UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, *et al*., Plaintiffs, v. U.S. OFFICE OF PERSONNEL MANAGEMENT, *et al*., Defendants.	Case No. 25-cv-1237-DLC

PLAINTIFFS' REPLY IN FURTHER SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

The limited AR[1] shows that Defendants rushed to disclose sensitive records in 14 databases to up to 17 DOGE agents in an unsecure manner, and that senior OPM officials conceded in writing that the disclosures were not needed. It is neither standard nor normal to give new, inexperienced employees administrative access to a broad range of systems in an urgent, desperate, "911-esque" fashion to the personal data of millions of people. OPM-000107.

Despite supplementing the AR three times, Defendants cannot explain this evidence away. There remain large gaps in the AR, and Defendants' declarations—riddled with omissions and artfully worded statements—do not provide answers. For example, the AR and declarations omit the fact that at least three DOGE agents at OPM are detailed to the DOGE agency itself—a fact that came to light only when Plaintiffs cross-referenced the redacted AR with other cases. The AR and declarations are silent about DOGE Defendants' widely reported coordination with and/or direction of DOGE agents' activities at OPM. They are silent about any activity after March 6, 2025, and about ten of the individuals given access (OPM-9 through OPM-18).

What little explanation Defendants do provide through Defendants' declarants is mostly irrelevant post-hoc rationalization. *See Dep't of Com. v. New York*, 588 U.S. 752, 780 (2019) ("[I]n reviewing agency action, a court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record"); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971), *abrogated on other grounds by Califano v. Sanders,* 430 U.S. 99 (1977) (same); *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997) (citing *Camp v Pitts*, 411 U.S. 138, 142 (1973)) ("the focal point for judicial

[1] Capitalized and abbreviated terms herein have the same meaning as in Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction ("Opening Br.") unless otherwise stated.

review should be the administrative record already in existence, not some new record made initially in the reviewing court.").

Given the serious gaps in the AR and the obvious haste and lack of regular order pervading OPM's and DOGE Defendants' actions, Defendants are not entitled to the presumption of regularity that might ordinarily be applied to agency decisionmaking. In this case:

> [u]se of the presumption of regularity to create from whole cloth evidence of compliance with [law] would create an end-run around Congress's substantive command and fly in the face of the Supreme Court's instruction that the "presumption [of regularity] is not to shield [the agency] action from a thorough, probing, in-depth review…consider[ing] whether the decision was based on a consideration of the relevant factors."

Merritt Parkway Conservancy v. Mineta, 424 F. Supp. 2d 396, 423 n. 8 (D. Conn. 2006) (quoting *Volpe*, 401 U.S. at 415–16).

A preliminary injunction is necessary. It is the only way to protect Plaintiffs against further unlawful disclosure and use of their data, especially given Defendants' refusal to provide information after March 6, 2025, coupled with the President's Executive Order ("E.O.") of March 20, 2025, expressly seeking "consolidation" of unclassified agency records, along with widespread, credible news reporting that access and disclosure of agency data continues apace across the government. There is both an ongoing privacy harm and a substantial and imminent harm of further misuse by internal bad actors and external attackers, including hostile foreign nations.

ARGUMENT

Starting on January 20, 2025, Defendants gave DOGE agents access to Plaintiffs' records in violation of the Privacy Act, causing irreparable harm to Plaintiffs' privacy and security. With a prohibitory injunction, Plaintiffs seek to restore the status quo ante—"the last actual, peaceable

uncontested status which preceded the pending controversy." *N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc.*, 883 F.3d 32, 37 (2d Cir. 2018) (*citing Mastrio v. Sebelius*, 768 F.3d 116, 120 (2d Cir. 2014)); *contra* Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for a Preliminary Injunction ("Opposition" or "Opp.") at 9–10.

I. PLAINTIFFS HAVE STANDING

Plaintiffs have demonstrated that they have suffered two independent injuries in fact that are concrete, particularized, and actual or imminent. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021). First, disclosure of Plaintiffs' records causes them past and present injury. Second, imminent dangers of records misuse and theft pose an intolerable risk of future injury. Both are analogous to the common-law tort of intrusion on seclusion. Accordingly, Plaintiffs are likely to succeed on standing. Opening Br. at 10–13.[2]

A. Actual Records Disclosure Injures Plaintiffs

Defendants concede a critical fact: "several new OPM employees were granted access *permissions* to 14 OPM systems," including DOGE agents. Opp. at 13 (emphasis in original); *see also* Second Hogan Decl. ¶ 13; *accord* Opening Br. at 8, 11 (citing OPM-000089-091). This concession establishes concrete injury, because as this Court previously ruled, "exposure of the plaintiffs' personally identifiable information to unauthorized third parties, without further use or disclosure, is analogous to harm cognizable under the common law right of privacy." *Am. Fed'n*

[2] Defendants' Opposition does not address Plaintiffs' showings that the personal information at issue is highly sensitive (Opening Br. at 8–9, 10–11); that Defendants caused these injuries, and this Court can redress those injuries (*id.* at 13); or that the union Plaintiffs have associational standing (*id*. at 10 n.22). Defendants thus waived argument on these issues. *First Cap. Asset Mgmt., Inc. v. Brickellbush, Inc.*, 218 F. Supp. 2d 369, 392–93, n.116 (S.D.N.Y. 2002). In contrast, Plaintiffs preserved their arguments regarding analogies to three common-law torts. Opening Br. at 13 (citing this Court's opinion, another court's opinion in a similar lawsuit, and one of Plaintiffs' earlier briefs). *Cf*. Opp. at 20.

of Gov't Emps. v. Off. of Pers. Mgmt., No. 25-cv-1237-DLC, 2025 WL 996542, at *7 (S.D.N.Y. Apr. 3, 2025) ("*AFGE*") (cleaned up).

Defendants now seek to reopen this ruling. *See* Opp. at 15 & n.12. But it is "law of the case" and should not be revisited absent "cogent and compelling reasons such as an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *U.S. v. Menendez*, 759 F. Supp. 3d 460, 525 (S.D.N.Y. 2024) (cleaned up). None of those conditions apply here. To the contrary, intervening legal authority supports this Court's ruling: seven Fourth Circuit judges, concurring in the en banc decision to deny a motion to stay a preliminary injunction in a similar case, repeatedly emphasized that DOGE agents had "unfettered access" to sensitive personal data and that access alone justified an injunction without regard to how they used or disclosed it. *AFSCME v. Social Security Admin.*, No. 25-1411, 2025 WL 1249608, at *2 (4th Cir. Apr. 30, 2025). In another intervening and similar case, six of those judges opined that by analogy to intrusion upon seclusion, "disclosure" of data to DOGE agents could establish standing. *Am. Fed'n of Tchrs. v. Bessent*, No. 25-1282, 2025 WL 1023638, at *9 (4th Cir. Apr. 7, 2025) (King, J., dissenting from denial of en banc consideration of motion to stay preliminary injunction).

Thus, to show standing, Plaintiffs need not show facts beyond OPM granting DOGE agents access to the disputed records. But Defendants now concede much more than that grant of access, raising the very security and privacy concerns that the Privacy Act was created to prevent.

First, Defendants concede that four DOGE agents (Scales, Sullivan, OPM-6, and OPM-7) logged into an OPM system called USA Staffing, and that those agents had "administrative access" to do so. Hogan says that the DOGE agents accessed the system for "several reasons,"

including (but importantly not limited to) making some unspecified "system changes" to "hiring/onboarding and job posting processes" given a hiring freeze and to "develop a data-driven hiring plan…." Opp. at 8, 13, 15 (citing Second Hogan Decl. ¶ 14 and OPM-000103). As Plaintiffs have shown, USA Staffing maintains information from federal job applicants including names, addresses, citizenship status, and veterans' information, and that system can contain information including social security number, age, gender, work experience, and education. Opening Br. at 9, 19 (citing OPM's PIA of July 28, 2021). Plaintiffs' expert, former Deputy CIO of OPM David Nesting, notes that this summary description makes it impossible to know if these changes involved "access to or manipulation of personal data in these systems." Second Declaration of David Nesting dated May 22, 2025, ("Second Nesting Decl.") ¶ 30. The harm of unlawful access to that information is further aggravated by OPM's failure to properly oversee, train, and vet the DOGE agents who logged into this sensitive system. Section II(B), *infra*.

Second, Defendants concede that one DOGE agent (Hogan) logged into another OPM system called USA Performance. Opp. at 7 n.6, 15 (citing Second Hogan Decl. ¶ 13 and OPM-000103). Hogan declines even to state why he logged in, let alone demonstrate a need to have done so. *Contra* Second Nesting Decl. ¶ 17–21. As Plaintiffs have shown, USA Performance maintains information from federal employees including names, social security numbers, work locations, positions, and self-assessments. Opening Br. at 9, n.18 (citing OPM's PIA of May 13, 2020).

These conceded DOGE logins are alarming privacy intrusions, especially given how vague Defendants are about what was accessed and why.

But there is more. Defendants cannot say whether there have been any additional logins in the past two and a half months because of their dubious choice not to investigate logins after

March 6.[3] Second Hogan Decl. ¶ 11. Even the March 6 date is questionable. Section II(A)(1), *infra*.

AR evidence also shows that after OPM disclosed its records, DOGE agents subsequently used records from the Enterprise Human Resources Integration (EHRI) and Official Personnel Folder (OPF) to create a government-wide email system (GWES), OPM-000119, which corroborates news reports that detail other additional uses. Noble Decl., Ex. M (congressional letter), Ex. N (news report). OPM also used GWES to email federal workers about deferred resignation. Noble Decl., Ex. N.

Widespread, credible news reports provide essential context in this case. Despite Defendants' claims of inadmissibility (Opp. at 1, 11–13), it is well settled in this Circuit that "hearsay evidence may be considered by a district court in determining whether to grant a preliminary injunction." *Mullins v. City of New York*, 626 F.3d 47, 52 (2d Cir. 2010); *see Havens v. James*, 76 F.4th 103, 123 (2d Cir. 2023) (affirming district court's consideration of news reports at the preliminary-injunction stage); *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 276 n.3 (2d Cir.), *opinion clarified*, 17 F.4th 368 (2d Cir. 2021).

Hogan asserts that OPM staff, not DOGE agents, extracted names and addresses, and that DOGE agents did not log into EHRI or OPF. But Hogan says nothing about whether DOGE

[3] Defendant suggest DOGE logins don't matter, absent DOGE "review" of data. Opp. at 13. But Defendants do not explain why a DOGE agent would login to any OPM systems except to access data, nor do they submit evidence that DOGE agents who logged in did not review data. *See* Second Nesting Decl. ¶ 5 ("it's implausible to me" that the access granted to USA Staffing System "does not grant access to personal data held by these systems"). Moreover, as Nesting points out, "Regardless of whether the individuals given this access exercised it, the fact that the privileged credentials were issued in the first place creates risk." Second Nesting Decl. ¶ 12. Defendants further suggest that even DOGE review of OPM data doesn't matter, unless it was data of "the individual Plaintiffs." *Id.* But the union Plaintiffs represent vast numbers of current federal employees. Kelley Decl. ¶ 2 (AFGE represents about 800,000 employees); Ramrup Dec. ¶ 2 (AALJ represents about 910 employees).

agents directed this extraction, accessed the data, or used the extracted data for any purpose. Second Hogan Decl. ¶¶ 11–12. Hogan's declaration thus does not address the key points in the congressional letter (Nobel Decl., Ex. M) and the report (*Id.*, Ex. N).[4] And Hogan's claim that only unnamed career OPM staff—and not DOGE agents—used records to create the email system is not credible. It is unsupported by any documentation, and a DOGE agent with access to the relevant systems (OPM-2) signed their name to the Privacy Impact Assessment (PIA) that describes the email system. OPM-000117.[5]

This case is unlike *Doe v. OPM*, Civil Action No. 25-234 (RDM), 2025 WL 513268 (D.D.C. Feb. 17, 2025), which alleged that an inadequate PIA regarding GWES violated the E-Government Act. *Cf.* Opp. at 18–19, 32. *Doe,* involved none of the claims asserted in this case, the only data at issue was .gov email addresses, and the *Doe* plaintiffs did not "identify any common-law analogues" in their standing analysis. 2025 WL 513268, at *5.

[4] A person's name and email address are "records." *Cf.* Opp. 14 & n.11. The Privacy Act defines that term as "any item, collection, or grouping of information about an individual" with their identifying particular. 5 U.S.C. § 552a(a)(4). An email's domain often discloses the office where a person works, and an email itself discloses how to send them a message. *Cf. Dept. of Defense v. FLRA*, 510 U.S. 487, 494 (1994) ("employee addresses … are 'records'"). The two cases cited by Defendants, Opp. at 14 n.11, do not help them. *Bechhoefer v. D.E.A.*, 209 F.3d 57, 62 (2d Cir. 2000) ("record" has "a broad meaning" that includes "any personal information" linked to person); *Bloche v. DOD*, 370 F. Supp. 3d 40, 58–59 (D.D.C. 2019) (suggesting FOIA's privacy exemption would not apply to an email domain by itself). Defendants cannot show the disclosures are justified by exception (b)(1). *See* section II(A), *infra*. Nor can they show a "routine use" under exception (b)(3) to send the controversial "Fork in the Road" email seeking mass resignations simultaneously to millions of federal employees, especially because they have not even attempted to show the use "is compatible with the purpose for which it was collected." 5 U.S.C. 552a(a)(7).

[5] Just yesterday, a news article indicated that DOGE agents used a Meta AI system to analyze the responses to the mass "fork" email from OPM databases. *See* Makena Kelly, "DOGE Used a Meta AI Model to Review Emails From Federal Workers," *Wired* (May 22, 2025) (Declaration of F. Mario Trujillo dated May 23, 2025, ("Trujillo Decl.") Ex. A)

B. Imminent Records Misuse and Theft Injures Plaintiffs

Injury is "imminent" if it "is certainly impending, or there is a substantial risk that harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (cleaned up).[6] Here, Plaintiffs' injuries are imminent in both ways. Plaintiffs show imminent risk that, because of Defendants unlawful acts, third parties, including foreign adversaries, will steal the disputed records or Defendants will misuse them. Schneier Decl. ¶¶ 5, 28, 32–35, 42–54; Lewis Decl. ¶ 17; Nesting Decl. ¶¶ 42–43; *see also* Kelley Decl. ¶ 11; Toussant Decl. ¶ 6; Ramrup Decl. ¶ 11. This is especially true because OPM has been a target of past breaches, Schneier Decl., Ex. B, and at least one individual who obtained access is associated with a past data leak. Noble Decl., Ex. G. Defendants' unpersuasive response rests largely on the inadequate and self-serving Second Hogan Declaration.

Defendants fault Plaintiffs' experts for not more precisely pointing to the record or relying on hearsay. Opp. at 16-17. Defendants also note that a Microsoft tool called MS Entra ID creates secure account and access management for some OPM systems. Opp. at 18. But the cybersecurity concerns raised by Plaintiffs' experts are all rooted in inexperienced DOGE agents receiving blanket administrative access to records systems (Second Nesting Decl. ¶ 36), which is described throughout the AR. *See* OPM-000029; OPM-000104; OPM-000107-09; Section II(A), (B), *infra*.

Granting administrative access to inexperienced people who do not need those permissions is not consistent with the "role-based access control" that Hogan relies on. Second Hogan Decl. ¶ 7; *see* Section II(B), *infra.* To the contrary, Nesting notes that in reviewing the AR and the

[6] Defendants' statement of the law merely addresses "certainly impending" harm, not "substantial risk." Opp. at 16.

two Hogan Declarations, "I saw nothing to suggest that this access was being tailored to any of these individuals or the particular work that they planned to do with this access, which is the normal process at OPM and other agencies to comply with their obligations under the Privacy Act." Second Nesting Decl. ¶ 6.

Plaintiffs' expert explained that administrative access gives users the "ability to create, read, update, and delete/destroy any data and code within the system." Lewis Decl. ¶ 8. Hogan never directly disputes that DOGE agents with administrative access can perform these elevated tasks. Second Hogan Decl. ¶ 9. Instead, he defines "administrative access" broadly as permissions over and above a "regular user." *Id.* He also notes that "the granting of permissions to access a specific system" (not administrative access) does not "necessarily" give a user permissions to perform those tasks. *Id.* Finally, he says merely that he is "not aware" of anyone performing those tasks. *Id.* What he does not say is whether any of the DOGE agents who were granted administrative access actually did have the permissions to perform those tasks. Even granting such elevated access increases the "attack surface" on the agency for credentials to be stolen, compromised, or abused by others. Second Nesting Decl. ¶¶ 12–13. Indeed, a news report this month detailed how one DOGE agent's login credentials "have appeared in multiple public leaks from info-stealer malware, a strong indication that devices belonging to him have been hacked in recent years." Trujillo Decl., Ex. B.

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR CLAIMS

A. Defendants' Disclosures Violate Section (b) of the Privacy Act

1. Defendants admit they disclosed records to DOGE agents, and evidence shows they did more.

Plaintiffs' sensitive records are stored in OPM systems, and Defendants admit that "several new OPM employees were granted access permissions to 14 OPM data systems," which constitutes a disclosure under the Privacy Act. Opp. at 13; section I(A), *supra*. As this Court

already ruled, "'providing' access to another person for their review of a record is a disclosure." *AFGE*, 2025 WL 996542 at *12.

Defendants also admit that four DOGE agents logged into at least one records system before March 6, 2025, which similarly constitutes a disclosure. Opp. at 13. While unnecessary as a matter of law, Plaintiffs point to AR evidence showing that, after OPM disclosed the records, DOGE agents subsequently used records to create a government-wide email system, OPM-000119, which corroborates news reports that detail other additional uses. Noble Decl., Exs. M, N.

In his declaration, Hogan disputes that DOGE agents used the records by pointing to a login audit. Second Hogan Decl. ¶¶ 12-14; OPM-000103; section I(A), *supra*. But Hogan admits this document covers dates only up to March 6. Second Hogan Decl. ¶ 11. Moreover, the audit is undated, has no author or explanation of its scope, and contains obvious errors; it thus should be given little weight.[7] For example, it shows that OPM-7 last logged into USA Staffing on Nov. 7, 2024. *Id.* Yet OPM-7 was appointed to OPM three months later, on Jan. 20, 2025. OPM-000111. And DOGE agents were given "administrative access" to these records systems, which potentially allowed them to delete or obscure records of their access, as has been alleged at other agencies. Lewis Decl. ¶¶ 7–8; Noble Decl., Ex. O. Hogan's carefully worded declaration does not dispute that DOGE agents have these capabilities. Second Hogan Decl. at ¶ 9.

Defendants—not Plaintiffs—bear the burden of persuasion as to the Privacy Act disclosure exception that Defendants assert as a defense. *See Doe v. FBI*, 936 F.2d 1346, 1353 (D.C. Cir. 1991); *see also Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 57 (2005) (under the "ordinary default rule," the "burden of persuasion" as to "affirmative defenses and exemptions" is properly "shifted to defendants").

[7] The AR contains no record of OPM's CISO team conducting the audit that led to the creation of OPM-000103. *Compare* Second Hogan Decl. ¶ 11 *to* OPM-000023, OPM-000054 (describing account creations between January 20 and February 12).

2. Defendants ignore record evidence that some DOGE agents were functionally employees of other agencies when they received OPM records.

Defendants assert that "Plaintiffs offer no actual evidence" that some DOGE agents are functionally controlled by other agencies like DOGE. Opp. at 25. This is incorrect. Plaintiffs offer evidence about the DOGE agents' many employers, the work those agents do, who supervises them, who pays them (or doesn't), and how the agents' colleagues refer to them.[8] Opening Br. at 15–16 (discussing assembled evidence). These factors—taken from the law of agency—demonstrate that DOGE agents were not functionally OPM employees when they received OPM records.[9] *Jud. Watch, Inc. v. Dep't of Energy*, 412 F.3d 125, 131–32 (D.C. Cir. 2005); *see also* Restatement (Third) Of Agency § 7.03(d)(2) (2006) (describing "lent employees").

Defendants offer no evidence that the DOGE agents are not being directed by, or coordinating with, the DOGE Defendants, and they ignore this functional test altogether. They rely on the simple, self-serving assertion that dual or detailed employees are "still employees of OPM" and therefore compliant with 5 U.S.C. 552a(b)(1). Opp. at 26. This charade would create a massive loophole that would render the Privacy Act inoperable.[10] To get around interagency data sharing restrictions, agencies could simply place dual employees in the agencies with which they want to share data and thereby circumvent the restrictions in 5 U.S.C. 552a(b)(3) & (7).

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[8] Plaintiffs assembled evidence of DOGE agents' multiple employers from other cases because Defendants omitted this from the AR. Garcia-Whiteside's catalogue is also incomplete. Garcia-Whiteside Decl. ¶¶ 9, 13. Despite DOGE being a Defendant in this case, the AR and Garcia-Whiteside do not disclose that OPM-4, OPM-6, and OPM-14 are detailed to DOGE. Noble Decl., Ex. A at 10, 14.

[9] Garcia-Whiteside attempts to address deficiencies in the record for OPM-4's onboarding. Garcia-Whiteside Decl. ¶ 9. In so doing, the declaration offers more evidence that OPM 4 should be functionally understood as an employee of other agencies.

[10] Defendants attempt to characterize DOGE as a normal continuation of the previous U.S. Digital Services (USDS). Opp. at 25 n.19. They ignore the fact that employees working for the original USDS resigned in mass after they saw what DOGE was doing, Noble Decl., Ex. P, and that one of the new purported missions of the DOGE Defendants is to get access to other agency records. Exec. Order No. 14,158 Sec. 4(b).

According to credible news reports, that is exactly what DOGE Defendants are doing.[11] To put the issue in the plainest terms, a teacher who works a second job as a barista at a coffee shop cannot take the coffee shop's cups and use them at school. *See AFL-CIO v. DOL*, No. CV 25-339 (JDB), ECF No. 71 at 11–12 (D.D.C. Mar. 19, 2025).

3. Defendants have expressly admitted they don't "need" the records.

Defendants admit that they granted blanket administrative access to multiple systems first, and only after press coverage and litigation reduced some of that access.[12] Emails from top OPM officials conclusively show DOGE agents "never needed" the records to which they gained access, and at most they implausibly "might need" access to "all the systems OPM operates and manages" for a future, undisclosed reason. OPM-000026; OPM-000028-000029. Despite Defendants' conclusory assertions (Opp. at 29–30), this is the opposite of the "principle of least privilege." Second Nesting Decl. ¶¶ 4–9, 11–14; Lewis Decl. ¶¶ 12–16. Defendants additionally do not even contest their violation of the Principle of Separation of Duties, which concerns their admitted granting of access to multiple databases to the same people. Second Nesting Decl. at ¶¶ 10–14; *see also* Schneier Decl. ¶¶ 29–35. Defendants cannot justify why they so urgently needed such broad access while simultaneously arguing they never used it. Second Hogan Decl. ¶¶ 13–14.

Additionally, Plaintiffs' experts have explained in detail that modernizing government systems does not require access to the underlying data. Nesting Decl. ¶¶ 15, 20–31; Lewis Decl.

[11] *See, e.g.*, Trujillo Decl., Ex. C.

[12] Defendants attack Plaintiffs' factual assertions about the scope of "administrative access" by noting that NIST guidance allows less than full "god mode" control under that term. But since they also fail to explain what powers they did in fact grant to these 17 individuals, this assertion is meaningless. Second Hogan Decl. ¶ 9; *see also* Second Nesting Decl. ¶¶ 15–16.

¶¶ 7, 23.[13] These declarations fill in the gaps in the AR. Courts may consider expert declarations due to the "absence of formal administrative findings" in the AR and the need for additional "background information." *Safe Haven Home Care, Inc. v. U. S. Dep't of Health & Hum. Servs.*, 130 F.4th 305, 324 (2d Cir. 2025). "[A] defendant agency cannot have sole, unreviewable authority to decide which documents" the Court may properly consider in "conducting the 'thorough, probing, in-depth review' of the agency action with which [they are] tasked.'" *State v. U.S. Immigr. & Customs Enf't*, 438 F. Supp. 3d 216, 217 (S.D.N.Y. 2020) (*quoting In re Nielsen*, No. 17-3345 (2d Cir. Dec. 27, 2017)).

Faced with this evidence against them, Defendants rely almost singularly on the executive orders to justify their access. Opp. at 26–27. But the DOGE E.O. itself acknowledges, as it must, that it cannot override the Privacy Act's restrictions. E.O. No. 14,158 at § 4(b); *see also Parks v. Internal Revenue Service*, 618 F.2d 677, 679 (10th Cir. 1980). Defendants must do much more than simply state "the goal of 'modernization' or 'increasing efficiency,' or even 'emergency,' without demonstrating how access to sensitive personal information is 'needed' to reach that goal." Second Nesting Decl. ¶ 26; *Dick v. Holder*, 67 F. Supp. 3d 167, 178 (D.D.C. 2014).[14]

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[13] The government attacks Nesting in a footnote, noting that he was "curiously silent" about his level of access at OPM. Opp. at 19, n.15. Nesting responds: "For me to possess administrative access over OPM's data systems for no reason other than my role as Deputy CIO would have been an egregious violation of good security practices, as I had no need for any special access or privileges on these systems, even in a position of authority over the teams operating them." Second Nesting Decl. ¶¶ 17–21.

[14] Defendants also claim that DOGE agents obtained access to records similar to hundreds of other employees. Opp. at 27. This ignores the fact that DOGE agents appear to be the only ones during this time to obtain access to certain sensitive systems. This includes: "USA Staffing Core + Admin Portal - DEV/TST/STG/TRN/PRD"; "OPM Data: Electronic Official Personnel Folder (eOPF) - DEV/TST/QA/TRN/PRD"; and "OPM Data: Enterprise Human Resources Integration (EHRI) - Dev/TST/QA/PRD." OPM-000089–91.

Defendants' broad initiatives fail to explain why any of the DOGE agents need administrative access to OPM systems containing millions of Americans' personal information, much less why the same people needed access to multiple systems. The same goes for the vague justification of "software development" and "system changes." Second Hogan Decl. ¶ 14; *see AFSCME v. Social Security Admin.*, 2025 WL 1206246, at *61 (D. Md. Apr. 17, 2025) (disregarding "cursory, circular statements"); *Am. Fed'n of Tchrs. v. Bessent*, 765 F. Supp. 3d 482, 502 ("The government never explains *why* OPM personnel need access to these sensitive records to implement the workplace reform measures in the Workforce Executive Order.") (emphasis in original); Second Nesting Decl. ¶¶ 22–35.

To the extent Defendants have belatedly attempted to articulate a need, the Court should not presumptively accept Defendants' vague, post-hoc rationalizations that contradict the record. *Volpe,* 401 U.S. at 419; *Hoffman*, 132 F.3d at 14; *contra* Opp. at 27–28.

B. DOGE Agents Were Onboarded and Obtained Access to Records in a Rushed and Unsecure Manner, Violating Section (e)(10)

OPM rushed to onboard and disclose records to DOGE agents, casting aside oversight, training, access permissions, sharing limits, and background checks. This was not, as Defendants characterize it, "ordinary day-to-day operations" (Opp. at 22); nor did they establish appropriate "administrative, technical, and physical safeguards" regarding these agents. 5 U.S.C. 552a(e)(10).

OPM onboarded and granted records access to DOGE agents in an "urgent," "rush[ed]," and "desperat[e]" manner. OPM-0000108; OPM-0000194. Trying to re-cast the situation as routine, Defendants note that OPM's career IT staff "authorized" and "approved" DOGE agents' access. Opp. at 7. This leaves out the coercive nature of the request. OPM's acting director sought access following a "911-esque" call, OPM-000107, and while he stripped career staffs' own "original permissions" and oversight. OPM-000026.

Defendants do not contest that OPM's acting director told career staff that DOGE engineers "won't have a lot of time" to understand the sensitive records systems and "what the program officers feel about the programs." OPM-000027. Despite supplementing the AR three times, Defendants still have provided no documentary evidence that all DOGE agents completed basic security and ethics training before gaining access to records.[15] Specifically, neither the AR nor Garcia-Whiteside's declaration provides documents to show that OPM-3, OPM-4, OPM-6, and Sullivan completed basic security training, nor that any DOGE agent completed OPM ethics training. Garcia-Whiteside Decl. ¶¶ 18–19 (making the assertion without documentation). Instead, it shows affirmatively that Sullivan did not complete security training when this lawsuit was filed, and that OPM-4 and OPM-7 did not complete OPM ethics training. *Id.*

The AR also shows that OPM does not "periodically" review access permissions or sharing permissions of DOGE agents. *Contra* Opp. at 7, 29; Second Hogan Decl. ¶ 10. Instead, it shows that under outside pressure stemming from news reports and lawsuits, OPM at one point reviewed access permissions. But Hogan and OPM have not asserted they have done so since March 6, 2025. Second Hogan Decl. ¶¶ 11, 13, 14.

Hogan describes OPM's "role-based" access controls and account management. *Id.* ¶ 7. But those controls are ineffective when OPM grants blanket administrative access to DOGE agents, bypassing longstanding security and privacy standards. Second Nesting Decl. ¶ 36. The cybersecurity concerns raised by Plaintiffs' experts are rooted in this blanket access. Second Nesting Decl. ¶¶ 12–13.[16] Similarly, the record shows that most DOGE agents working for

[15] The records that do exist merely show individuals used unusual procedures to self-certify that they understood a training document. Garcia-Whiteside Decl. ¶¶ 17–18.

[16] The Court need not be an expert to understand that Hogan's four months of experience at OPM (or less than a month when this lawsuit was filed)—after working at a company developing semiautonomous car technology—might not be enough to give Hogan the deep familiarity with OPM's old and complex systems necessary to secure them against sophisticated, foreign-government-sponsored cyberattacks. But Plaintiffs' internationally recognized cybersecurity expert Bruce Schneier has explained based on experience that those who are very skilled in one area of technology are often not skilled at cybersecurity. Schneier Decl. ¶ 4; *Cf.* Opp. at 17 n.13.

multiple agencies did not sign agreements that limit the sharing of OPM data with other agencies. *Cf.* OPM-000013.

Finally, the record shows that many DOGE agents avoided early background checks by taking advantage of temporary worker loopholes, 5 CFR 731.104(a)(3), and "emergency" exceptions. 5 CFR 1400.202. Defendants submit two declarations to explain that DOGE agents were vetted according to "established procedures." Garcia-Whiteside Decl. ¶ 20; Hilliard Decl. ¶ 24. While there may be established ways for federal workers to avoid early background checks, they are *exceptions* to normal vetting. And in at least one case, the process was inadequate. OPM-4, who was reportedly fired from a previous employer for data mismanagement (Noble Decl., Ex. G), should have received a background check. The General Service Administration appointed OPM-4 for a one-year term, and OPM appointed him for a 180-day term. Garcia-Whiteside Decl. ¶ 9. The one-year term requires a background check. 5 CFR 731.104(a); Hilliard ¶ 5. Moreover, OPM should have separately conducted a background check when it learned about OPM-4's previous firing—either through OPM-4's own required admissions, news reports, or this lawsuit. 5 CFR 731.104(a)(3) ("The employing agency, however, must conduct such checks as it deems appropriate to ensure the suitability or fitness of the person.").

C. Defendants' Decision to Disclose Plaintiffs' Records Is Final Agency Action Under the APA

Defendants engaged in final agency action when they unsecurely rushed to disclose records to DOGE agents in a flawed attempt to implement E.O. No. 14,158.[17] Section II(A), (B), *supra*; *AFGE*, 2025 WL 996542, at *16–18. Defendants' Opposition does not focus on the two-prong test for final agency action. *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997); *contra* Opp. at 20-23. First, Defendants do not dispute that their unsecured disclosure resulted in "legal

[17] The action is inconsistent with the E.O., the Privacy Act, *and* normal procedures.

consequences" to Plaintiffs in the form of privacy violations. *Id*. Second, they do not dispute that OPM's disclosure is the "consummation" of its decisionmaking process. *Id.*

Instead, Defendants argue there was no agency action because what they did was merely "representative of its ordinary day-to-day operations." Opp. at 22. But, as the Court already ruled, final agency action need not be formal. *AFGE*, 2025 WL 996542 at *17. Still, to the extent that Defendants try to recast their Privacy Act violations as normal procedures, that is as wrong as it is dangerous. Sections II(A), (B), *supra*.

And the cases cited by Defendants are inapposite. Opp. at 21–23. In two of those cases, the court found no final action when an agency wrote a "budget request" or when an agency sent an "informational" letter. *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 19 (D.C. Cir. 2006); *Indep. Equip. Dealers Ass'n v. E.P.A.*, 372 F.3d 420, 427 (D.C. Cir. 2004). No legal consequences flowed from those preliminary actions—unlike here, where Defendants deprived Plaintiffs of their privacy rights. *Jones v. U.S. Secret Serv.* is also inapposite, ruling that a "failure to train"—especially when there is no "mandatory agency duty" to train—is not final agency action. 701 F. Supp. 3d 4, 16 (D.D.C. 2023). Here, the record shows that Defendants affirmatively, unsecurely acted to disclose records in violation of the Privacy Act's direct prohibitions and mandates. 5 USC 552a(b) & (e)(10).

D. Ultra Vires

Regarding Plaintiffs' ultra vires claim, Defendants argue only that the AR contains no evidence (so Defendants aver) that the DOGE Defendants had any role in OPM's Privacy Act violations. Opp. at 31. This argument must be assessed in the context of what the record shows: "that the DOGE agents demanded immediate access to OPM records" and "were given that access" to at least 14 OPM systems. *AFGE*, 2025 WL 996542 at *7; OPM-000028–29; OPM-000104; OPM-000110; OPM-000089–102. In addition, three DOGE agents at OPM are detailed

to the DOGE agency. Noble Decl., Ex. A at 10, 14. Despite these facts, Defendants are asking this Court to believe that DOGE agents showed up at OPM, demanded access to OPM databases, and were granted that access, but that DOGE Defendants played no role whatsoever in directing those OPM DOGE agents or OPM officials. That assertion is not supported by anything in the record and makes no sense, not least because the DOGE E.O. itself, which provides that the DOGE agents at OPM and elsewhere must be hired in "consultation with" DOGE and must "coordinate their work" with DOGE, makes clear that DOGE activities at the various affected agencies, including OPM, are directed by the DOGE Defendants. E.O. § 3(c). Defendants' assertion also flies in the face of public statements by government officials and reams of public reporting documenting that DOGE Defendants are leading DOGE efforts across federal agencies.[18]

III. IRREPARABLE HARM

Defendants' argument on irreparable harm focuses only on potential harms detailed by Plaintiffs' experts, while ignoring the irreparable harm caused to Plaintiffs by Defendants' ongoing illegal disclosure of their data. Opp. at 31–32. The fact that Plaintiffs' "sensitive, personally identifiable information is accessible to the DOGE Team on a daily basis, with no proper justification," is itself an irreparable harm that warrants preliminary injunctive relief. *Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO v. Soc. Sec. Admin.*, No. CV ELH-25-0596, 2025 WL

[18] *See* Kelly, *supra* n.11 (Trujillo Decl., Ex. C); Andrea Shalal & Nandita Bose, "Trump appears to contradict White House, says Elon Musk in charge of DOGE," *Reuters* (Feb. 20, 2025) (Trujillo Decl., Ex. D); Hannah Natanson, *et al.*, "DOGE Aims to Pool Federal Data, Putting Personal Information at Risk," *Washington Post*, May 7, 2025 (Trujillo Decl., Ex. E); "Elon Musk 'Has Cracked the Code' with DOGE, Johnson Gloats," *Newsweek* (video), (Feb. 25, 2025), https://www.youtube.com/watch?v=xTj0huJrLgo (House Speaker Mike Johnson publicly stating, "But Elon has cracked the code. He is now inside the agencies. He has created algorithms that are constantly crawling through the data. As he told me in his office, the data doesn't lie.") (last visited May 23, 2025).

868953, *67 (D. Md. Mar. 20, 2025); *Am. Fed'n of Tchrs. v. Bessent*, --- F.Supp.3d ----, 2025 WL 895326, at *29–30 (D. Md. Mar. 24, 2025) (same). Nonetheless, risk of future harm is also imminent and substantial. Section I(B), *supra*. Additionally and tellingly, the cases Defendants cite on this point are all outside the Second Circuit; Defendants do not and cannot refute the law in this Circuit under which Plaintiffs have shown that they will suffer irreparable harm without injunctive relief. *See* Opening Br. at 24–27.

IV. BALANCE OF EQUITIES

There is no public interest in Defendants' illegal data misuse. "Logically, '[t]here is generally no public interest in the perpetuation of unlawful agency action.'" *Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO*, 2025 WL 868953, at *68 (D. Md. Mar. 20, 2025) (quoting *League of Women Voters of U. S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016)). Defendants have admitted that they gave DOGE agents unauthorized access to millions of Americans' personal information. Section II(A), *supra*. "Preventing the government's unauthorized disclosure of the plaintiffs' sensitive personal information is in the public interest." *Bessent*, 2025 WL 895326, at *31. (noting the "overlap" between the likelihood of success factor and the merged balance of equities and public-interest factor).

Additionally, any public interest in the modernization of IT systems, workforce reform, or other, undefined "policy choices of the President," Opp. at 33, is outweighed by the compounding data-privacy harms, the risks of a devastating cybersecurity breach, and the need to ensure that the federal government follows the law in effectuating its policy priorities. *New York v. Trump*, 2025 WL 573771, at *26 (S.D.N.Y. Feb. 21, 2025), *opinion modified on denial of reconsideration*, 2025 WL 1095147 (S.D.N.Y. Apr. 11, 2025) ("taking the time to adequately mitigate potential security concerns and properly onboard members to engage in this work outweighs the Defendants' immediate need to access and redevelop [agency] systems.").

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, excluding the caption, table of contents, table of authorities, signature block, and this certification, the foregoing Plaintiff's Reply in Further Support of Preliminary Injunction contains 6,488 words, calculated using Microsoft Word for Mac, which complies with Rule 7.1(c) of the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York and the Court's Order granting the parties an additional 3,250 words for their respective opposition and reply briefs. ECF No. 94.

Dated: May 23, 2025

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