IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL TREASURY EMPLOYEES UNION, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 1:05CV00201 RMC
MICHAEL CHERTOFF, SECRETARY, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,[1]	)	
Defendants.	)	

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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[1] Linda M. Springer was confirmed as the new director of the Office of Personnel Management. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, she should be substituted for Dan G. Blair as defendant in this action.

PRELIMINARY STATEMENT

As defendants explained in their prior memoranda, the central purpose of the Homeland Security Act ("HSA") is to improve the nation's ability to prevent further acts of terrorism by consolidating responsibilities relating to homeland security in a single, newly created Department of Homeland Security ("DHS"). As detailed in the legislative history, Congress concluded that the new Department's ability to succeed in preventing violent attacks against the United States depended, to a substantial degree, on the development and implementation of a new flexible and contemporary human resources management ("HR") system that would both enable the Secretary of DHS to meld together numerous federal agencies into a cohesive and integrated organization and, at the same time, enable the Department to respond quickly and effectively to evolving threats to the nation's security.

Shortly after the HSA was enacted, the Secretary of DHS and the Director of the Office of Personnel Management ("OPM") proceeded with the development of a new HR system in close coordination with the major labor organizations representing DHS employees – a process which culminated in the publication of the regulation challenged here on February 1, 2005. Since that time, DHS has continued to work closely with labor organizations to resolve a multitude of issues relating to the implementation of the new system when the rule becomes effective on August 1, 2005.

On the eve of the implementation of the new system, plaintiffs ask this Court to enter a preliminary injunction that would bring this entire process to a halt. Such an injunction would essentially tie the hands of the Department's managers and perpetuate by court order precisely the type of inflexible procedures and requirements in myriad collective bargaining agreements that the HSA sought to eliminate, and ultimately frustrate and undermine the central objective of the HSA which is to enhance (not impair) the Department's ability to deal flexibly and effectively with the

scourge of terrorism. Because such an injunction is not only unwarranted, but manifestly contrary to the public interest, defendants urge the Court to reject plaintiffs' request in its entirety.

At the outset, plaintiffs' motion for injunctive relief must be denied because the Court lacks subject matter jurisdiction over plaintiffs' underlying claims. As defendants previously explained, all of plaintiffs' claims with the exception of their challenge to the regulation defining management rights must be dismissed under Article III for lack of standing and ripeness. Plaintiffs' claim that the management rights regulation improperly limits the scope of collective bargaining is, in turn, jurisdictionally barred by the Federal Service Labor Management Relations Statute which confers exclusive jurisdiction upon the Federal Labor Relations Authority ("FLRA") to hear and determine such claims subject to review by the United States Courts of Appeals. Because the Court lacks subject matter jurisdiction, it is not empowered to proceed at all with the adjudication of plaintiffs' claims, much less grant the broad injunctive relief that plaintiffs seek here.

In addition, plaintiffs have failed to satisfy any of the traditional requirements for equitable relief, much less justify their extraordinary request to effectively shut down the Department's new HR system. As defendants already have demonstrated, even if plaintiffs were able to surmount the fundamental jurisdictional infirmities that exist in this case, their complaint must still be dismissed for failure to state a claim upon which relief can be granted. Consequently, plaintiffs have *no* likelihood of success on the merits which, in and of itself, requires the denial of their motion for preliminary injunction.

Plaintiffs also have not and cannot establish that they will suffer irreparable harm if the challenged provisions become effective on August 1st. Plaintiffs' claim that they will suffer irreparable harm as a result of changes in collective bargaining agreement ("CBA") provisions

governing overtime and reassignment of employees is groundless. The most recent CBA between the NTEU and the Customs Service, which plaintiffs rely upon for their claim of irreparable injury, expired six years ago; and the Customs Service adopted a policy which superseded the particular provisions in that agreement that govern overtime and reassignment of employees nearly four years ago. Therefore, whatever harm plaintiffs may have suffered as a result of the agency's refusal to retain these provisions is not attributable to the regulation and would not be remedied by an injunction prohibiting implementation of the regulation. Moreover, plaintiffs have already unsuccessfully sought redress for the harm alleged here before both the FLRA and the D.C. Circuit and cannot relitigate these same claims in this action.

Plaintiffs' remaining claims of irreparable harm are equally insubstantial. With the sole exception of the management rights regulation, plaintiffs have not even alleged a cognizable injury-in-fact sufficient to confer standing to challenge the regulatory provisions at issue here - - much less an irreparable injury sufficient to warrant equitable relief. Similarly, plaintiffs have wholly failed to demonstrate that they would suffer any irreparable injury if the management rights regulation were to become effective. That regulation, if implemented, would merely limit the scope of bargaining on selected issues during the brief period needed by the Court to resolve the parties' pending dispositive motions. Plaintiffs' unsubstantiated speculation that one or more of the unions might lose members if there is any limitation on bargaining during the interim falls far short of the type of certain, imminent and irreparable harm required for preliminary injunctive relief.

Plaintiffs fare no better on the remaining factors governing equitable relief. Whatever harm plaintiffs may suffer as a result of the limitations on the scope of bargaining during the brief period needed by the Court to decide the parties' pending dispositive motions pales in comparison to the

potentially disastrous consequences to our nation and the general public if inflexible procedures negotiated long before the current wave of terrorist violence impair DHS's ability to prevent further acts of terrorism. Moreover, the injunction sought here would frustrate the central objective of the HSA to provide the Secretary of DHS with the management flexibility necessary to respond to rapidly evolving threats to the nation's security, and hence is clearly contrary to the public interest. Plaintiffs' motion accordingly should be denied in its entirety.

ARGUMENT

I. BECAUSE THE COURT LACKS SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' CLAIMS IN THIS ACTION, PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION MUST BE DENIED

It is established that a federal court cannot grant any form of relief in a proceeding over which it lacks subject matter jurisdiction. As the Supreme Court has explained: "Without jurisdiction, the court *may not proceed at all* in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the *only* function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 7 Wall 506, 514, 19 L.Ed. 264 (1868)) (emphasis added); Fed. R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").

"The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" *Steel Co.*, 523 U.S. at 94-95 (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)); *accord Ruhrgas AG v. Marathon Oil Company*, 526 U.S. 574, 583 (1999) ("Article III generally requires a federal court to satisfy itself of its jurisdiction over the subject

matter before it considers the merits of a case. . . . Subject-matter limitations on federal jurisdiction serve institutional interests [by] keep[ing] the federal courts within the bounds the Constitution and Congress have prescribed.").

Thus, "resolving a merits issue while jurisdiction is in doubt carries the courts beyond the bounds of authorized judicial action . . . and violates the principle that the first and fundamental question is that of jurisdiction." *In re Minister Papandreou*, 139 F.3d 247, 253 (D.C. Cir. 1998) (internal quotation omitted). Concomitantly, when the Court lacks subject matter jurisdiction over the claims asserted, the Court is obliged to deny a motion for preliminary injunction and need not and should not assess the strength or weakness of the parties' claims on the merits. *E.g.*, *Crow Creek Sioux Tribe v. Brownlee*, 331 F.3d 912 , 915 (D.C. Cir. 2003) ("We need not delve into the Tribe's myriad constitutional and statutory claims because the Tribe lacks Article III standing to bring this action in federal court.").

As defendants previously established, all of plaintiffs' claims, with the exception of their challenge to the regulation governing management rights (5 C.F.R. § 9701.511), must be dismissed for lack of standing and ripeness. *See generally* Consolidated Memorandum in Support of Defendants' Motion to Dismiss and in Opposition to Plaintiffs' Motion for Summary Judgment ("Def. Dismiss Mem.") at 11-16; Reply Memorandum in Support of Defendants' Motion to Dismiss ("Def. Dismiss Reply") at 3-17. Moreover, all of plaintiffs' claims, *including* their challenge to the management rights regulation, are jurisdictionally barred by statutory provisions in the Federal Service Labor Management Relations Act (Chapter 71) and the Civil Service Reform Act ("CSRA") that establish exclusive schemes for administrative and judicial review of claims such as those brought by plaintiffs here. *See generally* Def. Dismiss Mem. at 19-26; Def. Dismiss Reply at 17-21.

Because these issues are addressed comprehensively in defendants' prior memoranda, little further discussion is necessary here. We address only plaintiffs' most recent attempt to establish a cognizable injury-in-fact which plaintiffs now describe as an "irreparable harm." Specifically, plaintiffs assert for the first time in their motion for preliminary injunction that the regulation challenged in this action will adversely affect the rights of Customs and Border Protection ("CBP") employees with respect to the assignment of overtime work and reassignment of employees under a CBA between plaintiff NTEU and the former Customs Service. *See* Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction ("Pl. PI Mem.") at 5-8; Declaration of Jonathan Levine, ¶¶ 15-21.

As we explain below, these claims are entirely groundless. First, the CBA referenced in NTEU's motion expired on September 30, 1999, Declaration of Robert M. Smith ("Smith Declar."), ¶ 5 and Exhibit A thereto; and the Customs Service adopted a new National Inspectional and Assignment Policy ("NIAP") that became effective on October 1, 2001, and, by its terms, supersedes the specific provisions in the CBA relating to the assignment of overtime work and reassignment of employees. Smith Declar., ¶¶ 6-8 and Exhibit B thereto. Consequently, "none of the specific contractual requirements mentioned by Mr. Levine in his Declaration of June 21, 2005, regarding overtime assignment and reassignment remain in effect." Smith Declar., ¶ 9. Second, the NTEU has already challenged the validity of the 2001 NIAP before an arbitrator and subsequently in proceedings before the FLRA and the D.C. Circuit. Smith Declar., ¶ 10. Its challenge to the validity of the NIAP was rejected by the FLRA, *U.S. Department of the Treasury, U.S. Customs Service and National Treasury Employees Union*, 59 FLRA No. 128 (2004), and the D.C. Circuit just denied plaintiff NTEU's petition for review of the FLRA's decision, *National Treasury Employees Union*

v. Federal Labor Relations Authority, No. 04-1137 (D.C. Cir. July 8, 2005). The NTEU cannot relitigate the enforceability of its CBA in this action.

In sum, plaintiffs' claim of "irreparable harm" rests on an asserted conflict between the challenged regulation and a CBA which has expired and included provisions that were superseded and rendered unenforceable by a policy adopted by the Customs Service three and a half years before the regulation was published. These provisions of the CBA would remain unenforceable regardless of whether the new regulation becomes effective. In these circumstances, there is simply no causal nexus between plaintiffs' alleged injuries and the regulation they challenge. Nor would plaintiffs' asserted injuries be redressed by an injunction prohibiting enforcement of the regulation. Consequently, plaintiffs' most recent claims of injury do not even arguably provide standing to challenge the regulation.

Plaintiffs alternatively speculate that implementation of the regulation may adversely affect the outcome of an election to determine which of three unions should be the exclusive representative of a consolidated bargaining unit for CPB employees. Declaration of Colleen M. Kelley dated June 20, 2005 ("Kelley Declar."), ¶ 6. However, even if there were some basis for plaintiffs' conjecture about the effect of the regulation on employee votes in an election, such an effect could occur only if an election occurs. *Id.* Although the CPB has filed a petition with the FLRA seeking to realign the existing CPB bargaining units into a single unit, *id.*, ¶ 3, plaintiffs do not suggest that the FLRA has acted on the petition. Nor do they suggest that the FLRA has ordered an election. In these circumstances, the asserted "harm" that might result if an election were held is remote, and falls far short of the type of actual or certainly impending injury necessary to satisfy Article III standing and ripeness requirements.

II. EVEN IF THE COURT HAD SUBJECT MATTER JURISDICTION IN THIS ACTION, PLAINTIFFS HAVE PLAINLY FAILED TO ESTABLISH ANY BASIS FOR ENTRY OF A PRELIMINARY INJUNCTION

In this circuit, a preliminary injunction "is considered an extraordinary remedy" that should "be granted *only* upon a clear showing of entitlement." *Emily's List v. Federal Election Comm'n*, 362 F. Supp. 2d 43, 51 (D.D.C. 2005); *Arrow Air, Inc. v. United States*, 649 F. Supp. 993, 998 (D.D.C. 1986) (emphasis added); *see also Association of Flight Attendants-CWA v. Pension Benefit Guar. Corp.*, __ F. Supp. 2d __, 2005 WL 1350061, at *4 (D.D.C., June 8, 2005) ("A preliminary injunction is an extraordinary form of relief that should not be granted absent a clear and convincing showing by the moving party."). Such a showing requires plaintiffs to demonstrate that (1) there is a substantial likelihood they will succeed on the merits; (2) they will be irreparably injured if an injunction is not granted; (3) the threatened injury to them outweighs the harm to others; and (4) the public interest will be furthered by the injunction. *See Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1317-18 (D.C. Cir. 1998). These factors "interrelate on a sliding scale and must be balanced against each other." *Id.* at 1318. Thus, if the arguments for one factor are particularly strong, an injunction may issue even though the arguments for the remaining factors are not. *Id.* at 1318. However, if a plaintiff "makes a particularly weak showing on one factor . . . the other factors may not be enough to compensate." *CWA*, 2005 WL 1350061, at * 4. Because that is the case here, the Court should deny plaintiffs' motion.

A. Plaintiffs Are Not Likely to Succeed on the Merits of Their Claims

Notwithstanding the "fluid nature" of the Court's inquiry, "it is particularly important for the [plaintiff] to demonstrate a substantial likelihood of success on the merits." *Emily's List*, 362 F. Supp. 2d at 51 (internal quotations omitted). The failure to do so "effectively decides the

preliminary injunction issue." *Serono*, 158 F.3d at 1326 (vacating preliminary injunction where plaintiff was not likely to succeed on the merits and the remaining factors were either "a wash" or "inextricably linked to the merits"); *Davenport v. Int'l Brotherhood of Teamsters, AFL-CIO*, 166 F.3d 356, 366 (D.C. Cir. 1999) (where "the plaintiffs are not likely to succeed on the merits, it would take a very strong showing with respect to the other preliminary injunction factors to turn the tide in plaintiff's favor").

For the reasons identified in defendants' prior memoranda, plaintiffs' claims must be summarily dismissed for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. *See generally* Def. Dismiss Mem. at 11-70; Def. Dismiss Reply at 3-45. Thus, plaintiffs have not come close to carrying their burden of establishing a likelihood of success on the merits of those claims.

B. Plaintiffs Have Not Demonstrated That They Will Suffer Immediate Irreparable Harm If An Injunction Is Not Granted

The "basis for injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Wisconsin Gas Co. v. Federal Energy Regulatory Comm'n*, 758 F.2d 669, 674 (D.C. Cir. 1985); *see also Emily's List*, 362 F. Supp. 2d at 52. Plaintiffs' failure to demonstrate immediate irreparable harm from any of the challenged provisions of the DHS regulations is reason alone for this Court to deny this motion. *See CWA*, 2005 WL 1350061, at *4 (noting that "if a party makes no showing of irreparable injury, the court may deny the motion for injunctive relief without considering the other factors"); *Emily's List*, 362 F. Supp. 2d at 52 (noting that "if the movant makes no showing of irreparable injury, that alone is sufficient for a district court to refuse to grant preliminary injunctive relief" (internal quotations omitted)).

The phrase "irreparable harm does not readily lend itself to definition." *Wisconsin Gas Co.*, 758 F.2d at 674. Courts, however, have developed several "well known and indisputable" principles that guide their determination of whether the plaintiff has satisfied this requirement of preliminary relief. *Id.* First, the injury must be "both certain and great" and "of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Emily's List*, 362 F. Supp. 2d at 52 (internal quotations omitted); *Wisconsin Gas Co.*, 758 F.2d at 674 (same). "Injunctive relief will not be granted against something merely feared as liable to occur at some indefinite time." *Id.* (internal quotations omitted). Second, economic loss "does not, in and of itself, constitute irreparable harm." *Id.* "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of [an injunction] are not enough." *Id.*; *Emily's List*, 362 F. Supp. 2d at 52. Third, the plaintiff must substantiate the claim that irreparable harm is "likely" to occur. *Wisconsin Gas Co.*, 758 F.2d at 674. "Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur." *Id.* Therefore, the plaintiff "must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future." *Id.* Finally, the alleged harm must result directly from the action the plaintiff seeks to enjoin. *Id.* Consideration of these guiding principles compels denial of the instant motion.

As discussed in defendants' earlier briefs, plaintiffs have not alleged a cognizable injury-in-fact sufficient to confer standing to challenge any portion of the final rule with the sole exception of the provision governing management rights (§9701.511). *See* Def. Dismiss Mem. at 12-16; Def. Dismiss Reply Br. at 3-12. As we demonstrate below, the alleged "irreparable injuries" identified by plaintiffs as warranting a preliminary injunction, like the injuries identified in their complaint,

are largely speculative and theoretical and therefore wholly insufficient to establish either standing or irreparable harm.[2] Plaintiffs additionally allege harm that is either self-inflicted or economic in nature, and thus subject to later remedy. *See* Pl. PI Mem. at 5-19. Such allegations likewise fail to satisfy plaintiffs' burden to establish irreparable harm.

1. Plaintiffs Have Failed To Demonstrate That Any Of Their Members Will Suffer Irreparable Harm If Injunctive Relief Is Denied

Plaintiffs argue that their individual member employees will be irreparably harmed if injunctive relief is denied because the challenged regulations will render invalid existing CBA provisions governing overtime and work assignments. *See* Pl. PI Mem. at 6-8. As a result of the invalidation of such provisions, union members allegedly "will be deprived of the opportunity to perform work viewed as important, challenging, or even career enhancing" and unable "to exchange overtime assignments and to expect periods of rest on scheduled days off." Pl. PI Mem. at 7, 8. However, as discussed in Point I above, the CBA which forms the basis for these claims expired six years ago, and the particular provisions relating to overtime assignments and reassignments of agency personnel in the expired agreement were superseded by the 2001 NIAP and have been inoperative for many years. Moreover, the FLRA has determined that Customs acted lawfully in doing so for reasons wholly unrelated to the regulation that plaintiffs challenge in this case, and the D.C. Circuit has upheld that decision. For these reasons, plaintiffs' allegations about the terms of this expired agreement plainly fail to establish that the regulation has caused or will cause any

[2] *See Council on Regulatory & Information Mgmt. v. United States Department of Labor*, 1993 WL 544303, at *2 (D.D.C. 1993) (concluding that plaintiff's inability "to meet the threshold injury requirement for standing prevents it from demonstrating an irreparable injury that demands a preliminary injunction").

irreparable harm to plaintiffs' member employees.[3]

Plaintiffs' allegations with respect to these provisions fail to afford any basis for injunctive relief for a second and independent reason. It is settled that allegations of economic loss do not, in and of themselves, constitute irreparable harm. *See Wisconsin Gas*, 758 F.2d at 674. Consequently, loss of overtime pay for additional hours worked is not irreparable. *See Davenport v. Int'l Brotherhood of Teamsters*, 166 F.3d at 367 (claim that Northwest Airlines unlawfully increased the flight time required of flight attendants in a given duty period while eliminating attendants' per diem pay and hotel allowances did not constitute irreparable harm); *Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union No. 18*, 471 F.2d 872, 877 (6th Cir. 1972) (concluding that "probable loss of overtime" does not constitute irreparable harm). Similarly, the loss of a right to be employed in a particular location is not irreparable. *See, e.g, Aluminum Workers Int'l Union v. Consolidated Aluminum Corp.*, 696 F.2d 437, 444 (6th Cir. 1982) (concluding that temporary unemployment was not irreparable harm); *Teamsters Local Union v. U.S. Truck Co. Holdings, Inc.*, 87 F. Supp. 2d 726, 736 (E.D. Mich. 2000) (concluding that union failed to establish irreparable harm based on allegations that members were "required to take lower paying jobs, suffer financial hardships, or be forced to have other family members seek additional employment to cover lost wages"). Thus, even if the CBA provisions upon which plaintiffs rely remained in effect, plaintiffs'

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[3] While the regulation does provide that any term of a CBA that is inconsistent with a provision of the regulation will become unenforceable as of the effective date of the regulation, 5 C.F.R. § 9701.506(a), plaintiffs identify no imminent harm from this provision beyond their reliance on terms of a CBA that has already expired and been superseded. Moreover, the regulation specifically provides that the unions may appeal DHS's determination that a provision is unenforceable to the Homeland Security Labor Relations Board ("HSLRB"). *Id.* Decisions of the HSLRB are reviewable by the FLRA. *See* 5 C.F.R. § 9701.508(h). In any event, as shown herein, even under the current statutory scheme, plaintiffs cannot circumvent review in the FLRA by seeking relief in the district court.

allegations would plainly be insufficient to establish irreparable harm.

The remaining "injuries" allegedly suffered by plaintiffs' member employees are purely speculative and hypothetical, and therefore insufficient to establish irreparable harm. For instance, plaintiffs suggest that CPB employees "will be subject to reassignment from . . . a seaport on the East Coast to one on the West Coast without being given any choice, or voice, in the matter, or any time to make arrangements before being transferred." Pl. PI Mem. at 7-8. However, plaintiffs have not and cannot establish that such an injury will imminently occur. *See* Smith Declar., ¶ 11 (noting that "I have no knowledge of this ever having been done to any Customs Service or CBP employee during my 28 year career with CBP and the U.S. Customs Service, despite the fact that this type of reassignment could have been required under the 2001 NIAP"). Similarly, plaintiffs fear that "the regulations will undoubtedly encourage the imposition of harsh penalties" upon employees and believe that "employees will lose the opportunity to benefit from procedures and arrangements the Unions might negotiate on their behalf." Pl. PI Mem. at 9-10.

As the D.C. Circuit emphasized in *Wisconsin Gas Co.*, 758 F.2d at 674, "[i]njunctive relief will not be granted against something merely feared as liable to occur at some indefinite time." *Id.*; *see also Clark v. Library of Congress*, 750 F.2d 89, 94 (D.C. Cir. 1984) (holding that "[i]njunctions . . . will not issue to prevent injuries neither extant nor presently threatened, but merely feared" (internal quotations omitted)).[4] Plaintiffs' beliefs and fears therefore cannot justify the issuance of

[4] Plaintiffs' unsubstantiated speculation about employees missing a "child's wedding" (Pl. PI Mem. at 7) or being unable to arrange child care because of an unexpected overtime assignment (*id.* at 8) cannot support a finding of irreparable harm for the same reasons. Plaintiffs have not identified a single union member who as a result of the challenged regulations will be unable to attend his child's wedding or other event. *See* Declaration of Jonathan Levine ¶¶ 18, 20. Plaintiffs' allegations of "what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur." *See Wisconsin Gas*, 758 F.2d at 674.

a preliminary injunction. *Nichols v. Agency for Int'l Dev.*, 18 F. Supp. 2d 1, 5 (D.D.C. 1998) ("To exercise its equitable discretion appropriately, the Court must rely on more than just the [p]laintiff's conclusory beliefs.").

2. Plaintiffs Have Failed To Establish That Any Of The Plaintiff Unions Will Suffer Irreparable Harm If Interim Relief Is Denied

a. Plaintiffs contend that the management rights regulation will have an immediate impact upon the unions' ability to protect their members by restricting the scope of bargaining with respect to the procedures followed in exercising management rights and appropriate arrangements for employees affected by the exercise of management rights. Pl. PI Mem. at 8-9, 10-11. Whether or not that is the case, plaintiffs have failed to demonstrate that any resulting harm is irreparable. If plaintiffs have a legal right to bargain with respect to issues defined as management rights in the regulation, as they claim, then they have a legal remedy available before the FLRA and, once the regulation is implemented, before the HSLRB subject to review by the FLRA. The availability of that remedy forecloses plaintiffs' request for equitable relief here for two reasons. First, injunctions in the federal courts have "always been" premised on irreparable harm and inadequacy of legal remedies. *See Wisconsin Gas*, 758 F.2d at 674. Plaintiffs have made no attempt to demonstrate that the legal remedy available before the FLRA (and ultimately the circuit courts of appeals) is "inadequate." Second, as defendants demonstrated in their prior memoranda, Congress intended that remedy to be the exclusive means for resolving labor management disputes in the federal sector. *E.g.*, *Montplaisir v. Leighton*, 875 F.2d 1, 3 (1st Cir. 1989) (noting that the circuits have "treated the CSRA as establishing the sole mechanism for resolving labor conflicts in the federal arena"). Consequently, the "district courts do not have concurrent jurisdiction over matters within the

exclusive purview of the FLRA." *AFGE v. Loy*, 367 F.3d 932, 935 (D.C. Cir. 2004).[5]

b. Plaintiffs alternatively argue that the new regulation will "irreparably injure the Unions' standing in the workplace." Pl. PI Mem. at 12. In that regard, plaintiffs suggest that the regulation "relegates the Unions to the sidelines" and "will have so weakened the Unions that, should they prevail in this lawsuit, they will have lost crucial support, including union dues." *Id.* at 16. They also assert that the new system "will dramatically reduce the ability of the Unions to attract members by attaining beneficial results for their bargaining units," "[s]ome DHS employees will be disinclined to pay dues in support of labor organizations," and the Unions' "ability to fulfill their responsibilities will be diminished." *Id.* None of the declarations submitted in support of plaintiffs' motion identifies any actual or even expected loss in support for any of the plaintiff unions. Indeed, plaintiffs offer no evidence whatsoever to support the dire predictions of their counsel.

Plaintiffs' conjecture about the potential loss of employee support for the unions falls far short of the type of irreparable harm needed to warrant a preliminary injunction. As we explained above, "[i]njunctive relief will not be granted against something merely feared as liable to occur at

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[5] Plaintiffs suggest that *NTEU v. Devine*, 577 F. Supp. 738 (D.D.C. 1983), supports their contention that limits on the scope of bargaining impose injuries that, in and of themselves, are "sufficiently irreparable to justify preliminary relief." Pl. PI Mem. at 11. That case, however, discusses injury sufficient to confer standing, not entitlement to preliminary relief. The standards are not the same. *See Taylor v. Resolution Trust Corp.*, 56 F.3d 1497, 1507 (D.C. Cir. 1995) (concluding that "while we hold that GAP has standing to *bring suit* under the First Amendment, we find that it has not sufficiently alleged a continuing injury that would justify granting its motion for *preliminary relief*" (emphasis in original)); *e.g., Pittsburgh Newspaper Printing Pressmen's Union No. 9 v. Pittsburgh Press Co.*, 479 F.2d 607, 610 (3d Cir. 1973) (denying preliminary injunction supported by "speculative assertions by union officials that the union would suffer irreparable harm by its members leaving town, its lessened ability to attract and train new pressmen and typographers, and the diminishment of payments into the pension fund"). Therefore, even if plaintiffs' alleged harm was sufficient for standing purposes, it does not follow that they are sufficient for preliminary relief.

some indefinite time." *Wisconsin Gas Co.*, 758 F.2d at 674; *accord Clark v. Library of Congress*, 750 F.2d at 94. Instead, the plaintiff "must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future." *Wisconsin Gas Co.*, 758 F.2d at 674. Because plaintiffs have failed to provide any evidence to substantiate their fears of eroding employee support, their claims of irreparable injury should be rejected by the Court.[6]

Plaintiffs, nonetheless, contend that courts routinely grant preliminary injunctive relief in circumstances such as those that exist here. However, the cases upon which plaintiffs rely (*see generally* Pl. PI Mem. at 12-17) are inapposite and fail to provide any support for this claim. In *American Federation v. Watson*, 327 U.S. 582, 594-95 (1946), the State of Florida adopted a constitutional amendment that prohibited closed shop agreements between labor organizations and Florida employers, and sought to enforce the amendment through quo warranto proceedings against corporate employers and threats of criminal prosecution. The amendment was challenged by several unions and several employers which alleged that the amendment would cause an "immediate decrease in the membership" of the unions which would "jeopardiz[e] the ability of the unions to function." *Id.* at 589-90. In these circumstances, the court found that the imminent threat to the collective bargaining system would cause irreparable damage. Here, in contrast, the Government has not imposed any proscriptive requirement that forecloses contracts between private parties. Instead, it places limitations on the types of agreements that the Government itself may enter into.

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[6] As explained in Point I, plaintiffs' conjecture about the impact of the regulation on employee votes in an election that has not been scheduled, and may or may not be required by the FLRA, does not even satisfy the injury-in-fact requirements of Article III, much less the more demanding standard of irreparable harm required as a necessary precondition for injunctive relief.

International Union of Electrical, Radio and Machine Workers v. NLRB., 426 F.2d 1243 (1970), involved a company that retaliated against its employees by initiating "a series of temporary and permanent layoffs" after the employees voted in favor of a union. The National Labor Relations Board ("NLRB") issued an order prohibiting the company from interfering with the employees' rights under the National Labor Relations Act and requiring reinstatement of the affected employees. The NLRB then filed a petition in the Court of Appeals seeking enforcement of its order pursuant to 29 U.S.C. § 160(e). The union filed a petition in the same court seeking review of the NLRB's final order pursuant to 29 U.S.C. § 160(f). The court concluded that the company's refusal to bargain with the union was a "clear and flagrant violation of the law," and dealt principally with the question of what relief was appropriate under the circumstances. 426 F.2d at 1248. The opinion makes no reference to irreparable harm or the standards to be applied by the courts in assessing a request for preliminary injunctive relief; instead, the court remanded the case to the NLRB for consideration of further retrospective relief (such as back pay) that would make the affected employees whole. The court's opinion has little relevance in this case because, unlike plaintiffs here, "the Government is not required to make a showing of irreparable injury when it seeks an injunction to give effect to an Act of Congress." *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. NLRB*, 449 F.2d 1046, 1051 (D.C. Cir. 1971). Consequently, the court's discussion of what remedies should be considered by the NLRB is wholly inapposite in this case. Plaintiffs' reliance on *Reuben v. Federal Deposit Insurance Corporation*, 760 F. Supp. 934 (D.D.C. 1991) is misplaced for the same reason. *Id.* at 942 (FLRA does not need to establish irreparable injury to enforce employer's duty to bargain).

Finally, in *Asseo v. Centro Medico Del Turabo*, 900 F.2d 445, 454 (1st Cir. 1990), which was also an action brought by the NLRB, the district court concluded that "an interim bargaining order was the only effective way to prevent irreparable erosion of employee support for the Union." However, in *Asseo*, the record contained evidence that a "chief union organizer" had not been hired by the company and "several . . . technical unit employees indicated to the Union that they would not continue to support it because they feared retaliation by their employer." *Id.* Based on this evidence, the court concluded that "there was a very real danger that if [the employer] continued to withhold recognition from the Union, employee support could erode to such an extent that the Union could no longer represent those employees." *Id.* Here, in contrast, DHS has not withheld recognition from any of the plaintiff unions, has continued to engage in negotiations with the unions, and has continued to collaborate with the unions respect to the implementation of the final rule. Moreover, plaintiffs have offered *no* evidence whatsoever suggesting that the regulation challenged here has eroded employee support for the unions' activities. Thus, plaintiffs' suggestion that the regulation may result in the erosion of support among employees for the unions is wholly unsubstantiated and rests on nothing more than unadorned speculation of counsel.

In contrast to the cases described above, plaintiffs here have eschewed the statutory remedial scheme established by Congress for resolution of labor management disputes in the federal sector which is intended to "leave the enforcement of union and agency duties under the [CSRA] to . . . the FLRA and to confine the courts to the role given them under the Act." *Karahalios v. National Fed'n of Federal Employees*, 489 U.S. 527, 537 (1989). The CSRA provides recourse to the courts in only three instances: "persons aggrieved by a final FLRA order may seek review in an appropriate court of appeals; the FLRA may seek judicial enforcement of its orders; and temporary injunctive relief

is available *to the FLRA* to assist in the discharge of its duties." *Id.* at 532 (citations omitted; emphasis added). Section 7123(d) of the statute specifically authorizes the FLRA to seek appropriate temporary relief (including a restraining order) and makes no provision for unions, such as plaintiffs here, to obtain such relief. Since Congress has spoken to when interim relief can be sought, and by whom, that congressional choice forecloses plaintiffs' request for a preliminary injunction here. *Karahalios*, 489 U.S. at 536-37. Plaintiffs seek the Court's assistance in an end run around this enforcement scheme established by Congress through an action for injunctive relief in this Court.

As the D.C. Circuit has recognized, the "district courts do not have concurrent jurisdiction over matters within the exclusive purview of the FLRA." *AFGE v. Loy*, 367 F.3d 932, 935 (D.C. Cir. 2004). In essence, plaintiffs seek to preserve the current scheme under Chapter 71 of the CSRA as the status quo. Yet, that very scheme, as well as the scheme under the new regulations, precludes district court review. In these circumstances, there is plainly no reason to relax the traditional standards for injunctive relief in the district courts as the courts in this Circuit have done in cases brought by the NLRB and the FLRA. Quite to the contrary, if the Court were to award injunctive relief in a case such as this one - - that falls within the exclusive jurisdiction of the FLRA[7] - - it would frustrate and undermine the exclusive remedial scheme established by Congress rather than enforce the statute.[8]

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[7] Similarly, as defendants previously have shown, plaintiffs' challenges to the adverse action regulations must be brought before the Merit Systems Protection Board ("MSPB"). *See* Def. Dismiss Mem. at 23-26.

[8] If the Court were to determine that preliminary relief is nevertheless appropriate, there is no basis whatsoever for the broad relief sought by plaintiffs here. *See* Pl. PI Mem. at 2 (requesting injunction as to entire subparts of the regulation when Plaintiffs have only challenged several specific provisions). The "law requires that courts closely tailor injunctions to the harm that they address." *Alpo Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 972 (D.C. Cir. 1990). There is

c. Plaintiffs lastly contend that, if the regulations become effective, the unions will have to expend resources "challenging agency decisions regarding which aspects of negotiated agreements are no longer enforceable," "renegotiating collective bargaining agreements," and "participating in the scheme." *See* Pl. PI Mem. at 17-19 (contending that "[t]he Unions will suffer irreparable injury because the new regulations will drain their resources and require them to submit to an illegal scheme of administrative review"). However, it is "well settled that economic loss does not, in and of itself, constitute irreparable harm." *Wisconsin Gas Co.*, 758 F.2d at 674; *see also id.* (quoting *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 925 (D.C. Cir. 1958)) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of [an injunction] are not enough."). Therefore, the fact that plaintiffs may choose to expend time and resources as a result of the implementation of the challenged rule is not an irreparable injury and fails to afford any basis for granting a preliminary injunction.[9]

Indeed, such allegations are not even sufficient to establish injury-in-fact for standing purposes, let alone *irreparable* injury in the preliminary injunction context. *See, e.g., Fair Employment Council of Greater Washington v. BMC Marketing Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994) (concluding that while "[t]he diversion of resources to testing might well harm the Council's other programs, for money spent on testing is money that is not spent on other things . .

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no colorable basis for enjoining an *entire* subpart of the regulation based upon claims of irreparable harm attributable to a single section or subsection within that regulation.

[9] *A fortiori*, plaintiffs' expectations regarding future decisions with respect to the allocation of unions' resources (*see, e.g.,* Declaration of Jonathan Levine ¶ 9 ("NTEU is certain to request to enter into [] negotiations . . . [which] will undoubtedly require the investment of significant time, effort, and resources by NTEU") do not constitute irreparable harm, and can hardly provide a basis for granting a preliminary injunction.

. . this particular harm is self-inflicted; it results not from any actions taken by BMC, but rather from the Council's own budgetary choices"); *Association for Retarded Citizens of Dallas v. Dallas County Mental Health & Mental Retardation Center Board of Trustees*, 19 F.3d 241, 244 (5th Cir. 1994) (concluding that "[t]he mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization"). "An organization cannot, of course, manufacture the injury necessary . . . from its expenditure of resources on that very suit." *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990). Nor may it do so through educational and legislative initiatives. *See National Taxpayers Union v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995) (concluding that an organization's "educational and legislative initiatives . . . do[] not constitute an injury in fact"). Otherwise, "an organization devoted exclusively to advancing more rigorous enforcement of selected laws could secure standing simply by showing that one alleged illegality had 'deflected' it from pursuit of another." *Fair Employment*, 28 F.3d at 1277.

Since plaintiffs have failed to establish that they will suffer any irreparable injury warranting the extraordinary relief sought here, their motion for preliminary injunction should be denied.[10]

[10] If the Court were to determine that preliminary relief is nevertheless appropriate, there is no basis whatsoever for the broad relief sought by plaintiffs here. *See* Pl. PI Mem. at 2 (requesting injunction as to entire subparts of the regulation when Plaintiffs have only challenged several specific provisions). The "law requires that courts closely tailor injunctions to the harm that they address." *Alpo Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 972 (D.C. Cir. 1990). There is no colorable basis for enjoining an *entire* subpart of the regulation based upon claims of irreparable harm attributable to a single section or subsection within that regulation.

C. The Balance Of Harms And Public Interest Favor Denial Of A Preliminary Injunction

In light of plaintiffs' insufficient showing on the harm and likelihood of success factors, this Court need not consider the remaining factors. *See CWA*, 2005 WL 1350061, at *4 (noting that "if a party makes no showing of irreparable injury, the court may deny the motion for injunctive relief without considering the other factors" (internal quotations omitted)); *Emily's List*, 362 F. Supp. 2d at 51 (concluding that if plaintiff does not demonstrate a substantial likelihood of success on the merits, "it would take a very strong showing with respect to the other preliminary injunction factors to turn the tide in plaintiff['s] favor" (internal quotations omitted)). Rather, the instant motion should be denied on that basis alone.

However, in light of plaintiffs' insufficient demonstration of irreparable harm, consideration of the balance of harms and public interest also compels denial of plaintiffs' motion. As discussed above, the only harms that plaintiffs contend will result if the challenged regulations become effective are speculative or properly redressable in legal proceedings before the FLRA or the MSPB. Although plaintiffs argue that "the government cannot credibly contend that it will be harmed by a preliminary injunction" and indeed that "the government itself will benefit" from maintaining the status quo, Pl. PI Mem. at 19, 20, the facts are to the contrary.

In denying NTEUs petition for review in *National Treasury Employees Union v. Federal Labor Relations Authority*, No. 04-1137 (D.C. Cir., July 8, 2005), the D.C. Circuit found that to delay the implementation of the NIAP would frustrate Congress's "larger goal" in the current Chapter 71 scheme of promoting an effective and efficient government. Slip Op. at 19. The goal of ensuring that DHS can effectively and efficiently carry out its critical mission is plainly even more

intensely reflected in the HSA; and a preliminary injunction here would clearly thwart that goal. As Congress concluded in enacting the HSA, the "status quo" directly impairs DHS's ability to carry out its mission of preventing terrorist attacks and protecting the public. As explained in the preamble to the regulation, "[n]o Federal agency has ever had a mission that is so broad, complex, dynamic, and vital." 70 Fed. Reg. 5271, 5273 (Feb. 1, 2005). Consequently, DHS "demands unprecedented organizational agility" to "put the right people in the right place at the right time in the defense of our country." *Id.*

The "status quo" as embodied in a CBA negotiated in 1996 that plaintiffs seek to reinstate does not permit such agility. In fact, it is the very rigidity of the kinds of temporary reassignment and details procedures that NTEU describes from the expired CBP agreement "that interfere[s] directly with the agency's ability to deploy its workforce quickly and flexibly in the face of an emerging operational situation. CBP encountered this problem in the wake of the September 11th tragedy when it was required to undertake a lengthy process of determining (a) who does/doesn't want the reassignment, (b) who's most/least senior, and (c) distributing the selection in what the union deems a fair geographic manner -- regardless of manpower or other operational considerations. Such inflexible requirements directly impair the Department's ability to achieve its central mission of preventing terrorist attacks on the United States." Smith Declar. at 12.

Thus, contrary to plaintiffs' suggestion, this is not a case where the status quo has been acceptable for years. *See* Pl. PI Mem. at 20 (erroneously comparing the instant case to *AFL-CIO v. Chao*, where in entering a preliminary injunction, the court noted that "the status quo had been acceptable for 40 years and should therefore be preserved until the challenge could be resolved"). Indeed, the status quo was deemed inadequate from the outset of DHS. *E.g.*, H. Rpt. No. 107-609,

at 64, 67 (July 24, 2002) ("The changing nature of the threats facing the United States requires a new Government structure to protect against invisible enemies that can strike with a wide variety of weapons."); *see also* 184 Cong. Rec. S11017 (Nov. 14, 2002) (Sen. Thompson) ("It is imperative that some sort of procedure is put in place to enable the Secretary to create one unified Department to prevent terrorist attacks and protect our homeland."). In recognition of the current system's inadequacy, Congress gave the Secretary of DHS broad discretion to change the status quo of federal personnel management and to establish a new HR system that would not hinder the agency's mission. *See* 5 U.S.C. § 9701(a) (authorizing the Secretary of Homeland Security "notwithstanding any other provision of [Part III of Title 5] . . . [to] establish, and from time to time adjust, a human resources management system for some or all of the organizational units of [DHS]"). Since April 2003, DHS and OPM have collaborated with department managers, HR experts, and unions to develop such a system. *See* 70 Fed. Reg. 5274. That this process took almost two years does not mean that continued operation under the current system can be tolerated. Rather, it is testament only to the fact that our nation has been very fortunate that none of the threats of the past two years to our homeland has exploited the vulnerabilities of the current HR system.

Plaintiffs' contention that the status quo better promotes collective bargaining provides no justification for abandoning the flexible and contemporary HR system that the statute mandates. While plaintiffs are free to focus exclusively on enhancing collective bargaining rights to the maximum extent feasible, *see* Pl. PI Mem. at 21 (contending that "allowing the new DHS system to take effect deprives the public of the benefits of collective bargaining"), the Secretary (and this Court) must interpret and apply the statute in a manner that advances *all* of the goals of the HSA, not just those that are of paramount importance to plaintiffs. Accordingly, plaintiffs' request for

preliminary relief should be denied because it is directly contrary to the overriding public interest.

CONCLUSION

For the foregoing reasons, defendants respectfully request that the Court deny plaintiffs' motion for a preliminary injunction and grant defendants' motion to dismiss this action.

Dated: July 8, 2005

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL TREASURY EMPLOYEES UNION, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 1:05CV00201 RMC
MICHAEL CHERTOFF, SECRETARY, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,	)	
Defendants.	)	

PROPOSED ORDER

Upon consideration of plaintiffs' motion for preliminary injunction, the opposition thereto, and the complete record in this case, it is hereby

ORDERED that plaintiffs' motion is DENIED and defendants' motion to dismiss is GRANTED.

SO ORDERED.

Dated: _____ _____
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that on this 8th day of July 2005, I caused a copy of the foregoing Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction and the attachment thereto to be filed electronically and that the documents are available for viewing and downloading from the ECF system.

_____
Jacqueline Coleman