No. 24A904

In the Supreme Court of the United States

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, *ET AL.*,
Applicants,

v.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, *ET AL.*,
Respondents.

On Application to Stay the Injunction Issued by the United States District Court for the Northern District of California and Request for an Immediate Administrative Stay

AMICUS CURIAE BRIEF OF APA WATCH IN SUPPORT OF APPLICANTS IN SUPPORT OF STAY, ADMINISTRATIVE STAY, AND *CERTIORARI* BEFORE JUDGMENT

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AMICUS CURIAE BRIEF OF APA WATCH

Pursuant to this Court's Rule 37.4,[1] *amicus curiae* APA Watch respectfully submits that (a) the Circuit Justice should refer this matter to the full Court, (b) pending further order of the Court, the full Court should summarily stay any interim relief (*e.g.*, temporary restraining order ("TRO"), preliminary injunction) that affects the public fisc without security under FED. R. CIV. P. 65(c) adequate to pay any damage from interim relief later held improper, and (c) the Court should construe the application as a petition for a writ of *certiorari* before judgment on the question of whether interim relief may issue without adequate security under Rule 65(c). This Court's expeditious review and relief is necessary both to prevent the district court's overreach in this case and the widespread similar overreach by other district courts against the new presidential Administration without security required by Rule 65(c), sovereign immunity, and 5 U.S.C. § 705.

INTEREST OF *AMICUS CURIAE*

Amicus curiae APA Watch is a nonprofit association dedicated to ensuring that federal and state agencies and courts comply with the rulemaking, decisionmaking, information-dissemination, and information-quality requirements under the federal Administrative Procedure Act, 5 U.S.C. §§ 551-706 ("APA"), related state laws, the federal Constitution, and state constitutions.

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[1] Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity other than *amicus* and its counsel contributed monetarily to preparing or submitting the brief.

STATEMENT OF THE CASE

Amicus APA Watch adopts the facts as stated by the federal applicants (collectively, the "Government"). *See* Appl. at 1-14. In summary, respondent unions, nonprofits, and the State of Washington (collectively, "Plaintiffs") have sued over the Government's dismissal of approximately 16,000 third-party probationary employees of the Government. With the average annual salary for a federal employee exceeding $100,000,[2] requiring the Government to reinstate 160,000 employees would exceed $1 billion annually. According to their most recent Form 990s filed with the Internal Revenue Service ("IRS"),[3] all Plaintiffs except the State of Washington appear inadequately capitalized to repay the salary that Plaintiffs' interim relief improperly requires the Government to pay out without security.

ARGUMENT

I. THE COURT SHOULD CONSTRUE THE APPLICATION AS A PETITION FOR A WRIT OF *CERTIORARI* BEFORE JUDGMENT, BUT—EVEN WITHOUT THAT RELIEF—THE COURT IS LIKELY TO GRANT A WRIT OF *CERTIORARI*.

To resolve a mature split in Circuit authority, *see* Section I.C, *infra*, the Court still could construe the application as a petition for a writ of *certiorari* before judgment on the question whether injunctive relief's can take effect without security pursuant to Rule 65(c), as well as to consider several important federal questions

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[2] Pew Research Center, What the data says about federal workers (Jan. 7, 2025) (available at https://www.pewresearch.org/short-reads/2025/01/07/what-the-data-says-about-federal-workers/, last visited Mar. 27, 2025).

[3] The IRS's Tax Exempt Organization Search tool is available at https://apps.irs.gov/app/eos/ (last visited Mar. 27, 2025).

related to that overarching question. *See* Sections I.A-I.B, I.D, *infra*.

Nothing would demonstrate the *likelihood* of this Court's granting a writ of *certiorari* more conclusively than this Court's *granting* a writ of *certiorari*. This Court has authority to construe stay applications as petitions for a writ of *certiorari*, *see*, *e.g.*, *United States v. Texas*, 143 S.Ct. 51 (2022), and to decide such cases summarily, *Wisconsin Legis. v. Wisconsin Elections Comm'n*, 595 U.S. 398, 401 (2022), or on expedited briefing. *Nken v. Mukasey*, 555 U.S. 1042 (2008); *cf. TikTok Inc. v. Garland*, 220 L.Ed.2d 319, 325 n.1 (U.S. 2025) (*per curiam*). Even without conclusively demonstrating the likelihood of granting *certiorari*, there is a reasonable possibility that this Court would grant the Government's eventual petition for a writ of *certiorari* in this matter.

In addition to the important issues that the Government raises, *amicus* notes that the Circuits are deeply split on whether Rule 65(c) constitutes a mandatory condition precedent to interim relief, *see* Section I.C, *infra*, and that the issues presented here are vital to democratic governance. *See* Sections I.A-I.B, *infra*. Significantly, even if some of Plaintiffs' claims or some of the district court's actions become moot, the situation presented here—namely, improper interim relief against the Government—is capable of repetition while evading review. As such, the issues presented here on what Rule 65(c) requires will not become moot. *See Univ. of Texas v. Camenisch*, 451 U.S. 390, 396-98 & n.2 (1981). Accordingly, the jurisdiction that this Court now has will not dissipate as these matters progress in district court. Given the jurisdictional issues involved, appellate courts have discretion over what issues

to consider on appeal, *Singleton v. Wulff*, 428 U.S. 106, 121 (1976), even if raised only by an *amicus*. *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 97 n.4 (1991).

A. The lower courts' requiring the Government to pay non-party salary as interim relief warrants this Court's exercise of its supervisory power over those courts.

By leaving in place the district court's overreach—which could cost billions over the full life of a federal lawsuit—the Ninth Circuit abdicated its supervisory role over its district courts, thereby necessitating this Court's supervisory control of lower federal courts. *See* S.Ct. Rule 10(a); Section II.A.2, *infra* (no Article III controversy to reinstate third parties). Indeed, if viewed as APA rules, rather than APA orders, the Government's actions here are plainly outside the APA. *See* 5 U.S.C. § 553(a)(2) (exempting "a matter relating to agency management or personnel" from APA rulemaking requirements). Moreover, internal operations are committed to agency discretion and thus outside federal court's review. *See* 5 U.S.C. § 701(a)(2) (exempting "agency action is committed to agency discretion by law" from APA review).

Under 5 U.S.C. § 301, the "head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business." That statute, "commonly referred to as the 'housekeeping statute[,]'" dates "back to the beginning of the Republic, when statutes were enacted to give heads of early Government departments authority to govern internal departmental affairs" and "seems to be simply a grant of authority to the agency to regulate its own affairs." *Chrysler Corp. v. Brown*, 441 U.S. 281, 309 (1979); *Georgia v. United States*, 411 U.S. 526, 536 (1973) (discussing agency authority under 5 U.S.C. § 301). This Court should

ensure that district courts do not micromanage agency operations absent clear statutory authority.

B. The district court's government-by-litigation approach threaten democratic self-rule.

The district court's action here is a particularly egregious example of a trend that this Court should reject, lest something "not normal" and unhealthy become the new normal by displacing the political branches with government by litigation:

> This is not normal. Universal injunctions have little basis in traditional equitable practice.

Dep't of Homeland Security v. New York, 140 S.Ct. 599, 600 (2020) (Gorsuch, J., concurring in the grant of stay) (citing Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 425-27 (2017)). This Court should review the issue not only based on the sheer scope of the district court's "departure" from the "accepted and usual course of judicial proceedings," S.Ct. Rule 10(a), but also based on these issues' fundamental importance to democratic norms. *See* S.Ct. Rule 10(c).

Hamilton's "least dangerous" branch should not become the "most dangerous one." *Compare* THE FEDERALIST NO. 78 at 522 (Hamilton) (Jacob E. Cooke, ed.) *with Missouri v. Jenkins*, 515 U.S. 70, 132 (1995) (judges become "dangerous" when they "presume to have the institutional ability to set effective educational, budgetary, or administrative policy") (O'Connor, J., concurring). Allowing the sweeping interim relief here would undermine this Nation's system of government under which the political branches resolve political issues. *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291, 311-12 (2014). "'The principle of immunity from litigation

assures the states and the nation from unanticipated intervention in the processes of government.'" *Alden v. Maine*, 527 U.S. 706, 750 (1999) (quoting *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944)). As *Read* explained, waivers of immunity must be limited to the terms of the waiver to avoid the "crippling interferences" of government-by-lawsuit:

> The history of sovereign immunity and the practical necessity of unfettered freedom for government from crippling interferences require a restriction of suability to the terms of the consent, as to persons, courts and procedures.

Read, 322 U.S. 53-54. To its credit, the United States—through Congress—has waived sovereign immunity for many suits against the Government, but the judiciary lacks jurisdiction to extend those waivers beyond their express terms: "'It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place.'" *Alden*, 527 U.S. at 751 (quoting *Louisiana v. Jumel*, 107 U.S. 711, 727-28 (1883)). Article III and sovereign immunity compel this Court to confine Plaintiffs to their own Article III claims and to the statutory procedures that Congress has enacted to resolve those claims.

C. <u>There is a mature Circuit split on whether Rule 65(c)'s provisions are mandatory.</u>

The Circuits are split on whether Rule 65(c)'s provisions are mandatory. Several Circuit deem Rule 65(c) mandatory, *Frank's GMC Truck Ctr., Inc. v. Gen. Motors Corp.*, 847 F.2d 100, 103 (3d Cir. 1988); *Continuum Co. v. Incepts, Inc.*, 873 F.2d 801, 803 (5th Cir. 1989); *Habitat Educ. Ctr. v. United States Forest Serv.*, 607 F.3d 453, 460 (7th Cir. 2010), while others do not. *See*, *e.g.*, *Moltan Co. v. Eagle-Picher*

Indus., 55 F.3d 1171, 1176 (6th Cir. 1995); *Doctor's Assocs. v. Stuart*, 85 F.3d 975, 985 (2d Cir. 1996); *California ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985) ("court has discretion to dispense with the security requirement, or to request mere nominal security, where requiring security would effectively deny access to judicial review"); *cf. Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 (4th Cir. 1999) (although security is waivable, court must expressly address the issue of security and cannot "disregard the bond requirement altogether"); *Coquina Oil Corp. v. Transwestern Pipeline Co.*, 825 F.2d 1461, 1462 (10th Cir. 1987); *Fed'l Prescription Serv. v. Am. Pharm. Ass'n*, 636 F.2d 755, 759 (D.C. Cir. 1980) (court may forgo security for injunctive relief where "the restraint will do the defendant no material damage," "there has been no proof of likelihood of harm," or the moving party's "considerable assets" enable it "to respond in damages if defendant does suffer damages by reason of a wrongful injunction") (cleaned up).[4] This mature Circuit split provides another rationale for the Court to hear this case. *See* S.Ct. Rule 10(c).

Further, contrary to the *dicta* in *W.R. Grace* that suggests limiting defendants to the amount of an injunction bond *see* note 4, *supra*, this Court previously found that equity jurisdiction includes the "discretionary power to assess damages sustained by parties who have been injured because of an injunctive restraint

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[4] In *dicta*, this Court has suggested that damages are unavailable outside an injunction bond: "A party injured by the issuance of an injunction later determined to be erroneous has no action for damages in the absence of a bond." *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber*, 461 U.S. 757, 770 n.14 (1983) (citing *Russell v. Farley*, 105 U.S. 433, 437 (1882)).

ultimately determined to have been improperly granted." *Pub. Serv. Comm'n v. Brashear Freight Lines, Inc.*, 312 U.S. 621, 629 (1941). That authority traces back to the Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78, and on to then-contemporaneous English chancery practice. *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999). The Court should resolve this important ambiguity in federal law as a subsidiary questions fairly included in the overall question under 5 U.S.C. § 705 of an appropriate security for interim relief. *See* S.Ct. Rule 10(c). If—contrary to the *dicta* in *W.R. Grace*, *see* note 4, *supra*—Plaintiffs can be held liable for the costs imposed by improper interim relief, Plaintiffs might prefer to know that.

D. The funds at issue are significant.

Finally, the sheer volume of federal funding that the district court seeks to control—by way of compelling the payment of salary the Government says it does not need to spend—is another rationale for the Court to hear this case. *See* S.Ct. Rule 10(c). "[A] billion here, a billion there, pretty soon you're talking real money." Paul Rose, *Sovereigns as Shareholders*, 87 N.C. L. REV. 83, 88 n.28 (2008) (quoting language attributed to Senator Everett Dirksen). As Section II.A.1.c, *infra*, explains, the APA authorizes this Court to set an injunction bond on appeal that Plaintiffs must post before any injunctive relief takes effect.

II. THE GOVERNMENT IS LIKELY TO PREVAIL

On the underlying litigation, the Government is likely to prevail not only because it is correct on the substantive merits, but also because (a) the district court lacks jurisdiction for Plaintiffs' claims, and (b) Plaintiffs lack a cause of action in the district court to review the challenged governmental actions. With respect to the

threshold issue of security under Rule 65(c), the Government is likely to prevail because this Court has never held that the Government must face litigation against the public fisc without recourse against interim relief subsequently held improper. *See* Sections I.C, *supra*, II.B, *infra*.

A. This Court has jurisdiction to review both the district court's substantive actions and the district court's jurisdiction.

Federal courts are courts of limited jurisdiction. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). "It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). The parties cannot confer jurisdiction by consent or waiver, *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702 (1982), and federal courts instead must assure themselves of jurisdiction before reaching the merits. *Steel Co. v. Citizens for a Better Env't.,* 523 U.S. 83, 95 (1998). Moreover, parties must establish jurisdiction separately for each form of relief they request. *Lewis v. Casey,* 518 U.S. 343, 358 n.6 (1996) ("standing is not dispensed in gross,"); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 & n.5 (2006).

Before reaching the question of the Government's likelihood of prevailing on the merits, therefore, this Court—or the Circuit Justice—first must establish federal jurisdiction, both for this Court's review and for the rulings of the courts below.

> Every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it. And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no

> contention concerning it. When the lower federal court lacks jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.

Id. (cleaned up). As the following subsections explain, this Court has jurisdiction for the Government's requested relief, *see* Section II.A.1, *infra*, but the district court lacks jurisdiction for the relief Plaintiffs seek. *See* Sections II.A.2-II.A.4, *infra*.

1. This Court has jurisdiction to issue injunctive and declaratory relief *vis-à-vis* the district court's actions.

This Court has jurisdiction to review the district court's challenged action, even assuming *arguendo* that appellate review does not lie directly pursuant to 28 U.S.C. § 1292(a)(1). The Government has three distinct bases for appellate jurisdiction and authority.

a. The All Writs Act gives this Court jurisdiction *now* to preserve its *future* jurisdiction over the Government's eventual petition for a writ of *certiorari*.

First, the All Writs Act, 28 U.S.C. § 1651(a), provides a supplemental alternate form of jurisdiction to stay the district court's action, if only to preserve the full range of the controversy *now* for this Court's consideration upon the Government's *future* appeal to this Court:

> The All Writs Act empowers the federal courts to issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. The exercise of this power is in the nature of appellate jurisdiction where directed to an inferior court, and *extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected*.

FTC v. Dean Foods Co., 384 U.S. 597, 603 (1966) (cleaned up, emphasis added).

Although resort to the All Writs Act is an extraordinary remedy—as indeed is any stay or injunction—the writ "has traditionally been used in the federal courts … to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Will v. United States*, 389 U.S. 90, 95 (1967) (cleaned up). While "only exceptional circumstances … will justify the invocation of this extraordinary remedy," those circumstances certainly include a "judicial usurpation of power," as happened here. *Id.* (cleaned up); *accord Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980); *Cheney v. United States Dist. Court*, 542 U.S. 367, 380 (2004). Here, if the interim relief is left in place without first complying with Rule 65(c) and the interim relief is reversed, the Government would suffer the irreparable harm of being unable to recoup its damages.

b. Even without mandamus *relief*, mandamus *jurisdiction* makes declaratory relief available.

Second, regardless of whether the underlying orders are sufficiently final for an interlocutory appeal under 28 U.S.C. § 1292(a)(1), appellate jurisdiction extends to potential mandamus relief. *See AIDS Vaccine Advoc. Coal. v. United States Dep't of State*, 2025 U.S. App. LEXIS 4611, at *2-4 (D.C. Cir. Feb. 26, 2025) (Nos. 25-5046, 25-5047). Even without mandamus relief, that is jurisdiction enough for an appellate court to issue declaratory relief.

Although the Declaratory Judgment Act does not *extend* federal courts' jurisdiction, *California v. Texas*, 593 U.S. 659, 672 (2021), a court *otherwise with jurisdiction* "may grant declaratory relief even though it chooses not to issue an injunction or mandamus." *Powell v. McCormack*, 395 U.S. 486, 499 (1969); *Steffel v.*

Thompson, 415 U.S. 452, 457 n.7 (1974). Like the Ninth Circuit (and the D.C. Circuit in the *AIDS Vaccine* case), this Court thus has jurisdiction to issue declaratory relief on the mandatory nature of Rule 65(c). Indeed, if the Court does not wish to do so via full merits briefing, the Court—or the Circuit Justice—could do so via a summary order. *Wisconsin Legis.*, 595 U.S. at 401. Given the torrent of litigation—and the accompanying nationwide interim relief without security under Rule 65(c)—against the Government, *amicus* respectfully submits that the Circuit Justice should refer the matter to the full Court, making the resulting order a decision of the full Court. *See Graddick v. Newman,* 453 U.S. 928, 929 (1981) (Powell, J., for the Court[5]).

c. The APA's provisions for interim relief allow this Court to preserve the Government's rights.

Third, the APA provides this Court—and all federal courts—the authority to preserve the parties' rights while an APA case progresses:

> On such conditions as may be required and *to the extent necessary to prevent irreparable injury*, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue *all necessary and appropriate process* to postpone the effective date of an agency action or *to preserve status or rights pending conclusion of the review proceedings*.

5 U.S.C. § 705 (emphasis added). Here, in addition to whatever rights Plaintiffs may have, the Government has the right to avoid irreparable harm in the form of billions of dollars in damages from improper interim relief. *Cf.* Sections III.A-III.B, *infra*

[5] Although *Graddick* began as an application to a circuit justice, the Chief Justice referred the application to the full Court. *Id.*

(balancing equities between Government and Plaintiffs). To the extent that the Government has an interest to protect here, this Court and the lower federal courts have APA authority to protect that interest. *See* 5 U.S.C. § 705. Here, the Government's "rights" pending this interlocutory proceeding include being made whole if the district court's injunctive relief later proves improper.[6] The Court should condition any injunctive relief's taking effect on Plaintiffs' providing adequate security—by bond or otherwise—pursuant to 5 U.S.C. § 705 and Rule 65(c).

For several reasons, setting an appropriate amount for security under Rule 65(c) would be a fact-intensive inquiry, could change over time, and would depend on how quickly a final judgment replaced the interim relief. Unless this Court commits to resolving these issues expeditiously (*e.g.*, because the district courts plainly lacked jurisdiction), an adequate security likely exceeds $1 billion. Because Plaintiffs' desire for interim relief may wane if interim relief requires providing security, an initial security of $1 billion may suffice to put aside any question of interim relief against the public fisc on the scope contemplated here. If the Court requires more exact or updated information on the federal funds at stake, the Court could remand the question to the federal agencies involved or appoint a special master. *See*, *e.g.*, *FCC*

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[6] *See* H. REP. NO. 79-1980 (1946), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 248, 79th Cong., 2d Sess., at 277-78 (1946) ("APA LEG. HIST.") ("the court should take into account that persons other than parties may be adversely affected, by such postponement and in such cases the *party seeking postponement may be required to furnish security* to protect such other persons from loss resulting from postponement") (emphasis added); *accord* S. REP. NO. 79-752 (1945), *reprinted in* APA LEG. HIST., at 213 ("authority granted is equitable and should be used by both agencies and courts to prevent irreparable injury or afford parties an adequate judicial remedy").

v. ITT World Commc'ns, Inc., 466 U.S. 463, 469 (1984); *Harrison v. PPG Indus.*, 446 U.S. 578, 594 (1980). As indicated, an initial security of $1 billion would likely resolve the issue as a practical matter.

2. Plaintiffs lack standing for relief involving third parties' reinstatement.

Under Article III, federal courts cannot issue advisory opinions, *Muskrat v. United States*, 219 U.S. 346, 356-57 (1911), so federal courts must instead focus on the cases or controversies presented by affected parties before the court. U.S. CONST. art. III, § 2. "All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to … the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government." *Allen v. Wright,* 468 U.S. 737, 750 (1984) (cleaned up). Under these limits, a federal court lacks the power to interject itself into public-policy disputes when the plaintiff lacks standing.

At its constitutional minimum, standing presents the tripartite test of whether the party invoking a court's jurisdiction raises a sufficient "injury in fact" under Article III. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-62 (1992). An "injury in fact" means (a) "an invasion of a legally protected interest" that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical;" (b) caused by the challenged action, and (c) likely to be redressed by the court's relief. *Id.* (cleaned up). In addition, the judiciary has adopted prudential limits on standing that bar review even when the plaintiff meets Article III's minimum criteria. *See*, *e.g.*,

Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 475 (1982) (zone-of-interests test); *Secretary of State of Md. v. Joseph H. Munson Co.,* 467 U.S. 947, 955 (1984) (litigants must raise their own rights). Just as important as the test for an Article III case or controversy is the requirement that the plaintiff bears the burden of proving standing: "We presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (cleaned up).

Plaintiffs lack standing to compel the Government to reinstate third-party probationary employees:

- To the extent that Plaintiffs rely on diverted resources, Appl. 14a, those are self-inflicted injuries that cannot support standing. *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 395 (2024).
- To the extent that Plaintiffs rely on a degradation in the services that they or their members receive from allegedly understaffed federal agencies, Plaintiffs have not established either that the injury is imminent (*i.e.*, non-speculative) or that redress is likely (*i.e.*, again, non-speculative). Having determined that the jobs of the employees in question were not mission critical, the Government may not return the employees to their prior posts, even if the district court could compel the Government to rehire them.
- More fundamentally, Plaintiffs have not established a cognizable right to levels of prior service from the Government.

- Finally, with respect to the unions' ability to bring claims as representatives of their members—if any—who are probationary employees, the individualized nature of whether a given employee does or does not deserve reinstatement is a question that requires the individual to participate or—at least—to be identified. *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977) (associational standing requires that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit");[7] *Summers v. Earth Island Inst.*, 555 U.S. 488, 498-99 (2009) ("requirement of naming the affected members has never been dispensed with in light of statistical probabilities, but only where *all* the members of the organization are affected by the challenged activity") (emphasis in original).

For all these reasons, Plaintiffs lack standing for the relief they seek.

3. The district court lacks jurisdiction over Plaintiffs' claims for third parties' reinstatement.

As the Government explains, Appl. at 7-8. 19-21, Congress provided an exclusive alternate set of remedies for employment disputes by federal employees. Plaintiffs cannot rely on indirection to circumvent the exclusive remedies for federal employment issues that Congress provided in the Civil Service Reform Act of 1978, PUB. L. NO. 95-454, 92 Stat. 1111 ("CSRA"), as amended. *See* Appl. at 7-8. 19-21. Either because Plaintiffs invoked the wrong federal processes, *id.*; *Elgin v. Dep't of*

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[7] Of course, associational standing requires that "members would otherwise have standing to sue in their own right," *id.*, which would not apply if probationary employees lack a legally cognizable right to continued federal employment.

the Treasury, 567 U.S. 1, 22 (2012), or because Plaintiffs are outside Article III altogether, *see* Section II.A.2, *supra*, the district court lacks jurisdiction for Plaintiffs' claims.

4. Sovereign immunity bars Plaintiffs' claims.

If "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, … the suit is one against the sovereign." *Land v. Dollar*, 330 U.S. 731, 738 (1947). Therefore, in addition to the lack of Article III jurisdiction, Plaintiffs' claims for third parties' reinstatement also fall outside the scope of the APA's waiver of sovereign immunity[8] and thus are subject to an independent jurisdictional bar: "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit," without regard to any perceived unfairness, inefficiency, or inequity. *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999); *see also Alabama v. North Carolina*, 560 U.S. 330, 341 (2010) ("the primeval sovereign right is immunity from levies against the government fisc"). The scope of such waivers, moreover, is strictly construed in favor of the sovereign. *Lane v. Pena*, 518 U.S. 187, 192 (1996). Because Plaintiffs' claims neither fall within the APA nor within the non-APA and pre-APA equitable exceptions to sovereign immunity, sovereign immunity bars Plaintiffs' claims for future funds not yet earned.

a. Plaintiffs cannot sue under the APA.

Subject to limitations, the APA provides a cause of action for judicial review to

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[8] The waiver of sovereign immunity was added to 5 U.S.C. § 702 in 1976. PUB. L. NO. 94-574, § 1, 90 Stat. 2721 (1976).

those "aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. For example, the APA excludes review under "statutes [that] preclude judicial review," those that commit agency action to agency discretion, and those with "special statutory review." 5 U.S.C. §§ 701(a)(1)-(2), 703; *cf.* 5 U.S.C. §§ 553(a)(2) (APA rulemaking requirements do not apply to "matter[s] relating to agency management or personnel"), 301 (agency "housekeeping" authority for operations). Further, APA review extends only to actions made reviewable by statute and to *final* agency actions for which there is no other adequate remedy in court. 5 U.S.C. § 704. These limitations can bar APA review.

As explained, CSRA provides administrative review followed by judicial review in the Federal Circuit. *See* Section II.A.3, *supra*. The APA does not provide review unless the "special statutory review" outlined in Section II.A.3, *supra*, is either absent or inadequate. *See* 5 U.S.C. § 703. Even where the CSRA and related remedies are both absent and inadequate, the APA nonetheless remains inapplicable to internal agency personnel affairs committed to agency discretion. *See* 5 U.S.C. §§ 553(a)(2), 701(a)(2), 301. Plaintiffs have not shown that the APA applies here, assuming *arguendo* that Plaintiffs have standing.

b. Plaintiffs cannot bring a non-APA or a pre-APA suit in equity.

For Plaintiffs to sue in equity, they must meet two conditions that they cannot meet simultaneously. First, Plaintiffs must lack an adequate alternate remedy. *See Beacon Theatres v. Westover*, 359 U.S. 500, 506-07 (1959) ("basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal

remedies"). Second, Plaintiffs must invoke a statutory or constitutional right for equity to enforce, such as life, liberty, or property under the Due Process Clause or equal protection under the Equal Protection Clause or its federal equivalent in the Fifth Amendment. *See*, *e.g.*, *United States v. Lee*, 106 U.S. 196, 220-21 (1882) (property); *Ex parte Young*, 209 U.S. 123, 149 (1908) (property); *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982) (liberty); *cf. Wadley S. R. Co. v. Georgia*, 235 U.S. 651, 661 (1915) ("any party affected by [government] action is entitled, by the due process clause, to a judicial review of the question as to whether he has been thereby deprived of a right protected by the Constitution"). Because Plaintiffs fail one or both conditions, Plaintiffs' claimed injuries here fall short of what equity requires.

First, as discussed in Section II.A.3, *supra*, and to the extent that Article III jurisdiction is present, *but see* Section II.A.2, *supra*, CSRA's "special statutory review" constitutes an adequate alternate remedy that bars resort to equity under the first condition.

Second, unlike the APA and this Court's liberal interpretation of Article III, pre-APA equity review requires "direct injury," which means "a wrong which directly results in the violation of a legal right." *Alabama Power Co. v. Ickes*, 302 U.S. 464, 479 (1938). Without that elevated level of direct injury, there is no review in equity:

> It is an ancient maxim, that a damage to one, without an injury in this sense, (*damnum absque injuria*), does not lay the foundation of an action; because, if the act complained of does not violate any of his legal rights, it is obvious, that he has no cause to complain. Want of right and want of remedy are justly said to be reciprocal. Where therefore there has been a violation of a right, the person injured is entitled to an action. The converse is equally true, that

> where, although there is damage, there is no violation of a right no action can be maintained.

Id. (cleaned up). In short, Plaintiffs do not have an action in equity. But even if Plaintiffs had an action in equity, they still would need to have jurisdiction for each claim. As already explained, Plaintiffs cannot meet that test. *See* Sections II.A.2-II.A.3, *supra.*

For both reasons, Plaintiffs lack a cause of action in equity.

B. <u>The Government is likely to prevail on the merits.</u>

To warrant a stay, there must be a "fair prospect" of the Government's prevailing. As explained in the prior subsection, the Government is likely to prevail in the underlying litigation because the district court lacks jurisdiction over Plaintiffs' claims. *See* Section II.A, *supra.* As explained in this subsection, the Government likely will prevail on the merits of *when* interim relief can apply, assuming *arguendo* that federal jurisdiction existed. Significantly, the inquiry about when interim relief takes effect is independent of the underlying merits of the parties' substantive disputes about reinstatement of the affected probationary federal employees.

By its terms, Rule 65(c) is mandatory as to the need to address security for the injunctive relief and the injunctive relief's remaining ineffective until that condition is met:

> The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.

FED. R. CIV. P. 65(c). By excluding the United States expressly, Rule 65(c) makes clear that a "nonprofit" exemption does not exist. *See Setser v. United States*, 566 U.S. 231, 238-39 (2012) (discussing principle of *expressio unius est exclusio alterius*). Because the district court did not consider security under Rule 65(c), the district court's injunctive relief remains ineffective. *See* Section I.C, *supra* (collecting cases on Circuit split). Even Circuits that allow forgoing security nonetheless require courts to *consider* the issue. Michael T. Morley, *Erroneous Injunctions*, 71 EMORY L.J. 1137, 1167 & n.206 (2022). Where a lower court fails to exercise discretion given it, an appellate court may exercise that discretion in the first instance, especially here where 5 U.S.C. § 705 vests appellate courts with that same authority and discretion. Indeed, even if the lower courts had exercised their authority under 5 U.S.C. § 705 and Rule 65(c) to set an injunction bond, this Court's *independent* authority under 5 U.S.C. § 705 would provide this Court the independent discretion and authority both to review and to revise that bond.

III. THE OTHER STAY CRITERIA TIP IN THE GOVERNMENT'S FAVOR.

Although the likelihood of this Court's granting a writ of *certiorari* and ruling for the Government on the merits would alone justify granting a stay, *amicus* addresses the balance of the equities. The Government has significant financial concerns at stake, and the public interest favors a stay; against those considerations, Plaintiffs' *legal* interests are trivial and likely not even cognizable.[9] In short, the

[9] *Amicus* does not suggest that the individual employees' claims that underlie Plaintiffs' claims are trivial. Federal employment is undoubtedly important not only to the employees but also to the Government. For that reason, Congress provided an exclusive process for courts to consider these issues. *See* Section II.A.3, *supra*. The

balance of the equities tip decidedly in the Government's favor.

A. The Government's harm is weighty and irreparable.

For stays, the question of irreparable injury requires a two-part "showing of a threat of irreparable injury to interests that [the applicant] properly represents." *Graddick,* 453 U.S. at 933. "The first, embraced by the concept of 'standing,' looks to the status of the party to redress the injury of which he complains." *Id.* "The second aspect of the inquiry involves the nature and severity of the actual or threatened harm alleged by the applicant." *Id.* The Government meet both tests.

As for standing, the Government clearly has standing to defend its actions. *Diamond v. Charles*, 476 U.S. 54, 62-63 (1986). For irreparable harm, the Government will suffer two distinct irreparable injuries.

First, although mere monetary loss is not irreparable if the injured party can recoup it later, there are two obstacles here: (a) the *dicta* in *W.R. Grace*, *see* note 4, *supra*, suggests that damages are unavailable beyond Rule 65(c)'s security; and (b) Plaintiffs' insolvency *vis-à-vis* potentially billions in damages. Monetary injury is not "irreparable" unless the responsible party is or would become insolvent or otherwise judgment-proof. *West Coast Constr. Co. v. Oceano Sanitary Dist.*, 17 Cal.App.3d 693, 700 (Ct. App. 1971); *Brown v. Pearson*, 241 A.3d 265, 274 n.36 (D.C. 2020); *Lockhart v. Leeds*, 195 U.S. 427, 438 (1904); *In re Estate of Marcos*, 25 F.3d 1467, 1480 (9th Cir. 1994); *Wisconsin Gas Co. v. Fed'l Energy Regulatory Comm'n*,

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issue for judicial consideration here, however, is whether Plaintiffs brought claims over which the district court had jurisdiction and—even with jurisdiction—for which the district court could impose interim injunctive relief without adequate security.

758 F.2d 669, 674 (D.C. Cir. 1985). The Government's monetary injury is irreparable without adequate security under Rule 65(c).

Second, the district court's enjoining the Government without jurisdiction violates the separation of powers, which injures the Executive Branch. *Axon Enter. v. FTC*, 598 U.S. 175, 191 (2023) ("subjection to an illegitimate proceeding" can constitute irreparable harm). If allowed to stand in the short run, the district court's unauthorized interference with the Executive Branch will either stymie the proper workings of the political branches or spawn satellite litigation over sanctions and contempt. To avoid that, this Court should supervise the lower federal courts with declaratory and injunctive relief to protect the Executive Branch from the irreparable injury it will suffer without a stay.

B. Plaintiffs' *cognizable* harm is trivial to non-existent.

With respect to Plaintiffs' countervailing claims of irreparable harm, a stay would not seriously prejudice Plaintiffs' *cognizable* interests. Because Plaintiffs lack the Article III minima of standing, *see* Section II.A.2, *supra*, Plaintiffs cannot make the *higher* showing required for irreparable harm. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149-50, 162 (2010) (injuries that qualify as sufficiently immediate for Article III standing can nonetheless fail to qualify under the higher bar for irreparable harm). Moreover, lack of jurisdiction "negates giving controlling consideration to the irreparable harm." *Heckler v. Lopez*, 464 U.S. 879, 886 (1983) (Brennan, J., dissenting from the denial of motion to vacate the Circuit Justice's stay). Finally, no litigant—and especially no litigant against the public fisc—has a cognizable interest in interim relief that takes effect before the requirements of Rule

65(c) are met. In sum, Plaintiffs have no countervailing *cognizable* harms to balance against the Government's irreparable harm.

C. The public interest favors a stay.

The last stay criterion is the public interest. Where the parties dispute the lawfulness of government actions, the public interest collapses into the merits. *ACLU v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003) ("the public interest [is] not served by the enforcement of an unconstitutional law") (cleaned up); *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994) (recognizing "greater public interest in having governmental agencies abide by the federal laws"); *League of Women Voters of the United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) ("no public interest in the perpetuation of unlawful [government] action"). The public interest favors preventing district courts that lack jurisdiction seeking to wrest governmental control from the elected branches.

If the Court agrees with the Government and *amicus* that Plaintiffs lack jurisdiction and that interim relief against the public fisc cannot commence without security under Rule 65(c), the public interest will tilt decidedly in favor of the Government:

> It is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of … governments in carrying out their domestic policy.

Burford v. Sun Oil Co., 319 U.S. 315, 318 (1943). In public-injury cases, equitable relief that affects competing public interests "has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff"

because courts also consider adverse effects on the public interest. *Yakus v. United States*, 321 U.S. 414, 440 (1944). Moreover, the greater public interest lies in having the elected branches set government policy, without government by litigation. *See* Section I.B, *supra*. For all these reasons, this Court—or the Circuit Justice—should stay the district court's interim relief until the Government has adequate security against the irreparable monetary harm that the interim relief would impose.

CONCLUSION

This Court should (a) construe the application as a petition for a writ of *certiorari* before judgment on the question whether Rule 65(c), 5 U.S.C. § 705, and sovereign immunity require adequate security before encumbering the public fisc with interim relief, including all subsidiary questions fairly included within the context of a governmental defendant's damages from interim relief improperly granted, (b) stay the district court's interim relief pending either the Court's resolving that question or Plaintiffs' providing adequate security pursuant to 5 U.S.C. § 705 and Rule 65(c), and (c) expedite consideration of this matter.

Dated: March 27, 2025

Respectfully submitted,

/s/ Lawrence J. Joseph

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CERTIFICATE AS TO FORM

Pursuant to Sup. Ct. Rules 22, 33, and 37.4, I certify that the foregoing *amicus* brief is proportionately spaced, has a typeface of Century Schoolbook, 12 points, and contain 25 pages (and 6,826 words), excluding this Certificate as to Form, the Table of Contents, and the Certificate of Service.

Dated: March 27, 2025

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CERTIFICATE OF SERVICE

The undersigned certifies that, on March 27, 2025, in addition to filing the foregoing document via the Court's electronic filing system, one true and correct copy of the foregoing document was served by Priority U.S. Mail, postage pre-paid, with a PDF courtesy copy served via electronic mail on the following counsel:

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The undersigned further certifies that, on March 27, 2025, an original and ten true and correct copies of the foregoing document were served on the Court by hand delivery.

Executed March 27, 2025,

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