

1 Scott A. Kronland (SBN 171693)
 2 Stacey M. Leyton (SBN 203827)
 3 Eileen B. Goldsmith (SBN 218029)
 4 Danielle E. Leonard (SBN 218201)
 5 Robin S. Tholin (SBN 344845)
 6 James Baltzer (SBN 332232)
 7 ALTSHULER BERZON LLP
 8 177 Post Street, Suite 300
 9 San Francisco, CA 94108
 10 Tel. (415) 421-7151
 11 Fax (415) 362-8064
 12 skronland@altber.com
 13 sleyton@altber.com
 14 egoldsmith@altber.com
 15 dleonard@altber.com
 16 rtholin@altber.com
 17 jbaltzer@altber.com

18 *Attorneys for Plaintiff Organizations*

19 [Additional Counsel listed on signature pages]

20 UNITED STATES DISTRICT COURT
 21 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 22 SAN FRANCISCO DIVISION

23 AMERICAN FEDERATION OF
 24 GOVERNMENT EMPLOYEES, AFL-CIO;
 25 AMERICAN FEDERATION OF STATE
 26 COUNTY AND MUNICIPAL EMPLOYEES,
 27 AFL-CIO, et al.,

28 Plaintiffs,

v.

UNITED STATES OFFICE OF PERSONNEL
 MANAGEMENT, et al.,

Defendants.

Case No. 3:25-cv-01780-WHA

**PLAINTIFFS' NOTICE OF MOTION AND
 MOTION FOR SUMMARY
 ADJUDICATION OF CLAIMS I-IV**

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE THAT at 8:00 a.m. on August 26, 2025 in Courtroom 12, 19th Floor, United States District Court, Northern District of California, located at 450 Golden Gate Avenue, San Francisco, CA, pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiffs will and hereby do move for summary adjudication of Claims I–IV of the Second Amended Complaint (Dkt. 90). The proposed hearing date is 14 days after the close of briefing on cross-motions for summary judgment as set forth in the Court’s order approving the parties’ stipulated briefing schedule (Dkt. 209).

The Motion will be made on the grounds that the administrative record compiled by Defendant OPM conclusively resolves the only material factual dispute in this case: whether (as Plaintiffs have alleged) OPM directed the mass termination of probationary employees at issue in this lawsuit, or whether (as Defendants have asserted) OPM offered mere “guidance” to individual agencies, which were free to take that guidance or to discard it. As explained in the accompanying Memorandum of Support, the long-awaited administrative record now conclusively demonstrates that OPM in fact directed the mass termination of probationary employees. The resolution of that factual dispute—together with the legal conclusions reached in this Court’s prior legal rulings—makes summary adjudication of Claims I-IV appropriate.

This Motion is supported by the accompanying Memorandum in Support; all papers on file in this action; and such argument as may be heard by the Court.

DATED: June 5, 2025

Scott A. Kronland
Stacey M. Leyton
Eileen B. Goldsmith
Danielle E. Leonard
Robin S. Tholin
James Baltzer
ALTSHULER BERZON LLP
177 Post St., Suite 300
San Francisco, CA 94108
Tel: (415) 421-7151

By: /s/ Danielle Leonard

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Attorneys for Plaintiff Organizations

Norman L. Eisen (*pro hac vice*)
Pooja Chaudhuri (SBN 314847)
STATE DEMOCRACY DEFENDERS
FUND
600 Pennsylvania Avenue SE #15180
Washington, DC 20003
Tel: (202) 594-9958
Norman@statedemocracydefenders.org
Pooja@statedemocracydefenders.org

By: /s/ Norman L. Eisen

Attorneys for Plaintiff Organizations

Rushab Sanghvi (SBN 302809)
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES
80 F Street, NW
Washington, DC 20001
Tel: (202) 639-6426
Sanghr@afge.org

By: /s/ Rushab Sanghvi

*Attorneys for Plaintiff American Federation of
Government Employees (AFGE)*

Teague Paterson (SBN 226659)
Matthew Blumin (*pro hac vice*)
AMERICAN FEDERATION OF STATE, COUNTY,
AND MUNICIPAL EMPLOYEES
1625 L Street, N.W.
Washington, D.C. 20036
Tel: (202) 775-5900
TPaterson@afscme.org
MBlumin@afscme.org

By: /s/ Teague Paterson

*Attorneys for Plaintiff American Federation of State
County and Municipal Employees (AFSCME)*

Tera M. Heintz (SBN 241414)
Cristina Sepe (SBN 308023)

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23
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Cynthia Alexander, WA Bar No. 46019 (pro hac vice)
Deputy Solicitors General
OFFICE OF THE WASHINGTON STATE
ATTORNEY GENERAL
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-7744
tera.heintz@atg.wa.gov
cristina.sepe@atg.wa.gov
cynthia.alexander@atg.wa.gov

By: /s/ Tera M. Heintz

Attorneys for Plaintiff State of Washington

1 Scott A. Kronland (SBN 171693)
 2 Stacey M. Leyton (SBN 203827)
 3 Eileen B. Goldsmith (SBN 218029)
 4 Danielle E. Leonard (SBN 218201)
 5 Robin S. Tholin (SBN 344845)
 6 James Baltzer (SBN 332232)
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 9 San Francisco, CA 94108
 10 Tel. (415) 421-7151
 11 Fax (415) 362-8064
 12 skronland@altber.com
 13 sleyton@altber.com
 14 egoldsmith@altber.com
 15 dleonard@altber.com
 16 rtholin@altber.com
 17 jbaltzer@altber.com

18 *Attorneys for Plaintiff Organizations*

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**PLAINTIFF’S MEMORANDUM IN
 SUPPORT OF MOTION FOR SUMMARY
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INTRODUCTION

1
2 Congress established the federal administrative agencies by statute, and specifically
3 authorized the heads of those agencies—not the Office of Personnel Management (“OPM”)—to
4 manage federal employment and make employment decisions in their agencies, consistent with
5 statutory requirements, authorizations, and appropriations. As this Court has previously observed,
6 OPM has never disputed the proposition that “[n]o statute—anywhere, ever—” authorized OPM to
7 direct other federal agencies to terminate their probationary employees. *See* Dkt. 45 at 7-8. From the
8 beginning, OPM’s principal response to this lawsuit (aside from jurisdictional arguments this Court
9 has long since rejected, *see* Dkt. 153) has been to insist that OPM did not in fact *direct* the en masse
10 termination of probationary employees on the baseless pretext of unsatisfactory performance, but
11 merely offered “guidance” to individual agencies, which were left free to “ma[k]e their own
12 determinations to terminate or retain their probationary employees.” Dkt. 33 at 6; *see also* Dkt. 45 at
13 8; Dkt. 110 at 2. The administrative record (“AR”) compiled by OPM (Dkt. 218-3) belies OPM’s
14 claims and conclusively answers the factual issue at the heart of this case: OPM directed the mass,
15 pretextual termination of probationary federal employees.

16 The building blocks of a final summary judgment ruling on plaintiffs’ challenge to the mass
17 termination scheme are already in place. The Court has ruled that the federal-sector union plaintiffs
18 that brought this action have standing to bring the *ultra vires* and Administrative Procedure Act
19 (“APA”) claims asserted in this action. Dkt. 202 at 14-19. The Court has also ruled that those claims
20 cannot be channeled to the Merit Systems Protection Board or the Federal Labor Relations Authority,
21 but instead belong in this Court. Dkt. 153; *see also* *AFGE v. Trump*, __ F.4th __, No. 25-3293, 2025
22 WL 1541714 at *3-5 (9th Cir. May 30, 2025). There is no basis to revisit either of these rulings.
23 Therefore, the only remaining question is whether the factual record, as set forth in the AR,
24 establishes that OPM directed the mass termination scheme challenged in this case.

25 The AR created by Defendants confirms that the facts are just as the Court previously found:
26 OPM directed other federal agencies to compile lists of their probationary employees and then
27 “asked” those agencies to terminate those probationary employees who were not identified as
28 “mission-critical”; multiple agencies sought “exemptions” from OPM to blunt the impact of OPM’s

1 mass termination directive; and OPM leadership decided whether to “grant” such “exemptions”—all
2 in the absence of any legal authority. *See infra* at 5-7. Nothing in the administrative record compiled
3 by OPM contradicts the “mountain of evidence” this Court relied on when it ordered preliminary
4 relief. Dkt. 132 at 5-7; Dkt. 202 at 2-8. The AR simply confirms that OPM’s factual contentions fare
5 no better than its legal arguments.

6 As a result, the Court’s earlier findings that plaintiffs were likely to succeed on the merits of
7 their *ultra vires* and APA claims (Dkt. 45 at 7-10; Dkt. 132 at 9-12; Dkt. 202 at 10-14) should be
8 converted to final rulings on the merits.¹ The Court should grant summary judgment to Plaintiffs on
9 Claims I-IV of the Second Amended Complaint and convert the Court’s April 18 preliminary
10 injunction into declaratory and permanent injunctive relief.²

11 STATEMENT OF FACTS³

12 The AR recounts the now-familiar story of OPM’s direction to other federal agencies to
13 terminate their probationary employees, relying on the pretext—chosen to insulate these terminations
14 from any form of review—that those employees were being separated from government service based
15 on their performance regardless of those employees’ *actual* performance. OPM’s contention that it
16 merely gave “guidance” to agencies that they could implement or ignore as they pleased is belied by
17 its own documents and the “exemption process” that forced agencies to secure OPM’s permission to
18 retain probationary employees.

19
20
21 ¹ This Court also found that the State of Washington had standing based on its financial injuries.
22 Dkt. 202 at 21-22. Although the Court’s finding that the nonprofit organization plaintiffs had standing
23 was rejected by the Supreme Court in its order staying the Court’s first preliminary injunction, the
denial of standing as to the nonprofit organizations has no bearing on whether summary judgment may
be granted because all plaintiffs in this action asserted identical claims.

24 ² Claim V of the Second Amended Complaint challenges OPM’s new requirement that each
25 federal employee submit a weekly email to OPM detailing five things the employee did during the prior
week. The AR prepared by OPM entirely ignores this claim.

26 ³ This statement of facts is drawn from the AR compiled by defendants. While it appears
27 implausible that this AR is a complete, warts-and-all account of OPM’s actions, nothing in the AR
28 conflicts with the evidentiary record assembled by Plaintiffs that the Court considered on the TRO and
PI motions. In the interest of avoiding presenting unnecessary disputes to this Court, Plaintiffs
therefore move for summary adjudication on the record defendants have presented, without conceding
that defendants properly compiled a complete and accurate record of this matter.

1 On January 20, 2025, his first day in office, OPM Acting Director Charles Ezell distributed a
2 memo to “Heads and Acting Heads of Departments and Agencies” regarding “Guidance on
3 Probationary Periods, Administrative Leave and Details,” directing department and agency heads to
4 submit to OPM, by January 24, a list of the agency’s “employees on probationary periods, who have
5 served less than a year in a competitive service appointment, or who have served less than two years
6 in an excepted service appointment.” AR335-37. The memorandum further directed agencies to
7 “promptly determine whether those employees should be retained at the agency.” AR335.

8 On February 12, in an email signed by “OPM,” OPM directed agencies to commence
9 “Probationary Employee Actions.” Dkt. 111-5 at 1-2.⁴ The email purported to “clarif[y] immediate
10 next steps for probationary employees,” including terminating employees “immediately or as soon as
11 possible,” demanded that agencies provide reports to OPM “after actioning,” and continue to provide
12 daily reports of the probationary employees they had terminated and for any employees they intended
13 to keep, “an explanation of why.” *Id.* at 1.

14 Also on February 12, the CHCO Council⁵ also sent an email to federal agencies with the
15 subject line “Key Takeaways from CHCO Council Special Session,” providing a template letter “for
16 terminating ... probationary period employee[s].” AR368-69. The template letter included empty
17 fields for “[NAME],” “[TITLE],” and “[ORGANIZATION],” and included a statement that: “[T]he
18 Agency is removing you from your position of [TITLE]” because “[t]he Agency finds, based on your
19 performance, that you have not demonstrated that your further employment at the Agency would be
20 in the public interest.” AR371-72.⁶

21 The AR does not include *any* evidence that OPM directed agencies to conduct individualized
22 performance evaluations before using this template letter to terminate probationary employees, nor
23 does it include any evidence that any agency actually conducted such evaluations. In fact, in the
24

25 ⁴ Dkt. 111-5 is a February 12 email that the defendants portrayed as part of “the forthcoming
26 administrative record prepared for this APA matter.” Dkt. 111 at 2. Inexplicably, defendants omitted
this email from the AR they later filed. *See generally* Dkt. 218-3.

27 ⁵ The CHCO Council is an assemblage of Chief Human Capital Officers from multiple
departments and agencies.

28 ⁶ The template letter at AR371-72 is substantially similar to the template letters considered by
this Court at earlier stages of these proceedings. Dkt. 45 at 3; Dkt. 132 at 5 (citing Dkt. 87-1).

1 body of the email to which this template letter was attached, OPM specifically instructed agencies to
2 use the template letter *even if* no “previous performance evaluation” had identified any concerns with
3 the recipient’s performance. AR369 (“While agencies must identify performance or conduct
4 deficiencies in the notice terminating a probationer, such performance or conduct deficiencies do not
5 have to be identified in a previous performance evaluation.”). Per OPM’s instructions, even
6 employees with exemplary performance evaluations would be told that they were being terminated
7 “based on [their] performance.” AR371.⁷

8 Another CHCO Council email followed on February 14, 2025, informing all “CHCOs and
9 Deputy CHCOs” of “immediate next steps for probationary employees.” AR375. The email was
10 signed “OPM.” *Id.* Referencing a conference call that had taken place that day, the February 14
11 email confirmed OPM’s directive: “We have asked that you separate probationary employees that you
12 have not identified as mission-critical no later than end of the day Monday, 2/17.” *Id.* It also
13 reiterated OPM’s views regarding employee performance:

14 An employee’s performance must be measured in light of the existing
15 needs and interests of government. OPM has emphasized that
16 individual employee performance measurement should be “aligned
17 with and support organization goals” and “focus[] employee efforts on
18 achieving organizational and group goals.” An employee’s performance
19 must be viewed through the current needs and best interest of the
20 government, in light of the president’s directive to dramatically reduce
21 the size of the federal workforce.

19 Through the exemptions process, agencies have identified the highest
20 performing probationers in mission critical areas. Regulations on
21 probationary periods state: “The agency shall utilize the probationary
22 period as fully as possible to determine the fitness of the employee and
23 shall terminate his or her services during this period if the employee
24 fails to demonstrate fully his or her qualifications for continued
25 employment. 5 CFR 315.803. OPM believes “qualifications for
26 continued employment” in the current context means that only the
27 highest-performing probationers in mission-critical areas should be
28 retained.

24 AR375. The email attached a new version of OPM’s template termination letter. AR377-78. The
25 email also instructed each agency: “After actioning,”—an apparent reference to terminations—

27 ⁷ As the evidentiary record previously assembled by Plaintiffs demonstrates, multiple
28 employees who received a substantially similar template termination letter had received exemplary
performance evaluations. *See* Dkt. 202 at 6-7.

1 “please update the previous probationary employee spreadsheet you’ve sent us to include...[w]hich
2 probationary employees have been terminated and which you plan to keep. For those you plan to
3 keep, provide an explanation of why.” AR375.

4 Five days after this lawsuit was filed, on February 24, 2025, the CHCO Council sent another
5 email to CHCOs and Deputy CHCOs. AR389. Unlike the February 14 email, in which OPM
6 explicitly “asked that [agencies] separate probationary employees,” AR375, the February 24 email
7 adopts a different framing: “As agencies continue to make decisions on whether to retain
8 probationary employees, OPM has received numerous questions. To assist agencies in carrying out
9 their decisions, OPM offers, attached, the following frequently asked questions for agencies.”
10 AR389. The attached FAQ reiterates OPM’s view that the phrase “qualifications for continued
11 employment,” as used in 5 C.F.R. § 315.803, “means that only the highest-performing probationers in
12 mission-critical areas should be retained.” AR390.

13 On March 5, 2025, a few days after this Court issued its temporary restraining order, Ezell
14 circulated a revised version of his January 20, 2025 memorandum. AR400-02. The revised
15 memorandum added a disclaimer not included in the original version: “Please note that, by this
16 memorandum, OPM is not directing agencies to take any specific performance-based actions
17 regarding probationary employees. Agencies have ultimate decision-making over, and responsibility
18 for, such personnel actions.” AR401.

19 Throughout this period, OPM also applied an “exemptions process” (AR375) by which
20 agencies could ask to protect at least some of their probationary employees from termination.
21 Several examples from the AR demonstrate that OPM was calling the shots, not the employing
22 agencies.

23 On January 24, 2025, the Chairman of the National Transportation Safety Board (“NTSB”)
24 responded to Ezell’s January 20 memorandum with an email identifying the agency’s 20 probationary
25 employees, but also informed OPM that “all 20 employees are critical to our mission of public
26 safety.” AR339-40. On February 4, the NTSB Chairman wrote again, reiterating that all 20 NTSB
27 probationary employees were “critical to public safety.” AR338-39. OPM Chief of Staff Amanda
28 Scales forwarded this email to OPM Senior Advisor Noah Peters. AR338 (“[W]anted to forward the
Plaintiffs’ Memorandum in Support of Motion for Summary Adjudication, Case No. 25-cv-017580-WHA

1 below from NTSB re probationary employees/critical needs in their group. Good to have on our
2 minds.”). Peters responded: “Fine to exempt them.” *Id.*

3 In a February 11, 2025 email, a Department of Defense official asked OPM, on behalf of
4 herself and the CHCO for the Department of Housing and Urban Development (“HUD”), whether
5 OPM would be confirming its representation on an earlier call that certain groups of employees
6 would be exempted from the terminations: “At a CHCO meeting last week, *you indicated that*
7 *disabled veterans and PMF/interns would be excluded* from the probationary exercise. Is that still
8 the case?” AR357 (emphasis added); *see also id.* at 358.⁸

9 On February 16, 2025, Scales and James Sullivan (a Senior Advisor to the OPM Director)
10 emailed Hayley Conklin, a CHCO at the Department of Justice (“DOJ”). Scales directed Conklin to
11 “use the attached letter to separate from probationary employees, with the exception of high-
12 performing employees in mission critical roles and **any employees serving in the functions noted in**
13 **red*.**” AR382 (emphasis in original); *see also id.* (“Please note that for DOJ, **OPM has granted**
14 **Civil Appellate, Federal Programs Branch, Office of Immigration Litigation, and Office of**
15 **Solicitor General exemptions from the hiring freeze and from any guidance to terminate**
16 **probationary employees.**”) (emphasis in original).

17 Two days later, on February 18, DOJ’s Assistant Attorney General for Administration, Jolene
18 Lauria, emailed Scales, asking for a broader, department-wide exemption from the plan to terminate
19 probationary employees. AR386-88 (“92% of [DOJ’s probationary] employees are in critical
20 immigration, law enforcement, national security, and other critical support categories... **The**
21 **Department of Justice must be exempt from firing its probationary employees given the**
22 **criticality of the missions we support.**”) (emphasis in original). Scales forwarded the email to
23 Peters and Sullivan, writing: “Know DOJ is exempted for Civil Appellate, Federal Programs, Office
24

25 ⁸ Although Peters responded to the DoD official that it was “up to each agency” and “We should
26 not send out anything more formal,” AR358, this cannot be viewed as evidence that agencies had any
27 meaningful right to opt out of the mass termination plan without OPM’s permission. If CHCOs had
28 understood their agencies were free to make unfettered decisions whether to terminate their
probationary employees, they would have had no reason to seek clarification from OPM about which
employees they could protect. *Cf.* Dkt. 202 at 12 (“If the agencies exercised ultimate discretion, why
did OPM make them apply for exemptions?”).

1 of Immigration Litigation, and Office of Solicitor General right now and nothing more right now. Let
2 me know what you think here about going broader. Happy to set something up with her to discuss
3 live if we need.” AR386.

4 While the AR does not record the actual terminations of thousands of probationary employees
5 in multiple departments and agencies that ensued in February 2025, defendants have never disputed
6 that those well-documented terminations occurred. *See* Dkt. 45 at 8-9; Dkt. 132 at 10-11; Dkt. 202 at
7 11-14; *see also* Dkt. 144 and 144-1–144-8; Dkt. 185 and 185-1–185-6; Dkt. 216 and 216-1–216-19
8 (government compliance reports regarding terminated probationary employees).

9 ARGUMENT

10 “Summary judgment is appropriate when there is no genuine issue of material fact and the
11 moving party is entitled to judgment as a matter of law.” *Karuk Tribe of California v. U.S. Forest*
12 *Service*, 681 F.3d 1006, 1014 (9th Cir. 2012) (en banc). “Generally, judicial review of an agency
13 decision is limited to the administrative record on which the agency based the challenged decision.”
14 *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010).

15 **I. The Administrative Record Confirms that OPM Directed the Mass, Pretextual** 16 **Termination of Probationary Employees of Other Agencies.**

17 Even on the sparse and self-serving administrative record compiled by OPM, there is no
18 reasonably disputing that OPM directed the mass termination of probationary employees. First, OPM
19 ordered agencies to compile and send to OPM lists of their probationary employees, AR335-37, and
20 then it instructed those agencies to commence “actioning” those employees, AR375. As is clearly
21 stated in the February 14 email signed by OPM recounting OPM’s February 14 CHCO call: “We
22 have asked that you separate probationary employees that you have identified as mission-critical no
23 later than end of the day, Monday, 2/17.” AR375. That email proceeds to detail OPM’s views about
24 how probationary employees’ performance “*must*” be evaluated, directing agencies to terminate
25 employees *en masse* on the pretext that the terminations were “based on [their] performance,” while
26 simultaneously instructing that this “find[ing]” of inadequate performance need not be supported by
27 any performance evaluation. *Id.*; *see also* AR369 (“While agencies must identify performance or
28 conduct deficiencies in the notice terminating a probationer, such performance or conduct

1 deficiencies do not have to be identified in a previous performance evaluation.”); AR390 (OPM
2 “FAQ” stating that although 5 C.F.R. §315.804 requires that any termination notice “must include the
3 agency’s conclusions as to the inadequacies of the employee’s conduct,” “only the highest-
4 performing probationers in mission-critical areas should be retained.”). As this Court has previously
5 recognized, “An ‘ask,’ followed by a directive, is a directive.” Dkt. 132 at 10.

6 Moreover, the very existence of an “exemptions process” by which agencies could obtain
7 OPM’s permission to retain certain employees (AR375) cannot be squared with the OPM’s fiction
8 that it offered mere “guidance” to the agencies. If OPM had merely been offering take-it-or-leave-it
9 advice to the agencies, there would have been no reason for agencies to seek OPM’s permission to
10 exempt their employees from the mass termination directive. But the administrative record here
11 shows that multiple federal agencies explicitly asked requested “exemptions” from OPM’s
12 “probationary exercise.” AR338-39; AR357-58; AR382; AR386. When OPM leadership received
13 these “exemption” requests, it did not respond by stating that the recipients of its purported
14 “guidance” were free to take that guidance or to ignore it, or by stating there was no need to ask for
15 permission. Instead, OPM decided whether to “grant” or deny such “exemptions.” AR338 (OPM
16 Senior Adviser Peters approving exemption for NTSB); AR382 (OPM Chief of Staff Scales
17 confirming that “OPM has granted [several DOJ sections] exemptions from...any guidance to
18 terminate probationary employees.”).⁹ When OPM assumed authority to “grant” or deny
19 “exemptions” from its purported “guidance to terminate probationary employees,” it usurped the
20 authority undisputedly conferred by Congress on each agency to make its own employment
21 decisions. Again, as the Court previously recognized, “A choice—you may choose to retain your
22 probationers—followed by a caveat—if OPM grants your exemption request—is not a choice.” Dkt.

23
24 ⁹ The administrative record compiled by OPM includes examples where OPM “grants”
25 exemptions, but no examples of denials. As this Court previously recognized, however, the record
26 compiled by Plaintiffs earlier in these proceedings is replete with such examples (including “agency
27 memos, termination letters, congressional testimony, meeting transcripts, emails, and more”) where
28 OPM denied exemption requests. *See* Dkt. 132 at 11; Dkt. 45 at 2-5 (collecting evidence). OPM’s
failure to include these denials in the administrative record it compiled—whether inadvertent or not—
does matter to any legal issue in this case; what matters is that OPM assumed the authority to decide
whether agencies would be excused from terminating probationary employees, and it exercised that
authority. *See supra* n.8.

1 202 at 13.

2 To be sure, there is no formal memorandum on OPM letterhead directly ordering the mass
3 termination of probationary employees (instead, OPM sent emails). Nor does the administrative
4 record disclose the exact contents of the CHCO Council conference calls where OPM announced
5 various directives. *See* Dkt. 45 at 1-2; AR368-69; AR375. But that is not surprising; the
6 administrative record reveals that OPM tried to conceal its role. *See, e.g.*, AR357 (Peters, in response
7 to a CHCO’s request that OPM to confirm its oral representations that “disabled veterans... would be
8 excluded from the probationary exercise”: “We should not send out anything more formal.”).
9 Nevertheless, the administrative record as a whole confirms the uncontroverted narrative that the
10 Court already understood: OPM directed agencies to terminate their probationary employees on the
11 pretext that the terminations were for performance reasons; and agencies understood, and did, exactly
12 what OPM directed. *Cf. AFGE v. Trump*, 2025 WL 1541714 at *6-7 (rejecting OPM’s attempt to
13 characterize a directive to other agencies as mere “guidance” where the record showed that agency
14 action was subject to OPM’s approval).

15 **II. Plaintiffs Are Entitled to Summary Judgment on Their *Ultra Vires* Claim**

16 As this Court previously recognized, “[n]o statute—anywhere, ever—has granted OPM the
17 authority to direct the termination of employees in other agencies.” Dkt. 45 at 7-8; *see also* Dkt. 132
18 at 9-10 (“OPM did not have the authority to direct the firing of employees, probationary or otherwise,
19 in any *other* federal agency.”) (emphasis in original). OPM’s actions, as confirmed in the AR, run
20 roughshod over the statutes creating and granting authority to other federal agencies, as well as
21 OPM’s own narrow statutory mandate. As such, they rise to the level of such “extreme” agency error,
22 *Fed. Express Corp. v. U.S. Dep’t of Commerce*, 39 F.4th 756, 764 (D.C. Cir. 2022), as to be enjoined
23 as an *ultra vires* attempt to usurp Congress’ Article I legislative power.

24 “The ability to enjoin unconstitutional actions by state and federal officers is the creation of
25 courts of equity, and reflects a long history of judicial review of illegal executive action...”
26 *Armstrong v. Exceptional Child. Ctr., Inc.*, 575 U.S. 320, 327 (2015). “Equitable actions to enjoin
27 *ultra vires* official conduct do not depend upon the availability of a statutory cause of action; instead,
28 they seek a ‘judge-made remedy’ for injuries stemming from unauthorized government conduct, and

1 they rest on the historical availability of equitable review.” *Sierra Club v. Trump*, 963 F.3d 874, 890-
2 91 (9th Cir. 2020) (citing *Armstrong*, 575 U.S. at 327), *vacated and remanded on other grounds*
3 (*mootness*), 142 S. Ct. 46 (2021).

4 “Administrative agencies are creatures of statute. They accordingly possess only the authority
5 that Congress has provided.” *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., OSHA*, 595 U.S. 109, 117
6 (2022); *see also La. Pub. Serv. Comm’n v. F.C.C.*, 476 U.S. 355, 374 (1986) (“[A]n agency literally
7 has no power to act ... unless and until Congress confers power upon it.”). The President and
8 Executive branch agencies have no constitutional power to exercise Congress’ Article I powers by
9 attempting to unilaterally enact, amend, or repeal duly enacted statutes. *Clinton v. City of New York*,
10 524 U.S. 417, 438–39 (1998); *see also In re Aiken Cnty.*, 725 F.3d 255, 259 (D.C. Cir. 2013) (“the
11 President may not decline to follow a statutory mandate or prohibition simply because of policy
12 objections ... Those basic constitutional principles apply to the President and subordinate executive
13 agencies”). Indeed, because “the accumulation of all powers, legislative, executive, and judiciary, in
14 the same hands ... pose[s] an inherent threat to liberty[,]” each branch of the federal government must
15 stay within its proper domain. *Patchak v. Zinke*, 583 U.S. 244, 250 (2018) (plurality op.) (cleaned
16 up); *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923); *see also Bowsher v. Synar*, 478 U.S. 714,
17 721–22 (1986) (“there can be no liberty where the legislative and executive powers are united in the
18 same person”) (quoting *The Federalist* No. 47, p. 325 (J. Cooke ed. 1961)).

19 When one of the three branches exceeds the scope of its statutory or constitutional authority, it
20 falls to the federal courts to reestablish the proper division of federal power. *See, e.g., Plaut v.*
21 *Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (rebuking Congress’s intrusion into judicial sphere);
22 *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992) (preventing judiciary from intruding into
23 executive sphere); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952) (halting
24 President’s encroachment upon legislative sphere); *cf. Loper Bright Enterprises v. Raimondo*, 603
25 U.S. 369, 391-92 (2024) (refusing to imply into APA any deference to agency decisions interpreting
26 laws, because that would permit other branches to usurp Article III).

27 Federal agency action outside of any constitutional or statutory authority therefore may be
28 struck down as *ultra vires*. *See, e.g., Sierra Club*, 963 F.3d at 888-93 (9th Cir. 2020); *Chamber of*

1 *Com. of U.S. v. Reich*, 74 F.3d 1322, 1327 (D.C. Cir. 1996); *see also Leedom v. Kyne*, 358 U.S.184,
2 188 (1958); *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 691 (1949); *cf. United States v.*
3 *McIntosh*, 833 F.3d 1163, 1174 (9th Cir. 2016) (“both federalism and separation-of-powers
4 constraints in the Constitution serve to protect individual liberty, and a litigant in a proper case can
5 invoke such constraints ‘[w]hen government acts in excess of its lawful powers.’”); *AFGE v. Trump*,
6 2025 WL 1541714 at *8-9. It is well-established that there is “‘extreme’ agency error where the
7 agency has ‘stepped so plainly beyond the bounds of [its statutory authority], or acted so clearly in
8 defiance of it, as to warrant the immediate intervention of an equity court.’” *Fed. Express*, 39 F.4th at
9 764 (analyzing both “extent of the agency’s delegated authority” and whether “agency has acted
10 within that authority”) (quotations omitted); *see also Sierra Club*, 963 F.3d at 888-93.

11 Here, OPM’s conduct is readily established as *ultra vires*. Each federal agency has its own
12 authorizing statutes that govern its administration, including statutory provisions that authorize one or
13 more individuals to act as the head of the agency. *See, e.g.*, 10 U.S.C. §§111, 113 (Defense); 12
14 U.S.C. §5491 (CFPB); 16 U.S.C. §551 (Agriculture); 26 U.S.C. §§7801, 7803 (IRS); 38 U.S.C.
15 §§301, 303 (VA); 42 U.S.C. §§202, 203 (HHS); 42 U.S.C §§281, 282 (NIH); 42 U.S.C. §§3411, 3412
16 (Education); 42 U.S.C. §7131 (Energy); 51 U.S.C. §20111 (NASA). Congress has then authorized
17 each agency head to exercise powers of management over that agency and its employees, including
18 the hiring and firing of employees, consistent with any applicable laws. *See, e.g.*, 26 U.S.C. §§7803,
19 7804 (IRS); 42 U.S.C. §§7231, 7253 (Energy); 20 U.S.C. §3461 (Education); 12 U.S.C. §5492
20 (CFPB); 16 U.S.C. §§551, 554a, 554e (Agriculture); 38 U.S.C. §§303, 510 (VA); 10 U.S.C. §113
21 (Defense); 42 U.S.C. §203 (HHS); 42 U.S.C. §282 (NIH); 51 U.S.C. §§20111, 20113 (NASA).

22 In addition to these specific authorizing statutes, Congress also enacted a “General Authority
23 to Employ” statute that applies to all federal agencies. 5 U.S.C. §3101; *see also* 5 U.S.C. §301
24 (delegating general authority to each federal agency head to adopt regulations “for the government of
25 his department, the conduct of its employees, the distribution and performance of its business...”); 5
26 U.S.C. §302 (authorizing agency heads to delegate their authority to subordinate employees).

27 OPM’s actions seek to usurp these other agencies’ statutory authority by arrogating to OPM
28 itself the authority to direct other agencies’ employment decisions. By contrast to the employing

1 power that Congress vested in agency heads, Congress did not authorize OPM to hire or fire any
2 federal employees employed by any agency other than OPM itself. 5 U.S.C. §§1102, 1103. Rather,
3 OPM’s statutory role is merely to provide human resources support for the federal government
4 agencies, including by creating and publishing government-wide rules in compliance with the APA.
5 5 U.S.C. §§1103, 1105; *see also* §1101 (Notes) (President’s message: “The positive personnel
6 management tasks of the government--such as training, productivity programs, examinations, and pay
7 and benefits administration--would be the responsibility of an Office of Personnel Management.”).
8 Further, OPM’s authority with respect to the termination of employees of other agencies and
9 departments is limited to providing technical assistance and promulgating regulations. 5 U.S.C.
10 §§4304, 4305, 7514; *see also AFGE v. Trump*, 2025 WL 1541714 at *8 (“OPM [has] only
11 supervisory authority over the other federal agencies... We therefore agree with the district court that
12 [OPM’s] actions directing other federal agencies to engage in restructuring and large-scale RIFs were
13 *ultra vires*.”).

14 Moreover, even if OPM did have the power to terminate employees of other agencies it
15 cannot evade the statutory requirements with which agencies must comply. In the Civil Service
16 Reform Act, Congress established uniform standards for civil service employment across the federal
17 government, which govern agencies’ termination of employees for cause based on performance (5
18 U.S.C. §4303(a); 5 U.S.C. §7513(a)), and agency layoffs (“reductions in force,” or “RIFs”) (5 U.S.C.
19 §3502). These statutes do not permit agencies to terminate probationary employees, immediately and
20 *en masse*, or for pretextual “performance” reasons, and OPM cannot override these provisions.

21 OPM’s directive that agencies terminate their probationary employees *en masse* and for
22 uniform, pretextual performance reasons is so “extreme” and far outside OPM’s delegated power as
23 to assume legislative authority in violation of the Constitution’s separation of powers and myriad
24 statutes described above, and is therefore *ultra vires*. *Fed. Express*, 39 F.4th at 764. As in *Aiken*
25 *County*, “our constitutional system of separation of powers would be significantly altered if we were
26 to allow executive and independent agencies to disregard federal law in the manner asserted in this
27 case” 725 F.3d at 266-67. Now that the administrative record has put to rest the fiction that
28 OPM’s unlawful directives were mere guidance, summary judgment should be granted.

III. Plaintiffs Are Entitled to Summary Judgment on their APA Claims

OPM is an “agency” subject to the APA. *NTEU v. Helfer*, 53 F.3d 1289, 1292–93 (D.C. Cir. 1995); 5 U.S.C. §§551; 1103(a)(5), (7); 1105 (requiring OPM to comply with APA). Congress granted OPM a single exception to APA compliance, inapplicable here, for rules that extend only internally within OPM’s own “Office or its employees.” 5 U.S.C. §1103(b)(1).¹⁰ OPM’s actions violated the APA in three different ways: they are contrary to law, arbitrary and capricious, and constitute rulemaking that should have been conducted pursuant to APA procedures.

A. OPM’s Directive to Agencies is Final Agency Action.

As an initial matter, OPM’s order that other federal agencies terminate their probationary employees, nominally but not in reality based on their performance, constitutes final agency action for purposes of an APA challenge. 5 U.S.C. §704. Final agency action marks the “consummation of the agency’s decisionmaking process” and is the action by which “rights or obligations have been determined,” or from which “legal consequences will flow.” *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).¹¹ In ascertaining whether agency action is final, courts look at the action’s “practical effect,” and in particular, whether “immediate compliance is expected.” *Oregon Nat. Desert Ass’n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006). OPM’s order to terminate probationary workers was not “tentative or interlocutory”; it has all the hallmarks of a programmatic decision that constitutes final OPM action. *Bennett*, 520 U.S. at 178; *see also, e.g., Helfer*, 53 F.3d at 1292-93 (OPM rulemaking final action subject to APA review).

¹⁰ Although the administrative record does not disclose whether OPM acted at the President’s direction, the President’s involvement would not excuse OPM from APA compliance. The APA has long been held to apply with full force to agency action that implements presidential directives. *See, e.g., Franklin v. Mass.*, 505 U.S. 788, 828 (1992) (Scalia, J., concurring); *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 770 (9th Cir. 2018); *see also State v. Su*, 121 F.4th 1, 15 (9th Cir. 2024) (“The Supreme Court has never excepted a final rule from APA review because it carried out a presidential directive. Nor have we—or any other circuit.”).

¹¹ Final agency action is the programmatic decision, even if further steps are necessary to implement the program and comply with the directive. *E.g., Oregon v. Ashcroft*, 368 F.3d 1118, 1148 (9th Cir. 2004), *aff’d sub nom. Gonzales v. Oregon*, 546 U.S. 243 (2006) (“An agency action can be final even if its concrete legal effects are contingent upon a future event.”); *Env’t Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 869 (9th Cir. 2022) (“programmatic review” is final agency action regardless of whether “reviewing and approving individual, site-specific permits” remains).

1 Here, the administrative record shows that OPM directed each federal agency to “separate
2 probationary employees that you have not identified as mission-critical no later than Monday, 2/17.”
3 AR375. OPM provided the agencies with a template termination letter to facilitate immediate
4 compliance with its directive. AR 377-38; *see also, e.g.*, AR382 (OPM Chief of Staff Scales;
5 directing DOJ to “use the attached letter to separate from probationary employees.”). OPM
6 proceeded to grant (or deny) “exemptions” from that directive. Both the directives and the
7 “exemption” decisions were final agency action. *Bennett*, 520 U.S. at 178; *see also supra* at 2-7.

8 **B. OPM’s Actions Are Contrary to Law**

9 The APA prohibits agency action that exceeds statutory or constitutional authority or is
10 otherwise contrary to law. 5 U.S.C. §706(2)(A), (C); *Kaweah Delta Health Care Dist. v. Becerra*,
11 123 F.4th 939, 944 (9th Cir. 2024) (“[U]nder our system of separation of powers, neither good
12 intentions nor pressing policy problems can substitute for an agency’s lack of statutory authority to
13 act.”); *Northwest Environmental Advocates v. U.S. E.P.A.*, 537 F.3d 1006, 1025-27 (9th Cir. 2008).
14 For the same reasons that OPM’s actions are *ultra vires*, OPM has exceeded its own statutory
15 authority and usurped the authority of other agencies, and has therefore violated 5 U.S.C. §706(2)(A)
16 and (C). Dkt. 45 at 9 (“OPM’s direction to other agencies was not supported by any statutory
17 authority. Plaintiffs are therefore likely to show that OPM’s directive constituted an agency action
18 that was ‘in excess of statutory jurisdiction, authority, or limitations, or short of statutory right’ that
19 must be ‘[held unlawful and set aside.]’”) (quoting 5 U.S.C. §706(2)(C)); Dkt. 132 at 9-10.
20 Accordingly, “the only appropriate remedy is vacatur.” *Kaweah*, 123 F.4th at 944.

21 **C. OPM’s Actions Are Arbitrary and Capricious**

22 The APA also prohibits arbitrary and capricious action. 5 U.S.C. §706(2)(A); *Kalispel Tribe*
23 *of Indians v. U.S. Dep’t of the Interior*, 999 F.3d 683, 688 (9th Cir. 2021). Pursuant to this standard,
24 federal agencies are required to engage in “reasoned decisionmaking.” *Dep’t of Homeland Sec. v.*
25 *Regents of the Univ. of Cal.*, 591 U.S. 1, 16 (2020). To do so, an agency must “examine the relevant
26 data and articulate a satisfactory explanation for its action including a rational connection between
27 the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*,
28 463 U.S. 29, 43 (1983) (quotations omitted); *see also Drs. for Am. v. Off. of Pers. Mgmt.*, No. CV 25-

1 322 (JDB), 2025 WL 452707, at *8 (D.D.C. Feb. 11, 2025) (“[Plaintiff’s] arbitrary and capricious
2 argument is simple: the agencies’ removal decisions were “completely unreasoned” and thus were not
3 the product of reasoned decisionmaking. . . . The Court agrees that [Plaintiff] has demonstrated a
4 likelihood of success on the merits as to this claim.”).

5 “Reliance on facts that an agency knows are false at the time it relies on them is the essence of
6 arbitrary and capricious decisionmaking.” *Missouri Serv. Comm’n v. FERC*, 337 F.3d 1066, 1075
7 (D.C. Cir. 2003); *see also Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 57 (D.C. Cir. 2015)
8 (“An agency contravenes the APA when it “fails to examine the relevant data,” which could reveal
9 “that the figures being used are erroneous.”); *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 656 (9th Cir.
10 2009) (arbitrary and capricious action includes an “an explanation that runs counter to the evidence
11 before the agency or is so implausible that it could not be ascribed to a difference in view or the
12 product of agency expertise.”); *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977)
13 (Friendly, J.) (“Our review is deferential, but we are ‘not required to exhibit a naiveté from which
14 ordinary citizens are free.’”).

15 Because it was based on an unreasoned and pretextual attempt to characterize these
16 terminations uniformly as being based on employees’ “performance,” OPM’s mass termination order
17 must be voided as arbitrary and capricious on several grounds.

18 First, OPM disregarded 5 C.F.R. §315.804, which establishes procedural requirements for
19 probationary employee terminations for cause. Under that regulation, federal agencies may
20 “terminate an employee serving a probationary or trial period because his work performance or
21 conduct during this period fails to demonstrate his fitness or his qualifications for continued
22 employment,” but in so doing must “notify[] him in writing as to why he is being separated,” and
23 state, “as a minimum, . . . the agency’s conclusions as to the inadequacies of his performance or
24 conduct.” 5 C.F.R. §315.804(a)¹²; *see also* 5 C.F.R. §316.304 (same notice rights for other trial-

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¹² Executive Order 14284, issued April 24, 2025, purports to revoke 5 C.F.R. §315.804 and
replace it with a new civil service rule. The legality of that EO is not at issue in this case. At the time
of the mass probationary employee termination challenged in this case, §315.804 was in full force and
effect.

1 period employees in the excepted service).¹³ Instead, OPM directed agencies to send template
2 termination letters with no individualized statements of reasons and with a statement that employees
3 were being terminated for cause that had no factual basis (except in a tiny fraction of instances, *see*
4 Dkt. 217).

5 Second, OPM categorically directed agencies to terminate all probationary employees for
6 performance, except those previously identified as “mission critical,” without regard for any
7 individualized assessment of any given employee’s performance. AR369 (“While agencies must
8 identify performance or conduct deficiencies in the notice terminating a probationer, such
9 performance or conduct deficiencies do not have to be identified in a previous performance
10 evaluation.”).

11 Third, OPM categorically directed agencies to retain only their “mission-critical”
12 probationary employees, notwithstanding the limits on terminating probationers for cause that are set
13 forth in 5 C.F.R. §§315.804 (performance and misconduct) and 315.805 (reasons predating federal
14 employment). *See* AR375 (reiterating OPM’s view that only “mission-critical” employees “should be
15 retained”).

16 And fourth, as this Court previously explained: “The OPM template letter used to effectuate
17 [the] terminations—‘[t]he Agency finds, based on your performance, that you have not demonstrated
18 that your further employment at the Agency would be in the public interest’—was an obvious pretext
19 intended to obstruct appeal and avoid statutory and regulatory reduction-in-force procedures (for
20 example, the honoring of veteran preferences in the order of retention).” Dkt. 132 at 10-11 (citing
21 Dkt. 87-1 at 1; Dkt. 94-1 at 3-5); *see also* AR369.

24 ¹³ Section 315.804 codifies the concept inherent to the merit system, *see* 5 U.S.C. §2301(b)(6)
25 and (b)(8)(A), that to terminate a probationary employee for cause, the employer “‘must *honestly* be
26 dissatisfied with the probationer’s conduct or performance after giving him a fair trial on the job.’”
27 *McGuffin v. Soc. Sec. Admin.*, 942 F.3d 1099, 1102 (Fed. Cir. 2019) (quoting *Shaw v. United States*,
28 622 F.2d 520, 544 (Ct. Cl. 1980) (emphasis added)); *see also Dargo v. United States*, 176 Ct. Cl. 1193,
1206 (Ct. Cl. 1966) (termination of probationary employee for “competence” reasons must reflect
agency’s “honest judgment”); *Horne v. United States*, 419 F.2d 416, 419 (Ct. Cl. 1969) (termination of
probationary employee may not be “so lacking in rational support that it must be characterized as
arbitrary or capricious”).

1 Thus, the administrative record further confirms this Court’s prior findings that OPM’s
2 directive that agencies characterize the terminations as performance-based was a sham. By
3 disregarding limits upon its authority and directing agencies to deceive their employees, OPM acted
4 arbitrarily and capriciously in violation of 5 U.S.C. §706(2)(A).

5 **D. OPM Failed to Comply with Notice and Comment Rulemaking Obligations**

6 The APA further requires the Court to “hold unlawful and set aside” any program that fails to
7 comply with “procedure required by law.” 5 U.S.C. §706(2)(D). In particular, when a federal agency
8 promulgates a “rule,” defined in the APA as “ the whole or a part of an agency statement of general or
9 particular applicability and future effect designed to implement, interpret, or prescribe law or policy
10 or describing the organization, procedure, or practice requirements of an agency,” 5 U.S.C. §551(4),
11 the agency must first comply with procedural requirements prescribed by statute, including the
12 requirement to follow the notice-and-comment rulemaking process described in 5 U.S.C. §553. That
13 process requires the rulemaking agency to publish a general notice of rulemaking in the federal
14 register and to “give interested persons an opportunity to participate in the rule making through
15 submission of written data, views, or arguments.” 5 U.S.C. §553(b)-(c).

16 OPM’s authorizing statutes expressly incorporate these APA requirements. 5 U.S.C.
17 §§1103(b), 1105. Although the APA generally waives notice and comment requirements for internal
18 agency “personnel” rules (5 U.S.C. §553(a)), Congress expressly made any government-wide rules
19 created by OPM subject to APA notice and comment. *See* 5 U.S.C. §1105 (“Subject to §1103(b) of
20 this title, in the exercise of the functions assigned under this chapter, the Director shall be subject to
21 subsections (b), (c), and (d) of section 553 of this title”); *see also id.* §1103(b)(1) (“The Director shall
22 publish in the Federal Register general notice of any rule or regulation which is proposed by the
23 Office and the application of which does not apply solely to the Office or its employees. Any such
24 notice shall include the matter required under section 553(b)(1), (2), and (3) of this title.”). Courts
25 have accordingly recognized that when OPM promulgates a new policy concerning federal
26 employees outside OPM itself, OPM is subject to notice-and-comment rulemaking requirements.
27 *See, e.g., Nat’l Treasury Emps. Union v. Newman*, 768 F.Supp. 8, 11 (D.D.C. 1991) (holding OPM’s
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1 “new program of examinations governing hiring for 112 career positions within the federal
2 government” was “clearly” a rule under the APA, subject to notice-and-comment rulemaking).

3 Here, the AR shows that OPM promulgated at least three government-wide “rules” which,
4 pursuant to 5 U.S.C. §§1105 and 1103(b)(1), could only be issued by means of notice-and-comment
5 rulemaking. First, OPM directed all department and agency heads to prepare and submit a report
6 listing all employees on probationary periods; to “promptly determine whether those employees
7 should be retained at the agency”; and to terminate all but their “mission-critical” probationers by
8 February 17. AR335-37, AR375. Second, OPM purported to redefine—on a government-wide
9 basis—employee “fitness” and “qualifications” as those terms are used in 5 C.F.R. §315.803, and
10 employee “performance” as a ground for termination as used in 5 C.F.R. §315.804, by instructing all
11 agencies that “only the highest-performing probationers in mission critical areas” were to be
12 considered fit for continued employment, AR377-78, and that “[w]hile agencies must identify
13 performance or conduct deficiencies in the notice terminating a probationer, such performance or
14 conduct deficiencies do not have to be identified in a previous performance evaluation,” AR369.
15 Third, OPM created a novel process by which agencies could secure exemptions from OPM’s equally
16 novel mass termination program. AR338-39, 357-58, 382, 386-88.

17 Each of OPM’s new government-wide policies were “statements of general ... applicability
18 and practical effect.” 5 U.S.C. §551(4). Such “change[s] in existing law or policy,” *Alcaraz v. Block*,
19 746 F.2d 593, 613 (9th Cir. 1984), were therefore “clearly ... ‘rule[s]’” that were subject to notice-
20 and-comment rulemaking requirements. *Newman*, 768 F. Supp. at 11. This is particularly clear with
21 respect to OPM’s wholesale revisions of 5 C.F.R. §§315.803 and 315.804, which were themselves
22 rules that were adopted pursuant to the APA. *See Doe v. Trump*, 288 F.Supp.3d 1045, 1075 (W.D.
23 Wash. 2017) (“Where the original rule was adopted after a notice and comment period, courts have
24 generally found the decision to alter those rules to be substantive, and therefore subject to APA
25 rulemaking procedures as well.”).

26 It cannot reasonably be disputed that OPM did not comply with the APA’s notice-and-
27 comment requirements. OPM therefore adopted its new government-wide rules “without observance
28 of procedure required by law,” and those rules are invalid. *Empire Health Found. for Valley Hosp.*

1 *Med. Ctr. v. Azar*, 958 F.3d 873, 882 (9th Cir. 2020), *reversed and remanded on other grounds, sub*
2 *nom. Becerra v. Empire Health Foundation*, 597 U.S. 424 (2022) (quoting 5 U.S.C. §706(2)(D)); *see*
3 *also Chief Probation Officers of Cal. v. Shalala*, 118 F.3d 1327, 1329 (9th Cir. 1997) (“Rules
4 requiring notice and comment are invalid if the promulgating agency fails to comply with the
5 applicable procedural requirements.”); *Rivera v. Patino*, 524 F. Supp. 136, 147 (N.D. Cal. 1981) (“It
6 is fundamental that administrative regulations are void unless they are promulgated in strict
7 compliance with the Administrative Procedure Act.”).

8 **III. Plaintiffs Are Entitled to Declaratory and Permanent Injunctive Relief**

9 Because the administrative record leaves no disputes of material fact, and plaintiffs are
10 entitled to judgment as a matter of law on that record, this Court should enter declaratory and
11 permanent injunctive relief as demanded in the Second Amended Complaint. *See* Dkt. 90 at 55-56.

12 First, the Court should issue a declaratory judgment that OPM lacked the authority to direct
13 other agencies to terminate their probationary employees, and that OPM’s actions and the resulting
14 February mass terminations were *ultra vires* and violated the APA.

15 Second, the Court should vacate OPM’s unlawful mass termination directive and enter such
16 relief as is necessary to fully unwind that unlawful action. This is the appropriate form of relief for
17 Plaintiffs’ APA and *ultra vires* claims, and includes converting the Court’s April 18 preliminary
18 injunction to permanent relief and prohibiting OPM and the relief defendant agencies from giving
19 any further effect to the unlawful February mass terminations. *See United States v. Oakland*
20 *Cannabis Buyers’ Coop.*, 532 U.S. 483, 496 (2001) (“[W]hen district courts are properly acting as
21 courts of equity, they have discretion unless a statute clearly provides otherwise.”) (*ultra vires*);
22 *Kaweah*, 123 F.4th at 953 (“Section 706(2) of the APA states that if a reviewing court finds that an
23 agency action is ‘in excess of statutory jurisdiction, authority, or limitations, or short of statutory
24 right’ then the court ‘shall ... hold unlawful and set aside’ that agency action.”) (emphasis in original).
25 The “statutory power [under the APA] to ‘set aside’ agency action is more than a mere non-
26 enforcement remedy,” and encompasses “the power to ‘strike down’ an agency’s work, and the
27 disapproved agency action is treated as though it had never happened.” *Griffin v. HM Fla.-ORL,*
28 *LLC*, __ U.S. __, 144 S. Ct. 1, 2 n.1 (2023) (Kavanaugh, J.) (quotation omitted).

1 “[T]his court, as a court of equity conducting judicial review under the APA, has broad
2 powers to order mandatory affirmative relief, if such relief is necessary to accomplish complete
3 justice.” *Nw. Env’t Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 680–81 (9th Cir. 2007)
4 (internal quotation marks and citations omitted); *see also Driftless Area Land Conservancy v. Valcq*,
5 16 F.4th 508, 522 (7th Cir. 2021) (“Vacatur [of agency action] retroactively undoes or expunges a
6 past [agency] action....*vacatur unwinds the challenged agency action.*”) (emphasis added); *Jane Doe*
7 *I v. Nielsen*, 357 F.Supp.3d 972, 1003–04 (N.D. Cal. 2018) (exercising equitable authority under the
8 APA to unwind unlawful denials of refugee status by setting aside the unlawful notices of
9 ineligibility, requiring that any future notices be corrected and re-issued, and reinstating the time
10 within which potential refugees could seek review). Notwithstanding the Court’s preliminary
11 injunctions, probationary employees who were wrongfully terminated pursuant to OPM’s unlawful
12 directive continue to suffer adverse consequences that must be “unw[ou]nd” to effectively strike
13 down that unlawful action. *Valcq*, 16 F.4th at 522.

14 To give full effect to the Court’s injunction, certain further corrective actions are necessary to
15 purge the remaining taint on probationary employees’ careers from OPM’s unlawful conduct.
16 Despite this Court’s April 18 order that the relief defendant agencies issue corrective letters to
17 probationary employees attesting that they were not in fact terminated for performance-based
18 reasons, many affected probationary employees have reported that their official government
19 personnel files continue to reflect that they were terminated for performance reasons. *See, e.g.*,
20 Holbrook Dec. Exh. 7 (Commerce); Kot Dec. Exh. 6 (Commerce); Schwarz Dec. Exh. B (HHS) (SF-
21 50 forms stating that employees were terminated on the basis of their performance and/or pursuant to
22 5 C.F.R. §315.804). In addition to the corrective notices the Court ordered each employee to receive,
23 the relief defendant agencies should be further ordered to promptly update each terminated
24 probationary employees’ personnel files, including employee status change forms called SF-50s, to
25 remove any references to performance-based terminations. Probationary employees who were
26 unlawfully terminated in February 2025 may seek new or different positions in the federal service in
27 the future, and, to enable those employees to compete fairly for future employment, their official
28 government personnel files should accurately reflect that they were *not* terminated based on their

1 performance. *See, e.g.*, Holbrook Dec. ¶15 (“The government’s failure to correct my SF-50 to reflect
2 that I was not terminated for performance will make it much harder for me to obtain a future
3 government job. I’ve always wanted to be a public servant, and working for the federal government
4 was my dream job. But any department or agency that would consider hiring me in the future will
5 obtain my official personnel file, and see the SF-50 and its reference that I was fired based on
6 performance.”); Schwarz Dec. ¶¶7-8.¹⁴ Further to cleanse the taint of OPM’s unlawful actions,
7 employees’ personnel files should be corrected to reflect that any dates of retroactive reinstatement
8 pursuant to this Court’s orders (or orders issued by the district court in *Maryland v. U.S. Dept. of*
9 *Agric.*, Case No. 25-00748 (D. Md.)), should be counted toward the employee’s probationary or trial
10 period.

11 In addition, the corrective letters sent by several agencies pursuant the Court’s April 18
12 preliminary injunction conflict with the plain terms of that injunction. Schwarz Dec. ¶¶3-5 & Exh. A
13 (Agriculture, HHS, HUD, and Interior); Blake Dec. ¶¶4-5 & Exh. 1 (Transportation); Cooley Dec.
14 Exh. 5 (Commerce); Dkt. 216-16 at 4 (EPA). All such letters require further corrective action.

15 Although these agencies’ letters accurately report this Court’s finding that probationary
16 employees were not terminated for performance reasons, they also include an agency statement that
17 the Court’s finding is “legally and factually incorrect” and is being appealed. Schwarz Dec. ¶¶3-5 &
18 Exh. A (Agriculture, HHS, HUD, and Interior); Blake Dec. ¶¶4-5 & Exh. 1 (Transportation); Cooley
19 Dec. Exh. 5 (Commerce); Dkt. 216-16 at 4 (EPA).¹⁵ These letters can be fairly construed, therefore,
20 as agency statements that the recipients actually *were* terminated for performance reasons. Indeed,
21 many probationary employees have found this refusal to comply with this Court’s order particularly
22 distressing, as it appears the government is deploying semantics to avoid responsibility for its actions.
23 *Cf. Carter v. Local 556, Transport Workers Union of Am.*, ___ F.4th ___, 2025 WL 1340536 at *28 (5th
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25 ¹⁴ In response to the Court’s April 18 injunction, the relief defendants submitted declarations
26 under seal establishing that agencies terminated only a tiny number of probationary employees in
February 2025 for genuine performance-based reasons. Dkt. 217.

27 ¹⁵ These letters further state that they “shall not serve as any basis for liability against the
28 [issuing agency] or any other agency or instrumentality of the Federal government, before any court or
in any administrative proceeding.” *See, e.g.*, Dkt. 216-16 at 4.

1 Cir. May 8, 2025) (affirming contempt finding where defendant undermined efficacy of court-ordered
2 notice through self-serving alteration of the court’s intended message; “[Defendant’s] bad-faith,
3 semantic attempt to avoid internal responsibility for its actions by simply notifying its employees of
4 the judgment in no way reflects compliance, let alone compliance describable as substantial.”). Each
5 relief defendant should be required to state in further corrective letters, without hedging or
6 qualification, that these probationary employees were not terminated for performance-based reasons.

7 Also, many of the corrective letters do not include the recipient employee’s name. *See, e.g.,*
8 Schwarz Dec. ¶6 & Exh. A at 3 (HUD); Cooley Dec. Exh. 5 (Commerce); Reed Dec. Exh. 5; Valenti
9 Dec. Exh. 5. While this might appear to be a minor issue because the affected employees plainly
10 received the letters at their home or email addresses, it is likely to affect employees who are searching
11 for new jobs, or currently seeking unemployment, who need to demonstrate they were not terminated
12 for cause. An employee bearing a form letter that does not include the employee’s name on its face
13 may be hindered in convincing a potential employer or state unemployment agency that they are the
14 legitimate recipient of the letter. *See, e.g.,* Reed Dec. ¶14 (“This is going to make it harder for me in
15 future job searches to establish that I was not terminated from my position at NOAA for cause, but
16 instead was caught up in a mass termination, because I will always have to prove that I am actually
17 the person to whom the May 7 letter was directed.”).¹⁶

18 Finally, terminated probationary employees of the National Oceanic & Atmospheric
19 Administration (“NOAA”) have been subjected to unique noncompliance that must be corrected.
20 Those employees, who were originally terminated on February 27 as part of the mass termination,
21 were briefly reinstated effective March 17 in compliance with the TRO in *Maryland v. U.S.*
22 *Department of Agriculture*, and were later re-terminated on April 10, *retroactively to February 27*,
23 after the Fourth Circuit stayed the *Maryland* district court’s order. Holbrook Dec. Exh. 3; Cooley
24 Dec. Exh. 3; Kot Dec. Exh. 3; Reed Dec. Exh. 3; Valenti Dec. Exh. 3; Seid-Green Dec. Exh. 3. Thus,

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¹⁶ For example, the Department of Commerce sent its form corrective letters to employees listed as bcc’s on a generic email, so an employee cannot even demonstrate that she received the email in question without providing further information. *See, e.g.,* Reed Dec. ¶14; Holbrook Dec. ¶16.

1 NOAA has continued to give effect to the unlawful OPM-directed mass termination from February.
2 Indeed, the Commerce Department (NOAA's parent agency) has disputed unemployment claims on
3 the grounds that probationary employees were actually terminated for performance reasons, *even*
4 *after those employees were issued corrective notices pursuant to Court's April 18 order*. Holbrook
5 Dec. ¶¶10-13 & Exhs. 5-7. All relief defendants, and the Commerce Department in particular, should
6 be permanently enjoined from giving further effect to the unlawful OPM-directed mass termination,
7 including specific prohibition of retroactive terminations.

8 Moreover, at NOAA, the retroactive re-termination threatens concrete harm to many of those
9 employees, notwithstanding corrective notices issued pursuant to this Court's April 18 preliminary
10 injunction, because the affected employees were also notified that as a result of the retroactive
11 termination, their federal employee health benefits were retroactively cancelled effective April 8,
12 2025, despite any medical expenses they might have incurred after that date – and even though during
13 their reinstatement, those employees had deductions from their pay for their share of federal health
14 benefits premiums. *See, e.g.*, Seid-Green Dec. ¶¶8, 11 (out-of-pocket expenses for surgery on April
15 9); *see also id.* Exh. 4 (notice re retroactive health benefits termination; Cooley Dec. Exh. 4; Kot Dec.
16 Exh. 4; Reed Dec. Exh. 4; Holbrook Dec. Exh. 4; Valenti Dec. Exh. 4.¹⁷ To fully unwind the effects
17 of the unlawful OPM-directed terminations, these employees should be made whole for any out-of-
18 pocket medical expenses incurred as a result of the retroactive terminations.

19 CONCLUSION

20 For the forgoing reasons, Plaintiffs' motion for summary adjudication of Claims I-IV of the
21 Second Amended Complaint should be granted.
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24 ¹⁷ *See also* <https://oversightdemocrats.house.gov/sites/evo-subsites/democrats-oversight.house.gov/files/evo-media-document/2025-06-04.lynch-to-commerce-lutnick-re-fired-worker-health-coverage.pdf> (letter from Rep. Steven Lynch, Acting Ranking Member of House Oversight Committee, to Secretary of Commerce); Valenti Dec. ¶10 (out-of-pocket medical expenses not covered by federal benefits); Kot Dec. ¶11 (same); Holbrook Dec. ¶9 (delaying medical appointments to avoid out-of-pocket expenses); Reed Dec. ¶11 (same). All of the NOAA declarants report that health benefits premiums were deducted from their pay while they were on administrative leave until they were terminated retroactively on April 10. Cooley Dec. ¶9; Kot Dec. ¶8; Holbrook Dec. ¶6; Reed Dec. ¶8; Seid-Green Dec. ¶8; Valenti Dec. ¶7.

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2 Scott A. Kronland
3 Stacey M. Leyton
4 Eileen B. Goldsmith
5 Danielle E. Leonard
6 Robin S. Tholin
7 James Baltzer
8 ALTSHULER BERZON LLP
9 177 Post St., Suite 300
10 San Francisco, CA 94108
11 Tel: (415) 421-7151

12 By: /s/ Danielle Leonard

13 *Attorneys for Plaintiff Organizations*

14 Norman L. Eisen (*pro hac vice*)
15 Pooja Chaudhuri (SBN 314847)
16 STATE DEMOCRACY DEFENDERS
17 FUND
18 600 Pennsylvania Avenue SE #15180
19 Washington, DC 20003
20 Tel: (202) 594-9958
21 Norman@statedemocracydefenders.org
22 Pooja@statedemocracydefenders.org

23 By: /s/ Norman L. Eisen

24 *Attorneys for Plaintiff Organizations*

25 Rushab Sanghvi (SBN 302809)
26 AMERICAN FEDERATION OF GOVERNMENT
27 EMPLOYEES
28 80 F Street, NW
Washington, DC 20001
Tel: (202) 639-6426
Sanghr@afge.org

By: /s/ Rushab Sanghvi

*Attorneys for Plaintiff American Federation of
Government Employees (AFGE)*

Teague Paterson (SBN 226659)
Matthew Blumin (*pro hac vice*)
AMERICAN FEDERATION OF STATE, COUNTY,
AND MUNICIPAL EMPLOYEES
1625 L Street, N.W.

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28

Washington, D.C. 20036
Tel: (202) 775-5900
TPaterson@afscme.org
MBlumin@afscme.org

By: /s/Teague Paterson

*Attorneys for Plaintiff American Federation of State
County and Municipal Employees (AFSCME)*

Tera M. Heintz (SBN 241414)
Cristina Sepe (SBN 308023)
Cynthia Alexander, WA Bar No. 46019 (pro hac vice)
Deputy Solicitors General
OFFICE OF THE WASHINGTON STATE ATTORNEY
GENERAL
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-7744
tera.heintz@atg.wa.gov
cristina.sepe@atg.wa.gov
cynthia.alexander@atg.wa.gov

By: /s/Tera M. Heintz

Attorneys for Plaintiff State of Washington