Office of Personnel Management
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Washington, DC 20415-1000

To Whom It May Concern:

The undersigned submit these comments in response to the proposed Office of Personnel Management (OPM) rule: *Improving Performance, Accountability and Responsiveness in the Civil Service*[1] (Fed. Reg.: 2025-06904; RIN 3206-AO80) ("Proposed Rule"), colloquially known as "Schedule Policy/Career," and previously in an earlier iteration, introduced via executive order, as "Schedule F."[2]

This Proposed Rule, at its heart, would mandate the creation of a new "excepted" category in the federal civil service and give the administration *carte blanche* to remove apolitical civil servants deemed to be working in "policy-influencing" positions — a term defined so broadly that it could be applied to the vast majority of the civil service. We object to this proposed rule and request its withdrawal because of the following:

- The Proposed Rule would dismantle the merit-based civil service system and effectively reimplement the spoils system (Section I, p. 2), which is virtually guaranteed to increase government corruption and reduce government competence (Section II, p. 7).
- The Proposed Rule would have dire consequences for scientific integrity and scientific progress, and it would make it harder to attract and retain as government employees the kinds of experts who have contributed to major scientific breakthroughs that have benefited the American people (Section III, p. 10).
- The Proposed Rule would be illegal and unconstitutional under the separation of powers and due process doctrines (Section IV, p. 18).

[1] Improving Performance, Accountability and Responsiveness in the Civil Service, 90 Fed. Reg. 17182, (proposed Apr. 22, 2025) (to be codified at 5 C.F.R. pts. 210, 212, 213, 302, 432, 451, 752).
[2] Exec. Order No. 14,171, 90 Fed. Reg. 8625 (Jan. 20, 2025).

# I. The Proposed Rule Would be a Return to the Corrupt and Incompetent Spoils System, Dismantling 140 Years of Merit-Based Federal Civil Service

Starting with the passage of the Pendleton Act in 1883, the United States has been committed to a strong civil service filled with dedicated, qualified citizens serving in an apolitical manner. Prior to the Pendleton Act, our nation's civil service existed as a patronage system, where civil service jobs — even critical ones — were routinely filled by political patrons who often lacked the expertise or experience for their appointed roles.[3] In the Supplemental Information to its Proposed Rule, OPM admits this "spoils system often prevented the Government from providing"[4] reliable government services, and it forced these political appointees to focus on "the local concerns of party machines instead of the national concerns of the President and Congress."[5]

Passed in the wake of President James Garfield's assassination at the hand of a jaded political patron, the Pendleton Act established America's commitment to a merit-based civil service. This system has been strengthened over the last 140 years, most notably by the Civil Service Reform Act (CSRA) of 1978, to include labor protections and avenues of recourse against adverse employment action.[6]

The United States, like every successful modern democracy, benefits greatly from having a stable workforce of merit-based civil servants. Apolitical, knowledgeable federal workers provide continuity and expertise in a deeply complex governance environment. Such a system allows for the steady implementation of national goals, with Congress providing broad instructions and agencies using their expertise and public input to craft regulations and implement laws. The average tenure for a federal worker is almost 12 years (compared to less than 4 years in the private

[3] Jerry L. Mashaw, *Administration and "The Democracy": Administrative Law from Jackson to Lincoln*, 1829-1861, 117 Yale L.J. 1568, 1618 (2008) ("In a spoils system both expertise and objectivity are suppressed by the demands of party loyalty and rewards for partisan political service."); Alejandro Perez, *The Return of Schedule F and the Perils of Mandating Loyalty in the Civil Service*, 104 B.U. L. Rev. 2233, 2238 (2024) ("[T]he practice of reserving positions for those loyal to the President came to be known as the "spoils system." Rewarding political supporters with public office was not without its consequences. During this period, incompetence, corruption, and outright theft within the civil service were common.")

[4] Improving Performance, 90 Fed. Reg. at 17184.

[5] *Id.* (citing Ronald N. Johnson & Gary D. Libecap, The Federal Civil Service and the Problem of Bureaucracy 17 (1994)).

[6] *See* Civil Service Reform Act of 1978, S. 2640, 95th Cong. (1978); Whistleblower Protection Enhancement Act of 2012, S. 743, 112th Cong. (2012); All Circuit Review Extension Act, H.R. 4197, 113th Cong. (2014).

sector),[7] allowing institutional knowledge to be cultivated and passed down. The opportunity to have a stable career while promoting the public good attracts topic experts, researchers, and dedicated citizens to pursue careers within the federal government. Our merit-based system creates hard metrics and accountability for applicants and employee career advancement.

The Proposed Rule would dismantle this long-standing backbone of the federal government, potentially converting hundreds of thousands of apolitical civil service positions into political appointments and stripping said civil servants of Congressionally-mandated labor protections and the ability to appeal adverse personnel actions. With nearly 4,000 civilian political appointments, the United States is already an outlier compared to other developed democracies, which often have only dozens to a few hundred political appointees who change with new government leadership.[8] Simply put, this Proposed Rule would drag America back into a spoils system and recreate the worst excesses of Jacksonian political patronage.

The core underpinnings of OPM's Proposed Rule are also directly contradictory to available research and overwhelming public sentiment. The Supplemental Information to the Proposed Rule suggests having more appointees would be responsive to the will of the voters, but a recent study found that nearly 90% of Americans view nonpartisan civil service as important for having a strong American democracy.[9] Research also shows that government programs "run by political appointees and agencies with large numbers of appointees perform worse than other agencies on a diverse set of metrics."[10]

The Proposed Rule does not provide a convincing explanation of how it will strip employment protections from large swaths of our federal workforce while avoiding a system of political patronage. The Supplemental Information claims the Proposed Rule is simply "a return to the efficient, merit-based system enacted by the Pendleton Act"[11] and that the Proposed Rule would

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[7] Drew DeSilver, *What the data says about federal workers*, Pew Research Center (Jan. 7, 2025), https://www.pewresearch.org/short-reads/2025/01/07/what-the-data-says-about-federal-workers/.
[8] Jun Makita, *A study of the functions of political appointees from a comparative perspective*, 7 Asian J. of Compar. Pol. 146, 161 (2022).
[9] *The State of Public Trust in Government 2024,* Partnership for Public Service (2024), https://ourpublicservice.org/publications/state-of-trust-in-government-2024/.
[10] David E. Lews, *Political Appointees to the Federal Bureaucracy*, The University of Chicago Center for Effective Government (Feb. 20, 2024), https://effectivegov.uchicago.edu/primers/political-appointees-to-the-federal-bureaucracy.
[11] Improving Performance, 90 Fed. Reg. at 17208.

ultimately not "disturb[]...merit hiring of career employees."[12] Neither assertion is persuasive. The Proposed Rule's move to turn back the clock to the enactment of the Pendleton Act ignores over 140 years of subsequent case law and legislative history, particularly the CSRA of 1978. This law created the Merit System Protections Board, codified employment and labor protections, and, ironically, expanded the authority of the Office of Personnel Management that now promulgates this rule.[13] As discussed below, these protections, which granted a property interest in federal employment and due process guarantees when faced with removal from the competitive civil service, cannot simply be negated nor stripped away by this Proposed Rule.[14]

The primary result of this Proposed Rule will be to turn hundreds of thousands of civil servants into at-will employees, serving at the whim of the President. This would remold the federal civil service into a workforce of loyalists, serving the singular desires of the Executive Branch, and not necessarily the American people. The assertion that new employees would be hired following merit-based principles comes with no guarantee that this would be the case; when rights of appeal are stripped away, it becomes hard to see what reliable force could stop an administration from simply awarding positions to those it knows or expect to be most loyal, rather than those with the most relevant experience and abilities. This risk of being fired for an action or inaction that is in line with one's job duties but displeases agency leadership functionally forces civil service workers to serve at the whim of the President and his partisan agenda.

The Proposed Rule would allow administrations to terminate federal employment for those who are determined, without any enumerated hard metrics and without any Congressionally-mandated procedural due process, to have "resist[ed] and undermin[ed] the policies and directives of their executive leadership."[15] Such an environment places a premium on personal loyalty and political patronage over apolitical civil service. It stands in direct contrast with the guiding star already in

[12] *Id*.
[13] CSRA replaced the Civil Service Commission (CSC), which had largely administered the civil service of the United States federal government until that point, with the Office of Personnel Management (OPM) and delegated the CSC's responsibilities over several agencies including OPM, Federal Labor Relations Authority (FLRA), Office of Special Counsel (OSC), and the newly minted Merit Systems Protection Board (MSPB).
[14] *See* Arnett v. Kennedy, 416 U.S. 167 (Justices Powell and Blackmun concurring) ("While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards"); *see also* U.S. Merit Systems Protections Board, What is Due Process in Federal Civil Service Employment? (May 2015), https://www.mspb.gov/studies/studies/What_is_Due_Process_in_Federal_Civil_Service_Employment_1166935.pdf.
[15] Improving Performance, 90 Fed. Reg. at 17188.

existence for the civil service, enshrined in the loyalty oath that each member of the federal workforce already takes to uphold and defend the Constitution.[16]

Further, mechanisms already exist for a federal agency to remove insubordinate or underachieving federal workers. OPM does not challenge in good faith the legality of said mechanisms — it only asserts that such due process guarantees take too long and do not go far enough in their vision of unprecedented Executive power. (Not incidentally, the Proposed Rule does not provide any indication that OPM considered more incremental solutions for addressing the problems that it purports to have identified that would be less drastic than reversing more than a century of practice and radically overhauling the civil service.) Yet, Chapter 75 and Chapter 43 of Title 5 of the U.S. Code[17] collectively lay out the removals, demotions, suspensions, and reductions in grade that an agency may utilize in bringing adverse action against an individual in the competitive civil service. Despite the Proposed Rule and its accompanying text's repeated assertions, federal workers are already required to follow the directives of executive leadership, and there are disciplinary actions for those who do not, up to and including termination.

Not only must any lawful order be followed, but the Merit Systems Protection Board (MSPB) has held that an agency may discipline or even remove a federal employee for failing to carry out an order that violates a regulation or agency rule. In *Rainey v. Department of State*,[18] the appellant, a federal civilian employee at the Bureau of African Affairs, disobeyed an order that would have required him to violate an agency rule. He appealed subsequent adverse action taken against him. In siding with the agency, the MSPB stated that "the right-to-disobey[19]…extends only to orders that would require the individual to take an action barred by statute." The MSPB added that because the order "would have required him to violate an agency rule or regulation, his claim [fell] outside of the scope of section 2302(b)(9)(D),"[20] which outlines prohibited personnel practices. Simply put, OPM's assertion in promulgating this rule — specifically, its claim that the competitive civil service has embedded dissidents actively sabotaging Executive directives with impunity — is utterly baseless. If such dissident civil servants are employed in the federal

[16] 5 U.S.C. § 3331 (1966).
[17] 5 U.S.C. § 7503 (1978).
[18] Rainey v. Dept. of State, 2015 M.S.P.B. 49 (2015).
[19] *See* 5 U.S.C. § 2302(b)(9)(D) (1978).
[20] Rainey, 2015 M.S.P.B. at 4.

government, legal and legitimate adverse action mechanisms already exist to address insubordinate or underperforming workers. If an agency has evidence that an employee is violating orders, it should proceed with disciplinary actions and accept any exercise of the employee's due process rights as the appropriate price of maintaining an apolitical competitive civil service that serves the public interest.

The Supplemental Information for the Proposed Rule also makes a misleading claim that Schedule Policy/Career is necessary to empower supervisors, many of whom are in the competitive civil service, to address the problem of underachieving or insubordinate lower-level employees. OPM cites MSPB research, which asserts that agency supervisors are not confident they could remove subordinates for serious misconduct or poor performance.[21] A deeper dive into this MSBP research (which, incidentally, is based on data almost a decade old) shows that managers did not claim there were legal or policy hurdles; they instead cited agency culture, lack of support from other managers, "HR quality," their own understanding of the process, and their own personal discomfort level in firing someone.[22] None of this supports a decision to strip civil service positions of their adverse action protections.

Even if we accept at face value any claims that the Proposed Rule makes about the need to make it easier for managers to fire employees who truly should be fired: how would Schedule Policy/Career remedy this issue? The Proposed Rule seeks to strip adverse action protections and appeal rights not from lower-level subordinates, but from those in so-called "policy-influencing" positions, roles more closely aligned with the same supervisors and managers the rule claims to empower. If implemented, this rule would likely have the inverse effect of its intended claim to bolster supervisor autonomy.

The Proposed Rule asserts several times that a return to the spoils system would not be possible because career employees are "not required to pledge personal loyalty to the President or his

[21] Improving Performance, 90 Fed. Reg. at 17188 (citing U.S. Merit Systems Protections Board, Remedying Unacceptable Employee Performance in the Federal Civil Service (June 18, 2019)).
[22] U.S. Merit Systems Protections Board, Remedying Unacceptable Employee Performance in the Federal Civil Service 6 (June 18, 2019).

policies"[23] and that the President has "expressly forbid political loyalty tests for Policy/Career employees."[24]

These assertions are hollow when faced with our political reality since January 20, 2025. Federal workers have already been vetted, harassed, and questioned about their loyalty to the President. In one instance, senior administration officials were documented questioning career civil servants who work on the White House National Security Council about "which candidate they voted for in the [2024] election, their political contributions and whether they have made social media posts that could be considered incriminating by [President] Trump's team."[25] Russell Vought, Director of OMB, who previously asserted that America is "living in a post-Constitutional time" and encouraged future administrations to discard existing and established "precedents and legal paradigms,"[26] has repeatedly called for federal workers unaligned with the President in any capacity to be "traumatically affected" and to be "increasingly viewed as the villains."[27] New hiring plans will require applicants to high-level civil service positions to complete an essay question about how they will "help advance the president's executive orders and policy priorities in this role"[28] in a move that requests loyalty not to the constitution but to the administration. While the Proposed Rule pays lip service to the apolitical nature of America's merit-based federal workforce, the real impact of Schedule Policy/Career will be to create a civil service where political fealty is a critical requirement of continued employment.

## II. The Proposal Would Cause the Very Problems It Purports to Solve

By weakening the civil service protections, the Proposed Rule risks hollowing out the expertise that the professional civil service brings to the complex task of implementing federal programs.

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[23] Improving Performance, 90 Fed. Reg. at 17201.
[24] *Id.* at 17208.
[25] Matthew Lee, Aamer Madhani, & Jill Colvin, *Loyalty Tests and MAGA Checks: Inside the Trump White House's Intense Screening of Job-Seekers*, A.P. News (Jan. 25, 2025), https://apnews.com/article/trump-loyalty-white-house-maga-vetting-jobs-768fa5cbcf175652655c86203222f47c.
[26] Russell Vought, *Renewing American Purpose,* The American Mind (Sept. 9, 2022), https://americanmind.org/salvo/renewing-american-purpose/.
[27] Alice Herman, *Russell Vought: Trump Appointee Who Wants Federal Workers to be 'In Trauma',* The Guardian (Feb. 10, 2025), https://www.theguardian.com/us-news/2025/feb/10/who-is-russell-vought-trump-office-of-management-and-budget.
[28] Office of Personnel Management, *OPM Announces Merit Hiring Plan to Restore Accountability to the Federal Workforce* (May 29, 2025), https://www.opm.gov/news/opm-announces-merit-hiring-plan-to-restore-accountability-to-the-federal-workforce.pdf.

Senior career staff — who not only have expertise in their particular area of professional specialty but also the practical expertise that comes with working in the government — may decide to leave public sector employment due to the increased uncertainty over their future and the dissatisfaction that comes with working in the hostile environment that the proposal is sure to create. At the same time, government agencies will have a hard time recruiting future generations of public-minded experts. Instead, these individuals will likely opt for the better pay and working conditions that come with working in the private sector. A 2024 study by the Congressional Budget Office found that federal workers with college or advanced degrees earned substantially less than their counterparts in the private sector.[29]

For those who remain, public service professionals may be less likely to fully apply their expertise and specialized training in carrying out their responsibilities. When they begin a position in the federal government, employees swear an oath to "uphold the Constitution" and to "faithfully discharge the duties" of their position.[30] Civil service protections are meant to empower public employees to adhere to that oath even in the face of pressure from their supervisors. In other words, civil service protections aim to prevent employees from being put in a position where they have to choose between their oath and their job. In the absence of such protection, applying one's expertise will become more risky. If an employee's expert analysis indicates the need for an action that the administration opposes, that employee might hesitate to share their conclusions with a supervisor who might consider the analysis a sign of disloyalty.

Such a hollowing out of expertise would in turn risk undermining the effective and successful delivery of agency programs. For instance, recipients of government services might experience significant delays in the provision of such services. Program implementation could also be hampered by mistakes, which can place public safety and personal property at risk of harm. The recent series of near-misses at airports due to air traffic controller staffing shortages has already laid these concerns out in stark terms.[31] The business community, in particular, will bear the costs of a degraded civil service as approvals for new drugs or new pesticides start to lag under growing

[29] Congressional Budget Office, Comparing the Compensation of Federal and Private-sector Employees in 2022 (2024), https://www.cbo.gov/publication/60235.
[30] 5 U.S.C. § 3331 (1966).
[31] Aaron Krolik, Elena Shao, & Emily Steel, *Newark's Air Traffic Control Staffing Crisis Is Dire. It's Also Not Unique*, New York Times (May 16, 2025), https://www.nytimes.com/interactive/2025/05/16/us/air-traffic-control-staffing-newark.html.

delays at the Food and Drug Administration and the Environmental Protection Agency (EPA), respectively.

Another detrimental side effect of the Proposed Rule is that it will lead to even greater policy swings between different presidential administrations, creating significant long-term uncertainty for the business community that will impair investment decisions and stymie economic growth. An independent civil service plays a critical role in promoting relative policy stability and continuity by maintaining institutional experience and expertise across election cycles. Civil servants perform this function even as they faithfully respond to new policy directions and priorities that each administration brings. In other words, their independence and expertise enable them to properly balance the need for predictable policies with the need for democratic responsiveness.

Eliminating their independence and, worse still, replacing professional experts with individuals more concerned with loyalty to the President than faithful implementation of the law is certain to undermine this modulating role. It is especially strange that the administration would take this action to aggravate policy swings at a time when there has been so much concern about reducing them. Indeed, the Supreme Court recently cited this concern as motivating its decision to overturn the longstanding *Chevron* deference doctrine.[32]

Finally, the Proposed Rule will likely introduce more corruption into the civil service — which was one of the negative consequences of the "spoils system" that a merit-based civil service was designed to prevent. The fact that policymaking will become attentive to the president's arbitrary direction instead of neutral principles — as noted above — will encourage external stakeholders to seek favors from the administration through implicit or explicit *quid pro quo* transactions.

[32] *See* Loper Bright Enterprises v. Raimondo, 603 U.S. 369, 435 (2024) (Gorsuch, J., concurring) ("In all these ways, Chevron's fiction has led us to a strange place. One where authorities long thought reserved for Article III are transferred to Article II, where the scales of justice are tilted systematically in favor of the most powerful, where legal demands can change with every election even though the laws do not, and where the people are left to guess about their legal rights and responsibilities.").

## III. The Proposed Rule Will Harm Scientific Integrity and Progress

The United States has had a proud tradition of fostering a robust scientific and research environment, particularly through visionary work that requires years of investment before yielding technological or medical advances that benefit our nation and the world. Scientific research drives economic growth, improves public and environmental health, and advances national security interests — including by forming the basis of policies to promote these important goals. In order to implement policies that benefit the American people, the federal government must have access to the best available science to inform its decisions. The success of laws — such as the Clean Air Act (discussed more below) — rests on science-driven processes.

Many of the tasks that Congress has assigned to federal agencies require generating and using evidence to carry out statutory requirements. Scientific staff at agencies are essential to effective implementation of laws that benefit the U.S. population, and they need civil service protections to do their jobs faithfully.

Civil service protections take on added significance for government scientists considering that they also adhere to and uphold a standard of general professional ethics that guides their work broadly. Among other things, professional ethics standards require them to present their experimental data accurately and follow generally accepted protocols in designing studies and experiments and reporting their findings. Civil service protections help insulate government scientists against politicized pressures to depart from these professional obligations.

Significantly, policymakers have long sought to reinforce government scientists' commitment to their professional obligations by instituting scientific integrity policies.[33] These policies require agencies to uphold the integrity of scientific processes — that is, to conduct scientific work according to the high standards established by their fields and communicate about it accurately — and protect them from inappropriate influence. Understood from this perspective, federal civil service protections are the bedrock upon which such scientific integrity policies are built. In the

[33] Government Accountability Office, *Scientific Integrity Policies: Additional Actions Could Strengthen Integrity of Federal Research* (April 2019), https://www.gao.gov/assets/gao-19-265.pdf.

absence of meaningful civil service protections, government scientists could be placed in the difficult position of choosing between scientific integrity and continued employment.[34]

## A. The history of Clean Air Act implementation illustrates why civil service protections are particularly important for scientific staff

The role of scientists in implementing the Clean Air Act (CAA) illustrates why civil service protections are so important for protecting scientists and safeguarding scientific integrity. One of the reasons Congress passed the CAA was to "initiate and accelerate a national research and development program to achieve the prevention and control of air pollution."[35] The CAA tasks the EPA administrator with issuing air quality criteria that accurately reflect "the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities"[36] and then using those criteria to set national ambient air quality standards (NAAQS).[37] It states that the administrator shall, "after consultation with appropriate advisory committees and Federal departments and agencies," issue information on pollution control techniques to states.[38] States must then create plans (state implementation plans, or SIPs) based on EPA's criteria and information to control pollution and submit them to EPA for review.[39] The administrator must then determine whether the plans comply with the law's pollution control requirements and either approve them or call for revisions.[40]

Although the CAA gives the EPA administrator the responsibility for issuing air quality standards and evaluating states' plans for controlling them, no single individual has the ability to digest all

[34] A new executive order—which requires agencies to create scientific integrity policies under Trump administration guidelines and place political appointees in charge of their implementation — raises the possibility that scientists could be forced to violate scientific integrity (as the concept is understood within the broader scientific community) in order to avoid being deemed as out of compliance with the new policies. Exec. Order No. 14,303, 90 Fed. Reg. 22601 (May 23, 2025); *see also* Jules Barbati-Dajches, *Trump's Executive Order Puts Science Under the Thumb of Politics*, Union of Concerned Scientists (May 29, 2025), https://blog.ucs.org/jules-barbati-dajches/trumps-executive-order-puts-science-under-the-thumb-of-politics/. It is difficult to predict the precise impacts until agencies receive more guidance from the administration, but the fact that the executive order does not mention the need to protect scientific independence or guard against political interference is troubling.
[35] 42 U.S.C., § 7401(b).
[36] 42 U.S.C., § 7408(a)(2).
[37] 42 U.S.C., § 7409(a)(2).
[38] 42 U.S.C., § 7401(b)(1).
[39] 42 U.S.C., § 7410(a).
[40] 42 U.S.C., § 7410(k).

of the relevant research that must inform the standards or the expertise to evaluate all aspects of the SIPs. Administrators must rely on both advisory committees — which require the support of agency staff to function — and "Federal departments and agencies"[41] in order to carry out the responsibilities the CAA assigns them. Expert career staff develop an Integrated Science Assessment and a Policy Assessment to inform the administrator's NAAQS determination.[42] The staff members involved in such efforts must have a wide range of advanced knowledge, including expertise in how different pollutants move through the air under a variety of conditions and the many factors that shape how effectively various technologies can reduce emissions, as well as the ability to model air pollution outcomes based on an array of variables. SIP evaluations benefit from the input of experienced staff who have gained familiarity with different states' circumstances and approaches.

Updates to the NAAQS and SIPs over the past several decades have resulted in stricter pollution controls, and the public's health has benefited.[43] Some might describe the tightening of pollution controls as policy decisions, especially given that polluting industries often oppose them. However, the CAA is clear about how air quality standards must be set and what SIPs must accomplish. Even an EPA administrator operating under a policy directive to prioritize the profits of fossil fuel companies above the health of the entire population cannot lawfully refuse to set standards informed by "the latest scientific knowledge" or approve a SIP that does not meet CAA requirements. Like the administrator, the staff working on NAAQS and SIPs must follow the CAA requirements for incorporating scientific knowledge into standards and evaluate state plans according to what the law requires. The proposed rule would allow these staff to be designated as "policy-influencing" because their work informs regulations, but placing them in the excepted service and thereby stripping civil service protections from them would be detrimental to EPA's ability to implement the CAA.

The EPA scientists involved with setting NAAQS and evaluating SIPs must adhere to the agency's scientific integrity policy. The version of the policy adopted in early 2025 requires "professional

[41] 42 U.S.C., § 7401(b)(1).
[42] Environmental Protection Agency, *Process of Reviewing the National Ambient Air Quality Standards* (Dec. 20, 2024), https://www.epa.gov/criteria-air-pollutants/process-reviewing-national-ambient-air-quality-standards.
[43]Environmental Protection Agency, *The Benefits and Costs of the Clean Air Act From 1990 to 2020* (Mar. 2011), at 3, https://www.epa.gov/sites/default/files/2015-07/documents/summaryreport.pdf.

practices, ethical behavior, and the principles of honesty and objectivity when conducting, managing, using the results of, and communicating about science and scientific activities."[44] A model of how much of a pollutant a particular technology will remove from the air might yield different answers depending on the parameters the person developing the model specifies, and there is often a range of parameters that are defensible based on how that person incorporates existing evidence. There are also possible parameter values that are not defensible because they are based on actions at odds with scientific integrity, such as falsifying the data that inform the parameters or ignoring high-quality studies that indicate the selected value is too high or too low. To designate scientists involved with this work as "policy-influencing" assumes that their selection of model parameters will be based on their policy preferences rather than a careful examination of relevant evidence. Such an assumption is insulting and at odds with how scientists are trained to operate. Absent evidence of widespread behavior at odds with best scientific practice, agencies should instead use tools such as their scientific integrity policies to address any individual instances of staff falsifying data, ignoring relevant high-quality evidence, or otherwise substituting a policy preference for a scientific approach.

In fact, stripping civil service protections from agencies' scientific staff could result in them feeling pressured to violate scientific integrity. Knowing that their continued employment relies on them pleasing the political appointees who head their agencies, federal scientists might reasonably conclude that the best way to remain employed is to produce results that align with the administration's policy preferences. An EPA scientist might use the best available evidence to create a model that, when applied to a state's SIP, finds that the state needs to tighten its pollution controls in order to meet standards. If their continued employment were at the pleasure of an administrator who had expressed a strong preference for less regulation, that scientist might fear that continuing to use the model based on the best evidence would put them at risk of being fired. Placing government employees in such stressful positions is not a recipe for attracting and retaining the most skilled scientists to federal service.

[44] Environmental Protection Agency, *Scientific Integrity Policy* (Jan. 16, 2025), https://www.epa.gov/system/files/documents/2025-01/us-epa-scientific-integrity-policy.pdf.

## B. Grants involving scientific evidence should be administered by career staff with civil service protections

Grant administrators are not always scientists, but statutes often instruct them to evaluate and apply scientific information in crafting funding announcements and evaluating applications. The OPM guidance referenced in the Supplemental Information to the Proposed Rule states, "Grantmaking is an important form of policymaking, so employees with a substantive discretionary role in how federal funding gets allocated may occupy policymaking positions." Expecting federal employees to administer grants according to the administration's political preferences or risk being fired can create pressure on grant administrators to stray from the criteria Congress has tasked them with applying, because sometimes an administration's priorities will differ from those of the Congress that created or extended a grant program.

One example of the priorities of Congress and an administration clashing came in the case of the Teen Pregnancy Prevention (TPP) Program during the first Trump administration. The TPP Program was initially established by the Consolidated Appropriations Act of Fiscal Year 2010, and it funds both projects that generate evidence about how to effectively prevent adolescent pregnancy and projects that employ adolescent pregnancy prevention models that researchers have found to be effective in rigorous evaluation.[45] However, political appointees canceled existing TPP grants awarded under these criteria[46] and attempted to instead award TPP funds to projects that focus primarily on abstinence[47] — an approach that has not been found effective in the kinds of rigorous evaluations that the TPP program established by Congress requires.[48] Federal judges in multiple cases ruled that the early grant termination was arbitrary and capricious and that allowing

[45] Jessica Tollestrup, Cong. Rsch. Serv., R45183, Adolescent Pregnancy: Federal Prevention Programs 7 (2024).
[46] Heidi Przybyla, *Notes, emails reveal Trump appointees' war to end HHS teen pregnancy program*, NBC News (Mar. 20, 2018), https://www.nbcnews.com/politics/politics-news/notes-emails-reveal-trump-appointees-war-end-hhs-teen-pregnancy-n857686.
[47] Heidi Przybyla, *Trump administration defies court order by pushing abstinence, Democrats say*, NBC News (Dec. 20, 2018), https://www.nbcnews.com/politics/politics-news/trump-administration-defies-court-order-pushing-abstinence-democrats-say-n950146.
[48] Kaiser Family Foundation, *Abstinence Education Programs: Definition, Funding, and Impact on Teen Sexual Behavior* (June 1, 2018), https://www.kff.org/womens-health-policy/fact-sheet/abstinence-education-programs-definition-funding-and-impact-on-teen-sexual-behavior/.

abstinence-only projects to apply for TPP grants was an action that contradicted the intent of Congress.[49]

Grantmaking at the National Institutes of Health (NIH) demonstrates the importance of expert staff who can best operate with civil service protections. NIH is the world's top funder of biomedical research, and its funding has supported breakthroughs in cancer therapies, heart valve replacements, drugs for diabetes, and many other areas.[50] Of the funding it receives from Congress ($47 billion in fiscal year 2024), NIH distributes 80% or more to researchers across the country, and every year it funds nearly 50,000 grants.[51] Strategic plans, published every 5 years as required by the 21st Century Cures Act, are shaped by the NIH Director, who is appointed by the president.[52] As the strategic plan for fiscal years 2021-2025 explains, "This enterprise is managed by NIH staff who facilitate and administer scientific programs, consult with scientific experts to inform priority setting, and act as agency experts for specific scientific areas."[53]

Funding is highly competitive, and NIH's process for evaluating grant applications "emphasizes fairness and accountability and prioritizes support of the best scientific ideas."[54] The agency relies on the expertise of more than 25,000 external reviewers annually to assess the scientific merit of applications; it then turns to national advisory councils and the NIH Office of the Director to assess mission relevance.[55] The final scores from this rigorous two-level process inform the final funding decisions of the directors of NIH's 27 institutes and centers, who work within the constraints of their individual budgets and are guided by strategic plans.[56]

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[49] Megan Uzzell, *One Year of Successful Battles to Protect the TPP Program Against Trump Administration Unlawful Actions; Fights Remain as Administration Continues its Assault on Evidence*, Democracy Forward (April 11, 2019), https://democracyforward.org/updates/trump-administration-continues-unlawful-effort-to-dismantle-the-evidence-based-teen-pregnancy-prevention-program/.
[50] Nisha Gaind, *How the NIH dominates the world's health research — in charts*, Nature (March 10, 2025), https://www.nature.com/articles/d41586-025-00754-4; *Congress must support robust federal funding for the NIH*, Association of American Medical Colleges (Feb. 4, 2025), https://www.aamc.org/about-us/aamc-leads/congress-must-support-robust-federal-funding-nih; *Scientific Breakthroughs*, National Institutes of Health (Mar. 28, 2025), https://www.nih.gov/about-nih/what-we-do/impact-nih-research/revolutionizing-science/scientific-breakthroughs.
[51] Kavya Sekar, Cong. Rsch. Serv., R43341, National Institutes of Health (NIH) Funding: FY1996-FY2025 4 (2024); *Budget,* National Institutes of Health (Oct. 3, 2024), https://www.nih.gov/about-nih/what-we-do/budget.
[52] *NIH-Wide Strategic Plan*, National Institutes of Health (Mar. 20, 2025), https://www.nih.gov/about-nih/nih-wide-strategic-plan.
[53] NIH-Wide Strategic Plan: Fiscal Years 2021–2025 at 1 (July 30, 2021).
[54] *Id.*
[55] *Id.*
[56] *Id.*

Recruiting and managing the work of reviewers is a demanding task.[57] NIH's scientific review officers (SROs) typically recruit review panel members for 4-year terms, which means they must replace one-fourth of reviewers annually.[58] Potential panel members "must be recognized authorities in their field and active scientists," and SROs must ensure membership is responsive to emerging areas of science.[59] They must also balance panel membership to assure an appropriate mix of senior- and junior-level reviewers and of generalists and specialists, and they must address potential conflicts of interest as well as expertise.[60] SROs convene and help manage review panels' meetings; after meetings, they release scores, interact with applicants, produce high-quality summary statements, and work with program officers to respond to appeals of scores.[61] NIH employs more than 500 SROs and holds approximately 2,600 meetings annually.[62]

Absent any indication that SROs are regularly seeking to apply political influence to the process by which NIH funding applications are evaluated, it would be inappropriate to designate them as "policy" staff under this Proposed Rule. If these specialized staff members were designated as policy employees and could be replaced with each successive administration, NIH's enormous grantmaking apparatus could grind to a halt every 4 years. The related delays would not only slow research but would be catastrophic for the pipeline of researchers. NIH grants support not only principal investigators but graduate students, postdoctoral fellows, and early-career faculty members whose continued work in their fields relies on consistent funding. A 4-week pause on publishing Federal Register notices of review panel meetings at the start of the second Trump administration held up the awarding of approximately $1.5 billion in NIH funding, and this uncertainty was one of the factors that caused some universities to pause graduate student admissions and some investigators to downsize or stop hiring for their labs.[63] Given the time

[57] Center for Scientific Review, *How Scientists Are Selected to Be Members of a Chartered Review Group* (Jan. 29, 2025), https://public.csr.nih.gov/ForReviewers/BecomeAReviewer/CharteredReviewers.
[58] *Id.*
[59] *Id.*
[60] Center for Scientific Review, *Role of the Scientific Review Officer* (Jan. 31, 2025), https://public.csr.nih.gov/ForReviewers/MeetingOverview/RoleofSRO.
[61] *Id.*
[62] Jocelyn Kaiser, *NIH will eliminate many peer-review panels and lay off some scientists overseeing them*, Science (Mar. 7, 2025), https://www.science.org/content/article/nih-will-eliminate-many-peer-review-panels-and-lay-some-scientists-overseeing-them; Rob Stein, *NIH funding freeze stalls applications on $1.5 billion in medical research funds*, National Public Radio (Feb. 22, 2025), https://www.npr.org/sections/shots-health-news/2025/02/22/nx-s1-5305276/trump-nih-funding-freeze-medical-research.
[63] *See* Stein, *supra* note 50 and accompanying text.

needed to hire new SROs and train them in this specialized work, delays caused by substantial turnover in SROs when each new president takes office could be even more disruptive than the recent pause in grant reviews. The prospect of repeated NIH funding upheaval could discourage early-career scientists from pursuing avenues of research that would depend on NIH funding.

Researchers might also be discouraged from pursuing biomedical research if they thought that SROs might be inappropriately influenced in their selection of external peer reviewers. If SROs must please political appointees in order to stay employed, they could feel pressured to seek out reviewers with fringe views aligned with administration priorities — e.g., the extensively studied and disproven claim that vaccines cause autism, which the most respected scientists do not hold.[64] SROs would not need to yield to such potential pressure in order for the situation to harm the US scientific enterprise; the fear that they might do so could turn potential future discoverers of scientific breakthroughs away from research if they were to fear that the competition for grant funding would be unfair.

NIH's strategic priorities are set by the presidentially appointed Director, and the strategic priorities guide grantmaking. The many specialized employees who carry out the work to ensure applications are evaluated appropriately for their scientific merit and priority alignment do not need to be designated as policy employees in order for that influence to operate. To designate them as such would be unnecessary and potentially extremely damaging to biomedical research conducted across the United States.

Other agencies also rely on some combination of external reviewers, priorities set by agency leadership, and Congressional instructions to award grant funding. While their processes might not be as complex as those of NIH, they likewise benefit from the involvement of staff who can build up and apply expertise while insulated from concerns that performing their duties correctly could cause them to be fired.

[64] Megan Molteni, Usha Lee McFarling, & Angus Chen, *Graduate student admissions paused and cut back as universities react to Trump orders on research*, STAT (Feb. 19, 2025), https://www.statnews.com/2025/02/19/trump-funding-freeze-grad-student-postdoc-acceptances-paused-nih-research/.

### C. The Proposed Rule's harms to scientific work will have nationwide consequences

EPA and NIH are just two of the agencies whose scientific work has enabled greater health and prosperity for the American people. By creating conditions under which it becomes harder for agencies to attract and retain expert staff and for those staff to do their jobs with integrity, the Proposed Rule imperils public health and economic growth.

Leadership of the Executive Branch, and the presidential directives that follow, change potentially every 4 years. Short-term successes and continued political viability are natural considerations when occupying the Office of the President. As a general matter, presidential directives do not necessarily incorporate the long-term perspective that in the past has successfully guided agency policies and practices critically important to American health and well-being, such as a framework for ensuring people can breathe clean air and a research funding system that drives biomedical innovation.

The Proposed Rule will lead to an environment where federal scientific integrity can easily be threatened in pursuit of short-term economic, political, deregulatory, or ideological aims. It would subvert a core precept of the scientific endeavor, which is that the best science is conducted when produced free from political or ideological considerations.

The Proposed Rule effectively allows the President, at whim, to negate decades of scientific understanding forged through nonpartisan research and peer review. The Proposed Rule would allow political pressures to adversely impact the apolitical work of federal scientists and researchers, potentially asking them to compromise on their scientific principles under the threat of employment termination. Given that we all rely on government protections for confidence in the quality of our air and water and that the vast majority of us will one day need a treatment whose development was initiated by NIH funding, degradation of federal scientific work will have severe consequences for our nation as a whole.

## IV. The Proposed Rule is Unlawful and Unconstitutional

The Proposed Rule conflicts with the text and purpose of the CSRA, rendering the Proposed Rule unlawful and unconstitutional. The CSRA establishes removal protections for positions in the

competitive civil service, entitling civil servants to due process before they lose their job or these removal protections. The CSRA also clearly authorizes the President to except policy-making positions from the competitive civil service, which closely parallels the President's constitutional authority to remove executive policy-making officers with "significant authority." In doing so, the CSRA addresses the problem OPM claims to be addressing with its Proposed Rule while remaining within constitutional limits. This reflects the longstanding view of the CSRA and established case law.

Defying logic or reason, OPM asserts that the CSRA — and 5 U.S.C. § 3302 — actually permit the President to add a wide range of "policy-influencing" positions to the Excepted Service. OPM defends this interpretation with a number of flimsy arguments. First, OPM claims that the plain language of Section 7511(b) of the CSRA allows the President to except "policy-influencing" positions. Second, OPM claims that 5 U.S.C. § 3302 independently grants the President the authority to except any civil service position for any reason necessary for good governance, irrespective of the language in the CSRA. Third, OPM contends that the Proposed Rule would not violate established due process precedent. Fourth, OPM claims that the CSRA would be unconstitutional if it bars the President from issuing the Proposed Rule. We address each of these arguments in turn.

## A. The Proposed Rule violates the plain meaning of the CSRA

A proposed rule must reasonably interpret the statute that gives an agency the authority to issue the rule. Here, OPM fails to accurately interpret the CSRA by adopting a rule that dramatically stretches the language of the statute beyond *any reasonable interpretation*.

In issuing the Proposed Rule, OPM purports to interpret 5 U.S.C. § 7511(b), which states that civil service removal protections do not apply to positions that require Senate confirmation or those that have a "confidential, policy-determining, policy-making or policy-advocating character."[65]

[65] 5 U.S.C. § 7511(b)(2) (1978).

### 1) "Policy-influencing" is far broader than "policy-determining, policy-making or policy-advocating"

OPM first attempts a linguistic sleight of hand by summarizing these characteristics as "policy-influencing," adopting a term that is substantially broader than the statutory language it claims to summarize.[66] "Determining," "making," and "advocating" — as used in 5 U.S.C. § 7511(b) — are all terms that refer to relatively authoritative action. Someone who determines, makes, or advocates for policy on behalf of the U.S. government clearly enjoys substantial authority. Each of these actions also implies a final or near-final result. For example, when a government employee is tasked with advocating for a policy, this is naturally presumed to be a representation of the government's final or near-final view on the matter. This is because advocacy represents a formed opinion, even if that opinion could later change. In contrast, "influencing" is a distinctly less authoritative and final action. By definition, "influencing" refers to actions that have *any* effect on a final result, rather than actions that reflect a final result. When one influences policy, they shape the policy that officials will ultimately make or advocate for. Put differently, "policy-influencing" actions *lead to* actions making, determining, or advocating for policy. These terms are hardly synonymous.

Indeed, almost every agency employee could be said to influence final agency policies. Even an intern "influences" policy development when they conduct research and explain this research to their supervisor. In fact, this research may influence final policy even if that final policy directly contradicts or bears no resemblance to the intern's analysis or recommendations. By using "policy-influencing" as a catch-all term for "policy-determining, policy-making or policy-advocating," OPM attempts to alter — rather than interpret — statutory language. OPM's usage of the term "policy-influencing" throughout its justification for the Proposed Rule reflects the agency's not-so-subtle effort to stretch the text of Section 7511(b) beyond its plain meaning. This sets the backdrop for OPM's flawed interpretation of the CSRA.

[66] Improving Performance, 90 Fed. Reg. at 17183.

### 2) The definition of Senior Executive Service positions cannot be substituted for the definition of "policy-determining, policy-making or policy-advocating" positions

Under the Proposed Rule, OPM interprets the phrase "policy-determining, policy-making or policy-advocating" as effectively synonymous with the language defining Senior Executive Service (SES) positions under 5 U.S.C. 3132(a)(2). OPM explains that "policy-influencing" roles "include functions of SES members such as directing the work of an organizational unit, being held accountable for the success of specific programs or projects, or monitoring progress towards, evaluating, and adjusting organizational goals."[67] This is the only definition that OPM offers for the phrase "policy-determining, policy-making or policy-advocating."

In making this assertion, OPM offers *no justification* for this interpretation; it simply asserts this conclusory statement as an objective interpretation. However, elsewhere in its justification for the Proposed Rule, OPM argues that Congress did not intend "policy-making" or "policy-determining" as a term of art for political appointees because SES positions are "definitionally policy-making or policy-determining" under Section 3132(a)(2) and 90% of the SES must be career positions.[68] In the absence of a properly stated explanation, one must assume that this argument underpins OPM's interpretation of "policy-determining, policy-making or policy-advocating" under 7511(b). In short, OPM appears to interpret "policy-determining, policy-making or policy-advocating" by reference to the definition of SES positions because it believes that such positions are "definitionally" policy-making or -determining.

This reasoning rests on a simple logical error, confusing a sufficient condition for a necessary one. SES positions are *not* "definitionally" policy-making or policy-determining. To understand this, it helps to look at the full text of Section 3132(a)(2), which states:

> "Senior Executive Service position" means any position in an agency which is **classified above GS-15** pursuant to section 5108 or in **level IV or V of the Executive Schedule**, **or an equivalent position**, which is not required to be filled by an appointment by the President by and with the advice and consent of the Senate, and in which an employee--

[67] *Id.* at 17188.
[68] *Id.* at 17194.

(A) directs the work of an organizational unit;

(B) is held accountable for the success of one or more specific programs or projects;

(C) monitors progress toward organizational goals and periodically evaluates and makes appropriate adjustments to such goals;

(D) supervises the work of employees other than personal assistants; **or**

(E) **otherwise** exercises important policy-making, policy-determining, or other executive functions . . . [69]

The use of "or otherwise" clearly indicates that this is a disjunctive list,[70] meaning that SES positions only require one of these conditions, not all of them. In other words, SES positions *may* be defined by their "policy-making" or "policy-determining" character, but they need not have these characteristics. For example, an SES position may "direct the work of an organizational unit" even if it does not exercise any power over policy. There is thus no required overlap between SES positions and those that are "policy-making" or "policy-determining." This critical point undermines the *entire basis* for OPM's broad definition of "policy-determining, policy-making or policy-advocating." Because SES positions are not definitionally policy-making or -determining, the other characteristics used to define SES positions have no bearing on the meaning of "policy-determining, policy-making or policy-advocating." OPM offers no justification for its logical error other than to simply quote the statute's disjunctive list.

While this is sufficient to undermine OPM's statutory interpretation, further textual analysis reinforces this point. Section 3132(a)(2) limits the definition of SES positions to those that receive the highest pay scales in the civil service, GS-15 or level IV or V of the Executive Schedule.[71] This inherently has the effect of limiting SES positions to well-paid senior positions of authority, as the name suggests. Thus, when Congress defined SES positions as those with responsibilities such as "direct[ing] the work of an organizational unit," this characteristic was already effectively limited to positions of authority by nature of their pay status. Removing this limitation would substantially broaden the language of Section 3132(a)(2) to include positions with no authority to

[69] 5 U.S.C. § 3132(a) (emphasis added).
[70] Antonin Scalia & Bryan Garner, *Conjunctive/Disjunctive Canon*, *in* Reading Law: The Interpretation of Legal Text 112, 112 (2012).
[71] 5 U.S.C. § 3132(a)(2).

make, determine, or advocate for policy. In other words, OPM defines "policy-determining, policy-making or policy-advocating" according to *some* of the broadest characteristics of SES positions while ignoring the characteristics that functionally limit SES positions to those with fairly substantial authority.[72]

It is easy to demonstrate the absurdity of this. OPM conveniently cherry-picked the SES characteristics that might reasonably overlap with the characteristics of "policy-determining, policy-making or policy-advocating" — namely "directing the work of an organizational unit, being held accountable for the success of specific programs or projects, or monitoring progress towards, evaluating, and adjusting organizational goals."[73] But these are only some of the characteristics that can define an SES position. SES positions can also be defined as those that receive the highest civil service pay scale and "supervise[] the work of employees other than personal assistants."[74] Thus, by OPM's reasoning, a position that merely supervises the work of other employees could be considered "policy-determining, policy-making or policy-advocating." Such a result would be patently absurd, yet OPM cannot justify its interpretation without logically arriving at such an outcome.

OPM's nonsensical interpretation of the CSRA suggests that the agency does not have any intention of faithfully interpreting the statute. The phrase "confidential, policy-determining, policy-making or policy-advocating character" plainly refers to positions with a great deal of authority. To be lawful, OPM's regulations must define Section 7511(b) accordingly. The Proposed Rule fails to do this.

## B. U.S. law does not grant the President unrestricted authority to except civil service positions from the adverse action protections set out in Chapter 75

Perhaps recognizing the flaws in its interpretation of Section 7511(b), OPM also argues that the Proposed Rule is lawful because a different subsection of Title 5 — Section 3302 — authorizes

[72] Improving Performance, 90 Fed. Reg. at 17194.
[73] *Id.* at 17188.
[74] 5 U.S.C. § 3132(a)(2).

the President to "except positions from the competitive service for any reason he finds necessary."[75] This interpretation is irreconcilable with a plain reading of the CSRA.

Section 3302, which Congress added to the Examination Chapter of Title 5 over a decade before it passed the CSRA, states that "The President may prescribe rules governing the competitive service. The rules shall provide, as nearly as conditions of good administration warrant, for– (1) necessary exceptions of positions from the competitive service…"[76] OPM argues that this effectively supersedes the narrower express language in Section 7511(b), allowing the President to except civil service positions even if they do not fall within the policy-making exception allowed in Section 7511(b).[77] OPM offers only three justifications for this interpretation: first, that this provision recodified the framework set forth in the Pendleton Act of 1883, which permitted at-will removals; second, that this section is not limited to exceptions for examination procedures simply because it is found in a the subchapter on examinations; and third, that the courts have found that Section 3302 allows the President to except positions from Chapter 75 procedures.[78]

Even if one were to accept OPM's reading of Congressional intent for Section 3302, OPM ignores the clash between its reading of Section 3302 and the later-enacted CSRA. In passing the CSRA, Congress explicitly intended to constrain the President's existing authority to dismiss civil service workers at will.[79] Indeed, this is a central purpose of Chapter 75. In adding Chapter 75 to the Code, Congress unambiguously signaled that it was altering the status quo with respect to adverse action protections. Congress defined the scope of Chapter 75 protections by clearly stating in Section 7511(b) that these protections do not apply to civil service positions that belong to certain discrete categories, such as positions with a policy-making, -determining, or -advocating character.[80] There is no basis for reading additional exceptions into this discrete list.[81]

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[75] Improving Performance, 90 Fed. Reg. at 17210.
[76] 5 U.S.C. § 3302.
[77] Improving Performance, 90 Fed. Reg. at 17210. Specifically, OPM writes that "section 3302's text, history, and precedents demonstrates that it allows the President to except positions from the competitive service for any reason he finds necessary, including excluding them from chapter 75."
[78] *Id.*
[79] 5 U.S.C. § 7511(b)(2).
[80] *Id.*
[81] *See* Scalia & Garner, *supra* note 55. The omitted-case canon of construction holds that a matter not covered by a statute's express language should be understood as excluded from the statute's provisions.

OPM's reading of Section 3302 would render Section 7511(b) entirely meaningless. If Section 3302 allows the President to except any civil service position from adverse action protections on the basis that he deems such exception necessary for good administration, then the specific language in Section 7511(b) would be entirely unnecessary. Congress clearly deemed each of the exceptions in Section 7511(b) necessary for good administration, since the necessities of good administration underpin the entire CSRA. Thus, OPM's broad interpretation of Section 3302 makes Section 7511(b) superfluous — under such a reading, the latter would merely state a non-exhaustive sampling of reasons that civil service positions may be excepted.

It is a foundational principle of statutory interpretation that Congress does not speak idly. OPM cannot read one part of a statute in such a broad and sweeping manner as to render another more precise and more recent provision meaningless. Additionally, the general/specific canon of statutory construction holds that when a general provision clashes with a specific provision, the specific provision prevails.[82] OPM must accordingly give Section 7511(b) meaning by reading it as a clear and complete expression of the exceptions that the President may make from Chapter 75.

In an attempt to defend its untenable reading of Section 3302, OPM cites the Supreme Court's decision in *Free Enterprise Fund* and Justice Kavanuagh's lower court dissent in this same case.[83] OPM cites non-binding *dicta* in both instances, as the Court's holding (and Justice Kavanuagh's dissent) did not rest on an interpretation of Section 3302.[84] Yet these citations also fail to support OPM's claim. In *Free Enterprise,* the Supreme Court merely cited Section 3302, along with Section 7511(b), as support for the proposition that "Senior or policymaking positions in government may be excepted from the competitive service to ensure Presidential control."[85] If anything, this quote supports a reading of Section 3302 as co-extensive with the exceptions provided in Section 7511(b). In other words, the Supreme Court's language indicates that Section 3302 should be read as authorizing the President to except "policymaking" positions, not any position he deems necessary. If the Supreme Court read Section 3302 as granting such sweeping authority, it would not have limited its statement to "Senior or policymaking positions." In fact, if the Supreme Court shared OPM's interpretation of Section 3302, it certainly would have said so,

[82] *Id*.
[83] Improving Performance, 90 Fed. Reg. at 17212.
[84] *Id.*
[85] Free Enterprise Fund v. Public Company Accounting Oversight Board, 561 U.S. 477, 506 (2010).

given that the Court's holding turned on the President's power to remove civil servants in positions of significant authority. It thus makes no sense to read *Free Enterprise* as affirming that the President has unrestricted authority to except civil service positions for reasons of good administration.

OPM offers no reasonable justification for interpreting Section 3302 as superseding and nullifying the specific, and more recently added, terms of Section 7511(b). Section 3302 clearly does not authorize the President to except any civil service position on the basis that he deems it necessary for good administration. However, the Proposed Rule fails to even satisfy OPM's own reading of Section 3302, which explicitly requires that exceptions be grounded in the necessities of good administration. As discussed above, OPM offers no sound reason that Schedule Policy/Career is necessary for good administration.

### C. OPM's Proposed Rule is also unconstitutional as it violates established due process precedent.

OPM further argues that the Proposed Rule would not violate constitutional due process when it eliminates adverse action protections for certain positions. OPM asserts that due process precedent allows the Executive branch to undertake "legislative" rulemaking that strips civil service workers of their statutory entitlement to secure employment.[86] Ironically, OPM cites no precedent for this proposition. It also fails to engage with the three cases that OPM previously cited in its April 2024 final rule, which concluded that "Federal appellate courts have held that rights conferred on state employees by legislative action can be revoked, but that revocation also requires legislative action."[87] It is likely that OPM did not discuss these cases because they clearly contradict OPM's current claims. These cases unambiguously establish that the *legislature* may remove entitlements that it created without due process; however, they say nothing about the Executive's ability to remove statutory entitlements through "legislative" rulemaking. For example, in *Correa-Ruiz v. Fortuno*, the Court of Appeals for the First Circuit held that "no due process violation occurs when

[86] Improving Performance, 90 Fed. Reg. at 17211.

[87] Upholding Civil Service Protections and Merit System Principles, 89 Fed. Reg. 24982, (Apr. 9, 2024) (codified at 5 C.F.R. pts. 210, 212, 213, 302, 432, 451, 752) (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985)); Correa-Ruiz v. Fortuno, 573 F.3d 1, 14–15 (1st Cir. 2009); Gattis v. Gavett, 806 F.2d 778, 779–81 (8th Cir. 1986).

'the legislature which creates a statutory entitlement (or other property interest) alters or terminates the entitlement by subsequent legislative enactment.'"[88] OPM has no justification for its proposition that directly contradicts case law, which OPM relied upon in its previous April 2024 findings. One may only assume that OPM has no precedential basis for its argument.

There is also an obvious flaw in OPM's reasoning that, as framed, would violate the separation of powers. If the Executive created a legal entitlement through the legislative rulemaking process, it is *conceivable* that the Executive could remove this entitlement without due process. However, in this instance, OPM claims the authority to remove an entitlement *established by the legislature*. As discussed above, the CSRA clearly extends adverse action protections to those who do not fall within the exceptions provided for in Section 7511(b).[89] The Executive did not create an entitlement for civil servants, and it has no authority to remove an entitlement afforded by the legislature. Such an authority would be a clear violation of constitutional separation of powers.

### D. Contrary to OPM's assertions, the CSRA does not impose unconstitutional limits on the President's removal authority

In an effort to bolster its flimsy claims, OPM offers a fallback argument: the CSRA is unconstitutional if it prohibits Schedule Policy/Career.[90] OPM asserts that the CSRA cannot constitutionally prevent the President from "excepting incumbent policy-influencing employees" from tenure protections.[91] Under the Appointments Clause of the Constitution, the President has the authority to appoint and dismiss "Officers of the United States."[92] The Supreme Court has so far recognized only two contexts where Congress may restrict the President's power to remove Officers.[93] Congress may grant removal protections for "multimember expert agencies that do not wield substantial executive power" and "inferior officers with limited duties and no policymaking

[88] Correa-Ruiz v. Fortuno, 573 F.3d 1, 14-15 (1st Cir. 2009) (quoting Gattis v. Gravett, 806 F.2d 778, 780 (8th Cir. 1986)) (ellipses and brackets removed).
[89] 5 U.S.C. § 7511(b).
[90] Improving Performance, 90 Fed. Reg. at 17213.
[91] *Id.*
[92] As is discussed in Section 4(D)(2), the Constitution does not explicitly grant the President this authority. However, the Supreme Court has determined that this power is implied by the authority afforded to the President in Art. II, Sec. 2 of the U.S. Constitution.
[93] *See* Seila L. LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 218 (2020).

or administrative authority."[94] OPM argues that current regulations impermissibly grant removal protections to Officers who fall outside these exceptions. Therefore, OPM suggests, courts must adopt OPM's current interpretation of the CSRA to avoid raising serious constitutional questions about the statute.

### 1) OPM's constitutional arguments do not justify the Proposed Rule

As an initial matter, OPM's argument employs the "false alternatives" logical fallacy. OPM reasons that courts must either adopt its reading of the CSRA or adopt a reading that would violate the constitution. But these are not the only two choices. OPM makes an argument for rescinding its April 2024 Rule on the basis that the rule would grant unconstitutional protections to certain Officers. If true, this argument would only justify a return to the pre-April 2024 status quo; it provides no reason to approve the Proposed Rule or its unreasonably broad interpretation of the CSRA. Courts can read the CSRA as constitutionally valid without adopting the Proposed Rule. Thus, to sustain its rule on constitutional grounds, OPM must show that the rule sets out the *only* constitutional construction of the CSRA. OPM's arguments otherwise have no bearing on its Proposed Rule; OPM cannot adopt the Proposed Rule on the basis of a false choice.

In fact, the CSRA plainly adheres to constitutional limits. The Supreme Court has explicitly recognized the constitutionality of removal protections for civil service employees[95] and "inferior officers with limited duties and no policymaking or administrative authority."[96] This is precisely the line that the CSRA draws: Section 7511(b) extends adverse action protections to civil service positions that do not engage in policy-making, -determining, or -advocating.[97] The CSRA thus allows the President to except officer positions that exercise significant policymaking authority, which has long been done under Schedule C. If the CSRA does extend removal protections to inferior officers with significant authority, as OPM suggests, the President already has the power to add such positions to the Excepted Service.

Yet, in proposing Schedule Policy/Career, OPM seeks to expand the Excepted Service to include employees and inferior officers who merely influence — rather than make — policy. OPM ignores

[94] *Id.*
[95] *See* Free Enterprise Fund, 561 U.S. at 506.
[96] Seila Law v. Consumer Financial Protection Bureau, 591 U.S. 197, 217 (2020).
[97] 5 U.S.C. § 7511(b)(2).

the fact that its definition of "policy-influencing" is substantially broader than the Court's language of "policymaking."[98] Schedule Policy/Career would permit the President to freely remove civil servants who may receive constitutionally valid removal protections, such as low-ranked employees who "direct the work of an organizational unit" or those who "supervise the work of employees other than personal assistants." Supreme Court precedent offers no support for a rule that seeks to strip removal protections from positions that clearly lack the substantial authority of Executive Officers under the Appointments Clause. The Constitution does not — and cannot — provide a basis for such an expansive rule.

### 2) The Proposed Rule is much broader than the President's power to remove officers with "significant authority"

It is undisputed that the Framers sought to avoid the aggrandization of executive power. Checks on executive power pervade the Constitution, including in the Appointments Clause. OPM attempts to pervert the interpretation of this clause by framing it as a basis for unrestricted removal authority, turning the Framers' intent on its head. The Appointments Clause states, in full, that:

> [The President] shall nominate, and **by and with the Advice and Consent of the Senate**, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: **but the Congress may by Law vest the Appointment of such inferior Officers**, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[99]

By its express terms, this clause only provides for congressional involvement in the appointment of Principal and Inferior Officers. The Constitution says nothing about the power to remove such officers, but the Supreme Court has held that it implicitly grants this power to the President, subject to certain exceptions.

[98] Improving Performance, 90 Fed. Reg. at 17194.
[99] Art. II Sec. 2 (emphasis added).

In a line of cases dating back to 1926, the Court has reasoned that the President must be able to remove officers *so that he or she can faithfully execute the laws*.[100] Without this power, a President cannot compel officers to carry out their duties. As described below, the Supreme Court has consistently emphasized that this concern only applies to executive officials with significant authority and discretion.[101] These officers play a crucial role in executive functions such that they must be responsive to the President. Or, in other words, their power and discretion gives them the potential to obstruct the faithful execution of the laws.

Such officers rely on lower-ranked officers and employees, who may be dismissed for good cause. These for-cause removal restrictions do not undermine the faithful execution of the laws for two reasons: 1) lower-ranking officers and employees do not have the authority or discretion to substantially disrupt executive functions, unlike their superiors; and 2) by nature of their position, these lower-ranked officers and employees do not have the power or discretion to undermine executive functions without being insubordinate (and thus eligible for removal). In other words, superior officers have good cause to remove lower-ranked officers and employees for failing to execute the laws, whereas the President would not have such a clear-cut basis to dismiss a superior officer who enjoys substantial discretion and authority. As a result, the Supreme Court has only found an implied constitutional basis for the President's power to remove officers with significant authority. This implication stems from its *necessity* for executive functioning. The Constitution, and Supreme Court precedent, provide no basis for an implied power of removal that is not necessary for the faithful execution of the laws.

In *Morrison v. Olson*, the Court explained that even though a Special Counsel "exercises no small amount of discretion and judgment in deciding how to carry out his or her duties under the Act, we simply do not see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President."[102] The Court further noted that "the power to remove the [Special Counsel] for "good cause" . . . provides the Executive with substantial ability

[100] The court first recognized this implied constitutional power in Myers v. United States, 272 U.S. 52 (1926).
[101] Damien M. Schiff & Oliver J. Dunford, *Distinguishing Between Inferior and Non-Inferior Officers Under the Appointments Clause-A Question of "Significance,"* 74 Rutgers U.L. Rev. 469, 512 (2022).
[102] Morrison v. Olson, 487 US 654, 691-92 (1988).

to ensure that the laws are 'faithfully executed.'"[103] Thus, a President's removal power only extends to Officers who perform substantial duties that are "central to the functioning of the Executive Branch."

Contrary to OPM's assertions, Supreme Court precedent supports the constitutionality of CSRA adverse action protections as currently understood and applied. OPM claims that failing to adopt its interpretation of the CSRA would mean that inferior officers in independent agencies are doubly insulated from removal, violating the Court's holding in *Free Enterprise Fund*. Yet, the Court explained in *Free Enterprise Fund* that the President's removal power does not apply to civil service employees who do not "qualify as 'Officers of the United States,' who 'exercise significant authority pursuant to the laws of the United States.'"[104] The Court further reasoned that the CSRA does not restrict Presidential oversight of civil servants because the President may except "[s]enior or policymaking" positions under Sections 5 U.S.C. §§ 2302(a)(2)(B), 3302, and 7511(b)(2).[105] The Court therefore concluded that "[n]othing in our opinion . . . should be read to cast doubt on the use of what is colloquially known as the civil service system within independent agencies."[106] OPM conveniently avoids mentioning this conclusion when it claims that the CSRA unconstitutionally insulates inferior officers in independent agencies.

By its own admission, OPM seeks to expand the President's power to remove "policy-influencing *employees*."[107] But as the Court explained in *Free Enterprise Fund*, the President has no constitutional authority to remove employees, only Officers with "significant authority."[108] Reiterating this point in a footnote, the Court noted that "[o]ne 'may be an agent or employee working for the government and paid by it, as nine-tenths of the persons rendering service to the government undoubtedly are, without thereby becoming its officer."[109] To be an officer, "an individual must occupy a 'continuing' position established by law" which exercises "significant authority pursuant to the laws of the United States."[110] While the Court has not established a "significant authority" test for inferior officers, the lower courts have looked to the significance of

[103] *Id.* at 696.
[104] Free Enterprise Fund, 561 U.S. at 506 (brackets removed).
[105] *Id.*
[106] *Id.* at 507.
[107] Improving Performance, 90 Fed. Reg. at 17213 (emphasis added).
[108] Free Enterprise Fund, 561 U.S. at 506.
[109] United States v. Germaine, 99 U.S. 508, 509 (1879).
[110] Lucia v. Sec. & Exch. Comm'n, 585 U.S. 237, 245 (2018).

the matters that the civil servant is responsible for, their discretion to make decisions, and the "finality of those decisions."[111]

It is abundantly clear that the Proposed Rule would sweep far wider than the President's constitutional authority to remove inferior officers with significant authority. OPM's definition of "policy-influencing" includes positions that are not "continuing position[s] established by law" and positions that do not enjoy discretion to issue final decisions on important matters. As noted above, the Proposed Rule would allow the President to except civil service positions that are merely responsible for supervising other employees or leading an organizational unit. OPM cannot claim a constitutional basis for its broad interpretation of the CSRA. If it earnestly believes that inferior officers with significant policymaking authority enjoy unconstitutional removal protections, OPM should recommend that these positions be excepted from Chapter 75 pursuant to Section 7511(b).

### 3) OPM seeks to dramatically expand Presidential power in violation of constitutional separation of powers

It is important to ground the Proposed Rule in the administration's unprecedented effort to expand Presidential powers beyond their constitutional limits. In a wave of recent cases, the administration has argued that it may cancel visas and deport noncitizens without due process,[112] decline to spend money appropriated by Congress,[113] and dismantle agencies created by Congress,[114] despite statutes and case law saying otherwise. By and large, the federal courts have rejected these claims[115] and, in several instances, have even found that agency officials may have knowingly

[111] Tucker v. Comm'r, 676 F.3d 1129, 1133 (D.C. Cir. 2012)
[112] Kelsey Reichmann, *Trump presses SCOTUS on due process loophole for deportations to South Sudan*, Courthouse News Service (May 27, 2025), https://www.courthousenews.com/trump-presses-scotus-on-due-process-loophole-for-deportations-to-south-sudan/.
[113] James Bikales & Jennifer Scholtes, *Trump administration violated 'impoundment' law by freezing electric vehicle funding, GAO finds*, Politico (May 22, 2025), https://www.politico.com/news/2025/05/22/trump-administration-violated-impoundment-law-gao-finds-00365728.
[114] Fatma Tanis & Benjamin Swasey, *A federal judge says the USAID shutdown likely violated the Constitution*, National Public Radio (March 18, 2025), https://www.npr.org/2025/03/18/nx-s1-5332274/judge-ruling-usaid-shutdown.
[115] While most of these cases have not been decided on the merits, courts have repeatedly found that there was a high likelihood that the Administration would fail at the merits stage such that emergency relief was justified. *See e.g.*, D.V.D. v. Dep't of Homeland Security, No. 25-10676-BEM (D. Mass. Mar. 28, 2025) (granting temporary restraining order preventing the government from deporting the plaintiffs to a "third country").

violated court orders.[116] The Proposed Rule unmistakably fits into this pattern: relying on a series of logical errors and untenable interpretations of the law and Constitution, OPM asserts that the President has almost limitless authority to dismiss civil servants. It would be foolish to read the Proposed Rule outside of this context.

OPM's arguments subtly advance an unsupported and once-fringe legal concept known as the Unitary Executive Theory, which holds that the President has unlimited power to control the actions of executive branch employees.[117] This theory has been thoroughly discredited by scholars[118] and courts[119] as having no sound basis in the Constitution. While claiming to apply recent Supreme Court precedent, OPM inverts the bedrock assumptions in these cases. *Free Enterprise Fund, Seila Law,* and *Lucia* all affirm that the President's implied removal power only covers officers with significant authority, yet OPM selectively reads these cases to say (almost) precisely the opposite.[120] Case law, constitutional history, and the very text of the Constitution show that Congress may establish limits on the President's authority over the executive branch. Indeed, the Appointments Clause itself authorizes Congress to vest the appointment, and by extension the supervision, of inferior officers in courts or heads of departments. Interpreting the Constitution to grant the President unrestricted authority over the executive branch would undermine the very core of constitutional separation of powers. The Constitution does not give any one branch full control over itself.

Indeed, granting the President unrestricted authority over the executive branch would usurp crucial congressional powers. Congress has repeatedly used its authority over federal officials to check abuses of executive power. For example, Unitary Executive Theory would nullify any federal watchdog or special prosecutor tasked with monitoring or investigating executive action by giving

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[116] Joanna Walters & Sam Levine, *Federal judge accuses White House of 'bad faith' in Kilmar Ábrego García case*, The Guardian (Apr. 23, 2025), https://www.theguardian.com/us-news/2025/apr/23/kilmar-abrego-garcia-judge-trump-bad-faith.
[117] Michael Waldman, *The Extreme Legal Theory Behind Trump's First Month in Office*, Brennan Center for Justice (Feb. 19, 2025), https://www.brennancenter.org/our-work/analysis-opinion/extreme-legal-theory-behind-trumps-first-month-office.
[118] Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 Stan. L. Rev. 175, 235 (2021) (arguing that Unitary Executive Theory embraces "a radical new definition of executive power and imposed a restriction on legislative authority contrary to—and completely unknown in— the English tradition").
[119] *See e.g.,* Wilcox v. Trump, No. CV 25-334 (BAH), 2025 WL 720914 (D.D.C. Mar. 6, 2025) (using originalist reasoning to determine that the President has never been viewed to have unrestricted removal power).
[120] *See* Free Enterprise Fund, 561 U.S. 477 (2010); Seila Law, 591 U.S. 197 (2020); Lucia v. Sec. & Exch. Comm'n, 585 U.S. 237 (2018).

the President the power to fire the officials tasked with this oversight. This precise concern underpinned the Supreme Court's decision in *United States v. Nixon*.[121] The Constitution would be rendered nearly meaningless if Congress and the courts must sit idly by while the President freely violates the law and constitution. Congressional authority over executive officers and employees plays a critical role in preventing abuses of Presidential power; no other judicial or legislative powers sufficiently guard against the possibility of such abuses.

## E. The Proposed Rule would violate the CSRA and the Constitution by allowing the President to freely fire civil servants without due process

At its core, the Proposed Rule would allow the President to freely remove almost any civil servant, including those who do not exercise substantial policymaking authority. This would clearly violate the CSRA, which only allows the President to freely remove civil servants who have the substantial authority to make, determine, or advocate for policy on behalf of the United States. Nevertheless, OPM attempts to defend the Proposed Rule by arguing that federal law and the Constitution support its broad assertion of Presidential removal power. These arguments are rife with errors of law, fact, and logical reasoning.

OPM claims that the Rule merely reflects the plain meaning of the CSRA and 5 U.S.C. § 3302, but its reasoning clearly belies this assertion. First, OPM attempts to substitute the term "policy-influencing" for the terms "policy-making, policy-determining, or policy-advocating," despite the fact that no reasonable person would consider these terms synonymous.[122] Next, OPM misreads a disjunctive list defining SES positions to conclude that such positions are necessarily "policy-making," and therefore "policy-making" positions can be defined according to the definition of SES positions.[123] This interpretation rests on a glaring logical error — SES positions are not definitionally policy-making — and leads to patently absurd results. Under OPM's interpretation, a postal worker who supervises and leads a small team of postal workers would be considered to occupy a "policy-making, policy-determining, or policy-advocating" position. Not only does

[121] *See* United States v. Nixon, 418 U.S. 683 (1974). While the President's removal power was not directly at issue in this case, it is widely understood that the Court's decision was influenced by the President's recent firing of Archibald Cox, the special prosecutor tasked with investigating the Watergate scandal.
[122] *See supra* note 65 and accompanying text.
[123] *See supra* note 69 and accompanying text.

OPM's reading of the CSRA defy logic and common sense, it also undermines a core purpose of the CSRA. In passing the CSRA, Congress clearly intended to protect civil servants from arbitrary dismissal, yet the Proposed Rule would effectively nullify this aim by granting the President the power to fire almost every civil servant without cause.

OPM next argues that 5 U.S.C. § 3302 separately grants the President unrestricted authority to except any civil servant position for "any reason he finds necessary." Of course, this novel interpretation would also undermine the CSRA's purpose, and it would render the specific exceptions in Section 7511(b) meaningless. OPM cannot reasonably rely on a vague, general provision added to the "Examination" subchapter 12 years before the CSRA to override the specific, unambiguous provisions of the CSRA. If Congress intended such a result, it would not have wasted its words on Section 7511(b).

OPM then defends the Proposed Rule as consistent with constitutional due process, arguing that precedent allows agencies to remove statutory entitlements through "legislative" rulemaking. OPM cites no precedent that establishes such agency authority, and it notably fails to discuss any of the precedent that directly contradicts such a claim. Even more crucially, there is no basis for the idea that an agency may undo congressional action through "legislative" rulemaking. Only Congress may remove an entitlement that it created without violating procedural due process.

Finally, OPM asserts that a different interpretation of the CSRA would violate the President's implied power of removal. This presents a false choice between rescinding the April 2024 rule and adopting OPM's broad interpretation of the CSRA. OPM only provides arguments against the April 2024 rule while providing no reason that its interpretation is constitutionally required. Furthermore, the CSRA does not, in fact, violate the President's power of removal because Section 7511(b) clearly allows the President to remove officers that the President has the constitutional authority to remove. The CSRA actually grants the President removal authority that extends *further* than the Constitution.

In sum, OPM offers no legally sound defense of its Proposed Rule. It uses logical fallacies — rather than accepted canons of construction — to justify its absurd and untenable statutory interpretation. It claims, without evidence, that it has the (unconstitutional) authority to reverse statutory entitlements without violating due process. It further attempts to present its interpretation

as constitutionally required by the President's implied removal power, despite the fact that the Proposed Rule would extend this power much further than the Constitution, which already aligns with the exception in Section 7511(b). Contrary to OPM's claims, the Proposed Rule would violate the CSRA by allowing the President the power to dismiss civil servants without statutory or constitutional authorization. OPM cannot legally adopt the Proposed Rule; it must go back to the drawing board.

# Conclusion

As we have described above, we oppose the Proposed Rule because it is unconstitutional and would effectively replace the merit-based civil service system with a spoils system. These changes would harm scientific integrity at federal agencies and block the kind of scientific progress we need to improve public health and sustain economic growth. Given the substantial shortcomings and harmful projected impacts of this Proposed Rule, we request that OPM withdraw it.

Sincerely,

Center for Progressive Reform
Climate Science Legal Defense Fund
Jacobs Institute of Women's Health
Science to Inform, LLC
Union of Concerned Scientists