IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL TREASURY EMPLOYEES UNION, Plaintiff, v. UNITED STATES OF AMERICA, *et al.*, Defendants.	Civil Action No. 19-cv-50 (RJL)
JANETTE HARDY, *et al.*, Plaintiffs, v. DONALD J. TRUMP, *in his official capacity as President of the United States, et al.*, Defendants.	Civil Action No. 19-cv-51 (RJL)

DEFENDANTS' COMBINED MEMORANDUM IN SUPPORT OF MOTIONS TO DISMISS

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INTRODUCTION

These two cases are brought by (or on behalf of) federal employees who were deemed "excepted" and therefore required to work during the recent lapse in appropriations. *See Nat'l Treasury Emps. Union (NTEU) v. United States*, 19-cv-50 (D.D.C.), Am. Compl. (ECF No. 13); *Hardy v. Trump*, 19-cv-51 (D.D.C.), Am. Compl (ECF No. 7). The lapse in appropriations ended almost two months ago, however, and all of the Plaintiffs have now returned to work, as well as been compensated for the work they performed during the lapse. Notwithstanding the restoration of appropriations, and the complete resolution of Plaintiffs' purported injuries, Plaintiffs still wish to pursue their claims challenging the Government's actions during the recent lapse.

Given that appropriations have now been restored, all of Plaintiffs' claims are moot. Plaintiffs do not meaningfully dispute that point, but instead contend that their claims are "capable of repetition but evading review." That exception applies only in extraordinary cases, however, and the D.C. Circuit has twice held that claims arising during lapses in appropriations do *not* satisfy the exception's requirements. After the October 2013 lapse in appropriations, a plaintiff sought to continue with his claims challenging the Government's actions during the lapse, but the D.C. Circuit affirmed the case's dismissal on mootness grounds, holding that the plaintiff's claims "do not qualify for the capable-of-repetition, yet-evading-review exception to the mootness doctrine because the likelihood of a future government shutdown is too speculative." *Leonard v. Dep't of Def.*, 598 F. App'x 9, 10 (D.C. Cir. 2015).

Similarly, after the December 1995 – January 1996 lapse in appropriations, in a lawsuit similar to the present ones (with NTEU as one of the plaintiffs), Judge Sullivan held that all of the claims were moot and did not satisfy the "capable of repetition but evading review" exception because "[i]t would be entirely speculative for this Court to attempt to predict if, and when, another lapse in appropriations may occur, how long that lapse might be, which agencies might be subject

to the lapse, which employees might be affected, and whether employees will be required to work without compensation." *Am. Fed'n of Gov't Employees (AFGE) v. Rivlin*, 995 F. Supp. 165, 166 (D.D.C. 1998). On appeal, the D.C. Circuit summarily affirmed the dismissal, stating that "[t]he merits of the parties' positions are so clear as to warrant summary action." *AFGE v. Raines*, No. 98-5045, 1998 WL 545417 (D.C. Cir. July 15, 1998) (per curiam).

Consistent with these decisions—as well as decisions from several other courts—Plaintiffs' claims here are likewise moot and do not satisfy the requirements of "capable of repetition but evading review." Even assuming Plaintiffs' claims satisfy the "evading review" prong, Plaintiffs cannot demonstrate that this same dispute, between the same parties, presenting the same alleged wrongs, is genuinely likely to recur. In particular, this Court would have to make numerous speculative assumptions to conclude that this same dispute is likely to recur: (1) that another lapse in appropriations will occur; (2) that the same agencies will be affected by the lapse; (3) that the agencies will respond to the lapse in exactly the same way; (4) that the Plaintiffs here will remain employed by the Federal Government in their exact same positions whenever the lapse does occur; and (5) that the lapse will occur at a time in the calendar year that implicates Plaintiffs' claims (*e.g.*, during tax filing season). Each of these contingencies is wholly speculative, and collectively they preclude Plaintiffs from demonstrating that their claims are capable of repetition. Accordingly, all of Plaintiffs' claims should be dismissed as moot.

Even apart from mootness, there are several additional reasons why Plaintiffs' claims are not justiciable. First, NTEU's Amended Complaint should be dismissed because NTEU has failed to satisfy the requirements for associational standing—in particular, by failing to name any individual members of NTEU that have standing in their own right. Second, none of the Plaintiffs has plausibly alleged a non-speculative injury-in-fact sufficient to satisfy Article III. Third, all of

Plaintiffs' claims (with one possible exception) are independently precluded pursuant to the Civil Service Reform Act (CSRA). Finally, even if the Court were to conclude that it had jurisdiction over Plaintiffs' claims, the vast majority of those claims would still need to be dismissed for lack of a cognizable cause of action.

The Court need not reach any of these alternative arguments for dismissal, however, if it concludes that Plaintiffs' claims are now moot. Given the straightforward nature of the mootness argument, the Government respectfully submits that is the clearest basis for dismissal. Accordingly, because the lapse in appropriations has now ended, Plaintiffs' claims are moot, and their Amended Complaints should be dismissed for lack of subject-matter jurisdiction.

BACKGROUND

I. LEGAL FRAMEWORK

A. Congress's Power Over the Purse and the Anti-Deficiency Act

Under the Constitution, Congress has "exclusive power over the federal purse[.]" *Rochester Pure Waters Dist. v. EPA*, 960 F.2d 180, 185 (D.C. Cir. 1992). In particular, the Appropriations Clause provides: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law[.]" U.S. Const., art. I, § 9, cl. 7. This Clause provides a "straightforward and explicit command[.]" *OPM v. Richmond*, 496 U.S. 414, 424 (1990). "It means simply that no money can be paid out of the Treasury unless it has been appropriated by an Act of Congress." *Id*. (quoting *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937)). Beyond just limiting disbursements from the Treasury, however, the Appropriations Clause also has "a more fundamental and comprehensive purpose"—namely, "to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." *Id.* at 427-28.

In addition to the powers granted by the Constitution, "[f]ederal statutes reinforce Congress's control over appropriated funds." *Dep't of Navy v. Fed. Labor Relations Auth.*, 665 F.3d 1339, 1347 (D.C. Cir. 2012); *see also Harrington v. Bush*, 553 F.2d 190, 194 (D.C. Cir. 1977) ("Th[e] [Appropriations] [C]lause is not self-defining and Congress has plenary power to give meaning to the provision."). One of the statutes that gives meaning to the Appropriations Clause is the Anti-Deficiency Act, 31 U.S.C. §§ 1341-42. *See Dep't of Navy*, 665 F.3d at 1347.

The Anti-Deficiency Act limits the circumstances in which federal employees may incur obligations on behalf of the United States in the absence of, or in excess of, available appropriations. The Act has existed in some form for almost 150 years. *See* 16 Stat. 251, § 7 (July 12, 1870). In its current form, the Anti-Deficiency Act (in pertinent part) prohibits expenditures or obligations in excess of the amount of appropriations available, *see* 31 U.S.C § 1341(a)(1)(A), as well as any "contract or obligation for the payment of money before an appropriation is made unless authorized by law[.]" *Id.* § 1341(a)(1)(B). One of the "authorized by law" exceptions is in the following section of the Act, which allows the Government to "accept voluntary services . . . or employ personal services exceeding that authorized by law" in "emergencies involving the safety of human life or the protection of property." *Id.* § 1342; *see also Kornitzky Grp., LLC v. Elwell*, 912 F.3d 637, 639-41 (D.C. Cir. 2019) (Randolph, J., dissenting). The statute makes clear, however, that the "emergency" exception "does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property." 31 U.S.C. § 1342.

B. Implementation of the Anti-Deficiency Act During a Lapse in Appropriations

When a lapse in appropriated funding occurs, consistent with the Anti-Deficiency Act, agencies must generally cease their activities unless those activities fall within one of the Act's exceptions. To help agencies determine which activities are "excepted" from the Act, the

Department of Justice (DOJ) has published several opinions on the subject. *See, e.g.*, *Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations*, 43 Op. Att'y Gen. 293 (Jan. 16, 1981) ("*1981 AG Op.*"); *Government Operations In the Event of a Lapse in Appropriations*, 1995 WL 17216091 (Aug. 16, 1995) ("*1995 OLC Op.*").

In those opinions, DOJ identified five categories of activities that, consistent with the Anti-Deficiency Act, may continue during a lapse in appropriations:

1. Activities that are not funded through annual appropriations, and therefore may continue without incurring any unauthorized obligations (*e.g.*, social security payments that are funded through an indefinite appropriation);

2. Activities where Congress has expressly authorized the agency to incur obligations in advance of appropriations (*e.g.*, specific contracting authority);

3. Activities where the authority to obligate is necessarily implied by statute (*e.g.*, the check-processing functions necessary to disburse the social-security benefits that operate under an indefinite appropriation);

4. Activities necessary to the discharge of the President's constitutional duties and powers; and

5. Activities justified under the "emergency" exception of § 1342, *i.e.*, "emergencies involving the safety of human life or the protection of property."

See 1995 OLC Op., 1995 WL 17216091 at *3-4; *1981 AG Op.*, 43 Op. Att'y Gen. at 296-303.

Specifically with respect to the fifth category of activities, DOJ consulted the history of § 1342 to determine what types of agency activities satisfy the standard. In the 1981 opinion, the Attorney General crafted a two-part test for determining whether the "emergency" standard of § 1342 was satisfied:

> First, there must be some reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property. Second, there must be some reasonable likelihood that the safety of human life or the protection of property would be compromised, in some degree, by delay in the performance of the function in question.

1981 AG Op., 43 Op. Att'y Gen. at 302.

In 1995, OLC re-examined the question in light of an amendment to § 1342 in 1990. *See 1995 OLC Op.*, 1995 WL 17216091 at *1. Ultimately, OLC concluded that "the [Attorney General's] 1981 articulation is a fair reading of the Antideficiency Act even after the 1990 amendment," but that some clarification was necessary in order to "forestall possible misinterpretations" and prevent the Attorney General's opinion from "be[ing] read more expansively than was intended[.]" *Id.* at *6. In particular, OLC concluded that, in the Attorney General's two-part standard, "the second criteria's use of the phrase 'in some degree' should be replaced with the phrase, 'in some significant degree.'" *Id.* This change avoided "too expansive an application of the emergency provision" by clarifying that the exception does not apply when "the increased risk to life or property [is] insignificant[.]" *Id.* at *7; *see also Kornitzky Grp.*, 912 F.3d at 640 (Randolph, J., dissenting) ("An opinion of the Office of Legal Counsel concludes, correctly I believe, that 'the emergencies exception applies only to cases of threat to human life or property where the threat can be reasonably said to be near at hand and demanding of immediate response.'" (quoting *1995 OLC Op.*, 1995 WL 17216091 at *7)).

Based on the advice contained within these DOJ opinions, the Office of Management and Budget (OMB) directs that agencies prepare for possible lapses in appropriations and develop "contingency plans" setting forth what agency activities will continue. Most recently, in January 2018, OMB issued a memorandum to the heads of all agencies instructing them to review their contingency plans, and "ensure that only those activities that are 'excepted' pursuant to applicable legal requirements would continue to be performed during a lapse in the appropriation for those activities[.]" OMB Mem. M-18-05, *Planning for Agency Operations during a Potential Lapse in Appropriations*, at 1 (Jan. 19, 2018) (previously filed as Exh. 1, *NTEU* ECF No. 19-1, *Hardy* ECF No. 21-1).

II. FACTUAL AND PROCEDURAL HISTORY

A. The Present Lawsuits

At the end of the day on December 21, 2018, the funding for several Executive Branch agencies expired, leaving those agencies without appropriated funding. As a result, those agencies began an "orderly shutdown" of certain activities, consistent with the Anti-Deficiency Act and guidance from OLC and OMB.

Approximately three weeks after the lapse in appropriations began, Plaintiffs in these two cases filed suit challenging various aspects of how certain agencies had responded to the lapse. In *NTEU v. United States*, 19-cv-50 (D.D.C.), Plaintiff NTEU is a union representing federal employees contending that the Anti-Deficiency Act is unconstitutional; that the OMB memorandum from January 2018 is unlawful because it interprets § 1342's emergency exception in an overly broad manner; and that the IRS's January 2019 Tax Filing Season contingency plan is unlawful because it labels too many employees "excepted." NTEU thus requests an injunction prohibiting the Government from employing excepted workers during the lapse in appropriations and from relying on the OMB memorandum, and prohibiting the IRS from designating any additional employees as "excepted."

Similarly, in *Hardy v. Trump*, 19-cv-51 (D.D.C.), the Plaintiffs are four individual employees of the Department of Transportation (DOT), Department of Justice, and Department of Agriculture (USDA), all of whom were deemed "excepted" during the lapse. The *Hardy* Plaintiffs also claim that the Anti-Deficiency Act is unconstitutional, and further claim that the Government's actions violate the 13th Amendment, 5th Amendment, and several statutory provisions, including the Fair Labor Standards Act (FLSA). The *Hardy* Plaintiffs request an order prohibiting the Government from requiring employees to work during the lapse, and prohibiting the Government from restricting employees' ability to obtain outside employment.

B. Proceedings on Plaintiffs' Requests for Expedited Relief

Plaintiffs in both cases filed motions for temporary restraining orders and preliminary injunctions. *See NTEU* ECF Nos. 8, 15; *Hardy* ECF No. 8. This Court scheduled a hearing for January 15, 2019, at which the parties presented arguments regarding Plaintiffs' requests for temporary restraining orders. *See* TRO Hr'g Tr. at 7-49. After hearing the parties' arguments, the Court orally denied Plaintiffs' motions, *see id.* at 49-55, followed by a written Order memorializing the Court's reasoning. *See* TRO Order (*NTEU* ECF No. 16, *Hardy* ECF No. 19).

In the Court's Order, although the Court expressed sympathy for the "real hardship being felt by innocent federal employees across the country right now," the Court made clear that "[i]n the final analysis, the shutdown is a ***political*** problem" that "does ***NOT***, and can ***NOT***, change this Court's limited role." *Id.* at 2 (emphasis in original). In particular, the Court rejected the invitation by the *NTEU* and *Hardy* Plaintiffs to "in effect, give all currently excepted federal employees—numbering in the hundreds of thousands across dozens of agencies—the option not to show up for work tomorrow." *Id.* at 4. Because those employees "perform functions that the relevant agencies have determined bear on the safety of human life and/or the protection of property," the Court held that "[i]t would be profoundly irresponsible under these circumstances . . . for me to grant that TRO" because "[a]t best, it would create chaos and confusion—at worst, catastrophe!" *Id.* at 4-5. Accordingly, the Court denied the Plaintiffs' TRO motions, and set an expedited briefing schedule for the pending preliminary-injunction motions.

On January 16, 2019—the day after the Court's TRO hearing—the President signed into law the Government Employee Fair Treatment Act of 2019. *See* Pub. L. No. 116-1, 133 Stat. 3 (codified at 31 U.S.C. § 1341(c)). The Act provided guaranteed pay for both furloughed and excepted employees during a "lapse in appropriations that begins on or after December 22, 2018," with the amount of payment being "at the employee's standard rate of pay, at the earliest date

possible after the lapse in appropriations ends[.]" 31 U.S.C. § 1341(c)(1)-(2). Accordingly, the Act ensures backpay for both the current lapse in appropriations as well as future lapses, but the Act also indicates that payments will be made after appropriations are restored. *Id.*

On January 22, 2019, the Government filed its opposition to Plaintiffs' motions for preliminary injunctions. *See* Gov't PI Mem. (*NTEU* ECF No. 19, *Hardy* ECF No. 21). Before briefing was completed, however, the lapse in appropriations ended, with appropriations restored on January 25, 2019. *See* Further Additional Continuing Appropriations Act, Pub. L. No. 116-5, 133 Stat. 10 (Jan. 25, 2019). Given the restoration of appropriations, Plaintiffs withdrew their motions for preliminary injunctions. *See NTEU* ECF No. 20; *Hardy* ECF No. 22.

C. Proceedings Following Restoration of Appropriations

After the restoration of appropriations, the Court held a status conference to discuss future proceedings in the cases, particularly if another lapse in appropriations were to occur. *See* Tr. of Jan. 31 Status Conf. at 6-8. On February 15, 2019, however, Congress enacted appropriations for all agencies through the remainder of the fiscal year—*i.e.*, through September 30, 2019. *See* Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, 133 Stat. 13 (2019).[1]

The Court held another status conference and inquired as to whether Plaintiffs intended to continue with their claims. Neither set of Plaintiffs disputed that their claims were now moot, but instead argued that their claims qualified for an exception to mootness doctrine—*i.e.*, for claims that are "capable of repetition but evading review." *See* Tr. of Feb. 22 Status Conf. at 5-7. The Court then set a briefing schedule, *see* Minute Order of Mar. 5, 2019, and the Government now moves to dismiss both Amended Complaints.

[1] Following this enactment of appropriated funding, plaintiffs in a third case challenging actions related to the lapse in appropriations—*National Air Traffic Controllers Association v. United States*, No. 19-cv-62 (D.D.C.)—voluntarily dismissed their claims. *See id.*, ECF No. 21.

STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 12(b)(1), Defendants hereby move to dismiss these lawsuits for lack of subject-matter jurisdiction. Plaintiffs bear the burden of showing subject-matter jurisdiction. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Indeed, it is "presume[d] that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006).

In the alternative, Defendants move for dismissal for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. A motion under Rule 12(b)(6) "tests the legal sufficiency of a plaintiff's complaint[.]" *Herron v. Fannie Mae*, 861 F.3d 160, 173 (D.C. Cir. 2017); *see also ACLU Found. of S. Cal. v. Barr*, 952 F.2d 457, 467 (D.C. Cir. 1991). Additionally, a plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level[.]" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Although a court must accept all factual allegations as true, the court is "not bound to accept as true a legal conclusion couched as a factual allegation[.]" *Twombly*, 550 U.S. at 555.

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE NOW MOOT, AS THE D.C. CIRCUIT HAS TWICE CONFIRMED

Because the lapse in appropriations has been resolved, all of Plaintiffs' claims are now moot and should be dismissed for lack of subject-matter jurisdiction. Plaintiffs cannot avoid mootness through the "capable of repetition but evading review" exception. Plaintiffs' own statements cast doubt on whether their claims necessarily evade review, and in any event Plaintiffs cannot demonstrate that their claims are likely to recur given the numerous speculative contingencies necessary for that to happen—*i.e.*, at least five separate contingencies regarding

whether, when, and how any future lapse in appropriations might occur. Thus, all of Plaintiffs' claims are now moot. Moreover, contrary to NTEU's argument at the recent status conference, their status as an organization does not change this analysis. Finally, even if Plaintiffs' claims were not completely moot in a constitutional sense, strong prudential considerations would still require that this Court dismiss their claims.

A. Now that the Lapse in Appropriations Has Ended, Plaintiffs' Claims Are Moot

Under Article III of the Constitution, "[f]ederal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies." *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70 (1983) (per curiam); *see also Church of Scientology v. United States*, 506 U.S. 9, 12 (1992) ("It has long been settled that a federal court has no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). "A case becomes moot . . . when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). An Article III case-or-controversy "must be extant at all stages of review, not merely at the time the complaint is filed," and therefore a "case that becomes moot at any point during the proceedings . . . is outside the jurisdiction of the federal courts." *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018); *see also Liu v. INS*, 274 F.3d 533, 535 (D.C. Cir. 2001) ("Mootness goes to [the Court's] jurisdiction.").

Here, even assuming a proper Article III dispute existed at the outset, *but see* Part II, *infra*, these lawsuits are plainly moot now that the lapse in appropriations has ended. All of Plaintiffs' claims sought to challenge the Government's actions *during* the lapse in appropriations. *See, e.g.*, *NTEU* Am. Compl. ¶ 9 ("Notwithstanding the ongoing lapse in appropriations, tens of thousands of federal employees represented by NTEU have been required to report to work since December

22, 2018."); *Hardy* Am. Compl. ¶ 4 ("Plaintiffs were designated as 'excepted' employees and subsequently ordered and required by the Defendants to work without pay *until such time as the lapse in appropriations is to end*." (emphasis added)). Because the challenged actions have now expired—*i.e.*, because the lapse in appropriations is now over—Plaintiffs' claims are now moot. *See, e.g.*, *Montes v. Janitorial Partners, Inc.*, 859 F.3d 1079, 1083 (D.C. Cir. 2017) ("If an intervening circumstance deprives the plaintiff of a personal stake in the lawsuit's outcome, the action must be dismissed as moot."); *Fund for Animals, Inc. v. Bureau of Land Mgmt.*, 460 F.3d 13, 18 (D.C. Cir. 2006) ("Because the memo has expired, this claim is moot.").

Moreover, Plaintiffs' purported injuries are no longer occurring: they are not being required to work without pay, nor do they wish to pursue outside employment any longer. *Cf.* Part II.A, *infra* (discussing these claimed injuries). Because outside events have now resulted in Plaintiffs' purported injuries being remedied, their claims are moot for that reason as well. *See Taylor v. Resolution Tr. Corp.*, 56 F.3d 1497, 1502 (D.C. Cir. 1995) ("Once the movant is no longer in harm's way, a motion for an injunction becomes moot."); *see also Alvarez v. Smith*, 558 U.S. 87, 92-93 (2009) (a case becomes moot when it is "a dispute solely about the meaning of a law, abstracted from any concrete actual or threatened harm"); *Christian Knights of the Ku Klux Klan v. District of Columbia*, 972 F.2d 365, 369 (D.C. Cir. 1992). Thus, Plaintiffs' claims are moot.

B. Plaintiffs Cannot Demonstrate that Their Claims are Capable of Repetition But Evading Review

Contrary to Plaintiffs' assertion at the most recent status conference, their claims do not qualify for the "capable of repetition but evading review" exception to mootness. This doctrine's "theoretical justification is somewhat obscure," *Christian Knights of the KKK*, 972 F.2d at 369, and the Supreme Court has applied the doctrine "only in exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will again be subjected to the

alleged illegality." *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983). Specifically, this exception to mootness applies only where "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Spencer v. Kemna*, 523 U.S. 1, 17 (1998) (modifications omitted).

Although the Government had the initial burden of demonstrating that a case is moot, *see* Part I.A, *supra*, Plaintiffs now bear the burden of demonstrating that this exception to mootness applies. *See Reid v. Hurwitz*, 914 F.3d 670, 674 (D.C. Cir. 2019) ("The party seeking jurisdictional dismissal must establish mootness, while the opposing party has the burden to prove that a mootness exception applies."). Here, Plaintiffs cannot carry their burden. Their own statements and actions cast doubt on whether lapses in appropriations are *inherently* so short as to evade review. More fundamentally, it is entirely speculative whether, and how, these Plaintiffs would be affected by any potential future lapse in appropriations. As numerous courts have thus recognized, the "capable of repetition" exception does not apply to claims arising during a lapse in appropriations.

1. Plaintiffs' Own Statements and Actions Cast Doubt on Whether Their Claims Necessarily Evade Review

With respect to the first requirement—whether the claims evade review—"the question is whether the challenged activity is *by its very nature* short in duration, so that it could not, or probably would not, be able to be adjudicated while fully live." *Pharmachemie B.V. v. Barr Labs., Inc.*, 276 F.3d 627, 633 (D.C. Cir. 2002); *see also Spencer*, 523 U.S. at 18 (denying application of the exception because the challenged action is not "always so short as to evade review").

To be sure, past lapses in appropriations have been resolved quickly, *i.e.*, in a timeframe that would prevent full appellate review of the claims. Plaintiffs in these cases, however, have

themselves cast doubt on whether lapses in appropriations will *necessarily* be resolved in such a short timeframe. *See, e.g.*, *Hardy* Am. Compl. ¶ 36 (suggesting that a lapse in appropriations "could last for months or even years"); TRO Hr'g Tr. at 11 (*NTEU* counsel arguing that the Government is given "a blank check of indefinite duration" and speculating about what might happen "if this government shutdown continues for months"). By Plaintiffs' own statements, therefore, future lapses in appropriations are not inherently so short as to evade review. *Cf. Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 193 (D.C. Cir. 2006) (stating that it "is possible for a plaintiff to plead too much: that is, to plead himself out of court by alleging facts that render success on the merits impossible").

Moreover, even if Plaintiffs' claims for *injunctive* relief are not capable of being litigated prior to a lapse in appropriations ending, Plaintiffs have not demonstrated that they are unable to raise these same issues in a suit for damages—*i.e.*, a suit that would not become moot even after a lapse in appropriations is resolved. *See People for Ethical Treatment of Animals, Inc. (PETA) v. Gittens*, 396 F.3d 416, 424-25 (D.C. Cir. 2005) (holding that the exception did not apply because in the future the plaintiff could sue for damages and thus "the controversy would not evade review in this court, or in the Supreme Court"). Indeed, NTEU itself has already filed a separate lawsuit—a putative collective action on behalf of all excepted employees covered by the FLSA—seeking damages under the FLSA in connection with the lapse in appropriations. *See* NTEU Press Release, *NTEU Lawsuit Alleges Shutdown Violates Fair Labor Standards Act* (Jan. 7, 2019), *available at* https://www.nteu.org/media-center/news-releases/2019/01/07/shutdownlawsuit; *see also Avalos et al. v. United States*, No. 19-cv-48 (Ct. Fed. Cl., filed Jan. 9, 2019). And that lawsuit expressly invokes 31 U.S.C. § 1342, the same provision of the Anti-Deficiency Act that NTEU seeks to challenge here. *See Avalos* Compl. (ECF No. 1) ¶ 9; *cf. also Martin v. United States*, 130 Fed. Cl.

578, 582-83 (2017) (discussing the Anti-Deficiency Act in connection with an FLSA claim arising out of a prior lapse in appropriations).

To be sure, the *Avalos* Complaint does not currently seek to challenge the validity or implementation of the Anti-Deficiency Act. And even if such arguments were raised, the Government would respond with all applicable defenses. For present purposes, however, the point is that Plaintiffs have the burden to demonstrate that these legal issues will necessarily evade review, and they cannot carry that burden while they are simultaneously pursuing a damages action involving the same subject matter and that depends, at least in part, on the meaning of the same statute at issue here. It is impossible to know the full range of issues that will be raised or decided in *Avalos* (or any of the other potential damages actions) until after those cases are resolved; in the meantime, these ongoing damages actions preclude Plaintiffs from demonstrating that the legal issues presented in these lawsuits will necessarily evade review.

2. It Is Wholly Speculative Whether, and How, Any Potential Future Lapse in Appropriations Might Affect Plaintiffs

Regardless of whether Plaintiffs' claims evade review, Plaintiffs also cannot demonstrate that the present dispute is genuinely likely to recur—*i.e.*, that this same dispute, involving the same alleged wrongs, is likely to recur between the same parties. There are simply too many assumptions necessary for this Court to conclude that these particular Plaintiffs are reasonably likely to suffer the same harms in the future.

As the D.C. Circuit recently explained, the "capable of repetition" inquiry requires more than a theoretical possibility that the same issues will arise between the same parties in the future:

> A controversy is capable of repetition only if the same parties will engage in litigation over the same issues in the future. A "theoretical possibility" is not sufficient to qualify as capable of repetition; there must instead be a "reasonable expectation" or "demonstrated probability" that the action will recur.

Senate Permanent Subcomm. on Investigations v. Ferrer, 856 F.3d 1080, 1088 (D.C. Cir. 2017)

(modifications and citations omitted). Additionally, "[t]he 'wrong' that is, or is not, 'capable of repetition' must be defined in terms of the precise controversy it spawns." *PETA*, 396 F.3d at 422. Thus, application of the exception is not warranted when "the controversy is highly fact-specific" or when "conclud[ing] that a dispute like this would arise in the future" would require "imagin[ing] a sequence of coincidences too long to credit." *Id.* at 424.

Here, Plaintiffs cannot demonstrate that the same legal questions are likely to recur between the same parties; there are simply too many contingencies required. Specifically, there are at least five contingencies here that make it impossible for Plaintiffs to carry their burden.

First, it is entirely speculative whether—and if so when—Congress might again fail to appropriate funding for Executive Branch agencies. As this Court previously noted, it is impossible to predict whether and when such lapses might occur. *See* Tr. of Jan. 31 Status Conf. at 4 ("Of course, we have no idea what the future holds."); *id.* at 12 ("I don't know what's going to happen. You[r] guess is, I'm sure, better than mine, even.").

As a theoretical matter, a lapse in appropriations is possible every time an appropriations act or continuing resolution is set to expire. Even in recent history, however, such lapses in appropriations remain quite rare. Before this most recent lapse, the next-most-recent lapse that lasted longer than 3 days—*i.e.*, that had any meaningful effect on workers' paychecks—was more than five years prior in October 2013. And before that, the next-most-recent lapse was almost eighteen years prior—from December 15, 1995 to January 6, 1996. As the Court correctly recognized, therefore, it is impossible to try to predict whether, and if so when, a lapse in appropriations might occur.

Second, even if a lapse in appropriations does occur, it is speculative whether the lapse would affect any of the relevant agencies in these lawsuits. Not all lapses in appropriations

necessarily affect all agencies. Indeed, this past lapse in appropriations affected only some agencies, as five of the twelve appropriations bills had already been enacted by the time the lapse began. Similarly, during the 1995-1996 lapse, Congress had already passed seven of the thirteen appropriations bills. Thus, even if a lapse in appropriations were to occur in the future, it is speculative whether the lapse would actually affect any of the particular agencies implicated by the named Plaintiffs in these lawsuits (*e.g.*, IRS, FAA, etc.).

Third, it is speculative whether, in response to any such lapse, the relevant agencies would respond to the lapse in exactly the same manner. For example, *NTEU* seeks to challenge OMB Mem. M-18-05, *Planning for Agency Operations during a Potential Lapse in Appropriations* (Jan. 19, 2018); *see NTEU* Am. Compl. ¶¶ 47-50. In a future lapse in appropriations, however, OMB may issue guidance that differs in material respects from OMB Mem. M-18-05. Similarly, it is speculative whether agencies will implement the exact same contingency plans in exactly the same manner. There could be any number of events that prompt agencies to respond differently to the lapse in appropriations: there may have been changes to the agencies' underlying programs, governing legal authorities, or employment relationships; agencies may have alternative sources of funding available at that time such that they may continue a program even in the absence of appropriated funding; factual circumstances may have changed such that agencies evaluate the "emergencies involving the safety of human life or the protection of property" exception differently; or agencies may simply exercise their discretion under the Anti-Deficiency Act in a different manner. Indeed, *NTEU*'s own Complaint makes clear that agencies sometimes respond to different lapses in appropriations in different ways. *See, e.g.*, *NTEU* Am. Compl. ¶ 31 (alleging that IRS's January 2019 contingency plan differed in material respects from its April 2011 contingency plan). Thus, it is entirely speculative whether, in a future lapse in appropriations,

agencies would even respond the same way as this most recent lapse.

Fourth, even if affected agencies decided to implement the same contingency plans in exactly the same way, it is still speculative whether any of these particular Plaintiffs would be affected. For example, as the Government explained in connection with Ms. Hardy's claims, Ms. Hardy transferred to her current position very recently—in December 2018—and the particular duties of that position are what caused her to be deemed excepted. *See* Decl. of Jodi S. McCarthy (*NTEU* ECF No. 19-7, *Hardy* ECF No. 21-7) ¶¶ 7-9. Many other people with Ms. Hardy's job title were actually furloughed during the lapse in appropriations. *Id.* ¶ 9. Thus, even assuming a future lapse in appropriations that affected the FAA and that the FAA responded in exactly the same way, it would *still* remain speculative whether the same dispute would recur with respect to Ms. Hardy; the same dispute would recur *only* if she remained a federal employee at that time and was employed in the exact same position as her current one. Given that Plaintiffs cannot predict when a future lapse in appropriations is likely to recur, however, they similarly cannot predict whether Ms. Hardy (or any of the other individuals in these cases) will remain in their current positions at that time.

Fifth and finally, for at least some of the Plaintiffs' claims, even if a lapse occurs and Plaintiffs remain in their current positions, there is no guarantee that individuals would actually be affected depending on when in the calendar year the lapse occurs. For example, with respect to NTEU's claim regarding the IRS's processing of tax refunds, NTEU challenges the "recall" of employees at the start of tax filing season in January 2019, but does not challenge the number of employees excepted in the IRS's December 2018 non-filing season contingency plan. *See NTEU* Am. Compl. ¶¶ 24-28, 31-40. Similarly, NTEU's claim challenging the increase in the number of IRS employees deemed excepted under § 1342 between December 2018 and January 2019—*i.e.*,

12,262 employees in January 2019, instead of only 8,017 employees in December 2018—is so fact-dependent that it is difficult to see how this same claim could recur in the future. *Id.* ¶ 29. At a minimum, this claim would require the future lapse to occur during the same December-January timeframe as this most recent lapse. For at least some of Plaintiffs' claims, therefore, it is impossible to predict whether any future lapse in appropriations would occur at the time of year necessary to implicate Plaintiffs' claims.

In short, Plaintiffs cannot invoke a narrow, extraordinary exception to mootness based on this extended chain of speculation. To invoke the exception for claims that are capable of repetition, the Court would have to assume at least five different contingencies: (1) that Congress will again fail to appropriate funding for the Executive Branch, thereby causing a lapse in appropriations; (2) that any such lapse would affect the particular agencies implicated by Plaintiffs' claims; (3) that the relevant agencies will respond to the lapse in appropriations in exactly the same way, *i.e.*, with the same guidance and the same contingency plans; (4) that Plaintiffs will remain employed by the Federal Government and in their exact same positions at the time of the future lapse in appropriations; and (5) that the future lapse will occur at a time in the calendar year that would implicate Plaintiffs' claims (*i.e.*, during tax filing season, or during the December-January timeframe). This chain of speculation amounts to nothing more than a theoretical possibility that Plaintiffs might someday be affected by a future lapse in appropriations—a far cry from the "reasonable expectation" or "demonstrated probability" that the Supreme Court's cases require. *Murphy v. Hunt*, 455 U.S. 478, 482 (1982); *see also Ferrer*, 856 F.3d at 1088 ("Although there is a 'theoretical possibility' that this chain of events might occur, [the plaintiff] gives us no basis for believing that there is a 'reasonable expectation' or 'demonstrated probability' that it will."); *Pharmachemie B.V.*, 276 F.3d at 633 (denying application of the exception because "several

contingencies would have to occur for the same issues to arise again"); *PETA*, 396 F.3d at 424; *Am. Family Life Assur. Co. v. FCC*, 129 F.3d 625, 628 (D.C. Cir. 1997) ("[T]o save a case from mootness the ongoing injury must be more than a remote possibility, not conjectural, more than speculative."); *James v. HHS*, 824 F.2d 1132, 1136 (D.C. Cir. 1987) (rejecting the exception because "[a]s many as five speculative events must occur before they would be subjected to the same agency action"). Accordingly, these numerous contingencies preclude Plaintiffs from demonstrating that their claims qualify as capable of repetition but evading review.

3. Numerous Courts, Including the D.C. Circuit, Have Confirmed that Claims Arising During a Lapse in Appropriations Do Not Qualify as Capable of Repetition

The above analysis is further supported by numerous court decisions, which uniformly hold that the "capable for repetition" exception does not apply to claims arising out of a lapse in appropriations or other similar circumstances. Indeed, the D.C. Circuit has twice held in unpublished judgments that the exception does not apply given the uncertainty associated with future lapses in appropriations.

The precedents most directly on point are the D.C. Circuit's two decisions arising out of past lapses in appropriations. Most recently in connection with the October 2013 lapse, a claim was brought by Father Leonard, a "Catholic minister at the naval submarine base in Kings Bay, Georgia" who was "prohibited from providing Catholic services during the shutdown because the Department of Defense (DOD) could not pay him." *Leonard*, 598 F. App'x at 9. Father Leonard filed suit, but DOD later allowed him to return to work and "the government shutdown ended on October 17, 2013[.]" *Id.* Accordingly, the D.C. Circuit held that Father Leonard's claims for injunctive and declaratory relief were moot because he had not alleged "an ongoing or imminent injury," and the D.C. Circuit further held that the capable of repetition exception did not apply: "Moreover, his claims do not qualify for the capable-of-repetition, yet-evading-review exception

to the mootness doctrine because the likelihood of a future government shutdown is 'too speculative.'" *Id.* at 10 (quoting *Columbian Rope Co. v. West*, 142 F.3d 1313, 1317 (D.C. Cir. 1998)). Father Leonard then requested Supreme Court review, but the Supreme Court denied his petition for a writ of certiorari. *See* 136 S. Ct. 261 (2015).

Similarly, in response to the 1995-96 lapse in appropriations, several unions representing government employees—including NTEU—filed suit raising many of the same claims as the present lawsuits. *See AFGE v. Rivlin*, No. 95-cv-2115 (D.D.C.); *NTEU v. United States*, 95-cv-2153 (D.D.C.). After the lapse in appropriations ended, Judge Sullivan held that the cases were moot and that "[t]he plaintiffs have not demonstrated either of the[] requirements" for the exception to the mootness doctrine. *AFGE v. Rivlin*, 995 F. Supp. at 166. With respect to capable of repetition, Judge Sullivan held that "plaintiffs have not demonstrated that there is a reasonable expectation that *they* will be subjected to the same action again," because "[i]t would be entirely speculative for this Court to attempt to predict if, and when, another lapse in appropriations may occur, how long that lapse might be, which agencies might be subject to the lapse, which employees might be affected, and whether employees will be required to work without compensation." *Id.* On appeal, the D.C. Circuit summarily affirmed the district court's decision, holding that "[t]he merits of the parties' positions are so clear as to warrant summary action." *AFGE v. Raines*, 1998 WL 545417 at *1.

Just as the district court and the D.C. Circuit in those cases declined to engage in speculation and prediction about if, when, and how any future lapse in appropriations might occur, this Court should do the same. And although the D.C. Circuit's decisions are unpublished, this Court should be extremely reluctant to reach a contrary conclusion when there is no compelling reason for doing so—particularly when, in one of the cases, the D.C. Circuit described the issue

as "so clear as to warrant summary action." *Id.*

Moreover, the D.C. Circuit is not the only court to have rejected the "capable of repetition" exception in the context of lapses in appropriations—several other courts have likewise rejected the argument. *See, e.g.*, *Smith v. Dep't of Agric.*, No. 15-cv-4497, 2016 WL 4179786, at *4-5 (N.D. Cal. Aug. 8, 2016) (dismissing a claim filed in anticipation of a lapse in appropriations seeking to compel continuation of benefits during the lapse, holding that any injury was now moot and "the chain of events necessary to bring about the same injury and the same action is simply too speculative for the Court to conclude that this is one of those 'exceptional situations' where the mootness exception should apply"); *Alaska v. Jewell*, No. 13-cv-34, 2014 WL 3778590, at *3 (D. Alaska July 29, 2014) ("[E]ven if the history of government funding gaps makes it reasonable to expect that another shutdown will occur at some point in the future, it does not make it reasonable to expect that Defendants' response to a future shutdown would be the same as the response to the 2013 shutdown."); *Nat'l Forest Recreation Ass'n v. Tidwell*, No.13-cv-1287, ECF No. 23 at 2 (E.D. Va. Jan. 24, 2014) ("The Court agrees with Defendant that the number of contingencies that would need to align to recreate the situation underlying Plaintiffs' complaint does not rise to the level or probability required to invoke this exception to the mootness doctrine.").

Additionally, in cases arising in similar circumstances—*i.e.*, local government fiscal crises—courts, including the D.C. Circuit in a published opinion, have likewise rejected application of the "capable of repetition" exception. *See LaShawn A. v. Barry*, 144 F.3d 847, 852 (D.C. Cir. 1998) (even if "temporary pay cuts and furloughs may be instituted again in the event of future budget deficits," there is "no support for the proposition that the District again will run budget deficits" during the relevant time period, or that any "pay cuts and furloughs [would be] so

severe" as to again prompt the challenged actions); *see also Foster v. Carson*, 347 F.3d 742, 748 (9th Cir. 2003) (when state sought to save money by temporarily suspending appointment of counsel for indigent defendants but that practice had expired, the case was now moot and not capable of repetition because "[t]he economic condition of the state is constantly fluctuating" and "[h]ow the political branches of the state will choose to fund indigent defense, how many indigent defendants will require services, whether a shortfall will occur, and how the state judicial system would address such a shortfall are all unknown" and thus there was no reasonable expectation that a similar order "will be issued again in the future").

The rationale underlying each of these cases is well-stated by a leading treatise on federal jurisdiction:

> Acts that result from complex political choices afford rather different grounds for refusing to find a prospect of repetition sufficient to defeat mootness. The more complex the process—such as a legislative budgeting process—the greater the uncertainty whether the future will ever present sufficiently similar constraints and sufficiently similar responses. And the more thoroughly political the judgments, the greater the wisdom of leaving future quarrels for future decision.

Wright & Miller, Federal Practice & Procedure § 3533.8.1 (3d ed. 2018). Both courts and commentators alike, then, recognize that once a fiscal crisis is resolved, lawsuits challenging actions undertaken during that crisis are moot. That is certainly true here: Plaintiffs' challenges to the Government's actions taken during the shutdown are now moot, and it is entirely speculative to suggest that those same actions will ever recur in the future. Thus, both of the Amended Complaints should be dismissed for lack of subject-matter jurisdiction.

C. The Above Analysis Applies Equally to NTEU as an Association Representing Its Individual Members

At the most recent status conference, counsel for NTEU suggested that the mootness analysis for its claims might be different given its status as an organization (rather than individual employees as in *Hardy*). *See* Tr. of Feb. 22 Status Conf. at 11 ("We have different claims, different

plaintiffs. There are different threshold arguments, because we're an organization that is specific to us[.]"). NTEU's assertion is incorrect; the above mootness analysis applies equally to their claims, notwithstanding their status as an organization.

As an initial matter, the D.C. Circuit obviously did not think that NTEU's status as an organization affected the mootness analysis, because in connection with their lawsuit challenging the 1995-96 lapse the D.C. Circuit nonetheless held that NTEU's claims were moot. Indeed, the D.C. Circuit's resolution of the "capable of repetition" issue in that case would appear to be dispositive here (at least as to NTEU) based on principles of issue preclusion. *See Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) ("Issue preclusion . . . bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim.").

In any event, NTEU's status as an organization does not change the mootness analysis for more fundamental reasons as well. Although NTEU purports to sue "on behalf of itself and its members," *NTEU* Am. Compl. ¶ 4, NTEU does not allege any harms to NTEU itself as an organization. Thus, NTEU can only be suing in an associational capacity on behalf of its members. *See Warth v. Seldin*, 422 U.S. 490, 511 (1975) ("Even in the absence of injury to itself, an association may have standing solely as the representative of its members.").

The Supreme Court has made clear that associational standing "does not eliminate or attenuate the constitutional requirement of a case or controversy." *Id.* At the outset of a case, that means the organization must demonstrate that at least one of its members would have standing to sue in their own right. *See id.* ("The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit."). That requirement

is necessary "to weed out plaintiffs who try to bring cases, which could not otherwise be brought[.]" *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 9 (1988).

Similarly, even if an association has standing at the outset of the case, the association must continue to have standing throughout all stages of the case. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 494-95 (2009) (holding that an association lacked standing because the only member who previously had standing settled his claim, and the association had "identified no other application of the invalidated regulations that threatens imminent and concrete harm to the interests of their members"); *see also Milwaukee Police Ass'n v. Bd. of Fire & Police Comm'rs*, 708 F.3d 921, 930 (7th Cir. 2013). Thus, when an association sues on behalf of its members and those members' claims become moot, the association's claims also become moot (unless some other member still has a live claim). Holding otherwise would effectively allow associations to avoid mootness, contrary to the Supreme Court's instruction that associations do not "eliminate or attenuate the constitutional requirement of a case or controversy." *Warth*, 422 U.S. at 511.

Here, NTEU's Amended Complaint does not identify *any* particular members with standing, which is an independent reason for dismissal. *See* Part II.A.1, *infra*. For mootness purposes, however, the point is that all of NTEU's members' claims are now moot, and none of those individual members' claims would qualify as capable of repetition but evading review. *See* Parts I.A-B, *supra*. Accordingly, because no individual member of NTEU has a live claim any longer, then NTEU as an organization likewise cannot continue pursuing any claims on behalf of those members. Thus, NTEU's status as an organization does not affect any of the above analysis.

D. Even If Not Constitutionally Moot, Strong Considerations of Prudential Mootness Would Still Require Dismissal

Finally, even if the Court were not constitutionally required to dismiss on mootness grounds, strong prudential considerations would militate in favor of withholding judicial review.

The complexity and sensitivity of the issues presented by Plaintiffs' lawsuits weigh strongly in favor of dismissal.

"The doctrine of prudential mootness refers to the discretion enjoyed by federal courts in exercising their Article III powers." *Finca Santa Elena, Inc. v. U.S. Army Corps of Engineers*, 62 F. Supp. 3d 1, 4 (D.D.C. 2014). "Even when a case is not moot in the Article III sense, it will sometimes be 'so attenuated that considerations of prudence and comity for coordinate branches of government counsel the court to stay its hand, and to withhold relief it has the power to grant.'" *Gordon v. Holder*, 85 F. Supp. 3d 78, 81-82 (D.D.C. 2015) (quoting *Chamber of Commerce v. Dep't of Energy*, 627 F.2d 289, 291 (D.C. Cir. 1980)), *aff'd sub nom. Gordon v. Lynch*, 817 F.3d 804 (D.C. Cir. 2016). The doctrine of prudential mootness has special force "where it is unlikely that the court's grant of declaratory judgment will actually relieve the injury," and "where the court can avoid adjudication of difficult or novel constitutional questions." *Foretich v. United States*, 351 F.3d 1198, 1216 (D.C. Cir. 2003) (modifications omitted).

Here, as this Court previously noted, deciding Plaintiffs' claims would require this Court to address numerous constitutional questions, including questions of first impression. *See* Tr. of Jan. 31 Status Conf. at 10. Moreover, it would require this Court to effectively place itself in the middle of a political dispute—namely, a dispute over the federal budgetary process, and how the government should operate when that budgetary process fails. As the Court correctly recognized before, rather than the Judiciary being used as "just another source of leverage to be tapped in the ongoing internal squabble between the political branches," TRO Order at 2, judicial restraint is the proper course here.

Indeed, the D.C. Circuit has previously explained that budget-related disputes are "the archetype" of matters that warrant the withholding of judicial review:

> Sometimes the great public importance of an issue militates in favor of its prompt resolution. At other times, however, the public interest dictates that courts exercise restraint in passing upon crucial issues. We think such restraint is necessary where, as here, appellants ask us to intervene in wrangling over the federal budget and budget procedures. Such matters are the archetype of those best resolved through bargaining and accommodation between the legislative and executive branches. We are reluctant to afford discretionary relief when to do so would intrude on the responsibilities including the shared responsibilities of the coordinate branches.

Nat'l Wildlife Fed'n v. United States, 626 F.2d 917, 924 (D.C. Cir. 1980) (internal citations omitted). Thus, the case for judicial restraint is particularly strong here, and Plaintiffs' claims should all be dismissed as both constitutionally and prudentially moot.

II. PLAINTIFFS HAVE OTHERWISE FAILED TO ESTABLISH THIS COURT'S SUBJECT-MATTER JURISDICTION OVER THEIR CLAIMS

The clearest basis for dismissing Plaintiffs' claims is mootness, as discussed above. Even apart from mootness, however, Plaintiffs' complaints would still need to be dismissed because Plaintiffs failed to establish this Court's jurisdiction at the outset of this action. Plaintiffs have the burden of establishing this Court's Article III jurisdiction, *see DaimlerChrysler Corp.*, 547 U.S. at 342 & n.3, which they failed to carry here: Plaintiffs have not established their Article III standing to sue, and furthermore their claims are precluded under the CSRA.

A. NTEU Has Not Met the Requirements for Associational Standing

As discussed above, NTEU's Amended Complaint does not allege any injuries to NTEU as an organization in its own right, and therefore NTEU is suing solely in a representative capacity—*i.e.*, on behalf of its individual members. *See* Part I.C, *supra*. To qualify for such associational standing, NTEU must satisfy three requirements:

> [W]e have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977); *see also NRDC v. EPA*, 464

F.3d 1, 5-6 (D.C. Cir. 2006). Here, NTEU fails to satisfy the first and third requirements.

1. NTEU Has Failed to Specifically Identify Members with Standing

To satisfy the first criterion of demonstrating that individual members would have standing to sue in their own right, the plaintiff organization must *actually name* the particular members with standing. *See Summers*, 555 U.S. 488, 498 (2009) ("[O]ur prior cases . . . have required plaintiff-organizations to make specific allegations establishing that at least one identified member had suffered or would suffer harm."); *Chamber of Commerce v. EPA*, 642 F.3d 192, 199 (D.C. Cir. 2011) ("When a petitioner claims associational standing, it is not enough to aver that unidentified members have been injured. Rather, the petitioner must specifically identify members who have suffered the requisite harm.").

Here, NTEU's Amended Complaint does not name *any* individual members, which is itself a basis for dismissing all of NTEU's claims. To be sure, in connection with the preliminary-injunction proceedings, NTEU filed declarations from two individual members. *See NTEU* ECF No. 9. But those declarations were filed *before* NTEU amended its Complaint, and yet the Amended Complaint still contains no mention of those individual members. *See NTEU* ECF No. 13. Thus, there is no impediment to the Court dismissing NTEU's Amended Complaint on this basis.

Even if the Court were to consider the two declarations, moreover, they would at most provide standing only for Count I of NTEU's Amended Complaint—challenging § 1342 of the Anti-Deficiency Act as inconsistent with the Appropriations Clause. *See NTEU* Am. Compl. ¶¶ 42-45. Those individuals cannot provide standing for Counts II and III, however, because their declarations do not establish that either individual was harmed in any way by the alleged illegal acts: neither individual actually asserts that he or she should *not* be excepted under a proper interpretation of § 1342 (and thus they do not have standing to raise Count II); nor is either

individual an IRS employee who was initially furloughed but then "called back" into work under the IRS's January 2019 Tax Filing Season contingency plan (and thus they do not have standing to raise Count III). *See NTEU* Am. Compl. ¶¶ 47-50 (Count II), 52-54 (Count III); *see also Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) ("[A] plaintiff must demonstrate standing . . . for each form of relief that is sought.").[2] At a minimum, then, NTEU has failed to identify any specific member with standing to raise Counts II and III of the Amended Complaint, and those Counts must therefore be dismissed.

2. Individualized Proof from Each Member Would Be Required

NTEU also fails to meet the third criterion for associational standing—that the participation of individual members in the lawsuit is not required—because in order to resolve NTEU's claims (or provide relief on those claims), it would be necessary to analyze each employee's particular factual circumstances. As NTEU itself effectively admits, not all of its members were affected by the lapse in appropriations the same way: some employees worked for agencies that were not affected at all; some employees were furloughed while others were excepted; some employees were excepted based on § 1342's provision for emergency services, while other employees were excepted based on different rationales; and even for employees who were excepted based on § 1342, the rationale for why their job function constituted emergency services would depend on

[2] Even if NTEU had sufficiently identified specific members for purposes of injury-in-fact, NTEU would also need to allege the necessary facts to demonstrate causation and redressability—*i.e.*, that the challenged agency actions caused the individual member(s) to be deemed "excepted," and that invalidating the challenged actions would result in the individual member(s) no longer being deemed "excepted." Here, there is good reason to doubt NTEU's ability to allege such facts. For example, NTEU admits that the challenged OMB directive also relies on other guidance documents that contain the same allegedly "overly broad" interpretation of § 1342. *See* NTEU Am. Compl. ¶¶ 14-20. Thus, NTEU cannot establish that the OMB Memorandum specifically is the source of their claimed injury, or that enjoining agencies from relying on the OMB Memorandum would actually redress their claimed injury.

the nature of the particular job function itself. *Cf. NTEU* Am. Compl. ¶¶ 3, 8-9, 21, 24, 29-32.

In these circumstances, associations cannot bring broad-ranging claims seeking relief on behalf of their entire membership, given that "both the fact and extent of injury would require individualized proof" for each employee. *Warth*, 422 U.S. at 515-16. For example, it would be inappropriate to enter relief as to all NTEU members if some of those members would validly be deemed "excepted" even under NTEU's interpretation of § 1342. Thus, the Court cannot decide (or enter relief) on NTEU's claims without considering each employee's individual circumstances, and therefore NTEU's claim of associational standing must fail. *Cf. Long Term Care Pharmacy All. v. UnitedHealth Grp., Inc.*, 498 F. Supp. 2d 187, 194 (D.D.C. 2007) (when contracts between the parties are not uniform, associational standing is inappropriate because "defendant may have breached its obligations to some of the pharmacies, but not to other ones").

B. The Individual Employees' Claimed Injuries are Speculative

Additionally, both the *NTEU* and *Hardy* Plaintiffs' claimed injuries are too speculative. "To establish Article III standing, an injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). Any threatened injuries "must be certainly impending to constitute injury in fact," and "allegations of *possible* future injury are not sufficient." *Id.* (modifications omitted). Here, Plaintiffs relied on two potential injuries-in-fact: (1) being compelled to work without pay; and (2) being restricted in their ability to obtain outside employment during the lapse in appropriations. Even at the outset of these cases, however, neither alleged injury sufficiently established Plaintiffs' Article III standing.

1. Plaintiffs Will Be Paid for the Work Performed

Plaintiffs first rely on a claimed injury of being compelled to work without pay. *See, e.g.*, *NTEU* Am. Compl. ¶ 45; *Hardy* Am. Compl. ¶ 1. Even during the lapse in appropriations,

however, Plaintiffs were not being required to work without pay; they were guaranteed to be paid for the work they were performing. As the Court recognized at the TRO hearing, and as counsel in *NTEU* agreed, the Executive Branch was incurring a legal obligation to pay excepted employees for work performed during the lapse in appropriations. *See* TRO Hr'g Tr. at 7 (counsel agreeing that excepted employees "have a claim against the Treasury" for work performed).

As previously explained, *see* Gov't PI Mem. at 14-15, guidance from several Executive Branch agencies has consistently confirmed that excepted employees have a legal right to be paid for the work that they perform during the lapse in appropriations. Indeed, while this most recent lapse was ongoing, Congress itself confirmed employees' entitlement to pay. *See* 31 U.S.C. § 1341(c)(2) ("[E]ach excepted employee who is required to perform work during a covered lapse in appropriations *shall be paid for such work*, at the employee's standard rate of pay, at the earliest date possible after the lapse in appropriations ends[.]" (emphasis added)). Thus, Plaintiffs cannot rely on a purported injury of being forced to work without pay to establish standing.

To be sure, the lapse in appropriations resulted in a *delay* in employees receiving payment for their work. But Plaintiffs have not based their assertion of injury-in-fact on delayed payment. Presumably that is because any delay in payment would not have been redressed by Plaintiffs' requested relief—*i.e.*, prohibiting the Government from requiring employees to report to work. Even if the Court provided such relief, that still would not result in those employees receiving their paycheck any sooner; the Court's relief therefore would not redress any delay in payment.[3] Thus,

[3] The only theory on which Plaintiffs' requested relief would redress a delay in payment is if the chaos caused by such relief were to prompt Congress and the President to avoid or end a lapse in appropriations. Even apart from the chaos itself being a reason not to enter such relief, that theory only underscores how Plaintiffs are effectively trying to insert this Court into an ongoing dispute between the political Branches—as both the *NTEU* and *Hardy* Plaintiffs have essentially admitted. *See* TRO Hr'g Tr. at 10, 17. And in any event, the D.C. Circuit has already

Plaintiffs have not established a cognizable injury-in-fact based on any issues related to their pay.

2. Plaintiffs Have No Concrete Plans to Seek Outside Employment

The *Hardy* Plaintiffs also rely on a second claimed injury—*i.e.*, their alleged inability to pursue outside employment. *See, e.g.*, *Hardy* Am. Compl. ¶ 51 ("Plaintiffs are currently subject to Defendants' prohibition against obtaining outside employment without authorization."). Even assuming such a prohibition existed, however, the injury was still wholly speculative because Plaintiffs did not establish that they *actually intended* to seek outside employment. Indeed, the *Hardy* Plaintiffs' allegations confirmed the speculative nature of this purported injury: "Were [Plaintiffs] not obligated to provide uncompensated services to Defendants, they would now, *or in the future depending on the length of the shutdown*, seek employment that timely and lawfully paid them for their services." *Hardy* Am. Compl. ¶ 48 (emphasis added).

The Supreme Court has squarely held that vague plans of this nature do not constitute injury-in-fact. *See Defs. of Wildlife*, 504 U.S. at 564 ("Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."). Accordingly, neither the *NTEU* nor *Hardy* Plaintiffs have established standing.

C. CSRA Preclusion Bars Plaintiffs' Claims

Plaintiffs' claims here are also not justiciable because their claims are essentially federal employment disputes. Plaintiffs seek to enjoin agencies from requiring employees to work and,

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held that a party cannot establish redressability by relying on the possibility of subsequent congressional action. *See Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 146-47 (D.C. Cir. 2012) (rejecting a theory of standing based on creating "astronomical costs and unleash[ing] chaos" such that "Congress will be forced to enact 'corrective legislation'"), *aff'd in part, rev'd in part on other grounds sub nom. Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302 (2014); *see also West Virginia v. HHS*, 827 F.3d 81, 84 n.5 (D.C. Cir. 2016).

likewise, from disciplining employees for failing to work. No matter how Plaintiffs plead their various claims for relief, these disputes concern the federal employer-employee relationship and must be channeled through the avenues created by Congress under the CSRA.[4]

The Supreme Court has repeatedly held that the remedies established by the CSRA are the exclusive means of redressing employment disputes involving federal employees; indeed, even when these disputes are framed in constitutional terms, the CSRA precludes review in district court. *See Elgin v. Dep't of Treas*, 567 U.S. 1, 10-15 (2012); *United States v. Fausto*, 484 U.S. 439, 455 (1988). Likewise, the D.C. Circuit has consistently held that for employment disputes, such as this one, the "CSRA provides 'the exclusive avenue for suit' to a plaintiff whose claims fall within its scope." *See AFGE v. Sec'y of Air Force*, 716 F.3d 633, 636 (D.C. Cir. 2013) (quoting *Grosdidier v. Chairman, Broad. Bd. of Governors*, 560 F.3d 495, 497 (D.C. Cir. 2009)); *see also Fornaro v. James*, 416 F.3d 63, 67 (D.C. Cir. 2005). Collective bargaining procedures are part of the CSRA's comprehensive scheme. *See* 5 U.S.C. § 7121; *see also AFGE v. Sec'y of Air Force*, 716 F.3d at 636-37; *Karahalios v. Nat'l Fed'n of Fed. Emps., Local 1263*, 489 U.S. 527, 531-32 (1989) (CSRA precludes action challenging violation of duty of fair representation under a collective bargaining agreement). Here, Plaintiffs' claims, with the exception of the FLSA claim, are precluded by the CSRA for two reasons.

1. All Union Plaintiffs Must Proceed Through Collective Bargaining

The *NTEU* lawsuit, and the claims of any *Hardy* Plaintiffs who are union members, must first proceed through the procedures established by the CSRA—*i.e.*, collective bargaining and/or

[4] The one potential exception is the FLSA claim brought by the *Hardy* Plaintiffs. Although courts in this district have found such claims must be brought in the Court of Federal Claims, *see, e.g.*, *Adair v. Bureau of Customs & Border Prot.*, 191 F. Supp. 3d 129 (D.D.C. 2016), the Government's view is that jurisdiction over such claims is proper in this Court. Nevertheless, the *Hardy* Plaintiffs cannot succeed on their FLSA claim as explained below. *See* Part III.D, *infra*.

the collective bargaining agreements' dispute-resolution procedures. NTEU's Amended Complaint confirms that NTEU is a union that engages in collective bargaining. *See NTEU* Am. Compl. ¶ 3. The *Hardy* Amended Complaint does not specify each plaintiff's union status, but counsel in *Hardy* has previously acknowledged that at least some of the individual plaintiffs—Ms. Hardy in particular—may be union members. *See* TRO Hr'g Tr. at 21.

As such, all of the union-covered Plaintiffs must first present their claims through the procedures established by the CSRA. *See AFGE v. Sec'y of Air Force*, 716 F.3d at 636. These procedures include an aggrieved party invoking a "grievance resolution and arbitration procedure," then an opportunity to file "with the [Federal Labor Relations Authority] exceptions to an arbitrator's award," and then, finally, to the extent the union claims an unfair labor practice, an opportunity for judicial review in the D.C. Circuit or "'in the circuit in which the person resides or transacts business.'" *See id*. at 636-37 (quoting 5 U.S.C. § 7123(a)).[5] What is not available is review "in district court." *Id*. at 637.

Indeed, the collective bargaining agreement between NTEU and the IRS further illustrates why review of the claims at issue must be channeled through the collective bargaining procedures. NTEU's agreement with the IRS expressly addresses how the IRS should respond to the lapse in appropriations. *See* 2019 National Agreement, Internal Revenue Service and National Treasury Employees Union (excerpts attached hereto as Exh. 13), Article 48, § 1 ("Shutdown Furloughs Due to Lapse in Appropriations/Debt Ceiling Limitations"). Specifically, the agreement acknowledges that certain employees will be excepted during a lapse in appropriations and thus

[5] To the extent a union chooses not to claim an unfair labor practice so that review is ultimately not available in a court of appeals, *see* 5 U.S.C. § 7123(a)(1), the current actions, nevertheless, would still be precluded from review in this Court. *See* Part I.C.2, *infra* (CSRA claims must be administratively exhausted).

are required to report to work during the lapse. *Id*. § 1(B). Further, the agreement addresses how to address situations when an employee may have a hardship that prevents them from reporting to work. *Id*. ("The Employer will consider an employee's request not to work due to a hardship."); *see also id.* Articles 41-43 (establishing various dispute-resolution procedures).

These provisions underscore that the union-covered Plaintiffs' claims are currently precluded by the CSRA. The relief Plaintiffs seek in their Amended Complaints would directly overlap with these various bargaining agreement provisions. *See also* Gov't PI Mem. at 21-22. For this reason alone, this Court lacks jurisdiction over the union-covered Plaintiffs' claims.

2. All Plaintiffs Are Challenging Prohibited Personnel Practices

Even apart from the collective bargaining grievance procedures, all of the Plaintiffs' claims (with the possible exception of the *Hardy* Plaintiffs' FLSA claim) are employment disputes that are governed by the CSRA. At their core, Plaintiffs' claims seek prospective relief that would address aspects of their ongoing employment relationship—*i.e.*, potential discipline for not showing up to work, being required to work while paychecks are delayed during the lapse in appropriations, etc. But claims that are interrelated to personnel actions, including constitutional claims, must first be exhausted administratively. *See Weaver v. U.S. Info. Agency*, 87 F.3d 1429, 1432 (D.C. Cir. 1996). Just last year, the Fourth Circuit explained the procedures necessary for exhausting such claims:

> [C]ertain employees may challenge specified "personnel actions" that violate "prohibited personnel practices" by filing a complaint in the Office of Special Counsel ("OSC"). The covered "personnel actions" include a "disciplinary or corrective action," "a decision concerning pay . . . or awards," and "other significant change[s] in duties, responsibilities, or working conditions." 5 U.S.C. § 2302(a)(2)(A)(iii), (ix), (xii). There are thirteen types of "prohibited personnel practices," including constitutional violations. 5 U.S.C. § 2301(b)(2); *see, e.g., Weaver v. United States Info. Agency*, 87 F.3d 1429, 1432 (D.C. Cir. 1996).

Fleming v. Spencer, 718 F. App'x 185, 186 (4th Cir. 2018) (unpublished, modifications in original);

see also id. at 189 (holding that because the plaintiff had "not exhausted his statutorily-prescribed administrative and judicial remedies," the district court properly dismissed the suit).

Because the disputes in these cases raise questions about potential discipline, pay, working conditions, as well as several alleged constitutional violations, these claims are likewise covered by the CSRA's exhaustion requirements. These claims raise quintessential federal employment disputes, and therefore this Court lacks jurisdiction over them. Plaintiffs' claims are not justiciable, at least not in this Court at this time.

III. THERE IS NO CAUSE OF ACTION AVAILABLE FOR MOST OF PLAINTIFFS' CLAIMS

Finally, even if Plaintiffs otherwise had established this Court's jurisdiction over their claims, the vast majority of Plaintiffs' claims must still be dismissed for lack of a cognizable cause of action. In particular, all of NTEU's claims must be dismissed, and Counts III-VII of the *Hardy* Amended Complaint must also be dismissed.[6]

A. The Appropriations Clause Does Not Provide a Cause of Action

Count I of the *NTEU* Amended Complaint and Count III of the *Hardy* Amended Complaint challenge the Anti-Deficiency Act as unconstitutional under the Appropriations Clause. *See* U.S. Const., art. I, § 9, cl. 7 ("No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law[.]"); *see also NTEU* Am. Compl. ¶¶ 42-45; *Hardy* Am. Compl. ¶¶ 58-60. Neither Complaint identifies a cause of action for these claims, presumably relying instead on an implied cause of action from the Appropriations Clause itself. But the Appropriations Clause does not itself provide a cause of action for private parties to bring such claims.

[6] In this motion, the Government does not dispute that the *Hardy* Plaintiffs have a private right of action for their Thirteenth Amendment and Due Process Clause claims (Counts I-II). Those claims would still fail on the merits, however, for reasons previously discussed. *See* Gov't PI Mem. at 42-51.

As the Supreme Court has long held, "implied causes of action are disfavored[.]" *Iqbal*, 556 U.S. at 675. "Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001); *see also Klay v. Panetta*, 758 F.3d 369, 373 (D.C. Cir. 2014). Indeed, "[t]here is even greater reason" for a court to decline to find implied rights of action "in the constitutional field[.]" *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring); *see also Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383 (2015) (holding that the Supremacy Clause does not create a cause of action, as it "is silent regarding who may enforce federal laws in court, and in what circumstances they may do so").

Here, as discussed above, the Appropriations Clause is part of "Congress's exclusive power over the federal purse." *Dep't of Navy*, 665 F.3d at 1346. Because the Clause "is not self-defining," Congress has "plenary power to give meaning to the provision." *Harrington*, 553 F.2d at 194; *see also Hart's Adm'r v. United States*, 16 Ct. Cl. 459, 484 (1880) ("The absolute control of the moneys of the United States is in Congress, and Congress is responsible for its exercise of this great power only to the people."), *aff'd sub nom. Hart v. United States*, 118 U.S. 62 (1886).

Plaintiffs' claim—that the Anti-Deficiency Act is contrary to the Appropriations Clause—is inconsistent with the above cases recognizing Congress's complete power over the purse. Plaintiffs are effectively asking the Judiciary to interpret, define, and enforce the Appropriations Clause, contrary to longstanding authority holding that it is *Congress* who is tasked with those responsibilities. This request for judicial relief, at the behest of private citizens, would deprive Congress of its "plenary power" to define and enforce the Appropriations Clause, and therefore this Court should not infer a private cause of action allowing such claims. *See United States v. Richardson*, 418 U.S. 166, 178 n.11 (1974) (discussing the second half of the Appropriations

Clause—*i.e.*, that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time," U.S Const., art. I, § 9, cl. 7—and stating that because "Congress has plenary power" under that provision, it is "open to serious question whether the Framers of the Constitution ever imagined that general directives to the Congress or the Executive would be subject to enforcement by an individual citizen").

At a minimum, this Court should not permit a claim that is effectively arguing that Congress erred in the exercise of its plenary power—*i.e.*, contending that a statute passed by Congress is not, in fact, consistent with the Appropriations Clause. *Cf. Dep't of Navy*, 665 F.3d at 1347 (noting that "[f]ederal statutes reinforce Congress's control over appropriated funds," and one of those statutes is the Anti-Deficiency Act). Plaintiffs are essentially asking this Court to second-guess Congress's decision about when, and under what circumstances, obligations may be incurred in advance of appropriations. The Government is not aware of any support for the proposition that the Appropriations Clause itself provides an implied cause of action for private parties to seek affirmative equitable relief against a Congressional statute—particularly a statute that is itself intended to enforce Congress's plenary power over appropriations. This Court should not be the first to recognize such an implied cause of action. Accordingly, Count I in *NTEU* and Count III in *Hardy* must be dismissed.

B. The Anti-Deficiency Act Does Not Provide a Cause of Action

The *Hardy* Plaintiffs also bring a variety of statutory challenges related to the Government's implementation of the Anti-Deficiency Act, *see Hardy* Am. Compl. ¶¶ 70-86 (Counts V-VII), apparently based on the assumption that the Anti-Deficiency Act itself provides a cause of action for such claims. Because the Act does not contain an express cause of action, however, one would have to be implied. The standard for implying a cause of action is high: "To support an implied cause of action, the relevant statute must demonstrate Congress's intent—

notwithstanding the lack of an express cause of action—to create a 'private right' and a 'private remedy.'" *Johnson v. Interstate Mgmt. Co., LLC*, 849 F.3d 1093, 1097 (D.C. Cir. 2017).

Here, the Anti-Deficiency Act cannot be interpreted in such a manner for several reasons. *First*, in both of the relevant sections, 31 U.S.C. §§ 1341-42, the statutory language is framed as restrictions on actions by Executive Branch officers—*i.e.*, "An officer or employee of the United States Government or of the District of Columbia government may not . . . ." Thus, there is no "rights-creating language" present within the statutes. *See Alexander*, 532 U.S. at 288-89 ("Statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons.").

Second, the Anti-Deficiency Act itself contains a comprehensive remedial scheme. If an Executive Branch employee violates §§ 1341 or 1342, the head of the employee's agency must report the violation to the President, to Congress, and to the Comptroller General. *See* 31 U.S.C. § 1351. Violations of the Act are also punishable in several different ways—ranging from potential administrative discipline, *see id.* § 1349, up to and including criminal penalties, *see id.* § 1350. This comprehensive remedial scheme for addressing violations—through after-the-fact reporting and enforcement—is strong evidence that Congress did not also intend for private individuals to pursue alleged violations through civil lawsuits seeking prospective, injunctive relief. *See Alexander*, 532 U.S. at 290 ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.").

Third and finally, the purpose of the Anti-Deficiency Act is to manage the internal affairs of Government. The Supreme Court has effectively recognized that the Anti-Deficiency Act does not regulate the rights of individuals. *See Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 197 (2012) ("[T]he Anti-Deficiency Act's requirements apply to the official, but they do not affect the

rights in this court of the citizen honestly contracting with the Government."). Thus, there is no basis for implying a cause of action for private individuals under the Anti-Deficiency Act itself.

C. Plaintiffs Cannot Use the APA to Challenge OMB Guidance or Agency Contingency Plans

Counts II and III of *NTEU*'s Amended Complaint rely on the APA to challenge an OMB memorandum and the IRS's January 2019 Tax Filing Season contingency plan. *See NTEU* Am. Compl. ¶¶ 49, 54. For several reasons, however, these APA claims also are not cognizable.

1. The Anti-Deficiency Act Is Not Enforceable Through the APA

As discussed previously, *see* Gov't PI Mem. at 36-37, for several reasons the APA cannot be used by private individuals to enforce the Anti-Deficiency Act's terms.

First, for the same reasons that the Anti-Deficiency Act does not impliedly provide a cause of action for private enforcement, neither does it permit private individuals to bring APA claims seeking prospective, injunctive relief against an agency's ongoing implementation of the Act. Private individuals are not within the relevant zone of interests of the Anti-Deficiency Act. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127-28 (2014).

Second, and relatedly, the Anti-Deficiency Act impliedly "preclude[s] judicial review" of such claims brought by private individuals. 5 U.S.C. § 701(a)(1). The Anti-Deficiency Act provides for administrative and criminal enforcement, not judicial enforcement by private parties. *See Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345-48 (1984) (holding that statute impliedly precluded review because it created an administrative scheme that excluded consumers, and "[a]llowing consumers to sue the Secretary would severely disrupt this complex and delicate administrative scheme"); *see also Switchmen's Union of N. Am. v. Nat'l Mediation Bd.*, 320 U.S. 297, 301 (1943) (noting that "the specification of one remedy normally excludes another"); *Israel Aircraft Industries Ltd. v. Sanwa Business Credit Corp.*, 16 F.3d 198, 200 (7th Cir. 1994) ("Express

provisions for criminal prosecution and administrative enforcement, without a corresponding provision for private enforcement, generally establish that private enforcement is inappropriate." (internal citation omitted)).

Third, the Executive's ongoing decisions about how to address "emergencies involving the safety of human life or the protection of property," 31 U.S.C. § 1342, are not properly subject to judicial oversight. In essence, Plaintiffs are asking this Court to second-guess the Executive Branch's "emergency" determination about which employees are necessary for the protection of life and property. Given that the Anti-Deficiency Act places that decision with the Executive (subject to the Anti-Deficiency Act's scheme of after-the-fact reporting and enforcement), this Court should not entertain a claim like this one seeking prospective interference with the Executive's emergency determinations. *See Curran v. Laird*, 420 F.2d 122, 132 (D.C. Cir. 1969) (en banc) ("In time of stress and emergency our officials need freedom to act. Congress gave the Executive such freedom in relation to the [program at issue]."); *see also Bd. of Trade v. Commodity Futures Trading Comm'n*, 605 F.2d 1016, 1023 (7th Cir. 1979) ("The fact that the Commission is authorized by Congress to take emergency action is, in itself, a suggestion of Congressional intent to commit such actions to the Commission's discretion."). Thus, an APA claim is also precluded because the Executive's decisions about how best to implement § 1342 are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2); *see Lincoln v. Vigil*, 508 U.S. 182, 192-93 (1993).

2. Plaintiffs Cannot Challenge Either of the Identified Agency Actions

Finally, even if Plaintiffs could theoretically use the APA to enforce the Anti-Deficiency Act, Plaintiffs' claims here would still fail because neither claim challenges "final agency action" subject to review. 5 U.S.C. § 704. To be "final agency action," an action must satisfy two criteria: "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one 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) (citations omitted). Here, neither the OMB Memorandum nor the IRS Tax Filing Season contingency plan satisfies either criterion.

a. With respect to the OMB Memorandum, it is not the consummation of a decisionmaking process, but is instead a guide for agencies to use in their own subsequent decisionmaking. Indeed, the OMB Memorandum expressly directs that further decisionmaking should occur. *See, e.g.*, OMB Mem. M-18-05 at 1 ("In reviewing contingency plans, agency leaders should ensure that only those activities that are 'excepted' pursuant to applicable legal requirements would continue to be performed during a lapse in the appropriation for those activities[.]").

Additionally, the OMB Memorandum did not itself establish any legal consequences. As the Court noted at the TRO hearing, it is up to individual agencies—not OMB—to decide which employees are excepted. *See* TRO Hr'g Tr. at 15. Indeed, *NTEU* effectively admits that the OMB Memorandum itself did not have any legal consequences, and was instead only an ingredient in agencies' future decisions. *See NTEU* Am. Compl. at 3 ("NTEU requests a declaration that the OMB directive being *used by agencies* to determine which employees may be required to report to work is inconsistent with the Antideficiency Act" (emphasis added)). Further proving this point is the fact that the OMB Memorandum was issued in January 2018—*eleven months* prior to the date the current lapse in appropriations began. This chronology underscores that issuance of the OMB Memorandum in January 2018 did not itself establish any legal consequences for NTEU or its members.

Ultimately, the OMB Memorandum "merely restated in an abstract setting – for the umpteenth time – [OMB's] longstanding interpretation" of the Anti-Deficiency Act, and therefore the OMB Memorandum had no "concrete impact" on NTEU or its members. *Indep. Equip.*

Dealers Ass'n v. EPA, 372 F.3d 420, 427 (D.C. Cir. 2004). By challenging an abstract legal interpretation set forth in a guidance document, Plaintiffs are seeking to circumvent the APA's limitation on challenging only discrete, identifiable agency action. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990) ("[R]espondent cannot seek wholesale improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made. Under the terms of the APA, respondent must direct its attack against some particular 'agency action' that causes it harm.").

b. Similarly, the IRS's January 2019 Tax Filing Season contingency plan is not a final agency action. First, the contingency plan is expressly not the consummation of the agency's decisionmaking process—by its own terms it only "describes actions and activities for the first five (5) business days following a lapse in appropriations," after which point "the Deputy Commissioner for Operations Support will direct the IRS Human Capital Officer to reassess ongoing activities and identify necessary adjustments of excepted positions and personnel." *See* IRS Filing Season Plan (*NTEU* ECF No. 15-4) at 5 ("Overview"); *see Vill. of Bensenville v. FAA*, 457 F.3d 52, 69 (D.C. Cir. 2006) (holding that "a planning document . . . does not complete the agency's decisionmaking process").

Second, the contingency plan itself did not determine any rights or legal consequences. Indeed, the NTEU CBA makes clear that legal consequences are not determined until any individual is told to report to work (presumably after a hardship exemption is denied). At most, those individualized decisions might constitute discrete, identifiable final agency action—but the mere issuance of the contingency plan did not itself have legal consequences for any individual employee. *See Ctr. for Auto Safety v. Nat'l Hwy. Traffic Safety Admin.*, 452 F.3d 798, 809-10 (D.C. Cir. 2006) (holding that policy guidelines were not final agency actions, because the agency

retained discretion to engage in case-by-case evaluation); *see also Vill. of Bensenville*, 457 F.3d at 69. Again, NTEU's decision to challenge a broad guidance document underscores that they are merely seeking to entangle this Court in ongoing supervision of the IRS's general implementation of the Anti-Deficiency Act—not discrete, identifiable disputes under the APA.

D. There Is No Cognizable FLSA Claim for Injunctive Relief

Finally, the *Hardy* Plaintiffs also seek to bring a claim under the Fair Labor Standards Act pursuant to the statute's minimum-wage provisions. *See Hardy* Am. Compl. ¶¶ 62-68. Importantly, however, the *Hardy* Plaintiffs have expressly waived any claim for damages under the FLSA: "Plaintiffs here do not seek to recover damages for this violation, but rather declaratory and injunctive relief proscribing the behavior to prevent further clear violations of employees' rights and ensure their ability to meaningfully oppose these unlawful practices." *Hardy* PI Mem. (ECF No. 8-2) at 13; *see also Hardy* Am. Compl., Prayer for Relief (not requesting any damages).

This FLSA claim cannot succeed because individuals cannot obtain injunctive relief for violations of the minimum-wage provisions. Pursuant to 29 U.S.C. § 216(b) (titled "Penalties"), "[a]ny employer who violates the provisions of section 206 . . . shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." There is no mention of injunctive or declaratory relief for violations of the minimum-wage provisions, even though that same subsection authorizes equitable relief for violations of other sections of the FLSA. *See id.* ("Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal *or equitable relief* as may be appropriate[.]" (emphasis added)); *cf. Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."

(modifications omitted)).

Moreover, other sections of the FLSA also provide for equitable relief in response to violations of the minimum-wage provisions, but only in suits brought by the Secretary of Labor. *See* 29 U.S.C. §§ 211(a), 217. Thus, courts have concluded that equitable relief is available only in those suits. *See Heitmann v. City of Chicago, Ill.*, 560 F.3d 642, 644 (7th Cir. 2009) ("Injunctive relief under § 217 is permissible only in suits by the Secretary of Labor."); *Ruggles v. Wellpoint, Inc.*, 253 F.R.D. 61, 68 (N.D.N.Y. 2008) ("An injunction is not an available remedy in an action brought by employees under the FLSA for failure to pay minimum wages or overtime compensation."). Accordingly, given that the *Hardy* Plaintiffs are pursuing only injunctive and declaratory relief, their FLSA claim likewise suffers from a lack of cognizable cause of action.

* * * *

If the Court concludes that it has jurisdiction over these cases, it should nonetheless dismiss all of *NTEU*'s claims, and Counts III-VII of the *Hardy* Plaintiffs' claims, for lack of a cognizable cause of action. For the reasons set forth above in Parts I-II, however, the proper resolution of this motion would be to dismiss all of Plaintiffs' claims for lack of subject-matter jurisdiction.

CONCLUSION

For the foregoing reasons, the Court should dismiss both the *NTEU* and *Hardy* Amended Complaints for lack of subject-matter jurisdiction.

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