No. 25A103

In the Supreme Court of the United States

NATIONAL INSTITUTES OF HEALTH, ET AL., APPLICANTS

v.

AMERICAN PUBLIC HEALTH ASSOCIATION, ET AL.

ROBERT F. KENNEDY, JR., ET AL., APPLICANTS

v.

COMMONWEALTH OF MASSACHUSETTS, ET AL.

REPLY IN SUPPORT OF APPLICATION FOR A STAY

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"Th[is] application is squarely controlled by" the Court's stay ruling in *Department of Education* v. *California*, 145 S. Ct. 966 (2025) (per curiam). *Trump* v. *Boyle*, No. 25A11 (July 23, 2025), slip op. 1. When the government terminates millions of dollars in discretionary grants founded on contracts and is sued to force their resumption, that suit belongs in the Court of Federal Claims, not district court, because only the former court has jurisdiction over most contract claims against the government. This Court in *California* stayed an order from the United States District Court for the District of Massachusetts that would have forced the Department of Education to pay out $65 million in grants related to diversity, equity, and inclusion (DEI) that the agency terminated as contrary to the Administration's priorities. When most of the

same respondents brought the same claims to force a different agency—the National Institutes of Health (NIH)—to resume $783 million in grants that were terminated for the same reasons, the District of Massachusetts should have followed this Court's precedent. Instead, the court disavowed *California*, embraced the dissents, hewed to arguments this Court rejected, and again exercised jurisdiction that it lacked to force the government to pay out millions of dollars in discretionary grants antithetical to the Administration's policy objectives. Respondents, for their part, have no real answers to *California*; they too just repackage the *California* dissenters' arguments.

This case differs from *California* only in being even more manifestly cert-worthy. The lower courts are commandeering the Executive into continuing grant payments based on precedent-defying Administrative Procedure Act (APA) rationales that would independently warrant review. Meanwhile, lower courts have responded to *California* by openly disagreeing with that decision and each other, creating a 3-1 circuit split and sowing lower-court chaos in the dozens of cases raising this issue. This Court should not countenance this ongoing defiance of its decisions. The Court should grant a stay because this case—like many others—"does not * * * differ from [*California*] in any pertinent respect." *Boyle*, slip op. 1.

A. The Government Is Likely To Succeed On The Merits

Three independent flaws in the lower courts' opinions make the government likely to succeed on the merits and would each warrant review: (1) The district court's exercise of jurisdiction over these grant-termination claims flouts the Tucker Act and defies *California*; (2) the district court transgressed the APA's bar on review of agencies' discretionary decisions to reallocate lump-sum appropriations; and (3) the district court's finding of APA violations contravenes bedrock APA precepts and ignores that the NIH's decision to terminate grants inconsistent with Administration priori-

ties was reasonable and reasonably explained.

1. The Tucker Act precludes jurisdiction

California controls this stay application. The essence of respondents' claim is that the government should not have terminated their grant agreements and must continue performing those contracts. That is a contractual dispute which Congress channeled to the Court of Federal Claims, not an APA suit for district courts. Appl. 18-27.

a. Respondents barely address the lower courts' defiance of *California*, which the States—many of whom were *California* respondents—relegate to page 30. In both cases, plaintiffs brought APA claims alleging that across-the-board cuts to DEI-related grants were arbitrary and capricious. Appl. 19. There too, the States purported to "challenge a programmatic decision" based on "statutes and regulations, not contracts," and sought "equitable relief," not money damages. Opp. at 22, 25, *California*, 145 S. Ct. 966 (24A910) (*California* Opp.); cf. States Opp. 22-23, 25-27; APHA Opp. 22-25. Yet this Court held that those were disguised breach-of-contract claims that belonged in the Court of Federal Claims. *California*, 145 S. Ct. at 968.

Respondents say that *California* turned on "the terms and conditions of each individual grant award," citing the First Circuit's characterization of that case. States Opp. 30 (quoting *California* v. *United States Dep't of Educ.*, 132 F.4th 92, 96-97 (2025)); accord APHA Opp. 24. But just as here, the *California* district court did not "examine[] any of the plaintiffs' grant terms nor interpret[] them." APHA Opp. 24 (quoting Appl. App. 22a); see *California* v. *United States Dep't of Educ.*, 769 F. Supp. 3d 72 (D. Mass. 2025). In both cases, the grant terms gave respondents a right to payment, and they allowed the government to terminate grants that "no longer effectuate[] the program goals or agency priorities" via Office of Management and

Budget guidance incorporated into every contract. 2 C.F.R. 200.340(a)(4); Appl. 24-25. And in both cases, that contract term was the basis for the contested termination, making clear that the crux of the dispute was whether the government breached the grant contracts.

Respondents emphasize (States Opp. 31; APHA Opp. 19-22) that the *California* district court awarded injunctive relief, while the district court here awarded declaratory relief. That distinction is meritless. Respondents offer no principled reason why declaratory claims would escape the Tucker Act's jurisdictional bar when, under *California*, injunctive claims do not. Both are "quintessentially equitable remed[ies]" (APHA Opp. 14) that are generally unavailable in the Court of Federal Claims. See *North Star Alaska* v. *United States*, 9 F.3d 1430, 1432 (9th Cir. 1993) (en banc) (per curiam). If plaintiffs could evade the Tucker Act by asking district courts to declare their rights under a contract, every contractual dispute could be reformulated as an APA suit, contrary to Congress's jurisdiction-channeling scheme. Appl. 26-27.

The similarities were not lost on the district court, which recognized that *California* "may be an indicator of how the Supreme Court *might* someday view the merits" but declared that decision "not binding on this Court." Appl. App. 229a. That was erroneous. This Court's interim orders "squarely control[]" lower courts when faced with materially identical facts. *Boyle*, slip op. 1. The district court's refusal to follow *California* and grant a stay should be dispositive.

b. Respondents portray (States Opp. 22-23; APHA Opp. 2, 20 n.3) the district court as issuing two distinct orders—one vacating the NIH's guidance, and one vacating the grant terminations. They assert that the government challenges only the latter and that the district court could vacate the guidance even if it lacked jurisdiction to vacate the grant terminations. But the government seeks a stay of the

district court's judgments in full, because the two are inseparable here. Appl. 25-26.

The entire point of respondents' attack on the guidance is to get back their terminated grants. Without the termination of their own funding, respondents would lack standing to challenge the guidance documents in the first place. Each set of respondents thus brings a single arbitrary-and-capricious claim attacking the NIH's guidance and the grant terminations as a package because the guidance led to the termination of *their* grants (or their instrumentalities' or members'). 25-cv-10814 Am. Compl. ¶¶ 225-233; 25-cv-10787 Compl. ¶¶ 196-215. Private respondents asserted that the grant terminations and the guidance underlying those terminations were arbitrary and capricious "[f]or the same reasons." 25-cv-10787 Compl. ¶ 215. And the States sought an order "holding unlawful and setting aside the Challenged Directives," *i.e.*, the guidance, "and enjoining any action taken to enforce or implement the Challenged Directives," *i.e.*, the grant terminations. 25-cv-10814 Am. Compl. ¶ 233. Before *California*, the States did not even challenge the guidance. Their original arbitrary-and-capricious claim was limited "to termination of the Terminated Grants." 25-cv-10814 Compl. ¶ 234. The States added their artfully pleaded attack on the NIH's guidance only after *California* issued (the same day they filed their original complaint).

Even if the district court's remedy applies prospectively to future grant applications, States Opp. 22-23, the core of this suit is contractual, and the judgments should be stayed in full. In *California*, the States likewise insisted that they were also "seeking prospective relief," to no avail. *California* Opp. at 26 n.3; accord *id.* at 25, 27. Respondents' effort to plead around the Tucker Act should fail here too.

c. Rather than engage with *California*, respondents largely defend the district court's exercise of jurisdiction over their grant-terminations claims under court-

of-appeals precedent. Those contentions are meritless, and the cited lower-court precedents support the government, not respondents.

The parties start from common ground: With exceptions not relevant here, the Tucker Act impliedly precludes district-court jurisdiction over contract suits against the United States. Appl. 20-21; States Opp. 24; APHA Opp. 20. The key question is whether the action is in essence contractual, which "depends both on the source of the rights upon which the plaintiff bases its claims, and upon the type of relief sought." Appl. 21 (quoting *Megapulse, Inc.* v. *Lewis*, 672 F.2d 959, 968 (D.C. Cir. 1982)); accord States Opp. 24; APHA Opp. 22.

Here, the "source of rights upon which the plaintiff bases its claims" is the grant contract. *Megapulse*, 672 F.2d at 968. Without the contracts, respondents would have no right to payment in the first place. When "[t]he right to the[] payments is created in the first instance by the contract," that is a contract claim that belongs in the Court of Federal Claims. *Spectrum Leasing Corp.* v. *United States*, 764 F.2d 891, 894 (D.C. Cir. 1985). Parties cannot evade that jurisdictional requirement by claiming that the government's breach of contract violated the "procedural requirements" of another statute, like the APA, *ibid.*, particularly when, as here, the basis for termination was spelled out in the contract. See pp. 3-4, *supra.*

Respondents counter that the "source of their rights is * * * the APA's guarantee of freedom from arbitrary and capricious agency decisionmaking." States Opp. 25-26; accord APHA Opp. 25. But "a plaintiff may not avoid the jurisdictional bar * * * merely by alleging violations of regulatory or statutory provisions rather than breach of contract"; the jurisdictional inquiry instead depends on the "essential aspects" of the claim. *Ingersoll-Rand Co.* v. *United States*, 780 F.2d 74, 77-78 (D.C. Cir. 1985). Otherwise, every plaintiff could evade the Tucker Act by insisting that the

government arbitrarily breached its contract in violation of the APA. See *Megapulse*, 672 F.2d at 967 n.34.

The States worry (Opp. 26) about nullifying the APA's application to "grant[s] of money." 5 U.S.C. 551(11)(A). But not every grant is accompanied by a contract covered by the Tucker Act—for example, when the government offers money without enforceable conditions. When plaintiffs seek "to enforce a contractual obligation to pay money" though, jurisdiction lies in the Court of Federal Claims. *California*, 145 S. Ct. at 968 (citation omitted).

Respondents note (States Opp. 26-28; APHA Opp. 20, 22-24) that they, like the State in *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988), seek declaratory relief authorized by the APA, not money damages. But *Bowen* involved neither a contract claim nor the APA's bar on suits impliedly forbidden by another statute. Appl. 21-22, 26. Plaintiffs cannot "sidestep" jurisdictional preclusion "merely by avoiding a request for damages." *Ingersoll-Rand*, 780 F.2d at 79. The key inquiry is "the essence" of the claim, and when that essence "is a request for specific performance of the original contract," that request belongs in the Court of Federal Claims however pleaded. *Ibid.*

The States assert (Opp. 28-29) that their "complex, ongoing relationship" with the federal government makes this "a quintessential APA suit" like *Bowen*. But in a huge number of contract claims, the parties have an ongoing relationship, and those claims still belong in the Court of Federal Claims. *Ingersoll-Rand*, 780 F.2d at 80. Even if the court must review an agency's decision, contract claims are fundamentally not "quintessential APA suit[s]."

The States bemoan (Opp. 29-30) the creation of "an intolerable jurisdictional void" whereby no court could "prospectively reinstate grants." But the idea that a particular form of relief would not be available against the United States should be

neither surprising nor intolerable. The APA retains the United States' sovereign immunity for relief that Congress impliedly precluded elsewhere to "prevent[] plaintiffs from exploiting the APA's waiver to evade limitations on suit contained in other statutes." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 567 U.S. 209, 215 (2012). One such limitation is in the Tucker Act, which allows money damages but "foreclose[s] specific performance of government contracts." *Spectrum*, 764 F.2d at 893 n.2 (quoting H.R. Rep. No. 1656, 94th Cong., 2d Sess. 12-13 (1976)). Plaintiffs' inability to compel specific performance is an inherent feature of Congress's design for contract claims generally, not a license to resort to the APA.

Respondents raise (States Opp. 30; APHA Opp. 29) the specter of discriminatory government contract terminations and assert that it would be intolerable if no court could enjoin such action. But the reason *why* the government breached a contract does not alter whether a dispute is contractual. If the government refused to pay $25,000 owed to a construction contractor, that contractual dispute would obviously belong in the Court of Federal Claims regardless of the reason for the breach. Discrimination might give the contractor a winning equal-protection claim, but it would not change the fundamentally contractual nature of the dispute.

d. Private respondents, but not the States, question (Opp. 25-30) whether NIH grant agreements are contracts. The lower courts did not embrace that argument for good reason. NIH grant agreements entitle recipients to "request[]" awarded funds "from the designated [Department of Health and Human Services (HHS)] payment system" in exchange for conducting research pursuant to detailed "terms and conditions" which "are binding on the recipient." Administrative Record 3982, 3984. That is a textbook contract.

Private respondents invoke (Opp. 26-28) irrelevant Federal Circuit and Court

of Federal Claims cases looking to agency practice to inform whether plaintiffs have "implied-in-fact contract[s]" with the government. *E.g.*, *Hanlin* v. *United States*, 316 F.3d 1325, 1328 (Fed. Cir. 2003); *Adia Holdings, Inc.* v. *United States*, 170 Fed. Cl. 296, 300 (2024). Respondents have *express*, not implied, contracts with the NIH—the notices of award.

Private respondents assert (Opp. 28-29) that the grant agreements are not backed by adequate consideration because they did not directly benefit the government. But "consideration[] turns on the conditions attached to [the] grants." *Columbus Regional Hosp.* v. *United States*, 990 F.3d 1330, 1340 (Fed. Cir. 2021). When the grant agreement "impose[s] a variety of duties on" the grantee—as is plainly true here—adequate consideration exists. *Ibid.* *California* treated materially identical DEI-related grants as contracts, 145 S. Ct. at 968; they remain contracts here too.

2. The grant terminations were committed to agency discretion

Even if the Tucker Act did not foreclose jurisdiction, the NIH's decisions about how to allocate lump-sum appropriations to grantees are "committed to agency discretion by law" and not reviewable under the APA. 5 U.S.C. 701(a)(2); Appl. 27-29.

The States claim (Opp. 33) that lump-sum appropriations are generally subject to arbitrary-and-capricious review. This Court has held otherwise: "The allocation of funds from a lump-sum appropriation is * * * traditionally regarded as committed to agency discretion" and "is accordingly unreviewable under § 701(a)(2)." *Lincoln* v. *Vigil*, 508 U.S. 182, 192-193 (1993); Appl. 28. The States' cited court-of-appeals cases (Opp. 33) do not involve lump-sum appropriations and are thus beside the point.

Private respondents at least acknowledge (Opp. 35-38) *Lincoln*'s rule, but they claim that various statutes and an HHS regulation make the agency's discretion reviewable here. But "as long as the agency allocates funds from a lump-sum appropri-

ation to meet permissible statutory objectives, * * * the decision to allocate funds 'is committed to agency discretion by law.'" *Lincoln*, 508 U.S. at 193 (quoting 5 U.S.C. 701(a)(2)). Respondents' own authority confirms this: "*Lincoln* stands for the principle that once that initial level of judicial review is passed," *i.e.*, that the agency complied with statutory objectives, "the specific execution by the agency to meet those objectives may still be left entirely within its discretion." *Raymond Proffitt Found.* v. *U.S. Army Corps of Engineers*, 343 F.3d 199, 208 (3d Cir. 2003) (cited at APHA Opp. 38). While respondents' contrary-to-law claims remain pending in district court, this appeal proceeds on the assumption that the NIH complied with all statutory objectives. Appl. App. 139a. The NIH's discretionary allocation of lump-sum appropriations within those bounds is not subject to arbitrary-and-capricious review.

Respondents also claim (States Opp. 32; APHA Opp. 34-35) that the government forfeited this argument by not *re*-raising it in the district-court stay motion. But respondents do not dispute that the government raised it when litigating the merits in district court. Regardless, the First Circuit passed upon this argument, so it is preserved for *this* Court's review. Appl. 29.

3. The grant terminations were not arbitrary or capricious

Even if they were reviewable, the grant terminations pass muster under the APA. The Administration has clearly articulated its opposition to supporting DEI and gender ideology, and the NIH realigned its grants with those priorities and reasonably explained that it was doing so. Appl. 29-31. By definition, agency decision-making is "prompted by an Administration's priorities." *Department of Commerce* v. *New York*, 588 U.S. 752, 781 (2019); Appl. 33. The district court opined otherwise, but respondents do not defend the court's openly political disagreements, Appl. 14-15, 32-34, and the States distance (Opp. 17 n.10) themselves from the court's baseless

accusation of race and sex discrimination.[1]

Respondents instead demand (States Opp. 34; APHA Opp. 31-32) "data" and "empirical" support for the Administration's opposition to DEI. But "the APA imposes no general obligation on agencies to conduct or commission their own empirical or statistical studies." *FCC* v. *Prometheus Radio Project*, 592 U.S. 414, 423 (2021). Regardless, it is unclear what empirical support respondents would have the government offer to demonstrate, *e.g.*, that DEI does not "expand our knowledge of living systems." APHA Opp. 31 (quoting Appl. App. 130a).

Respondents echo (States Opp. 34-35; APHA Opp. 32) the district court's criticism of the guidance documents' failure to explicitly define DEI. Respondents ignore case law holding that grant criteria need not define terms with exacting precision. Appl. 31-32. And respondents themselves seem to know what DEI is. *E.g.*, Cal. Gov't Operations, *Diversity, Equity and Inclusion*, https://perma.cc/JR3N-YR82; APHA, *Equity Diversity & Inclusion Survey* (Oct. 2021), https://perma.cc/3UFG-JTPE. They clearly recognize (States Opp. 35) that DEI encompasses inquiries into "structural racism and discrimination." And they do not dispute that intersectionality, "anti-

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[1] After the government filed its application, the district court announced that it intends to press forward with its race- and sex-discrimination theory even if this Court grants a stay on the Tucker Act argument and even though no party has advanced such a claim. App., *infra*, 5a-6a; see generally 25-cv-10787 Compl.; 25-cv-10814 Am. Compl. The district court stated that, "as a court of equity," it "surely * * * retains jurisdiction" to enjoin discrimination. App., *infra*, 5a. The court thus announced its plan to "immediately * * * convene a hearing" to "impose an injunction that's not only prospective" but would order the NIH to "reevaluate[]" "a subset" of grants "forthwith * * * without regard to racial or gender issues of any sort, to see whether those grants, as a scientific matter, are not appropriate to go forward." *Id.* at 6a. In addition to violating the party-presentation rule, see *United States* v. *Sineneng-Smith*, 590 U.S. 371, 375-376 (2020), such an injunction would be plainly improper. Respondents have attempted (States Opp. 31; APHA Opp. 19-22) to distinguish *California* on the ground that that case involved an injunction while this case involves declaratory relief. If this Court stays the district court's declaratory relief on jurisdictional grounds, it would be highly inappropriate for the court to turn around and immediately issue a materially similar injunction.

racist healing," and "Buddhism and HIV stigma in Thailand" all qualify. Appl. 11. Instead, they point (States Opp. 34-35) to a small sample of studies with less facially DEI-related titles and assert a scientific basis for a study involving "daily diar[ies] for bisexual+ young adults" while feigning confusion over why that grant was terminated. To the extent that respondents contend that individual grants were misclassified, they can ask the agency to review that decision, see Pet. App. 86a, not pursue a blunderbuss arbitrary-and-capricious challenge to every grant termination.

Further, respondents' retail-level broadsides about what certain studies have to do with DEI are deeply misleading. Their study of "how aging is affected by HIV" (APHA Opp. 18) is titled "Structural Racism and Discrimination in Older Men's Health Inequities." 25-cv-10787 D. Ct. Doc. 38-33 ¶ 11 (Apr. 25, 2025). Their description of "equip[ping] peers with the tools to respond effectively and compassionately to disclosures of sexual violence" (APHA Opp. 18) omits that the study was limited to "SGM [sexual and gender minority]-specific sexual violence." 25-cv-10787 D. Ct. Doc. 38-34 ¶ 11 (Apr. 25, 2025).

Many of the highlighted grants were funded through a racially discriminatory process that the current Administration abhors. For example, the States' grant on "Bacterial and Molecular Determinants of Mycobacterial Impermeability" (Opp. 10 n.4, 34-35) came through a program with an explicit racial preference for "Blacks or African Americans, Hispanics or Latinos, American Indians or Alaska Natives, Native Hawaiians, and other Pacific Islanders," *i.e.*, not whites or Asians. NIH, *NIAID Research Opportunities for New and "At-Risk" Investigators to Promote Workforce Diversity*, https://perma.cc/S83S-H23T; see NIH RePORT, *Bacterial and Molecular Determinants of Mycobacterial Impermeability*, https://bit.ly/5R01AI179080-02 (showing funding via "PAR-22-241," this diversity program). Numerous other cited studies

were funded via similarly discriminatory programs.[2] And one of the named respondents described having her department chair certify that she was "dedicated to a career that champions and fosters DEI" to apply for the previous Administration's diversity grants. *E.g.*, 25-cv-10787 D. Ct. Doc. 38-21 ¶15.b (Apr. 25, 2025). The NIH reasonably identified such grants resulting from a racially discriminatory application process as incompatible with Administration priorities.

Respondents also attack (States Opp. 36; APHA Opp. 32-33) the process by which individual grants were identified for termination. That focus on individual

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[2] *E.g.*, NIH, *Ruth L. Kirschstein National Research Service Award (NRSA) Individual Predoctoral Fellowship to Promote Diversity in Health-Related Research*, https://perma.cc/U3CW-ESQR (PA-21-052) (same racial preference for grants on "Exploration of Unique Neurobehavioral Profile of Sequential Opioid-Stimulant Polysubstance Use Disorders" (States Opp. 10 n.3, 34) and "Understanding the Role of Coiled-Coil Domains in Regulating Liquid-Liquid Phase Separation of Protein Assemblies in Cell Division" (APHA Opp. 3)); NIH, *NCI Cancer Moonshot Scholars Diversity Program*, https://perma.cc/A4YP-JSF4 (RFA-CA-22-050) (same for grant on "Evaluating Centralizing Interventions to Address Low Adherence to Lung Cancer Screening Follow-up in Decentralized Settings" (APHA Opp. 18)); NIH, *Research Supplements to Promote Diversity in Health-Related Research*, https://perma.cc/BP5N-KH4K (PA-21-071) (same for grant on "Understanding Biological and Lifestyle Contributions to Alzheimer's Disease Pathology and Clinical Profiles in Black Women" (States Opp. 11 n.6)); NIH, *NIDCD Research Opportunities for New Investigators to Promote Workforce Diversity*, https://perma.cc/W8XD-KQ9E (RFA-DC-23-001) (same for grant on "family language planning and language acquisition among deaf and hard of hearing children" (APHA Opp. 10)); NIH, *Maximizing Opportunities for Scientific and Academic Independent Careers (MOSAIC) Postdoctoral Career Transition Award to Promote Diversity*, https://perma.cc/K3QE-CXM6 (PA-21-271) (similar for grants on "Identifying Unique Biological Factors as Potential Targets to Mitigate Colorectal Cancer Health Disparities in Native Hawaiians" (States Opp. 11 n.7), "Alzheimer's Disease and Related Dementia Neuropathologies and Exposures to Traffic Pollution Mixtures" (APHA Opp. 3), "An Adaptive Framework to Synthesize and Reconfigure Bacterial Viruses (Phages) to Counter Antibiotic Resistance" (*ibid.*), "Delineating the Role of the Homocysteine-Folate-Thymidylate Synthase Axis and Uracil Accumulation in African American Prostate Tumors" (APHA Opp. 10), and "Molecular Understanding of Maternal Humoral Responses to Pregnancy" (APHA Opp. 18)); NIH, *Providing Research Education Experiences to Enhance Diversity in the Next Generation of Substance Use and Addiction Scientists*, https://perma.cc/2U8T-F2EZ (PAR-20-236) (same for grant on "Preparing Indigenous Scientists to Lead Innovative Substance Use Research" (States Opp. 11 n.8)). Other highlighted grants, like the States' "Rapid Response for Pandemics" example (Opp. 10 n.5), supported COVID-19 research that the NIH has deprioritized.

terminations, despite respondents' claim to challenge a "centralized policy decision" (States Opp. 36), confirms that this is a contract dispute for the Court of Federal Claims. See pp. 3-9, *supra*. While embracing the district court's findings elsewhere, respondents run away from the court's finding that the NIH's chief grants official testified "[c]onsistent with the Administrative Record" that NIH staff were to use their "scientific background" and knowledge of their programs "to identify DEI activities." Appl. App. 65a n.8. Respondents' main objection (APHA Opp. 32-33) is that "individuals outside of NIH" (*i.e.*, government officials at NIH's parent agency, HHS) helped identify disqualified grants. But respondents identify no rule of administrative law that prevents agencies from working together to carry out shared goals, particularly when the NIH Director reports to the HHS Secretary. 42 U.S.C. 282.

Finally, respondents claim (States Opp. 36-37; APHA Opp. 31, 33-34) that the NIH gave inadequate weight to reliance interests. But the NIH invited respondents to request transition funding for an orderly wind-down. Appl. 33-34. While respondents dismiss such funding as inadequate, agencies need only take "serious reliance interests * * * into account," *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009), not mitigate every harm. Regardless, the grant contracts enshrine the NIH's authority to terminate awards that "no longer effectuate[] the program goals or agency priorities." 2 C.F.R. 200.340(a)(4). Though previous administrations may not have exercised that authority, States Opp. 37, any reliance would be objectively unreasonable given the contracts' clear terms. Appl. 34. Such clear and explicit "disclaimers are surely pertinent in considering the strength of any reliance interests." See *DHS* v. *Regents of the Univ. of Cal.*, 591 U.S. 1, 31 (2020).

B. The Remaining Factors Support A Stay

Certworthiness. Certworthiness is obvious: The Tucker Act question impli-

cates (at least) tens of billions of dollars, the circuits are split 3-1, and dozens of district courts have reached conflicting results. And the APA questions reflect a trend of district-court intrusion on executive-branch decision-making, with this case alone implicating $783 million in grant money that lower-court orders are forcing the Executive Branch to continue disbursing over the Administration's strong policy objections. Appl. 34-36. The States claim (Opp. 40) that the split may resolve itself, while private respondents implausibly dismiss (Opp. 39) the split as fact-bound. But the Second Circuit has acknowledged the split, the en banc D.C. Circuit has recognized the question's "recurren[t]" "important[ce]," and ten Ninth Circuit judges have called out for review. *Widakuswara* v. *Lake*, No. 25-5144, 2025 WL 1521355, at *1 (D.C. Cir. May 28, 2025) (en banc) (per curiam); see Appl. 35. Moreover, lower-court defiance of interim orders itself warrants intervention, as recent decisions confirm. *Boyle*, slip op. 1; *DHS* v. *D.V.D.*, No. 24A1153, 2025 WL 1832186 (July 3, 2025).

Irreparable Harm. The States ignore the First Circuit's conclusion (Appl. App. 31a) that the government has irreparable harm because it will be forced to pay unrecoverable grants. Respondents dismiss (States Opp. 31, 37; APHA Opp. 17) that harm as not "quantif[iable]" and note that they can only withdraw funds for "specific project-related costs." But respondents have ongoing access to $783 million in federal funds that they have every incentive to draw down and never return. That is the same harm this Court accepted in *California*, 145 S. Ct. at 969. Appl. 36-37.

The States point (Opp. 37-38) to contractual and regulatory terms allowing the government to recoup "unallowable" payments. But they do not explain why those provisions would apply to grants whose termination a district court vacated, and they conspicuously have not "promised to return withdrawn funds should [the] grant termination[s] be reinstated." *California*, 145 S. Ct. at 969 (citation omitted).

The government is also irreparably harmed by the blockade of a key executive-branch priority. Appl. 37 (citing *Trump* v. *CASA, Inc.*, 145 S. Ct. 2540, 2561 (2025)). Respondents claim (States Opp. 38; APHA Opp. 17-18) that *CASA*'s irreparable-harm analysis is limited to universal injunctions. But an "improper intrusion by a federal court into the workings of a coordinate branch of Government" is an irreparable harm. *INS* v. *Legalization Assistance Project of L.A. Cnty. Fed'n of Labor*, 510 U.S. 1301, 1306 (1993) (O'Connor, J., in chambers); cf. *Maryland* v. *King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.") (citation omitted).

Balance of the Equities. Respondents' asserted harms do not outweigh the government's paramount interest in overseeing the Executive Branch. Appl. 37-38. Respondents and their amici present the loss of federal funding as a cataclysm for American science. The States in *California* offered similar rhetoric about the devastation of "programs vital to the education of our youth." *California* Opp. at 40. Yet this Court recognized that those assertions did not refute the need for a stay. 145 S. Ct. at 969. Those respondents could seek any funds to which they were legally entitled in the Court of Federal Claims. *Ibid.* And any harms from terminating programs in the meantime was "self-imposed" because the States could use their own money to keep the programs running. *Ibid.* (citation omitted).

Despite also being respondents in *California*, the States assert (Opp. 31-32, 39) that they now suddenly lack money to plug the gap. Accord APHA Opp. 16-17. That defies credulity. California collected $86 billion in revenue this year, from personal income taxes alone. Cal. State Controller's Office, *April 2025 California Personal Income Tax Daily Revenue Tracker*, https://perma.cc/VZF7-C6XR. While California

might prefer that the federal government pay for research at its state universities, California's choice to shutter research rather than keep the lights on while litigating in the Court of Federal Claims is just that—a choice. As for private respondents, their highlighted examples (APHA Opp. 17) include affidavits stating that researchers *are* using "reserve funding to make up the difference," 25-cv-10787 D. Ct. Doc. 38-33 ¶ 23 (Apr. 25, 2025), or have received "short-term funding" from their university, 25-cv-10787 D. Ct. Doc. 38-34 ¶ 25 (Apr. 25, 2025). And some named respondents work at institutions like Harvard and the University of Michigan, with 11-figure endowments. See 25-cv-10787 Compl. ¶¶ 15-16. Any interim injury is self-inflicted.

Respondents' focus on public health also ignores that NIH research funding is finite. Money not spent on respondents' DEI-related research can be reallocated to projects that, in the Administration's view, advance public health. Appl. 38. The NIH denies 80% of grant applications; the public does not have any inherent interest in having one study funded over another. Which studies best serve the public is a discretionary decision Congress reserved to the NIH.

In any event, private respondents mischaracterize (Opp. 15) this factor as "the most crucial." This Court considers the equities only in "close cases." *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam). Given the on-point decision in *California*, this case is not close. The district court flouted vertical *stare decisis* by following this Court's dissenters over the majority. Appl. App. 221a. That alone should warrant a swift rebuke.

* * * * *

For the foregoing reasons and those stated in the government's application, the Court should stay the district court's judgments.

Respectfully submitted.

D. JOHN SAUER
Solicitor General

AUGUST 2025

APPENDIX

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS (Boston)

No. 1:25-cv-10814-WGY

COMMONWEALTH OF MASSACHUSETTS, et al,
Plaintiffs
vs.

ROBERT F. KENNEDY, JR., et al,
Defendants

No. 1:25-cv-10787-WGY

AMERICAN PUBLIC HEALTH ASSOCIATION, et al,
Plaintiffs
vs.

NATIONAL INSTITUTES OF HEALTH, et al,
Defendants

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For Hearing Before:
Judge William G. Young

Status Conference

United States District Court
District of Massachusetts (Boston.)
One Courthouse Way
Boston, Massachusetts 02210
Monday, July 28, 2025

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REPORTER: RICHARD H. ROMANOW, RPR
Official Court Reporter
United States District Court
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For all defendants

advance of the trial, just a little bit later than the August 4th date we proposed.

THE COURT: That's the order. You proposed it. You're held to it.

All right. There's one other aspect of this that I need to speak to, and again I speak only because I think it's helpful.

The, um, defendant public officials, quite properly, as they have every right, have made applications for an emergency stay to the Supreme Court of the United States. I am not going to speak to it or make any arguments with respect to it at all. But that fact, um, raises in my mind a possible outcome that I consider I ought make an indicative ruling with respect to, and it has to do with this matter of discrimination.

The -- I've read the Solicitor General's brief and I understand that the plaintiffs will get a chance to oppose. I've said my say with respect to those matters and have nothing further to say.

I just can conceive of really three possible outcomes to the application for a stay and they are these.

One, the stay may be denied. If it's denied, what we've done here this afternoon of course -- this morning, governs the further proceedings in the further

aspect of this case.

Two, the stay may be granted but without, um, specificity as to the grounds on which the, um, Supreme Court is acting. As I read the Solicitor General's brief, he raises two arguments. One, he raises the Tucker Act argument, it's a respectable argument, though I've rejected it, as has the Court of Appeals. But he also raises an argument that these matters are committed to agency discretion and, um, the DOGE -- I'll call them the "DOGE directives," are within agency discretion.

Well wanting and believing it was in the interests of the parties to get a prompt resolution, I purposely have focused my actions on serving up to the Court of Appeals what I've called a "clean APA," um, "based determination," and indeed I've entered a partial final judgment under the appropriate civil rule.

In addition to this Phase 2, I have made it clear on the record, in a conclusory way, that I have found that the DOGE directives, um, direct racial, gender, and, um, what I call "LGBTQ discrimination." I have not entered any, um, equitable decision, and indeed as the footnote to this Court's comprehensive written opinion indicates, in light of decisions of the Supreme Court, I now include that it would be improvident for me to do so as to LGBTQ discrimination, though discrimination there

was. But as to racial and sexist discrimination, I intend, and I've intended throughout, to enter a prospective injunction against the public officials from prospectively engaging in any such discrimination.

I have thought that such -- and I think that's clear on the record, I'm simply reiterating it, and I'm at work now in, um, writing up the factual basis for entering such an injunction and considering the language that I will use in fashioning such an injunction.

In the unlikely event that the Supreme Court indicates that there is a stay -- and this is what I have not thought through and I take the opportunity now to explain it, so that -- so that everyone understands. I don't want to be in a position, and I don't want to be seen to be in a position of, um, in any way disregarding or getting around an order of the Supreme Court of the United States. That -- I would never do that.

So I guess what I'm saying is that if the Supreme Court enters a stay and the stay is reasonably limited to the Tucker Act issue, surely this Court then retains jurisdiction, as a court of equity, which the Court of Federal Claims is not, to address the discrimination, which this Court has unequivocally found.

If -- so now I'm saying that were that to be the way it plays out before the Supreme Court, I will

immediately convene -- because we can't wait on my written decision, I will convene a hearing and I will impose an injunction that's not only prospective, but would say -- and it would be a subset of the grants to which the, um -- well what I have called the "DOGE directives," which I've declared invalid and have no force and effect, a subset of those, which in this Court's mind evidence the racial and gender discrimination, um, and I will enjoin -- forthwith in this wise, I will instruct the officials and the Cabinet Secretary that those grants are to be reevaluated at once forthwith, um, without regard to racial or gender issues of any sort, to see whether those grants, as a scientific matter, are not appropriate to go forward. It shouldn't take long, because of course the scientists have already reviewed these grants and allocated the funds and such that the grants may go forward.

To reiterate. If there's no stay, I will get to this discrimination business with a prospective injunction in the ordinary course, and we have our, um, framework to proceed on Phase 2. If there is a "blanket stay" or anything that fairly can be construed as a "blanket stay," all orders in this case are suspended until that stay is lifted. And the only thing left appropriately for this Court is to, um, file, as the

Rules of Civil Procedure require, its written findings of racial, gender, and I can still find LGBTQ discrimination, though I've decided it would be improvident to enter an order, that I'm going to go ahead with anyway. Only if the Tucker Act is stayed but the issue of whether it's committed to agency discretion is not stayed, fairly read, would I have the need promptly to enter an injunction, since my written opinion presumes this Court has subject matter jurisdiction over the APA claim.

Questions as to what I just said. And we'll go around.

Any questions?

MS. DIRKS: None from the state plaintiffs, your Honor.

THE COURT: APHA?

MS. SCHLOSSBERG: No, your Honor.

THE COURT: Questions, Mr. Hobbs?

MR. HOBBS: Your Honor, it's not a question, but we do have a comment on the discrimination --

THE COURT: Well feel free, but you'll understand I'm not arguing it, I simply am trying to explain the Court's position. But I will hear you, sir.

MR. HOBBS: Yeah. No, I understand the Court's position, I just think it's important for the defendants

to note, um, that since the plaintiffs never asserted discrimination claims, we've never had an opportunity to be heard on the discrimination claims. And so at the very least, we would seek an opportunity to submit, um, briefing on why we think the Court doesn't have jurisdiction to, um, issue any rulings or injunctions related to the discrimination claims.

THE COURT: Then I urge you to file such briefs, because I -- assuming no stay, which is what I'm assuming, I'm working on it right now. So the sooner I get your views on that, the better it will be. For me it's palpable and the Court must deal with it. But of course I will entertain your briefs.

MR. HOBBS: Understood, your Honor. Thank you.

THE COURT: Thank you.

All right, it's good to see you all. We'll stand in recess.

(Ends, 11:50 a.m.)