UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LISA GUFFEY & CHRISTINE SMITH, Plaintiffs, v. JAMES C. DUFF, in his official capacity, Defendant.	Case No. 1:18-cv-01271-CRC

PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiffs Lisa Guffey and Christine Smith hereby move for summary judgment and oppose Defendant's motion for summary judgment. In support of Plaintiffs' cross-motion and opposition, a memorandum of points and authorities follows. Attached are Plaintiffs' statement of facts not in dispute and response to Defendant's statement of facts, along with a proposed order. Plaintiffs also rely on the Guffey, Smith, and Politeo Declarations (and exhibits thereto) submitted in support of Plaintiffs' motion for preliminary injunction (filed May 31, 2018).

July 25, 2019

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This case concerns a set of restrictions on Plaintiffs' First Amendment rights that are "as serious as they come." *Guffey v. Duff*, 330 F. Supp. 3d 66, 74 (D.D.C. 2018). The speech code at issue prohibits Plaintiffs—even on their own time, outside of work, and without identifying themselves with their employer—from putting their political preferences in print, contributing any amount (however small) to their favored candidates, or attending a campaign rally even just to learn more about a candidate's views. In short, the restrictions cut Plaintiffs off from a broad swath of political activity that is at the heart of our democracy.

Administrative Office of the U.S. Courts ("AO") Director James C. Duff attempts to justify these severe restrictions by predicting a cascade of harms, from lost public confidence in the judiciary, to congressional decisions to deny the courts needed funds, to judges no longer being able to trust their own staff. But the Director cannot plausibly tie the sweeping restrictions on Plaintiffs' political participation to any harm that is even remotely likely to occur. In fact, the Director's evidence strengthens the case against his new Code—first, by acknowledging (by omission) that no harm has befallen his agency in eighty years of operation without these new restrictions, and second, by providing affirmative evidence from two former congressional staffers that the AO has enjoyed a splendid reputation for partisan neutrality even while employees were free to post lawn signs, display bumper stickers, contribute to candidates, and engage in other core First Amendment activities the Director would now prohibit.

The Director has failed to carry his heavy burden to justify stripping Plaintiffs and more than a thousand other employees of some of their most fundamental rights in our democratic system. Summary judgment should be granted to Plaintiffs.

BACKGROUND

A. Facts

Created in 1939, the AO provides "legislative, legal, financial, technology, management, administrative, and program support services to federal courts." U.S. Courts, Judicial Administration, *at* http://www.uscourts.gov/about-federal-courts/judicial-administration. In service of this mission, AO employees carry out a variety of tasks in support of the federal judiciary but do not themselves decide cases or participate in the decisional process (in contrast to, for instance, a judge's law clerks). Most of the AO's 1100 employees work in the Thurgood Marshall Federal Judiciary Building in Washington, D.C. Duff Decl. ¶ 7.

Plaintiff Lisa Guffey is an AO employee whose job is to assess whether federal defender offices and court panel attorney programs are properly resourced, operating effectively, and complying with relevant administrative policies and procedures. Guffey Decl. ¶ 2. Plaintiff Christine Smith is an AO employee whose job is to address the IT needs of the federal public defender and community defender offices and to make recommendations concerning defender IT and cybersecurity policy. Smith Decl. ¶ 2. Neither Ms. Guffey nor Ms. Smith has any influence regarding the outcome of any individual case before any federal judge; they are not in a position to implement any sort of partisan agenda of their own in a pending case or otherwise. *See* Guffey Decl. ¶¶ 3-4; Smith Decl. ¶ 3.

Other employees of the AO are similarly removed from the process of deciding cases. Outside of its "executive offices," the AO consists of three departments: Technology Services, Administrative Services, and Program Services. The first two of these plainly have no responsibilities that pertain to judicial decisionmaking; instead, they are responsible for the basic, day-to-day operations of the judicial branch, as a list of the name of the Technology and

Administrative Services subcomponents makes clear: Technology Solutions, IT Security, Systems Deployment and Support, Cloud Technology and Hosting, Infrastructure Management, AO Technology, Human Resources, Finance and Procurement, Facilities and Security, and Administrative Systems. Guffey Decl. ¶¶ 6-9.

Although the divisions within Program Services have some responsibility for overseeing and supporting substantive functions performed by judicial branch employees like probation officers, they are not involved in deciding cases, either. Specifically, the Judicial Services Office supports the needs of judges and their staff (such as by coordinating travel), and it conducts assessments of the judiciary's workload and staffing needs. *Id.* ¶ 10. The Court Services Office manages services related to court administration and case management, including providing day-to-day operational support for the federal courts. *Id.* The Probation and Pretrial Services Office manages, oversees, and supports the judiciary's probation and pretrial services program, including training, operational support, and development of policies and procedures. *Id.* The Judiciary Data and Analysis Office provides data analysis and reporting, ensures the judiciary's compliance with data governance standards, and provides technical support. *Id.* The Case Management Systems Office oversees, supervises, and coordinates case management systems, facilitates the effective use of information technology by the judiciary, and manages the transition to the "Next Generation CM/ECF" system for legal filings. *Id.*

Finally, apart from the Offices of the Director and Deputy Director, the AO also has several "executive" offices. Though staff in these offices sometimes work directly with judges in a supporting role, they are far removed from the process of deciding cases. The Defender Services Office, of which Plaintiffs are a part, *id.* ¶ 2; Smith Decl. ¶ 2; Def.'s Answ. to Pls.' Compl., ECF 18, ¶¶ 14-15 (noting that the Defender Services Office is now an executive office rather than a part

of Program Services), provides leadership, direction, administration, management, oversight, and support for the federal system of providing legal representation and other defense services under the Criminal Justice Act, including by providing training and advice to appointed counsel and by developing policies and procedures regarding appointed counsel. Guffey Decl. ¶ 10. The Office of Audit administers financial audits of the judiciary; the Office of the General Counsel provides legal counsel to employees of the judicial branch; the Judicial Conference Secretariat provides support for the Judicial Conference; the Office of Public Affairs conducts public-relations activities; the Office of Legislative Affairs is the judiciary's legislative liaison; the Office of Fair Employment Practices protects against discrimination and promotes diversity at the AO; and the Office of AO Human Resources provides human resources service to AO employees. *Id.* ¶ 11.

Some AO employees interact with judges in performing non-case-related functions, such as making recommendations regarding rules and policies for the judicial branch and drafting proposed legislation affecting the judicial branch, *see* Duff Decl. ¶¶ 10-11, and working on matters such as the judicial branch's budget, its facilities, and the maintenance of the Thurgood Marshall Building, *see* Baugher Decl. ¶¶ 4, 6-7. But AO employees make no final decisions on these matters: recommendations become "the policy of the Judicial Branch" when approved by the Judicial Conference, *see* Duff Decl. ¶ 10—the "national policy-making body for the federal Judiciary," which "operates through a network of 25 committees, composed of more than 250 federal judges." *Id.* ¶ 9. AO employees are not members of the Judicial Conference, which consists of the Chief Justice and 26 other judges. *Id.* ¶ 9. The limited role of AO employees is to "staff" or "support" the Conference. *Id.* ¶ 10; Baugher Decl. ¶ 3. AO employees work with federal judges "in support of" Judicial Conference committees. *Id.* ¶ 11; *see also* Baugher Decl. ¶¶ 3-5. About 30 AO employees in the Department of Program Services/Judicial Services Office and the Office of the

General Counsel provide substantive legal guidance to judges regarding ethical issues like recusal and financial disclosure and issues of court administration. Duff Decl. ¶ 12(a)-(b). AO employees sometimes arrange hearings for the Judicial Conference to hear from witnesses regarding possible policy changes; communicate with members of Congress and congressional staff about legislation affecting the judicial branch; and issue public statements. *Id.* ¶ 14(a)-(d). Director Duff (though not, apparently, AO employees) sometimes testifies before Congress. *Id.* ¶ 14(d).

Prior to March 1, 2018, AO employees (other than a handful of high-level "designated employees") were permitted to engaged in a wide variety of off-duty political activities with regard to both partisan and non-partisan offices, including expressing views on political candidates publicly, displaying political signs and badges, contributing to parties and partisan candidates for office, joining a political party, and attending political fundraisers. Guffey Decl., Ex. D, AO Code of Conduct § 260(a)(2), (b)(1), (c)(1), (c)(8), (c)(10), (e)(1), (e)(2) & (f) (Oct. 5, 2016 version).

The new Code of Conduct, effective March 1, 2018, added prohibitions on "partisan political activity," Guffey Decl., Ex. A, AO Code of Conduct § 260 Canon 5(a)(1), and on "mak[ing] speeches for or publicly endors[ing] or oppos[ing] a partisan political organization or candidate," *id.* Canon 5(a)(3). Under this Code and the July 2017 interpretive guidance issued by Director Duff defining the term "partisan political activity," the following activities are forbidden for all AO employees, even when not at work, not using government facilities for their speech, and not identifying themselves as AO employees:

(1) expressing opinions publicly, including on social media or via articles or letters to the editor, regarding a political party or partisan candidate for office;

(2) wearing or displaying partisan political badges, signs, or buttons;

(3) driving voters to polls on behalf of a political party or partisan candidate for office;

(4) contributing funds to a political party, political action committee, or partisan candidate for office;

(5) attending partisan fundraisers;

(6) being a member of a partisan political organization (other than registering as a member of a party for voting purposes);

(7) attending events for a partisan candidate for office;

(8) organizing events for a partisan candidate for office; and

(9) attending party conventions, rallies, or meetings.

See Guffey Decl., Ex. A, "Examples of Permissible and Impermissible Political Activities," App. to Memo. of James C. Duff, Dir. of Admin. Office of U.S. Courts, to All Administrative Office Employees 1-3, July 10, 2017. Plaintiffs call these prohibitions the "Identified Restrictions."[1]

In announcing the new Code and its restrictions, Defendant Duff identified two (and only two) justifications for the new rules: (1) conveying "the unity of purpose between the AO and the courts" and demonstrating "that the AO is very much an integral part of the Judicial Branch and not an independent, isolated agency"; and (2) "to align ourselves more consistently with the Court Code" that applies to other employees who work at courthouses. *Id.* at 1-2.

In response to a March 2018 letter on behalf of Plaintiffs asking that the Identified Restrictions be rescinded, Director Duff opined that the new Code was "necessary to maintain the public's confidence in the Judiciary's work." Guffey Decl., Ex. B, Letter of James C. Duff to Scott Michelman 1-2, Mar. 30, 2018. A year into this litigation, for the first time, Director Duff now

[1] Additional restrictions, not at issue here, apply to "designated employees": the Director, Deputy Director, and AO Executive Management Group. *See* AO Code of Conduct § 260 Canon 5(b)(1).

posits additional justifications for the new Code: maintaining the AO's reputation not only with the public but also with other branches of government. *See* Duff Decl. ¶¶ 23, 26, 32.

The Identified Restrictions would significantly curtail—in fact, throttle—political activity that Plaintiffs would otherwise engage in, along with opportunities for political engagement for the other 1100 employees of the AO. Both Plaintiffs have been politically active in the past and desire to continue their political activities in many ways forbidden under the new Code. In the past, Plaintiff Guffey has donated money to a national party committee and to individual partisan candidates, posted yard signs for local candidates for office, attended fundraising events for local candidates, and expressed opinions about political candidates on social media. Guffey Decl. ¶¶ 12-13. Plaintiff Smith has expressed her opinions publicly about candidates and parties (including via social media like Facebook), displayed political bumper stickers and buttons about candidates and parties, driven voters to polls on behalf of a political party, contributed funds to candidates and to a political party, attended and organized fundraising events for candidates, and joined a political party. Smith Decl. ¶ 6. In particular, Plaintiff Smith volunteered as the Volunteer Coordinator for a partisan city council race in Toledo, Ohio, in 2006; in that role, Ms. Smith coordinated the activities of more than 100 volunteers, canvassed neighborhoods, put up posters, made calls, worked at polling places, and attended and organized fundraising events for her candidate. *Id.* ¶ 7.

Plaintiffs Guffey and Smith desire to engage in all these activities and more—although not during work hours, using work resources, or while identifying themselves with the AO in any way—with respect to future elections, including the 2021 Virginia gubernatorial election (Ms. Smith), and the 2020 U.S. Presidential election (both). Guffey Decl. ¶¶ 14; Smith Decl. ¶¶ 8-10. When the new Code was in effect (prior to this Court's enjoining much of it), it deterred both Plaintiffs from political activity in which they would otherwise be engaging, including attending

events, contributing money, expressing views on social media, and wearing clothing expressing their political views. Guffey Decl. ¶¶ 14, 15; Smith Decl. ¶ 11.

AO officials have made clear that the new Code is not merely hortatory; on the contrary, AO Assistant General Counsel Robert Deyling has told Plaintiffs that violating the Code would expose an employee to disciplinary action. Guffey Decl. ¶¶ 15-17; Smith Decl. ¶¶ 12-14.

B. Procedural History

Plaintiffs filed this action in May 2018, seeking equitable relief against the nine Identified Restrictions. The same day, Plaintiffs moved for a preliminary injunction. The Court granted the requested injunction in large part and denied it in part, in a thorough opinion in August 2018. *Guffey v. Duff*, 330 F. Supp. 3d 66 (D.D.C. 2018). Applying the test prescribed in *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454 (1995), the Court found that the "challenged restrictions strike at the core of" AO employees' "strong interest in freely participating in partisan politics" through "publicly expressing opinions about parties and candidates, ... displaying political messages, ... contributing to parties and candidates, and ... openly associating with political parties," even "on their own time and in their own communities." *Guffey*, 330 F. Supp. 3d at 73-74. Accordingly, the Court concluded that the burden the Identified Restrictions imposed on AO employees' First Amendment rights "is as serious as they come." *Id.* at 74.

The Court then evaluated the strength of the government's interests and, equally important, the degree to which the Identified Restrictions served those interests. The Court found that the government's interest in signaling the "unity" between the AO and the rest of the judicial branch was insufficient to override employees' core First Amendment political-speech rights. *Id.* at 74. The government's interest in preserving the appearance of the judiciary's impartiality was much more substantial, the Court concluded. *Id.* at 75. However, that interest could not justify seven of

the nine Identified Restrictions because, even allowing that the government did not need documentary evidence of the harm it feared, the connection between the government's interests and these restrictions was too attenuated to justify them. *Id.* at 76-80. Specifically, with respect to the restrictions on (1) expressing opinions publicly regarding a political party or partisan candidate for office; (2) wearing or displaying partisan political badges, signs, or buttons; (3) contributing funds to a political party, political action committee, or partisan candidate for office; (4) attending partisan fundraisers; (5) being a member of a partisan political organization; (6) attending events for a partisan candidate for office; and (7) attending party conventions, rallies, or meetings (hereinafter the "Seven Enjoined Restrictions"), the government failed to carry its burden to show "a justifiable inference that the judiciary has been infected by partisanship." *Id.* at 78-79. Regarding these restrictions, the Court found that the Plaintiffs faced irreparable harm, and that the balance of equities and the public interest both weighed in Plaintiffs' favor. *Id.* at 80-81. Because the Director "offered no basis on which to distinguish the two plaintiffs here from other AO employees to whom the challenged provisions also apply," the Court enjoined the Director from enforcing, against "any AO employees except for the six high-level employees not at issue in this case," the Seven Enjoined Restrictions. *Id.* at 81.

The Court held that the two remaining Identified Restrictions—against (1) organizing or managing political rallies or meetings ("the Organizing Restriction") and (2) driving voters to the polls on behalf of a party or candidate ("the Driving Restriction")—passed muster, mainly because the Supreme Court had upheld these limitations where imposed by the Hatch Act on "further restricted" executive-branch workers, such as FEC staff and employees of law enforcement agencies like the FBI and CIA. *See id.* at 77. Although the Court was "not fully convinced that the

government has adequately justified these restrictions with respect to rank-and-file AO employees," the Court could not say that they were likely unconstitutional. *Id.* at 77-78.

After negotiation among the parties regarding discovery, which was delayed by a government shutdown, and the government's consideration and rejection of the use of expert testimony, the parties agreed to forgo discovery, and summary judgment briefing commenced.

APPLICABLE LEGAL STANDARDS

A court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. "In determining whether to enter a permanent injunction, the Court considers a modified iteration of the factors it utilizes in assessing preliminary injunctions: (1) success on the merits, (2) whether the plaintiffs will suffer irreparable injury absent an injunction, (3) whether, balancing the hardships, there is harm to defendants or other interested parties, and (4) whether the public interest favors granting the injunction." *ACLU v. Mineta*, 319 F. Supp. 2d 69, 87 (D.D.C. 2004). The Court's prior decision on preliminary relief is highly relevant, because "[t]he standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008) (quoting *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546 n.12 (1987)).

ARGUMENT

The Court's analysis of the Seven Enjoined Restrictions in its prior opinion was correct, and the government's summary judgment presentation provides no basis to reverse course. Although the Director and his declarants have constructed more detailed and elaborate hypotheticals to try to show how public confidence in the judiciary might be undermined by the

political activities of AO employees, the chain of speculative inferences on which the Director relies is even longer than those this Court rejected at the preliminary injunction stage. Thus, the Director has come no closer to making a plausible case that AO employees' political activities could undermine public confidence in the judiciary—or (his newly asserted fears) that they could undermine inter- or intra-branch relations. If anything, the government's summary judgment presentation has *strengthened* the Plaintiffs' case by providing evidence that the AO enjoyed a strong reputation for non-partisanship even prior to the implementation of the new AO Code, when its employees were permitted to engage in the political activities that the new Code forbids.

The Court should revisit one aspect of its legal analysis in the preliminary injunction opinion: its holding regarding the Organizing and Driving Restrictions. The Court's conclusion that these restrictions did not violate Plaintiffs' rights was understandably tentative (the Court was "not fully convinced that the government has adequately justified these restrictions with respect to rank-and-file AO employees," 330 F. Supp. 3d at 78) and relied on the fact that these same restrictions had been upheld regarding a subset of executive-branch employees. But that subset consists of "further restricted" employees with sensitive jobs at agencies like the FEC, intelligence agencies, and the criminal division of DOJ. These restrictions don't apply to mine-run executive-branch employees, who are much more comparable to Plaintiffs in function. Even the Director does not argue that the Organizing or Driving Restrictions are more justifiable than the remaining restrictions, and the Director gives no reason to single these activities out for special prohibition.

This Court should grant summary judgment to Plaintiffs on all nine Identified Restrictions.

I. The Identified Restrictions Violate Plaintiffs' First Amendment Rights.

A. The Government Must Carry A High Burden To Justify *Ex Ante* Restrictions On Government Employees' Speech.

The First Amendment commands the government to "make no law . . . abridging the freedom of speech." Although the government has more latitude to regulate the speech of its employees than of the public at large, the Supreme Court has for fifty years rejected the premise that public employees may by virtue of their employment "constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

Further, when the government imposes an *ex ante* restriction on employee speech (as distinguished from disciplining an employee for her speech after it occurs), its rule has "widespread impact" that "gives rise to far more serious concerns than could any single supervisory decision," because "such a ban chills potential speech before it happens." *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 468 (1995) *("NTEU")*. Accordingly, for *ex ante* restrictions on public employees' expression to survive application of the *Pickering* analysis, "[t]he Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government," which may include the appearance of impropriety. *Id.* at 468, 473 (citation and internal quotation marks omitted). The Court has recently reiterated how rigorous this analysis is:

> A speech-restrictive law with "widespread impact," we have said, "gives rise to far more serious concerns than could any single supervisory decision." Therefore, when such a law is at issue, the government must shoulder a correspondingly "heav[ier]" burden, and is entitled to considerably less deference in its assessment that a predicted harm justifies a particular impingement on First Amendment rights. The end product of those adjustments is a test that more closely resembles exacting scrutiny than the traditional *Pickering* analysis.

Janus v. Am. Fed'n of State, Cty., & Mun. Employees, 138 S. Ct. 2448, 2472 (2018) (quoting *NTEU*, 513 U.S. at 468 & 466, respectively) (citations omitted; alterations by the Court).

The Court rightly applied this framework in its decision on the preliminary injunction. *Guffey*, 330 F. Supp. 3d at 71–72. The Director does not formally dispute that the strict *NTEU* standard applies, *see* Memo. in Support of Def.'s Mot. for Summ. J. ("Def.'s MSJ") 17, but makes several efforts to water it down. None succeeds. The Director relies on *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973), for the generalization that he "may impose even broad restrictions on employees' political speech on a prospective basis." Def.'s MSJ 21. But the analysis in that forty-six-year-old case has been eclipsed by modern doctrine. The *NTEU* standard is stricter than the one applied in *Letter Carriers*: *NTEU* noted that *Letter Carriers* "did not determine how the components of the *Pickering* balance should be analyzed in the context of a sweeping statutory impediment to speech," and the Court went on to hold that with respect to that type of restriction, "the Government's burden is greater ... than with respect to an isolated disciplinary action." *NTEU*, 513 U.S. at 467-68. And the Court has become far less willing than it was in *Letter Carriers* to defer to congressional judgment (to say nothing of the judgment of an appointed agency official like Director Duff) when political participation is at stake. *Compare Citizens United v. FEC*, 558 U.S. 310, 361 (2010). ("Here Congress has created categorical bans on speech that are asymmetrical to [its interest]."), *and McCutcheon v. FEC*, 572 U.S. 185, 192 (2014) (plurality opinion). ("Campaign finance restrictions that pursue other objectives [than preventing quid pro quo corruption], we have explained, impermissibly inject the Government into the debate over who should govern. And those who govern should be the *last* people to help decide who *should* govern." (citation and internal quotation marks omitted)), *with Letter Carriers*, 413 U.S. at 567 ("Perhaps Congress at some time will come to a different view of the realities of

political life and Government service; but that is its current view of the matter, and we are not now in any position to dispute it.").[2]

The government further contends that the important nature of its interest and the fact "that there are many fewer individuals subject to the Challenged Restrictions weigh[] heavily" in its favor. Def.'s MSJ 21. But the modern *NTEU* standard already accounts for the government's interest; that interest does not "weigh heavily" independent of its place in the *NTEU* analysis, which inquires not just about the government's interests but their relationship to the challenged restrictions. And *NTEU* nowhere suggests that a restriction applicable to more than a thousand employees is somehow too slight to deserve full constitutional scrutiny.

The Director's claim that he is entitled to "deference" regarding his predictions of harms, Def.'s MSJ 20, 24, far overstates the case. This Court said that it gives "*more* deference to the government's predictions of harm" regarding public perception of the judiciary "than would be proper if the government had asserted a different interest," *Guffey*, 330 F. Supp. 3d at 76 (emphasis added), but as that statement reflects, the level of deference is relative. As a baseline under *NTEU*, the government receives very little deference in speculative predictions and bears the burden of justifying its restrictions. *NTEU*, 513 U.S. at 468, 475; *Janus*, 138 S. Ct. at 2472. "More" than a

[2] The Court has never had the opportunity to revisit its holding in *Letter Carriers* that Congress could impose broad restrictions on federal workers' political activities under the version of the Hatch Act then in effect, because Congress substantially loosened these restrictions in the Hatch Act Reform Amendments of 1993. *See* Cynthia Brown & Jack Maskell, Cong. Res. Serv., *Hatch Act Restrictions on Federal Employees' Political Activities in the Digital Age* 1-2 (Apr. 13, 2016), *at* https://fas.org/sgp/crs/misc/R44469.pdf. The House Report on those Amendments reflects the judgment that the prior version of the Act had unnecessarily trammeled the rights of federal employees: "The committee finds that the supposed evil of political partisanship by classified employees of Government is neither so imminent nor so apparent as to justify an intrusion into individual rights and democratic values as profound as the Hatch Act imposes." H.R. Rep. No. 103-16, at 5 (1993) (citation and internal quotation marks omitted).

little is still not very much. The Court correctly refused in its prior opinion simply to grant "deference" to the government's speculative assertions where they were not reasonable.

Thus, the government fails to dislodge *NTEU* as the governing standard. The government bears the burden of persuading the Court that its restrictions survive a test that "resembles exacting scrutiny." *Janus*, 138 S. Ct. at 2472. Under this test, the nine Identified Restrictions cannot constitutionally be applied to AO employees.

B. This Court's Preliminary Injunction Ruling Correctly Diagnosed The Gravity Of The Identified Restrictions' Threat To Plaintiffs' First Amendment Rights.

The "challenged restrictions strike at the core of" AO employees' "strong interest in freely participating in partisan politics" through "publicly expressing opinions about parties and candidates, ... displaying political messages, ... contributing to parties and candidates, and ... openly associating with political parties," even "on their own time and in their own communities." *Guffey*, 330 F. Supp. 3d at 73-74. "There is no right more basic in our democracy than the right to participate in electing our political leaders. Citizens can exercise that right in a variety of ways: They can ... urge others to vote for a particular candidate, volunteer to work on a campaign, and contribute to a candidate's campaign." *McCutcheon*, 572 U.S. at 191 (plurality opinion). "[S]peech about the qualifications of candidates for public office," is "at the core of our First Amendment freedoms." *Repub. Party of Minn. v. White*, 536 U.S. 765, 774 (2002) (citation and internal quotation marks omitted). "Indeed, the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." *Eu v. S.F. Cty. Dem. Cent. Comm.*, 489 U.S. 214, 223 (1989) (citation and internal quotation marks omitted). "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Williams v. Rhodes*, 393 U.S. 23, 31 (1968) (citation and internal quotation marks omitted). The Identified Restrictions also prohibit a broad range of

associational activities—including attending and organizing events and being a member of a partisan political organization—long recognized as fundamental First Amendment freedoms. *See Tashjian v. Repub. Party of Conn.*, 479 U.S. 208, 214 (1986).

The Court was right to reject the government's argument (which it no longer presses) that *non-partisan* political expression is somehow a substitute for participation in the democratic process of electing partisan candidates, *Guffey*, 330 F. Supp. 3d at 74—which of course incudes elections for President, members of Congress, governors, mayors, city councils, and more.

Additionally, the new Code also operates to strip an entire class of potential speakers—administrative employees of the judicial branch—of the right to participate in the political conversation concerning any partisan election. The Supreme Court has expressed concern that government regulation not disadvantage a particular class of speakers and thus silence a particular point of view. *See Citizens United*, 558 U.S. at 341. And the interest in hearing public employees' perspectives on political issues "is manifestly great" given their particular insight into the workings of government. *Sanjour v. EPA*, 56 F.3d 85, 94 (D.C. Cir. 1995) (en banc).

The Court was undoubtedly correct that the burden the Identified Restrictions imposed on AO employees' First Amendment rights "is as serious as they come." *Guffey*, 330 F. Supp. 3d at 74. The government no longer seems to disagree. *See* Def.'s MSJ 17, 20.

C. This Court's Preliminary Injunction Ruling Correctly Concluded That Seven Of The Identified Restrictions Could Not Survive The *NTEU* Balancing Test.

The Court correctly held that the government failed to carry its burden of justification under *NTEU* with respect to the restrictions on (1) expressing opinions publicly regarding a political party or partisan candidate for office; (2) wearing or displaying partisan political badges, signs, or buttons; (3) contributing funds to a political party, political action committee, or partisan candidate for office; (4) attending partisan fundraisers; (5) being a member of a partisan political

organization; (6) attending events for a partisan candidate for office; and (7) attending party conventions, rallies, or meetings. *Guffey*, 330 F. Supp. 3d at 78-80.

The first interest the government asserted—demonstrating the unity of purpose between the AO and the rest of the judiciary—could not outweigh the First Amendment rights of Plaintiffs that the Seven Enjoined Restrictions abridged. *Id.* at 75. Apparently no longer disagreeing, the Director mentions the "unity" interest just once, Def.'s MSJ 18, and no longer defends it.

The second interest the government asserted—preserving public perception of the judiciary—is a weighty one. However, the Court correctly held that the government could not plausibly show that the Seven Enjoined Restrictions were justified to serve that interest.

Although the Court found that "nebulous nature" of this second interest "allows [the government] to rely on predicted harms to the public's perception of judicial integrity," rather than "point[ing] to documentary evidence," the Court correctly required the government to assert at least "*realistic* hypotheticals of how partisan activity restricted under the Code could lead the public to believe that the judiciary is not behaving impartially." *Id.* at 76 (emphasis added); *see also id.* at 80 (requiring "a *plausible* showing that these interests will actually be jeopardized" (emphasis added)). It is understandable that the Court would not need the government to point to a specific incident to know that, for instance, permitting a sitting federal judge to manage a partisan political campaign would undermine public confidence in the impartiality of the judiciary. However, the qualifiers "realistic" and "plausible" are crucial limits on the scope of the government's speculation about its interests and must be applied rigorously to avoid undermining First Amendment rights. As the Court explained in *NTEU*, "a 'reasonable' burden on expression requires a justification far stronger than mere speculation about serious harms." 513 U.S. at 475. There, in striking down a ban on federal employees' receipt of honoraria for speeches and articles,

the Court described the government's burden in these terms: "[The government] must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* at 475 (citation, internal quotation marks, and source's alteration marks omitted); *accord Sanjour*, 56 F.3d at 91 (applying *NTEU* in striking down prohibition on EPA employees' receipt of travel expense reimbursements from private sources); *Lodge No. 5, Fraternal Order of Police v. City of Phila.*, 763 F.3d 358, 368-69, 384-85 (3d Cir. 2014) ("*Fraternal Order*") (applying *NTEU* in striking down prohibition on police officers' contributions to their union's political action committee). Of note, the government's speculation in *NTEU* itself failed to satisfy the standard because it was not reasonable:

> Congress reasonably could assume that payments of honoraria to judges or high-ranking officials in the Executive Branch might generate [the] appearance of improper influence. Congress could not, however, *reasonably* extend that assumption to all federal employees below grade GS-16, an immense class of workers with negligible power to confer favors on those who might pay to hear them speak or to read their articles.

513 U.S. at 473 (emphasis added).

Following the Supreme Court's lead, this Court's treatment of the Seven Enjoined Restrictions refused to allow unreasonable speculation or attenuated chains of causation to defeat core First Amendment rights. As the Court observed, the government offered no evidence that, when AO employees were free to engage in activities the new Code would prohibit, "any member of the public noticed that AO employees engaged in them—let alone that the public viewed that engagement as reflecting poorly on the impartiality or integrity of the judicial branch as a whole." *Guffey*, 330 F. Supp. 3d at 78.

Further, the link from AO employees' political activity to a fear that these employees would "try to influence judges or cases" was far too attenuated, the Court found, to support the Seven Enjoined Restrictions:

> For a member of the public to see someone engaged in restricted activity—say, attending a rally—and draw the inference that the government fears, it would first need to know that the participant is an AO employee. (Or, in the case of a campaign contribution, the public would need to learn of AO employees' donation histories.) It would then need to draw three tenuous conclusions: First, that attending a rally reflects a partisan commitment serious enough to influence an AO employee's performance of her job duties. Second, that the politically inclined administrative employee could meaningfully influence judicial decisionmaking. And third, that the employee would choose to exert that influence, notwithstanding its obvious impropriety and its near-certain violation of other provisions in the AO Code. A member of the public might be forgiven for believing one or two of those links, but the Court cannot uphold these restrictions based on the speculative fear that he might accept the whole chain.

Id. at 79. Instead of following the government down its long chain of speculation, the Court instead cited the *NTEU* Court's reliance on "the powerful and realistic presumption that the federal work force consists of dedicated and honorable civil servants." *Id.* (quoting *NTEU*, 513 U.S. at 476). As the Court explained, the possibility that AO employees might "engag[e] in more extreme displays of partisan belief—say, vitriolic social media postings or cable news interviews" could not justify the "magnitude of more benign partisan activity" swept in by the Seven Enjoined Restrictions. *Id.* Any problematic outliers could be addressed through "after-the-fact, isolated disciplinary actions." *Id.* (citing the AO Code's Canon 2, which prohibits employees from "engag[ing] in any activities that would put into question the propriety of the employee's conduct in carrying out the duties of the office"). Nor could the idea that an AO employee's activity would be attributed to the judiciary as a whole justify the breadth of the government's restrictions, which "forbid[] partisan activity even where the participant does not identify herself as a judicial-branch employee and even where the activity takes place nowhere near the AO's offices in Washington." *Id.* at 79-80. Moreover,

"[e]ven to the extent that the public can discern that the participants work for the AO, the Court finds it unlikely that an administrative employee's partisan acts would give rise to an inference that the judiciary is itself a partisan institution. AO employees, after all, do not work in courthouses or interact with litigants, and their job titles do not suggest any relationship with judges or their immediate staffs." *Id.* at 80.

The Court's analysis finds support in several other factually analogous cases. For instance, *Hobbs v. Thompson*, 448 F.2d 456 (5th Cir. 1971), though predating *NTEU*, applied similar reasoning to a ban like the one the AO has imposed. There, the city of Macon, Georgia, barred firefighters from engaging in political speech in support of a candidate (including displaying candidate bumper stickers), soliciting votes, or contributing money to a candidate. *Id*. at 457-58. Like the restrictions at issue in *Hobbs*, the new AO Code prohibits speech—right down to the bumper stickers and their 21st-century equivalent, the social media post—about partisan political candidates, along with a host of other expressive and associative activities. Anticipating the approach of *NTEU*, the court focused on the mismatch between the regulations' broad sweep and the vague interests asserted to justify them:

> We might ask whether a fireman's bumper stickers are so politically inflammatory that they would inhibit his firefighting ferocity or does the proscription of bumper stickers prevent extortion of political contributions? We think not. Macon has simply not aimed precisely at particular, specific evils which might justify political regulation. Bland assurances that the Macon scheme contributes to the "reasonable neutrality" of public employees or constitutes a "worthy aim" do nothing to overcome the fatal overbreadth of the charter and ordinance provisions in question.

Id. at 471. The court found the unconstitutionality of these restrictions "patently obvious," as they "proscribe[d] a great deal of political activity which is unrelated to the effective workings of the fire department." *Id.*; *accord Castle v. Colonial Sch. Dist.*, 933 F. Supp. 458, 461-62, 465 (E.D. Pa. 1996) (striking down school district policy that prohibited off-duty school employees from

engaging in political activity at polling places that happened to be located on school grounds); *Goodman v. City of Kansas City*, 906 F. Supp. 537, 544 (W.D. Mo. 1995) (striking down city prohibition on city employees' display of bumper stickers, buttons, and yard signs).

The Court's prior opinion faithfully applied *NTEU* to the Seven Enjoined Restrictions, and the same analysis should apply now.

D. The Government's Latest Round Of Speculation Does Not Undermine The Court's Prior Conclusion Regarding The Seven Enjoined Restrictions.

The Director's new attempts to justify the restrictions of the new AO Code are more extensive than before, but no more convincing. No one disputes the importance of the government's interest in the public perception of the judiciary as impartial. But the link between that interest and the Identified Restrictions is at best attenuated and at worst nonexistent. The Director tries to bolster his case by citing new interests—inter- and intra-branch harmony—but he provides no evidence tying the new AO Code to these interests.

Perhaps responding to the Court's previous observation that the government "struggled to generate a single concrete example—even a hypothetical one—where an AO employee's participation in the prohibited activities would cause a member of the public reasonably to question the impartiality or integrity of particular judges or the judiciary as an institution," 330 F. Supp. 3d at 78-79, the government now brings forth scads of hypotheticals. But they are all lacking in foundation or reliant on such a lengthy chain of speculation that they are impossible to credit consistent with *NTEU*. Equally important, what *concrete* evidence the record contains suggests that the new AO Code is utterly unnecessary.

1. The government's evidence affirmatively shows that the Identified Restrictions are unnecessary.

The AO was founded in 1939. Conspicuously absent from the government's fifty-four pages of declarations is any concrete, real-life example of a circumstance from the AO's eighty-year history in which an instance of political participation by an AO employee cast even the slightest aspersion on the integrity and impartiality of the judiciary. That fact alone speaks volumes. If AO employees' exercise of ordinary, everyday democratic freedoms hasn't been a problem for eighty years, why has it suddenly become one? The reason it hasn't been a problem in the past isn't because such activities were disallowed (or disallowed on social media, the medium of most concern to the government); on the contrary, prior to 2018, AO employees could engage in a great deal of partisan political activity that the new AO Code bans. That the Director, having had a year since the filing of this lawsuit, cannot muster a single concrete example of harm suggests that these activities are harmless vis-à-vis the reputation of the judiciary. This conclusion is unsurprising, for, as this Court has observed: "run-of-the-mill acts of civic participation like speaking out publicly about a candidate, joining or donating to a party, or attending a rally" are "actions that, in the eyes of a reasonable member of the public, reveal only that the employee is politically engaged and prefers a particular candidate or party," rather than "a justifiable inference that the judiciary has been infected by partisanship." *Guffey*, 330 F. Supp. 3d at 79.

The government's evidence not only fails to demonstrate that AO employees' partisan political activities *are* a problem; two of the government's declarants affirmatively demonstrate that AO employees' partisan political activities *are not* a problem. Specifically, both the Cooney and Weich declarations reflect the opinions of individuals who worked in Congress or in executive agencies between the years 1987 and 2012, *see* Cooney Decl. ¶ 1; Weich Decl. ¶ 2—i.e., before the new AO Code was promulgated, when partisan political activity was permitted (and during the

time when social media rose to prominence). Reflecting on their perceptions of the AO during their time in government, both Cooney and Weich aver that the AO's reputation was excellent even without the new Code's draconian restrictions on employees' First Amendment rights. *See* Cooney Decl. ¶ 10 ("[T]he perception was that the AO consistently and reliably presented views that were solely in the best interest of the courts, without allowance for political considerations."); Weich Decl. ¶ 12 ("In my experience as a congressional staffer, the AO and its employees were uniformly perceived as non-partisan actors advocating on behalf of the federal Judiciary."). As discussed below, these declarants' speculation as to the opinions of *other* individuals in *hypothetical* circumstances lack foundation and are therefore inadmissible, but the declarants *are* competent to testify to their own perceptions and experiences. These perceptions eviscerate the Director's argument by showing that there was no problem with the AO's impartiality, actual or perceived, before the new Code came along. When AO employees were allowed to display bumper stickers supporting partisan candidates, speak publicly (including on social media) about partisan candidates, give money to partisan candidates, attend fundraisers for partisan candidates, and join political parties, the AO's reputation was solid. Accordingly, the Director's own evidence shows the new Code is unnecessary to serve the government's interests.

2. The government has provided no evidence that Plaintiffs' First Amendment-protected participation in the democratic process harms interbranch relations or judges' trust in the AO.

In addition to its interest in public perception of judicial integrity (addressed below), the Director relies on additional interests as well: the perception of the judiciary by other branches and by the judges themselves. Duff Decl. ¶ 23; Def.'s MSJ 12, 18, 20-21. These asserted interests cannot justify the new Code because the government provides no evidence whatsoever that the new Code is needed to protect these interests or that the new Code's absence has harmed them.

This Court has permitted the government to indulge in more speculation than would ordinarily be allowed regarding the interest in the perception of judicial integrity because of the "nebulous" nature of that interest. *Guffey*, 330 F. Supp. 3d at 76. Interests based on the perceptions of judges or congressional staff are not "nebulous" in the same way: if either of these discrete and easily accessible groups of officials were distrustful of the AO because of its employees' political activities, it should not be hard for them to say so. They have not. Without concrete examples of harms to the Director's interests in the perception of his agency by judges and congressional staff, the Director has, with respect to these interests, completely defaulted on his burden to "show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." *NTEU*, 513 U.S. at 468.

In place of concrete examples, the Director offers implausible speculation. It strains credulity to attribute to AO employees' political activities the possibility that "[a] majority in Congress might, for instance, decline to authorize new judgeships if it viewed them as benefitting another party's political or electoral prospects." Def.'s MSJ 38. Tussles over the size and composition of the judiciary go back over a century: Congress altered the size of the Supreme Court to deny President Andrew Johnson the opportunity to add Justices to the Court that had decided *Dred Scott*; President Franklin Roosevelt attempted to pack the Court in the 1930s to respond to judicial invalidation of New Deal programs; ideological fights and blockades of judicial nominees to federal courts of appeals date back a generation (and for Supreme Court nominees, far longer); and the Ninth Circuit has for years been proposed for division "by legislators keen on manipulating the circuit's decisionmaking majority." Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the*

Courts, 78 Ind. L.J. 153, 179-80, 189, 215-18, 219-20, 221 (2003). To think that the off-duty political activities of judicial-branch employees with no decisionmaking authority would make any difference to the degree of political maneuvering over the size, configuration, and composition of the judiciary ignores both history and current events.

The asserted interests of judges themselves in trusting the AO is the strangest of the government's justifications and actually underscores how anomalous the Identified Restrictions are. The judges, through the Judicial Conference, oversee the work of the AO and have total discretion to accept recommendations they find persuasive and reject those that they don't—or ask for further analysis if they need it. The judges thus are in the best position of anyone to evaluate the work of the AO on its merits rather than distorted by fear of partisanship. More fundamentally, the Director's argument in this regard proves far too much. If the judges' interest in "unbiased" performance of AO employees—who ultimately report to the judges themselves—justifies sweeping restrictions on those employees' political freedoms, then any government officials could claim an interest in imposing comparable restrictions on career employees to ensure the neutral performance of their own staff. The free-speech protections of *NTEU* would be a dead letter.

3. The government relies on inadmissible evidence, implausible hypotheticals, attenuated chains of causation, and the misguided assumption that AO employees are presumed not to have any partisan views.

The heart of the government's case supporting the Identified Restrictions is a series of hypotheticals purporting to connect political activities banned by the Identified Restrictions to a loss of public confidence in the judiciary. These fall far short of carrying the government's burden, because they reflect untenable assumptions and fanciful theories of causation.

As a threshold matter, the bulk of the government's declarations consists of inadmissible lay opinion testimony. The Director's declarants make a great many predictions about what *other*,

often *unspecified*, individuals will think of some general category of *future* possible activities. *See, e.g.,* Weich Decl. ¶ 13 ("If AO employees were permitted to engage in the partisan political activities that are restricted by the AO Code of Conduct—and that are at issue in this case—it is reasonably likely that *observers would doubt* that the AO was approaching the business of the Judiciary without regard to politics, thereby undermining the federal Judiciary's reputation and effectiveness." (emphasis added)); Cooney Decl. ¶ 19 ("I believe that those activities, if permitted by AO employees and observed by the public, would make it more likely for Congress and *the public to perceive* the judiciary as an institution with partisan inclinations and associations[.]" (emphasis added)). The government's declarations are littered with such guesses. *See* Weich Decl. ¶¶ 4, 9, 13, 14, 15, 16, 17, 18, 19, 20, 21; Cooney Decl. ¶¶ 8, 10, 12, 13, 14, 15, 16, 17, 18, 19; Baugher Decl. ¶¶ 4, 5, 9, 10, 11, 12; Duff Decl. ¶¶ 26, 28, 29, 32, 33, 34, 35, 36, 37, 38, 39, 40, 43. To the extent these statements characterize the opinions of other people about hypothetical future events, they are inadmissible.

After giving the question much thought, the government decided not to rely on expert testimony in this case. *See* Jt. Mot. To Modify Sched. Order, ECF 23, at 1. Therefore, the government's declarants can give only the type of opinion testimony permitted of lay witnesses:

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed. R. Evid. 701. It follows from these criteria that, in general, "non-expert witnesses cannot testify to what someone else thinks, feels, or intends." Mauet & Wolfson, Trial Evidence 60 (2d ed. 2001); *accord* Fed. R. Civ. P. 56(c)(4) ("An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence,

and show that the affiant or declarant is competent to testify on the matters stated."). The D.C. Circuit strictly polices the line between permissible lay opinions based on a witness's own perception and those based on speculation. In *United States v. Hampton*, 718 F.3d 978, 982-83 (D.C. Cir. 2013), for instance, the court held inadmissible under Rule 701 an officer's speculation about the meaning of a criminal suspect's conversations. If an officer cannot testify as to what is in the head of a specific person he has been investigating based on the person's statement, it follows *a fortiori* that the speculation by the Director's declarants as to the hypothetical reaction of hypothetical observers of hypothetical conduct by hypothetical AO employees are not even close to admissible. These statements are not in any sense "evidence." Instead, they are the kind of speculative predictions on which the government may rely for the purpose of its judicial-reputation interest only if they are realistic. *Guffey*, 330 F. Supp. 3d at 76. They are not remotely so.

First, the notion that an employee who engages in protected political speech and association on her own time must inevitably bring her political commitments to her job performance—or will be assumed to do so—is unfounded. The experience of the government's own declarants, from before the promulgation of the new Code, refutes it. *See* Cooney Decl. ¶ 9 ("I . . . do not recall hearing the AO voice a partisan, political, or ideological perspective in presenting the views or positions of the federal judiciary."); *id.* ¶ 11 ("While it was known to me that several AO employees had prior job experience with partisan affiliations or associations, those employees did not allow that past experience to color or affect their work for the AO."); Weich Decl. ¶ 12 ("I never observed those AO employees bring a political or partisan perspective to their work on behalf of the Judiciary.")." Even the Hatch Act, which restricts the political activities of executive-branch employees, does not restrict political activity as severely as the new AO Code. Of the nine types of political activity barred under the Identified Restrictions, eight of them are

permitted for ordinary executive-branch employees as long as the employees are not engaging in these activities on duty, in uniform, in a government room or building, or using government property; the ninth (contributing funds) is restricted only as to political action committees and even then only partially. *See* 5 U.S.C. §§ 7323(a) & 7324(a); 5 C.F.R. §§ 734.202-.06 & .208. Seven of the nine Identified Restrictions are permitted in some manner even for "further restricted" employees such as FBI agents, CIA analysts, DOJ prosecutors, and FEC staff. *See* 5 U.S.C. § 7323(b); 5 C.F.R. §§ 734.401, 734.402, 734.404, 734.410, 734.412. Thus, the AO's new Code imposes more severe restrictions on a judicial-branch IT specialist than Congress has imposed on employees of the Federal Election Commission. The new Code forbids more political activity by a judicial-branch attorney who runs trainings for federal public defenders than by an executive-branch attorney with the power to decide whether or not to prosecute elected officials for alleged violations of law. A Defense Department employee who evaluates competing bids for the next billion-dollar fighter jet can contribute funds to President Trump's primary or general-election challengers for reelection; an AO facilities manager cannot. The potential for mischief or appearance of impropriety arising out of federal employees' partisan activities is not difficult to recognize when the employees in question are responsible for enforcing the nation's election laws or prosecuting crimes. Such mischief is nearly impossible to imagine when the employees in question are responsible for managing the courts' electronic case filing system.

Plaintiffs do not hold out the Hatch Act as an ideal balance between anti-corruption interests and political speech and association rights. Nevertheless, the Hatch Act does provide a useful reference point: if Congress does not find it necessary to ban any of these activities for most federal workers—perhaps because Congress credits "the powerful and realistic presumption that the federal work force consists of dedicated and honorable civil servants," *NTEU*, 513 U.S. at

476—there is no reason to consider these activities incompatible with the work of the federal judiciary. Just as the interest in judicial neutrality is of great importance, so does it "seem[] fundamental in the first place that employees in the Executive Branch of the Government, or those working for any of its agencies, should administer the law in accordance with the will of Congress, rather than in accordance with their own or the will of a political party." *Letter Carriers*, 413 U.S. at 564–65. That Congress has made the considered judgment that some of the most powerful civil servants in the executive branch need not comply with the restrictions contained in the new AO Code underscores how anomalous it would be to hold otherwise here.

Second, beyond the unrealistic assumption that anyone who posts in support of a partisan candidate on Facebook cannot help but pursue a partisan agenda at work, it is equally unreasonable to assume that people who engage in *none* of the conduct prohibited by the Identified Restrictions do not have strong political beliefs of their own. The Director expects as much. Duff Decl. ¶ 42 ("AO employees may also express opinions about partisan candidates or political parties privately as individual citizens."). If the Director truly believed that having a partisan personal view disqualified a person from serving in the AO, it is difficult to imagine he could fully staff the agency. Even for judges themselves, doing an unbiased job does not mean having no personal political views; Justice Sandra Day O'Connor, for instance, was a Republican state legislator (and ultimately state-senate majority leader) in Arizona before her appointment to the bench.

Nor will the new Code prevent AO employees from being "outed" as having personal partisan political views of one kind or another (if anyone cared to "out" them—a dubious assumption). The views of any AO employees who expressed themselves politically on social media prior to joining the AO will be just as easy to find as if they post those views today. And there are many ways in which an AO employee might signal a strong partisan view without running

afoul of the new Code—being spotted at a Michael Moore movie or reading Bernie Sanders' *Where We Go From Here: Two Years in the Resistance* on the Metro suggests a person's partisan orientation just as strongly as attending a Donald Trump rally, yet the former activities are permissible under the new Code while the latter is not. Should AO employees be banned from going to political movies or reading political books on public transit? Any attempt to purify the AO of employees with personal political views—or employees who might somehow give an observer the impression that they hold such views—is doomed to failure.

Third, all the government's hypotheticals reveal how long a chain of speculation is required, and the degree of uncertainty at each link in the chain, to connect an AO employee's partisan political activity to a loss of public trust in the impartiality of the judiciary (or any of the government's other posited harms). The government's account of how an AO employee's participation in the political process could cause loss of public confidence in the judiciary runs as follows: The employee's act of political expression is (1) viewed by a member of the public (or a congressional employee or member of Congress),[3] who (2) recognizes that employee as an employee of the AO,[4] (3) has heard of the AO,[5] (4) understands the function of the AO well enough to know that its employees work with judges, but not well enough to know that AO employees are not involved in the process of deciding cases and make only recommendations to the Judicial Conference, not final decisions on behalf of the judiciary,[6] then (5) assumes that the AO employee's act of political expression means that her job performance will be infected by partisan

[3] *See* Def.'s MSJ 30, 32 (discussing likelihood that AO employees' political activities are seen).
[4] *See id.* at 27-28 (discussing likelihood that AO employees will be recognized).
[5] *See id.* at 28 (opining that the AO "is not entirely outside the public eye").
[6] *See id.* at 28 (considering whether the public has "a good understanding of [AO employees'] role in the judiciary).

bias,[7] (6) and that the observed employee's beliefs are shared widely enough by other AO employees whose politics also compromise their job performance,[8] (7) *and* all of these employees' biased actions together will have an effect on the work of the judiciary,[9] (8) such that the federal judiciary is no longer perceived to be impartial.[10]

Each link in this lengthy chain is quite unlikely. The government's own language, hedging on the issue of likelihood, is revealing. Various occurrences are described as "conceivable," Def.'s MSJ 28, or "not inconceivable," *id.* at 32; their effects are "not at all 'far-fetched,'" *id.* at 31; a harmless outcome is "far from assured," *id.* at 32; the public is "quite capable" of drawing the wrong conclusions, *id.* at 39. These locutions hardly suggest that grave danger is just around the corner.

The government even admits that "[t]he general American public may be less likely than federal judges or members of Congress and their staffs to interact with AO employees, let alone recognize them as such or observe them engaged in partisan political activities with a good understanding of their role in the Judiciary." *Id.* at 27-28. And how likely is "less likely"? The most that the Director can say is that the AO is "not entirely outside the public eye." *Id.* at 28. In other words, he can't rule out the possibility of harm. The Court would be hard-pressed to find a

[7] *See id.* at 24-25 (fearing the aggregation of "isolated, individual acts of partisanship"); *id.* at 39 ("The general public ... is also quite capable of observing partisan conduct by AO employees, [and] attributing it to the Judiciary[.]").
[8] *See id.* at 28 (defending "the AO's concern that the general public could observe certain of the activities covered by the Challenged Restrictions and attribute those activities to the AO or the Judiciary as a whole").
[9] *See id.* at 27 (citing the opinion of a former congressional staffer speculating about whether unspecified "observers" would, upon seeing AO staffers engaging in political activity, "doubt that the AO was approaching the business of the Judiciary without regard to politics" (quoting Weich Decl. ¶ 13)).
[10] *See id.* at 31 (fearing "diminished public confidence in the independence of the Judiciary").

First Amendment case in the modern era restricting speech based on a weaker showing than this one.

How will the Facebooking public know they are reading the social-media post of an AO employee? The government speculates that this will occur "if AO employees identify as employees of the AO or the Judiciary on the sites on which the posts appear." Def.'s MSJ 29. If that's the crux of the government's case, then it has effectively conceded the new Code is unnecessary, because the pre-2018 Code already contained a restriction nicely tailored to that scenario: "Employees who participate in political activity may not use their position, title, or authority in connection with the activity." Guffey Decl., Ex. D, § 260(a)(4).

How will concerns about the work of a single AO employee translate into suspicion of the impartiality of the courts? The Director asserts that the risk "is real and it could have a substantial effect." Def.'s MSJ 29-30. But his only support is a law review article that focused on perceptions *of the Supreme Court* based on criticisms of *judges themselves* and an experiment testing reactions to criticism *of the Supreme Court. See* Nelson & Gibson, *Has Trump Trumped the Courts?* NYU L. Rev. Online Symposium 32-33, 37 (April 2018). The Director provides no reason to believe the activities of administrative employees of an obscure agency should have the same effect.

To bolster its attenuated case for causation, the government relies on the work of AO staffers on matters of policy related to the judiciary, such as recommendations about amendments to the federal rules. Duff Decl. ¶ 26. These concerns are not the same as concerns over the impartiality of the judiciary—an interest that derives its importance from the need for *adjudications* that are impartial. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1662 (2015) ("A State may assure its people that judges will apply the law without fear or favor[.]"). Even then,

the previously-described lack of causal connection also would doom this justification, because the judiciary's policy decisions are made by the Judicial Conference, not the AO.

And some of the government's hypotheticals and linkages are simply absurd on their face. The government raises the specter that a foreign government or partisan-aligned organization will amplify the effects of an AO employee's speech and thus undermine public confidence in the judiciary. Duff Decl. ¶ 25; Cooney Decl. ¶ 16. But the government cannot explain why anyone would choose to focus disinformation efforts on a small and obscure federal agency rather than politicians and institutions in the news every day, and the government points to no examples of its ever having occurred. The Director worries the judiciary's reputation is on the line because AO employees may display bumper stickers on their cars in the parking garage of the Thurgood Marshall building—even as the Director acknowledges that congressional staffers, the absolute last people anyone would expect to be nonpartisan, use the same garage. Duff Decl. ¶ 28. Thus, any person seeing a car with a bumper sticker exiting that garage will have no way of knowing that it doesn't belong to a congressional staffer. The Director thinks that AO employees' location "steps away from congressional appropriators and regulators" Duff Decl. ¶ 20, makes silencing them (even outside the office) imperative—on the theory, perhaps, that partisan views are contagious at close range? To state these theories is to refute them.

In its prior opinion, the Court was rightly unwilling to indulge a three-step chain of speculation. *Guffey*, 330 F. Supp. 3d at 79. The government can fare no better with a chain of speculation that is longer, with its links weaker, than before. *Cf. Am. Postal Workers Union v. U.S. Postal Serv.*, 764 F.2d 858, 859–65 (D.C. Cir. 1985) ("We find it difficult to see how the public could conceivably lose confidence in the political neutrality of the Postal Service if off-duty, out-of-uniform postal employees were permitted to take part in voter registration drives conducted in

postal lobbies by nonpartisan organizations[.]"). Just as the Supreme Court in *NTEU* held that "Congress could not ... reasonably extend [an] assumption [about judges or high-ranking officials] to all federal employees below grade GS-16, an immense class of workers with negligible power to confer favors," 513 U.S. at 473, so here: the government cannot assume activities that might undermine public confidence in the judiciary were they performed by judges would have the same effect if pursued by AO employees—another large "class of workers with negligible power to confer favors."

In sum, lacking concrete evidence from the eighty-year history of the AO of threats to the public perception of the judiciary based on any of the activities banned by the Identified Restrictions, the government has pinned its case to a series of hypotheticals that are impossible to credit. These cannot carry the government's burden to show "that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." *Id.* at 468.

4. The government has made no effort to tailor the Identified Restrictions to realistic harms.

Beyond the government's failure reasonably to demonstrate a connection between the activities prohibited by the new Code and anticipated harms to the judiciary's image, the failure even to attempt to tailor the new Code's restrictions independently dooms them.

Although the government argues against requiring a "heightened showing of 'fit,'" between the government's interests and the restrictions it has adopted, or a "least restrictive means" requirement, Def.'s MSJ 19-20, there is no disputing that "fit" or "tailoring" is important to assessing the constitutionality of government employee speech restrictions. "In performing the *Pickering* balance ... the courts must consider whether the challenged statute or regulation is

tailored to address the harm that the government allegedly aims to protect." *Sanjour*, 56 F.3d at 97; *accord McCutcheon*, 572 U.S. at 218 (plurality opinion) ("In the First Amendment context, fit matters."); *NTEU*, 513 U.S. at 476-77 (noting that the ban was "crudely crafted" and not "a reasonable response to the [government's] posited harms"); *Fraternal Order*, 763 F.3d at 375 (noting that a "tailoring requirement" was "implicit" in *NTEU*'s analysis); *see also Sanjour*, 56 F.3d at 95 (finding "the obvious lack of 'fit' between the government's purported interest and the sweep of its restrictions" to be of "[f]oremost" concern). The Court need not identify here the precise degree of "fit" required, because the Identified Restrictions are ill-suited to the government's aims under any standard.

The government asserts that "although not every AO employee's job functions would in the ordinary course entail representing the broader Judiciary to the public or the other branches of government, it is difficult to identify in advance which employees might be required to assume such functions, even temporarily," Def.'s MSJ 40, and the Director states broadly that different AO employees engage in different activities, Duff Decl. ¶¶ 15, 21. But the government's own brief highlights the work of particular subgroups within the AO, such as the Office of Legislative Affairs in working with Congress, Def.'s MSJ 8-9, and the Office of Public Affairs in interacting with the media, *id.* at 11—thus demonstrating that it isn't hard to identify which offices generally engage in the activities the Director thinks most sensitive from the perspective of public perception. And the Director never explains how AO employees like Plaintiffs—an IT Liaison and a Supervisory Attorney Advisor—would end up briefing Congress or the press. Indeed, whole swaths of the AO appear unlikely to do so: departments like Technology Solutions, IT Security, Systems Deployment and Support, Cloud Technology and Hosting, Infrastructure Management, AO

Technology, Human Resources, Finance and Procurement, Facilities and Security, and Case Management Systems.

Even more problematic, the government has made no effort to show that the AO's interests could not be served by a range of lesser restrictions, such as a prohibition on pressuring coworkers or subordinates to hold, disavow, act on, or refrain from acting on any political views, along with a prohibition on engaging in partisan political activity at work, when using government resources, or when identifying oneself with the AO. Then, as this Court found in its prior opinion, any problematic outliers could be addressed through "after-the-fact, isolated disciplinary actions." *Guffey*, 330 F. Supp. 3d at 79 (citing AO Code's Canon 2, which prohibits employees from "engag[ing] in any activities that would put into question the propriety of the employee's conduct in carrying out the duties of the office"). Indeed, as the Director admits, even without the Identified Restrictions, AO employees are "nonetheless ... required to 'observe high standards of conduct so that the integrity and independence of the judiciary are preserved.'" Def.'s MSJ 38 (quoting AO Code of Conduct § 220(b), ECF No. 2-5). The government never explains why this requirement is insufficient to protect judicial integrity, particularly in the absence of a history of problems.

The D.C. Circuit's recent decision in *Wagner v. FEC*, 793 F.3d 1 (D.C. Cir. 2015) (en banc), provides an illustrative contrast. There, the court upheld restrictions on political contributions by federal contractors. *Id.* at 3. Unlike the new AO Code, the ban at issue was justified by a demonstrated problem: "Congress enacted [the provision] in the aftermath of a national scandal involving a pay-to-play scheme for federal contracts. … And it was followed by subsequent scandals that led to further legislative refinements, again motivated by concerns over corruption and merit protection." *Id.* at 14. Moreover, the court explicitly distinguished the circumstances of contractors from those of employees: "Because regular employees do not

generally need new contracts or renewals with the frequency required by outside contractors, permitting them to make contributions carries less risk of corruption or its appearance: employees have less to gain from making contributions and less to lose from not making them." *Id.* at 31. And the court also found that the necessary tailoring was present: the contribution ban there left the plaintiff contractors "free to volunteer for candidates, parties, or political committees; to speak in their favor; and to host fundraisers." *Id.* at 25. None of these alternative avenues for political participation remains open to Ms. Guffey or Ms. Smith under the new AO Code.

The Identified Restrictions therefore fail not only because they do not serve the government's purported interest but also for lack of tailoring.

The government defends the lack of tailoring by citing *United Public Workers v. Mitchell*, 330 U.S. 75, 102 (1947), a case that predates not only *NTEU* but *Pickering* as well. It is no wonder that the Court in *Mitchell* upheld the Hatch Act—it would be two decades before *Pickering* applied the First Amendment to government-employee speech restrictions to begin with. *Mitchell* articulated a broad theory of congressional speech-regulating power that is entirely incompatible with modern First Amendment jurisprudence: "Congress may regulate the political conduct of Government employees 'within reasonable limits,' even though the regulation trenches to some extent upon unfettered political action. The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress." *Id.* at 102. By contrast, in *NTEU*, the breadth and lack of tailoring of the regulation at issue—a regulation that struck less closely to the core of the interests protected by the First Amendment than the new AO Code—doomed it. *See* 513 U.S. at 473 (rejecting application of honoraria ban because "Congress reasonably could assume that payments of honoraria to judges or high-ranking officials in the

Executive Branch might generate a similar appearance of improper influence. Congress could not, however, reasonably extend that assumption to all federal employees below grade GS–16").[11]

The government also relies on *Weaver v. U.S. Information Agency*, 87 F.3d 1429, 1443 (D.C. Cir. 1996) to justify the breadth of the new AO Code, but that case did *not* hold that the restriction at issue—a prepublication review requirement imposed on certain writings by certain federal agency employees—passed muster because tailoring was unnecessary. Instead, it held that the scope of the restriction *was* appropriately tailored—"restrict[ing] no more speech than is 'reasonably necessary' to achieve the government's interests"— because "of the risk of unintended leakage of classified or other sensitive information." *Id.* (quoting *NTEU*, 513 U.S. at 474). In *Weaver*, furthermore, "no speech [was] forbidden," just delayed. *Id.* at 1440. By contrast, the new Code at issue here would forbid many types of political speech entirely.

Finally, the government claims that drawing narrower lines would have undermined AO employees' "morale." Def.'s MSJ 42. But because we are no longer here dealing with the "nebulous" interest in public perception, *Guffey*, 330 F. Supp. 3d at 76, the government cannot resort to hypothetical harms. The government's support for the "morale" rationale is the antithesis of a showing of "real, not merely conjectural" harm. *Id.* at 72 (quoting *NTEU*, 513 U.S. at 475). It consists of a single, conclusory assertion: "an attempt to divide the AO further into such categories would have had a detrimental effect on employee morale and efficiencies." Duff Decl. ¶ 21. The government's only legal authority on this point is a quote pulled out of context from *Jurgensen v.*

[11] Even Congress itself has backed away from the judgment of *Mitchell*: the House Report to the Hatch Act Reform Amendments of 1993 quoted approvingly from Justice Black's dissent in the case: " 'Legislation which muzzles several million citizens threatens popular government, not only because it injures the individuals muzzled, but also, because of its harmful effect on the body politic in depriving it of the political participation and interest of such a large segment of our citizens.' " H.R. Rep. No. 103-16, at 5 (1993) (quoting *Mitchell*, 330 U.S. at 111 (Black, J., dissenting)).

Fairfax County, 745 F.2d 868, 879 (4th Cir. 1984), which was not about overinclusive categorization of employees for a speech restriction and which, in any event, predates *NTEU*. Thus, the government cannot excuse its failure to tailor.

In sum, the Seven Enjoined Restrictions that this Court enjoined last August are just as constitutionally problematic now as then. They should be permanently enjoined.

E. The Two Identified Restrictions This Court Has Not Enjoined Also Violate Plaintiffs' First Amendment Rights.

The Court denied a preliminary injunction as to two restrictions—the Driving Restriction and the Organizing Restriction—because "a member of the public could … plausibly view these two activities as evincing a partisan tie so durable that it could affect an AO employee's performance of her day-to-day duties." *Guffey*, 330 F. Supp. 3d at 77. But, now that the summary judgment record is complete, it is clear that these restrictions are no more justified than the other seven in terms of reasonable connection to the government's interest.

The Driving Restriction and the Organizing Restriction do not cover activity that raises special concerns about the visibility of AO employees engaging in it. When an AO employee drives someone to a polling center or organizes an event for a partisan candidate, she is no more visible than when she engages in activity that is covered under the seven restrictions that were enjoined by this Court. As compared with being a vocal commentator on social media, an AO employee driving voters to the polls is far less observable: an observer would not only need to see the car at the moment it arrives at the polls, but also be close enough to ascertain the identity of the driver through the window of the car, then recognize her as an AO employee, *then* somehow discern that she has driven voters to the polling place *in coordination with a political party* as

opposed to a non-partisan voter-driving organization.[12] And there is no reason to believe that a person who organizes a political event (as opposed to the event host) is visible to anyone as she organizes—by calling to arrange a venue, coordinating logistics, or emailing specific potential attendees. The government concedes as much. Def.'s MSJ 32. And it does not argue that the Organizing and Driving Restrictions are more justifiable than the remaining restrictions, or give any reason to single these activities out for special prohibition. The most concrete prediction the government can make about these activities is that it is "not inconceivable" that one person may "personally observe an AO employee dropping off voters at a polling station…or hear about it from someone who had." *Id.* This is far from a strong or likely connection.

In enjoining the Driving Restriction and the Organizing Restriction, the Court was influenced by their appearance among activities restricted by the Hatch Act. *See Guffey*, 330 F. Supp. 3d at 77. But the Driving and Organizing Restrictions do not in fact apply to the vast majority of executive-branch employees, only the "further restricted" ones. *See supra* at 28 and authorities cited there. When looking to the Hatch Act as a reference point, the Court should treat judicial branch employees like Christine Smith and Lisa Guffey as equivalent to less-restricted employees in the executive branch. Section 7323(b)'s heightened prohibitions apply only to "[c]ertain federal employees in specified executive agencies, generally those dealing with law enforcement or national security," Cong. Res. Serv., *"Hatch Act" and Other Restrictions in Federal Law on Political Activities of Government Employees*, at "Summary" page (Oct. 23, 1998), *at* https://www.everycrsreport.com/files/19981023_98-885_f821fd976a43bb778ebada0007e54fe45dd470fe.pdf, along with career appointees, administrative law judges, contract appeals board

[12] *See, e.g.*, Carpool Vote, Frequently Asked Questions, *at* https://carpoolvote.com/faq/ (last visited July 24, 2019) ("We are nonpartisan. This service is open to any driver or rider—no matter what their political views.").

members, and administrative appeals judges, *see* 5 U.S.C. § 7323(b)(2)(A). Lisa Guffey and Christine Smith self-evidently do not fall into any of these categories, or approach them; in fact, treating them like "further restricted" employees would subject them to restrictions on political activity that outstrip those applicable to some employees with actual adjudicative authority.[13] Although members of the AO play an important role in supporting the work of the judiciary, they lack the power of "further restricted" employees in terms of approval, adjudicatory, investigatory, or any other final decision-making authority.

Because the Hatch Act does not provide a good reason to subject AO employees to the Driving and Organization Restrictions, and because these restrictions apply to activities that are no more visible than the other Identified Restrictions, all the Director is left with are the same arguments that fail as to the other seven restrictions: outdated legal principles, an implausibly long chain of speculation, and a failure of tailoring. The Driving and Organization Restrictions should fall together with the other seven.

F. Plaintiffs Prevail Based On Their First Amendment Claim Alone.

Plaintiffs concede that, now that Director Duff has confirmed in this litigation that he stands by the interpretation of the new Code provided in his July 2017 memorandum and subsequent briefing, the Code is not vague.

* * *

[13] For instance, the first level of review that a benefits applicant faces in the Department of Veterans Affairs is conducted not by an administrative law judge but by a "ratings veterans service representative" (RVSR). *See* Duties of RVSRs, U.S. Dep't of Vets. Affairs, M21-1, Part III, Subpart i, 1.3.f—Structure of the Veterans Service Center (RVSRs "determin[e] whether medical evidence received in connection with a claim justifies the granting of entitlement to VA benefits"), *at* https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/554400000001018/content/554400000014098/M21-1,-Part-III,-Subpart-i,-Chapter-1---Structure-of-the-Veterans-Service-Center-(VSC) (last visited July 24, 2019).

The Identified Restrictions unnecessarily impinge on the free speech rights of AO employees like Ms. Guffey and Ms. Smith without protecting against any concrete and demonstrable—or even *reasonably* hypothetical—adverse effects on the operation of the AO. The Identified Restrictions therefore violate the First Amendment.

II. Plaintiffs Will Suffer Irreparable Harm In The Absence Of Relief.

"It has long been established that the loss of constitutional freedoms, 'for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (quoting *Elrod v. Burns*, 427 U.S. 347, 373–74 (1976)); *accord Am. Freedom Def. Initiative v. WMATA*, 898 F. Supp. 2d 73, 84 (D.D.C. 2012) ("Where a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed." (quoting *Bronx Household of Faith v. Bd. of Educ.*, 331 F.3d 342, 349-50 (2d Cir. 2003))); *Student Press Law Ctr. v. Alexander*, 778 F. Supp. 1227, 1234 (D.D.C. 1991) ("The Court presumes that irreparable harm will flow to plaintiffs from a continuing constitutional violation.").

If the Identified Restrictions are reinstated, Plaintiffs Smith and Guffey and more than 1,000 other employees will lose opportunities to attend events in support of their preferred candidates, to seek to persuade others to their views through public expressions of those views, to express support for and aid their chosen candidates through contributions of funds, and so forth. All of these activities, it bears repeating, are at or near the core of the First Amendment, which "'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). Prior to this Court's issuance of a preliminary injunction, Plaintiffs were forced to refrain from several acts of political

participation—attending a candidate's event, donating to a political party, and posting views on Facebook—because of the Identified Restrictions. Should the Identified Restrictions come back into effect, Plaintiffs, who are not covered by federal civil service protections, *see* 5 U.S.C. § 7103(a)(2)-(3) (covered "employees" must work for an "Executive agency …, the Library of Congress, the Government Publishing Office, [or] the Smithsonian Institution"), have been informed that the political activities in which they wish to engage would expose them to discipline. Guffey Decl. ¶¶ 15-17; Smith Decl. ¶¶ 12-14. The Identified Restrictions would therefore stifle Plaintiffs' political speech and thereby cause irreparable harm.

III. The Balance Of Equities And The Public Interest Favor Granting Relief.

As this Court has noted, "[t]he Government cannot suffer harm from an injunction that merely ends an unlawful practice." *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 191 (D.D.C. 2015) (internal quotation marks omitted). And for the same reasons that the government's predictions of harm are too tenuous to support the Identified Restrictions, they also cannot demonstrate that the government would suffer harm from an injunction against the Identified Restrictions. It suffered none in the 80 years before they were imposed.

For similar reasons, "[i]t is always in the public interest to prevent the violation of a party's constitutional rights." *Simms v. District of Columbia*, 872 F. Supp. 2d 90, 105 (D.D.C. 2012) (quoting *Abdah v. Bush*, 2005 WL 711814 at *6 (D.D.C. Mar. 29, 2005)); *accord Lamprecht v. FCC*, 958 F.2d 382, 390 (D.C. Cir. 1992) ("a [government] policy that is unconstitutional would inherently conflict with the public interest"); *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006) ("injunctions protecting First Amendment freedoms are always in the public interest").

Accordingly, as in this Court's prior opinion, the Court should hold that enjoining restrictions that would violate of Plaintiffs' rights to engage in core, First Amendment-protected political activity is consistent with the balance of harms and the public interest.

IV. The Permanent Injunction Should Cover All Non-Designated AO Employees.

As the D.C. Circuit has recognized, challenges to employee-speech rules brought under *NTEU* are not easily classified as "facial" or "as-applied" in the usual sense:

> Indeed, in *NTEU* itself the Court did not categorize the employees' challenge as either "facial" or "as applied." This was not an oversight; the fact is that the test enunciated in *NTEU* for determining the constitutionality of a statute or regulation restricting government employee speech requires the reviewing court to consider whether the "interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's necessary impact on the actual operation of the government." *NTEU*, 115 S. Ct. at 1014 (internal quotations and citation omitted). Because this same test—which requires the court to go beyond the facts of the particular case before it—presumably applies to both "facial" and "as-applied" challenges, the distinction between the two is largely elided.

Sanjour, 56 F.3d at 92.

Although it appears that the new Code improperly prohibits "a substantial amount of protected free speech" in relation to its "legitimate sweep," *Initiative & Referendum Inst. v. U.S. Postal Serv.*, 417 F.3d 1299, 1312 (D.C. Cir. 2005) (stating standard for First Amendment facial challenges for overbreadth), this Court need not invalidate the entire Code. In this motion, rather, Plaintiffs pursue an "as applied challenge to a broad category of non-official employee speech." *Sanjour*, 56 F.3d at 93 (source's alternation marks omitted).

Because the Director "offered no basis on which to distinguish the two plaintiffs here from other AO employees to whom the challenged provisions also apply," the Court in its preliminary injunction opinion followed the path laid out by the D.C. Circuit in *Sanjour* and enjoined the Director from enforcing, against "any AO employees except for the six high-level employees not

at issue in this case," the provisions the Court found constitutionally problematic. *Guffey*, 330 F. Supp. 3d at 73, 81. The Director does not take issue with this approach to the scope of injunctive relief. Indeed, his own arguments point to the same result, as he has refused to identify AO employees for whom his concerns are any more concrete than others. *See* Duff Decl. ¶ 21. The Court should therefore enjoin the enforcement of any of the Identified Restrictions against any AO employee except the same six "designated" AO executives excluded from the scope of the preliminary injunction.

CONCLUSION

For the reasons provided, the Court should grant Plaintiffs' motion for summary judgment and deny Defendant's motion.

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Respectfully submitted,

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