

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

PROTECT DEMOCRACY PROJECT )

Plaintiff, )

v. )

Case No. 1:25-cv-01111-EGS

OFFICE OF MANAGEMENT AND )  
BUDGET, et al., )

Defendants. )  
\_\_\_\_\_ )

**DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY  
INJUNCTION OR IN THE ALTERNATIVE PARTIAL SUMMARY JUDGMENT**

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## INTRODUCTION

Plaintiff Protect Democracy Project (“Protect Democracy”), a non-profit organization, attempts to enforce a statute that purports to require the Office of Management and Budget (“OMB”) to publicly post documents apportioning appropriated funds. Protect Democracy seeks a preliminary injunction, and has moved for partial summary judgment, arguing that OMB’s decision to discontinue apportionment postings is contrary to law. The Court should deny both motions.

As a threshold matter, Protect Democracy lacks standing to bring this case. Article III does not permit litigation premised on generalized grievances that are common to all members of the public and where the plaintiff has not suffered a particularized injury, as is the case here. Nor has Protect Democracy suffered the type of harm Congress sought to prevent by requiring disclosure of apportionment documents. Disclosure was aimed at providing the public with insights into government spending and enabling Congress to oversee the Executive Branch’s apportionment of appropriated funds, not to support a private organization’s investment in a website it created to make the OMB website of apportionment documents searchable and its other activities as a middleman between the OMB website and the public.

Protect Democracy’s claim also fails on the merits. The President has delegated to OMB authority to allocate budgetary resources consistent with policy goals. OMB initiates the budget allocation process through its apportionment of appropriated funds. Apportionments are inherently deliberative in nature: they are OMB’s interim funding deliberations, are routinely subject to change based on evolving conditions, and merely reflect OMB’s best judgment in the moment about how an agency should use its funds. The statutes at issue—which would require

OMB's disclosure of deliberative information— violate the separation of powers and Article II, and thus are unconstitutional and unenforceable.

Protect Democracy has also failed to show that it is suffering, or will suffer, irreparable harm in the absence of preliminary relief. Protect Democracy has failed to show that it needs access to the apportionment documents on a preliminary basis and that information regarding the Executive Branch's spending is not otherwise available. The balance of equities and the public interest also cut against Protect Democracy's request. The Court should deny Protect Democracy's request for a preliminary injunction and partial summary judgment.

## **BACKGROUND**

### **I. Statutory Background**

Protect Democracy claims that Defendants have violated the Consolidated Appropriations Act of 2022 ("2022 Act") and the Consolidated Appropriations Act of 2023 ("2023 Act").

The 2022 Act states that the Office of Management and Budget ("OMB") is to "provide to the Committees on Appropriations and the Budget of the House of Representatives and the Senate each document apportioning an appropriation . . . including any associated footnotes, not later than 2 business days after the date of approval of such apportionment by the Office of Management and Budget." Pub. L. 117–103, div. E, title II, § 204(a), 136 Stat. 257 (Mar. 15, 2022). The 2022 Act further provides that OMB is to implement "an automated system to post each document apportioning an appropriation . . . , including any associated footnotes, in a format that qualifies each such document as an Open Government Data Asset . . . not later than 2 business days after the date of approval of such apportionment, and shall place on such website each document apportioning an appropriation . . . , including any associated footnotes, already

approved the current fiscal year . . . .” *Id.* § 204(b). The statute also states that “[e]ach document apportioning an appropriation . . . that is posted on a publicly accessible website . . . shall also include a written explanation by the official approving each such apportionment stating the rationale for any footnotes for apportioned amounts.” *Id.* § 204(c). Finally, the statute provides that OMB or the applicable agency “shall make available classified documentation referenced in any apportionment at the request of the chair or ranking member of any appropriate congressional committee or subcommittee.” *Id.*

The 2023 Act provides that OMB “shall continue to post [to its website] each document apportioning an appropriation . . . including any associated footnotes.” Pub. L. 117–328, div. E, title II, § 204, 136 Stat. 4667 (Dec. 29, 2022) (codified at 31 U.S.C. § 1513 note).

## **II. Factual Background**

### **A. The Apportionment Process**

At the start of each fiscal year, after appropriations bills are passed, the President must “apportion” the budget authority to the relevant federal agencies before each agency may obligate its funds. 31 U.S.C. §§ 1512–13; Declaration of Kelly Kinneen (“Kinneen Decl.”) ¶ 4. The President has delegated this apportionment authority to the OMB Director. E.O. 6166, as amended by E.O. 12,608; Kinneen Decl. ¶ 4.

An apportionment is an OMB-approved plan to use budgetary resources. 31 U.S.C. § 1513(b)); Kinneen Decl. ¶ 5. OMB apportions funds to agencies by time period, specific activity or project, or both. 31 U.S.C. § 1513(b)(1); Kinneen Decl. ¶ 5. Funds are apportioned “as the [apportioning] official considers appropriate.” 31 U.S.C. § 1512(b)(2); Kinneen Decl. ¶ 6. Apportionments involve “significant discretion and judgment regarding the budgetary resources a program requires, including when those resources will be needed and for what purpose.”

Kinneen Decl. ¶ 6. Apportionments are legally binding on agencies, but not on OMB which remains free to alter its apportionment decisions “whenever it so chooses.” Kinneen Decl. ¶ 6. OMB Circular No. A-11 “confirms that agencies must follow instructions from the President, acting through OMB.” Kinneen Decl. ¶ 6.

Apportionments reflect OMB’s forward-looking judgment about how an agency should use its funds during the period when those funds are legally available for obligation. *Id.* ¶ 10. Apportionments “are estimates of the amounts of budgetary resources that OMB anticipates that programs will likely require in the future.” *Id.* ¶ 16. OMB is statutorily required to periodically review and potentially modify apportionment decisions based on changes in circumstances or policy goals. 31 U.S.C. 1512(a); Kinneen Decl. ¶ 10. As such, apportionments are “an internal Executive branch fiscal control mechanism designed to ensure that funds are being spent in accordance with the law and policy.” Kinneen Decl. ¶ 16. They involve “ongoing conversations and instructions to the agencies to ensure that apportionments are updated to reflect current realities and future estimates.” *Id.* ¶ 16. “Apportionments are an interim step in the spending cycle that is only finalized “when the agency, not OMB, takes actions to obligate or expend the funds.” *Id.*

OMB’s apportionment judgment can, and frequently does, change based on changes in economic, foreign policy, or domestic policy changes and events. As long as the agency has not expended the funds for a program, OMB can reapportion the funds for other purposes, within the scope of the appropriation, throughout the fiscal year. *Id.* ¶ 12. Apportionments are part of an iterative, internal Executive Branch decision-making process that involves ongoing discussions between OMB and agencies to ensure that apportionments reflect current realities and future estimates. *Id.* ¶ 12, 15. Following the issuance of an apportionment, “OMB continues to

monitor agency funding, and works with agencies to determine the best use of appropriated funds. It may advise agencies regarding the President's priorities for the use of the funds or on sensitive matters touching on national security or foreign policy." *Id.* ¶ 16.

Two steps generally follow an OMB apportionment—obligation and expenditure. An OMB apportionment is typically required before an agency obligates funds, that is before an agency enters into a legally binding commitment that requires payment for goods or services. *Id.* ¶ 7. An expenditure occurs when an agency makes a payment on an obligation. *Id.* ¶ 8. Although obligations and expenditures cannot exceed the amount apportioned by OMB, an agency is not required to obligate or expend the full amount apportioned. *Id.* ¶ 9.

#### **B. The Apportionment Documents and their Contents.**

OMB communicates apportionment decisions to agencies through Excel sheets that include designated funds for times, periods, projects, or activities. *Id.* ¶ 10. Designated funds are often accompanied by footnotes that give an agency additional information or instructions beyond the dollar amounts. *Id.* ¶ 11. Footnotes often provide additional restrictions on the use of funds, or condition the availability of funds on further action by the agency, or on other future circumstances. *Id.* Footnotes may disclose ongoing negotiations between an agency and OMB. *Id.* Footnotes may also reflect OMB's current policy deliberations, assumptions about program needs, and even future economic assumptions, all of which are subject to change and may precipitate re-apportionment. *Id.*

For example, a recently published apportionment to the Department of Interior included a footnote that conditioned fund allocation on the agency's provision of a spend plan that aligned with OMB's spending goals. Kinneen Decl., Exhibit B. An apportionment to the Department of Homeland Security required the agency to submit written reports justifying its programmatic

spending decisions. *Id.* These documents “demonstrate the iterative nature of OMB’s apportionment decisions because additional engagement was necessary with the agencies before the funding could be provided for the purposes in question.” Kinnen Decl. ¶ 17

In sum, apportionment documents “contain deliberative information that, while not classified, could nevertheless reveal sensitive information about national security, foreign affairs, the industrial base, critical infrastructure, and the like.” *Id.* ¶ 17. An apportionment may also “indicate predecisional details regarding the timing for an infrastructure project, or may indicate the recipient of foreign aid.” *Id.* Since the 2022 Act’s enactment, OMB has been forced to omit “key information that would assist OMB and agencies in guiding allocations of resources throughout the funding process.” *Id.* ¶ 13.

### **C. The Apportionment Reporting Requirements**

From July 2022 through March 24, 2025, OMB operated a publicly available apportionment reporting system in accordance with the 2022 Act. *See id.* ¶ 13. On March 24, 2025, the apportionment database was removed from OMB’s website. On March 29, 2025, OMB explained, in correspondence to members of Congress, that it would no longer operate and maintain the publicly available automated system to which apportionments are posted. Kinnen Decl., Exhibit C. OMB determined that the system improperly requires “disclosure of sensitive, predecisional, and deliberative information. By their nature, apportionments and footnotes contain predecisional and deliberative information because they are interim decisions based on current circumstances and needs, and may be (and are) frequently changed as those circumstances change.” *Id.* OMB further explained that such disclosures have a “chilling effect on deliberations within the Executive Branch,” and have “adversely impacted the candor contained in OMB’s communications with agencies and have undermined OMB’s effectiveness

in supervising agency spending.” *Id.*

### III. Procedural History

On April 14, 2025, Protect Democracy filed its complaint under the Administrative Procedure Act (“APA”) against OMB and its director, in his official capacity, alleging that OMB unlawfully removed its automated system for posting apportionment documents to a publicly accessible website, and the information in that system. ECF No. 1. The Complaint asserts six counts. Count I alleges that Defendants’ failure to maintain a publicly available apportionment database violates the requirements of the 2022 and 2023 Acts, violates a constitutional right or power, and exceeds statutory authority. *Id.* at 16–17. Count II alleges that Defendants’ failure to publicly post apportionments within two days of approval constitutes unreasonable withholding or delay. *Id.* at 17–18. Count III alleges that Defendants’ removal of the apportionment database was arbitrary and capricious. *Id.* at 18–19. Count IV alleges that Defendant Vought’s removal of the apportionment database is *ultra vires* because it violates the 2022 Act, the 2023 Act, and the Constitution. *Id.* at 19–20. Count V seeks a declaration under the Declaratory Judgment Act that Defendants have violated the 2022 and 2023 Acts. *Id.* at 20. Count VI seeks a writ of mandamus compelling Defendants to comply with the 2022 and 2023 Acts. *Id.* at 21. The Complaint seeks declaratory and injunctive, including restoration of the database and an injunction preventing Defendants from removing it again. *Id.* at 22.

On April 27, 2025, Protect Democracy filed a Motion for a Preliminary Injunction, or in the alternative Partial Summary Judgment, seeking a declaration that Defendants have violated the 2022 and 2023 Acts and ordering Defendants to restore the publicly available apportionment database. ECF No. 18. The sole basis of the motion is that Defendants’ conduct is contrary to the 2022 and 2023 Acts.

## LEGAL STANDARD

### A. Preliminary Injunction Standard

“[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (quotation omitted). To warrant preliminary relief, the movant must satisfy a four-prong test, establishing “that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The third and fourth factors of the analysis—harm to others and the public interest—“merge when the Government is the opposing party.” *Nken v. Holder*, 556 U.S. 418, 435 (2009).

Any movant seeking a preliminary injunction, must demonstrate that they will suffer irreparable harm in the absence of the requested relief. *See Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). Irrespective of a party’s showing as to the other three factors necessary to obtain preliminary equitable relief, “[a] . . . failure to show any irreparable harm’ constitutes grounds for denying the motion.” *Sterling Com. Credit-Michigan, LLC v. Phoenix Indus. I, LLC*, 762 F. Supp. 2d 8, 13 (D.D.C. 2011) (quoting *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297). Moreover, relief that “deeply intrudes into the core concerns of the executive branch” may be awarded only upon “an extraordinarily strong showing” as to each element. *Dellinger v. Bessent*, No. 25-5028, 2025 WL 559669, at \*14 (D.C. Cir. Feb. 15, 2025) (quoting *Adams v. Vance*, 570 F.2d 950, 954–55 (D.C. Cir. 1978)).

The particular form of injunction Protect Democracy seeks here—an affirmative injunction ordering the Government to change the status quo—comprises a highly disfavored



form of relief. Mandatory preliminary injunctions, which seek to alter rather than preserve the status quo by compelling affirmative action, “are disfavored as an even more extraordinary remedy than the typical preliminary injunction, especially when directed at the United States Government.” *Strait Shipbrokers Pte. Ltd. v. Blinken*, 560 F. Supp. 3d 81, 92–93 (D.D.C. 2021) (quotation marks and citations omitted); *see also, e.g., Mylan Pharms., Inc. v. Shalala*, 81 F. Supp. 2d 30, 36 (D.D.C. 2000). Plaintiffs seeking such relief “face a significantly heightened burden” of showing an entitlement to relief. *Feng Wang v. Pompeo*, 354 F. Supp. 3d 13, 20 (D.D.C. 2018). “[C]ourts exercise extreme caution in assessing” motions seeking affirmative injunctive relief, and as a general rule they deny such relief unless “the facts and law clearly favor the moving party.” *Shipbrokers*, 560 F. Supp. 3d at 93 (quotation marks omitted).

#### **B. Summary Judgment Standard**

In an APA case, the Federal Rule of Civil Procedure 56(a) summary judgment standard, requiring the court to determine if there is a genuine dispute of material fact, does not apply. Rather, the district court sits as an appellate tribunal, reviewing the administrative record. “[S]ummary judgment serves as a mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and is otherwise consistent with the APA standard of review.” *See Advoc. Christ Med. Ctr. v. Becerra*, No. 17-cv-1519, 2022 WL 2064830 (D.D.C. June 8, 2022), *aff’d*, 80 F.4th 346 (D.C. Cir. 2023) (internal quotation omitted).

### **ARGUMENT**

#### **I. Protect Democracy Cannot Establish Likelihood of Success on the Merits.**

##### **A. Protect Democracy Lacks Standing Under Article III.**

Article III extends only to cases and controversies. U.S. Const. art. III, § 2, cl. 1; *Food and Drug Administration v. Alliance for Hippocratic Medicine*, 602 U.S. 367 (2024); *Coalition*

for *Mercury Free Drugs v. Sebelius*, 671 F.3d 1275, 1278–79 (D.C. Cir. 2012). The party seeking to invoke a federal court’s jurisdiction bears the burden of establishing that it has standing to sue. *Alliance*, 602 U.S. 367 at 378. To establish standing, a plaintiff must show that: (i) it has or likely will suffer an injury in fact, (ii) defendant has or likely will cause plaintiff’s injury, and (iii) the requested judicial relief will likely redress plaintiff’s injury. *Alliance*, 602 U.S. at 380. A plaintiff’s failure to meet just one of the three prongs results in its failure to establish standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (noting that each standing element “must be supported”). In the preliminary injunction context, a plaintiff must show a “substantial likelihood of standing.” *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm’n on Election Integrity (“EPIC”)*, 878 F.3d 371, 377 (D.C. Cir. 2017) (citing *Lujan*, 504 U.S. at 561). “Standing is not dispensed in gross,” but rather must be established for each claim in a complaint. *Id.*

With respect to the first requirement, injury in fact, a plaintiff must show “that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public.” *United States v. Richardson*, 418 U.S. 166, 177–78 (1974) (quoting *Ex parte Levitt*, 302 U.S. 633, 636 (1937)). In *Richardson*, the plaintiff claimed that “without detailed information on [agency] expenditures—and hence its activities—he [could not] follow the actions of Congress or the Executive” or “properly fulfill his obligations as a member of the electorate in voting for candidates seeking national office.” *Id.* at 176. Even fifty years ago, the Supreme Court recognized that “[a]s our society has become more complex, our numbers more vast, our lives more varied, and our resources more strained, citizens increasingly request the intervention of the courts on a greater variety of issues than at any period of our national development.” *Id.* The

Supreme Court, however, concluded that the plaintiff's "generalized grievance" was insufficient to establish standing because plaintiff did not have a "personal stake in the outcome," a "particular, concrete injury," or "a direct injury." *Id.* at 176, 179–80; *Lujan*, 504 U.S. at 576 (concluding "the public interest in proper administration of the laws (specifically, in agencies' observance of a particular, statutorily prescribed procedure) can[not] be converted into an individual right by a statute that denominates it as such"); *TransUnion LLC v. Ramirez*, 594 U.S. 413, 442 (2021) (In order to establish a concrete, information injury, the plaintiff must show "downstream consequences' from failing to receive the required information.").

Despite it being Protect Democracy's burden to establish its standing, neither its complaint nor its motion even mention standing. Protect Democracy does not allege harm to any members that it may have; indeed, it does not claim to have members at all. *See* Mot. at 7 (explaining that Protect Democracy is a "nonpartisan, nonprofit organization dedicated to preventing American democracy from declining into a more authoritarian form of government" that carries out its work by "educating the public about democratic norms and conducting research, analysis, and technology developments to promote fact-based debate"). Protect Democracy's standing as an organization, therefore, can only be based on organizational standing, as opposed to associational standing, which requires that at least one of an organization's members have standing. *See, e.g., Doctors for America v. OPM*, -- F. Supp. 3d --, 2025 WL 452707, at \*3 (D.D.C. Feb. 11, 2025). Nor can Protect Democracy base its standing on harm to third parties not before the Court, such as members of the public or Congress. *Alliance*, 602 U.S. at 392–93.

Protect Democracy's theory of how *it* is harmed by the removal of OMB's public apportionment database is harm to its interest in operating a website that it developed based on

OMB's website. Protect Democracy explains that in October 2024, more than two years after OMB launched its public apportionment database website, it launched its own website called OpenOMB to make it easier for Congress, the press, and the public to use OMB's apportionment information. Ford Decl. (ECF No. 18-4) at ¶¶ 4, Mot. at 7–8. The website pulls the primary source data from OMB's site and stores the files in a database in a manner that allows them to be searched, filtered, and indexed. *Id.* ¶ 10. Protect Democracy claims that OpenOMB is used by Congress, litigants, the press, public policy organizations, academics, libraries, budget experts, and the Wikipedia community, and touts the number of views it has gotten. *Id.* at ¶ 11-12. It claims to have invested “hundreds of hours” building, designing, operating, and improving OpenOMB. *Id.* at ¶ 9. Protect Democracy also provides training to organizations and journalists on how to use OpenOMB. *Id.* Since OMB took down its apportionment website, Protect Democracy claims the number of views OpenOMB has received has dropped, that it cannot launch a new notification feature that it spent resources developing, and that it can no longer provide updated information about apportionments through OpenOMB. *Id.* at ¶¶ 15-17, 19-20.

Protect Democracy attempts to characterize this alleged harm as an informational injury, arguing that it is being deprived of the ability to make OMB's apportionment documents more accessible to the public. But it is really complaining about an injury to its own proprietary interests in OpenOMB, citing the fewer visitors to its website since OMB took down its website, and having to halt the new notification feature that it had been developing. Mot. at 19. In any event, the cases Protect Democracy relies on for its alleged irreparable informational injury are inapposite. *Id.* *Lawyers' Committee for Civil Rights Under Law v. Presidential Advisory Commission on Election Integrity*, 265 F. Supp. 3d 54 (D.D.C. 2017), was a suit seeking disclosure of records of an alleged advisory committee, brought under the Federal Advisory

Committee Act (“FACA”), and *EPIC v. DOJ*, 416 F. Supp. 2d 30 (D.D.C. 2006), was a suit seeking records under the Freedom of Information Act (“FOIA”). In FOIA cases, including ones brought to enforce FOIA’s affirmative disclosure obligations under 5 U.S.C. § 552(a)(2), anyone who has requested specific records from an agency and had their request denied has standing to bring an action; “the requester has suffered a particularized injury because he has requested and been denied information Congress gave him a right to receive.” *Prisology, Inc. v. Federal Bureau of Prisons*, 852 F.3d 1114, 1117 (D.C. Cir. 2017). The same is true when someone requests, and is denied, information under FACA. *Public Citizen v. DOJ*, 491 U.S. 440, 449–50 (1989); see also *Lawyers’ Committee*, 265 F. Supp. 3d at 64 (citing *Public Citizen* in discussing standing). In contrast, here, there are no allegations of a request for, and denial of, apportionment documents to support a particularized injury for purposes of standing. See ECF No. 1.

Nor does Protect Democracy’s asserted informational injury satisfy the test set forth by the D.C. Circuit in *EPIC v. Presidential Advisory Comm’n on Election Integrity* for a denial of access to information to constitute an injury-in-fact for standing purposes. In that *EPIC* case, the plaintiff was a nonprofit organization whose mission was to focus public attention on emerging privacy and civil liberties issues. 878 F.3d at 374. It sued a presidential commission on election integrity, which had requested voter roll data from the states, for failing to complete a privacy impact assessment before collecting that information, as allegedly required by the E-Government Act. *Id.* The court held that EPIC lacked standing based on either informational or organizational injury. *Id.* at 378. The court explained that to demonstrate a “sufficiently concrete and particularized informational injury” for purposes of standing, a plaintiff must show that “(1) it has been deprived of information that, on its interpretation, a statute requires the

government or a third party to disclose to it, and (2) it suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure.” *Id.* (quoting *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016)); *see also* *FEC v. Akins*, 524 U.S. 11, 22 (1998) (noting the presence of a statute that “does seek to protect individuals such as respondents from the kind of harm they say they have suffered, i.e., failing to receive particular information about campaign-related activities.”). The court held that EPIC had not suffered the type of harm that the E-Government Act sought to prevent in requiring agencies to conduct privacy impact assessments, and therefore faltered at the second step. *EPIC*, 878 F.3d at 378. That requirement was meant to protect individuals’ privacy—in EPIC’s challenge, voters’ privacy—not help EPIC further its mission of “ensuring public oversight of record systems” or focusing public attention on privacy issues. *Id.*

Protect Democracy fails at both steps. Neither the 2022 nor the 2023 Acts require disclosure of information to Protect Democracy, but rather require the government’s disclosure of information to the public at large. Protect Democracy also has not suffered the type of harm Congress sought to prevent by requiring disclosure under the 2022 and 2023 Acts. The 2022 and 2023 Acts are intended to provide the public with insights into government spending and to enable Congress to oversee the Executive Branch’s apportionment of appropriated funds. *See* Financial Services and General Government Appropriations for 2023: Hearings Before the Subcomm. on Fin. Servs. & Gen. Gov’t of the H. Comm. on Appropriations, 117th Cong., pt. 5, at 125 (2022) (The 2023 Act “will provide the public with insight into billions of dollars of federal spending, while ensuring this committee, and Congress, can perform its oversight work and ensure the executive branch is faithfully implementing appropriations law.”); Pl. Ex. 7 (In a division-by-division summary of the 2022 Act, then-Chairwoman of the House Appropriations

Committee stated that the 2022 Act would make “apportionments of appropriations publicly available in a timely manner”). As discussed above, the injury Protect Democracy seeks to vindicate is the injury to its own proprietary interests in OpenOMB. That is an interest that is distinct from providing the public with the apportionment materials directly, without any middleman, as Congress did in the 2023 Act, and of course it is also distinct from Congress’s own interest in oversight.

**B. Protect Democracy’s Claim That Defendants’ Conduct Violated the 2022 and 2023 Acts is Unlikely to Succeed Because the Statute Unconstitutionally Infringes Upon Executive Power.**

Protect Democracy is unlikely to succeed on its claim that OMB’s failure to operate and maintain a system to publicly post apportionments is unlawful. Under the 2022 and 2023 Acts, Congress imposed various requirements relating to OMB’s apportionment approvals, including that OMB maintain a publicly available, automated system wherein approved apportionments are posted within two business days of the date of approval and written explanations for any footnotes accompanying approved apportionments are provided. *See* 31 U.S.C. § 1513 note. Because these provisions constitute impermissible Congressional intrusion into Executive functions, Protect Democracy’s enforcement attempt fails.

The Constitution divides power “into three defined categories, legislative, executive and judicial, to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility.” *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 951 (1983). Each Branch is required to act “within its assigned sphere” consistent with Constitutional mandates. *Id.* at 952–53. Although the three Branches are not “entirely separate and distinct,” each Branch must be “free from the control or coercive influence, direct or indirect, of either of the others.” *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (cleaned

up). “Even when a branch does not arrogate power to itself[,] the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties.” *Clinton v. Jones*, 520 U.S. 681, 701 (1997) (cleaned up); *see also Trump v. United States*, 603 U.S. 593, 614 (2024).

Indeed, “[t]he Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts.” *Bowsher v. Synar*, 478 U.S. 714, 722 (1986). Once Congress enacts legislation, “its participation ends” and “can thereafter control the execution of its enactment only indirectly—by passing new legislation.” *Id.* at 733–34 (citation omitted); *Chadha*, 462 U.S. at 958 (holding that a legislative veto violated separation of powers because it permitted Congressional override of a function delegated to the Executive Branch). The Constitution, therefore, prohibits Congressional intrusion into the President’s “supervisory and policy responsibilities,” which include[s] the enforcement of federal law.” *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982).

More specifically, the “application and disbursement of the public moneys in conformity to the general appropriations of the legislature” is executive in nature, and those carrying out such functions “ought to be considered as the assistants or deputies of the chief magistrate.” The Federalist No. 72, at 435–36 (A. Hamilton) (Clinton Rossiter ed. 1961). Apportionment allows the President to act with “energy” and “unity” in the implementation of programs enacted by Congress. The Federalist No. 70, at 472 (A. Hamilton) (Clinton Rossiter ed. 1961). And “the Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts.” *Bowsher*, 478 U.S. at 722. Accordingly, Congress’s power of appropriation has long been understood to not carry with it a power to



infringe upon the constitutional prerogatives of other entities. Thus, once Congress appropriates funds, the power of administering the funds falls on the President.

Here, Congress afforded the President authority to apportion funds as he “considers appropriate.” *See* 15 U.S.C. § 1512(b)(2). And as the statutory scheme recognizes, the Executive Branch’s apportionment decisions are subject to change. *See* 31 U.S.C. § 1512(a) (“An apportionment may be reapportioned under this section.”); *id.* § 1512(d) (“An apportionment or a reapportionment shall be reviewed at least 4 times a year by the official designated in section 1513 of this title to make apportionments.”). In practice, OMB and agencies engage in an iterative process before appropriated funds are obligated and expended. Kinneen Decl. ¶ 16. Following issuance of an apportionment, “OMB continues to monitor agency funding, and works with agencies to determine the best use of appropriated funds.” *Id.* Apportionment are not fixed; OMB frequently re-visits and amends apportionment decisions based on changing circumstances, including ongoing discussions with agencies. *Id.* ¶ 11, 16. OMB’s guidance is not finalized until an agency obligates apportioned funds. *Id.* OMB’s interim apportionment decisions are, therefore, privileged because they are “crucial to fulfillment of the unique role and responsibilities of the executive branch.” *In re Sealed Case*, 121 F.3d 729, 736 (D.C. Cir. 1997) (citations omitted).

The deliberative process privilege—the most common executive privilege—is a privilege grounded in the separation of powers aimed at ensuring “that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism” and preventing “disclosure of proposed policies before they have been finally formulated or adopted.” *Judicial Watch, Inc. v. United States Dep’t of Justice*, 20 F.4th 49, 54 (D.C. Cir. 2021) (quoting *Coastal States Gas*

*Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)); *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8–9 (2001) (“The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government.” (quotation marks omitted)).

The deliberative process privilege, therefore, shields “documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (internal quotation marks omitted); *United States Fish & Wildlife Serv. v. Sierra Club, Inc.*, 592 U.S. 261, 263 (2021) (The privilege “protects from disclosure documents generated during an agency’s deliberations about a policy.”). The privilege applies to documents that are predecisional and deliberative. *In re Sealed Case*, 121 F.3d at 737 (citing *Army Times Publ’g Co. v. Department of the Air Force*, 998 F.2d 1067, 1070 (D.C. Cir. 1993)); *Texaco Puerto Rico, Inc. v. Dep’t of Consumer Affairs*, 60 F.3d 867, 884 (1st Cir. 1995). “The privilege applies when a document is “(1) predecisional, that is, ‘antecedent to the adoption of agency policy,’ and (2) deliberative, that is, actually ‘related to the process by which policies are formulated.’” (quoting *Nat’l Wildlife Fed’n v. U.S. Forest Serv.*, 861 F.2d 1114, 1117 (9th Cir. 1988)).

OMB’s apportionment of funds involves a complex, deliberative process laden with policy considerations. Kineenn Decl. ¶¶ 11–12. Defendants do not dispute that apportionments are legally binding OMB-approved plans, in that agencies are required to act consistent with OMB’s guidance on spending. See OMB Circular No. A-11 § 120.1; Pl.’s Mot. at 13 (quoting

same). The apportionment, however, does not bind OMB, which remains free to change the allocations, as OMB Circular No. A-11 notes. *See* OMB Circular No. A-11 § 120.48. An apportionment is the initial step in the Executive’s spending determination. *Id.* ¶ 11, 16. It is OMB’s initial distribution of funds to accomplish policy goals. *Id.* ¶¶ 10–11. Apportionments are routinely subject to change based on OMB’s continued monitoring of agencies’ actions and re-evaluation of policy goals. *Id.* ¶¶ 10–11. Specifically, “if a significant economic, foreign, or other policy shift occurs, the funds apportioned for those programs may need to change. One program might then have its apportionment reduced, while another program’s apportionment would be increased.” *Id.* ¶ 12. Thus, there is more than a “mere possibility” that OMB will reconsider budgetary allocations, *Sackett v. E.P.A.*, 566 U.S. 120, 127 (2012)—that is in fact the nature of the process.

Requiring OMB to reveal its apportionments results in disclosure of predecisional, deliberative information has a chilling effect on OMB’s decision making, including through OMB’s omission of key details regarding the agency action it seeks prior to making funds available for disbursement. For example, in the past, OMB apportionments for projects or activities (category B apportionments) included “identifying references for the individual loan borrowers” along with “provisional financial commitments subject to ongoing review and potential re-apportionment.” *Id.* ¶ 14. Following enactment of the publication requirement, OMB removed sensitive information from apportionment documents, “which has impeded OMB’s ability to most efficiently provide direction to and receive information from agencies.” *Id.* ¶ 15. While apportionment documents still contain deliberative information, *id.* ¶ 16, OMB has been forced to omit important context that “could reveal information about the Executive

Branch's internal planning and strategy," *id.* ¶ 15. Therefore, these statutes requiring revealing the apportionment information "impair" the performance of the Executive's duties.

Apportionment documents reflect interim deliberations that are part of the Executive's broader spending policy. The Constitution confers on the President the duty to take care that the laws are faithfully executed. When it comes to apportionment authority in particular, it is up to the President to apportion funds as he "considers appropriate." 31 U.S.C. § 1512(b)(2). As the Supreme Court emphasized in *Bowsher*, "exercise[ing] judgment concerning facts that affect the application" of a statute and "interpret[ing] the provisions of the [statute] to determine what budgetary calculations are required," is "the very essence of execution of the law." 478 U.S. at 733.

Specifically, the 2023 Act's requirement that OMB publish information automatically within two days impermissibly burdens the administration of the apportionment process and creates a heightened risk of disclosure of deliberative information. Requiring OMB to disclose approved apportionments hinders the prudent obligation of an appropriation and the execution of an agency program, project, or activity at the risk of divulging deliberative communications. For example, following the issuance of an apportionment, OMB works with agencies to determine the best use of appropriated funds and may advise agencies regarding the President's priorities for funds or on sensitive matters touching on national security or foreign policy. Kinneen Decl. ¶ 17. Due to the expedited timeline for public disclosure, OMB is often forced to omit key policy information from apportionments, thereby forcing it "to choose between compromising confidentiality and using its apportionment authority as Congress intended." *Id.* ¶ 18.

By comparison, FOIA provides at least twenty business days, plus an additional ten days in unusual circumstances, for agencies to collect, review, and produce records in response to

specific requests. 5 U.S.C. § 552(a)(6)(A). That process includes determining whether predecisional, deliberative information is exempt from disclosure. *Id.* § 552(b)(5). Similarly, when Congress requests information or even subpoenas records from the Executive Branch, agencies engage in the accommodation process, which invariably takes longer than two days. *See United States v. American Tel. & Tel. Co.*, 567 F.2d 121 (D.C. Cir. 1977). Yet the 2022 and 2023 Acts require the automatic publication of information in a mere two days. Without the two-day requirement, Protect Democracy’s “contrary to law” claim is reduced to an “unreasonable delay” claim under the APA, which is a separate claim Protect Democracy asserts in its Complaint but does not assert in the instant motion.

In sum, the 2022 and 2023 Acts’ disclosure requirements amount to excessive and impermissible micromanagement, interfering with the President’s constitutional authority over the implementation of appropriations and his discretion in executing the laws. *See* 28 Op. O.L.C. 79, 81 (2004) (Department of Justice’s Office of Legal Counsel letter noting that “the ‘right of disclosure’ statutes prohibit Executive Branch supervision of employee disclosures unconstitutionally limits the ability of the President and his appointees to supervise and control the dissemination of privileged government information.”); 6 Op. O.L.C. 632, 638 (1982) (“[T]he President’s relationship with his subordinates must be free from certain types of interference from the coordinate branches of government in order to permit the President effectively to carry out his constitutionally assigned responsibilities.”); 1 Op. O.L.C. 16, 17 (1977) (similar analysis of Inspector General reporting requirements). Accordingly, the mandatory and automatic reporting requirements are foreclosed by the deliberative process privilege and prohibited by the Constitution.

## II. Protect Democracy Has Failed to Demonstrate that It Will Suffer Irreparable Harm Unless the Court Grants the Requested Relief.

Protect Democracy has also failed to demonstrate that it will suffer irreparable harm if the Court does not enter the requested preliminary injunction. To demonstrate irreparable harm, Protect Democracy must meet a “high standard” of showing that it faces injuries that are “certain, great, actual, and imminent,” *Hi-Tech Pharmacal Co. v. FDA*, 587 F. Supp. 2d 1, 11 (D.D.C. 2008) (citation omitted), and that are “beyond remediation.” *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297; *League of Women Voters v. Newby*, 838 F.3d 1, 7–8 (D.C. Cir. 2016) (Harm must be “certain and great, actual and not theoretical, and so imminent that there is a clear and present need for equitable relief to prevent irreparable harm” (citation and alteration omitted)). Making that showing requires proof that the harm it identifies “is certain to occur in the near future.” *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam). “[T]he failure to show a likelihood of irreparable harms remains, standing alone, sufficient to defeat [a preliminary injunction] motion.” *Navajo Nation v. Azar*, 292 F. Supp. 3d 508, 512 (D.D.C. 2018).

First, Protect Democracy’s generalized claim that it has been unable to monitor and report “on the Executive Branch’s compliance with Congress’s directives” is insufficient to establish irreparable harm. *See* Mot. at 19; *id.* at 11 (“Having data on apportionments is [] crucial to ensuring transparency in how taxpayer dollars are allocated and spent.”). Protect Democracy does not represent the public here, and “injuries to third parties are not a basis to find irreparable harm,” just as they are not a basis to find standing. *Alcresta Therapeutics, Inc. v. Azar*, 318 F. Supp. 3d 321, 326 (D.D.C. 2018); *State v. Musk*, ---F. Supp. 3d ---, 2025 WL 520583, at \*4 (D.D.C. 2025) (“[H]arm that might befall unnamed third parties does not satisfy the irreparable harm requirement in the context of emergency injunctive relief, which must

instead be connected specifically to the parties before the Court.” (quoting *Church v. Biden*, 573 F. Supp. 3d 118, 146 (D.D.C. 2021)). Assuming the public has an overarching desire for apportionment information, such desire does not support a finding of irreparable harm to Protect Democracy.

Second, Protect Democracy’s claim that it is suffering irreparable harm by the diminished utility of its OpenOMB website similarly fails. Mot. at 19. Protect Democracy has not had to fold OpenOMB as a result of the challenged action; rather, it complains of decreased views to its site. Ford Decl. ¶¶ 15–17. Protect Democracy acknowledges that it recently submitted a FOIA request to OMB seeking the apportionment documents that have been taken down from the OMB website. *Id.* ¶ 22. Significantly, Protect Democracy does not claim an inability to obtain the documents through that request, but merely speculates that the documents will be produced in a format that would prevent Protect Democracy from “feed[ing] the information into OpenOMB . . . without significant manual effort.” *Id.* Therefore, by its own admission, Protect Democracy’s claimed harm is not irreparable.

Third, Protect Democracy claims that it has invested significant resources into the development of its website and a new notification feature it intended to make available. However, “[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended . . . are not enough.” *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297. Rather, it is black-letter law that economic harm is generally not irreparable. *Wis. Gas Co.*, 758 F.2d at 674. The only exceptions are “where the loss threatens the very existence of the movant’s business,” *id.* (citation omitted), or “where the claimed economic loss is unrecoverable.” *Safari Club Int’l v. Jewell*, 47 F. Supp. 3d 29, 36 (D.D.C. 2014). Protect Democracy’s investment in its website is, therefore, not cognizable as irreparable harm for purposes of a preliminary injunction.

Finally, Protect Democracy has failed to show that injunctive relief is necessary pending the resolution of this case. In *Citizens for Responsibility & Ethics in Washington v. U.S. DOGE Serv.*, the District Court determined that the plaintiff failed to establish irreparable harm as a result of the defendant's failure to "to expeditiously process" a FOIA request. No. 25-CV-511 (CRC), 2025 WL 752367, at \*5, 9 (D.D.C. Mar. 10, 2025), *reconsideration denied*, No. 25-CV-511 (CRC), 2025 WL 863947 (D.D.C. Mar. 19, 2025). The plaintiff claimed that an injunction was necessary prior to the date the government's continuing resolution was set to expire because the plaintiff was required "to inform public debate over appropriations legislation." *Id.* at \*5. The court concluded that injunctive relief was not warranted because the requested information would "not go 'stale' for [plaintiff]'s own asserted purpose." *Id.* at \*9–10. The court explained that because the plaintiff's request was not tied to a singular event with a certain end date (*i.e.*, "a census, congressional election, or impeachment process"), "after which the requested records would no longer have anything but 'historical value,'" the records would "remain valuable and relevant" to Congress and the public. *Id.* (citing *Brennan Ctr. for Justice at NYU Sch. of Law v. Dep't of Commerce*, 498 F. Supp. 3d 87, 101 (D.D.C. 2020)).

Here, too, Protect Democracy has failed to show that it will be irreparably harmed in the absence of a mandatory injunction ordering Defendants to post all apportionment documents and footnotes. Protect Democracy does not claim that the documents will be "stale" or otherwise merely "historical" to the extent this case is ultimately resolved in its favor. At bottom, there is no need for preliminary injunctive relief now because there is no date certain by which Protect Democracy needs to review and analyze spending documents for the government writ large. To the extent Protect Democracy prevails in this case, it will be afforded access to the apportionment documents and may resume review in accordance with its mission.



**III. The Balance of the Equities and the Public Interest Support Rejection of Protect Democracy's Motion.**

A preliminary injunction also is not appropriate because the balance of the equities and the public interest tip in Defendants' favor. *See Nken*, 556 U.S. at 435 (holding that "[t]hese factors merge when the Government is the opposing party"). "[T]hwarting the lawful exercise of authority of a duly appointed official would be inequitable and disserve the public interest." *Open Tech. Fund v. Pack*, 470 F. Supp. 3d 8, 31 (D.D.C. 2020). In this setting, granting the preliminary injunction that Protect Democracy seeks would require unconstitutional infringement upon Executive power. *See NAACP v. U.S. Department of Educ.*, No. 25-CV-1120 (DLF), 2025 WL 1196212, at \*7 (D.D.C. Apr. 24, 2025) ("[E]nforcement of an unconstitutional law is always contrary to the public interest." (citation omitted)).

**IV. Protect Democracy Should Be Ordered to Post Security in Connection with Any Preliminary Injunctive Relief**

The Court should order security with any preliminary injunction. Under Federal Rule of Civil Procedure 65(c), the Court may issue a preliminary injunction "only if the movant gives security" for "costs and damages sustained" by Defendants if they are later found to "have been wrongfully enjoined." Fed. R. Civ. P. 65(c). In the event the Court issues an injunction here, the Court should require Protect Democracy to post an appropriate bond commensurate with the scope of any injunction. *See DSE, Inc. v. United States*, 169 F.3d 21, 33 (D.C. Cir. 1999) (stating that Rule 65(c) places "broad discretion in the district court to determine the appropriate amount of an injunction bond").

**V. Protect Democracy's Partial Motion for Summary Judgment Fails**

Protect Democracy moves for partial summary judgment on its claim that OMB's failure to maintain a publicly available apportionment database is contrary to the 2022 and 2023 Acts.

Because Protect Democracy has not established a likelihood of success on the merits of that claim, as explained above, it is not entitled to summary judgment.

**CONCLUSION**

For all the foregoing reasons, the Court should deny Protect Democracy's motion for a preliminary injunction and for partial summary judgment.

Dated: May 2, 2025

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

PROTECT DEMOCRACY PROJECT

Plaintiff,

v.

OFFICE OF MANAGEMENT AND  
BUDGET, et al.,

Defendants.

Case No. 1:25-cv-01111-EGS

**DECLARATION OF KELLY KINNEEN**

I, Kelly Kinneen, make the following declaration based upon my personal knowledge, upon information provided in my official capacity, and upon conclusions I reached based on that knowledge or information:

1. I am the Assistant Director for Budget of the Office of Management and Budget (OMB) in the Executive Office of the President, in Washington, D.C. I have served in this position since 2017, and have worked at OMB since 2006.
2. I am the senior-most career official responsible for supporting the OMB Director in developing all aspects of the President's Budget. Additionally, I advise OMB leadership and Federal agencies on matters of execution relating to OMB's apportionment authority, 31 U.S.C. § 1512 et seq.
3. In this declaration, I summarize OMB's apportionment authority and describe the nature of the interagency process by which appropriated funds are made available to agencies.
4. At the start of the fiscal year, and after appropriations bills are passed, pursuant to 31 U.S.C. §§ 1512-13, the President must "apportion" the budget authority to the relevant Federal agencies before each agency may obligate its funds. The President has delegated this apportionment authority to the OMB Director. Executive Order (E.O.)

6166, as amended by E.O. 12608.

5. An apportionment is an OMB-approved plan to use budgetary resources. 31 U.S.C. 1513(b). OMB apportions funds to Executive Branch agencies by time periods, specific activities or projects, or a combination thereof. 31 U.S.C. § 1512(b)(1); OMB Circular A-11 § 120.1. If funds are apportioned by time period, OMB refers to that as a “category A” apportionment. If funds are apportioned by project or activity, OMB refers to that as a “category B” apportionment. If funds are apportioned by both time and purpose, that is referred to as a “category AB” apportionment.
6. Funds are to be apportioned “as the [apportioning] official considers appropriate.” 31 U.S.C. § 1512(b)(2). Apportionments involve exercising significant discretion and judgment regarding the budgetary resources a program requires, including when those resources will be needed and for what purpose. Circular A-11 makes clear that officials cannot exceed apportionments. Apportionments, being an exercise of delegated authority from the President, are legally binding upon the Executive Branch officials. The apportionment, however, does not bind OMB, which remains free to change it whenever it so chooses, as Circular A-11 also makes clear. Circular A-11, an Executive Branch guidance document, merely confirms that agencies must follow instructions from the President, acting through OMB.
7. With narrow exceptions, OMB must apportion appropriated funds before an agency may obligate those funds during each fiscal year. The Government Accountability Office (GAO) defines an obligation as “[a] definite commitment that creates a legal liability of the government for the payment of goods and services ordered or received, or a legal duty on the part of the United States that could mature into a legal liability by virtue of actions on the part of the other party beyond the control of the United States.”

U.S. Gov't Accountability Office, A Glossary of Terms Used in the Federal Budget Process, GAO-05-734SP, at 70 (2005), available at <https://www.gao.gov/assets/gao-05-734sp.pdf>. An agency enters an obligation where, for example, it places an order, signs a contract, awards a grant, purchases a service, or takes other actions that require the government to make payments to the public or from one government account to another. OMB Circular A-11 § 20.5(a).

8. An “expenditure” or “outlay” occurs when an agency makes a payment to liquidate an obligation. OMB Circular A-11 § 20.6.
9. Obligations and expenditures that exceed an apportionment are a violation of, and are subject to reporting under, the Antideficiency Act. 31 U.S.C. 1517(a)(1), (b). An apportionment authorizes an agency, but does not require it, to make an obligation of funds. An apportionment does not in any way entitle an outside party to funds. Rather, apportionments are internal directives from OMB, exercising the President’s delegated authority, to agencies.
10. OMB communicates apportionment decisions to agencies through Excel sheets that include designated funds for times, periods, projects, or activities. Apportionments reflect a snapshot of time of OMB’s best judgment in the moment about how an agency should use its funds during the period when those funds are legally available for obligation. This time period could be one quarter, one fiscal year, many fiscal years, or indefinite. Because apportionments are forward-looking, they are required by statute to be periodically reviewed and often are updated (or “reapportioned”) to reflect changes in circumstances or policy goals. 31 U.S.C. 1512(a).
11. OMB routinely also includes informational or legally binding footnotes on apportionments. Footnotes give an agency additional information or instructions beyond

the dollar amounts provided for a time period, project, or activity. Frequently, footnotes will provide additional restrictions on the use of funds, or will condition the availability of funds on further action by the agency, or on other future circumstances. Footnotes can disclose ongoing negotiations between an agency and OMB. An iterative approach to footnotes can assist in gathering information from agencies that are less inclined to provide information to OMB for oversight. They may reflect OMB's current policy deliberations, assumptions about program needs, and even future economic assumptions. As circumstances change, OMB's judgment about such considerations may also change, necessitating a reapportionment.

12. If, for example, funds for several agency programs are each given a category B apportionment that lists a particular dollar amounts for each program, that reflects the Administration's current view on what those programs may need in the future. But if a significant economic, foreign, or other policy shift occurs, the funds apportioned for those programs may need to change. One program might then have its apportionment reduced, while another program's apportionment would be increased. As long as the agency has not expended the funds for a program, those funds can be reapportioned for other purposes, within the scope of the appropriation.
13. In 2022, OMB began operating a publicly available automated apportionment reporting system in accordance with section 204 of division E of the Consolidated Appropriations Act, 2022 (Public Law 117-103). The system included each document apportioning an appropriation beginning in fiscal year 2022, including any associated footnotes (in a format that qualified each such document as an Open Government Data Asset) and a written explanation stating the rationale of any footnotes for apportioned amounts. The reporting requirements made OMB's administration of apportionments more difficult.

OMB believed it was prudent to promulgate apportionment documents omitting key information that would assist OMB and agencies in guiding allocations of resources throughout the funding process.

14. To provide a more specific example, OMB has, in the past, apportioned the Department of Energy's funds for the Title 17 loan guarantee program as category B in manner that included estimated credit subsidy amounts for the loans obligated by the agency during that fiscal year. The category B descriptions included identifying references for the individual loan borrowers, and the category B apportionments reflected provisional financial commitments subject to ongoing review and potential re-apportionment. Following the requirement to publish apportionments, OMB had to change its process to protect sensitive information about who would receive Government funding in advance of public announcements, and only included such information after the funds had been obligated and a public announcement had been made. An example of such an apportionment is attached as Exhibit A.
15. In another example, OMB apportioned funds with a footnote that detailed OMB's preliminary understanding of an agency's financial controls, indicating ongoing analysis subject to future verification. Following the publication requirement, OMB was reluctant to include such a footnote due to the deliberative nature of the facts surrounding the apportionment, which has impeded OMB's ability to most efficiently provide direction to and receive information from agencies. The apportionment itself can be part of a larger deliberative process and viewing these as stand-alone documents without additional context could reveal information about the Executive Branch's internal planning and strategy.
16. Apportionments are not fixed in place once signed. They are part of an iterative, internal Executive branch decision-making process that involves ongoing conversations and instructions to the agencies to ensure that apportionments are updated to reflect current

realities and future estimates. Apportionments are an internal Executive branch fiscal control mechanism designed to ensure that funds are being spent in accordance with the law and policy. By their nature, they are estimates of the amounts of budgetary resources that OMB anticipates that programs will likely require in the future. But they must and do change throughout the fiscal year. It is only when the agency, not OMB, takes actions to obligate or expend the funds that any entity outside the Executive branch, is affected. After appropriations Acts are enacted, apportionment of these appropriated funds is one of the first steps in the process before a program or activity can be carried out – it is not the last. Following an apportionment, OMB continues to monitor agency funding, and works with agencies to determine the best use of appropriated funds. It may advise agencies regarding the President’s priorities for the use of the funds or on sensitive matters touching on national security or foreign policy.

17. For example, a recent apportionment for the Department of the Interior included a footnote that stated, “Of the amounts apportioned, funding for the Bureau of Reclamation’s proposed ‘Sustainable Water for Agriculture Program’ may be obligated ten days after the Bureau of Reclamation provides a report to OMB on how it will coordinate with USDA on implementation of such program to avoid duplication of programs. [Rationale: An agency spend plan or other documentation is necessary to better understand how the agency intends to obligate some or all of the apportioned funds.]” In another case, an apportionment for the Department of Homeland Security included a footnote that provided, “...these funds are apportioned with the understanding that DHS will submit written reports to OMB on ongoing projects within 10 business days of the close of each quarter, detailing the: DHS component(s) supported; project purpose; desired project outcome; project timeline; number of AI Corps members



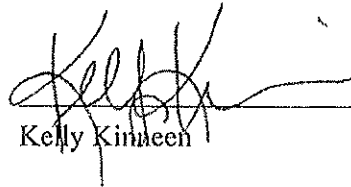
working on the project; and data on outcome measures (e.g., number of work hours saved; number/value of contracts reduced). [Rationale: OMB requests additional information on programmatic spending for some or all of the apportioned funds.]” These apportionments demonstrate the iterative nature of OMB’s apportionment decisions because additional engagement was necessary with the agencies before the funding could be provided for the purposes in question. These apportionments are included as Exhibit B. Apportionments and footnotes may contain deliberative information that, while not classified, could nevertheless reveal sensitive information about national security, foreign affairs, the industrial base, critical infrastructure, and the like. An apportionment may indicate predecisional details regarding the timing for an infrastructure project, or may indicate the recipient of foreign aid. Apportionments and footnotes can also contain predecisional information that can move markets or create financial disruption, such as apportionments for funding intended to assist an industry.

18. The requirement in the Consolidated Appropriations Act, 2022, to disclose OMB’s apportionments within 48 hours of signing, and to provide a rationale for any footnotes, caused OMB to have to amend the manner in which it apportioned funds that has implications for OMB’s ability to use the full scope of its apportionment authority. Even if the OMB apportioning “official considers [it] appropriate” under 31 U.S.C. § 1512(b)(2) to apportion funds with legally binding specific instructions in a Category B apportionment line or a footnote, following the requirement to publish those instructions may mean that in fact, the OMB apportioning official cannot apportion in the manner deemed appropriate. In some instances, it has forced OMB to choose between compromising confidentiality and using its apportionment authority as Congress intended.

17. On March 29, 2025, OMB Director Russell Vought informed the House and Senate Committees on Appropriations that OMB would no longer operate and maintain the automated apportionment system. Those letters are attached as Exhibit C.

#### CONCLUSION

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed in Washington, D.C., on the 30<sup>th</sup> day of April, 2025.



Kelly Kinneen

## **EXHIBIT A**

## SF 132 APPORTIONMENT SCHEDULE

FY 2024 Apportionment  
Funds provided by PL 117-169

Line No	Line Split	Line Description	OMB Action	OMB Footnote
		<b>Department of Energy</b> <b>Bureau: Energy Programs</b> <b>Account: Title 17 Innovative Technology Loan Guarantee Program</b> <b>TAFS: 089-2022-2026-0208</b>		
IterNo 9		Last Approved Apportionment: 2024-07-05		
RptCat NO		Reporting Categories		
AdjAut NO		Adjustment Authority provided		
		<b>Budgetary resources</b>		
1000	MA	Mandatory Actual - Unobligated balance brought forward, Oct 1 - Direct	327,210,687	
1000	MA4	Mandatory Actual - Unobligated balance brought forward, Oct 1 - Other	8,222,314,951	B4
1010		Unob Bal: Transferred to other accounts	-17,200,000	B5
1021		Unob Bal: Recov of prior year unpaid obligations	121,240	
1061		Unob Bal: Antic recov of prior year unpd/pd obl	1,878,760	
1920		<b>Total budgetary resources avail (disc. and mand.)</b>	<b>8,534,325,638</b>	<b>B2</b>
		<b>Application of budgetary resources</b>		
		<b>Category B Projects</b>		
6011		IRA - Administrative Expenses - Section 50141 (sec. 1703 of EPA)	82,632,915	
6012		IRA - Administrative Expenses - Section 50144 (sec. 1706 of EPA)	246,577,772	
6015		Subsidy on Loan 1412 - LongPath Development Company LLC	10,519,255	
6016		Subsidy on Loan EIR0007 - Holtec Palisades LLC	18,056,245	
6017		Subsidy on Loan 1365 - Plug Power Energy Loan Borrower LLC	29,178,402	
6018		Subsidy on Loan 1448 - Bioforge Marshall LLC	2,063,376	
6019		Subsidy on Loan EIR0029 - Clean Flexible Energy LLC	74,327,590	
6020		Subsidy on Loan EIR0017	43,250,951	
		<b>Category C, Apportioned for future fiscal years</b>		
6170		Apportioned in FY 2025	8,027,719,132	
6190		<b>Total budgetary resources available</b>	<b>8,534,325,638</b>	

Submitted \_\_\_\_\_ Date \_\_\_\_\_

SF 132 APPORTIONMENT SCHEDULE

FY 2024 Apportionment  
Funds provided by PL 117-169

Line No	Line Split	Line Description	OMB Action	OMB Footnote
		See Approval_Info sheet for OMB approval information		

FY 2024 Apportionment  
OMB Footnotes

Footnotes for Apportioned Amounts

Footnotes for Budgetary Resources

- B2 Pursuant to the authority in OMB Circular A-11 section 120.21 one or more lines on the apportionment (including lines above line 1920) may have been rounded up and as such those rounded lines will not match the actuals reported on the SF-133. DOE will ensure that its funds control system will only allot actuals.
- B4 \$ 7,200,000.00 Shifting to Admin for OIG 0.2% transfer  
\$ 10,000,000.00 Shifting to Admin for OIG 0.2% transfer  
\$3,465,114,950.26 Subsidy for Section 50141  
\$4,740,000,000.00 Subsidy for Section 50144  
\$ 0.74 Rounding  
-----  
\$8,222,314,951.00
- B5 Reflects appropriation transfer of two-tenths of one percent to the Office of the Inspector General from unobligated balances of amounts made available under sections 50141 and 50144 of Public Law 117-169, in accordance with Public Law 118-42, Division D, Sec. 307(b), as follows:  
-\$ 7,200,000 Section 50141  
-\$10,000,000 Section 50144  
-----  
\$ 17,200,000

End of File

OMB Approved this apportionment request using  
the web-based apportionment system



Mark Affixed By: Kelly Colyar  
Acting Deputy Associate Director for Energy, Science and Water Programs

Signed On: 2024-09-10 03:51 PM  
File Name: FY24\_DOE\_089-2226-0208\_09ReApp\_v1\_Updated.xlsx  
Sent By: John Dick  
Sent On: 2024-09-10 04:20 PM

TAF(s) Included: 089-2022-2026-0208 (Title 17 Innovative Technology Loan Guarantee Program)

## **EXHIBIT B**



**Exhibit B**

## SF 132 APPORTIONMENT SCHEDULE

FY 2025 Apportionment  
Funds Provided by N/A - Carryover

Line No	Line Split	Line Description	OMB Action
		Department of the Interior Bureau: Bureau of Reclamation Account: Water and Related Resources TAFS: 014-2022-2026-0880	
IterNo 2		Last Approved Apportionment: 2024-09-06	
RptCat NO		Reporting Categories	
AdjAut YES		Adjustment Authority provided	
		<b>Budgetary resources</b>	
1000	E43	Estimated - Estimated - Unob Bal: Brought forward, October 1 - Supplemental - Direct (Mand) Inflation Reduction Act, 2022, P. L. 117-169	2,957,265,248
1061		Unob Bal: Antic recov of prior year unpd/pd obl	800,000
1920		<b>Total budgetary resources avail (disc. and mand.)</b>	<b>2,958,065,248</b>
		<b>Application of budgetary resources</b>	
		<b>Category B Projects</b>	
6011		All Projects	800,000
6012		SEC. 50233 Drought Mitigation in the Reclamation States	2,944,778,679
6013		Sec 80004 Emergency Drought Relief for Tribes	12,486,569
6190		<b>Total budgetary resources available</b>	<b>2,958,065,248</b>

Submitted \_\_\_\_\_ Date \_\_\_\_\_

See Approval\_Info sheet for OMB approval information

FY 2025 Apportionment  
OMB Footnotes

Footnotes for Apportioned Amounts

- A1 To the extent authorized by law, this estimated amount is apportioned for the current fiscal year. This estimated amount may be increased or decreased without further action by OMB if the actual indefinite appropriations; actual reimbursements earned, including reimbursements and offsetting collections from non-Federal/Federal sources; actual recoveries of prior year obligations; and actual contributions from non-Federal/Federal sources differ from the estimate. If the actual unobligated balance (excluding reimbursable funding) differs by more than 20 percent from the estimate in this apportionment, the agency must request a reapportionment of the account. Transfers of funds authorized by law (except for Section 102 transfers and transfers from the Wildfire Suppression Operations Reserve fund), to or from any of the accounts listed, may be processed without further action by OMB. Any of these funds that are not needed for this purpose may be used for current year obligations without further action by OMB. [Rationale: Footnote signifies that this TAFS has received or may receive an automatic apportionment.]
- A5 Of the amounts apportioned, funding for the Bureau of Reclamation's proposed "Sustainable Water for Agriculture Program" may be obligated ten days after the Bureau of Reclamation provides a report to OMB on how it will coordinate with USDA on implementation of such program to avoid duplication of programs. [Rationale: An agency spend plan or other documentation is necessary to better understand how the agency intends to obligate some or all of the apportioned funds.]

Footnotes for Budgetary Resources

End of File

OMB Approved this apportionment request using  
the web-based apportionment system



Mark Affixed By: John Pasquantino  
Deputy Associate Director for Energy, Science and Water Programs

Signed On: 2025-01-16 12:30 PM  
File Name: FY2025\_DOI\_BURREC\_TAFS014-2022-2026-0680\_IterNo\_2\_2025-01-15\_16.29pm\_Updated OMB Edit.xlsx  
Sent By: Sherron White  
Sent On: 2025-01-17 09:55 AM

TAF(s) Included: 014-2022-2026-0680 (Water and Related Resources)

## SF 132 APPORTIONMENT SCHEDULE

FY 2025 Apportionment  
Funds Provided by Public Law N/A

Line No	Line Split	Line Description	OMB Action	OMB Footnote
		<b>Department of Homeland Security</b> <b>Bureau: Management Directorate</b> <b>Account: Operations and Support, MD</b> <b>Treasury Account: Operations and Support</b> <b>TAFS: 070-2025-2025-0112</b>		
IterNo: 1		Last Approved Apportionment: N/A, First Request of Year		
RptCat: NO		Reporting Categories		
AdjAut: NO		Adjustment Authority provided		
		<b>Budgetary resources</b>		
1100		BA: Disc: Appropriation	1,722,204,000	
1134		BA: Disc: Appropriations precluded from obligation	-1,340,046,932	
1740		BA: Disc: Spending auth: Antic colls, reimbs, other	390,428,577	
<b>1920</b>		<b>Total budgetary resources avail (disc. and mand.)</b>	<b>772,585,645</b>	
		<b>Application of budgetary resources</b>		
6001		Category A -- 1st quarter	379,935,384	
6002		Category A -- 2nd quarter		
6003		Category A -- 3rd quarter		
6004		Category A -- 4th quarter		
		<b>Category B Projects</b>		
6011		General Reimbursable Authority	390,428,577	
6012		AI Corps	2,221,684	
<b>6190</b>		<b>Total budgetary resources available</b>	<b>772,585,645</b>	<b>A2</b>

Submitted: Ann M. Tipton, Ph.D., PMCEd, CDFM  
 Budget Director, Office of the Chief Financial Officer  
 Date: 10.28.2024

FY 2025 Apportionment  
OMB Footnotes

**Footnotes for Apportioned Amounts**

- A2** Of the amounts apportioned, only the amount on line 6012 may be obligated in support of DHS's Artificial Intelligence (AI) Corps or any successor entity, including for no more than 50 positions. Further, these funds are apportioned with the understanding that DHS will submit written reports to OMB on ongoing projects within 10 business days of the close of each quarter, detailing the: DHS component(s) supported; project purpose; desired project outcome; project timeline; number of AI Corps members working on the project; and data on outcome measures (e.g., number of work hours saved; number/value of contracts reduced). [Rationale: OMB requests additional information on programmatic spending for some or all of the apportioned funds.]

**Footnotes for Budgetary Resources**

End of File

OMB Approved this apportionment request using  
the web-based apportionment system

Authoritative Mark

Mark Affixed By: Andrew Abrams  
Deputy Asso Director for Transportation, Homeland, Justice and Service Programs

Signed On: 2024-11-01 05:49 PM  
File Name: FY\_2025\_DHS\_MGMT\_070\_25\_0112.xlsx  
Sent By: Andrew Abrams  
Sent On: 2024-11-01 05:49 PM

TAF(s) Included: 070-2025-2025-0112 (Operations and Support)

## **EXHIBIT C**



THE DIRECTOR

EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

March 29, 2025

The Honorable Susan Collins  
Chair  
Committee on Appropriations  
United States Senate  
Washington, D.C. 20510

Dear Chair Collins:

I write to inform you that the Office of Management and Budget will no longer operate and maintain the publicly available automated system to which apportionments are posted envisioned in section 204 of division E of the Consolidated Appropriations Act, 2023.

OMB has determined that it can no longer operate and maintain this system because it requires the disclosure of sensitive, predecisional, and deliberative information. By their nature, apportionments and footnotes contain predecisional and deliberative information because they are interim decisions based on current circumstances and needs, and may be (and are) frequently changed as those circumstances change.

Such disclosures have a chilling effect on the deliberations within the Executive Branch. Indeed, these disclosure provisions have already adversely impacted the candor contained in OMB's communications with agencies and have undermined OMB's effectiveness in supervising agency spending. Moreover, apportionments may contain sensitive information, the automatic public disclosure of which may pose a danger to national security and foreign policy.

I value OMB's longstanding relationship with the Committee and I am committed to working with you to provide information on apportionments that may be of interest to the Committee.

Sincerely,

A handwritten signature in black ink, appearing to read "Russell T. Vought", is located below the word "Sincerely,".

Russell T. Vought  
Director





THE DIRECTOR

EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

March 29, 2025

The Honorable Rosa DeLauro  
Ranking Member  
Committee on Appropriations  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Ranking Member DeLauro:

I write to inform you that the Office of Management and Budget will no longer operate and maintain the publicly available automated system to which apportionments are posted envisioned in section 204 of division E of the Consolidated Appropriations Act, 2023.

OMB has determined that it can no longer operate and maintain this system because it requires the disclosure of sensitive, predecisional, and deliberative information. By their nature, apportionments and footnotes contain predecisional and deliberative information because they are interim decisions based on current circumstances and needs, and may be (and are) frequently changed as those circumstances change.

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I value OMB's longstanding relationship with the Committee and I am committed to working with you to provide information on apportionments that may be of interest to the Committee.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Vought", is positioned above the printed name of the Director.

Russell T. Vought  
Director



THE DIRECTOR

EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

March 29, 2025

The Honorable Patty Murray  
Vice Chair  
Committee on Appropriations  
United States Senate  
Washington, D.C. 20510

Dear Vice Chair Murray:

I write to inform you that the Office of Management and Budget will no longer operate and maintain the publicly available automated system to which apportionments are posted envisioned in section 204 of division E of the Consolidated Appropriations Act, 2023.

OMB has determined that it can no longer operate and maintain this system because it requires the disclosure of sensitive, predecisional, and deliberative information. By their nature, apportionments and footnotes contain predecisional and deliberative information because they are interim decisions based on current circumstances and needs, and may be (and are) frequently changed as those circumstances change.

Such disclosures have a chilling effect on the deliberations within the Executive Branch. Indeed, these disclosure provisions have already adversely impacted the candor contained in OMB's communications with agencies and have undermined OMB's effectiveness in supervising agency spending. Moreover, apportionments may contain sensitive information, the automatic public disclosure of which may pose a danger to national security and foreign policy.

I value OMB's longstanding relationship with the Committee and I am committed to working with you to provide information on apportionments that may be of interest to the Committee.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Vought", is written over a horizontal line.

Russell T. Vought  
Director



THE DIRECTOR

EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

March 29, 2025

The Honorable Tom Cole  
Chairman  
Committee on Appropriations  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Chairman Cole:

I write to inform you that the Office of Management and Budget will no longer operate and maintain the publicly available automated system to which apportionments are posted envisioned in section 204 of division E of the Consolidated Appropriations Act, 2023.

OMB has determined that it can no longer operate and maintain this system because it requires the disclosure of sensitive, predecisional, and deliberative information. By their nature, apportionments and footnotes contain predecisional and deliberative information because they are interim decisions based on current circumstances and needs, and may be (and are) frequently changed as those circumstances change.

Such disclosures have a chilling effect on the deliberations within the Executive Branch. Indeed, these disclosure provisions have already adversely impacted the candor contained in OMB's communications with agencies and have undermined OMB's effectiveness in supervising agency spending. Moreover, apportionments may contain sensitive information, the automatic public disclosure of which may pose a danger to national security and foreign policy.

I value OMB's longstanding relationship with the Committee and I am committed to working with you to provide information on apportionments that may be of interest to the Committee.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Vought", is positioned above the printed name of the Director.

Russell T. Vought  
Director

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

PROTECT DEMOCRACY PROJECT )

Plaintiff, )

v. )

OFFICE OF MANAGEMENT AND )  
BUDGET, et al., )

Defendants. )

Case No. 1:25-cv-01111-EGS

**DEFENDANTS' COUNTER-STATEMENT OF MATERIAL FACTS**  
**AS TO WHICH THERE IS NO GENUINE ISSUE**

1. The Office of Management and Budget (OMB) is a federal agency with responsibility for government-wide financial management policies for executive agencies and numerous financial management functions. <i>See</i> 31 U.S.C. §§ 503(a), 504.	Undisputed. The Court is referred to the cited statute for a complete statement of its contents.
2. Russell T. Vought is the Director of OMB.	Undisputed.
3. The Antideficiency Act established the process of apportionment, which requires that budget authority provided to federal agencies in appropriations acts be allocated in installments, rather than all at once. <i>See</i> 31 U.S.C. § 1512.	Undisputed.
4. The Antideficiency Act requires that funds that are appropriated for limited durations be apportioned to prevent obligation or expenditure at a rate that may require Congress to appropriate more money to the agency before the next appropriations cycle. <i>Id.</i> § 1512(a).	Undisputed. The Court is referred to the cited statute for a complete statement of its contents.
5. Even for appropriations that are indefinite durations, the Act requires	Undisputed. The Court is referred to the cited statute for a complete statement of its

apportionments to achieve the most effective and economical use of the funds. <i>Id.</i>	contents.
6. The Impoundment Control Act provides that the Executive Branch must spend the funds that Congress appropriated for particular purposes, without delay, except in narrowly prescribed circumstances. 2 U.S.C. §§ 682-88.	Undisputed. The Court is referred to the cited statute for a complete statement of its contents.
7. The Antideficiency Act requires the president to apportion appropriations for federal agencies. 31 U.S.C. § 1513(b).	Undisputed. The Court is referred to the cited statute for a complete statement of its contents.
8. The Antideficiency Act requires the president to apportion an appropriation in writing and notify the head of the executive agency of the action taken to apportion an appropriation within specified timelines. <i>Id.</i> § 1513(a), (b).	Undisputed. The Court is referred to the cited statute for a complete statement of its contents.
9. The Antideficiency Act prohibits agency officials from making an obligation or expenditure exceeding an apportionment. <i>Id.</i> § 1517(a)(1).	Undisputed. The Court is referred to the cited statute for a complete statement of its contents.
10. The Antideficiency Act provides for potential administrative penalties and criminal liability for officials who violate the Act by obligating or expending amounts exceeding an apportionment. <i>Id.</i> §§ 1518-19.	Undisputed. The Court is referred to the cited statute for a complete statement of its contents.
11. The President has long-delegated the apportionment authority to the OMB Director. <i>See</i> 90 Fed. Reg. 9737 (Feb. 18, 2025).	Undisputed. The Court is referred to the cited regulation for a complete statement of its contents.
12. OMB Circular No. A-11 states that an individual apportionment is “an OMB-approved plan” that sets the rate of agency expenditure. Ex. 4 (OMB Circular No. A-11 § 120.1 (2024)).	Undisputed. The Court is referred to the Circular for a complete statement of its contents.
13. An individual apportionment is “an OMB-approved plan” that sets the rate of agency expenditure. Ex. 4 § 120.1.	Undisputed to the extent that an apportionment is an OMB-approved plan per OMB Circular § 120.1. The Court is referred to the Circular for a complete statement of its contents.

14. OMB Circular No. A-11 states that “an apportionment is legally binding.” <i>Id.</i>	Undisputed.
15. An apportionment is legally binding. <i>Id.</i>	Undisputed that the OMB Circular No. 11 includes a statement that “an apportionment is legally binding.” Apportionments involve exercising significant discretion and judgment regarding the budgetary resources a program requires, including when those resources will be needed and for what purpose. Apportionments, being an exercise of delegated authority from the President, are legally binding upon the Executive Branch officials. The apportionment, however, does not bind OMB, which remains free to change it whenever it so chooses, as Circular A-11 also makes clear. Circular A-11, an Executive Branch guidance document, merely confirms that agencies must follow instructions from the President, acting through OMB. Kinneen Decl. ¶ 6.
16. OMB Circular No. A-11 states that “apportioned amounts are legal limits that restrict how much an agency can obligate, when it can obligate, and what projects, programs, and activities it can obligate for.” <i>Id.</i> § 120.10.	Undisputed.
17. Apportioned amounts are legal limits that restrict how much an agency can obligate, when it can obligate, and what projects, programs, and activities it can obligate for. <i>Id.</i> § 120.10.	Undisputed.
18. OMB Circular No. A-11 states that footnotes in apportionments for apportioned amounts (also known as “A” footnotes, which appear in the application of budgetary resources section) “have legal effect” <i>Id.</i> § 120.34.	Undisputed.
19. Footnotes in apportionments for apportioned amounts (also known as “A” footnotes, which appear in the application of budgetary resources section) have legal effect <i>Id.</i> § 120.34.	Undisputed.

<p>20. OMB Circular No. A-11 states that “[w]hen OMB approves an apportionment through the apportionment system, [agencies] will receive an e-mail with the approved Excel file . . . and the subject line will include the words ‘Approved Apportionment.’” <i>Id.</i> § 120.37.</p>	<p>Undisputed.</p>
<p>21. When OMB approves an apportionment through the apportionment system, agencies will receive an e-mail with the approved Excel file and the subject line will include the words “Approved Apportionment.” <i>Id.</i></p>	<p>Undisputed.</p>
<p>22. In March 2022, Congress enacted new legislation requiring OMB to make apportionments public. Pub. L. No. 117-103, div. E, tit. II, § 204(b)-(c), 136 Stat. 49, 256-57 (2022) (codified at 31 U.S.C. § 1513 note) (hereinafter “2022 Appropriations Act”).</p>	<p>Undisputed.</p>
<p>23. The 2022 Appropriations Act provides that OMB “shall complete implementation of an automated system to post each document apportioning an appropriation, . . . including any associated footnotes, in a format that qualifies each such document as an Open Government Data Asset (as defined in section 3504 of title 44, United States Code), not later than 2 business days after the date of approval of such apportionment.” <i>Id.</i></p>	<p>Undisputed.</p>
<p>24. The 2022 Appropriations Act further provides that “[e]ach document apportioning an appropriation . . . that is posted on a publicly accessible website . . . shall also include a written explanation by the official approving each such apportionment stating the rationale for any footnotes for apportioned amounts: Provided, That the Office of Management and Budget or the applicable department or agency shall make available classified documentation referenced in any apportionment at the request of the chair or ranking member of any appropriate</p>	<p>Undisputed.</p>

congressional committee or subcommittee.” <i>Id.</i>	
25. The “Open Government Data Asset” format required by § 204(b) is defined as “a public data asset that is—(A) machine-readable; (B) available (or could be made available) in an open format; (C) not encumbered by restrictions, other than intellectual property rights, including under titles 17 and 35, that would impede the use or reuse of such asset; and (D) based on an underlying open standard that is maintained by a standards organization.” 44 U.S.C. § 3502(20).	Undisputed.
26. In a division-by-division summary of the 2022 Appropriations Act, Representative Rosa DeLauro (then-Chairwoman of the House Appropriations Committee) described the legislation as among other “Important Policy Changes” that would “[s]trengthen[] our democracy” by “mak[ing] apportionments of appropriations publicly available in a timely manner.” Ex. 7, Chair Rosa DeLauro, H.R. 2471, <i>Funding for the People: Division-by-Division Summary of Appropriations Provisions</i> 18.	Undisputed. The Court is referred to the statement for a complete statement of its contents.
27. In December 2022, Congress made the requirements of the 2022 Appropriations Act permanent, in the Consolidated Appropriations Act of 2023, which provides that, “[i]n fiscal year 2023 and each fiscal year thereafter,” OMB “shall operate and maintain the automated system required to be implemented by section 204 of the [2022 Appropriations Act].” Pub. L. No. 117-328, div. E, tit. II., § 204, 136 Stat. 4459, 4667 (2022) (codified at 31 U.S.C. § 1513 note) (hereinafter “2023 Appropriations Act”).	Undisputed.
28. In the 2023 Appropriations Act, Congress further directed that OMB “shall continue to post each document apportioning an appropriation” (including “any associated	Undisputed.



footnotes”) in the format and subject to the requirements specified in the 2022 Appropriations Act. <i>Id.</i>	
29. In July 2022, OMB began making apportionments public at <a href="https://apportionment-public.max.gov">https://apportionment-public.max.gov</a> .	Undisputed.
30. Plaintiff Protect Democracy is a nonpartisan, nonprofit organization whose mission is to prevent American democracy from declining into a more authoritarian form of government. Ex. 1, Declaration of William Ford (“Ford Decl.”) ¶ 2.	Undisputed that the cited paragraph includes this statement.
31. After OMB created its public apportionment website, Protect Democracy organized and led a virtual training for congressional staff in October 2022 on how to read apportionments, navigate and use OMB’s website, and find the apportionments associated with a particular appropriation or Treasury account.” <i>Id.</i> ¶ 5; see Protect Democracy, <i>Experts Explain How to Read Apportionments and Navigate OMB’s New Apportionment Website</i> , YouTube (Oct. 17, 2022), <a href="https://tinyurl.com/yd6urbxe">https://tinyurl.com/yd6urbxe</a> .	This assertion contains plaintiff’s characterization of the cited paragraph. The Court is referred to the Ford declaration for a full and accurate statement of its contents.
32. Protect Democracy made a recording of the training and other resources for Congress publicly available online. <i>See id.</i> ¶ 6; Ex. 9, <i>Using OMB’s Apportionment Website: Resources for Congress</i> , Protect Democracy (Nov. 3, 2022).	Undisputed.
33. In October 2024, Protect Democracy launched OpenOMB.org. Ford Decl. ¶ 8.	Undisputed that the cited paragraph contains this statement. Because the link included in the declaration is not functional, Defendants have been unable to confirm the veracity of this statement.
34. When OMB is posting its apportionments, each day, OpenOMB.org pulls the primary source data from OMB’s site and stores the files in a database in a manner that allows them to be searched, filtered, and indexed. <i>Id.</i> ¶ 10.	This assertion contains plaintiff’s characterization of the cited paragraph. The Court is referred to the Ford declaration for a full and accurate statement of its contents.

35. Congressional appropriators have stated in press releases that they monitor OpenOMB to identify apportionment abuses. <i>Id.</i> ¶ 11.	Undisputed that the cited paragraph contains this statement. Because the link included in the declaration is not functional, Defendants have been unable to confirm the veracity of this statement.
36. Journalists have used OpenOMB as a source in their news reporting. <i>Id.</i>	Undisputed that the cited paragraph contains this statement. Because the link included in the declaration is not functional, Defendants have been unable to confirm the veracity of this statement.
37. Libraries have shared OpenOMB as a resource to help the communities they serve understand developments in government. <i>Id.</i>	Undisputed that the cited paragraph contains this statement. Because the link included in the declaration is not functional, Defendants have been unable to confirm the veracity of this statement.
38. OMB stopped making apportionments public on March 24, 2025, when the website began showing a "Page not found" error. <i>Id.</i> ¶ 13.	Undisputed.
39. From March 24, 2025 to March 28, 2025, OMB provided no official explanation why the apportionments website was not functioning.	Undisputed.
40. On March 29, 2025, OMB Director Vought sent a letter to the House and Senate Appropriations Committee's Ranking Member and Vice Chair, Representative Rosa DeLauro and Senator Patty Murray, stating that OMB "will no longer operate and maintain" the website mandated by law. Ex. 16, Letter from Russell T. Vought to The Hon. Patty Murray (March 29, 2025).	Undisputed. The Court is referred to Director Vought's letter for a full statement of its content.
41. Vought's letter claimed that complying with the law "requires the disclosure of sensitive, predecisional, and deliberative information," and that disclosing the required information "may pose a danger to national security and foreign policy." <i>Id.</i>	Undisputed. The Court is referred to Director Vought's letter for a full statement of its content.
42. Vought's letter did not point to any specific examples where OMB's compliance	Undisputed.

with the law has required disclosure of privileged information or would pose a danger to national security or foreign policy. <i>Id.</i>	
43. After OMB took its website down, Protect Democracy posted the following header on OpenOMB: "The OMB website that provides the underlying data used by OpenOMB is offline. There will be no new apportionments posted on OpenOMB until that site is back online." OpenOMB.org, <a href="https://openomb.org">https://openomb.org</a> (last visited Apr. 20, 2025); <i>see also</i> Ford Decl. 14.	Undisputed that the OpenOMB website contains the referenced header as of the date of this filing.
44. OMB has previously released apportionments in response to FOIA requests or during FOIA litigation without asserting the deliberative process privilege as a basis for withholding the apportionments. <i>Ctr. for Public Integrity v. Dep't of Def.</i> , No. 1:19-cv-03265-CKK, ECF No. 23-2 (D.D.C. Feb. 14, 2020).	Defendants are not required to respond to this statement because the alleged facts are not material to the resolution of the instant motion. The assertion of the deliberative process privilege is discretionary.

Dated: May 2, 2025

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

PROTECT DEMOCRACY PROJECT )

Plaintiff, )

v. )

OFFICE OF MANAGEMENT AND )  
BUDGET, et al., )

Defendants. )  
\_\_\_\_\_ )

Case No. 1:25-cv-01111-EGS

**[PROPOSED] ORDER**

The Court, having fully considered Plaintiff's Motion for Preliminary Injunction or in the Alternative Partial Summary Judgment and the parties' respective submissions in support thereof and in opposition thereto, HEREBY ORDERS that the Motion be DENIED.

IT IS SO ORDERED, this \_\_\_\_\_ day of \_\_\_\_\_, 2025.

\_\_\_\_\_  
Hon. Emmet G. Sullivan  
Senior United States District Judge