

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

AMERICAN FEDERATION OF LABOR  
AND CONGRESS OF INDUSTRIAL  
ORGANIZATIONS, *et al.*,

Plaintiffs,

v.

DEPARTMENT OF LABOR *et al.*,

Defendants.

Case No. 1:25-cv-00339-JDB

Judge John D. Bates

**DEFENDANTS' REPLY IN SUPPORT OF DEFENDANTS' CROSS-MOTION  
FOR SUMMARY JUDGMENT**

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## INTRODUCTION

Plaintiffs' attempts to recast the work-a-day operations of the Department of Labor and Department of Health and Human Services—in granting certain DOGE Team Members<sup>1</sup> access to information systems they require to fulfill a Presidential initiative—into reviewable final agency action falters in the light of the record before the Court. As previously outlined, these agency employees have been granted a broad mandate to root out waste, fraud, and abuse in their agencies at the direction of the President. Accordingly, DOL and HHS worked through their previously established processes to grant these employees access to the informational systems they required to accomplish their task.

The record before the Court affirms that Plaintiffs' attempts to challenge the DOGE Team Members' work fail at multiple points. Plaintiffs fail to establish an injury-in-fact sufficient to maintain Article III standing, both for themselves and their members. The mere provision of access to government employees of personal or organizational information without a subsequent injury or public disclosure is not the kind—or akin to the kind—of injury traditionally recognized by Article III per the Supreme Court's decision in *TransUnion*. Further, Plaintiffs have failed to sufficiently support their alleged organizational injury.

Similarly, Plaintiffs' claims fail on the merits. At the threshold, Plaintiffs fail to demonstrate challengeable final agency action, as their alleged new agency practices—the “DOGE Data Access Policies”—are no more than stylized creations by Plaintiffs to exaggerate otherwise routine and pre-existing on-boarding and system access processes. By contrast, the record demonstrates that DOGE Team Employees at DOL and HHS went through the same processes for

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<sup>1</sup> Defendants hereby adopt all defined terms previously utilized in Defendants' Response to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment, ECF No. 95-1 (“Defs.’ MSJ”).

access and were evaluated under the same standard as any other employee. Additionally at the threshold, Plaintiffs fail to show that they may use the APA to bypass the Privacy Act's precisely defined remedial scheme.

Even if Plaintiffs could overcome these hurdles, the record before the Court demonstrates that Defendants' process in on-boarding DOGE Team Employees complied with the substantive requirements of the APA and Privacy Act. As to the APA, Plaintiffs fail to show that DOL and HHS have instituted new informational access policies in an arbitrary and capricious manner, as neither agency has adopted a new access policy specialized for their DOGE Teams. Instead, DOGE Team Employees at DOL and HHS went through the same processes for database access as any other employee. As to the Privacy Act, Plaintiffs fail to refute the straightforward conclusion that the DOGE Team Employees are employees of their respective agencies with a need to access the informational systems in question and, as such, are excepted from the Privacy Act's disclosure prohibition under 5 U.S.C. § 552a(b)(1).

Finally, Plaintiffs have failed to establish their *ultra vires* claim or that they are entitled to prospective injunctive relief against DOL, as there are no longer any DOGE Team Members at DOL, and other forms of relief as to both DOL and HHS. For all these reasons, the Court should deny Plaintiff's Motion for Summary Judgment, grant Defendants' Cross-Motion for Summary Judgment, and enter judgment in favor of Defendants.

## **ARGUMENT**

### **I. Plaintiffs Lack Standing**

#### **A. Plaintiffs' Members Fail To Demonstrate Injury-In-Fact**

Contrary to Plaintiffs' assertions, Defendants' Cross-Motion for Summary Judgment is more than a mere plea for the Court to "change its mind" regarding Plaintiffs' claims to associational standing. Pls.' Resp. to Defs.' Cross-Mot. for Summ. J. and Reply in Supp. of Pls.'

Mot. for Summ. J. at 3, ECF No. 97 (“Pls.’ Resp. and Reply”). Instead, as compared to the previous motion to dismiss, “at the summary judgment stage, ‘the plaintiff must set forth by affidavit or other evidence specific facts’ that prove standing.” *Wash. All. of Tech. Workers v. U.S. Dep’t of Homeland Sec.*, 50 F.4th 164, 175–76 (D.C. Cir. 2022) (quoting *Humane Soc’y of the U.S. v. Perdue*, 935 F.3d 598, 602 (D.C. Cir. 2019)). This is in contrast to the much more forgiving Rule 12 standard. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Plaintiffs have failed to provide the necessary support at this stage of the case because the alleged injuries here at issue are not of the kind traditionally recognized by Article III and the torts of intrusion upon seclusion and breach of confidence.

Specifically, Plaintiffs claim that they face imminent, concrete, intangible harm through the mere “disclosure of sensitive records to unauthorized government employees.” Pls.’ Mot. for Summ. J. at 5, ECF No. 93-2, (“Pls.’ SJ Br.”). But, as Defendants have previously highlighted, alleged intangible harms must have a “close relationship” to a “harm[] traditionally recognized as providing a basis for a lawsuit in American courts.” *TransUnion LLC v. Ramirez*, 594 U.S. 413, 425–26 (2021) (citing *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340–341 (2016)); *see also* Defs.’ MSJ at 9–10. Plaintiffs have failed to demonstrate the comparability between the harms experienced from the torts of intrusion upon seclusion and breach of confidence with the mere granting of access to databases containing Plaintiffs’ members’ information to allegedly unauthorized government employees—although, as elaborated below, these employees were duly authorized, *see infra* at 11-16—in the course of their duties, without further injury stemming from that access or public disclosure.

Plaintiffs present no record evidence that their members’ information was misused in any way, disclosed to the public, or even viewed by the DOGE Team Members here in question. *See*

*Am. Fed'n of Tchrs. v. Bessent*, 152 F.4th 162, 172 (4th Cir. 2025) (noting that, at the preliminary injunction stage, “Plaintiffs [did] not allege . . . any particular row of information belonging to any particular Plaintiff has been examined at all.”). Crucially, it was the potential for such viewing which this Court found persuasive at the motion to dismiss phase of this case. *See* Mem. Op. at 16, ECF No. 78 (“MTD Op.”). At summary judgment, where the case now stands, Plaintiffs can present no evidence confirming that their members’ “row o[n] a spreadsheet,” *id.*, was viewed by the DOGE Team members nor that their members have been subject to the “targeted snooping” that makes up the harm felt from the tort of intrusion upon seclusion, *Am. Fed'n of Tchrs.*, 152 F.4th at 172; *see also* Defs.’ MSJ at 13.

The lack of such record evidence supports the conclusion that merely providing database access to a government employee in the course of their duties is not a close analogue to the harms suffered from the torts of intrusion upon seclusion and breach of confidence, even if it is later determined that authorization was improper at the time. Defendants have briefed the misfit between the claims in this case and the elements of (and by implication the harms felt from) these torts previously. *See, e.g.*, Mot. to Dismiss at 13–18, ECF No. 49; Reply Br. in Supp. of Defs.’ Mot. to Dismiss at 1–6, ECF No. 56; Defs.’ Mem in Opp’n to Pls.’ Mot. for a Prelim. Inj. at 27–31, ECF No. 82; Defs.’ MSJ at 9–14. And, while not controlling, the Fourth Circuit’s opinion in *American Federation of Teachers* is persuasive in its logic and conclusion that the “sort of harm[s]” recognized from intrusion upon seclusion and breach of confidence, “[are] not present here.” 152 F.4th at 172; *contra* Pls.’ Resp. and Reply at 6. In sum, Plaintiffs have failed to show that Defendants’ activities constitute a highly offensive intrusion by one akin to a reporter, detective, or paparazzi into an area or information Plaintiffs’ members have secluded, or, in other words, for which they have an expectation of privacy. *Am. Fed'n of Tchrs.*, 152 F.4th

at 172. As such, Plaintiffs’ members have failed to demonstrate standing, warranting dismissal of their claims.

### **B. Plaintiffs Lack Organizational Standing**

Plaintiffs have also failed to establish standing on their own behalf pursuant to a theory of organizational standing. As previously outlined, an organization asserting standing on its own behalf must demonstrate that it has suffered a “concrete and demonstrable injury to [its] activities—with [a] consequent drain on [its] resources—constitut[ing] . . . more than simply a setback to the organization’s abstract social interests.” *Nat’l Ass’n of Home Builders v. EPA*, 667 F.3d 6, 11 (D.C. Cir. 2011) (quoting *Nat’l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995)); *see also* Defs.’ MSJ at 14. And, at the summary judgment phase, Plaintiffs “must set forth by affidavit or other evidence specific facts that prove standing.” *See supra* at 3 (quoting *Wash. All. of Tech. Workers*, 50 F.4th at 174–75).

To do so, Plaintiffs have merely pointed to affidavits submitted at the TRO stage outlining the alleged risk of public disclosure of records regarding the Plaintiff unions, both to (1) their own interests and (2) their efforts to secure benefits for their members. *See* Pls.’ SJ Br. at 14–15. Additionally, as an attempt to resurrect their organizational standing claims in their Reply, Plaintiffs claim that the DOL DOGE Access Data Policy (3) “breaches the relationship of confidence between the unions and DOL,”<sup>2</sup> and (4) threatens the core organizational objectives because it may chill confidential witnesses’ willingness to report to DOL, thus undermining confidence in DOL’s investigations, thereby harming Plaintiff unions. Pls.’ Resp. and Reply at 6–10.

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<sup>2</sup> As Plaintiffs themselves note, courts “will generally not entertain arguments omitted from an . . . opening brief and raised initially [only in a] reply.” Pls.’ Resp. and Reply at 7 n.3 (quoting *McBride v. Merrell Dow & Pharms., Inc.*, 800 F.2d 1208, 1211 (D.C. Cir. 1986)). Still, Defendants address these arguments here.

First, as noted previously, Plaintiffs' claims for organizational standing focus only on DOL, to the exclusion of HHS. *See* Defs.' MSJ at 15; *concur* Pls.' Resp. at Reply at 7; *Coubaly v. Cargill, Inc.*, 610 F. Supp. 3d 173, 180 (D.D.C. 2022) ("a plaintiff must demonstrate that he has 'standing separately as to each defendant[.]'" (quoting *Disability Rts. S.C. v. McMaster*, 24 F.4th 893, 900 (4th Cir. 2022))).

Second, as to Plaintiffs' claims that third parties—such as their members or whistleblowers—may be chilled from either working with the unions on benefits or DOL on investigations based on the DOL DOGE Data Access Policy, such claims are speculative beyond supporting Article III standing and unsupported by specific facts in the record. The Supreme Court has made clear that claims to injury based on the subjective chill of intermediary third parties cannot constitute Article III standing because it is conjectural that those alleged fears will come to pass without specific evidence. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 n.7 (2013) (dismissing claim of standing based on claim that "third parties might be disinclined to speak with" respondents in the case as conjectural); *see also United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1378 (D.C. Cir. 1984) ("[A]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." (quoting *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972))).

Third, and most critically, Plaintiffs' claims of organization harm are premised on the notion that disclosure to the DOGE Team Employees is tantamount to external disclosure, and therefore a breach of confidence between DOL and the unions. But, as Plaintiffs concede, the employees in question are either formally hired by their agencies or detailed from agencies with unquestioned detailing authority. As demonstrated below, these employees are both formally and functionally employees of the agencies at which they are hired—such that any disclosure would

be *internal*. See *infra* at 11-13. Therefore, Plaintiffs have failed on the record evidence to demonstrate a breach of confidence sufficient to establish Article III standing.

## II. Plaintiffs Fail To Establish A Claim Under The APA

### A. Plaintiffs Fail To Establish Reviewable Final Agency Action

Identifying a discrete final agency action is necessary to establishing a claim under the APA. See MTD Op. at 25; 5 U.S.C. § 704. As the Supreme Court has explained, requiring final agency action precludes plaintiffs from leveling “broad programmatic attack[s],” *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004), against programs for which they are seeking “*wholesale* improvement . . . by court decree, rather than in the offices of the Department or the halls of Congress,” *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 891 (1990).

The record evidence in this case reveals that members of DOGE Teams at DOL and HHS were granted and denied access to agency informational systems on an individual basis according to the specific needs of the employee in keeping with the agency’s existing access policies for on-boarding. See Defs.’ Statement of Undisputed Material Facts ¶¶ 7–9; 19–22, ECF No. 95-2, (“DSUMF”)<sup>3</sup>; see also Defs.’ MSJ at 19–20. Defendants do not dispute that many of these employees’ needs were similar, or that they were granted access in similar manners, but this is because they were similarly situated employees onboarding to accomplish parallel tasks under the same broad mandate. The record evidence establishes that no new systemic or specialized access policies were created for DOGE Team members. Instead, the DOGE employees were individually adjudicated using the existing processes even when their justification for access was apparent on the basis of the broad mandates of their positions.

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<sup>3</sup> Citations herein are to Defendants’ Statement of Undisputed Material Facts beginning on page 16 of ECF No. 95-2.

Seeking to avoid this record evidence, Plaintiffs are left with two arguments. First, they argue that the Court’s previous Motion to Dismiss Order settled this issue, and the Court should ignore the record by declining to revisit a previous legal conclusion. *See* Pls.’ Resp. and Reply at 10. But the Court previously (and correctly) premised its conclusion accepting the allegations as true based on the face of the Plaintiffs’ Amended Complaint. MTD Op. at 27; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). That does not relieve Plaintiffs of the burden at summary judgment of establishing that DOL and HHS created “across-the-board” DOGE data access policies. *Id.* at 25.

Second, Plaintiffs are left with cobbling together an alleged across-the-board policy from individual access decisions. None of the minutia Plaintiffs attempt to elevate to broad, new access policies, however, demonstrates that—according to Plaintiffs—DOL and HHS “wholly re[wrote] their data access policies for DOGE.” Pls.’ SJ Br. at 15. Instead, the record demonstrates that HHS and DOL followed their existing access policies, although certain elements of the existing access policies—such as the applicant’s need for access—were evident from the work the DOGE Teams Employees were tasked to accomplish. There is simply no record evidence that DOL or HHS created overarching DOGE-specific policies, whether formal or informal, akin to that in *Venetian Casino*, which was “long-running, agency-wide, conceded to exist by agency counsel, and expressly written down in the agency’s formal Compliance Manual.” *Am. Fed’n of Tchrs*, 152 F.4th at 175 (citing *Venetian Casino Resort, LLC v. EEOC*, 530 F.3d 925, 928–31 (D.C. Cir. 2008)). It is well-established that Plaintiffs cannot cobble together final agency action from disparate, otherwise unreviewable daily agency operations. *See Lujan*, 497 U.S. at 890–94. Doing so would amount to the same “broad programmatic attack” the Supreme Court has counseled against. *Norton*, 542 U.S. at 64. And, as the D.C. Circuit has

highlighted, a theory like Plaintiffs’ would allow courts to impermissibly exercise “judicial review [over] everything done by an administrative agency,” *Indep. Equip. Dealers Ass’n v. E.P.A.*, 372 F.3d 420, 427 (D.C. Cir. 2004) (quoting *Hearst Radio, Inc. v. FCC*, 167 F.2d 225, 227 (D.C.Cir.1948), including a judicial review of the agencies “day-to-day operations” of onboarding new employees, *Lujan*, 497 U.S. at 899.

### **B. Plaintiffs Cannot Bring A Privacy Act Claim Through The APA**

Both sides have extensively briefed the issue of whether Plaintiffs may avoid the constraints of the Privacy Act’s cause of action by pleading their claim through the APA. *See, e.g.*, Defs.’ Mem. in Opp’n to Pls.’ Mot. for a TRO at 10–11, ECF No. 16; Pls.’ Reply in Supp. of Mot. for TRO at 8–10, ECF No. 17; Defs.’ Mem. in Opp’n to Pls.’ Renewed Mot. for a TRO at 20–24, ECF No. 31; Defs.’ Mem. of L. in Supp. of Defs.’ Mot to Dismiss Pls.’ First Am. Compl. at 25–28, ECF No. 49-1; Pls.’ Resp. to Defs.’ Mot. to Dismiss at 23–25, ECF No. 50; Defs.’ Reply Br. in Supp. of Defs.’ Mot to Dismiss First Am. Compl. at 11–13, ECF No. 56; Defs.’ Mem. in Opp’n to Pls.’ Mot for a Prelim Inj. at 34; Defs.’ MSJ at 21–23; Pls.’ Resp. and Reply at 14–17. Defendants recognize the Court’s previous conclusion on this question, MTD Op. at 28–33, and raise the issue here to preserve it and for purposes of any appeal.

Additionally, the Fourth Circuit’s intervening decision in *American Federation of Teachers v. Bessent*, lends further support to Defendants’ position that Plaintiffs may not use the APA as an end run around Congress’s carefully drawn remedial scheme in the Privacy Act. As the Fourth Circuit noted, it was likely that the Privacy Act’s exclusion of injunctive relief in these circumstances “reflects Congress’s intent to preclude suit under the APA in circumstances like those presented here.” 152 F.4th at 175; *see also id.* at 176 (“We think it unlikely that Congress would have gone to the trouble [in the Privacy Act] of authorizing equitable relief for two forms of agency misconduct and monetary relief for all other forms if it had intended to make

injunctions available across the board.” (quoting *Cell Assocs. Inc. v. Nat’l Inst. of Health*, 579 F.2d 1155, 1159–60 (9th Cir. 1978)).

### C. Plaintiffs Cannot Succeed On Their Arbitrary And Capricious Claims

Plaintiffs’ arbitrary and capricious claims fail based on a straightforward examination of the record, which reveals that neither DOL nor HHS adopted a specialized access policy for DOGE Team Employees, nor treated DOGE Team Employees differently than any other onboarding employee with respect to data access.

First, as outlined previously, DOL and HHS have not adopted either formal or informal specialized access policies for DOGE Team Employees. *See supra* at Sec. II.A; *see also* Defs.’ MSJ at 23–24. Quite simply, as there was no adoption of a new policy—merely application of an existing policy to the onboarding of individual employees—there are no “important aspect[s] of the problem” for DOL or HHS to have considered in adopting a new policy. *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983); *see also* Defs.’ Mem. in Opp’n to Pls.’ Mot for a Prelim Inj. at 43–44. Instead, the alleged DOGE Data Access Policies are no more than fictions of Plaintiffs’ creation.

Even if Plaintiffs were able to cobble together the discrete on-boardings of individual DOGE Team Employees into a unified agency policy, the record bears out that DOL and HHS considered the issues Plaintiffs highlight. As the Court has already recognized, DOGE “team members have signed non-disclosure agreements, received security training, and are otherwise subject to agency requirements as to data permissions and accesses.” Order Denying Renewed TRO at 4, ECF No. 34; *see also* DSUMF ¶ 26. Further, DOGE Team Members are subject to the same conflict of interest processes and requirements as any other agency employee. *See* DSUMF ¶¶ 17, 25. Thus, it cannot be said that DOL and HHS failed to consider aspects such as “the need to protect Americans’ privacy,” “the potential [chilling, financial, or bodily harm]

effects of disclosure,” “reliance interest,” and “conflicts of interests” where DOGE Team Members were subjected to the same substantive requirements as any other onboarding employee. Indeed, those were elements of the policies Plaintiffs purportedly challenge. As such, even if Plaintiffs had pointed to the existence of a policy for DOGE Team Members, they failed to show that the agencies did not institute the same protections compelled by the Privacy Act and its implementing regulations as to those individuals.

### **III. Defendants’ Conduct Complies With The Privacy Act**

Even if Plaintiffs could surmount the threshold issues of standing and the APA’s limitations in bringing their claims, their central premise that DOL and DHS’s actions in hiring and giving DOGE Team Employees access to agency informational systems fails to show a violation of the Privacy Act. The Privacy Act expressly provides an exception to its general prohibition on disclosure of records to “officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties.” 5 U.S.C § 552a(b)(1). As Defendants have previously demonstrated, DOGE Team Members are employees of their agencies with a need to access the informational systems in questions. *See* Defs.’ MSJ at 26–32.

#### **A. DOGE Team Members Are Employees Of The Defendant Agencies**

The record in this case demonstrates that DOGE Team Employees are employees of their respective agencies while working on behalf of those agencies. Plaintiffs’ responses otherwise do not suffice.

At the outset, as Plaintiffs concede and this Court has recognized, all the employees in question were either formally hired by the agency at which they are conducting their duties or were detailed from an agency other than USDS with unquestioned authority to detail. *See* Defs.’ MSJ at 27; Pls.’ SJ Br. at 25; MTD Op. at 33–36; Defs.’ Objs. & Resp. to Expedited Disc. at 6–

20, ECF No. 80-5 (explaining employment arrangements of the DOGE Teams at DOL and HHS); DSUMF ¶¶ 3, 5–6, 18. None of the relevant employees were detailed from USDS, and the functional test<sup>4</sup> the Court previously utilized in its Motion to Dismiss Order applied only to detailees, not direct employees. MTD Op. at 34–35. Thus, even to the extent the functionalist test applies to some or all the employees in question, certainly DOGE Team Employees’ formal employment status at each agency weighs heavily in favor of a finding that they fall into the statutory exception spelled out in 5 U.S.C. § 552a(b)(1). Simply put, the Privacy Act provides that “employees of the agency” are exempt from the statute’s prohibition on disclosure, and many of the employees in question are direct employees of DOL and HHS. This should end the inquiry.

Even if the functionalist test applies to some of the employees in question, the record evidence clearly establishes that DOGE Team Employees are functionally employed by their agency as they work to modernize that agency’s information systems and eliminate waste, fraud, and abuse within the agency’s programs. As thoroughly outlined, DOGE Team Employees are formally selected and hired by their agency, paid (if at all) by their agency, and conduct agency work to improve their agency’s programs, on agency equipment, pursuant to agency-specific training, and are supervised in that work by their agency. *See* Defs.’ MSJ at 28–32; *see also* DSUMF ¶¶ 3–4, 11–16, 25–29.

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<sup>4</sup> In its motion to dismiss opinion, the Court adopted a “functional approach” to “determine a detailee’s employment” consistent with the D.C. Circuit case *Judicial Watch, Inc. v. Department of Energy*, 412 F.3d 125, 131 (D.C. Cir. 2005), in which that court considered the subject matter and purpose of a detailee’s work, their supervision, and their physical worksite as illustrative (but not conclusive) factors of whether they constituted an employee of their receiving agency for FOIA purposes. MTD Op. at 35.

An example from the record is particularly instructive. Plaintiffs' counsel asked DOL's deponent to recount the procedure for resolving a dispute between a DOL DOGE Team Employee and another DOL employee regarding work conducted by the DOGE Team Employee at DOL. *See* Kryger Dep. at 38:13–39:5, ECF No. 82-5; *id.* at 43:4–44:4. The answer was that the question would be “escalated through normal management channels, possibly all the way up to the [S]ecretary[ of Labor]’s office.” *Id.* at 38:20–22. Plaintiffs' counsel elaborated: “let’s say you have a DOGE team affiliate who says that I think X is fraud, waste or abuse, and you have another Department of Labor employee who thinks, no, this is actually really necessary for agency function, what-- what happens to make the decision as to what to do with that particular function.” *Id.* at 43:4–11. The answer: “[s]o normal escalation management, escalation channels will be used, as I described earlier, to reach a final decision.” *Id.* at 43:12–15.

What is instructive about this scenario is that it encapsulates the entire dispute in one. It illustrates that DOGE Team Employees work within their agencies, with other agency employees, on projects specific to the agency, supervised by agency management, and that management (potentially up to the office of the Secretary themselves) has authority to resolve questions over the substance of the work.

Plaintiffs, however, persist in their claim that, in conducting some aspects of their work with USDS or DOGE Teams at other agencies, DOGE Team Employees are, in fact, not employees of the agencies where they are formally hired and work. *See* Pls.' Resp. and Reply at 17-20. But this stretches the functionalist test too far. Merely consulting with another agency or governmental entity cannot put at risk an agency employee's status under the Privacy Act. Would a Congressional Liaison Officer at any agency lose access to their agency's informational systems if they worked too closely with Congress? Taken to its logical end, an FBI Agent could

lose access to FBI systems if they work too closely with a Postal Inspection Service Agent in taking down a mail fraud ring. Furthermore, judicial examination of agency employees' degree of external interaction again pushes the APA cause of action too far. The APA is not intended to invite judicial review of daily agency operations. *See supra* at Sect II.A.

What Plaintiffs' arguments expose is their attempt to muddle the (1) DOGE Agenda, which is an Executive-wide policy seeking to make agencies more efficient and effective, (2) the U.S DOGE Service, an Executive Branch subcomponent dedicated to implementing the DOGE Agenda, and (3) agency DOGE Team Employees, who effectuate the President's DOGE Agenda by making their agency's systems and programs more efficient. DOGE Team Employees are agency employees who work within their agency to improve their agency's work, and as such, they fall neatly within the Privacy Act's exemption.

**B. DOGE Team Member Employees Need To Access Agency Record Systems To Perform Their Duties**

Plaintiffs continue to conflate the need to access information with the process applicable to those with such access as they attempt to counter the straightforward assessment that, as employees with broad mandates, the DOGE Team Employees required the broad access to informational systems granted by their agencies. *See* Pls.' Resp. and Reply at 20–21. As previously outlined, the Privacy Act permits access to records (and thereby the informational systems that hold such records) to “employees . . . who have a need for the record in the performance of their duties.” 5 U.S.C. § 552a(b)(1). The Fourth Circuit's opinion in *American Federation of Teachers*, shows why DOGE Team Employees require the broad access to informational systems they were granted by their agencies. *See* 152 F.4th at 176–77.

As the Fourth Circuit explained, “DOGE-affiliated agency employees are tasked with . . . broad and open-ended dut[ies]” and “[t]he broader an employee's duties, the broader their

needs.” *Id.* at 176. It, therefore, “does not stretch the imagination to think that an employee tasked with modernizing an agency’s software and IT systems would require . . . access to those systems, including internal databases, especially when conducting the internal survey of the agency’s technological ailments.” *Id.* at 177. This is all the Privacy Act requires, as the Act “does not prohibit sharing information with those whose jobs give them good reason to access it.” *Id.* at 176 (citing *Bigelow v. Dep’t of Def.*, 217 F.3d 875, 877 (D.C. Cir. 2000)).

Again trying to escape the conclusion that those who seek to improve and modernize an agency’s information systems—and detect waste, fraud, and abuse therein—would need access to those systems, Plaintiffs rely on process arguments. In other words, Plaintiffs persist in their claims that, at the time the agencies granted the DOGE Teams access to informational systems, the DOGE Teams did not sufficiently proffer their needs for the relevant information, or that the agencies did not sufficiently scrutinize those needs. *See* Pls.’ Resp. and Reply at 20–21. But these claims are unavailing for multiple reasons.

First, as demonstrated already, there was no overarching DOGE Data Access Policies, only individual analysis of employee access that is no different from any other agency employee. *See supra* at 7-9. Thus, Plaintiffs stretch the APA cause of action too far in inviting judicial flyspecking of the “day-to-day operations” of onboarding new employees. *Lujan*, 497 U.S. at 899.

Second, as the record evidence shows, the DOGE Team Employee’s mandate aligns with their access needs. Plaintiffs’ attempts to nitpick the terminology or timing of the Executive Orders which establish the DOGE Teams’ mission, ignores the broad needs that accompany “improv[ing] the quality and efficiency of government-wide software, network infrastructure, and information technology (IT) systems.” Exec. Order No. 14,158 § 4, 90 Fed. Reg 8,441 (Jan.

20, 2025). As outlined in Defendant’s Motion for Summary Judgment, these modernization and efficiency goals are often understood to include efforts to detect and eliminate waste, fraud, and abuse in such systems and programs. *See* Defs.’ MSJ at 34–35.

Finally, even were the Court to examine the processes by which DOGE Employees were granted access to the systems at their agencies, those processes were sound, and the APA’s cause of action is highly deferential, dictating that “court[s are] not to substitute [their] judgment for that of the agency.” *State Farm*, 463 U.S. at 43. Here, those examining the DOGE Team Employees’ access requests determined that their needs were “clear and apparent.” DSUMF ¶¶ 8–9, 21–22. Thus, contrary to Plaintiffs’ claims, the agencies did not fail to ask certain questions or to accomplish parts of the normal access procedures. Instead, the answers to the question and that part of the process were obvious on their face, just as the Fourth Circuit in *American Federation of Teachers* determined. There was simply no need to ask questions which sometimes are needed to verify an application, because verification was unnecessary. *See* DSUMF ¶¶ 8–9, 21–22.

#### **IV. Plaintiffs Fail To Establish An Ultra Vires Claim**

Plaintiffs’ reliance on the “doctrine of last resort” which is *ultra vires* review continues to be unavailing. *Schroer v. Billington*, 525 F. Supp. 2d 58, 65 (D.D.C. 2007); *see* Pls.’ Resp. and Reply at 26–27; *see also Nuclear Regul. Comm’n v. Texas*, 605 U.S. 665, 681 (2025) (“Because *ultra vires* review could become an easy end-run around the limitations of the Hobbs Act and other judicial-review statutes, this Court’s subsequent cases have strictly limited nonstatutory *ultra vires* review to the ‘painstakingly delineated procedural boundaries of [*Leedom v. Kyne*, 358 U.S. 184 (1958)].” (quoting *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964))). As the D.C. Circuit has dictated, *ultra vires* review is the equivalent of “a Hail Mary pass—and in court as in football, the attempt rarely succeeds.” *Nyunt v. Chairman, Broad. Bd. of Governors*, 589 F.3d

445, 449 (D.C. Cir. 2009). More specifically, *ultra vires* review of agency action is only available when an agency's error is "patently a misconstruction of [statute;]" "when the agency has disregarded a specific and unambiguous statutory directive[;]" or "when the agency has violated some specific command of a statute." *Griffith v. Fed. Lab. Relations Auth.*, 842 F.2d 487, 493 (D.C. Cir. 1988) (citations omitted). "Garden-variety errors of law or fact are not enough." *Id.*

To surmount this incredible burden, Plaintiffs are forced to persist in their claims that USDS is "misappropriat[ing] agency records," Pls.' Resp. and Reply at 27, or, as the Court summarized in its Motion to Dismiss Order, "directing operations and personnel at the agency defendants," MTD Op. at 45. But, these claims merely repackage Plaintiffs' claims under the APA and the Privacy Act, and Plaintiffs are precluded from proceeding under an *ultra vires* theory when those alternative remedial forums exist. *See* Defs.' MSJ at 36.

Moreover, Plaintiffs' claims fail to survive the scrutiny of the record on summary judgment review. First, Plaintiffs run into the factual roadblock that USDS has not dictated any particular outcome at any particular agency. Instead, the record shows that the DOGE Team Employees, as employees at their agencies, conduct work on their agencies' behalf while supervised by agency supervisors. *See supra* at 13. While they may consult with USDS, this is a far cry from establishing that USDS is dictating actions at agencies in excess of any particular statutory authority or with no statutory authority at all.

To avoid this result, Plaintiffs conflate USDS and agency DOGE Team Employees. But, as demonstrated above, DOGE Team Employees are employees of their agencies. *See supra* at 11-14. Thus, their access to agency informational systems both complies with the Privacy Act and demonstrates that neither they, nor USDS, is "operating without any legal authority

*whatsoever*, whether statutory or constitutional.” MTD Op. at 45 (emphasis in original). As such, the Court should dismiss Plaintiffs *ultra vires* cause of action.

## V. The Court Cannot Order Certain Relief

Based on intervening facts, and their own chosen cause of action, Plaintiffs are prevented from seeking certain relief. *See* Defs.’ MSJ at 37–38. Plaintiffs’ arguments otherwise, *see* Pls.’ Resp. and Reply at 27–32, miss the mark.

### A. No DOGE Team Employees Retain Access to DOL Systems

Plaintiffs cannot resurrect their claim to prospective relief against DOL. As noted previously, there are no longer any DOGE Team Employees with access to DOL systems. *See* Defs.’ MSJ at 38; *see also* Declaration of Tania Burkley, Exhibit 1. As the Court highlighted in its opinion denying Plaintiffs’ Motion for a Preliminary Injunction, appropriate prospective relief would entail preventing improperly appointed DOGE Team members from “accessing additional records and retaining any records already accessed.” PI Op. at 26, ECF No. 87. But no such employees have access to DOL systems. Burkley Decl. at 1. Thus, there are no additional records to prevent access to and no ongoing alleged injury to Plaintiffs or their members.

Further, the APA empowers the Court only to “hold unlawful and set aside agency action.” 5 U.S.C. § 706(2). Thus, the standard remedy for an offending agency action is remand and vacatur. *See Harmon v. Thornburgh*, 878 F.2d 484, 494 (D.C. Cir. 1989) (“When a court finds that an agency regulation is invalid in substantial part, and that the invalid portion cannot be severed from the rest of the rule, its typical response is to vacate the rule and remand to the agency.”); *see also Sierra Club v. U.S. Dep’t of Transp.*, 125 F.4th 1170, 1186 (D.C. Cir. 2025) (“Remand with vacatur is the ordinary remedy for unlawful agency action.”). While Defendants continue to assert that DOL has not adopted a new agency policy—and that the so-called DOL DOGE Data Access Policy is no more than a creation of Plaintiffs’ making—if the Court were to

find such a policy existed, and vacate it, the future terms by which DOGE Team Employees would be onboarded at DOL would be entirely speculative. Put more simply, the Court cannot constrain the future access of DOL employees where the procedures of granting them access are uncertain pending the outcome of this case. The appropriate course would be to permit DOL the opportunity to sculpt a new policy complying with the circumstances under which the Court found the present (nonexistent) policy deficient.

**B. Plaintiffs' Requested Destruction Of Records, Prevention of Future Access, And Superintending Compliance Is Also Inappropriate.**

Plaintiffs' argument that they may seek destruction of records as a remedy only serves to highlight why they cannot bring their Privacy Act claims through the APA. *See supra* at Sec. II.B. The Privacy Act permits a cause of action only to individuals, not organizations such as Plaintiffs. *See* MTD Op. at 44. Permitting Plaintiffs to access a remedy provided by the Privacy Act, for which Congress did not grant Plaintiffs a cause of action, by permitting pleading such claims through the APA, which itself does not authorize that form of relief, runs counter to Congress's comprehensive statutory scheme within the Privacy Act.

Furthermore, the full suite of remedies Plaintiffs seek—including destruction of records, prevention of future access, and ongoing status reports confirming compliance with an as-of-yet unissued order—is outside the APA's scope and premature.

First, as noted above, the APA empowers courts only to set aside agency action, with the standard remedy being vacatur of the action and remand to the agency to cure noncompliant elements of the original policy. *See supra* at Sec. V.A. As such, ordering destruction of records and enjoining future access extends beyond the APA's remedies and robs the agencies of the APA-granted opportunity to compose compliant on-boarding policies, especially in a case where

the agencies themselves do not believe they have created new or separate policies in the first instance.

Second, ordering Court superintendence over Defendants' compliance through an injunction requiring ongoing status reports prematurely assumes Defendants will not comply with any injunction the Court may issue. On the contrary, the Federal Government is presumed to comply with lawful orders as government agencies and employees are entitled both to presumptions of regularity and good faith. *See, e.g., United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926); *Anderson v. U.S. Dep't of Hous. & Urb. Dev.*, 731 F. Supp. 3d 19, 32 (D.D.C. 2024); *Latif v. Obama*, 677 F.3d 1175, 1178–181 (D.C. Cir. 2011); *Hercules, Inc. v. EPA*, 598 F.2d 91, 123 (D.C. Cir. 1978). Plaintiffs have presented no facts on the record in this case to rebut such presumptions.

### CONCLUSION

For the reasons explained above, the Court should deny Plaintiffs' Motion for Summary Judgment and grant Defendants' Motion for Summary Judgment.

Dated: December 23, 2025

Respectfully submitted,

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