

No. 25-1959

**In the United States Court of Appeals
for the First Circuit**

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

Plaintiffs-Appellants,

v.

SCOTT KUPOR, Director of the U.S. Office of
Personnel Management, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Massachusetts
Case No. 1:25-cv-10276-GAO
Hon. George A. O'Toole, Jr., Judge

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, each plaintiff-appellant that is a nongovernmental corporation hereby identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states there is no such corporation.

1. American Federation of Government Employees, AFL-CIO has no parent corporation and has no stock or stockholders, so no publicly held corporation owns 10% or more of its stock.

2. American Federation of State, County and Municipal Employees, AFL-CIO has no parent corporation and has no stock or stockholders, so no publicly held corporation owns 10% or more of its stock.

3. National Association of Government Employees, Inc., has no parent corporation and has no stock or stockholders, so no publicly held corporation owns 10% or more of its stock.

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Appellants believe oral argument should be heard in this case due to the important legal issues presented. The channeling question has affected many district courts within this Circuit, particularly in the last year. It has also repeatedly (and increasingly) arisen in courts across the country. Given its impact and nuances, and to best aid the Court in reaching a decision on this and other issues, Appellants respectfully request oral argument.

PRELIMINARY STATEMENT

Plaintiffs-Appellants American Federation of Government Employees, AFL-CIO (“AFGE”), American Federation of State, County, and Municipal Employees, AFL-CIO (“AFSCME”), and the National Association of Government Employees (“NAGE”) (collectively, the “Unions”) appeal from the District Court’s Order dismissing the Unions’ challenge to the Defendant-Appellee United States Office of Personnel Management’s (“OPM”) chaotic creation and rollout of a mass-resignation program that used thinly veiled threats to encourage nearly every federal worker to quit all at once. The Unions plausibly alleged that OPM’s so-called “Fork Directive” was promulgated in violation of the Administrative Procedure Act (“APA”) and is *ultra vires*.

In its eight-sentence order dismissing the case, the District Court declined to reach the merits, holding instead that the Unions’ claims were impliedly channeled to administrative adjudication under the Civil Service Reform Act of 1978 (“CSRA”)—created to adjudicate individual personnel issues between employees and their employing agencies—and the Federal Service Labor-Management Relations Statute (“FSLMRS”)—contained within the CSRA, which provides for the

adjudication of labor relations issues between unions and the employing agencies of union members. That was error. The Unions' APA and *ultra vires* claims do not touch on the individual personnel actions or labor-management relations disputes within the scope of the CSRA or FSLMRS. Channeling those claims is improper under the controlling test in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), because the administrative agencies lack any relevant expertise and offer no meaningful forum for judicial review of the Unions' claims for government-wide relief, which are wholly collateral to the CSRA and FSLMRS's review schemes. In holding otherwise, the District Court impermissibly expanded the reach of the narrow implied jurisdiction stripping doctrine and contravened the substantial weight of authority.

The District Court also erred in holding that the Unions lacked standing. The Amended Complaint asserts two bases for standing: (1) associational standing based on injuries to Union members who suffered reputational harm and diminished prospects at work as a result of the Fork Directive; and (2) organizational standing based on injuries to the Unions, which were put in the impossible position of attempting to adequately advise their members about the opaque and

ever-shifting program, harming their reputation and diverting their resources from their core functions. The District Court failed to accept as true those well-pleaded allegations and drew inferences against the Unions, failing even to acknowledge the Unions' allegations supporting associational standing.

The Unions are entitled to their day in court. The District Court's ruling should be reversed.

STATEMENT OF JURISDICTION

The District Court had jurisdiction under 28 U.S.C. § 1331, because the action arises under federal law under the Administrative Procedure Act, 5 U.S.C. §§ 701, et seq, and for the reasons set forth below. This Court has appellate jurisdiction under 28 U.S.C. § 1291, because the District Court entered final judgment under Federal Rule of Civil Procedure 54, dismissing all claims with prejudice on September 24, 2025. A180-81, A182. The Unions timely appealed on October 7, 2025. A183.

ISSUES PRESENTED FOR REVIEW

Whether the District Court has jurisdiction to hear APA and *ultra vires* challenges to a government-wide deferred resignation program

carried out by a centralized federal agency, acting in its role as administrator of government-wide policies, not as the employer of affected workers?

Whether the Unions adequately alleged associational standing based on the injuries to their members and/or organizational standing based on their own injuries?

STATEMENT OF THE CASE

The Unions plausibly alleged the following facts in their Amended Complaint, which the District Court was required to accept as true in deciding the government’s motion to dismiss.

On January 28, 2025, without any prior notice, OPM, the chief human resources agency for the federal government, sent an unprecedented email directly to nearly every federal employee, entitled “Fork in the Road” (“Fork Directive”). A126-28 ¶¶ 33, 46. The OPM email announced a “deferred resignation” program for all recipients, mimicking a program of the same name created and executed by Elon Musk—who, in January 2025, was running the Department of Government Efficiency and strongly influencing OPM and its actions—while he was simultaneously leading Twitter (now “X”). *Id.* at 140 ¶ 91.

Musk’s Twitter program was widely regarded as chaotic and inefficient. *Id.* ¶ 90. It fared no better in the public sector.

OPM’s program purported to allow federal employees who opted in to stop performing any work for their employing agencies, but to continue receiving pay through September 30, 2025. *Id.* at 128-29 ¶¶ 46-47. All employees had to do was reply to OPM’s email with the word “RESIGN” within nine days. *Id.* at 128-29, 142, 146 ¶¶ 47, 49, 101, 119. In addition to the short-fuse timeline, the email contained not-so-subtly veiled threats of early termination for employees who failed to accept the deferred resignation program. *Id.* at 129-30 ¶¶ 50–52. OPM’s threats were designed to and did make employees feel helpless, scared, anxious, and confused, intimidating them into making life-altering professional and personal decisions under time pressure without clear answers to fundamental questions about the program. *Id.* at 119-30, 150-53 ¶¶ 5-52, 132–37.

And their questions abounded. The program’s guidelines were unclear, and OPM provided conflicting information about employees’ rights and obligations if they accepted the offer. *Id.* at 133-38 ¶¶ 63–81. For example, OPM failed to clearly explain whether and when

employees who accepted the Fork Directive might still be required to work, *id.* at 134-36 ¶¶ 67–72, repeatedly revised its FAQs to reflect inconsistent substantive information throughout the sign-up period, *id.* at 133-35 ¶¶ 64–67, 72, and left federal employees’ questions unanswered, *id.* at 136-37 ¶¶ 73, 75–76, 78. OPM repeatedly shifted its stance on which workers were eligible. *Id.* at 131-132 ¶¶ 57–60. Federal workers were left in the dark about whether the Fork Directive was even lawful. *Id.* at 136-37 ¶ 74, 79.

The Fork Directive was solely an OPM program. It was designed, implemented, and executed exclusively by OPM. *Id.* at 144-45 ¶¶ 112–14. No other agency provided pre-rollout input about factors to consider, ideal staffing levels, timing, eligibility, or the impact on the agency’s services. *Id.* at 144 ¶ 112. The implementing email completely bypassed employing agencies: it did not originate from employing agencies, employees were not instructed to respond to their employing agencies, and it is unclear that employees *could* accept the Directive by responding to their employing agencies, even if they wanted to. *Id.* at 129 ¶ 47. OPM instructed how and when to respond to the email. *Id.* at 129, 145 ¶¶ 47, 49, 113. And only OPM could answer questions about

the program (to the extent that it did at all). *Id.* at 145 ¶ 114. No agency other than OPM could update the Fork Directive’s FAQs. *Id.* No other agency could change the Directive during its execution. *Id.* And no other agency could provide support to its employees about the Fork Directive during the rollout. *Id.*

OPM had no statutory authority to create or impose such a program or to alter the employment relationship between federal employees and their employing agencies. *Id.* at 127-28 ¶¶ 39–43. Specifically, Congress vested federal agencies and their heads with the authority to employ, regulate, and manage the agency’s federal employees (*see* 5 U.S.C. §§ 301–302, 3101), not OPM (*see* 5 U.S.C. §§1101-1105). OPM created and implemented this Directive without complying with statutes governing voluntary employee departures (*see* 5 U.S.C. § 3521 *et seq.*) or statutes and regulations governing reductions in force (*see* 5 U.S.C. §3502; 5 C.F.R. Part 351 *et seq.*). OPM also failed to explain whether and how it had complied with ethics regulations, *id.* at 138-39 ¶¶ 83–87, or why it could create and implement this program without any appropriated funding, *id.* at 146-48 ¶¶ 117–24. Moreover, in enacting the Fork Directive, OPM failed to consider numerous

critical factors, such as who ought to be eligible and what the adverse consequences to the government would be by providing a termination program to millions of federal employees at once. *Id.* at 131-33 ¶¶ 55-61. OPM's rash implementation of the Fork Directive, imposing ever-shifting rules and a random deadline, is the textbook definition of an arbitrary and capricious action. *Id.* at 139-40, 142-43 ¶¶ 89-90, 101-05.

Plaintiffs-Appellants are three public-sector unions that collectively represent more than 800,000 federal civil servants. *Id.* at 122 ¶ 18. Their members work across a broad spectrum of federal agencies and live and work in all 50 states and the District of Columbia. *Id.* at 154-55 ¶¶ 147-50. The chaotic implementation of the Fork Directive has substantially harmed the employees the Unions represent. Among other things, employees represented by the Unions were prevented from making informed or reasoned decisions, while being forced to choose between an apparently lawless and unfunded program and the threat of termination. *Id.* at 129-30, 131-32, 133-41, 142-44, 146-47, 148, 150-53 ¶¶ 48-54, 57-59, 63-93, 102-05, 108-11, 120-22, 125, 132-37. By ignoring the APA, OPM gave the Unions and the employees they represent no ability to consider and comment on the

program before it was announced. *Id.* 129-30 ¶¶ 48–54. And those who chose or felt compelled to join the program were routinely denied the benefits they were promised, suffering pecuniary, reputational, and emotional harm in the process. *Id.* at 131-32, 148-53 ¶¶ 57–59, 125–37.

The Unions were harmed in their own right, as well. One of the Unions’ core functions is to counsel members about the terms of their employment. *Id.* at 159-61 ¶¶ 175, 187. But by constantly shifting the contours of the Fork Directive, OPM frustrated the Unions’ efforts to adequately advise members about their rights. *Id.* at 159-61 ¶¶ 175-187. The Unions spent a substantial amount of time and resources attempting to respond to inquiries—diverting time and resources from other core components of their mission—but OPM’s lack of guidance hindered their efforts. *Id.* at 161 ¶¶ 188. When the Unions necessarily left members’ questions unanswered (because there were no answers), the Unions suffered reputational injury both with their members and with federal employees more broadly. *Id.* at 161-62 ¶ 189.

To stop OPM’s lawless implementation of this hugely consequential program, the Unions filed this case on February 4, 2025—two days before the deadline for members to accept or reject the

Fork Directive—and promptly moved for a temporary restraining order. A009. In response, the District Court stayed the February 6 deadline, pending further proceedings on the motion for a temporary restraining order. A183-84. On February 12, 2025, the District Court issued an Opinion and Order dissolving the temporary restraining order on the grounds that the Unions lacked organizational standing and that Congress had impliedly precluded the District Court from exercising jurisdiction over the claims through the FSLMRS and CSRA, of which the FSLMRS is a part.¹ A114-16.

The Unions amended their complaint, adding new allegations and asserting associational standing as an alternative basis for standing.

A117. Defendants moved to dismiss. A021. In an eight-sentence order,

¹ As discussed below, the Civil Service Reform Act of 1978 provides a mechanism for federal employees to adjudicate individual personnel complaints against their employing agencies before the Merit Systems Protection Board. 5 U.S.C. §§ 2302, 7512. The Federal Service Labor-Management Relations Statute is set forth in Title VII of the CSRA. The FSLMRS establishes a framework to govern collective bargaining for federal government employees. *See* 5 U.S.C. §§ 7101–35. Under the FSLMRS, the Federal Labor Relations Authority “adjudicates negotiability disputes, unfair labor practice complaints, bargaining unit issues, arbitration exceptions, and conflicts over the conduct of representational elections.” *Bureau of Alcohol, Tobacco & Firearms v. Fed. Lab. Rels. Auth.*, 464 U.S. 89, 93 (1983).

the District Court dismissed the Amended Complaint with prejudice, relying entirely on “the reasons previously articulated by the Court in its prior Opinion and Order,” and noting there was “no need for a discussion.” A180-81. The District Court failed to address the new allegations and new bases for standing set forth in the Amended Complaint. *Id.*

SUMMARY OF ARGUMENT

The District Court erred in holding that it lacked jurisdiction to hear the Unions’ claims in two ways.

First, the Court erred in holding that, under *Thunder Basin*, the CSRA impliedly precludes District Court jurisdiction. There is no reason to conclude that Congress intended to silently divest district courts of jurisdiction to hear a challenge to a government-wide OPM program by creating administrative agencies that *cannot* hear claims against agencies not acting as employers. Nor did Congress intend to preclude federal jurisdiction over APA and *ultra vires* claims that have nothing to do with the individual personnel actions or labor disputes covered by the CSRA and FSLMRS. No Supreme Court case or case from this Circuit has ever expanded *Thunder Basin’s* implied preclusion

doctrine as capaciously as the District Court did here. This Court should not endorse that radical approach.

Second, the Unions have both associational and organizational standing. The Amended Complaint plausibly alleges that the Fork Directive's lawless and chaotic rollout caused the Unions and the employees they represent to suffer pecuniary, reputational and other harm. In holding otherwise, the Court impermissibly ignored the Unions' well-pleaded allegations and improperly drew inferences against the Unions.

STANDARD OF REVIEW

This Court reviews the District Court's dismissal for lack of jurisdiction *de novo*. *Reddy v. Foster*, 845 F.3d 493, 501 (1st Cir. 2017).

ARGUMENT

I. The District Court erred by concluding that the CSRA and FSLMRS impliedly stripped the court of jurisdiction to hear the Unions' claims against OPM.

Misapplying the Supreme Court's holding in *Thunder Basin*, the District Court erroneously concluded that it lacked jurisdiction to hear the Union's claims and that those claims must be channeled to administrative review under the CSRA and FSLMRS. In so ruling, the

District Court radically expanded the doctrine of implied jurisdiction stripping far beyond the narrow context in which it is appropriate. The District Court also ignored the rapidly developing case law the Unions cited that denied government requests to channel claims similar to those asserted here. Properly applied, the controlling test in *Thunder Basin* directs the District Court to retain jurisdiction over the Unions' APA and *ultra vires* claims challenging the government-wide Fork Directive.

This Circuit begins with a legal presumption the District Court ignored: there is a “strong presumption that Congress intends judicial review of administrative action.” *R.I. Dep’t of Env’t Mgmt. v. United States*, 304 F.3d 31, 41 (1st Cir. 2002). That presumption is especially important here, where the issue is whether a doctrine of *implied* jurisdiction stripping prevents the Unions from bringing their claims in federal court. *See Buck v. Am. Airlines, Inc.*, 476 F.3d 29, 37 (1st Cir. 2007) (stating the Supreme Court has “devoted [many] decades to cabin[ing]” such doctrines). Only under unusual circumstances do courts find that Congress intended to “[d]ivest[] jurisdiction by mere implication.” *Axon Enter., Inc. v. Fed. Trade Comm’n*, 598 U.S. 175, 208

(2023) (Gorsuch, J., concurring); *Bowen v. Michigan Acad. of Fam. Physicians*, 476 U.S. 667, 670 (1986) (“[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.”). Instead, when Congress wants to channel claims to agency review, “it does not ask [courts] to juggle a variety of factors and then guess at the implicit intentions of legislators past. It simply tells us.” *Axon*, 598 U.S. at 208 (Gorsuch, J., concurring).

Notwithstanding that presumption, courts have recognized that under certain limited circumstances, jurisdiction may be impliedly precluded by statute. The Supreme Court’s decision in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994) provides the standard for implied preclusion, but the Supreme Court has repeatedly advised courts to apply that doctrine cautiously, as statutory schemes for agency review do “not necessarily extend to every claim concerning agency action.” *Axon*, 598 U.S. at 185; *id.* at 205 (“There are many problems with the *Thunder Basin* project.”) (Gorsuch, J., concurring); *see also Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 490–91 (2010) (refusing to channel plaintiffs’ constitutional claims to agency review).

The central questions under *Thunder Basin* are whether the “‘statutory scheme’ displays a ‘fairly discernible’ intent to limit jurisdiction, and the claims at issue ‘are of the type Congress intended to be reviewed within th[e] statutory structure.’” *Free Enter. Fund.*, 561 U.S. at 489. On the first question, here, there is nothing in the CSRA or FSLMRS that evinces Congress’s intent to channel APA and *ultra vires* claims to a government-wide program brought against an agency not acting as an employer. Given that silence and for all the reasons below, the answer to the first question is “no.”

To assist in answering the second question whether the Unions’ claims are the type Congress intended to channel to administrative review, courts weigh three factors, none of which is dispositive, asking whether (i) precluding district court jurisdiction would “foreclose all meaningful judicial review;” (ii) the claim is “wholly collateral to [the] statute’s review provisions;” and (iii) the claim is “outside the agency’s expertise.” *Axon Enter.*, 598 U.S. at 186. As the Supreme Court explained most recently in *Axon Enterprises*: “The first *Thunder Basin* factor recognizes that Congress rarely allows claims about agency action to escape effective judicial review.” *Id.* (citing *Bowen*, 476 U.S. at

670). And “[t]he second and third reflect in related ways the point of special review provisions—to give the agency a heightened role in the matters it customarily handles, and can apply distinctive knowledge to.” *Id.*

In the last year, numerous courts across the country have applied *Thunder Basin* to actions of the current Administration, finding that district courts have jurisdiction to hear cases relating to similar APA and *ultra vires* claims, government-wide actors (including OPM), and government-wide directives to those at issue here.² For example, in *AFGE v. Trump*, the Ninth Circuit affirmed the lower court’s decision granting the plaintiff unions’—two of the appellants here—motion for preliminary injunction. 139 F.4th 1020, 1033 (9th Cir. 2025). The court correctly held that, under *Thunder Basin*, the unions’ APA and *ultra vires* claims challenging a government-wide Executive Order

² The Unions cited many of these examples in their Opposition to Defendants’ Motion to Dismiss, ECF 102 at 7, 9-16, all of which the District Court ignored. *See, e.g., AFGE v. U.S. Off. of Pers. Mgmt.* (“*OPM I*”), 771 F. Supp. 3d 1127 (N.D. Cal. 2025); *AFGE v. Trump*, 784 F. Supp. 3d 1316 (N.D. Cal. 2025), *aff’d*, 139 F.4th 1020 (9th Cir. 2025); *Widakuswara v. Lake*, 779 F. Supp. 3d 10 (D.D.C. 2025); *New York v. McMahon*, 784 F. Supp. 3d. 311(D. Mass. 2025) (favorably citing *OPM I* and *Widakuswara*).

implemented by the Office of Management and Budget (“OMB”) and OPM that forced federal agencies to “initiate large-scale reductions in force” should not be channeled under the CSRA. *Id.* The court explained that “the CSRA does not allow for review of Plaintiffs’ constitutional and statutory claims at all,” and therefore, the court concluded, it was “unlikely that Congress intended for the CSRA to preclude review for parties not even covered by that statute who allege claims outside the [CSRA administrative fora’s] jurisdiction.” *Id.* That case is directly on point.

The Supreme Court later stayed the preliminary injunction at issue in *AFGE v. Trump* on the grounds that the Executive Order, OMB and OPM actions at issue were “likely” lawful. *Trump v. AFGE*, 145 S. Ct. 2635 (2025) (mem). That order’s clear implication, as this Court held in *New York v. Kennedy*, is that “the Supreme Court likely decided that the CSRA did *not* funnel the dispute at issue . . . to the MSPB.” 155 F. 4th 67, 75 (1st Cir. 2025). *Trump v. AFGE* and *New York v. Kennedy* control the outcome here. Those cases are consistent with numerous

other cases that have reached similar conclusions in the last year.³ No Supreme Court authority has held otherwise. *See New York v. Kennedy*, 155 F. 4th at 74 (“[N]or has any other Supreme Court interim order or decision accepted the government’s CSRA argument in a like case.”).

Consistent with that recent authority, here all *Thunder Basin* factors weigh in favor of finding district court jurisdiction. First, channeling APA and *ultra vires* claims challenging the Fork Directive would preclude meaningful judicial review because the relevant administrative agencies, the Merit Systems Protection Board (“MSPB”)—under the CSRA—and the Federal Labor Relations Authority (“FLRA”)—under the FSLMRS—cannot adjudicate these

³ *See, e.g., Wash. State Ass’n of Head Start & Early Childhood Assistance & Educ. Program v. Kennedy*, No. C25-781-RSM, 2026 WL 35858, at *6 (W.D. Wash. Jan. 6, 2026) (finding that neither the CSRA nor FSLMRS channels challenges to mass layoffs and agency restructuring); *AFSCME v. U.S. Off. of Mgmt. & Budget*, No. 25-CV-08302-SI, 2025 WL 3018250 (N.D. Cal. Oct. 28, 2025); *AFGE v. U.S. Off. of Pers. Mgmt.*, 799 F. Supp. 3d 967, 977 (N.D. Cal. 2025); *Does 4, 7, 22, 27, 28, & 29 v. Musk*, No. 25-0462-TDC, 2025 WL 2346258 (D. Md. Aug. 13, 2025); *Elev8 Baltimore, Inc. v. Corp. for Nat’l & Cmty. Serv.*, 804 F. Supp. 3d 524 (D. Md. 2025); *see also NLRB v. N. Mountain Foothills Apartments*, 157 F. 4th 1089 (9th Cir. 2025) (no channeling of constitutional challenge to NLRB); *AFGE v. U.S. Dep’t of Educ.*, No. 25-cv-3553 (CRC), 2025 WL 3123707 (D.D.C. Nov. 7, 2025) (no channeling of constitutional challenge to out of office messages).

claims. Second, the Unions' APA and *ultra vires* claims are “wholly collateral” to those Congress intended to be heard under the CSRA and FSLMRS. And third, the MSPB and FLRA lack any expertise that would assist them in evaluating the Fork Directive's lawfulness. The Unions' claims thus are not “of the type” Congress intended to channel to the CSRA's and FSLMRS's review schemes. *See Axon. Enter.*, 598 U.S. at 186. They belong in the district court.

A. Channeling the Unions' claims would foreclose all meaningful judicial review.

The first *Thunder Basin* factor weighs heavily in favor of finding district court jurisdiction because channeling the Unions' claims to the MSPB and FLRA, which can hear only personnel decisions and labor relations issues against employing agencies, would “foreclose all meaningful judicial review.” *Id.*

First, as to the CSRA: the CSRA's administrative review process is limited to only personnel decisions made by employing agencies. *See* 5 U.S.C. §§ 7513, 7701. The statute contemplates and creates a process for federal workers to challenge “personnel practice[s]” and “adverse action[s],” including decisions about an *individual worker's* promotion, suspension, hiring, and the like. 5 U.S.C. §§ 2302, 7512; *see Elgin v.*

Dep't of Treasury, 567 U.S. 1, 11-13 (2012) (holding that the CSRA applies to covered employees' challenges of "adverse personnel actions"). The CSRA contemplates that any action challenged by a worker was taken by the worker's employing agency. *See, e.g.*, 5 U.S.C. § 7513 ("[A]n agency may take an action [like suspension or firing] against an employee only for [] cause") (emphasis added); 5 U.S.C. § 7701. The MSPB can review any such action "which is appealable to the Board," *id.* § 7701, meaning personnel actions, 5 U.S.C. §§ 1214(a), (b), 7513, taken by employing agencies. Thus, the CSRA is limited to providing a forum for "covered federal employees *when they are challenging CSRA-covered personnel actions.*" *Feds for Med. Freedom v. Biden*, 63 F.4th 366, 372 (5th Cir. 2023), *cert. granted, judgment vacated on other grounds*, 144 S. Ct. 480 (2023) (emphasis in original).

This lawsuit involves no CSRA-covered personnel action that any employing agency took. The Unions plausibly alleged that the Fork Directive is an *OPM* program because OPM designed, implemented, and executed it, with no input from any agency employer. *See id.* at A144-46 ¶¶ 112–16. The Unions challenge the Fork Directive's *creation* and *execution*, including OPM's astounding failure to even attempt to

comply with the APA, 5 U.S.C. §§ 553–59. *See id.* at 168-75 ¶¶ 213–57. Nothing in the CSRA contemplates challenges to such government-wide OPM programs. *See* 5 U.S.C. §§ 2302, 7512. Because the Unions mount no challenge to any employing agency’s personnel decision or adverse employment action, the Union’s claims lie beyond the CSRA’s scope. *See Feds for Med. Freedom*, 63 F. 4th at 372; *see also AFGE*, 139 F.4th at 1031. And because the MSPB lacks the statutory authority to review appeals of such challenges, if their claims were channeled, the Unions would never be able to receive from the MSPB a final appealable order, thus precluding all judicial relief. *See Free Enter. Fund*, 561 U.S. at 490–91; *Am. Fed’n of Gov’t Emps., AFL-CIO v. United States Off. of Pers. Mgmt. (“OPM I”)*, 771 F. Supp. 3d 1127, 1133 (N.D. Cal. 2025) (stating where the plaintiff challenges a “government-wide” policy, rather than “any [one] personnel action,’ [the] claims . . . remain[] in district court).⁴

⁴ In the District Court, the government relied on a host of inapposite cases that properly channeled claims by federal workers suing their employing agencies over personnel actions. Add.001. Those claims differ fundamentally from the Unions’ claims here. *See OPM I*, 771 F. Supp. 3d at 1133 (distinguishing cases that “have attacked, substantively or procedurally, one agency’s decision about one employee or its own

Second, like the CSRA, the FSLMRS encompasses only claims against *employing agencies*. The FSLMRS provides that Collective Bargaining Agreements (“CBAs”) between workers and their employers, and Unfair Labor Practices (“ULPs”), brought against employers, are the exclusive source of grievance procedures. *See* 5 U.S.C. § 7121. Here, the Unions’ claims are APA and *ultra vires* claims, not CBA grievances, nor ULPs. The FSLMRS does not create a mechanism for the Unions to challenge such government-wide policies of an agency not acting as an employer. Nor is there a way for the FLRA to issue the declaratory and injunctive relief sought to remedy the unlawful implementation of *OPM’s* government-wide program.

Moreover, the Unions’ claims here fall far outside the FSLMRS’s statutory scope, which is limited to creating procedures and rules for labor-management relations. This includes rules about union elections and recognition, 5 U.S.C. § 7111, representation, *id.* § 7114, ULPs by an employing agency or a labor organization, *id.* § 7116, and collective bargaining, *id.* § 7117. Certain decisions made under the FSLMRS can

workforce, which are the kinds of claims appellate courts have channeled into the CSRA” from government-wide programs).

be appealed to the FLRA. 5 U.S.C. § 7105. But the FLRA is empowered only to issue decisions covered by the statute. *Id.* § 7105 (discussing union elections, criteria for union rights, and labor bargaining issues). Specifically, the FLRA can review only those “‘issues relating to the duty to bargain in good faith’ and unfair labor practices.” *Id.* §§ 7105(a)(2), 7117, 7118.

This detailed statutory scheme evinces Congress’s intent to limit the FSLMRS to *labor-management relations*. But the Unions bring no labor-management relations claims. Nor could they; the Fork Directive has nothing to do with regulating or challenging labor rules, union elections, collective bargaining, or grievance procedures.⁵ They are thus beyond the statute’s scope. *See OPM I*, 771 F. Supp. 3d at 1134.

Because the Unions could not bring these claims against OPM in front of the FLRA, finding that the FSLMRS precludes district court review would “foreclose all meaningful judicial review” of the Unions’ claims. *Axon Enter.*, 598 U.S. at 186.

⁵ Additionally, OPM is not the employer of non-OPM workers for purposes of labor-management relations, *see* 5 U.S.C. § 7103(a)(11).

B. The Unions' claims for relief are wholly collateral to the remedial schemes under the CSRA and FSLMRS.

The second *Thunder Basin* factor likewise counsels against channeling, because the relief the Unions seek is wholly collateral to the CSRA's and FSLMRS's review provisions. *See Axon Enter.*, 598 U.S. at 186. The Unions seek to vacate and remand the Fork Directive to allow OPM to perform notice-and-comment rulemaking, as well as declaratory relief that the Directive and any employment-related retaliation against workers for accepting or rejecting the Fork are unlawful. A175 at (A)-(E). Those challenges to the lawfulness of the regulation itself and the procedures under which it was adopted do not seek to address any "specific adverse action" taken by an employer against any individual worker, as contemplated by the CSRA. *AFGE v. Trump*, 139 F.4th at 1030. Nor do they address "issues relating to the duty to bargain in good faith' and unfair labor practices," as contemplated by the FLRA. *Id.* at 1031. And they do not seek to change any individual employee's employment status, whether part of the Fork Directive or not. *See McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 495 (1991) (declining to channel claims because plaintiff challenged process to

apply for benefits under statute, rather than the outcome of the process).

Neither the MSPB nor the FLRA is designed or equipped to hear the claims for government-wide relief that the Unions seek. *See Arch Coal, Inc. v. Hugler*, 242 F. Supp. 3d 13, 19 (D.D.C. 2017), *aff'd sub nom. Arch Coal, Inc. v. Acosta*, 888 F.3d 493 (D.C. Cir. 2018) (notice-and-comment rules applying government-wide with the “force of law” are not suited for individual adjudication); *Nat’l Mining Ass’n v. Dep’t of Labor*, 292 F.3d 849, 856 (D.C. Cir. 2002) (“[G]eneric challenges to agency action” are properly asserted in District court). Thus, as the Ninth Circuit held in *AFGE v. Trump*, neither statute confers on the agencies “the authority to address the type of . . . claims raised by [the Unions].” *AFGE v. Trump*, 139 F.4th at 1031 (holding that the FLRA lacks the authority to address APA and *ultra vires* claims).

Courts are clear that non-individualized claims seeking government-wide relief and vacatur of an unlawful regulation fall outside of administrative channeling. *See e.g. McNary*, 498 U.S. at 495. For example, courts have found district court jurisdiction where a plaintiff sought to “prohibit further use of the [challenged] regulation,”

Nat'l Treasury Emps. Union v. Whipple, 636 F. Supp. 2d 63, 69 (D.D.C. 2009); where plaintiffs sought to enjoin enforcement of a final rule, *Nat'l Mining Ass'n v. Chao*, 160 F. Supp. 2d 47, 51 (D.D.C. 2001), *aff'd in part, rev'd in part sub nom. Nat'l Min. Ass'n*, 292 F.3d 849; and where plaintiffs sought to “invalidate” a regulation, *OCONUS DOD Emp. Rotation Action Grp. v. Cohen*, 144 F. Supp. 2d 1, 7 (D.D.C. 2000).⁶ Similarly, courts have held that challenges to the existence of a rule including based on the constitutionality of the agency itself, *Axon*, 598 U.S. at 180; *Free Enter. Fund*, 561 U.S. at 490–91, and “generic challenges to agency action,” *Nat'l Mining Ass'n*, 292 F.3d at 856, are properly asserted in district court.

The issues with channeling such non-individualized claims are even more salient where, as here, the claims arise under the APA. Courts have repeatedly found that notice-and-comment claims similar

⁶ See also *Nat'l Treasury Emps. Union v. Devine*, 577 F. Supp. 738, 751 (D.D.C. 1983), *aff'd*, 733 F.2d 114 (D.C. Cir. 1984) (district court had jurisdiction where plaintiff sought declaration to void regulations, and injunction preventing their use); *Serv. Emps. Int'l Union Loc. 200 United v. Trump*, 420 F. Supp. 3d 65, 74 (W.D.N.Y. 2019) (finding jurisdiction “plausible” where plaintiffs sought general declaratory and injunctive relief, styled as a “purely procedural APA challenge—that is, a challenge to the process used to adopt a regulation, rather than the content thereof”).

to those at issue here “fall outside the scope of the administrative process,” because APA claims are not suited for individual adjudication. *AFGE*, 139 F.4th at 1030 (holding that “APA claims plainly fall outside the scope of the CSRA’s review provisions.”); *see also New York v. Kennedy*, 155 F.4th at 75 (stating that the Supreme Court implicitly affirmed the channeling decision in *AFGE v. Trump*).

For good reason. The Administrative Procedure Act embodies a “basic presumption of judicial review.” *Dep’t of Com. v. New York*, 588 U.S. 752, 771 (2019). “To honor the presumption of review,” the Supreme Court must read any exception to judicial review under the APA, “quite narrowly.” *Dep’t of Homeland Sec. v. Regents of the Univ. of California*, 591 U.S. 1, 17 (2020). District courts have long reviewed APA challenges to OPM actions affecting federal employment without channeling the claims. *See Nat’l Treasury Emps. Union v. Helfer*, 53 F.3d 1289, 1295 (D.C. Cir. 1995) (reviewing OPM regulation regarding agency hiring practices); *Feds for Med. Freedom*, 63 F.4th at 378 (“A long line of cases establishes that federal employees can bring facial, pre-enforcement actions against federal policies outside of the CSRA.”). While the Supreme Court has twice held that an agency adjudication

statute impliedly precluded district court jurisdiction over certain claims, it has never concluded that such a scheme impliedly precludes any *APA* claims. *Axon Enter.*, 598 U.S. at 186; *see also Free Enter. Fund*, 561 U.S. at 491; *Elgin*, 567 U.S. at 11-13; *Thunder Basin*, 510 U.S. at 216. There is thus no reason to find a novel exception to the *APA*'s "command" of judicial review for the claims at issue here. *Dep't of Com. v. New York*, 588 U.S. at 772.

The relief the Unions seek is thus outside the scope of the *CSRA* and *FSLMRS*, and is "wholly collateral" to the remedial schemes created by those statutes.

C. The Unions' *APA* and *ultra vires* claims are outside the MSPB's and FLRA's expertise.

Finally, under the third *Thunder Basin* factor, the Unions' claims are not "intertwined with factual and policy questions that would benefit from the MSPB's or the FLRA's expertise." *OPM I*, 771 F. Supp. 3d at 1132.

The MSPB's expertise in evaluating whether agency personnel actions comport with the requirements of the *CSRA* is unrelated to whether *OPM* has statutory authority to create and implement a government-wide policy or whether it must undertake notice and

comment before embarking on such an unprecedented exercise. *See id.* Similarly, the FLRA’s expertise in resolving unfair labor practice claims and addressing collective bargaining contract disputes has no relation to whether OPM violated the APA or exceeded its authority. *See id.* Deciding the Unions’ APA and *ultra vires* claims in no sense requires the district court to address any personnel actions, *see Elgin*, 567 U.S. at 22–23, or any “employer-agency policy choices that the MSPB or the FLRA commonly parse,” *OPM I*, 771 F. Supp. 3d, at 1132. These questions are best addressed by the federal courts. *See Axon Enter.*, 598 U.S. at 195.

In reaching the opposite conclusion, the District Court relied primarily on an out-of-circuit case that had channeled unions’ claims to the FSLMRS. *See AFGE v. Trump*, 929 F.3d 748 (D.C. Cir. 2019). There, however, the challenges concerned executive orders regarding collective bargaining and grievance procedures, which the court found properly within the FSLMRS’s scope. *Id.* at 753–56. The Unions assert no such claims here.

II. The Unions have standing to bring their claims.

The District Court also erred in its standing analysis. The Unions have both associational and organizational standing.⁷ To establish standing, a plaintiff must show

(1) an injury in fact which is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical,’ (2) that the injury is ‘fairly traceable to the challenged action,’ and (3) that it is ‘likely . . . that the injury will be redressed by a favorable decision.’

Massachusetts v. United States Dep’t of Health & Hum. Servs., 923 F.3d 209, 221–22 (1st Cir. 2019) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). Where, as here, a plaintiff’s standing is challenged on the pleadings, “this Court takes all well-pleaded facts in the complaint as true and indulges all reasonable inferences in [the plaintiff’s] favor to determine whether it plausibly pleaded facts necessary to demonstrate standing to bring the action.” *Dantzler, Inc. v. Empresas Berrios Inventory & Operations, Inc.*, 958 F.3d 38, 46–47 (1st Cir. 2020) (internal alterations and quotation omitted).

⁷ The Unions need establish only one kind of standing to bring their claims.

A. The Unions have associational standing.

An organization has associational standing to bring claims on behalf of its members where (1) “its members would otherwise have standing in their own right;” (2) “the interests it seeks to protect are germane to the organization’s purpose;” and (3) neither the claims nor requested relief requires participation of individual members. *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 110 F.4th 295, 308 (1st Cir. 2024); see also *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977). The Unions meet each requirement.

1. The Unions’ members would have standing in their own right.

The Unions’ members have suffered myriad concrete injuries that are traceable to OPM’s conduct and redressable by the district court. See *Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 27 (1st Cir. 2007). The Amended Complaint pleads three categories of injuries that the Unions’ members suffered.

First, members were harmed by their inability to provide input, via notice and comment, on the Fork Directive’s design and implementation. A129-30 ¶¶ 48–54. The result was an unreasoned and self-contradictory program that forced members to choose between an

apparently lawless and unfunded program and the threat of termination. *Id.* at 133-41, 142-43, 146-48 ¶¶ 63–93, 101–05, 120–22. OPM’s failure to engage in notice and comment rulemaking created the exact confusion and lack of clarity that the APA’s notice and comment procedure is designed to avoid. This Court has held that procedural relief of the kind the Unions seek gives rise to standing if it could “prompt the injury-causing party to reconsider the decision.” *Nulankeyutmonen*, 503 F.3d at 28; *see also Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 94–95 (D.C. Cir. 2002) (holding that a procedural injury gives rise to standing when the “procedural step was connected to the substantive result”). If Defendants had followed the APA’s notice-and-comment requirements, the Unions and their members would have provided input regarding the Fork Directive’s scope, implementation, duration, consequences, effects on operations, ethical considerations, and legality. A138, 141, 143, 148 ¶¶ 82, 93, 105, 124. There is at least a reasonable likelihood that the program resulting from such considered rulemaking would create less contradiction and confusion for the Unions’ members. That is sufficient for standing. *See Sugar Cane Growers*, 289 F.3d at 95 (“If a party claiming the

deprivation of a right to notice-and-comment rulemaking under the APA had to show that its comment would have altered the agency's rule, section 553 would be a dead letter.”).

Second, the Fork Directive forced members to accept or decline the program based on poor and conflicting information. *Id.* at 129-30, 131-32, 133-41, 142-44, 146-49 ¶¶ 48–54, 57–59, 63–93, 102–05, 108–11, 120–22, 126–37. “Government regulations that require or forbid some action by the plaintiff almost invariably satisfy both the injury in fact and causation requirements.” *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 382 (2024). Under the Fork Directive members had to make a choice: either accept the Directive on a short fuse, based on incomplete information, or decline the Directive and face the possibility of termination. A129-30, 142-46 ¶¶ 47, 49, 50–52, 101, 119. In many cases, members declined simply because they had a number of legitimate and unanswered questions about the program’s legality and OPM was unable to provide clear, timely answers. *Id.* at 151-53 ¶¶ 134–36. The obligation to make that uninformed choice gives rise to members’ standing.

Third, members were denied promised benefits under the program, causing them pecuniary, reputational and emotional harm. *Id.* at 150-51 ¶¶ 132, 133. Several members attempted to accept the Fork Directive under the terms on which it was offered; however, after providing their acceptance they were told that they were ineligible for the program. *Id.* Those members suffered anxiety and other emotional harm, reputational harm, and reasonably feared retaliation, including diminished prospects for future promotions and performance awards and pecuniary harm. *Id.* Such economic and reputational harms are among the “traditional harms” that unquestionably give rise to standing. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 425 (2021).

Each of these harms is directly traceable to OPM’s chaotic promulgation and rollout of the Fork Directive. Each would be redressable by the relief sought: injunctive and declaratory relief vacating the current program, requiring OPM to engage in reasoned rulemaking, and declaring unlawful employment-related retaliation arising out of acceptance or non-acceptance of the Fork Directive. A175 at 59 ¶¶ (A)-(C).

2. The interests at stake are germane to the Unions’ purpose.

The interests the Unions seek to protect are germane to the Unions’ purpose—an argument the lower court failed to address, and the government has never challenged. This litigation advances members’ employment rights, protects them from unlawful termination, advances lawful workplaces and stable pay, and encourages government effectiveness—each of which the Unions alleged are germane to their purposes. *Id.* at 124-26, 153 ¶¶ 25, 27–28, 31, 139. And the Unions regularly submit comments via the APA rulemaking process on behalf of their members to protect these kinds of interests. *See id.* at 153, 161 ¶¶ 139, 186. The OPM’s decision to roll out the Fork Directive—a program that affected nearly the entire federal workforce—with no notice, opportunity to comment, or any of the procedural safeguards the APA affords, attacked interests that are unquestionably germane to the Unions’ purposes.

3. Individual members’ participation is unnecessary.

The third factor, whether the litigation requires individual members’ participation, is a “prudential” inquiry, not a constitutional

one, *United Food & Com. Workers Union Loc. 751 v. Brown Grp., Inc.*, 517 U.S. 544, 555 (1996), and courts have “latitude” to determine whether and how to apply this prong on and assess on a “case-by-case” basis, *Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294, 314 (1st Cir. 2005). Here, no individual participation is required to prove that the government failed to engage in notice and comment, that the Fork Directive is arbitrary and capricious and contrary to law, or that OPM’s actions were *ultra vires*. And where, as here, the parties seek only non-individualized relief, varying circumstances between members are immaterial. *See id.*

The single sentence on standing that appears in the District Court’s order fails to engage with any of the Unions’ allegations regarding associational standing. A180-81. And though the District Court purported to rely on the reasoning in its “prior Opinion and Order” for portions of its order of dismissal, *id.*, its Order on the Unions’ motion for a temporary restraining order analyzes only organizational standing and is silent as to whether the Unions have associational standing. Add.001 at .003. By failing to engage with the Unions’ claimed injuries, the Court failed to accept all “well-pleaded facts in the

complaint as true and indulge[] all reasonable inferences in [the Unions'] favor.” *Dantzler*, 958 F.3d at 46-47. It should be reversed.

B. The Unions have organizational standing.

The Unions also have organizational standing based on their own injuries. *See Warth v. Seldin*, 422 U.S. 490, 511 (1975).

First, the Unions plausibly alleged that the government’s violations of the APA impaired their abilities to provide services to their members. A159-61 ¶¶ 175–88. One of the Unions’ core business activities is to advise their members of their rights and benefits in the workplace. *Id.* at 159, 161 ¶¶ 175-76, 187. Indeed, the Unions have a *legal duty* to represent their members and their interests. *See* 5 U.S.C. § 7114. The Fork Directive prevents the Unions from adequately advising and representing their clients because it created mass confusion about employment issues vital to the Unions’ membership. A160-61 ¶¶ 180-87. While the Unions attempted to respond to the onslaught of inquiries from members generated by the Fork Directive, they have limited resources and were operating with limited information, so could not fully satisfy members’ need for guidance. *Id.* at 160 ¶¶ 184-85. The substantial volume of inquiries and counseling

requests also required the Unions to divert resources from other parts of their core mission, including organizing and representing employees, negotiating with employers, and advocating for improved employment conditions. *Id.* at 161 ¶ 188.

Where, as here, actions by the defendant “directly affect[] and interfere[] with [an organization’s] core business activities” they give rise to a cognizable injury for Article III purposes. *Hippocratic Med.*, 602 U.S. at 395 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)); *see also Widakuswara v. Lake*, 779 F. Supp. 3d 10, 28 (D.D.C. 2025) (holding that AFSCME and AFGE expenditure of “significant resources to . . . perform their core services such as advising members about the terms of their employment and the implication of Defendants’ actions” is sufficient for organizational standing) (alteration and quotation omitted; *AFGE v. U.S. OPM*, 781 F. Supp. 3d 920, 936-37 (N.D. Cal., 2025) (same); A117 at 161 ¶ 188. Thus, the confusion OPM created that interfered with the Unions’ core activities gives rise to the Unions’ organizational standing.

The District Court’s order to the contrary misinterpreted the Supreme Court’s decision in *Hippocratic Medicine*. It failed to address

the weight of authority that has interpreted that case to “reaffirm” longstanding caselaw that standing arises when a governmental action forces an organization to divert resources from its core business activities. *Nairne v. Landry*, 151 F.4th 666, 682 (5th Cir. 2025) (holding that an organization’s need to divert resources away from its core mission to respond to government action gives rise to an Article III injury); *see also Republican Nat’l Comm. v. N. Carolina State Bd. of Elections*, 120 F.4th 390, 397 (4th Cir. 2024) (same); *Immigrant Defs. L. Ctr. v. Noem*, 145 F.4th 972, 988 (9th Cir. 2025) (same). The Court failed to address the Unions’ allegations regarding OPM’s interference with its core business activities, recasting the Unions’ claims as an attempt to “spend their way into standing.” Add.003. In doing so, the Court ignored the well-pleaded allegations in the Amended Complaint and impermissibly drew inferences against the Unions.

Second, the Unions alleged that the Fork Directive has injured their membership, finances, and bargaining power. A162 ¶ 191. Specifically, members who accepted the Fork with an incomplete understanding of the program will now be separated from federal employment, will no longer be members of the Unions, and therefore

will no longer contribute to the Unions' persuasive strength in numbers or to its financial strength through membership dues. *Id.* These are well-established Article III injuries. See *Rivera-Vega v. ConAgra, Inc.*, 70 F.3d 153, 164 (1st Cir. 1995) (union's loss of member support constitutes irreparable injury); *Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO by Negrón v. Union De Carpinteros De P.R.*, 615 F. Supp. 3d 87, 94–95 (D.P.R. 2022) (impeding union's ability to carry out its duties to members constitutes injury); see also *Hunt*, 432 U.S. at 345 (loss of dues confers standing); *Am. Libr. Ass'n v. Sonderling*, 783 F. Supp. 3d 57, 60 (D.D.C. 2025) (reduction of union's bargaining power constitutes irreparable harm). The District Court failed to address these injuries. A.001; A.006.

Third, the Fork Directive prevented the Unions from participating in the decision-making process by filing comments of their own, in a way that affected their interests. A130, 138-39, 141-43, 148, 153 ¶¶ 54, 82, 88, 93, 100, 105, 124, 137. In *Nulankeyutmonen*, 503 F.3d at 27–29, this Court held that plaintiffs established Article III standing to challenge a federal agency's failure to follow statutory procedures where those procedural requirements protected the plaintiffs' interests.

See also Citizens of Karst, Inc. v. U.S. Army Corps of Eng'rs, 160 F. Supp. 3d 451, 457 (D.P.R. 2016) (failure to engage in notice and comment and evaluate project's impact injured plaintiff who had interest in evaluation gives rise to standing); *see also Nat'l Treasury Emps. Union v. Newman*, 768 F. Supp. 8, 10 (D.D.C. 1991) (holding that the plaintiff union "is unquestionably an interested party in OPM rulemaking proceedings and would undoubtedly participate in any such proceedings, as it often has in the past."). Here, the deprivation of the opportunity to provide notice and comment resulted in a chaotic and opaque program about which the Unions' could not advise their members. The District Court ignored these injuries as well. Add.001; Add.006.

Finally, the Fork Directive's unlawful promulgation and implementation caused the Unions reputational harm by injuring their relationships with members in a way that reasoned decision-making would have prevented. A161-62 ¶¶ 189–90; *see, e.g., TransUnion LLC*, 594 U.S. at 425 (reputational harm has long "provid[ed] a basis for lawsuits in American courts"). Once again, the District Court failed to grapple with these injuries. Add.001; Add.006.

In short, the Unions pleaded cognizable harms that give rise to organizational standing. The District Court erred in holding otherwise.

CONCLUSION

For the foregoing reasons, the Unions respectfully request this Court reverse the Order of the District Court, and remand with instructions to proceed to the next stage of litigation. Under District of Massachusetts Local Rule 40.1(d)(2), the Unions respectfully request reassignment to a different district judge.

Dated: February 6, 2026

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the undersigned counsel hereby certifies that this document complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(C) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this document contains 7,616 words.

This document also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionately spaced typeface using Microsoft Word (Office 16) in size 14 of Century Schoolbook.

Dated: February 6, 2026

KEKER, VAN NEST & PETERS LLP

/s/ Christine Zaleski

CHRISTINE ZALESKI

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 25-10276-GAO

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO; AMERICAN
FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 3707; AMERICAN
FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO; and
NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, INC.,
Plaintiffs,

v.

CHARLES EZELL, in his official capacity as Acting Director of the Office of Personnel and
Management, and OFFICE OF PERSONNEL MANAGEMENT,
Defendants.

OPINION AND ORDER

February 12, 2025

O'TOOLE, D.J.

The plaintiffs, several labor unions representing federal employees, have moved to restrain the Office of Personnel Management (“OPM”) and Charles Ezell, the acting director of OPM, from enforcing the deadline by which federal employees may accept OPM’s “Fork in the Road” directive, which has been stylized by the plaintiffs as the “Fork Directive.” That directive permitted certain federal employees in the executive branch to resign their positions effective September 30, 2025, but also permitted employees who took up the offer to cease active work in their respective agencies and still be paid their existing salaries through the end of the fiscal year. In addition, those employees would be free to pursue other remunerative employment outside of the executive branch if they wished.

On January 28, 2025, OPM sent an email to nearly all federal employees in the executive branch announcing the directive. As originally announced, the opportunity to accept the offer was

to expire as of February 6. (Fork in the Road, U.S. Office of Pers. Mgmt., <https://www.opm.gov/fork>.)

The plaintiffs commenced this action on February 4, 2025, seeking to challenge the legal basis of the directive through two claims asserted under the Administrative Procedure Act (“APA”). The next day, the plaintiffs moved for a temporary restraining order to stay the directive’s February 6 closing. The defendants oppose this motion. On February 6, the Court ordered the defendants to refrain from enforcing the deadline until further order of the Court. A hearing on the merits of the motion was held on February 10.

A plaintiff seeking a temporary restraining order or a preliminary injunction must establish four familiar elements: (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm to the plaintiff in the absence of preliminary relief, (3) a balance of pertinent equities tips in plaintiff’s favor, and (4) that the requested injunction would be consistent with the public interest. Together Emps. v. Mass. Gen. Brigham Inc., 32 F.4th 82, 85 (1st Cir. 2022) (quoting Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008)). The last two factors “merge when the Government is the party opposing the preliminary injunctions.” Nken v. Holder, 556 U.S. 418, 435 (2009). Here, the plaintiffs have not established that they are likely to succeed on the merits.

The plaintiffs are unable to succeed on the merits of their two APA claims because they lack Article III standing and because this Court does not have subject matter jurisdiction over the claims asserted.

First, the unions lack standing to challenge the directive. Standing requires the plaintiffs to be more than “mere bystander[s]” and instead requires a “personal stake in the dispute.” Food & Drug Admin. v. All. for Hippocratic Med., 602 U.S. 367, 379 (2024) (quotations omitted). Further, the Supreme Court recently held that an organization that is not directly affected by an agency’s

actions cannot establish standing simply by “divert[ing] its resources in response to a defendant’s actions.” Id. at 395. The plaintiffs cannot manufacture standing through self-inflicted harms. See Clapper v. Amnesty Int’l USA, 568 U.S. 398, 416 (2013).

The plaintiffs here are not directly impacted by the directive. Instead, they allege that the directive subjects them to upstream effects including a diversion of resources to answer members’ questions about the directive, a potential loss of membership, and possible reputational harm. The unions do not have the required direct stake in the Fork Directive, but are challenging a policy that affects others, specifically executive branch employees. This is not sufficient. Just as the Court found that the plaintiffs in Hippocratic Medicine could not spend their way into standing, neither can the plaintiffs in this case establish standing by choosing to divert resources towards “respond[ing] to tremendous uncertainty created by OPM’s actions” and away from other union priorities. (Pls.’ Mem. in Supp. of TRO 17.) Moreover, a loss of membership dues to the unions is not certain before the September 30th deadline.

Second, this Court lacks subject matter jurisdiction to consider the plaintiffs’ pleaded claims. While not binding on this Court, the decision in Am. Fed’n of Gov’t Emps., AFL-CIO v. Trump (“AFGE”) is instructive. 929 F.3d 748 (D.C. Cir. 2019). In that case, the court held that the plaintiff-unions’ claims fell within the Federal Service Labor-Management Relations Statute’s (“FSL-MRS”) scheme and therefore the district court lacked jurisdiction to hear the case. Id. at 754. In so deciding, the court walked through the two-part Thunder Basin framework. Id. (“Under that framework, Congress intended that a litigant proceed exclusively through a statutory scheme . . . when (i) such intent is fairly discernible in the statutory scheme, and (ii) the litigant’s claims are of the type Congress intended to be reviewed within [the] statutory structure.” (citations and quotations omitted)).

The D.C. Court of Appeals ruled that the first Thunder Basin step was satisfied because the FSL-MRS “provides the exclusive procedures by which federal employees and their bargaining representatives may assert federal labor-management relations claims.” Id. at 755 (quoting Am. Fed’n of Gov’t Emps. v. Sec’y of the Air Force, 716 F.3d 633, 638 (D.C. Cir. 2013)). This is also the case here. Congress intended for the FSL-MRS and the Civil Service Reform Act of 1978 (“CSRA”), of which the FSL-MRS is a part, to provide the exclusive procedures for disputes involving employees and their federal employers and disputes between unions representing federal employees and the federal government. According to this complex scheme, disputes must first be administratively exhausted before the employing agency and the relevant administrative review board and any further challenges are properly heard in a court of appeals. See id. at 752 (citing 5 U.S.C. §§ 7105(a), 7123(a), (c)); 5 U.S.C. § 7703(b). Therefore, the first Thunder Basin step is satisfied because Congress intended the FSL-MRS and CSRA to preclude district court review.

The second Thunder Basin step involves determining whether the plaintiffs’ claims are of the type Congress intended for review within the statutory scheme. Again, the AFGE decision is illustrative. In that case, the court found that the plaintiff-unions’ claims were of a type intended for review by the circuit court because (1) the unions had the possibility of meaningful judicial review even if they were required to go through the statutory scheme; (2) the claims were not “wholly collateral to the statutory scheme;” and, (3) the claims were not beyond the reviewing agency’s expertise. AFGE, 929 F.3d at 755.

The two APA claims alleged in this case are the type of challenges Congress intended for review within the statutory scheme, which provides for “administrative and judicial review.” See id. at 752; Parrott v. Merit Sys. Prot. Bd., 519 F.3d 1328, 1334–35 (Fed. Cir. 2008) (reviewing a Merit Systems Protection Board decision regarding an allegedly involuntary resignation).

Aggrieved employees can bring claims through the administrative process. That the unions themselves may be foreclosed from this administrative process does not mean that adequate judicial review is lacking. See AFGE, 929 F.3d at 756; cf. Sackett v. EPA, 566 U.S. 120, 130 (2012) (“Where a statute provides that particular agency action is reviewable at the instance of one party, who must first exhaust administrative remedies, the inference that it is not reviewable at the instance of other parties, who are not subject to the administrative process, is strong.”). The second and third factors are also satisfied. See Elgin v. Dep’t of Treasury, 567 U.S. 1, 23 (2012) (finding that a constitutional question was within the agency’s expertise because threshold questions about employment and routine statutory interpretations may be “brought to bear” to resolve the challenge); Sec’y of Air Force, 716 F.3d at 638 (“[T]he fact that National AFGE may not pursue a claim through the CSRA does not mean that it has access to the courts. Rather, it means that National AFGE may not raise the claim at all.”).

For the foregoing reasons the temporary restraining order previously entered is DISSOLVED and further preliminary injunctive relief is DENIED.

It is SO ORDERED.

/s/ George A. O’Toole, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 25-10276-GAO

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, AMERICAN
FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, and
NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, INC.,
Plaintiffs,

v.

CHARLES EZELL, in his official capacity as Acting Director of the Office of Personnel
Management, and OFFICE OF PERSONNEL MANAGEMENT,
Defendants.

OPINION AND ORDER

September 24, 2025

O'TOOLE, D.J.

After the plaintiffs' motion for a preliminary injunction was denied by this Court (dkt. no. 66), the plaintiffs filed an Amended Complaint (dkt. no. 77), asserting four revised counts. The first three counts purport to assert claims arising under the Administrative Procedure Act ("APA") and the last count asserts that the Office of Personnel Management lacked legal authority to propose the offers that were made to certain agency employees and therefore those offers were *ultra vires* and unenforceable.

The defendants have moved to dismiss the Amended Complaint with prejudice. They have properly pointed out that the jurisdictions of the federal courts that are inferior to the Supreme Court rest "entirely on statutory grants from Congress." Evans v. Thompson, 518 F.3d 1, 5 (1st Cir. 2008). As the defendants have also pointed out, the Court in this case has already concluded that existing statutes, the Civil Service Reform Act of 1978 ("CSRA") and the Federal Service Labor-Management Relations Statute ("FSL-MRS"), preclude jurisdiction here over the plaintiffs'

claims. See Am. Fed'n of Gov't Emps., AFL-CIO v. Ezell, No. CV 25-10276-GAO, 2025 WL 470459, at *2 (D. Mass. Feb. 12, 2025). Although the Amended Complaint has recast the claims asserted under the APA in present Counts 1 through 3, the revised claims do nothing to authorize those claims to be litigated in this Court in light of the CSRA and the FSL-MRS for the reasons previously articulated by the Court in its prior Opinion and Order and as carefully and explicitly addressed by the defendants in their brief in support of dismissal.

There is no need for a discussion that simply repeats the two major points argued by the defendants: (1) that this Court lacks subject matter jurisdiction over the plaintiffs' claims in light of the remedies available under the CSRA and FSL-MRS, and (2) that, under the circumstances described in the pleadings and arguments, the plaintiffs lack standing to litigate the grievances set forth in their claims and arguments. For these two reasons, the Amended Complaint is dismissed with prejudice.

It is SO ORDERED.

/s/ George A. O'Toole, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

**American Federation of
Government Employees, AFL-CIO et al**

Plaintiff(s)

V.

CIVIL ACTION

NO. 1:25-10276-GAO

Charles Ezell et al

Defendant(s)

ORDER OF DISMISSAL

O'TOOLE, D. J.

In accordance with the Court's OPINION AND ORDER (Dkt. No. 104) dated September 24, 2025, it is hereby ORDERED that the above-entitled action be and hereby is DISMISSED.

By the Court,

9/24/2025
Date

/s/ Flaviana de Oliveira
Deputy Clerk