their requests are limited to the period from March 20, 2025, through March 24, 2025, which reflects the details of Defendants' disclosures in Part I of the Notice. *Id.* at 4, 6, 8. And most seek information that SSA presumably identified and reviewed when conducting its "review." *See, e.g.*, *id.* at 5 (asking Defendants to identify the third-party political group with which the SSA DOGE Team signed a "Voter Data Agreement"); *id.* at 6 (seeking production of the executed "Voter Data Agreement").

Information about how the SSA DOGE Team used certain data and systems *after* access had been granted, *see* ECF 204 at 20, is relevant both because it evidences noncompliance with a court order and because that information is relevant to assessing whether the SSA DOGE Team's asserted need was pretextual. Specifically, it is relevant to whether the need described in Mr.

[9] Defendants also incorrectly assert that Plaintiffs "abandoned" their motion for discovery. ECF 204 at 9. Regardless, a party's strategic decision regarding a prior discovery motion has no bearing on the appropriateness of a new, different motion based on new revelations.

Russo's own declaration (and a multitude of other statements by Defendants), ECF 36-1 at 1–5, regarding SSA's grants of data access to the SSA DOGE Team was the actual and complete basis for the agency's decision to grant that access. Against those facts, Defendants resort to overstating Plaintiffs' proposed requests. *Compare* ECF 204 at 20 ("Plaintiffs seek 'any and all documents and/or communications referring, containing, or concerning any audits, investigations, or other reviews."), *with* ECF 200-1 at 7 (seeking "[a]ny and all documents and/or communications referring, containing, or concerning any audits, investigations, or other reviews *through which Defendants or their counsel learned of any of the events or information described in the Notice*.") (emphasis added).

Also unsupported is Defendants' cursory assertion that Plaintiffs' APA claims mean their "pursuit of a 30(b)(6) deposition is in itself questionable." ECF 204 at 15. The only two cases Defendants cite in support of that argument—both unpublished and out-of-circuit—come nowhere near establishing that alleged standard. *Immigrant Defenders Law Ctr. v. DHS*, Case No. 21-00395, 2021 WL 6882438 (C.D. Cal. Dec. 8, 2021), merely concludes that the plaintiffs in that case were not entitled to a deposition because their proposed topics were so broad as to render sufficient narrowing unlikely. *See id.* at *6 (seeking testimony from DHS, ICE, and CBP on, among other things, their "policy and practice" of denying unaccompanied minors their rights under the Trafficking Victims Protection Reauthorization Act). In *Trower v. Blinken*, 4:22-CV-77-JAR, 2022 WL 2304041 (E.D. Mo. June 27, 2022), the Court declined to authorize a deposition of State Department officials regarding their oral communications with the Democratic Republic of the Congo because it did not "require discovery into the nature of such diplomatic discussions in order to reach a determination of DRC law"). Defendants do not address the actual proposed deposition topics, which are appropriately tailored to elicit relevant information.

As Defendants acknowledge, they may challenge "Plaintiffs' discovery requests when served, including through discovery objections and/or a motion for protective order under Rule 26(c)." ECF 204 at 20 n.5; *accord Alliance for Retired Ams.*, 2025 WL 1114350 (authorizing extra-record discovery but directing Plaintiffs to amend their requests). But mischaracterizations and broad assertions about the scope of discovery Plaintiffs seek do not justify preventing Plaintiffs from serving their requests in the first place.

CONCLUSION

The Court should lift the stay for the narrow purpose of discovery and order the limited discovery Plaintiffs seek.

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Respectfully Submitted,

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