IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL TREASURY EMPLOYEES UNION 1750 H Street, N.W. Washington, D.C. 20006, Plaintiff, v. UNITED STATES OF AMERICA, JOHN MICHAEL MULVANEY, in his official capacity as Director of the Office of Management and Budget, 725 17th Street, N.W. Washington, D.C. 20503, and STEVEN TERNER MNUCHIN, in his official capacity as Secretary of the Treasury, 1500 Pennsylvania Ave., N.W. Washington, D.C. 20220 Defendants.	Case No. 1:19-cv-50-RJL

PLAINTIFF NTEU'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

GREGORY O'DUDEN
General Counsel

LARRY J. ADKINS
Deputy General Counsel

PARAS N. SHAH
Assistant Counsel

ALLISON C. GILES
Assistant Counsel

JESSICA HORNE
Assistant Counsel

NATIONAL TREASURY EMPLOYEES UNION
1750 H Street N.W.
Washington, D.C. 20006
Tel: (202) 572-5500
Fax: (202) 572-5645
greg.oduden@nteu.org
larry.adkins@nteu.org
paras.shah@nteu.org
allie.giles@nteu.org
jessica.horne@nteu.org

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INTRODUCTION

Plaintiff National Treasury Employees Union (NTEU) sued defendants on behalf of its tens of thousands of members who were forced to work during the recent lapse in appropriations, which was the longest in this nation's history. This memorandum addresses the government's motion to dismiss NTEU's lawsuit, including the government's argument that it is unreasonable to expect that there will ever be another lapse in appropriations—even though the government has shut down three times in the last sixteen months and news reports indicate that the next shutdown may only be months away.

In its papers, the government not only argues for unchecked executive power on the merits, but asks this Court to conclude that judicial oversight of that unharnessed executive power would be inappropriate. If the government's argument succeeds, the constitutional and statutory violations alleged here will reoccur with every future shutdown without legal consequence because no shutdown will last long enough for the issues to be fully litigated. And executive branch agencies will be more emboldened than ever to require as many employees as they wish to work during a lapse in appropriations—regardless of the work these employees perform—because agencies will know that they can simply run out the clock on any resulting litigation and avoid judicial review of the types of claims that NTEU raises here. Their authority will be unfettered, and the judicial branch will be cut out of the equation altogether.

SUMMARY OF THE ARGUMENT

1. The Constitution's Appropriations Clause provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . . ." U.S. Const., Art. I, § 9, cl. 7. Consistent with the Clause, Section 1341 of the Antideficiency Act prohibits agencies from involving the government "in a contract or obligation for the payment of money

before an appropriation is made unless authorized by law." 31 U.S.C. § 1341. The later-enacted Section 1342, however, provides that the United States may "employ personal services exceeding that authorized by law" in "emergencies involving the safety of human life or the protection of property." Section 1342 violates the Constitution's Appropriations Clause by authorizing executive branch agencies to obligate funds, without limitation, in advance of appropriations. NTEU asks this Court to enjoin defendants from giving effect to Section 1342 by requiring NTEU members to work during a lapse in appropriations.

2. Alternatively, NTEU argues that an Office of Management and Budget (OMB) directive to executive branch agencies regarding lapses in appropriations, issued in January 2018 and still in effect, illegally conflicts with Section 1342.[1] The OMB directive's incorrect instructions go beyond Section 1342's text and allow employees to be excepted from a shutdown even if they are not needed to combat an imminent threat to life or property. Agencies using OMB's flawed test designated a far broader swath of "excepted" employees for purposes of the last government shutdown than Section 1342 allows. NTEU thus asks this Court to enjoin agency reliance on it.

3. Additionally, NTEU challenges IRS's January 15, 2019 "contingency plan" for operations during a lapse in appropriations, which remains in force.[2] Under that plan, IRS recalled over 36,000 employees (including about 21,900 NTEU-represented employees) whom it

[1] See Memorandum for the Heads of Executive Departments and Agencies, from Mick Mulvaney, Director, Re: Planning for Agency Operations During a Potential Lapse in Appropriations (Jan. 19, 2018), https://www.whitehouse.gov/wp-content/uploads/2017/11/m-18-05-Final.pdf (OMB directive).

[2] See U.S. Department of the Treasury, Lapse in Appropriations Contingency Plans, https://home.treasury.gov/lapse-in-appropriations-contingency-plans (listing Treasury component contingency plans currently in effect, including the IRS plan at issue).

had designated for furlough only three weeks earlier. These employees were on furlough for the first several weeks of the shutdown, but were pressed back into service to process tax returns. IRS's contingency plan offered two flawed legal bases for this unprecedented, sweeping recall.[3]

First, IRS designated 32,967 employees to work on tax refund processing under the "necessarily implied by law" theory—up from 250 employees placed in that category only three weeks earlier. Defendant OMB, itself, has underscored the narrowness of the doctrine, which has no application to IRS employees who process federal tax returns (as even former IRS Commissioner John Koskinen agrees). Second, in January, IRS designated 12,262 employees as excepted under Section 1342 emergency exception, which was a 52% increase from the 8,017 employees so designated only three weeks earlier. IRS offered no explanation for this substantial increase, which is implausible on its face. NTEU thus asks the Court to enjoin the Secretary of the Treasury from requiring any NTEU member who was initially furloughed during the last shutdown, but then recalled to work during the lapse through IRS's January 2019 contingency plan, to work during a lapse in appropriations.

STANDARD OF REVIEW

In evaluating a Rule 12(b)(1) arguments, the Court may go beyond the pleadings and consider "undisputed facts evidenced in the record" (Herbert v. Nat'l Academy of Sciences, 974 F.2d 192, 197 (D.C. Cir. 1992)) and materials such as sworn statements providing "further particularized allegations of fact deemed supportive of plaintiff's standing." Haase v. Sessions, 835 F.2d 902, 906-07 (D.C. Cir. 1987) (quoting Warth v. Seldin, 422 U.S. 490, 501-02 (1975)).

[3] This Court has noted, based on its review of the Antideficiency Act, Office of Legal Counsel guidance, and the IRS contingency plan, that it has "very serious concerns about whether or not calling back thousands of employees for the purpose of issuing refund checks is consistent with the Antideficiency Act." Tr. of Jan. 31, 2019 Status Hr'g at 5, 10.

For Rule 12(b)(6) purposes, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). For any Rule 12(b) motion, the Court "must treat the complaint's factual allegations as true, and must grant plaintiff 'the benefit of all inferences that can be derived from the facts alleged.'" Prisology v. Fed. Bureau of Prisons, 74 F. Supp. 3d 88, 92 (D.D.C. 2014).

ARGUMENT

I. This Court Has Jurisdiction Over NTEU's Claims.

A. The Illegalities Alleged Are "Capable of Repetition Yet Evading Review."

NTEU's claims meet the test for the capable of repetition yet evading review exception to the mootness doctrine, which applies 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.'" Int'l Internship Programs v. Napolitano, 853 F. Supp. 2d 86, 95 (D.D.C. 2012).

1. Government Shutdowns Evade Review.

"'[B]oth Supreme Court and circuit precedent hold that orders of less than two years' duration ordinarily evade review.'" Id. at 96 (quoting Burlington N. R.R. Co. v. Surface Transp. Bd., 75 F.3d 685, 690 (D.C. Cir. 1996)). Here, the parties were sixteen days into this litigation and engaged in briefing on NTEU's motions for preliminary relief when the thirty-five-day shutdown ended. There was insufficient time for complete briefing on NTEU's preliminary motions, let alone a full airing of the issues before this Court and any appellate review.

Indeed, no government shutdown has come close to lasting the two years presumptively required to allow the legal issues raised to be "fully litigated." Int'l Internship Programs, 853 F. Supp. at 95-96 (observing that plaintiff's action may evade review "because Q-1 visas are valid

for, at most, a period of fifteen months"). Unless NTEU's legal claims are heard through the capable of repetition yet evading review doctrine, they will never be decided, even though the alleged injuries would reoccur during every future government shutdown.[4]

Because binding precedent shows that NTEU has satisfied this prong, the government throws a red herring this Court's way, pointing to a Fair Labor Standards Act (FLSA) lawsuit that NTEU filed in the U.S. Court of Federal Claims alleging FLSA violations for the late payment of minimum wage and overtime wages during the shutdown. Gov't Mem. at 14-15 (referencing Avalos v. United States, No. 19-cv-0048 (Fed. Cl. filed Jan. 9, 2019)). The Court of Federal Claims has previously held the government to owe liquidated damages for the late payment of such wages (Martin v. United States, 130 Fed. Cl. 578 (Fed. Cl. 2017)) (rejecting government argument that the Antideficiency Act excuses FLSA late-payment violations), which is the remedy that NTEU seeks for its FLSA claims. NTEU's Court of Federal Claims complaint raises no other claims. Indeed, the Court of Federal Claims would lack jurisdiction over the claims that NTEU raises before this Court and could not grant the equitable relief that NTEU seeks here. See U.S. Court of Federal Claims, Frequently Asked Questions, www.uscfc.uscourts.gov/faqs#Jurisdiction.

2. A Government Shutdown Affecting NTEU Members is Capable of Repetition.

"To be capable of repetition, 'there must be a reasonable expectation or demonstrated probability that the same controversy will recur involving the same complaining party.'" Int'l Internship Programs, 853 F. Supp. at 96 (quoting Spirit of the Sage Council v. Norton, 411 F.3d 225, 230 (D.C. Cir. 2005)). The Supreme Court has repeatedly "found controversies capable of

[4] NTEU previously raised its constitutional claim before Judge Sullivan in a past shutdown; he did not reach the merits of the claim. AFGE v. Rivlin, 995 F. Supp. 165 (D.D.C. 1998).

repetition based on expectations that, while reasonable, were hardly demonstrably probable." Honig v. Doe, 484 U.S. 305, 318 n.6 (1988). Moreover, "[w]hen the court views the public interest as greater[,] a lesser possibility of repetition may suffice." Alton & S. R. Co. v. Int'l Ass'n of Machinists & Aerospace Workers, 463 F.2d 872, 880 (D.C. Cir. 1972).

Critically, it is the alleged legal injury to the plaintiff that must be capable of recurrence—and nothing more. As the Supreme Court has explained, its "cases find the same controversy sufficiently likely to recur when a party has a reasonable expectation that it 'will again be subjected to the alleged illegality.'" FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 463 (2007). The Court has rejected the notion that, for the exception to apply, plaintiff must show a reasonable expectation of repetition "of every 'legally relevant' characteristic" to the legal challenge. Id. Consistent with Supreme Court precedent, the D.C. Circuit has reversed a district court for "focus[ing] on whether the precise historical facts that spawned the plaintiff's claims are likely to recur, rather than whether the legal wrong complained of by the plaintiff is reasonably likely to recur, as our precedent requires." Del Monte Fresh Produce Co. v. U.S., 570 F.3d 316, 324 (D.C. Cir. 2009).

a. Here, there is reasonable expectation that, at some point, another shutdown will occur during which NTEU members, who serve in thirty-three different federal agencies and departments (https://www.nteu.org/who-we-are/our-agencies), will be forced to work in violation of the Constitution or federal statute. See Am. Compl., Counts I-III. The recent history of government shutdowns leaves little doubt that there will be another one. There have been twenty-one government shutdowns since Congress enacted the modern budgeting process forty-three years ago; four of those lapses in funding have occurred in the last six years, and three of

them have occurred in the last sixteen months.[5] The most recent of which, of course, was by far the longest in our nation's history at thirty-five days. Id.

The trend is unambiguous: since 2013, shutdowns have become vastly more common than in the preceding two decades. See id. Indeed, the government has been shuttered for a total of 54 days since fall of 2013, which is eleven more days than it was shuttered in the 1990s and 1980s combined. Id. See Gov't Mem. at 16 (noting that no shutdowns occurred in the nearly 18 years preceding the 2013 shutdown). This unmistakable trend—punctuated by the three shutdowns occurring in 2018-19—fundamentally alters the "capable of repetition" calculus.

This recent trend plainly gives rise to a reasonable expectation that another government shutdown will occur at some point in the future, causing the legal wrongs that NTEU has alleged to reoccur. Further supporting this reasonable expectation of another shutdown occurring one day are the countless near misses—the instances in which government shutdowns were averted via last-minute continuing resolutions—such as the one enacted on February 15, 2019. Although shutdowns have not always occurred in these scenarios, it has not been unreasonable to expect (as this Court has done in scheduling briefing in this case) that they will. See pp. 10-11 infra.

This recent trend, standing alone, shows that NTEU's alleged legal injuries are capable of repetition. Current events provide additional support for that conclusion: there are already reports giving rise to a reasonable expectation of another government shutdown affecting the full federal government this year. On March 11, the President sent his budget proposal to Congress, "starting a new battle over how to fund the government that sets up the nation for an even more destructive shutdown when money runs out later this year": the proposal "seeks deep cuts from

[5] See Gretchen Frazee & Lisa Desjardins, "How the Government Shutdown Compared to Every Other Since 1976," PBS.org (Jan. 25, 2019), https://www.pbs.org/newshour/politics/every-government-shutdown-from-1976-to-now (relying on Congressional Research Service data).

[certain] agencies . . . . At the same time[,] it would spend $8.6 billion on a border wall with Mexico and boost defense spending to $750 billion, both items sure to raise intense opposition from Democrats."[6]

It is difficult to argue that there is not a very real possibility of another lapse in appropriations this year—and it is untenable to argue that there is no reasonable expectation of another shutdown ever—when the very same issue that was at the heart of the longest shutdown in our nation's history (funding for the border wall) is among those already threatening to cause another shutdown. See Tr. of Jan. 31 Status Hr'g at 11-12 (properly taking reports of budget negotiations into account when setting briefing schedule in event of another shutdown). Indeed, there are reports that the "looming battle . . . over government spending and the debt limit could make the 35-day government shutdown look like a blip," and that "lawmakers are openly worried about stumbling over the edge."[7]

Given the recent history of government shutdowns and the real prospect that another is well within sight, there is a reasonable expectation that, at some point, there will be a government shutdown that affects at least one of the thirty-three federal agencies and departments at which NTEU represents bargaining unit employees. There is also a reasonable expectation that NTEU members will be forced to work during the lapse. See Am. Compl. at 1, ¶¶ 20, 24, 28 (tens of thousands of NTEU members working during the recent partial

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[6] Caitlin Emma & Jennifer Scholtes, "Trump's Budget Sets Up Another Shutdown Battle," Politico.com (Mar. 11, 2019), https://www.politico.com/story/2019/03/11/trump-fiscal-budget-2020-1215609.

[7] Sarah Ferris, "Congress Fears Trump Could Stumble Over Next Fiscal Cliff," Politico.com (Apr. 2, 2019), https://www.politico.com/story/2019/04/02/congress-spending-budget-shutdown-1244283 (discussing "[a] series of budget deadlines converging in the coming months").

government shutdown). The government's incurrence of their salary obligations would violate the Constitution's Appropriations Clause. Am. Compl., Count I.

Moreover, the agencies that designate these NTEU members for work during the shutdown will do so using legally deficient instructions from OMB. Am. Compl., Count II. And in the case of IRS (at which NTEU represents some 21,900 employees who were initially furloughed but then called back into work to process tax returns during the last shutdown, Am. Compl. ¶ 28), NTEU members would be forced to work under a legally deficient contingency plan that overbroadly applies the extra-textual "necessarily implied by law" theory and the Antideficiency Act's emergency exception. Am. Compl., Count III.

Both the OMB directive and the IRS contingency plan at issue in this litigation remain in force and would thus govern agency determinations regarding whether an NTEU member would be forced to work during a future lapse in appropriations. Cf. Better Gov't Ass'n v. Dep't of State, 780 F.2d 86, 91-92 (D.C. Cir. 1986) (ruling that plaintiffs' facial challenges to agency regulation and guidelines that were still in effect and would be applied in the future were not moot). It is thus reasonable to expect that these illegal documents will again cause injury to NTEU members. See id. The government's speculation that either agency document might one day be altered is immaterial. The bottom line is that each is in effect and would govern a future lapse in appropriations, including the full government shutdown that might soon occur.

This Court thus has ample basis to conclude that it is reasonable to expect that another shutdown will one day occur, affecting at least one of the thirty-three federal departments and

agencies at which NTEU represents employees, and that some NTEU members will be required to work during the lapse in violation of the Constitution and federal statute.[8]

b. The schedule in this litigation has plainly reflected a reasonable expectation of another government shutdown that would again injure NTEU members. In the first two months of this litigation, the Court twice burdened itself to schedule proceedings so that, if needed, decisions on the relief that NTEU seeks could be made before another government shutdown.

On January 31, 2019, after the last government shutdown ended with the passage of a continuing resolution, this Court set a schedule for adjudicating any motions for preliminary injunction that might be filed in the event of another shutdown upon the continuing resolution's expiration. Tr. of Jan. 31, 2019 Status Hr'g at 6-8. "We may indeed be right back where we were last week [in] mid-February. Hopefully not, but we may be," the Court remarked. Id. at 4. The Court, moreover, prudently scheduled oral argument, to be followed by an oral ruling, on February 22, which would have been "the first day after a renewed shutdown that employees of the federal government would miss a paycheck or a portion of a paycheck." Id. at 7.

In setting this schedule, the Court "considered" and "rejected" the government's position that "any future lapse in appropriations is entirely speculative at this point." Id. at 11. And it ordered a schedule that reflected not only a reasonable expectation of another government

[8] The government's purported "chain of speculation" regarding what must be capable of repetition (Gov't Mem. at 19) does not withstand scrutiny and fails to heed binding precedent concerning what, exactly, must be capable of repetition, which is the alleged legal wrong and not "every 'legally relevant' characteristic." Wis. Right to Life, Inc., 551 U.S. at 463. Accord Del Monte Fresh Produce Co., 570 F.3d at 324. Its suggestion, moreover, that a government shutdown would have to occur during tax season for NTEU's claim against IRS to reoccur is wrong. Gov't Mem. at 18-19. The January 2019 IRS contingency plan is in force, and it would be speculative to conclude if or when it will be modified. Indeed, if NTEU's legal challenge is dismissed, IRS would have little incentive to scale back or otherwise alter its contingency plan in the future, regardless of when a lapse in appropriations is threatened to occur.

shutdown, but also a reasonable expectation that the government shutdown, should it come to bear, might last until a scheduled payday for federal workers. Id. at 6-8.

On February 22, after another government shutdown was averted the week before, the Court set out the basic framework for the motion to dismiss briefing schedule that is currently underway, taking into account the reasonable expectation of another lapse in funding at the end of this year. Tr. of Feb. 22, 2019 Status Hr'g at 12-13. The Court requested that Rule 12 briefing and argument conclude by "early May," so that there would be sufficient time to brief, argue, and decide any motions for summary judgment by "mid-September[,] before we have any new problems." Id.

As this Court underscored in discussing this schedule, "this is a novel case, but it's a case that has great potential concern and impact to the country, and I mean, hopefully we'll never have [a shutdown] again, but it's a possibility. It's a very real possibility that it could happen again. Maybe not even in this administration, [but] a future administration." Id. at 13. That, of course, is the bottom line: it is reasonable to expect—particularly based upon what has transpired in recent years, the current political climate, and reports of another potential shutdown in a few months—that another government shutdown will one day occur.

c. The government relies upon two nonprecedential decisions by the D.C. Circuit and the district court decisions underlying them to argue that NTEU's claims are moot. Gov't Mem. at 20-21. Neither decision binds this Court. Neither, moreover, is instructive on the question of whether today, in this political climate, with three shutdowns having occurred in the last sixteen months and another potential lapse in sight, it can be said that there is no reasonable expectation of another shutdown ever occurring.

First, Judge Sullivan's decision, affirmed summarily by the Court of Appeals, came in an entirely different time than today: one during which the budget process appeared to be fixed. See AFGE v. Rivlin, 995 F. Supp. 165 (D.D.C. 1998), aff'd, slip op., No. 98-5045 (D.C. Cir. July 15, 1998). Judge Sullivan relied on the following facts in rejecting arguments that the alleged injuries were capable of repetition yet evading review: (1) that there had not been a shutdown for three years, and (2) that Congress passed and the President signed appropriations acts for each federal agency for fiscal years 1997 and 1998. Id. at 166. In other words, Judge Sullivan had reason to believe that the budget process was working again and that the prospect of another shutdown was speculative. But we now know that what occurred during that time period was an aberration: Congress has not timely passed a budget since then.[9] Moreover, in the last half-dozen years, the political branches have demonstrated a decreasing ability to fund the government continuously: funding has lapsed four times since the fall of 2013, including three times in the last sixteen months. See pp. 6-7 supra.

Judge Sullivan's other bases for rejecting the capable of repetition yet evading review argument have no application here. He stated that it would be speculative to predict precisely "when [] another lapse in appropriations may occur" or "how long the lapse might be." 995 F. Supp. at 166. As the Court has correctly indicated, it need not predict either of these things. It need only conclude that it is reasonable to expect that another government shutdown might occur at some point in the future. See p. 11 supra (quoting status conference remarks). Accord Wis. Right to Life, Inc., 551 U.S. at 463; Del Monte Fresh Produce Co., 570 F.3d at 324.

[9] Drew DeSilver, "Congress Has Long Struggled to Pass Spending Bills on Time," Pew Research Center (Jan. 16, 2018), https://www.pewresearch.org/fact-tank/2018/01/16/congress-has-long-struggled-to-pass-spending-bills-on-time.

Judge Sullivan added that it would be speculative to predict "which employees" would be required to work during a lapse in appropriations and whether they would "be required to work without compensation." 995 F. Supp. at 166. NTEU represents approximately 150,000 employees in thirty-three different federal agencies and departments (https://www.nteu.org/who-we-are/our-agencies). It is reasonable to expect that some of its members would be affected by a future lapse in appropriations (indeed, tens of thousands of its employees were affected by the recent partial government shutdown involving only 25% of the government). See Am. Compl. at 1, ¶¶ 28, 53. If appropriations lapse, no funds would exist to pay them and the Antideficiency Act, 31 U.S.C. § 1341, in any event, would forbid payment on scheduled paydays.[10]

Second, Judge Huvelle's decision, affirmed through a short per curiam decision containing two sentences on mootness, pertained to a narrow factual dispute involving a single individual that was unlikely to reoccur. See Leonard v. Dep't of Def., 38 F. Supp. 3d 99 (D.D.C. 2014), aff'd, 598 F. App'x 9 (D.C. Cir. 2015). In Leonard, a Navy chaplain under contract with the government was prohibited from providing religious services during the 2013 government shutdown because he could not be paid for those services. Id. at 102. The district court held that the chaplain could not establish that his First Amendment and statutory claims were capable of repetition yet evading review because there are "too many contingencies that would need to occur simultaneously" for the exception to apply. Id. at 106. That is: (1) the government would

[10] The government suggests that the D.C. Circuit's nonprecedential affirmance of Judge Sullivan's ruling might preclude the capable of repetition yet evading review argument made here. Gov't Mem. 24. NTEU, here, is making entirely different factual arguments related to this issue (e.g., the recent history of government shutdowns and the reports on the real risk of another government shutdown this year), which could not have been made to Judge Sullivan a quarter-century ago. Cf. Schuler v. PricewaterhouseCoopers, LLP, 739 F. Supp. 2d 1, 5 (D.D.C. 2010) (properly finding issue preclusion where, among other things, the underlying factual arguments on the legal issue raised in the two pertinent cases were "essentially identical").

need to shut down again; (2) it would need to exclude payment for chaplains from any temporary funding schemes; (3) plaintiff, who worked on year-to-year contracts, would need to still be a Navy chaplain; and (4) the Navy would need to apply the Antideficiency Act "so as to limit chaplains' religious activities despite the express decision not to do so at the end of the most recent government shutdown." Id. (emphasis added).

On appeal, the D.C. Circuit did not precisely restate the district court's detailed, fact-specific ruling. It instead alluded to that ruling in an incomplete way, stating that the plaintiff's claims did not fit the capable of repetition yet evading review doctrine "because the likelihood of a future government shutdown is 'too speculative.'" 598 F. App'x at 10. The district court's opinion, though, makes clear the basis for its far more nuanced holding (including the government's change in course), which has no application here. The situation in Leonard is wholly distinct from the one here, where the occurrence of a shutdown is all that would be needed to again injure tens of thousands of NTEU members.[11]

This Court should disregard these uninstructive decisions and look, instead, to this Circuit's most recent opinion on the capable of repetition yet evading review doctrine. In Reid v. Inch, 914 F.3d 670 (D.C. Cir. 2019), a prisoner serving a long sentence had been placed in various "Special Housing Units" (SHU) at Bureau of Prisons facilities over the years for either disciplinary or administrative reasons and alleged that he suffered certain legal deprivations while housed in those units. Id. at 675-76. Based on those past experiences, without any

[11] The out-of-circuit, inapposite, and unreported district court decisions that the government cites add nothing to its argument. Gov't Mem. at 22 (relying on case filed in anticipation of a shutdown that "never occurred," Smith v. United States Dep't of Agric., 2016 U.S. Dist. LEXIS 105058, at *3 (N.D. Cal., Aug. 8, 2016), among others). These cases, in any event, could not have contemplated more recent events—i.e., three shutdowns in the last sixteen months, including the longest in our nation's history—which fundamentally alter this analysis.

specific evidence that the prisoner would again be sent to a SHU or any evidence of what would happen once he got there, the D.C. Circuit ruled that he could continue to press his legal claims. Id. It held that, although he was then not in a SHU, it was a "logical theory" that he might once again be sent to a SHU and suffer the same type of legal deprivations alleged. Id. at 676. Accord Olmstead v. Zimring 527 U.S. 581, 594 n.6 (1999) (concluding as part of mootness analysis that where petitioners had been institutionalized multiple times, it was reasonable to expect, given those past experiences, that they might be institutionalized again one day).

Here, of course, there is specific reporting that another budget impasse might occur this year, making NTEU's claimed legal violations even more "capable of repetition" than the claims raised in Reid or Olmstead. But, even absent that, the history of the last six years alone tells us that there is "a very real possibility" of another government shutdown at some point in the future. Tr. of Feb. 22, 2019 Status Hr'g at 13. Should that occur, there is a reasonable expectation that at least one of the thirty-three federal agencies and departments at which NTEU represents bargaining unit employees would be affected and that thousands of them would be forced to work during the lapse. Am. Compl. at 1, ¶¶ 28, 53. The incurrence of their salary obligations would violate the Constitution's Appropriations Clause. Am. Compl., Count I. Their agencies would have designated them for work during the shutdown using legally deficient instructions from OMB that remain in force. Am. Compl., Count II. And, in the case of IRS, NTEU members would be forced to work during a lapse based on an agency contingency plan that, on its face, overbroadly applies the narrow "necessarily implied by law" theory (discussed at pp. 39-41 below) and Section 1342 of the Antideficiency Act. Am. Compl. Count III.

* * *

In sum, the history of shutdowns over the last the last few years, the status of budget discussions, and common sense should not be overtaken by nonprecedential or nonbinding decisions stemming from past shutdowns that are either reflective of an entirely different era or inapposite. There likely is not a single person today who thinks that the last government shutdown has occurred. It is reasonable to expect that another shutdown will occur and that NTEU members will again suffer the legal wrongs that NTEU alleges on their behalf.

B. Prudential Considerations Do Not Help the Government's Cause.

NTEU's satisfaction of the capable of repetition yet evading review test, "together with a public interest in having the legality of the practices settled, militates against a mootness conclusion." United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953). NTEU's lawsuit aims to prevent illegal government action from reoccurring in future shutdowns. It does not seek to merely prompt legislation, as the government claims (Gov't Mem. at 26-27). The "enforcement of an unconstitutional law is always contrary to the public interest" (Gordon v. Holder, 721 F.3d 638, 653 (D.C. Cir. 2013)) because it "is always in the public interest to prevent the violation of a party's constitutional rights." Klayman v. Obama, 957 F. Supp. 2d 1, 42 (D.D.C. 2013), rev'd on other grounds, 800 F.3d 559 (D.C. Cir. 2015). Similarly, "the public has a profound interest in ensuring that . . . [an agency] acts within the limits of its authority established by Congress." Brendsel v. Office of Fed. Hous. Enter. Oversight, 339 F. Supp. 2d 52, 66 (D.D.C. 2004).

That there are "political overtones" in this lawsuit, moreover, does not weigh in favor of avoiding NTEU's claims. See Japan Whaling Ass'n v. Cetacean Soc'y, 478 U.S. 221, 230 (1986) ("[U]nder the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones."). This Court should not avoid questions of "great potential

concern and impact to the country" (Tr. of Feb. 22, 2019 Status Hr'g at 13) that are properly before it because the government would prefer that those questions, which are destined to arise again, go unanswered forever. See Int'l Ass'n of Machinists & Aerospace Workers, 463 F.2d at 880 (favoring judicial review even when there is "a lesser possibility of repetition" where "the court views the public interest as greater").

C. NTEU Has Sufficiently Shown Associational Standing.

NTEU has shown that specific members have suffered Article III injuries that are fairly traceable to the defendants' conduct and redressable through the relief sought. Cf. Gov't Mem. at 28-29, 30-32. The declaratory and injunctive relief sought for NTEU's purely legal claims, moreover, does not require that an individual member participate in this litigation as a named plaintiff. Cf. Gov't Mem. at 29-30.

1. The Government's Misunderstanding of the Injury-in-Fact Undermines Its Injury, Traceability, and Redressability Arguments.

The declarations that NTEU submitted in connection with its motions for preliminary relief show that NTEU has identified specific members who suffered concrete Article III injuries during the last lapse in appropriations. Cf. Gov't Mem. at 28-29. These declarations are properly considered for Rule 12(b)(1) purposes. Herbert, 974 F.2d at 197; Haase, 835 F.2d at 906-07. The pertinent Article III injury-in-fact for each of its legal claims, as NTEU described in its motions for preliminary relief, is unrecouped financial loss stemming from unpaid work during the shutdown. See Brendsel, 339 F. Supp. 2d at 66 (injury where plaintiff would not be able to recover monetary loss suffered). Cf. Gov't Mem. at 30-32 (incorrectly describing injury as simply being required to work without pay). These injuries are fairly traceable to the defendants' conduct and redressable through the relief sought. Cf. Gov't Mem. at 31-32 n.3.

a. NTEU's Constitutional Claim (Count I). NTEU members, such as Elizabeth Thigpen, who were excepted from the shutdown through Section 1342 of the Antideficiency Act, were forced to work without pay for roughly one month during the lapse in appropriations and had no choice but to incur debt to pay their bills, including payment for costs attendant to their unpaid work, such as childcare and commuting costs. Declaration of Elizabeth Thigpen, ECF No. 9 (Thigpen Decl.), ¶¶ 1-10. The interest fees associated with that debt would not be recovered when Congress issued back pay to federal employees after the shutdown concluded.

Ms. Thigpen is a single mother of four who, in addition to working without pay during the shutdown, stopped receiving child support payments during the shutdown because the father of her children is also a federal employee. Id. ¶ 7. She received her last paycheck on December 28, 2018 and received no other pay during the lapse in appropriations. Id. ¶ 6. During this time, she continued to incur the cost of her daily commute to work and the continued cost of daycare for her children, causing her to incur credit card debt due for which she would incur a fee. Id. ¶¶ 8-10. Her working status, which included overtime work, kept her from working a second, paying job to try to make ends meet. Id. ¶¶ 4, 5, 8 (told that any annual leave request would be denied).

Ms. Thigpen's injury was fairly traceable to the unconstitutional statute being challenged, through which she was required to work without pay during the lapse in appropriations, causing her to incur financial debt for costs attendant to her unpaid work. See id. ¶¶ 1-10. It was unquestionably redressable through the relief sought, which would have prevented her from incurring those costs attendant to her required and unpaid work. Am. Compl., Request for Relief (declaring Section 1342 unconstitutional and enjoining defendants from "requiring Plaintiff NTEU's members to work during a period of lapsed appropriations").

b. NTEU's APA Claim Against OMB (Count II). NTEU members who were designated to work during the most recent shutdown under an untenably broad reading of Section 1342's emergency exception, suffered the same type of Article III injury-in-fact as Ms. Thigpen. As NTEU's Director of Negotiations attested based on his communications with agencies on their shutdown plans and his review of those plans, many employees designated as excepted "in accordance with agency plans and the [OMB directive]," including "many NTEU members," performed "services involv[ing] only 'the ongoing regular functions of government, the suspension of which would not imminently threaten the safety of human life or the protection of property.'" Declaration of Kenneth Moffett, Jr., ECF No. 8-3 (Moffett Decl.), ¶¶ 1-4. Accord Am. Compl. ¶¶ 20-21 (alleging agencies considered the OMB directive into account and designated NTEU members as excepted, in conflict with the plain text of Section 1342).

NTEU member Terrance Hebron, for example, was an IRS employee who was designated as "excepted" and required to work during the entirety of the shutdown. Declaration of Terrance Hebron, ECF No. 9 (Hebron Decl.), ¶¶ 1-3. He was so designated even though his stated duties as a Tax Examiner have nothing to do protecting human life or property from imminent threat; they, instead, involve "processing dishonored checks, notifying taxpayers of any penalty assessed for dishonored checks, and responding to related taxpayer inquiries. Id. ¶ 5. Mr. Hebron is thus emblematic of agencies, guided by the legally flawed OMB directive, over-designating employees as falling within Section 1342's emergency exception.[12]

[12] The government offers that Mr. Hebron failed to state a legal conclusion in his declaration—i.e., that he "should not be excepted under a proper interpretation of § 1342." Gov't Mem. at 28. But that type of conclusory statement (which would be inappropriate for a non-lawyer to attest to in a declaration) is not required to show his standing here, which is demonstrated by his duties, his excepted status during the most recent shutdown, and NTEU's allegations.

Mr. Hebron did not receive his scheduled paychecks during the lapse in appropriations and was thus unable to pay all his monthly bills—which included utility bills, credit card bills, and loan payments. Id. ¶¶ 6, 7 ("Without my regular paycheck, I am forced to make difficult choices about which of these bills to pay."). The failure to pay a utility or credit card bill or to make a loan payment will, of course, lead to a fee or charge—i.e., a financial loss that the back pay provided by Congress at the end of the shutdown did not cure. Mr. Hebron's designation as an excepted employee, moreover, prevented him from mitigating this financial loss through other work. Id. at ¶ 3 ("If I do not report to work, I may be charged as AWOL . . . .").

"Article III standing does not require that the defendant be the most immediate cause, or even a proximate cause, of the plaintiffs' injuries; it requires only that those injuries be 'fairly traceable' to the defendant." Attias v. CareFirst, Inc., 865 F.3d 620, 629 (D.C. Cir. 2017). Here, the OMB directive explicitly ordered federal agencies to plan for agency operations during a lapse in appropriations and gave directions for determining which employees would continue working during a lapse in appropriations. OMB directive, Attachment, FAQs, at I.A.2. Agency decisions on who to except, even if they considered other authority such as the 1995 OLC Opinion, are thus "fairly traceable" to the OMB directive. Attias, 865 F.3d at 629. [13] Indeed, the government has conceded that the OMB directive was "an ingredient in agencies' future decisions" on who to except. Defendants' Combined Memorandum in Opposition to Plaintiffs' Motions for Preliminary Injunctions, ECF No. 19 (Gov't PI Opp.), at 37-38. The OMB directive is thus at least partially to blame for Mr. Hebron's excepted status, showing traceability.

[13] "1995 OLC Opinion" refers to the Memorandum for Alice Rivlin, Director, Office of Management and Budget, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, Re: Government Operations in the Event of a Lapse in Appropriations at 4 (Aug. 16, 1995), a copy of which is available at https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/1995-1998/m95-18.pdf.

Because the OMB directive was, in the government's words, at least "an ingredient" (id.) in agencies' decisions on who would work during a lapse in appropriations, redressability is established. If agency reliance on the OMB directive is enjoined or if it is declared unlawful or ordered to be withdrawn (see Am. Compl., Request for Relief), NTEU and its members will have "benefit[ed] in a tangible way from the court's intervention." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 103 n.5 (1998). Nothing more need be shown: "'a party seeking judicial relief need not show to a certainty that a favorable decision will redress [its] injury.'" Teton Historic Aviation Found. v. DOD, 785 F.3d 719, 725-26 & n.5 (D.C. Cir. 2015).

c. NTEU's APA Claim Against IRS. NTEU is the exclusive representative for IRS bargaining unit employees (https://www.nteu.org/who-we-are/our-agencies). On January 15, 2019, IRS informed NTEU that approximately 21,900 IRS employees represented by NTEU who were on furlough during the lapse in appropriations would be recalled into service during the shutdown to process federal tax refunds. Am. Compl. ¶¶ 24-28. These "recalled" IRS employees suffered the same type of Article III injury-in-fact as the other NTEU members forced to work without pay during the shutdown: unrecouped financial loss. These IRS employees had no choice but to pay the costs attendant with their unpaid work, such as childcare and commuting costs. Declaration of Kenneth J. Moffett, Jr., ECF No. 15-3 (Second Moffett Decl.), ¶ 10. They also lost income that they could have otherwise secured while furloughed through nongovernmental jobs. Id. These same employees had to make difficult choices about goods and services that they may have to forgo. Id.

The government has noted that NTEU has not provided a name of a specific IRS recalled employee (Gov't Mem. at 29), though it does not dispute that NTEU represents some 21,900 of them. NTEU thus attaches the declarations of Kimyarda Naylor (Exhibit 1) and Dawn Peniston

(Exhibit 2), IRS employees who were recalled to work in January 2019 to assist in processing tax returns and tax refunds. Ms. Naylor incurred late fees and interest charges on bills due during the shutdown, all while paying the costs attendant to her unpaid work, such as commuting costs. Ex. 1 ¶¶ 7, 8. Ms. Peniston also incurred commuting costs and, once recalled, suffered additional financial harm because she was no longer able to work extra shifts at a part-time job that she was working while on furlough. Ex. 2 ¶ 8. If the Court wishes to consider their declarations as part of its standing assessment, it may do so. Herbert, 974 F.2d at 197; Haase, 835 F.2d at 906-07. Their declarations only reaffirm what has previously been stated regarding the injury-in-fact for this claim. See Second Moffett Decl. ¶ 10. Their consideration would serve only to cure a purported technical deficiency and should not delay this proceeding: the parties are on "the two-yard line" (Tr. of Jan. 31, 2019 Status Hr'g at 11). There is no reason to disturb the Court's sound decision to schedule proceedings in a way that will address all the legal issues presented in NTEU's lawsuit prior to the looming September shutdown.

Moving on to traceability and redressability, the unrecouped financial losses suffered by IRS recalled employees are plainly due to the agency decision to recall them, as embodied by the January 2019 contingency plan. The relief that NTEU seeks would alleviate their injury by enjoining the government from requiring these tens of thousands of initially-furloughed employees from being illegally required to work during a future lapse in appropriations.

2. Individualized Proof Is Not Required for NTEU's Purely Legal Claims Seeking Declaratory and Injunctive Relief.

It is well established that associations may sue on behalf of the individuals they represent, without need of individual member plaintiffs, unless individualized proof of damages is required—which it is not in this case. See, e.g., Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977); Comm. for Auto Responsibility v. Solomon, 603 F.2d 992,

998 n.13 (D.C. Cir. 1979). Here, "NTEU seeks declaratory and injunctive relief, which does not require individual participation." NTEU v. Whipple, 636 F. Supp. 2d 63, 75 (D.D.C. 2009).

This precedent plainly defeats the government's argument that individual member participation is required here because NTEU's claims require analysis of "each employee's particular factual circumstances." Gov't Mem. at 29. None of NTEU's claims requires assessment of any employee's individual factual circumstances. NTEU's first claim requires this Court to assess whether the plain text of Section 1342 violates the Appropriation's Clause. Am. Compl., Count I. Its second claim requires this Court to assess whether the OMB directive conflicts with the plain text of Section 1342. Am. Compl., Count II. Its third claim asks this Court to consider the purely legal question of whether IRS's recall of tens of thousands of employees for the explicit purpose of processing federal tax returns, as embodied in its January 2019 contingency plan, violates the Antideficiency Act. Am. Compl., Count III. It seeks to enjoin IRS from requiring those employees who were recalled into service from having to work during a lapse in appropriations. Am. Compl., Request for Relief. The resolution of these strictly legal questions for which only declaratory and injunctive relief is sought does not require the participation of any individual member.

D. Congress Has Not Divested This Court of Jurisdiction Over NTEU's Constitutional and Statutory Claims.

The government raises two meritless subject matter jurisdiction arguments. Despite the robust body of contrary precedent in this Circuit, the government argues that the Civil Service Reform Act (CSRA) precludes NTEU's constitutional and statutory claims. The government also argues, without support, that NTEU's facial constitutional and statutory claims—"broad-ranging claims," as the government acknowledges (Gov't Mem. at 30)—actually constitute one or more of 5 U.S.C. § 2302's enumerated prohibited personnel practices.

1. The CSRA does not divest this Court of jurisdiction over NTEU's claims. The government has attempted this same preclusion argument, unsuccessfully, in similar circumstances involving facial legal challenges to federal statutes or federal regulations. Those challenges, like this one, were not mere labor disputes that can be channeled through the CSRA's administrative scheme to the Federal Labor Relations Authority (FLRA) or addressed through negotiated grievance procedures.

a. In NTEU v. Devine, for example, NTEU sued to enjoin regulations that it argued were contrary to federal statute. See 577 F. Supp. 738 (D.D.C. 1983), aff'd, 733 F.2d 114 (D.C. Cir. 1984). The government asserted that NTEU's claim "must be processed only as provided for in the exclusive scheme established by the Civil Service Reform Act." 577 F. Supp. at 745. This Court rejected the government's argument, holding that the union's challenge "is not the typical sort of labor altercation between a federal employee and his federal employer" that the CSRA covers, and allowed NTEU's suit to proceed. Id. The D.C. Circuit affirmed, calling the government's preclusion argument "meritless." 733 F.2d at 117 n.8. As it explained:

> It is one thing to say that when a statute provides a detailed scheme of administrative protection for defined employment rights, less significant employment rights of the same sort are implicitly excluded and cannot form the basis for relief directly through the courts. It is quite different to suggest . . . that a detailed scheme of administrative adjudication impliedly precludes pre-enforcement judicial review of rules.

Id. (citation omitted).

Similarly, in NTEU v. Chertoff, this Court rejected the government's preclusion argument where NTEU brought a broad challenge to the legality of a new agency human resources program. 385 F. Supp. 2d 1, 22-23 (D.D.C. 2005), aff'd in part, rev'd in part, 452 F.3d 839 (D.C. Cir. 2006). As it explained, federal district courts have jurisdiction "to hear union

challenges to agency regulations or policies of general application on the grounds that they were inconsistent with a statute or the Constitution." 385 F. Supp. 2d at 23.

Again, in NTEU v. Whipple, this Court rejected the government's preclusion argument where NTEU was "not seek[ing] to address adverse personnel actions regarding specific employees," but instead was challenging broadly the legality of an agency regulation. 636 F. Supp. 2d at 71. Similarly, this Court recently rejected the government's argument that the CSRA precluded federal district court review of facial challenges to the legality of provisions in three executive orders on collective bargaining and labor-management issues. See AFGE v. Trump, 318 F. Supp. 3d 370, 409 (D.D.C. 2018) (invalidating facially deficient executive order provisions), appeal docketed, No. 19-5289 (D.C. Cir. Sept. 25, 2018).

In contrast to the cases discussed above, Elgin v. Department of the Treasury (discussed in Gov't Mem. at 33), stemmed from a discrete personnel action—the removal of employees—for which the CSRA provides an administrative process. See 567 U.S. 1, 7 (2012). NTEU's claims here, in contrast, are not based on any such discrete personnel action, but rather are based upon an unconstitutional statutory provision and agency actions that conflict with the plain text of that federal statute. The CSRA therefore does not preclude judicial review of such challenges.

b. The government argues that this Court lacks jurisdiction over NTEU's claims because NTEU "must first proceed through the collective bargaining procedures" (Gov't Mem. at 34-35), which NTEU interprets to mean the negotiated grievance procedure contained in a collective bargaining agreement. While narrow collective bargaining disputes must proceed through the FLRA or, where applicable, a negotiated grievance procedure, NTEU's broad

constitutional and statutory challenges are wholly different.[14] This Circuit and the FLRA have repeatedly held that such broad legal challenges do not belong before the FLRA. See, e.g., AFGE v. Nicholson, 475 F.3d 341, 348 (D.C. Cir. 2007); Dep't of Air Force v. FLRA, 952 F.2d 446, 452-53 (D.C. Cir. 1991); NTEU and IRS, 60 F.L.R.A. 782, 783 (2005). Neither do they belong before an arbitrator who, like the FLRA, would plainly lack the authority to declare a federal statute unconstitutional or enjoin reliance on a government-wide directive or agency contingency plan. NTEU, 60 F.L.R.A. at 783.

At bottom, the government's "collective bargaining procedures" argument runs directly counter to the state of the law since at least 2002. That was when the Federal Circuit interpreted the then-recently amended text of the federal labor statute governing when parties' negotiated grievance procedures would be the exclusive mechanism to enforce certain rights. As it explained, 5 U.S.C. "Section 7121(a)(1) directs that, with a few enumerated exceptions, the negotiated grievance procedures set forth in a federal employee's CBA are to be the exclusive administrative procedures for resolving grievances that fall within the CBA's coverage." Mudge v. United States, 308 F.3d 1220, 1227 (Fed. Cir. 2002) (cleaned up). "The plain language of § 7121(a)(1) as amended is therefore clear: while § 7121(a)(1) limits the administrative resolution of a federal employee's grievances to the negotiated procedures set forth in his or her CBA, the text of the statute does not restrict an employee's right to seek a judicial remedy for such grievances." Id. at 1228 (emphases added). In light of Mudge, the government's observations about the NTEU-IRS collective bargaining agreement show nothing pertinent to its preclusion

[14] An example of a narrow collective bargaining dispute that must proceed through the CSRA's remedial scheme is the one in AFGE v. Secretary of the Air Force, 716 F.3d 633, 637-38 (D.C. Cir. 2013) (relied on in Gov't Mem. at 33-34), which involved a challenge to an agency dress code that could have been resolved in three different ways through the CSRA's scheme. Here, in contrast, there is no administrative mechanism to resolve any of NTEU's facial legal claims.

argument. Gov't Mem. at 34-35. Those observations show only that NTEU properly bargained with IRS on negotiable conditions of employment (which is the duty of every union), including those related to lapses in appropriations and hardship waivers where an employee is prevented from working.

2. The government also attempts to divest this Court of jurisdiction by claiming that NTEU is challenging one or more statutorily enumerated "prohibited personnel practices" through its Appropriations Clause and Administrative Procedure Act claims. Gov't Mem. at 35-36. The government says little to elaborate on its conclusory and incorrect assertion that any constitutional or statutory claim that touches upon the "employment relationship" challenges a prohibited personnel practice. Gov't Mem. at 35. None of NTEU's facial legal challenges implicates any of Section 2302's prohibited personnel practices. See 5 U.S.C. § 2302. The cases cited in the CSRA preclusion section above also refute the government's basic assertion that federal district courts lack the authority to hear legal claims that might affect federal employees.

II. Section 1342 of the Antideficiency Act Conflicts with the Constitution's Appropriations Clause.

A. The Framers Intended the Appropriations Clause to Vest Congress with the Exclusive Power to Make Spending Decisions.

The Constitution's Appropriations Clause provides, unequivocally, that "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 "is particularly important as a restraint on Executive Branch officers." Dep't of the Navy v. FLRA, 665 F.3d 1339, 1347 (D.C. Cir. 2012). It prohibits the executive branch from authorizing payment or incurring obligations to pay, absent congressionally enacted appropriations. See OPM v. Richmond, 496 U.S. 414, 427-28 (1990).

The Appropriations Clause is thus "a bulwark of the Constitution's separation of powers" and serves to protect "Congress's exclusive power over the federal purse." Dep't of the Navy, 665 F.3d at 1346 (internal quotation marks omitted). The Clause's "fundamental and comprehensive purpose" is "to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress." Richmond, 496 U.S. at 427-28. This power "may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people." The Federalist No. 58, at 394 (James Madison) (J. Cooke ed. 1961).

The Framers deliberately placed spending power in the hands of Congress and outside the grasp of the President, plainly intending that the power of the purse be exercised by only "our most representative of institutions" and not by the President. Hon. Abner Mikva, Congress: The Purse, The Purpose, and the Power, 21 Ga. L. Rev. 1, 3 (1986). If it were otherwise, as Justice Story observed, "'the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure.'" Dep't of the Navy, 665 F.3d at 1347 (quoting 3 Joseph Story, Commentaries on the Constitution of the United States § 1342, at 213-14 (1833)).

B. The Antideficiency Act Was Originally Intended to Enforce the Appropriations Clause.

In 1870, Congress enacted the Antideficiency Act to address the increasingly common problem of the executive branch obligating funds in advance of appropriations—which put pressure on Congress to then appropriate those funds, so that creditors could be paid. See, e.g., Fenster and Volz, The Anti-Deficiency Act, Constitutional Control Gone Astray, 11 Pub. Contract L. J. 155, 159-62 (1979) (hereinafter Fenster and Volz). The Act, as passed, did not include what is now Section 1342 of Title 31, which NTEU alleges is unconstitutional.

Section 1341 assiduously protects Congress's constitutional power of the purse. It provides that a federal official may not (1) "make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation"; or (2) "involve" the federal government "in a contract or obligation for the payment of money before an appropriation is made unless authorized by law."

Congress enacted this language to enforce the Appropriations Clause. As the Justice Department has recognized, it "implements the constitutional requirement that 'No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.'" See 1995 OLC Opinion at 3. Section 1341, on its face, forbids not only the actual expenditure of appropriated funds, but also their obligation. Indeed, the entire point of the Act was to preclude executive branch agencies from incurring obligations or borrowing money "in anticipation of future appropriations," which would undermine Congress's power of the purse. Kate Stith, Congress' Power of the Purse, 97 Yale L. J. 1343, 1371-72 (1988).

C. Section 1342 of the Antideficiency Act is Unconstitutional.

The Antideficiency Act was amended in 1905 to include Section 1342, which NTEU argues contravenes the Appropriations Clause. That section authorizes federal agencies to "employ personal services exceeding that authorized by law" if those services are "for emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342. Section 1342 contains no limitation whatsoever on the amount that the executive branch may obligate to employ personal services for such "emergencies." See id.

Section 1342 is unconstitutional to the extent that it has the effect of authorizing the executive branch to obligate funds in advance of appropriations. Allowing the executive branch to usurp the legislative prerogative by incurring unauthorized obligations distorts our

Constitution's scheme and undermines Congress's power of the purse. The incurring of these obligations by the executive branch exerts a hydraulic pressure on Congress to fulfill those obligations or risk the "full faith and credit" of the United States. See Fenster & Volz at 160.

Section 1342 thus unconstitutionally purports to transfer fundamental legislative spending authority by bestowing on the executive branch the far-reaching power to incur substantial financial obligations. As Chief Justice Taft made clear, "it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President." J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928).

D. The Government's Arguments Are Unfounded.

The government raises two arguments against allowing NTEU's constitutional claim to proceed. Neither has merit.

First, the government argues that the Appropriations Clause itself does not contain a cause of action and that NTEU's claim should thus not be heard. Gov't Mem. at 36-38. That argument is simply incompatible with constitutional jurisprudence. The government cites no case barring a claim that a federal statute is unconstitutional based on the absence of an explicit cause of action in the constitutional provision alleged to be violated. The government's argument that this Court may not assess the constitutionality of a federal statute is untenable.

Second, the government sweepingly argues that the Appropriations Clause means whatever Congress says it means; as such, private citizens must not be able to sue over the provision. No act of Congress, in the government's view, could ever violate the Appropriations Clause and would instead only give meaning to it. Gov't Mem. at 36-38. This argument relies on a single quotation from Harrington v. Bush, referring to Congress's "plenary power to give

meaning to the provision." 553 F.2d 190, 194 (D.C. Cir. 1977).[15] The argument, moreover, is incorrect; the Supreme Court has made clear that Congress would act unconstitutionally by ceding its legislative spending power to the President. See, e.g., J.W. Hampton, Jr. & Co., 276 U.S. at 406.

While Congress may have some leeway in giving meaning to the Appropriations Clause, the Clause's text and purpose set boundaries for that discretion. This Court, moreover, would have no trouble applying the Supreme Court's unambiguous instruction that the Clause "means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." Richmond, 496 U.S. at 424. Cf. Gov't Mem. at 37 (questioning whether the judiciary equipped to "interpret, define, and enforce the Appropriations Clause"). The blank check that Section 1342 gives to the executive branch—which agencies recently used to incur a month's worth of salary obligations for hundreds of thousands of employees—is plainly anathema to the Appropriations Clause, as the Supreme Court has interpreted it. The Framers intended to give Congress alone the power of the purse and to keep the Executive from being able to spend at will. Richmond, 496 U.S. at 427-28; Dep't of the Navy, 665 F.3d at 1347.

III. The OMB Directive Conflicts with Section 1342 of the Antideficiency Act.

A. The OMB Directive Is Incompatible with Section 1342's Text.

Even if Section 1342 of the Antideficiency Act is constitutional, the OMB directive on which agencies rely to except employees from government shutdowns conflicts with Section

[15] As the government acknowledges, United States v. Richardson, 418 U.S. 166 (1974), in a footnote that was entirely dicta, spoke to different language than is at issue here: Article I, Section 9, Clause 7's "general directive[]" that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." Gov't Mem. at 37-38. The issue in Richardson was whether plaintiff's status as a taxpayer alone gave him standing to pursue his cause of action, which it did not. Id. at 170.

1342's plain text. See Am. Compl., Count II. Section 1342 provides that the United States may "employ personal services exceeding that authorized by law" in "emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342. In 1990, Congress amended Section 1342 to provide explicitly that "[a]s used in this section, the term 'emergencies involving the safety of human life or the protection of property' 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."

Congress added this clarifying language in 1990 because of "what the conferees believe[d] might be an overly broad interpretation" by the Attorney General in 1981 "regarding the authority for the continuance of Government functions during the temporary lapse in appropriations, and [to] affirm that the constitutional power of the purse resides with Congress." H.R. Conf. Rep. No. 101-964, at 1170 (1990). OMB, through the directive discussed below, nonetheless continues to direct federal agencies to determine which employees should be excepted during a lapse in appropriations using the very same "overly broad interpretation" of Section 1342 that Congress rejected through its 1990 amendment.

On January 19, 2018, Defendant Mulvaney sent the OMB directive at issue to the heads of all executive departments and agencies, requiring that they review and, if needed, update their contingency plans for agency operations during a lapse in appropriations. The OMB directive tells agencies that, under the Antideficiency Act, they "may incur an obligation in the absence of an appropriation in certain 'excepted' situations" and then goes on to address Section 1342's emergency exception using the same overly broad interpretation that Congress rejected in the 1990 amendment. OMB directive, Attachment, Frequently Asked Questions (FAQs), Sec. I.A. The OMB directive first restates the test contained in the 1995 OLC Opinion—which reaffirmed

the Attorney General's 1981 interpretation of Section 1342 as "fair," despite Congress's amendment to counter it. 1995 OLC Opinion at 8. The directive then states that that the emergency exception applies when there is

> (a) a reasonable and articulable connection between the obligation . . . and the safety of life or the protection of property, and (b) some reasonable likelihood that either the safety of life or the protection of property would be compromised in some significant degree by failure to carry out the function in question -- and that the threat to life or property can be reasonably said to be near at hand and demanding of immediate response.

OMB directive, Attachment, FAQs, Sec. I.A.2 (emphases added)

This overbroad test—requiring only a "reasonable" connection to protecting life or property and only a "reasonable likelihood" that life or property would be compromised if the employee did not continue to perform his or her official functions—is inconsistent with the plain text of Section 1342. Congress amended that text to require the actual existence of an "imminent[] threat[]" to human safety or property to justify continued work during a lapse in appropriations. 31 U.S.C. § 1342. OMB's directive expands this statutory requirement of imminent threat to the "reasonable" possibility of an imminent threat. Going even farther, the directive requires that there be only a "reasonable" chance that the worker might have an effect on any such possible threat.

Acting pursuant to the OMB directive, federal agencies have drawn up contingency plans designating thousands of NTEU-represented employees as excepted employees, whose services could be required in a government shutdown, notwithstanding the Antideficiency Act. Am. Compl. ¶ 50. Many of these excepted NTEU members are persons whose services involve only "the ongoing, regular functions of government, the suspension of which would not imminently threaten the safety of human life or the protection of property." Am. Compl. ¶ 48; Moffett Decl.

¶¶ 1-4. See Hebron Decl. ¶ 5. In sum, the OMB directive is inconsistent with the plain text of the Antideficiency Act. It thus constitutes unlawful agency action under the APA.

B. The Government's Arguments Are Without Merit.

The government raises four unfounded arguments in response to NTEU's claim.

First, NTEU has prudential standing to bring its APA claim, contrary to the government's contention. Gov't Mem. at 40 (failing to articulate the relevant standard in its one-sentence argument on this point). NTEU and its members are "arguably within the zone of interests to be protected or regulated by" the Antideficiency Act. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 224 (2012). On this question, lest there be ambiguity, "the benefit of any doubt goes to the plaintiff." Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 130 (2014).

The test for prudential standing "is not meant to be especially demanding," and it forecloses suit only when "plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" Patchak, 567 U.S. at 225. This "lenient approach is an appropriate means of preserving the flexibility of the APA's omnibus judicial-review provision, which permits suit for violations of numerous statutes of varying character that do not themselves include causes of action for judicial review." Lexmark Int'l, Inc., 572 U.S. at 130.

Here, the Antideficiency Act guards against the executive branch incurring obligations not sanctioned by Congress during a lapse in appropriations—including the obligation of funds to "employ personal services" that are not authorized by Section 1342's emergency exception. See 31 U.S.C. §§ 1341, 1342. It cannot be said that NTEU members whose salary obligations are being incurred illegally during a lapse in appropriations based, at least in part, on OMB's erroneous instructions to agencies regarding Section 1342's emergency exception have interests

that are "marginally related to or inconsistent" with the Antideficiency Act's purpose. They are directly affected by the OMB directive's inconsistency with the Act and thus plainly fall within the Act's zone of interests. Patchak, 567 U.S. at 225. Construing any doubt in NTEU's favor (Lexmark Int'l, Inc., 572 U.S. at 130), this Court thus should allow its APA claim to proceed.

Second, the government's argument that the Antideficiency Act impliedly precludes review of APA claims based upon noncompliance with the Act fails. Gov't Mem. at 40-41. The government's primary support for its claim is a decision holding that "when a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded." Block v. Cmty. Nutrition Inst., 467 U.S. 340, 349 (1984) (cited in Gov't Mem. at 40) (emphases added). The government does not suggest that this holding has application here. Neither does it argue that the Antidefiency Act's "specific language or specific legislative history" overcome the "presumption favoring judicial review of administrative action." Id.

Thus, for review to be impliedly precluded, this Court would have to conclude that "congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'" Id. at 351. The Supreme Court, in recent years, has been reluctant to find implied preclusion in this manner. See, e.g,. Patchak, 567 U.S. at 222 (rejecting Block-based argument and refusing to impliedly preclude judicial review where plaintiff was "bringing a different claim, seeking different relief, from the kind the [statute] addresses"); Sackett v. EPA, 566 U.S. 120, 129 (2012) (rejecting Block-based argument and refusing to impliedly preclude judicial review even where statute provide for judicial review in other circumstances). Further, nothing in the rather bare statutory scheme here, in any event, evinces an intent to preclude judicial review. The Act,

including its criminal penalties, evinces congressional intent that the Act—which passed to guard against executive branch abuses—have meaning and thus be enforced judicially where its plain text is flatly disregarded. Reading a preclusion of judicial review into the Act, so as to defeat the presumption in favor of judicial review would be inconsistent with that objective.

Third, the government broadly argues that executive agencies' determinations regarding Section 1342's emergency exception "are not properly subject to judicial oversight" and thus "committed to agency discretion by law." Gov't Mem. at 41 (arguing that NTEU is second-guessing executive branch "emergency" determinations). This argument is based on a mischaracterization of NTEU's purely legal claim, which does not challenge any agency's individualized Section 1342 designations. It instead challenges OMB's instruction to agencies, which facially conflicts with Section 1342's plain text.

The APA's presumption of judicial review, moreover, is only defeated by the "committed to agency discretion by law" doctrine "in those rare circumstances where the relevant statute 'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" Lincoln v. Vigil, 508 U.S. 182, 191 (1993) (emphasis added) (cited in Gov't Mem. at 41). NTEU's claim here is that the text of the OMB directive contravenes the text of Section 1342; the government is incorrect that courts are incapable of deciding such a question, for which no additional standard is necessary.

Fourth, contrary to the government's argument, the OMB directive is a final agency action for purposes of APA review. Cf. Gov't Mem. at 41-43. This Circuit "appl[ies] the finality requirement in a flexible and pragmatic way." See John Doe, Inc. v. DEA, 484 F.3d 561, 566 (D.C. Cir. 2007) (internal quotation marks omitted). It uses a two-part test to evaluate finality: "First, the action under review must mark the consummation of the agency's

decisionmaking process -- it must not be of a merely tentative or interlocutory nature. Second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." See id. The latter is the "most important factor." Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 252 (D.C. Cir. 2014).

As an initial matter, the OMB directive is not of a "merely tentative or interlocutory nature." John Doe, Inc., 484 F.3d at 566. Instead, it provides OMB's considered direction to agencies: it instructs them to plan for agency operations during a lapse in appropriations, and it provides thirteen pages of specific instruction on how those plans should be made. See generally OMB directive and Attachment, FAQs. That agencies engage in their own decisionmaking processes in formulating contingency plans (based upon OMB's instruction) does not affect the inescapable conclusion that the OMB directive itself is the "consummation" of OMB's own decisionmaking process. See John Doe, Inc., 484 F.3d at 566. Cf. Gov't Mem. at 42.

Most important, individual employees' rights and obligations are determined using the standard set forth in the OMB directive, which gives agencies a different, more elastic standard for determining which employees are excepted from a lapse in appropriations than Section 1342 allows. This incorrect legal instruction affects the rights and obligations of employees whose respective work statuses are determined by their employers based (at least in part) upon OMB's guidance. Employees deemed excepted based upon OMB's overbroad construction of Section 1342 were forced to incur costs attendant to their work during the shutdown—e.g., childcare and commuting costs—and forced to incur fees associated with unpaid bills because they were required to work without pay. See pp. 19-20 supra.

The OMB directive thus "altered the legal regime" that Congress established: it conveys OMB's erroneous view of Section 1342 for agencies to apply in their contingency plans and thus

qualifies as a final agency action. Natural Res. Def. Council v. EPA, 643 F.3d 311, 320 (D.C. Cir. 2011) (concluding EPA guidance qualified as final agency action). In other words, "[t]his is not a situation where the challenged agency action 'as a legal matter . . . is meaningless.'" Tex. Children's Hosp. v. Burwell, 76 F. Supp. 3d 224, 241 (D.D.C. 2014) (quoting Nat'l Mining Ass'n, 758 F.3d at 252) (concluding that a "frequently asked question" and corresponding answer published by agency constituted a final agency action). Instead, employees have had their rights and obligations affected by the OMB directive's illegal instruction to federal agencies, showing that it was a final agency action.

IV. IRS's January 15, 2019 Contingency Plan Constitutes Unlawful Agency Action.

IRS's legal bases for its massive recall of thousands of NTEU members to process federal tax returns during a lapse in appropriations, as detailed in its January 15, 2019 contingency plan, are implausible on their face. Its contingency plan is thus an illegal agency action under the APA. This Court, after reviewing the Antideficiency Act, OLC guidance, and IRS's plan, has expressed "serious concerns" about this recall. Tr. of Jan. 31, 2019 Status Hr'g at 5, 10.

A. The Contingency Plan's Use of the "Necessarily Implied by Law" Exception is Erroneous and Thus Violates the Antideficiency Act, 31 U.S.C. § 1341.

The government has not disputed that IRS's recall of some 21,900 NTEU-represented employees was due to the President's promise, in early January, that the government shutdown would not delay the issuance of federal tax refunds.[16] To fulfill that pledge, IRS announced on January 15 "that it expects to have 46,052 employees on the job — more than half its workforce

[16] Sam Mintz et al., "Shutdown Shrinks As Thousands More Employees Called In To Work Without Pay," Politico.com (Jan. 15, 2019), https://www.politico.com/story/2019/01/15/shutdown-employees-work-without-pay-1088020.

— if the shutdown stretches into tax-filing season in late January. That [was] a huge jump from its initial shutdown plan, which kept only 9,946 workers on the job." Id.

On January 15, IRS thus designated 32,967 employees to work during the shutdown based upon a narrow theory that the Department of Justice introduced in the 1980s: the "necessarily implied by law" theory. Second Moffett Decl., Ex. A at 6, 9. This theory stands separate from the Antideficiency Act's Section 1342 emergency exception. These 32,967 employees include 17,520 employees at "accounts management centers" and another 12,961 employees at "submission processing centers." Second Moffett Decl., Ex. A at 13. Each of these types of centers process federal tax returns. Second Moffett Decl. ¶ 7 & Ex. A at 132. IRS's January 15, 2019 contingency plan, at page 6, confirms that it is relying on the "necessarily implied by law" theory to fund the salaries of those engaged in "activities necessary to issue [tax] refunds." Second Moffett Decl., Ex. A at 6. In a plan distributed only three weeks earlier, IRS had concluded that this theory applied to only 250 of its employees. Second Moffett Decl. Ex. B at 9.

1. DOJ surmised in 1981, and maintains now, that "the Antideficiency Act contemplates that a limited number of government functions funded through annual appropriations must otherwise continue despite a lapse in appropriations." 1995 OLC Opinion at 4 (emphasis added). In DOJ's view, this is "because the lawful continuation of other activities necessarily implies that these functions will continue as well." Id.

As OMB has stated, the "necessarily implied by law" theory applies only where (1) "Congress has provided funding that remains available during the lapse (including funds already obligated from the current fiscal year); and (2) "the suspension of the related activity (during the funding lapse) would prevent or significantly damage the execution of the terms of the statutory

authorization or appropriation." OMB directive, Attachment, FAQs, Section I.B (emphasis added). "The touchstone of the analysis is determining whether the execution of the terms of the [pertinent] statutory provision . . . would be significantly damaged in the absence of immediate performance of the unfunded, related activity." Id. (emphases added).

Examples of the "limited" activities that fit this category include (1) "the check writing and distributing functions necessary to disburse the social security benefits that operate under indefinite appropriations"; and (2) the contracting for materials "essential to the performance of the emergency services that continue under [this] separate exception." 1995 OLC Opinion at 4 (emphases added). See OMB directive, Attachment, FAQs, Section I.B (for entitlement programs, "there is a congressional authorization to make regular payments to beneficiaries").

2. IRS's January 15, 2019 contingency plan, at page 6, states the agency's view that "tax refunds are paid from the permanent, indefinite refund appropriation (31 U.S.C. § 1324) and activities necessary to issue the refunds may continue during a shutdown." Second Moffett Decl., Ex. A at 6. IRS thus appears to be relying solely on the type of appropriation involved—an indefinite appropriation—to justify its use of the necessarily implied by law theory. That is an incomplete and erroneous analysis. It ignores what OMB agrees is the "touchstone of the analysis": "whether execution of the terms of the [pertinent] statutory provision . . . would be significantly damaged in the absence of immediate performance of the unfunded, related activity." OMB directive, Attachment, FAQs, Section I.B (emphases added).

Section 1324 of Title 31 is, on its face, limited to appropriating funds for the disbursement of federal tax refunds. It provides, in pertinent part, that "[n]ecessary amounts are appropriated to the Secretary of the Treasury for refunding internal revenue collections as provided by law, including payment of . . . [r]efunds and payments of processing and related

taxes." Nothing in Section 1324 requires the payment of federal tax refunds by any date certain. Indeed, nothing in Section 1324 requires that refunds be issued at all. Section 1324 simply makes appropriated funds available to issue such payments. Thus, the execution of Section 1324's terms would not be "significantly damaged in the absence of immediate performance" of activities related to those disbursements. OMB directive, Attachment, FAQs, Section I.B.

The difference between Section 1324 and the Social Security Act (which, for purposes of this theory, IRS views as "[s]imilar[]," Second Moffett Decl., Ex. A. at 6, is obvious. The latter entails the monthly payment of congressionally approved entitlements to vulnerable citizens, which, if delayed, would put them in jeopardy. The former is a one-time payment that individuals, regardless of their financial need, might receive on some unspecified date. As former IRS Commissioner John Koskinen has indicated, "it would be hard to make the case that taxpayers face real hardship if their refunds are delayed, as they are with Social Security payments." Katie Rogers and Alan Rappeport, "White House Redefines Who Is Essential to Get Parts of Government Moving Again," NYTimes.com (Jan. 16, 2019), https://www.nytimes.com/2019/01/16/us/politics/white-house-essential-shutdown.html.

In sum, the necessarily implied by law exception does not encompass the disbursements of federal tax refunds under 31 U.S.C. § 1324. There is nothing in Section 1324 suggesting that the execution of its terms would be significantly damaged in the absence of immediate performance. Because the exception does not apply, the incurrence of financial obligations for those engaged in processing and disbursing tax returns during the lapse of appropriations violates Section 1341 of the Antideficiency Act. IRS's January 15, 2019 contingency plan thus constitutes an unlawful agency action under the APA.

B. IRS's Decision to Except 52% More Employees on January 15, 2019 than on December 21, 2018 Through Section 1342 is Illegal.

In its January 15, 2019 contingency plan, IRS relied on Section 1342's emergency exception to recall an additional 4,245 employees. Second Moffett Decl., Ex. A at 9 & Ex. B at 9. IRS's stated mission is to "[p]rovide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all" (https://www.irs.gov/about-irs/the-agency-its-mission-and-statutory-authority). That mission statement, on its face, does not involve protecting human life or property from imminent threat.

IRS's mission, coupled with the chronology of its Section 1342 emergency exception designations, shows that these additional designations cannot be correct. In January 2018, Defendant OMB instructed federal agencies to review "the legal requirements imposed by the Antideficiency Act (Act) during a lapse in appropriations and the guiding standards agencies should use in making decisions under the Act during a lapse in appropriations." OMB directive at 1. After receiving this instruction, IRS, on December 21, 2018, provided NTEU with a contingency plan for use during the potential lapse in appropriations. Second Moffett Decl., ¶ 6. That contingency plan contained IRS's determination that 8,017 of its employees fell within Section 1342's emergency exception. Second Moffett Decl., Ex. B at 9.

Only three weeks later, IRS provided NTEU with an updated contingency plan designating over 4,245 more IRS employees as being required to protect human life or property from imminent threat. Second Moffett Decl., Ex. A at 9. That represented a 52% increase in IRS employees excepted under Section 1342, bringing the total number of employees that IRS categorized as falling within Section 1342's emergency exception to 12,262. The duties of these 4,245 employees did not change over a three-week period. Neither did the mandates of the

Antideficiency Act. The only new development during this three-week span was the President's pledge that the government shutdown would not delay federal tax refunds.

There is thus no plausible valid basis for IRS's exception of the additional 4,245 employees only three weeks after its December 21, 2018 contingency plan issued. Indeed, all indications are that these additional "emergency exception" designations were part of the larger, politically-motivated recall of IRS employees to process tax returns. These additional designations thus violate the Antideficiency Act, 31 U.S.C. § 1341, making IRS's January 2019 plan an unlawful agency action under the APA.

C. The Government's Arguments Are Wrong.

The government raises the same four arguments in response to NTEU's claim regarding IRS's January 2019 contingency plan that it does for NTEU's claim regarding the OMB directive: (1) prudential standing; (2) implied preclusion; (3) committed to agency discretion by law; and (4) final agency action. The analysis for the first three government arguments is the same for NTEU's IRS plan claim as it is for NTEU's OMB directive claim (see pp. 34-38 supra) and is briefly restated below. The analysis for the government's fourth argument is similar for both APA claims—though the government's case is even weaker for this claim.

First, as to prudential standing, it cannot reasonably be said that NTEU members recalled to work during the last shutdown to their financial detriment through an IRS contingency plan that flouts the Antideficiency Act have "'interests [] so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" Patchak, 567 U.S. at 225. NTEU thus meets the "lenient" test for prudential standing. Lexmark Int'l, Inc., 572 U.S. at 130.

Second, the Antideficiency Act does not impliedly preclude this APA claim. The government raises no implied preclusion argument based upon the Antideficiency Act's text or legislative history. The government's "statutory structure" implied preclusion argument fails for the same reasons as noted above. See pp. 35-36 supra.

Third, there is a "meaningful standard against which to judge the agency's exercise of discretion" here, which defeats any argument that IRS's plan is unreviewable under the rarely applied "committed to agency discretion by law" doctrine. Lincoln, 508 U.S. at 191. The IRS plan's sweeping application of the "necessarily implied by law doctrine," on its face, is illegal because it does not comport with the government's own limited view of when the doctrine applies. The IRS plan is also plainly deficient due in its unexplained 52% increase Section 1342 exceptions as part of the politically-driven recall. The chronology of events, IRS's mission, and the undisputed impetus behind the recall, show that this drastic increase cannot be a proper use of Section 1342. This is precisely the kind of executive overreach that Congress intended to prevent when it amended Section 1342 in 1990. H.R. Conf. Rep. No. 101-964, at 1170.

Fourth, IRS's January 2019 contingency plan is a final agency action because it (1) reflects the consummation of IRS's decisionmaking process regarding which of its employees are legally permitted to work during a shutdown, and (2) affects the rights and obligations of those who are designated for such work. John Doe, Inc., 484 F.3d at 566. These individuals must incur the costs attendant to that work, while not being paid during the lapse for their work, often experiencing late fees and interest charges because they cannot pay their monthly expenses. See pp. 21-22 supra. They also lose out on pay that they could earn through nongovernmental work while on furlough. See id.

The government argues that IRS's comprehensive contingency plan recalling tens of thousands of furloughed employees back into federal service during a shutdown is not a final action because it is potentially subject to change through an agency reassessment and because an individual employee may seek an exemption from the plan's dictates. Gov't Mem. at 43-44. Under its view, which is incompatible with the requirement that finality be assessed in a "flexible and pragmatic way" (John Doe, Inc., 484 F.3d at 566), no agency action could ever be a final agency action for purposes of APA review. No agency decision governs forever without the possibility of reexamination. Neither does the possibility of an individual exception to an agency decision affecting the rights and obligations of some 36,000 employees preclude a finding that the agency decision is "final." This is plainly "not a situation where the challenged agency action 'as a legal matter . . . is meaningless.'" Tex. Children's Hosp., 76 F. Supp. 3d at 241 (quoting Nat'l Mining Ass'n, 758 F.3d at 252). It is thus a final agency action under the APA.

CONCLUSION

For the foregoing reasons, the government's motion should be denied.

Respectfully submitted,

GREGORY O'DUDEN
General Counsel

LARRY J. ADKINS
Deputy General Counsel

/s/ Paras N. Shah

PARAS N. SHAH
Assistant Counsel

ALLISON C. GILES
Assistant Counsel

JESSICA HORNE
Assistant Counsel

NATIONAL TREASURY EMPLOYEES UNION
1750 H Street, N.W.
Washington, D.C. 20006
Tel: (202) 572-5500
Fax: (202) 572-5645
greg.oduden@nteu.org
larry.adkins@nteu.org
paras.shah@nteu.org
allie.giles@nteu.org
jessica.horne@nteu.org

Attorneys for Plaintiff NTEU

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