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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Rita F. Lin, Judge

NEETA THAKUR, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
VS.	)	**NO. 3:25-cv-04737-RFL**
DONALD J. TRUMP, in his official capacity as President of the United States, et al.,	)	
Defendants.	)	

San Francisco, California
Friday, June 20, 2025

TRANSCRIPT OF REMOTE PROCEEDINGS

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Friday - June 20, 2025 **10:01 a.m.**

P R O C E E D I N G S

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THE CLERK: All rise. This Court is now in session. The Honorable Rita F. Lin presiding.

(Pause in proceedings.)

THE CLERK: Please be seated.

Calling Civil Case 25-4737, Thakur, et al., v. Trump, et al.

Counsel, please state your appearances for the record beginning with the plaintiffs.

MR. CHEMERINSKY: Erwin Chemerinsky for the plaintiffs.

MS. CABRASER: Good morning, Your Honor. Elizabeth Cabraser of Lieff Cabraser Heimann & Bernstein for the plaintiffs, with Richard Heimann of Lieff Cabraser for the plaintiffs as well.

MR. McLORG: Good morning, Your Honor. Kyle McLorg for the plaintiffs.

MR. SCHOENBERG: Good morning, Your Honor. Tony Schoenberg from Farella Braun & Martel for the plaintiffs.

MR. BUDNER: Good morning, Your Honor. Kevin Budner from Lieff Cabraser for the plaintiffs.

MS. WANLESS: Annie Wanless from Lieff Cabraser for the plaintiffs.

MR. ALTABET: Jason Altabet on behalf of the Department of Justice representing the United States.

THE COURT: Good morning to all of you.

Let me start out by just giving you a sense of my thoughts on the case initially so far. I'm, obviously, open to hearing more; that's the whole reason we're here. But I thought it'd be useful for your argument to hear how I see the case.

Then I'd like to go through the questions that I put out for the parties to be prepared on yesterday. And then at the end, I promise you, you will have time to tell me more about whatever else you think I should know about the case.

So just at the outset, in terms of how I see the case so far, I have to say that I am quite troubled by the information I see in the record.

Researchers across the University of California system rely heavily, of course, on federal funds. The record is that the University of California system had over $4 billion in federal grants in 2024. In the last few months, $324 million in grants have already been terminated.

These are multiyear projects, funded after a highly competitive process with peer review, expert selection panels. It looks to me, from the record, like the administration has terminated grants on a massive scale without reasoned consideration.

The record shows grants being flagged for review based on keywords in their title, like having "diversity" or "equity" in the title. There are form letters being issued with no explanation at all other than "there's been a change to the agency priorities."

There's no explanation as to why the particular grant doesn't serve agency priorities anymore. And there's no explanation as to why it falls within a forbidden topic, like DEI, diversity, equity, or inclusion, or any of the other prohibited areas.

Dr. Thakur's grant is really a grant example of this, it seems to me. The record describes her as doing research at UCSF on genetic differences in lung disease among racially and ethnically diverse groups, and she was funded for a federal grant about how wildfire smoke affects those particular populations.

It is hard to understand why that would be DEI or diversity, equity, or inclusion-related work, but there was no explanation in the letter as to why it falls within that category. It -- I have to say, just looking at the record at this initial stage, it seems totally arbitrary.

The Administrative Procedure Act, as you all know, requires a reasoned explanation when the agency changes its priorities and changes its mind about a particular grant. It requires reasoned consideration of reliance interests. These

terminations are upending years of investment of resources. It just looks like a blatant violation of the APA's requirements.

It also seems likely to me that the practice of terminating grants because they are on -- or they involved research that touches on a blacklisted topic, like diversity or equity, is likely in violation of the First Amendment.

Obviously, the Government can build programs with certain goals and favor certain speech in order to achieve that, but that does not appear to be what these executive orders are doing. They appear to be targeted at penalizing forbidden ideas across the board to drive them out of the marketplace of ideas, which is not allowed.

A number of courts have reached that conclusion in other cases. It seems right to me.

Also, it seems to me that both of these claims, the arbitrary and capricious claim and the First Amendment, are appropriately treated as classwide claims. These are classic, class action type claims.

I do have some questions about class scope and definition. But the arbitrary and capricious claim is a classic form letter claim. We litigate these types of form letter class actions all the time in the federal courts.

And the First Amendment claim involves two executive orders that NEH, NSF, and EPA all said they were implementing by searching for and terminating grants on forbidden topics.

It appears to me that the defendants' main argument is that I shouldn't consider the merits of these claims because the researchers don't have Article III standing, that they aren't injured by the termination of the grants.

I have to say I'm having a hard time understanding that point. I absolutely understand that they could not bring a breach of contract claim, most likely, because they're not parties to the grant agreement. The grant agreement is with the University of California, not with the individual researchers.

But what I don't understand is why that means they were not harmed. Justice Scalia famously described the standing inquiry as, "What's it to you?"

These are folks who have been doing research for years and then have the rug pulled out from under them. They can't hire grad students. The research has to be delayed, maybe even thrown out.

Obviously, it has a profound effect on their careers. It's hard to imagine who would be more affected by the grant terminations than the researchers who applied for the grants and are conducting the research.

So that's the fundamental disconnect that I'm seeing with the Government's argument. I hope that's helpful, the initial sense of where I am in the case.

Let me ask both parties to send whoever is going to

argue to the podium for both sides, and then we'll just go through the questions one by one, and each side can respond. I'll tell you who should address each question first when I finish it.

MR. CHEMERINSKY: Your Honor, I'm going to be arguing in favor of the motion for preliminary injunction, so I'll be addressing Questions 1, 2, and 6. And my co-counsel, Ms. Cabraser, is going to have a class certification. So when we get to Questions 3, 4, and 5, she'll address those for you.

THE COURT: Great. Thank you.

MR. ALTABET: And I'll be addressing all the questions.

THE COURT: Thank you.

So let's just start with Question 1. I'll read it so we're all on the same page. (as read):

"The defendants argue that plaintiffs lack Article III standing because they are not parties to the grant agreements between the agencies and the University of California. Is it the defendants' position that a non-party to a contract could never suffer cognizable injury from its termination unless the non-party is an intended third-party beneficiary to the contract?"

And then relatedly (as read):

"Why would traditional Article III standing rules

be any different merely because the injury occurs in the context a contract termination?"

Obviously, that's a question for the Government to take the first crack at.

MR. ALTABET: Yeah. And I apologize, because I think this is a product of inartful briefing because we were trying to set out possible ways that plaintiffs could have an interest of their own that they're asserting.

So sort of starting with *Lujan*, the standing test requires a violation of a legally protected interest. And I think cases like *DOL v. Triplett*, T-R-I-P-L-E-T-T, and *Kowalski*, K-O-W-A-L-S-K-I, are setting out this idea that even if you suffer a factual concrete injury -- so in *Triplett*, it's the loss the money to an attorney because claimants there had their fee structure basically regulated by the Government in a way that no one doubted caused a monetary injury to their attorney.

And similar in *Kowalski*, no one argued that they didn't have a pocketbook, concrete injury, the type of thing we think about as an injury, in fact, that's well established in American English law. Everyone agreed that that happened, but because the rights those two attorneys were asserting were others -- in *Triplett*, it was the due process rights of their clients; in *Kowalski*, it was at Sixth Amendment rights of the potential clients -- the Court required both the concrete

actual factual injury and a determination as to the right of the third party and whether the person could assert that right.

And our understanding of this case is -- as sort of in the motion in the complaint, the grants are described as "plaintiffs' grants." And even in their reply, they say on page 7, lines 1 to 2 (as read):

> "Plaintiffs demonstrated concrete and actual harm resulting from the invasion of their interest in the grants."

So I think it's just a matter of law, and I think everyone agrees, they have to have some sort of interest in the grant for them to assert the rights, at least as they've asserted the right. So I think the First Amendment claim is a great example.

So they are arguing that the Government has canceled funding under grant agreements in violation of the First Amendment because of some viewpoint discriminatory reason because of the subject matter of the grants. That -- for example, that's the language they used in the proposed order for the findings that the Court would issue if the First Amendment claim was successful on their part.

And the subject matter of grants belongs to the University of California institutions. They submitted the grants. For example, some of these plaintiffs are co-principal investigators or otherwise not even the people who helped to

draft the original grant or, like, sort of if they have ownership even if they're arguing --

(Reporter interrupts for clarification of the record.)

MR. ALTABET: Sorry. It's too fast.

THE COURT: The court reporter has to write every word.

MR. ALTABET: Okay. Even in situations where a plaintiff -- we'll say a project manager versus a co-principal investigator. It's the institution that is submitting the grant application, the grant agreement; and therefore, the subject matter of the grant belongs to the University of California.

So I think what plaintiffs have to show, for example, in the First Amendment context is that they have some sort of positive law interest in the funding that would then allow them to be asserting their own rights. Because, otherwise, I think they are, like in *Kowalski* or *in Triplett*, asserting the rights of the University of California to funding.

THE COURT: Let me ask you about *Kowalski* and *Triplett*.

It seems to me that the legal lens through which the Court should look at those cases is really causation and redressability. The Court is saying that there's too much of a gap in the chain for that to count as an injury; but, here, although the injury occurs through a contract termination to

another party, there is a lot of evidence about a close causal link and evidence of redressability.

Do you agree that *Triplett* and *Kowalski* are really cases that are about causation and redressability? And if that's the case, why shouldn't the Court just apply the traditional causation/redressability test?

MR. ALTABET: So I don't think they're about that. And I think the language of the cases and even, frankly, where they are in the casebook on federal courts in the federal system, is about whether someone is asserting their own rights or the rights of another. And I don't think that's a causation and a redressability question. It's whether the positive law has provided a legal interest that someone is themselves asserting, because I don't think there is a causation or redressability problem, say, in *Triplett*.

Everyone agrees that these claimants will either be sending more or less money to the attorney depending on how the statute operates. If the statute is in violation of due process, then the attorney gets more money. If the violation -- if it's not in violation of due process, the attorney gets less money.

I don't think that's a causation or redressability problem. But still, the attorney couldn't assert -- like the attorney had no due process right in the fee structure, as understood by the Court. It had to be the clients and the

claimants, and therefore, there was a third-party standing analysis.

THE COURT: Let me ask you about -- a hypothetical. Let's just imagine that we have another administration -- not this administration, a future administration -- that engages in just blatantly illegal racial discrimination. So let's say, EPA goes out, looks at every grant and says: Does the lead researcher have an Asian last name? And if the answer is yes, we're terminating those grants.

Obviously, this has a profound effect on all the lead researchers across the country who have Asian last names.

Is it the Department of Justice's view that none of those researchers would have standing to sue because they are not parties to the contract that was terminated?

MR. ALTABET: No. Because, I think, in that scenario, it's the individual rights of the researchers or the principal investigators that are the legally invaded interest.

And I brought an example to Your Honor's question about: Is there any scenario where we think that the contract termination would lead to a cognizable injury?

I could think of a lot of examples, but it just depends on what the claim is. So again, here is the claim as to funding, and so they have to have an interest in the funding.

But let's say the Sixth Amendment context --

(Reporter interrupts for clarification of the record.)

MR. ALTABET: Yes. I will.

THE COURT: Just help out the court reporter. She has to write every word as you say it. We have time to hear your argument. If we go too long, we'll take a break.

MR. ALTABET: Yes, Your Honor.

Think, for example, about the Sixth Amendment. Let's say I am arrested for a felony and I'm sitting in jail awaiting an attorney, and the State of Aims [sic] has a contract with the legal aid group that represents indigent criminal defendants, and they terminate that contract. They say it's too much money; no one is going to be representing indigent criminal defendants.

In that case, the termination of the contract leads to a cognizable injury, as a felony defendant, because I am no longer receiving an attorney. That's a personal right to myself.

But that contrasts with the First Amendment context where it's about funding, and so they need to have an interest in the funding that is recognized under law. And here we try to spell out a possible way that they could have the -- sort of the only possible way we could think of where they would have a positive law, cognizable legal interest in the funding because of third-party beneficiary status.

THE COURT: So going back to the hypothetical that I

posed to you about termination of all grants of researchers who have an Asian last name, your view would be, in that scenario, the researchers have an independent injury because the -- the harm inflicted was on them directly? And the right at issue was their right to be free of racial discrimination?

MR. ALTABET: Yes. It's targeting them directly through the equal protection right that they have.

And here, at least as pled, as set up as a First Amendment claim, it's about the right to continued funding. So they must have a legal interest in that funding.

And I think that has to come from the positive law or some way that's been recognized. I don't think First Amendment law recognizes, in any of these funding cases, people -- like employees, say, at the institutions in the USAID case, the Open Society Foundation.

The employees there were no longer receiving funding for their projects because of Open Society's inability to take a pledge about sex trafficking and prostitution. But we would, I think, say that it's the First Amendment right of Open Society -- not the First Amendment right of the employees who also face a lack of funding -- that's being asserted in that case. And I don't think the employees of Open Society would have a legally cognizable interest to bring their own lawsuit in that case.

THE COURT: Is there case law saying that the

employees who are required to, say, take -- or to participate in this -- or who are prohibited from advocating for particular causes that they want to -- or, in this case, doing the research that they want to -- that they want to conduct, the Government is now saying these are forbidden topics, you can't research these topics?

I'm having a hard time understanding why the person who is doing the research hasn't suffered an independent First Amendment injury.

MR. ALTABET: And I think the reason I -- I think these cases like *Kowalski* and *Triplett* -- and if Your Honor sees them differently, then that is a substantial part of our argument. But cases like *Kowalski* and *Triplett* stand for the proposition that even a cognizable pocketbook injury, if the right being asserted is not my own, but rather, an action happens, a third party suffers harm that flows to me, the right I'm asserting matters.

And if it's the due process right, say, of the third party where, ultimately, the consequences flow to me, I need to show the third-party standing test of close relationship and hinderance.

THE COURT: Is that because the target of the Government's regulation is the third party, rather than the plaintiff in those cases?

MR. ALTABET: I think, yes. And in particular, it's

about -- I think in this context especially -- what the content of the claim is.

And here the content of the claim is funding, and unless you have an interest independently known in the positive law in that funding, then I don't think you have this legally cognizable injury. And I think *Triplett* is the same, you don't have a due process right in the funding scheme for the fees.

THE COURT: But why isn't the target here the researcher and the research that's being done?

MR. ALTABET: Because, at least in this context, the researchers, I do not think, are asserting their own First Amendment rights as described. Because in, for example, a case where the United States says that every principal investigator must take a pledge of X, Y, Z -- in the Open Society way. I think that's an example where their rights are being targeted and affected.

But here, at least as pled, it's about a funding stream to a third party. The funding does eventually reach these researchers, but it's still through that third party, and so it's the right of the third partying to funding.

I don't think you can just go down the line. Employee -- well, maybe the researcher hires a nonprofit to help them with their project. So now does the nonprofit have standing?

Then the nonprofit has employees. Does the nonprofit

employees have standing?

I think it would be disruptive to this whole area of law to think that anyone who has been affected by, for example, the Government's choice on funding, can now bring a suit independent of the actual recipient of the funding.

THE COURT: Let me just give plaintiffs an opportunity to respond.

MR. CHEMERINSKY: Thank you, Your Honor.

Kowalski and *Triplett* are third-party standing cases. *Kowalski*, for example, is about whether a criminal defense lawyer could raise the rights of criminal defendants by repeal in Michigan.

We could talk about whether or not the plaintiffs here can represent the University of California, but this isn't a third-party standing case. This is an instance where the plaintiffs are suing over the injuries they've suffered with regard to their research being stopped.

It's a loss of income to many of them to the extent they're paid out of that. The Supreme Court has always said that an economic injury is sufficient for standing. It's harm to their professional work. The Supreme Court has recognized that harm to one's professional work is an injury sufficient for standing. It's a harm to reputation. The Supreme Court has said that's sufficient for standing.

I also think that the Government's premise

misunderstands how grants work. The grants functionally are to the researchers. They're through the Regents of the University of California. Generally, the researchers can take them with them if they move to another institution.

Also, the First Amendment harm is to the individuals that are being denied grants because of the viewpoints that they're expressing in their research, as perceived by the Government. First Amendment is always a personal harm.

Now, we could go on and talk about could there be third-party standing. And I think this is different than *Kowalski* and *Triplett* if you needed to get to third-party standing because this situation where there's sufficient identity of interest between the plaintiff and the third party, so it's more like *Singleton vs. Wulff* or *Craig vs. Boren*.

But, Your Honor, you don't need to get to third-party standing. As you said in your remarks, this is about the injuries that these plaintiffs have suffered.

THE COURT: Let's just move to Question 2.

MR. ALTABET: Can I just address one thing, Your Honor, that was said?

It's just -- they actually -- in order to take those grants with them, they need to -- the institution would need to agree. It's not the researchers' grants.

As a matter of fact, the institution would have to say -- let's say, our principal investigator moves to a new

place. The institution would have to say, "I relinquish this grant to, say, the new institution."

THE COURT: Isn't it true that if the -- I thought I saw somewhere in the grant agreements that if the institution -- if the University of California, we have a grant that goes to Researcher A, and now the University of California wants to reassign it to Researcher B, that they have to let the Government know, and the Government has to approve that change?

MR. ALTABET: Yes, Your Honor. But I think in -- similar to any contract, if someone is doing work for me and a new person is going to start doing the work, I might have the ability to say: Person 1, that's fine. Person 2 is a good enough substitute. I agree.

THE COURT: In terms of Question 2, my question was (as read):

> "Assuming plaintiffs have Article III standing to bring their claims, do defendants contend that plaintiffs' claims could actually be heard in the Court of Federal Claims under the Tucker Act?"

Let's just start with that.

MR. ALTABET: Yes, Your Honor, we do.

And I think it's most helpful to start with B and C, the consideration and the right to monetary recovery, and then move to A.

So starting with that, we cited *Boaz Housing Authority*

as our main case on this -- B-O-A-Z, Housing Authority -- a 2021 federal circuit case. And there, the topic matter was a contract for public housing authority subsidies to states and localities. It was through a statutory discretionary program, and the Housing and Urban Development Agency created contracts to send this subsidy money to states and localities to help fund public housing. So it was for the benefit of the public.

The Court didn't even question the consideration portion. It just moved to whether there was a right to monetary recovery.

And there, I think you can see what has happened with the *Rick's Mushroom* case.

The United States for decades has tried to argue that these grant agreements in the Court of Federal Claims in the Federal Circuit are not cognizable there, and we've lost that war. And I think *Boaz Housing Authority* is a good example of that.

The Court says there's only three categories of contracts where there would not be a right to monetary recovery. That would be express disavowals, contracts involving criminal cases, and specific special cost-sharing agreements like that in *Rick's Mushroom*.

And what you'll see over the course of the decades after *Rick's Mushroom* is that case is essentially limited to its facts where the government and the person receiving the

funds worked very closely together, with the United States doing substantial work and the other person doing substantial work. So it's not that kind of case.

I have one case that's not in the briefing but that's responsive to Your Honor's question. It's *Columbus Regional Hospital v. United States*, 990 F.3d 1330, which I think answers Your Honor's A and B category questions.

First, that case was about an agreement between FEMA and Indiana for disaster relief funds. And there, the Court said: (as read):

> "Consideration in this context is satisfied if the Government has imposed a variety of duties on the counterparty, even if it's in a standard form agreement."

So I think this is to the contrast of *St. Bernard*, which is just a Court of Federal Claims case. It's not precedential under the Court of Federal Claims' rules, and it was affirmed on different grounds.

Meanwhile, this is a Federal Circuit Case, post-dating *St. Bernard*, and it makes it clear that consideration is allowed in this context, and particularly so here, where the Government has chosen topics in notice of funding opportunities to -- that it wants research done on and then has imposed terms on the counterparty.

I'll also note that in the *Boaz Housing Authority*

case, that case makes clear that in the event of a breach of contract, the counterparty to the United States can recover as if the contract had gone its entire term.

So there's no question that here, if plaintiffs were to succeed in the Court of Federal Claims -- or the University of California were to succeed, they could recover the entire term of the contract. It doesn't matter that it was purportedly terminated halfway through.

And now, I guess I'll turn to Your Honor's first, A, which is, "Could plaintiffs bring the suit there?"

Yes. The Court of Federal Claims would have subject matter jurisdiction over the suit. The question would be on the merits. "Do plaintiffs have an express contract, an implied-in-fact contract, or third-party beneficiary status?"

That's in *Columbus Regional Hospital*. That cleared up several different cases on that at the Court of Federal Claims, whether it's a 12(b)(1) or a 12(b)(6) dismissal when someone doesn't have a contract.

And so long as it's not a frivolous claim, the Court of Federal Claims has jurisdiction but then, on the merits, may say that they lose. And *Columbus Regional Hospital* is a great example. There, the Columbus Regional Hospital was not a direct party to United States' contract with Indiana.

But they argued that in the negotiations over the contract, worksheets involving Columbus Regional Hospital were

approved by the United States -- maybe similar to this situation where the research is approved as part of the agreement with the United States and University of California institutions.

And the Court held that it was non-frivolous, and the Court had jurisdiction over whether that was an express contract, an implied-in-fact contract, or the Court even held that it might be a third-party beneficiary situation.

Now, we think that this is not -- we still think that they cannot succeed on third-party beneficiary status. But it's not a frivolous claim that the Court of the Federal Claims would not have jurisdiction over.

THE COURT: If plaintiffs haven't asserted third-party beneficiary status as the basis for their claims, is it still your view that there would be jurisdiction over their claims in this action?

They don't assert breach of contract. They don't assert third-party beneficiary either, so it is hard for me to see how the Federal Circuit can conclude that this is breach of contract within the Tucker Act.

MR. ALTABET: And that's -- the reason that we can assert that is the *MegaPulse* test and its progeny, which requires looking at the substance of whether an action is, in essence, a contract action regardless of how it's pled.

And I think one important note there, the *Tuscon*

Airport Authority case from the Ninth Circuit that we cited, I think, is the most on point in explaining this, specifically, because, there, the Court rejected the idea that there needs to be even an adequate remedy in the Court of Federal Claims. It just needs to have jurisdiction over the essence of the action, and that included constitutional claims.

And the Court still held that the implied preclusion test under *MegaPulse* applies. You look at the essence of the action, and if it is, in essence, a contract action on a claim-by-claim analysis -- some claims could be, some claims could not be. But if a claim is, in essence, a contract action, then it needs to be brought in the Court of Federal Claims, and there's implied preclusion, even if you're going to lose.

THE COURT: Just to stay for a minute on the *MegaPulse* test.

So let's just assume that I find that the plaintiffs would be irreparably harmed by termination of the grants because their research would be interrupted, they'd have to lay off their researchers, it would hurt their career opportunities.

If I -- if I reach that conclusion and I send plaintiffs to the Court of Federal Claims, am I -- are you in agreement that that means they would not be able to get preliminary injunctive relief there to -- to arrest that harm?

MR. ALTABET: I think it would depend on which claims, Your Honor has concluded fit -- under the *MegaPulse* test belong in the Court of Federal Claims.

If, for example, Your Honor found three of their claims, but one claim doesn't, so one claim the Court maintains jurisdiction over, and that one claim was the basis for the preliminary injunction, then, no, because the Court would have jurisdiction over that claim.

But I think it's true that if the Court lacks jurisdiction over all of plaintiffs' claims that would provide preliminary injunctive relief, then the preliminary injunction could not continue upon a conclusion that there's a lack of jurisdiction in this court.

THE COURT: So, essentially, if I -- if I agree with the Government's position which is that the whole case should go to the Court of Federal Claims, even if I think that plaintiffs have been irreparably harmed, and injunctive relief would otherwise issue to protect them, it's your view I should send them to this court where they can't get any of that relief and nothing can be done to prevent that irreparable harm.

Am I understanding the Government's position correctly?

MR. ALTABET: Yes. I mean, our position -- I will embrace this -- is that if there's a lack of subject matter jurisdiction in this court, then the Court cannot issue a

preliminary injunction on the basis of a case that lacks subject matter jurisdiction.

And in the Court of Federal Claims, the plaintiffs could ask for expedited relief. They could ask for, you know, a quick turnaround on whether there's been a breach of contract to retrieve the money. But, ultimately, if there is no jurisdiction, there can be no preliminary injunction regardless of irreparable harm.

THE COURT: And isn't that part of the *MegaPulse* test, though, to look at the rights and remedies that are at issue, and if the remedy -- the principal remedy that is sought is to arrest immediately these irreparable harms, why does it make sense to send it to a court where they can't do that?

MR. ALTABET: I don't think it's part of the *MegaPulse* test in the same way that if we were asserting that there is as explicit preclusion -- let's say Congress passed a statute "This Court shall not have jurisdiction over this action," or, you know, the subject matter of this action, then the Court couldn't issue a preliminary injunction just because the remedies -- there is irreparable harm if Congress has precluded the action.

And similarly, the *MegaPulse* test is a way of thinking about: Does this court have subject matter jurisdiction?

I don't think it's amenable to, then, bringing in, say, the equities or irreparable harm. I think it is a

formalistic test as to whether under 702 there is implied preclusion or whether under, say, *Armstrong*, there's been preclusion because there's a separate statutory scheme designed to deal. And that's for the ultra vires claims.

THE COURT: Let me give plaintiffs an opportunity to respond.

MR. CHEMERINSKY: Thank you.

Your Honor, the flaw in the Government's argument -- and this also goes to your first question -- is in thinking of this as a contract. That's wrong both factually and legally under binding Ninth Circuit precedent.

Factually, I would point you to a declaration the Government filed, the Pendleton declaration, paragraph 6. It specifically says there's an important distinction between a grant and a contract, and these are grants not contracts.

In terms of the law, there's a binding Ninth Circuit precedent, *United States Aeronautical Corporation vs. United States Air Force*. And specifically, if you look at 80 F.4th at page 1026, it says you have to look where the cause of action arises.

And it says explicitly, if the cause of action arises from the constitution or statute, then the Tucker Act doesn't apply. Only if the cause of action is for breach of contract does the Tucker Act apply.

All of the causes of action of the complaint are for

constitutional and statutory violations.

Indeed, a number of federal district courts in two other cases from the Northern District have held that the Tucker Act doesn't apply.

Now, to go to the three factors that you pointed to -- and I think there's no need to go to those factors because the Tucker Act doesn't apply -- as to the first, it's notable the Government wants to have it both ways because the first factor says it has to be a contract between the Government and the plaintiff.

And arguing for no standing, they want to say, "Oh, this isn't a contract with these individuals." But, here, they want to say, "Yes. Treat it as if it is a contract with these individuals."

I'd also go to the third of the factors that you identify in the question yesterday, and that's whether money damages would be available.

This isn't a case for money damages. This is a case for an injunction; and as you pointed out, no injunction is available in Federal Court of Claims. This would leave the plaintiffs with no remedy.

Your Honor, long ago *Marbury v. Madison* said: With a right, there has to be a remedy.

THE COURT: And what is your view of the issues that were flagged in Question 2? Is it your view that Federal

Circuit precedent would preclude the claims from being -- from going forward in the Court of Federal Claims? If I sent it there, would they just be sending it right back, or are you in agreement with the Government that if -- if I looked at the more modern Federal Circuit precedents that they would allow those cases to continue in the Court of Federal Claims?

MR. CHEMERINSKY: I don't think the Federal Court of Claims would take jurisdiction here because, just what I said, these are constitutional and statutory claims. They're not breach of contract claims.

In terms of the first factor, I think that -- very well the Court of Claims could say what the Government says in its standing argument: This isn't a contract with these individuals.

I think with regard to the third, the Court of Claims would say: We're focused on money damages. This is a case for an injunction. Not money damages. That should be in the District Court.

THE COURT: And let me just confirm. It seems implicit in some of the briefing, but I want to confirm with you.

Is it plaintiffs' position that your claims don't rely in any way on the terms of the grant agreements?

MR. CHEMERINSKY: Well, Your Honor, we're saying that the Government didn't follow the constitution and statutory

requirements, that -- also the agency didn't follow its own procedures. So we're not focusing on the terms of the grant agreements in that sense.

THE COURT: Well, let's say -- let's do another hypothetical.

MR. CHEMERINSKY: Okay.

THE COURT: Let's say, in a future administration we have a day all the lawyers go on vacation that day, and the Government just decides to extend grants without having an actual grant agreement; they just decide that they're going to start paying the money, and they tell the researchers: The plan is to fund your research for the next few years.

And then the Government abruptly terminates the funding after two years without any explanation and -- because it involves a forbidden topic of research.

Would you have the same claim, even though there's no actual grant agreement in that situation?

MR. CHEMERINSKY: Well, I would start by wanting to know, is there a statute that appropriates the money, in which case that means that the money is there, and that administration can't cut it off.

But in terms of your specific question, yes, it would be the same. Think of it with regard to the Administrative Procedures Act. The agency still can't act in a manner that's arbitrary, capricious, or abuse of discretion. It still has

to, under *Ohio v. EPA*, be reasonable and reasonably explained when they would take that action.

Also, in terms of the First Amendment, you still can't punish people because of their viewpoint, even if they didn't have a right to the money.

And in terms of due process, it may be different, but so long as they have a reasonable expectation to continued receipt of a benefit, under *Roth v. Board of Regents*, they still have a property interest requiring due process.

THE COURT: Thank you.

Last opportunity for the Government to respond.

MR. ALTABET: I'll just -- just a couple of things.

So *Boaz Housing Authority* addresses Your Honor's question about what happens when an agency uses a contract versus doesn't use a contract in this sort of program involving grants. And there, the Court says when the government chooses to use a contract, it is then subject to the Court of Federal Claims so long as the general requirements are met.

In regards to grant versus contract, the Federal Circuit -- we've made this argument for decades, again, that the grants are not subject to Court of Federal Claims, and we've lost.

And so grants and contracts are both, as we've described them under the Pendleton declaration, in the Federal Circuit -- or in the Federal Circuit and the Court of Federal

Claims.

And just a couple of last points. We argue that they are bringing claims that involve the Constitution and statute but that require the terms of the contract because it's the terms of the contract that set out the obligation for funding, that certain parties receive funding.

And the cases we cite, from *Tucson Airport Authority* onward, address those points and say constitutional and statutory claims, as pled in the District Court, may still belong in the Court of Federal Claims if it's about the termination of a contract.

And lastly, as to implied preclusion, just because these plaintiffs would lose on the merits in the Court of Federal Claims under *Tucson Airport Authority*, that is, that they don't have an adequate remedy, doesn't matter under implied preclusion because implied preclusion is about whether the actual subject matter has been moved to a different court.

And Congress, for example, in the Civil Service Reform Act context says that employees have the ability to bring certain suits in the Merit Systems Protection Board, but the union might not be able to bring suit there, but would still be precluded from bringing a suit in district court on the same subject matter.

I think that kind of understanding applies here as well.

THE COURT: Let me give plaintiff an opportunity to respond about the Civil Service Reform Act point.

MR. CHEMERINSKY: I'm not sure I understand the question you're asking.

THE COURT: So as I understand the Government's argument, it's that just because there is no opportunity for plaintiffs to bring their case in the Court of Federal Claims, that doesn't mean that this Court has jurisdiction over it as long as someone could enforce these rights, for example, the University of California could sue in the Court of Federal Claims. That's good enough.

MR. CHEMERINSKY: Your Honor, that's not the law, and it's not what due process would say.

The United States Supreme Court, in a long line of cases has always said statutes should be interpreted to make sure that somebody is not precluded from any jurisdiction in a court.

Johnson v. Robison, *Osterreicher*, and cases like that.

What this would say, then, is these plaintiffs have no forum that they can go to to vindicate their rights. The Government is saying they can't come to Federal District Court to vindicate their rights, and they can't go to the Federal Court of Claims.

The Supreme Court has never said, "Well, because somebody else might be able to sue, your due process rights are

vindicated."

Their due process rights mean they have to have a forum, and what the Supreme Court has said is statutes should be interpreted to preserve the ability of people to be able to have their day in court. The Government leaves them with no day in court.

THE COURT: Let's move to Question 3.

I'll start with plaintiffs on this question. So Question 3 is (as read):

"In the event that the Court finds the Winter's factor satisfied with respect to the arbitrary and capricious claim and the First Amendment claim as to the DEI executive orders without reaching the other claims asserted, should the Court consider certifying separate classes for each claim? And if so, should the class definition for the arbitrary and capricious claim be tailored to those researchers whose grants are terminated via a form letter that lacks a grant-specific explanation stating why the agency changed its position from the original word and considering the reliance interest in the funding regardless of which executive order, if any, served as the basis for the grant termination?"

Let's start with plaintiffs on that.

MS. CABRASER: Good morning, Your Honor, Elizabeth

Cabraser.

We -- we interpreted this question as one of class scope and class structure. And having thought about it and having had several different answers since yesterday, I think where we land is this: First of all, Rule 23(c)(1)(b) does require the Court in certifying a class to specify the claims or issues as to which the class is being certified. And, of course, a class can be certified as to some claims or issues and not others, hence the rule.

We had considered, in proposing our revised class definition, that it would serve equally for any and all claims that the Court would certify, and that we did not need different class definitions or different class scopes for that.

That said, the Court's suggestion with respect to tailoring the APA claim, the arbitrary and capricious claim to the use of form letters, has a certain precedent and a certain appeal. First of all, it is an objective class definition, and courts always strive for that, even in 23(b)(2) classes where it's less important than in 23(b)(3). And it would be certainly possible to look at all of the letters and see that they are form letters that lack these qualities. Indeed, that is what the record shows to date.

We do have a concern on the margins about that class definition. And that is that it would be easy or at least possible as the case goes on toward the final judgment for the

agencies to amend termination letters or to issue new termination letters that include more boilerplate that says: We reviewed your grant specifically, and we considered your reliance issues.

For -- and that is one reason why we would submit, all of this is discretionary with the Court, that the same class definition can serve with respect to both of those claims.

Our claim under the APA, arbitrary and capricious, is really that none of these form letters, however amended, however they might be varied, can remedy the basic problem here which is that the way grant terminations were done from the outset violates, categorically, the APA. It was not a reasonable process.

And if you don't have a reasonable process, you can't have a reasoned explanation for it. And I think the most recent example of that was the *Green & Healthy v. EPA* case that we submitted yesterday, issued on June 17th, involving a group of block grants that had been approved by Congress, appropriated by Congress, given out to do environmental justice.

And once the EO's were issued earlier this year that condemned environmental justice as a grant project, of course, the grants were terminated. And the problem was Congress said it wanted environmental justice. That statute had never been amended. The money was appropriated. The money was paid out,

and suddenly, no environmental justice. It couldn't a starker contrast. And it's the same type of contrast that is illustrated throughout this case.

Judge Ableson, in that case, doing the individual APA work of looking at the complete administrative record and all the e-mails and the minutia of the grant termination process, found there was no way to square what the EPA had done with any semblance of a reasonable process or that it was even possible to give a reasoned explanation. And that's our position here, and we think those are common questions capable of classwide adjudication.

That said, we don't object to this additional specificity if the Court feels that that is going to result in a more managed -- manageable and more focused inquiry going forward.

THE COURT: The question I have is whether there's a situation in which the administration could administer a grant termination program pursuant to the executive orders that require reduction in federal spending, generally, in a way that is reasoned and that does provide a reasoned explanation in the form letters.

In order to provide a reasoned explanation, one would, of course, have to conduct reasoned inquiry. So I don't think that a boilerplate letter that just says: "We've done the reasoned inquiry," without explaining what it is, is really the

same thing as what we currently have.

But the worry that I have is if the claim that I am finding likelihood of success on and issuing preliminary injunctive relief on is an arbitrary and capricious claim, it does seem to me that to the extent I'm issuing prospective injunctive relief, it needs to be tailored to the form in which the notice is provided.

So I'm curious, though, what plaintiffs' reaction is to that tentative view.

MS. CABRASER: Your Honor, other than our -- other than our position that it is not necessary because of the nature of our claim that, at least with respect to previously terminated grants, there is no possibility of papering over what happened.

But the point about prospective relief is an interesting one, and of course, that is what an injunction is for. It is also to protect the class against future violations.

And with that in mind, in terms of enforceability of the injunction and notice to the agencies and the defendants of what is enjoined, then I think that is a matter that is at the discretion of the Court. I don't think it would be erroneous, and I think, our skepticism aside about what agencies might do to try to get around it, that is a matter for another day with respect to enforceability of the injunction. And we have no

objection to that.

And I would say that as -- as -- as our briefing shows, we are not requesting grant termination immunity for anyone. We are simply requesting that the process that -- processes that were in place before the executive orders are restored, and that the agencies get back to what they were doing and how they were doing it, and the careful evaluations they were giving to both grant approvals and the rare, very rare grant terminations prior to these executive orders.

The concerns that we have, again, on the margins about a reason coming up, you know, funding, and that being a potentially valid reason, the EOs -- the executive orders listed, the class definition, aren't only the DOGE orders, the DEI, the DEI environmental justice, and gender ideology, they're also the EOs that say: We are going to cut the government.

So, in fact, there is a sword hanging over these agencies' heads if they don't continue to do what we are asking them to be enjoined to do because they could be eliminated. It's an unprecedented situation, Your Honor, but it's one that is going to require, I think, vigilance in the enforcement of the injunction.

But as I say, that said, we don't have an objection to that class definition being tailored in that manner to the APA claim.

THE COURT: Let me give defendants an opportunity to comment on it as well.

MR. ALTABET: So just a couple of points, Your Honor.

First, my understanding is that for a (b)(2) class action, even if there are subclasses, that the broader class still needs to meet all of the 23(a) and the (b)(2) requirements. So we sort of think the same objections that we have to the broader class would apply even if there were additional subclasses.

Also, under Ninth Circuit precedent, subclasses need to meet the 23(a) and the (b)(2) requirements separately. And we think there are a couple of problems there, and the main one is just for the arbitrary and capricious claim.

Since we have raised a committed-to-agency-discretion-by-law basis, which would eliminate all APA review if correct, and that committed-to-agency-discretion-by-law analysis requires looking at, agency by agency, what does the statutory scheme permit in terms of discretion, we think there's still the kind of individualized inquiry for an arbitrary and capricious subclass that bars a (b)(2) class action or class subclass because the Court would have to find for each agency whether or not it's committed to agency discretion by law to determine funding priorities.

So, for example, plaintiffs note that in the EPA they would raise that the environmental justice funding from

Congress creates a mandatory directive that would forbid the committed-to-agency-discretion-by-law success for the Government.

But by contrast, the NEH statutory scheme gives full discretion to the NEH chairperson to decide what grants to fund, if to fund them, and how to fund them. So I think that there has to be an individualized inquiry would defeat the commonality and typicality for that subclass under arbitrary and capricious.

Lastly, for the First Amendment DEIA subclass, I still think there's differences across agencies that would defeat commonality and typicality, but it is certainly of a different kind than the arbitrary and capricious example, where I do think it's a real substantial individual inquiry for each agency. And --

THE COURT: When you say it's an individual inquiry, you're suggesting that the Court really needs to have a subclass for each -- on the arbitrary and capricious class. It would need to have a subclass for each individual agency; is that really what you're saying?

But you're not saying that within the EPA or within those grants that were terminated by NEH or NSF that each of those involve an individualized inquiry, are you?

MR. ALTABET: So I mean, we stand by our objection that -- in our briefing that arbitrary and capricious requires

that individual review generally. But putting that aside, assuming Your Honor does not agree, we think -- we just want to point out that the committed-to-agency-discretion-by-law portion certainly requires agency-by-agency individualized inquiry.

Not grant by grant, but agency by agency. And then there would be a real problem if there were agency-by-agency subclasses because they have to meet 23(a) numerosity and other requirements. And so for many of these grants -- for many of these agencies, as we've seen, there would not be enough terminations for there to be numerosity.

THE COURT: Let me give plaintiffs an opportunity to respond.

MS. CABRASER: Thank you, Your Honor.

None of those arguments prevent this Court from certifying either separate classes on 1A and the APA, that those are not subclasses. There are representatives for each of them that are currently named. There's numerosity -- which the Government did not contend -- and certainly, commonality.

If the Court determined it were appropriate to certify agency-specific subclasses, we also have named proposed class representatives that dealt with -- dealt directly with -- were the names that were searched out by those specific agencies, with the exception of NIH, and we have an additional plaintiff from UCSF who has confirmed she would be willing to serve as a

representative for an agency-specific subclass.

She had a $5 million NIH grant that was terminated based on gender ideology. So with respect to gender ideology-specific EO plaintiff and an NIH-specific plaintiff, if the Court were inclined to parse the class that way with respect to separate classes and even subclasses, we can meet those requirements and we can do so expeditiously.

With respect to the numerosity issue for a subclass, that's a -- numerosity is a relaxed standard for subclasses because the Courts recognize that there are many, many reasons -- including Rule 42 reasons, you know, partial issue adjudications -- why the Court might want to focus on a smaller group. And I believe the case law in the Ninth Circuit has certified subclasses with as many as ten or a dozen class members in them.

So, again, we don't think it's necessary to subdivide the class in that way because the big questions are common questions, and all of the researchers, regardless of their agency, regardless of the EO, whose language was borrowed to terminate their grant, have claims against the directors from the top, against the Trump and the DOGE defendants.

So everyone has those claims. Any of the plaintiffs can represent all of the class with respect to those claims. And it's simply a matter of how -- how granular the Court wants to get in terms of class structuring. And our complaint

recognizes that subclasses can be designated. It's something that we have had in mind from the beginning.

And as you see, researchers continue to come forward and contact us and offer to provide their information, as you saw the declarants did -- by the way, many of those declarants are also willing to serve as class representatives in the case. So that is not a situation where the case will fail or some portion of the class will go unrepresented, depending on how you structure the class order.

THE COURT: Let me move to Question 4, which is about the juridical link theory.

Plaintiffs challenge the termination of grants by NEH, NSF, and EPA. That's the named plaintiffs. But the lawsuit generally also sues other agency defendants on a juridical link theory on behalf of the proposed class.

The Ninth Circuit has confined that doctrine to situations where the defendants followed a mandatory rule requiring them to carry out the challenged conduct in the same common way, not just in encouragement for them all to do it from the same playbook. That's the *Martinez* case that I've cited in the notice of questions.

What mandatory rule required the grant terminations to be carried out in the same arbitrary and capricious way, allegedly, across the agencies or in the -- this way that violated the First Amendment without the required

considerations?

MS. CABRASER: Your Honor, those mandatory -- well, those rules are the executive orders: the DOGE creation order; the DOGE implementation order; and the DEI and environmental justice, gender ideology, and the antidiscrimination merit EO.

They all have mandatory language. They are not guidelines. They are not suggestions.

Unlike the Federal Rules, they use "must," "shall," "shall not." It's not "might." It's not "may." And they are marching orders to the agencies, and they set deadlines.

I mean, there is nothing suggestive about them. There is nothing in the record that indicates any of the agencies felt that they didn't have to follow these EOs, that they could ignore them, or even that they could combine them with their own pre-existing processes.

Everything changed. In fact, the DOGE creation EO says: This order commences a transformation in the way the Federal Government spends money on contracts, grants, et cetera.

So it was a transformative, transformatory order, set of orders, from the top. That was completely absent from the *Martinez* case. Those were guidelines and suggestions for what to do for special needs children during COVID.

And, of course, the school districts did all sorts of

things. The school districts were able to do all sorts of things. That is not what happened here.

That said, the juridical link is not the sole basis for our contention that we have a classwide claim against all of the named defendants because, in fact, the relationship among these defendants -- which is unprecedented; it doesn't have a name -- it's much closer than a juridical link. We called it a convergent -- convergence in our briefing.

The closest thing that I could think of from existing law would be the association-in-fact enterprise that -- that is used in enterprise liability or civil RICO claims. But it's even closer than that. And we know it's closer than that because the President said so.

When Elon Musk left DOGE, the President said: All of my cabinet members are now in charge of DOGE, and they're all going to implement DOGE.

And the executive orders I just mentioned are all still in place. So now we have a situation where the President, all the agency heads that we name in our complaint, are running DOGE, and DOGE is running all of the agencies that we name as defendants in our complaint. There couldn't be a closer relationship. It is something that is far cozier, for lack of a better word, than the juridical link.

So that's something that does not depend on the application of the juridical link as the courts have utilized

it. It's not necessary here.

There's another basis on which courts rejecting juridical link have included defendants with whom plaintiffs had not -- had no direct dealings in a class and in a case, and that is Federal Rule of Civil Procedure 20(a).

The Eleventh Circuit in case called *Moore v. Comfed* surveyed all the juridical link cases, rejected them under the factual circumstances of the case but said because there is -- because plaintiffs' claims all arose out of a series of transactions or occurrences that have a question of law or fact common to all defendants -- that is the case here -- they could be joined under Rule 20(a) in the case.

And the named plaintiffs who had direct dealings with only a few of those defendants could represent the entire class. That's *Moore v. Comfed Savings Bank*, 908 F.2d 834, from 1990.

So that is a third basis upon which our currently named plaintiffs have standing to and can adequately represent the class against all of the defendants, even if the Court did not exercise its discretion to create separate classes or subclasses that are agency-specific or claim-specific or executive order-specific, for that matter.

THE COURT: Let me give defendants an opportunity to respond.

MR. ALTABET: Your Honor, I think that pointing out

the mandatory rule and juridical link doctrine here is, I think, well taken by the Government. We think there is no mandatory rule that's been identified in the way that matters for the legal claims.

So as Your Honor pointed out specifically, how grant terminations were carried out, including consideration of required factors or reasoned explanation, they have pointed to no mandatory rule requiring the way that it was carried out, which I think is ultimately what Your Honor is very focused on here.

And so given that, I think what they've described does not support named plaintiffs bringing suit for these other agencies.

THE COURT: Do you have a response to the Rule 20 point?

MR. ALTABET: Your Honor, I'm not familiar, particularly, with Rule 20(a), nor the case that plaintiffs have cited except to say we don't think that a transaction or occurrence or association-in-fact sort of analysis makes sense here. We're in a pretty standard discussion of administrative law and administrative law class actions.

And I think there's well-taken 23 law on this subject including, as Your Honor pointed out, this question of whether there's a mandatory rule and an understanding of whether other defendants can be brought into the case.

So I don't know that 20(a) is particularly relevant.

THE COURT: One question I have for plaintiffs about this Rule 20(a) analysis, which is new to me, is why do the courts even have this juridical link doctrine? If you could get around the juridical link requirements by joining parties through 20(a), it would seem to -- it would seem totally superfluous to have juridical link doctrine.

Help me just understand the interaction between these two.

MS. CABRASER: Sometimes the most obvious solutions are hiding in plain sight, Your Honor. There are many attorneys that have not read through the Federal Rules of Civil Procedure recently, or perhaps at all; and I often find something new, and I think that I'm fairly familiar with the rules.

And I think the answer to that question is a legal history question -- or a legal history answer, which is that the juridical link sprang out of a particular case in the Ninth Circuit. It looked like a good solution to a recurring problem in class actions, and so other courts adopted it; and all of a sudden you've got a juridical link doctrine.

And, frankly, I think that it had its first heyday when the courts were unclear about how standing in class actions worked. And we have more clarity on that here, so it may be a doctrine that, while it was -- it is a helpful analogy

to us because our relationship among the defendants as we allege it and as the publicly facing statements of the administration describe it is far closer, both among the defendants themselves and in their dealings with the plaintiffs.

Then the instances in which the juridical link was used to come up with something that didn't look like a conspiracy or a concert of action or an enterprise; right? So I -- it's not -- it's not a doctrine on which our -- the scope of our class stands or falls.

THE COURT: Let's move to Question 5 which is: Why are the named plaintiffs typical and adequate to represent class members whose grants were terminated under the gender -- quote/unquote, gender ideology executive order and the, quote/unquote, environmental justice executive order?

I didn't put that in the question, but I think it's a similar scenario.

MS. CABRASER: We do have environmental justice plaintiffs, the DEI/environmental justice.

There's two DEI executive orders, so it's a little confusing. There's one that is about restoring merits-based competition, and so you can't say anything about race or gender or groups.

And then the DEI/environmental justice calls out these two areas of now forbidden ideas or speech.

THE COURT: I really should have -- I said that wrong. I didn't mean the environmental justice, but there's an executive order that's about improving American energy --

MS. CABRASER: Yes.

THE COURT: -- that is in a related environmental area, but I didn't see clear indication of which plaintiff is associated.

MS. CABRASER: I don't think presently that we have a named plaintiff for that category. We could supply one, if necessary. We do have named plaintiffs for all of the other executive orders with respect to gender ideology. As I mentioned before, we have an additional class representative whose termination letter is a form letter which borrows from the gender ideology executive order to supply the reason for the grant termination.

Her grant is a five-year study, and it included -- but it wasn't -- the focus of the study was not transgender women, but it included transgender women in the participant group because the point of the study was to look at diseases across all groups.

So the problem there is both it included a group which now is now to be addressed or included, and it included in it language that was tagged and flagged and used to terminate the grant, although it's not the point of the study.

So if the Court decides to structure the class along

either agency-specific or executive order lines, gender ideology is covered.

That said, we believe that present class representatives are adequate to represent all of the class regardless of executive orders that were paraphrased or expressly referenced in a particular termination letter by any of the agencies, A, because of the close relationship -- now the merger -- of all the agencies and DOGE; and the administration completely bypassing Congress -- by the way, congress is the only one not included in that group.

But also because for many of these grants, they cross executive order lines; right? They involve both gender ideology and other DEI terms. They might include environmental justice, DEI, and gender ideology aspects. That's what science is and does, and that is why all of these terminations violate the APA.

But, again, it's a matter of the degree of specificity and granularity that the Court decides is appropriate here, and we can meet it.

THE COURT: Anything further from defendants on that topic?

MR. ALTABET: Yes, briefly.

I think that the last statement from plaintiffs helps to clarify why there's not adequacy and typicality, and more broadly, some of the problems with the class action structure

here, which is depending on a grant-by-grand review, you may find that one or more executive orders and the content of those executive orders are involved. But the fact that that requires such an individualized inquiry, is why adequacy, typicality, commonality are so problematic on that First Amendment claim.

THE COURT: You're saying because it's -- the issue is identifying which grants have been terminated because of the DEI orders?

It seemed to me from the materials that the parties submitted that it was quite clear the agencies went -- did rounds of grant termination that were driven by the DEI orders. So it doesn't seem like it would be hard to figure out who got their grant terminated for a DEI reason.

But let me know if there's something else in the record you think I should be looking at.

MR. ALTABET: I meant in terms of the legal analysis in determining whether there's a First Amendment violation from each executive order, I think, requires a separate analysis.

So is the gender identity EO something that is violative of the First Amendment in how it's implemented versus the DEIA?

And we agree with Your Honor that there is, for example, in one agency a spreadsheet where there's ways of identifying which executive order may be in play. And so we don't think it's from a sort of finding as sort of acquiring

which particular grant was terminated for reasons, but in terms of how the analysis is done across executive orders. We think this is demonstrative of the commonality and typicality problems.

THE COURT: So you're saying that the analysis as to whether the DEI orders violate First Amendment by discriminating on viewpoint would involve a separate analysis than looking at whether the gender ideology or, for example -- violated the First Amendment by discriminating on viewpoint?

MR. ALTABET: And the energy order and these other executive orders that have been cited, yes.

THE COURT: But so executive order by executive order but not necessarily grant by grant?

MR. ALTABET: That's right. But determining if, say, a confluence, as plaintiffs just posited, for example, a grant that includes multiple topics would require -- would require determining the First Amendment analysis as to each executive order, or that the confluence of executive orders causes a First Amendment problem.

It partly depends on Your Honor's understanding and analysis of what the First Amendment problem is.

THE COURT: Let's move to Question 6, which is the final agency action question. This is really question for plaintiffs in the initial phase, and then I can hear from defendants. (as read):

"If the Court finds that the final agency action here is the individual grant terminations and finds the grant terminations to be arbitrary and capricious, what prospective relief is appropriate for individuals who have not yet had their grants terminated? Could the Court, for example, enjoin defendants from giving effect to future form termination notices that are issued to UC researchers?"

MR. CHEMERINSKY: The answer to your latter question, Your Honor, is yes.

What we're asking is that the Government be required to comply with the law with regard to grant terminations, in essence, to go back to the procedures that were followed before January 20th.

We proposed language for this. You would find it in the document titled "Temporary Restraining Order and Order to Show Cause." It was filed on June 5th. And I'm specifically focusing on page 4, paragraph 3.

It's short so I can read it because I think it directly answers Your Honor's question.

It says (as read):

"TRO defendants are further enjoined to return to the lawful and orderly grant procedures they employed prior to January 20th, 2025, including but not

limited to, A, providing plaintiffs and proposed class members reasonable notice and opportunity to be heard prior to terminating already awarded grants; and B, providing plaintiffs and proposed class members a meaningful, individualized explanation of the reasons for any imposed grant termination rather than a barely customized form letter."

THE COURT: Let me give defendants an opportunity to respond.

MR. ALTABET: I think if Your Honor determines that the final agency action is the grant terminations itself, then there can be no prospective relief as to agency actions that are not -- that haven't occurred. There's no agency action, and they're not final for non-terminated grants.

So, I think, taking the premise of Your Honor's question, Your Honor has identified, I think, a serious issue with prospective relief, and plaintiffs cannot rely, for example, on just the executive order because under *Dalton* and *Franklin*, the APA doesn't apply to the President. It's only when it's reduced to final agency action at the agency level. And if Your Honor has determined it's the grant terminations, then there's no prospective relief.

THE COURT: Why couldn't the Court, for example, say that upon issuance of a purported grant termination that is enacted through a form letter that doesn't have any

explanation, that as soon as the agency issues that letter, there's now a final agency action and that letter is essentially dead on arrival; in other words, it's vacated upon its issuance because it lacks the required elements under the Administrative Procedure Act, and then the agency's enjoined from effectuating that termination letter?

Tell me what's wrong, in the Government's view, with an approach like that.

MR. ALTABET: So the APA's final agency action bar is institute inaction, and it's what gives this Court the ability to act on the administrative agencies. And I think what the Court has described is prospectively saying that future final agency actions not currently within the bounds of Section 702 will be set aside in the future.

And I just don't know of -- I don't think that's possible. I don't think that there's a legal basis for saying that actions that have not occurred are, as of here and now, forbidden under the APA. I don't think there's a set-aside or an injunctive order that can issue as to future expected final agency actions.

THE COURT: Why is that? Because it seems -- it seems like if the final agency action is exactly the same agency action that has already occurred, courts routinely enjoin, for example, agencies from taking an action, and then they say, "If you're going to reenact the same thing under a different name,

you can't do it. That's enjoined, too."

So why is this different from that scenario?

MR. ALTABET: So that's because it depends on -- I think it still depends on what the final agency action is. So if the final agency action is a policy, then the Court could say that actions flowing from that policy at the agency level are forbidden because I vacated or enjoined the policy you've described.

But if the Court determines it's the actual terminations itself, I think those -- it's just different cases. There are other cases where policies or rules are barred. But here we're discussing final agency actions being the terminations. And therefore, there's not the same sort of flow-down that we see in an APA case where it's a policy or a rule or a guidance document.

MR. CHEMERINSKY: Your Honor, that can't be right because, otherwise, what you could do is say, "All of the grants that have been cut off should be restored."

And then tomorrow the Government could do exactly the same thing and then the same thing again and then the same thing again.

I think the flaw in the Government's argument is it's drawing an arbitrary distinction between the Government's policy to cut off grants in this way and the actual termination of individual grants.

What you're saying is, from the policy perspective, the Government has to comply with the APA and that its actions have to be reasonable and reasonably explained. And all your order would be saying is to the Government, "You have to comply with the law in the future, and you can't continue to violate it."

THE COURT: Thank you.

I promised you all that you'd have an opportunity at the end to tell me anything else you wanted me to know. It's plaintiffs' motion, so it's your turn first. Then I can hear from defendants, and then plaintiff will have the last word.

MR. CHEMERINSKY: Thank you.

Your Honor, what I was going to address was how the requirements for preliminary injunction have been fulfilled. I will just be very brief as to those requirements and, of course, answer any questions that you have.

I would go in the order of there's irreparable injury; likelihood regarding the merits; and on balance, it would serve the public interest to have the injunction in terms of the equities.

In terms of irreparable injury, we've already addressed this. The reality is, these researchers have had their research stopped. If, someday in the future, a year or two from now, they're able to resume, they'll already have lost their graduate students. They'll have already lost their labs.

They'll have already lost their post-docs.

As I said to you earlier, with regard to the injury requirement, there's a financial loss. There's a loss with regard to the professional work. There's a loss with regard to the reputation.

With regard to likelihood of prevailing on the merits, I think, here, Section 706(2) of the Administrative Procedures Act very much outlines how this Court can go about it. And I think A, B, C, and D are all separately met, though, of course only one would need to be met for an injunction.

A, is that it's arbitrary, capricious, and abuse of discretion. We've already talked about that. So the only thing I want to say here is, the Government makes the argument that this doesn't apply because it's committed to agency discretion.

And here, I want to point this Court to what I think is controlling Ninth Circuit law. The Ninth Circuit case that I would point you to here is *Community Legal Services v. Health & Human Services*, specifically at 137 F.4th 939 to 940.

Speaking of this, this exception has been construed narrowly to apply only in those rare circumstances where the relevant statute is drawn so that the Court would have no meaningful standard against which to judge the agency's exercise of discretion.

That's not true here. The Supreme Court in *Ohio v. EPA* said, as I mentioned, an agency action is to be reasonable and reasonably explained.

That's not true for these termination of grants.

With regard to 706(2)(B), you're allowed to grant an injunction if the agency action violates the Constitution. And we raise three constitutional arguments.

One is separation of powers. Congress has the spending power, not the President. If Congress passes a spending billing, the President can choose to veto it. But if it's adopted, including over the President's veto, the President doesn't get another veto by choosing to spend money and refusing to spend the money that's been appropriated by statute.

We, second, in terms of a constitutional claim, raise the First Amendment, which you've addressed and which have talked about as this being viewpoint discrimination.

And the third constitutional claim is due process. We believe that the researchers do have a reasonable expectation to continue to receive a benefit, and no procedural due process has been provided.

706(2)(C) allows you to set aside an agency action when it violates a statute. And the one thing we haven't mentioned this morning, here, is the Impoundment Control Act, which is very specific that says that when Congress has

appropriated money, the President has no authority to impound it. He can propose a recision to Congress and has 45 days to act.

But that hasn't occurred to any of these funds. And the Impoundment Control Act can be enforced, Your Honor, through the Administrative Procedures Act.

True, that only the comptroller general could bring an action under the Impoundment Control Act, but 706(2)(C) says you can enjoin it because of the violation of statute.

And finally, 706(2)(D) says that you can set aside an agency action for not following proper procedures. Proper procedures weren't followed here. Each agency has within its rules procedures for terminating grants. None of them have been followed here.

The final part, of course, for an injunction concerns the balance of the equities and the public interest. And we think here, when you look at the irreparable harm that's done to these researchers and their constitutional rights, it way outweighs what the Government's interests are.

And I'm glad to answer any questions, but I would simply conclude by saying that, Your Honor, this is a case of such profound importance -- because it really raises the issue: Does the President have the power to refuse to spend money appropriated by Congress without any legal basis for doing so, not following any procedures specified in the Constitution or

statutes?

THE COURT: Let me give defendants an opportunity to respond.

MR. ALTABET: I'll just make a couple -- or few points, Your Honor, and I'll try to focus on what Your Honor has indicated you're interested in based on the questions. So I want to start with just a broad stepping-back for a moment.

Federal agencies receive tens of thousands of grant applications every year and can only fund a small fraction of them. That's in plaintiffs' complaint. That's in the record.

And so, when they decide what to fund, it's not just about whether a research topic is meritorious scientifically or artistically. But it also is about whether it's a topic the agency is interested in based on the agency's priorities.

And that, obviously, has to be true; Programmatic factors are required. And even looking that every research opportunity begins with a notice of funding opportunity, which is the agency saying what topics they're interested in.

And those necessarily include executive priorities. For example, we cited that 2021 EPA research notice of funding opportunity, which focused on executive orders related to racial equity and environmental justice because at the time those were administration priorities; and, obviously, those priorities by executive order have shifted.

So I think that's an important framing for thinking

about this case more broadly.

This isn't about that, by statute, agencies are required to fund certain topics, but that they are required within a certain bound to be thinking about and filing notice of funding opportunities and to fund research that includes topical choices within a larger subject matter, for example, at EPA.

So briefly, just walking through a couple of other points.

On the First Amendment inquiry, I think we all agree that it's the subject matter of the grant that's at issue here. That's, for example, in plaintiffs' own proposed order. They asked this Court to conclude that based on the subject matter of the grant, there has been a violation of the First Amendment.

So the question we're asking is how the executive branch can choose its funding priorities within a program in compliance with the First Amendment or not in compliance with the First Amendment.

And to the extent there's any question whether the executive branch is setting the priorities, not the legislative branch, that has been addressed by the case law. For example, we cited *Rust*. That was a situation where the executive branch, by regulation, was setting out priorities.

So it doesn't matter, necessarily, that Congress is

not setting the priorities. *Finley* also stands for that because *Finley*, using terms like "decency" and "respect," gave the executive branch discretion to determine which types of research or what types of projects to fund.

And that brings me to committed-to-agency-discretion by-law. And just to be clear, that -- the APA includes, say, a reasonable explanation requirement, doesn't give law to apply for committed-to-agency-discretion-by-law, because that's a bar in 702 that, if something is committed to agency discretion by law, arbitrary and capricious does not apply.

And here we just would turn the Court to the *Milk Train* case in the DC Circuit because we think that's a helpful framing device for thinking of which statutes are committed to agency discretion by law, or which topics are and which aren't because there the statute said to provide assistance directly to dairy producers in a manner determined appropriate by the secretary, and stated that it was for economic losses incurred during 1999. So there's sort of two statutory hooks there at the discretion of the secretary and for certain types of losses.

The DC Circuit surveying the law explained: Well, that first part, the providing assistance in an appropriate manner determined by the secretary, that's committed to agency discretion by law because courts can't determine how, within a broad mandate, funding decisions should be made.

But whether the economic losses incurred during 1999 or what the secretary looked at could be reviewed, because that's a direct statement, and there the secretary was looking at losses from other years, and that was illegitimate.

But the funding decisions themselves were within the bounds of committed to agency discretion by law, and I think when the Court looks at the statutory schemes here, the Court will see that several of the statutory schemes are of such a discretionary basis, like the NEH statute, that it is committed to agency discretion by law to determine what to fund and how to fund it.

Just -- I'm going to skip due process, Your Honor, because I don't think Your Honor is particularly interested in the procedural due process point.

On *MegaPulse* and *Tucson Airport Authority*, I would just urge Your Honor to think claim by claim about whether plaintiffs, in their constitutional and statutory claims, are relying on the contracts.

And here, I think that they are because, for example, for the First Amendment claim, plaintiffs are saying the contracts were terminated on an illegitimate basis. There is money owed to the University of California. But the fact of the money being owed to University of California is based on a contract, and the reason that the money should continue to flow into the University of California is from the First Amendment.

And so *Tucson Airport Authority* addresses that kind of case and says in that instance, even though the right is constitutional, it's the contract that forms the basis for the relief and forms the basis within the claim as to why there's a problem, and therefore, it is within the Tucker Act jurisdiction.

And I think *California* and *Sustainability Institute* go to that. And in fact, paragraph 3 of plaintiffs' complaint is clear that they're seeking to have the lost funding restored, in their language; and I think that is clearly within the bounds of the *MegaPulse* and *Tucson Airport Authority* test.

And finally, on irreparable injury, I would just point Your Honor to the SDNY case that we cited. We think it's helpful for standing. We think it's helpful on a few bases.

But one thing the Court noted was, there, Columbia University chose to continue funding projects where the Federal Government had chose to no longer fund them.

So we think, on that basis, that there is, in fact, a choice at the University of California of -- and Iowa State and the other educational institutions, of whether to continue funding the projects that makes this far more attenuated monetary harm of the type that is not amenable to irreparable harm -- that's also part of our causation and redressability -- rather than the sort of irreparable harm that plaintiffs cite, like a bankruptcy, that's direct coming from their claims.

THE COURT: Last word for the plaintiff.

MR. CHEMERINSKY: Thank you. Just a few quick points.

First, with regard to the initial point that the Government makes, that the Court gets -- the Government gets to decide what it wants to fund. Of course, it's the power of Congress to decide, and an agency can change its priorities, but it has to do so in a manner that it explains. It has to be reasonable and reasonably explained.

And here I'd refer you to a case that we filed yesterday that came down the day before yesterday. And this is the *Green & Healthy Homes v. EPA* case from the District of Maryland. And it makes exactly the point that we're advancing to this Court now as to why the agency can't say: Well, we've just changed our mind.

That is inconsistent with the requirements of the Administrative Procedures Act.

Second, as to the First Amendment, the Government just pointed you to two cases, *Rust v. Sullivan* and *Finley v. NEA*. What's so striking about those -- and in both instances Congress passed a statute that said that: We want money to be used in a particular way.

That's not what this has involved at all. And in both those cases, the Supreme Court made clear it wasn't viewpoint discrimination.

In *NEA v. Finley*, the Court went out of its way to

say: There wasn't viewpoint discrimination going on here.

This is all about viewpoint discrimination saying that the Government didn't want to fund certain views.

Third, with regard to committed to agency discretion, the Ninth Circuit has made clear that this is limited to a situation where there aren't legal standards for the Court to apply. Here, there clearly are legal standards in each of the four areas that I talked about under 706(2).

Fourth, with regard to going back to the Tucker Act, again, I believe that this is resolved for this Court by the decision that I cited in the *United States Aeronautics Corporation v. United States Air Force*. And it's interesting, never does the Government talk about that.

Your Honor, there, the Ninth Circuit -- and I think it's 80 F.4th 1026 -- specifically says that when a cause of action arises under the Constitution or under a statute, the Tucker Act doesn't apply.

Every cause of action that is presented by plaintiffs is under the Constitution and with regard to a statute.

I would simply conclude, Your Honor, by saying that what the Government is trying to say to this Court is that the President and the executive agencies have unlimited authority to refuse to spend money appropriated by Congress, and that no court can grant injunctive relief.

No court in the country has ever taken that position,

and many courts, in just the last few weeks, have come to the opposite conclusion.

Thank you.

THE COURT: Thank you all for the argument. I'll take the matter under submission and issue a written order.

I am conscious, obviously, that this is a preliminary injunction matter, and so I will endeavor to get the opinion out shortly. I do think that it will probably be early next week at the earliest.

Thank you all.

MR. CHEMERINSKY: Thank you so much.

THE CLERK: Court is in recess.

(Proceedings adjourned at 11:35 a.m.)

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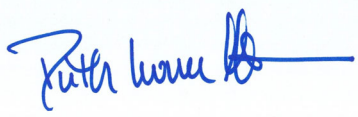
CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Saturday, June 21, 2025



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