**No. 25A103**

IN THE
# Supreme Court of the United States

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NATIONAL INSTITUTES OF HEALTH, *et al.*,
*Applicants*,

*v.*

AMERICAN PUBLIC HEALTH ASSOCIATION, *et al.*,
*Respondents.*

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ROBERT F. KENNEDY, JR., *et al.*,
*Applicants*,

*v.*

COMMONWEALTH OF MASSACHUSETTS, *et al.*,
*Respondents.*

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On an Application for a Stay of Final Judgments of the
United States District Court for the District of Massachusetts

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## RESPONDENT STATES' OPPOSITION TO THE APPLICATION FOR A STAY

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## TABLE OF CONTENTS


Introduction ..... 1

Statement of the Case ..... 4

I. Background ..... 4

A. NIH's Support for Biomedical Research ..... 4

B. Adoption of the Challenged Directives ..... 5

1. Secretarial Directive ..... 6

2. Memoli Directive ..... 7

3. Subsequent Directives ..... 8

C. Implementation of the Challenged Directives ..... 9

1. Terminated Grants ..... 9

2. Termination Letters ..... 11

3. Harms to the Plaintiff States ..... 13

II. Procedural History ..... 14

A. District Court ..... 14

B. First Circuit ..... 18

Argument ..... 21

I. Defendants are unlikely to succeed on appeal. ..... 21

A. The district court, not the Court of Federal Claims, had jurisdiction over plaintiffs' arbitrary-and-capricious claim. ..... 21

1. Defendants do not meaningfully challenge the district court's jurisdiction to vacate the Challenged Directives. ..... 22

2. The district court had jurisdiction to vacate the resulting grant terminations, too. ..... 23

a. Plaintiffs pressed noncontractual rights and the district court awarded noncontractual relief. ..... 24

b. The parties' complex, ongoing relationship shows that this is a quintessential APA suit. ..... 28

3. Defendants' arguments would create an intolerable jurisdictional void. ..... 29

4. *California* does not compel a different result. ..... 30

B. The pertinent decisions are not committed to agency discretion. ..... 32

C. Defendants' actions were arbitrary and capricious. ..... 33

II. The remaining stay factors militate against a stay. ..... 37
A. The judgment does not irreparably harm defendants. ..... 37
B. Granting a stay will harm plaintiffs and the public. ..... 38
C. Defendants have not shown a likelihood of certiorari. ..... 40
Conclusion ..... 40

## TABLE OF AUTHORITIES

**Cases:**

*Am. Med. Ass'n* v. *Reno*,
57 F.3d 1129 (D.C. Cir. 1995) ..... 33

*Am. Sci. & Eng'g, Inc.* v. *Califano*,
571 F.2d 58 (1st Cir. 1978) ..... 24

*Bowen* v. *Massachusetts*,
487 U.S. 879 (1988) ..... 3, 18, 19, 25-28

*California* v. *Dep't of Educ.*,
132 F.4th 92 (1st Cir. 2025) ..... 2, 30

*City of Waltham* v. *USPS*,
786 F. Supp. 105 (D. Mass. 1992) ..... 6

*Dep't of Educ.* v. *California*,
145 S. Ct. 966 (2025) ..... 2, 3, 15, 18-20, 30, 31

*Dep't of Educ.* v. *Louisiana*,
603 U.S. 866 (2024) ..... 21

*Dep't of Homeland Security* v. *Regents of the Univ. of California*,
591 U.S. 1 (2020) ..... 33, 36

*FCC* v. *Fox Television Stations, Inc.*,
556 U.S. 502, 515 (2009) ..... 17, 36

*FDA* v. *Wages & White Lion Invs., LLC*,
145 S. Ct. 898 (2025) ..... 36

*Ferreiro* v. *United States*,
501 F.3d 1349 (Fed. Cir. 2007) ..... 29

*Great-West Life & Annuity Insurance Co.* v. *Knudson*,
534 U.S. 204 (2002) ..... 18, 19

*Hollingsworth* v. *Perry*,
558 U.S. 183, 190 (2010) ..... 40

*Katz* v. *Cisneros*,
16 F.3d 1204 (Fed. Cir. 1994) ..... 24

*Lincoln* v. *Vigil*,
508 U.S. 182 (1993) ..... 33

*Match-E-Be-Nash-She-Wish Band* v. *Patchak*,
567 U.S. 209 (2012) ..... 24, 27

*Md. Dep't of Hum. Res.* v. *HHS*,
763 F.2d 1441 (D.C. Cir. 1985) ..... 25

*Me. Cmty. Health Options* v. *United States*,
590 U.S. 296 (2020) ..... 28, 29

*Megapulse, Inc.* v. *Lewis*,
672 F.2d 959 (D.C. Cir. 1982) ..... 24-26

*Nken* v. *Holder*,
556 U.S. 418 (2009) ..... 21, 37

*Ohio* v. *EPA*,
603 U.S. 279 (2024) ..... 33

*Tootle* v. *Sec'y of the Navy*,
446 F.3d 167 (D.C. Cir. 2006) ..... 30

*Trump* v. *Boyle*,
No. 25A11, slip op. (U.S. July 23, 2025) ..... 30

*Trump* v. *CASA, Inc.*,
145 S. Ct. 2540 (2025) ..... 38

*Union of Concerned Scientists* v. *Wheeler*,
954 F.3d 11 (1st Cir. 2020) ..... 33

*United States* v. *Sineneng-Smith*,
590 U.S. 371 (2020) ..... 32

*Weyerhaeuser Co.* v. *U.S. Fish & Wildlife Serv.*,
586 U.S. 9 (2018) ..... 30, 32

**Statutes:**

5 U.S.C. §551 ..... 17

5 U.S.C. §551(4) ..... 22

5 U.S.C. §551(11)(A) ..... 26

5 U.S.C. §551(13) ..... 22, 26

5 U.S.C. §701(a)(2) ..... 32

5 U.S.C. §704 ..... 27

5 U.S.C. §706(2) ..... 23

5 U.S.C. §706(2)(A) ..... 16, 17, 21, 25, 33

28 U.S.C. §1491(a) ..... 29

42 U.S.C. §283p ..... 10

42 U.S.C. §284a(a)(3)(A)(ii) ..... 5

42 U.S.C. §285a-6 ..... 10

42 U.S.C. §285b-7a(c)(1) ..... 10

42 U.S.C. §285t(c) ..... 10
42 U.S.C. §289a ..... 5

**Rules:**

Fed. R. App. P. 8(a)(1) ..... 20
Fed. R. Civ. P. 54(b) ..... 16, 17
Fed. R. Civ. P. 65(a) ..... 15
S. Ct. R. 23.3 ..... 32

**Regulations:**

2 C.F.R. §200.340(a)(4) ..... 26

**Agency Documents:**

NIH Data Book, *Research Project Grants* (last updated Jan. 2025), https://report.nih.gov/nihdatabook/report/20 ..... 5

NIH RePORT, Project No. 1F31DA059262-01A1, *Exploration of the Unique Neurobehavioral Profile of Sequential Opioid-Stimulant Polysubstance Use Disorders*, https://bit.ly/1F31DA059262-01A1 ..... 10

NIH RePORT, Project No. 1K99MD019294-01, *Identifying Unique Biological Factors as Potential Targets to Mitigate Colorectal Cancer Health Disparities in Native Hawaiians*, https://bit.ly/1K99MD019294-01 ..... 11

NIH RePORT, Project No. 1R21AA031548-01A1, *Daily Impact of Sexual Minority Stress on Alcohol-Related Intimate Partner Violence among Bisexual+ Young Adults: A Couples' Daily Diary Study*, https://bit.ly/1R21AA031548-01A1 ..... 35

NIH RePORT, Project No. 1R25DA061492-01, *Preparing Indigenous Scientists to Lead Innovative Substance Use Research: The Native Children's Research Exchange Scholars Program* https://bit.ly/1R25DA061492-01 ..... 11

NIH RePORT, Project No. 3R01AG077579-02S1, *Understanding Biological and Lifestyle Contributions to Alzheimer's Disease Pathology and Clinical Profiles in Black Women: Defining Prevention Targets in High Risk Groups*, https://bit.ly/3R01AG077579-02S1 ..... 11

NIH RePORT, Project No. 3R01AI169543-01S1, *Rapid Response for Pandemics: Single Cell Sequencing and Deep Learning to Predict Antibody Sequences Against an Emerging Antigen*, http://bit.ly/3R01AI169543-01S1 ..... 10

NIH RePORT, Project No. 5R01AI179080-02, *Bacterial and Molecular Determinants of Mycobacterial Impermeability*, https://bit.ly/5R01AI179080-02 ..... 10

**Other Authorities:**

S. Schneider et al., *Ambulatory and Diary Methods Can Facilitate the Measurement of Patient-Reported Outcomes*, 25 Qual. Life Rsch. 497 (2016) ..... 35

United for Med. Rsch., NIH's Role in Sustaining the U.S. Economy (March 2025), https://bit.ly/UMR-2025..... 5

Respondents Massachusetts, California, Maryland, Washington, Arizona, Colorado, Delaware, Hawai‘i, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, and Wisconsin (collectively, plaintiffs or the plaintiff states) oppose the request for a stay of the district court's judgment in No. 25-cv-10814.

## INTRODUCTION

The federal government's application spins a tale of lower courts disregarding established legal guardrails to block routine agency decisions. That narrative bears little resemblance to reality; indeed, it gets things exactly backward. The judgment below awarded run-of-the-mill APA relief after a full trial on the merits in the face of "breathtakingly arbitrary and capricious" agency actions. App. to Appl. for Stay 4a (S.G. App.). The only unlawful decisions here are the federal government's. And the only urgency is that manufactured by NIH in its haste to implement its unprecedented and unreasoned policies. The government has not shown any need for a stay.

This case centers on a series of final agency actions—called the Challenged Directives in the proceedings below—that purport to bar NIH from supporting any research into seven topic areas. Various federal agencies and officials (collectively, defendants) adopted the Challenged Directives without considering any evidence or weighing any party's reliance interests—and without providing any meaningful explanation of their decisions. Defendants then executed the directives by, among other things, canceling hundreds of research grants to the plaintiff states' public universities for projects investigating heart disease, HIV/AIDS, Alzheimer's disease, alcohol and substance abuse, mental-health issues, and countless other health conditions.

While defendants' actions were extraordinary, the lower courts' decisions were

not. After review of the administrative record, full briefing, and a bench trial, the district court found the Challenged Directives arbitrary and capricious and entered a final judgment vacating (1) the directives and (2) certain termination decisions premised on them. The First Circuit then declined to issue a stay. Its decision carefully parsed this Court's relevant opinions, including the order in *Department of Education* v. *California*, 145 S. Ct. 966 (2025), and explained that the district court "likely had jurisdiction to enter the orders here—which provided declaratory relief under the APA independent of any contractual language." S.G. App. 23a-24a. The First Circuit also explained why defendants' remaining arguments did not support issuance of a stay. For the following reasons, this Court should reach the same conclusions.

As an initial matter, defendants do not meaningfully argue that the district court lacked jurisdiction to set aside the Challenged Directives (as distinct from the resulting grant terminations). Nor could they. Defendants admit (Appl. 33) that the Challenged Directives memorialized a "uniform policy" with "global[]" application antecedent to, and independent of, any specific NIH grant or application. The APA has always allowed district courts to review and set aside that kind of final agency action.

The district court likewise had jurisdiction to vacate the downstream termination decisions that flowed from the Challenged Directives. Defendants' contrary argument rests on the false premise (Appl. 2) that this case is "materially identical" to *California*. It is not. In *California*, "the terms and conditions of each individual grant award [were] at issue," 132 F.4th 92, 96-97 (1st Cir. 2025); here, the district court did not review a single contract term. In *California*, the district court issued an "order[]"

to "pay money," 145 S. Ct. at 968; here, the district court issued a declaratory judgment prospectively setting aside certain final agency decisions premised on the now-vacated Challenged Directives. In *California*, the federal government argued that the TRO posture encouraged grantees to quickly draw down funds; here, the appeal arises on review of a final judgment, and defendants have mechanisms to recoup any funds paid during the appeal in the event they ultimately succeed. In *California*, this Court maintained that the grantees had the means to "keep their programs running" while the federal government pursued its appeal, *id.* at 969; here, it is undisputed both that the plaintiff states lack such resources and that they face "non-monetary harms" that "cannot be remedied by belated payment." S.G. App. 32a. In short, this case is meaningfully different from *California*. Because the district court enforced statutory guarantees (not contract terms) and awarded vacatur (not damages), the APA's waiver of sovereign immunity applies—even if the judgment might have downstream financial effects. *See Bowen* v. *Massachusetts*, 487 U.S. 879, 894-901 (1988).

Defendants are also unlikely to succeed on their other merits arguments. They claim that the challenged agency actions were committed to agency discretion or satisfied the APA. But defendants failed to raise these arguments in their district-court stay request, and they are, in any event, wrong. The plaintiff states are challenging final agency policies, not discretionary funding decisions. And, as the district court correctly found, those policies were "bereft of reasoning virtually in their entirety" and "unsupported by factual development" (S.G. App. 158a)—deficiencies that defendants cannot backfill with post hoc attorney argument.

Finally, the other stay factors cut against defendants' request for emergency relief. Defendants never explain why available mechanisms for recovering improperly disbursed funds are inadequate to protect their interests. And they have "fail[ed] to address any of the non-monetary harms that the plaintiffs detailed"—meaning that, as the First Circuit found, those harms are undisputed. *Id.* at 32a. Defendants also cannot show a reasonable probability of certiorari, given serious questions about the suitability of this case as a vehicle for reviewing the disputed legal issues.

The Court should deny defendants' application.

## STATEMENT OF THE CASE

### I. Background

#### A. NIH's Support for Biomedical Research

Widely acknowledged as a crown jewel of America's scientific institutions, NIH is the largest public funder of medical research in the world. S.G. App. 50a. The agency's work has spurred life-changing advances, from the creation of the rubella vaccine to the discovery of the BRCA mutation responsible for various forms of breast and ovarian cancer. D. Ct. Doc. 75, ¶2 & nn. 2-6 (collecting citations).

While NIH conducts some research in-house, most of its support for biomedical research comes in the form of competitive grants to non-federal scientists. S.G. App. 50a. These awards not only support the funded projects themselves, but also advance the United States' national interests. By fostering domestic research, for example, NIH grants ensure that tomorrow's medical breakthroughs are developed in American laboratories—not those of our international competitors. By supporting graduate students, postdoctoral fellows, and early-career investigators, NIH grants allow us to

train the next generation of scientists and researchers. And by funding jobs and research-related goods and services, NIH grants drive economic activity in all 50 states and the District of Columbia. In Fiscal Year 2024, NIH awarded over $36 billion in outside grants. United for Med. Rsch., NIH's Role in Sustaining the U.S. Economy, at 5 (March 2025), https://bit.ly/UMR-2025; *see id.* at 1-2.

To secure one of these grants, a researcher must go through a rigorous application process. The researcher's application must describe the proposed project in detail. That application must then survive multiple layers of review, including evaluation by experts in the relevant field, who assess the proposal's scientific merit and likely impact, and evaluation by agency officials, who weigh programmatic considerations such as how a proposed project aligns with NIH's priorities. S.G. App. 51a; 42 U.S.C. §§284a(a)(3)(A)(ii), 289a. This process is highly competitive: the "success rate" for reviewed applications has hovered around 20% over the past two decades. *See* NIH Data Book, *Research Project Grants* (last updated Jan. 2025), https://report.nih.gov/nihdatabook/report/20.

### B. Adoption of the Challenged Directives

The above-described process of awarding NIH research grants has historically been governed, across presidential administrations stretching back decades, by the apolitical assessment of proposed projects' scientific merit. That changed earlier this year with defendants' adoption of a suite of policies—the Challenged Directives—that prohibited NIH from supporting any projects with a perceived connection to seven newly-identified and ill-defined topics. The district court described the evolution of these directives in detail. *See* S.G. App. 54a-114a. An abbreviated account follows.

### 1. Secretarial Directive

On February 10, the Acting Secretary of Health and Human Services issued a memorandum entitled "Secretarial Directive on DEI-Related Funding" (Secretarial Directive). App., *infra*, 2a-3a (State App.); *see* S.G. App. 58a-60a. The directive contained several conclusory statements about "DEI"—a term the directive did not define. For example, the directive stated, without any elaboration, that "grants that support DEI" are "inconsistent with the Department's policy of improving the health and well-being of all Americans," and that such grants "can cause serious programmatic failures." State App. 2a. Based on these unexplained pronouncements, the directive instructed NIH personnel to pause all payments for grants "related to DEI and similar programs" and advised that "grants may be terminated." *Id.*

Defendants have certified that the "complete administrative record for [the Secretarial Directive] consists" only of the two-page directive itself. D. Ct. Doc. 118-1 (¶7) (certifying that the record for the directive is located at A.R. 4-5[1]); *accord* S.G. App. 60a ("There is conspicuously nothing else in the Administrative Record concerning the Secretarial Directive."). In other words, defendants admit that they considered no other documents or evidence in promulgating the directive or in reaching the conclusions therein. *See City of Waltham* v. *USPS*, 786 F. Supp. 105, 116 (D. Mass. 1992) (explaining that the administrative record "consists of all documents and materials directly or indirectly considered by agency decision-makers").

[1] For pages 1-3824 of the administrative record, see Notice of Filing of Courtesy Electronic Copies (1st Cir. July 8, 2025) (No. 25-1612). For pages 3825-4270 of the administrative record, see Docs. 131-6 to -15 (D. Mass. June 11, 2025) (No. 25-cv-10814).

### 2. Memoli Directive

On February 21, Acting NIH Director Matthew Memoli issued a memorandum entitled "Directive on NIH Priorities" (Memoli Directive). State App. 5a-6a; *see* S.G. App. 66a-71a. The first half of the directive offered scattered conclusions about "studies based on diversity, equity, and inclusion (DEI) and gender identity," including the assertions that such studies "are antithetical to the scientific inquiry, do nothing to expand our knowledge of living systems, provide low returns on investment, and ultimately do not enhance health," and that they "are often used to support unlawful discrimination on the basis of race and other protected characteristics." State App. 5a. The memorandum gave no support for these conclusory assertions—nor, like the Secretarial Directive, did it explain what qualifies as impermissible "DEI." As with the Secretarial Directive, the administrative record reveals that Acting Director Memoli did not consider any other documents or evidence in promulgating the directive. The document stated in passing that Memoli "issue[d] th[e] directive based on [his] expertise and experience." *Id.* But the record shows, and the district court found as a factual matter, that "much, if not all, of the content" of his directive "was provided to [Acting Director Memoli] by HHS." S.G. App. 71a.

The second half of the Memoli Directive put its conclusory statements into action, "direct[ing]" NIH offices to "conduct an internal review of all . . . existing awards" to "ensur[e]" that they "do not fund or support . . . DEI and gender identity research activities and programs." State App. 6a. The directive further instructed that any grants "deemed inconsistent with NIH's mission" would be "subject to funding restrictions, terminated or partially terminated, paused, and/or not continued or

renewed, in compliance with all procedural requirements." *Id.*

### 3. Subsequent Directives

Starting in March, several follow-on directives (the Award Revision Guidance and various Priorities Directives, as they were called below) expanded and operationalized the foregoing policies. State App. 7a-48a; *see* S.G. App. 87a-93a, 103a-114a. Two aspects of these later directives are relevant for present purposes.

First, these directives expanded the list of prohibited research subjects without explanation. As just discussed, the Memoli Directive barred any projects related to "DEI" or "gender identity." Subsequent directives grew that list of forbidden topics to include "Vaccine Hesitancy," "COVID," "Climate Change," and "Influencing Public Opinion." S.G. App. 17a, 38a.[2] The administrative record does not reveal the origin of, or provide any underlying rationale for, the addition of these new topics.

Second, these additional directives expressly instructed NIH officials to terminate awards with a perceived connection to the offending topics—and even provided the exact language for NIH officials to use in doing so. *E.g.*, *id.* at 12a-13a, 15a-16a. For example, program officials were instructed to cancel any grant with a perceived connection to "DEI" using the following boilerplate text:

> "Research programs based primarily on artificial and non-scientific categories, including amorphous equity objectives, are antithetical to the scientific inquiry, do nothing to expand our knowledge of living systems, provide low returns on investment, and ultimately do not enhance health, lengthen life, or reduce illness. Worse, so-called diversity, equity, and inclusion ("DEI") studies are often used to support unlawful

[2] The district court held that plaintiffs lacked standing to challenge a seventh category, "China." State App. 114a-115a. Accordingly, NIH policies regarding Chinese universities are not relevant to the pending application. *But cf.* Appl. 10-11.

> discrimination on the basis of race and other protected characteristics ICO's [*sic*], which harms the health of Americans. Therefore, it is the policy of NIH not to prioritize such research programs."

*Id.* at 38a (quotation marks in original); *see, e.g.*, A.R. 607 (copying and pasting this language, enclosing quotation marks and all, into a termination decision). The directives provided similar stock language for the other six prohibited topics. State App. 38a (reproducing the full menu of boilerplate termination language each topic).

As with the earlier directives, the record shows that defendants did not consider any underlying materials or evidence in promulgating these later directives.

### C. Implementation of the Challenged Directives

In the weeks following the promulgation of the Challenged Directives, defendants implemented them by, among other things, launching an unprecedented mass-termination of grants for existing, ongoing research projects. In normal times, NIH cancels less than one grant per year—usually for serious issues like the death of a researcher or gross misconduct. *See* D. Ct. Doc. 77-37, ¶¶29-31; D. Ct. Doc. 77-41, at 44:7-45:23. Starting in January, however, defendants terminated thousands of grants nationwide—including over 800 grants to the 16 plaintiff states' public universities, other state instrumentalities, and local governments. D. Ct. Doc. 147-1

#### 1. Terminated Grants

The terminated grants supported a wide range of research, with projects focusing on topics relevant to a broad swath of the American public. One University of Washington study, for example, aimed to develop new pharmaceutical treatments by examining how simultaneous use of opioids and stimulants—a "deadl[y] combination[]" that is "increasingly responsible for overdose deaths"—can affect the brain's

neural pathways.[3] A canceled project at the University of Massachusetts, meanwhile, sought to analyze the properties of the tuberculosis bacterium's "cell envelope" to better understand why it is relatively impermeable to drug compounds, with a view to improving the treatments for the highly contagious disease.[4] And a terminated study at the University of California aimed to develop a "rigorously tested and fully automated" AI system capable of "rapidly generat[ing] synthetic antibody candidates" to fight new viruses, thus enhancing our response to a future pandemic.[5]

Other canceled grants focused on issues impacting more discrete demographic groups, consistent with Congress's express commands. *E.g.*, 42 U.S.C. §285t(c)(2)-(3) (instructing NIH to study conditions uniquely or disproportionately affecting racial or ethnic minorities); *id.* §§285a-6, §285b-7a(c) (instructing NIH to study certain women's health conditions); *id.* §283p (instructing NIH to "improve research related to the health of sexual and gender minority populations"). For example, defendants terminated a grant for University of California study examining how inflammation, insulin resistance, and physical activity affect Alzheimer's disease in Black women, a group with "higher rate[s]" and "a more aggressive profile" of the disease than other

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[3] NIH RePORT, Project No. 1F31DA059262-01A1, *Exploration of the Unique Neurobehavioral Profile of Sequential Opioid-Stimulant Polysubstance Use Disorders*, https://bit.ly/1F31DA059262-01A1.

[4] NIH RePORT, Project No. 5R01AI179080-02, *Bacterial and Molecular Determinants of Mycobacterial Impermeability*, https://bit.ly/5R01AI179080-02. UMass is a subawardee of the primary grantee, UVA. *See* D. Ct. Doc. 147-1, at 21.

[5] NIH RePORT, Project No. 3R01AI169543-01S1, *Rapid Response for Pandemics: Single Cell Sequencing and Deep Learning to Predict Antibody Sequences Against an Emerging Antigen*, http://bit.ly/3R01AI169543-01S1; UC Riverside is a subawardee of the primary grantee, the Keck Graduate Institute. *See* D. Ct. Doc. 147-1, at 52.

demographic groups.[6] Defendants also pulled support from a University of Hawai‘i study that aimed to identify genetic and biological risk factors for colorectal cancer among Native Hawaiians, a population with "increased incidence and mortality rates of" that disease.[7] And defendants canceled a grant to the University of Colorado for scholarships to Native American researchers focused on substance-use disorders in Indigenous communities, which face "significant substance use disorder inequities."[8]

**2. Termination Letters**

Defendants accomplished this mass termination by dispatching swarms of boilerplate letters to the researchers whose projects were selected for cancellation. Each letter followed the same format, plugging the addressee, the grant number, and a scripted basis for termination into a fill-in-the-blank template—with no individualized discussion of the relevant project. S.G. App. 85a-86a (blank template); *see, e.g.*, A.R. 2426-2427 (exemplar of a freestanding termination letter); A.R. 1785-1786 (exemplar of a "revised" award incorporating the termination script). Defendants issued these terminations, which took immediate effect, with no advance warning.

The administrative record reveals the haste with which defendants carried out

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[6] NIH RePORT, Project No. 3R01AG077579-02S1, *Understanding Biological and Lifestyle Contributions to Alzheimer's Disease Pathology and Clinical Profiles in Black Women: Defining Prevention Targets in High Risk Groups*, https://bit.ly/3R01AG077579-02S1.

[7] NIH RePORT, Project No. 1K99MD019294-01, *Identifying Unique Biological Factors as Potential Targets to Mitigate Colorectal Cancer Health Disparities in Native Hawaiians*, https://bit.ly/1K99MD019294-01.

[8] NIH RePORT, Project No. 1R25DA061492-01, *Preparing Indigenous Scientists to Lead Innovative Substance Use Research: The Native Children's Research Exchange Scholars Program*, https://bit.ly/1R25DA061492-01.

these terminations. Throughout March, for example, Acting Director Memoli circulated spreadsheets containing anywhere from a dozen to several hundred grants, demanding that NIH officials terminate the listed projects with extraordinary speed. *E.g.*, A.R. 2469 ("Please terminate the grants on the attached spreadsheet by COB today."); A.R. 3122 (demanding termination of 530 grants "by COB next Friday," with "daily evening update[s] on how many were terminated"). The administrative record does not show who selected these awards for termination or what criteria they used. But one thing is clear: Acting Director Memoli did not undertake any independent review. Instead, the record shows that he typically approved terminations within minutes of receiving a list of grants flagged by the agency's black-box process. *See, e.g.*, S.G. App. 99a (finding that Memoli approved a list of terminations "within 2 minutes of" receiving a list of grants from a staffer).

Given defendants' lack of contemporaneous reasoning—including the threadbare nature of their termination letters—it is impossible to glean from the record how defendants decided any *specific* program was related to one of the prohibited topics. For example, defendants canceled a grant entitled "Faithful Response II: COVID-19 Rapid Test-to-Treat with African American Churches," A.R. 2813, on the basis that it "focus[ed] on DEI." A.R. 2817. (As the termination letter makes clear, defendants did *not* cancel this grant because it involved COVID treatments. *Id.*) At the same time, defendants boasted in their briefing below that they spared grants entitled "Church Wellness Coordinator-led Intervention to Improve Hypertension Control in the Black Community" and "Engaging Partners in Caring Communities (EPICC):

Building Capacity to Implement Health Promotion Programs in African American Churches." D. Ct. Doc. 95-1. The record does not reveal, and defendants have never explained, why they deemed the first study impermissible "DEI" but view the second and third studies as permissible science.

### 3. Harms to the Plaintiff States

Before the judgment below, the Challenged Directives and unprecedented terminations had already caused—and, if a stay were to issue, they would continue to cause—irreparable harm to the plaintiff states and the public.

First, the termination of plaintiffs' grants caused unrecoverable loss of scientific knowledge. Where, as here, projects like longitudinal studies are "stop[ped] in full swing, their partial results often lose validity." D. Ct. Doc. 77-36, ¶21; *see, e.g.*, D. Ct. Doc. 77-33, ¶18-c (describing suspension of two such studies). Many of the canceled studies also involved physical specimens or animal subjects that cannot be maintained when the relevant project is suspended; the destruction of these specimens causes irreplaceable loss, too. D. Ct. Doc. 77-36, ¶21; *see, e.g.*, D. Ct. Doc. 77-34, ¶46 (describing the need to euthanize animal test subjects).

Second, the abrupt cancellation of hundreds of plaintiffs' grants imposed severe operational burdens on the plaintiff states' institutions. Planning at research universities often occurs years in advance, and universities organize their affairs around the grants they receive: they hire staff, make admission offers, buy equipment, recruit study participants, contract with vendors, and more. *See, e.g.*, D. Ct. Doc. 77-49, ¶9. The sudden termination of the plaintiff states' grants forced them to lay off highly specialized personnel, cut student enrollment, and even withdraw offers

of admission to accepted applicants. *E.g.*, D. Ct. Doc. 77-31, ¶18-b; D. Ct. Doc. 77-59, ¶31; D. Ct. Doc. 77-45, ¶15. To take just one example, defendants' terminations forced the University of Massachusetts's medical school to lay off or furlough 209 employees and to cut the incoming fall 2025 graduate class by 86%, from 70 students to 10. D. Ct. Doc. 77-45, ¶10.

Third, defendants' terminations put individual health at risk by eliminating patient-facing clinical programs. For example, defendants canceled a study at San Diego State University that provided clinical care to 85 participants with a history of suicide attempts and current suicidal ideation. A.R. 2977; *see* D. Ct. Doc. 77-14, ¶¶78-80. Similarly, defendants terminated a grant for a University of Hawai'i study offering advanced screening for HPV, a virus known to cause certain cancers. D. Ct. Doc. 77-17, ¶44. "[T]he study was forced to shut down," and "there are no other options in a clinical setting in Hawai'i for this type of important screening." *Id.*

As the First Circuit explained, defendants "fail[ed] to address any of the[se] non-monetary harms," which "cannot be remedied by belated payment." S.G. App. 32a. And plaintiffs established with uncontested evidence that they do not have the resources to keep their programs running if a stay were to issue.[9]

## II. Procedural History

### A. District Court

Seeking relief for their injuries, the plaintiff states brought this lawsuit and

[9] *E.g.*, D. Ct. Doc. 77-18, ¶¶32, 35, 41 (in Maryland, no available resources for stopgap funding); D. Ct. Doc. 77-25, ¶23 (in New York, stopgap funding limited to two weeks); D. Ct. Doc. 77-49, ¶¶5, 7-10 (no alternative funding sources at Cal State).

sought a preliminary injunction. (A group of private plaintiffs, also respondents in this Court, brought a comparable suit that the district court informally consolidated with this one.) The plaintiff states' operative complaint asserted several claims, including APA and constitutional claims arising out of defendants' adoption of the Challenged Directives, their termination of plaintiffs' existing research grants, and their undue delay in reviewing applications for new or renewed grants. *See* D. Ct. Doc. 75.

In an opinion on threshold issues, the district court rejected defendants' contention that the Tucker Act required the plaintiff states to bring their claims to the Court of Federal Claims. S.G. App. 221a-236a. The court acknowledged this Court's order in *California* and explained that here "the 'essence' of th[e] action [was] not one of contract" and the plaintiff states' requested relief did not amount to "monetary damages." *Id.* at 235a. The court also rejected defendants' argument that plaintiffs were challenging funding decisions committed to agency discretion. *Id.* at 239a.

The district court subsequently consolidated the plaintiff states' preliminary-injunction motion with a trial on the merits under Civil Rule 65(a), *see id.* at 42a, and bifurcated the proceedings into two phases. In the first phase, the court directed the parties to address the legality of both the Challenged Directives and the resulting grant terminations. State App. 74a-75a (25:19-26:22). The court reserved for the second phase any issues regarding defendants' unlawful delay in reviewing applications for new or renewed research grants. *See id.* at 42a, 44a, 75a (26:19-22)

Following production of the administrative record, robust briefing, and a bench trial on Phase One, the district court found for the plaintiffs on their claim that the

Challenged Directives and resulting grant terminations were arbitrary and capricious under 5 U.S.C. §706(2)(A). The court announced its decision from the bench on June 16, explaining that the directives were "bereft of reasoning virtually in their entirety" and "unsupported by factual development." S.G. App. 158a. The court also found that the directives arbitrarily ignored "the reliance interests of the many parties affected." *Id.* The court accordingly ruled that the Challenged Directives violated the APA and ordered that the directives and resulting grant terminations be set aside. *Id.* at 159a-160a. The court reserved decision on other claims and issues.

The district court entered partial final judgment on this single claim on June 23. *See* Fed. R. Civ. P. 54(b). The operative language of the judgment reads:

> I. The Challenged Directives as a whole are arbitrary and capricious in violation of 5 U.S.C. §706(2)(A). Thus, the Challenged Directives as a whole are void, illegal, and of no force and effect and are hereby vacated and set aside pursuant to §706(2).
>
> II. The Resulting Grant Terminations are arbitrary and capricious in violation of 5 U.S.C. §706(2)(A). Thus, the Resulting Grant Terminations are void, illegal, and of no force and effect, and are hereby vacated and set aside pursuant to §706(2).
>
> III. Judgment shall enter in favor of plaintiffs and against defendants on Count 3 of the Amended Complaint.
>
> IV. The Court retains jurisdiction to enforce this judgment.

S.G. App. 152a. The judgment included a list of specific, identified grants falling within the definition of "Resulting Grant Terminations." *Id.* at 151a n. 2; *see* D. Ct. Doc. 151-1. The defendants appealed the next day.

On July 2, the district court issued a written decision further explaining its reasoning. The court held that both the Challenged Directives and "the resultant,

downstream individual terminations" constituted "final agency action[s]" under 5 U.S.C. §551. S.G. App. 115a (rejecting defendants' "attempts to narrow the action to grant terminations"). With respect to the merits, the court found that the Challenged Directives were propped up by "sparse pseudo-reasoning" and "wholly unsupported statements." *Id.* at 125a; *see id.* at 121a-134a. For example, there was "not a shred of evidence" to substantiate the directives' statement that "DEI studies are often used to support unlawful discrimination on the basis of race and other protected characteristics." *Id.* at 130a-131a (quoting State App. 5a) (emphasis omitted). The court also saw "no evidence that [defendants] even considered the reliance interests that naturally inure to NIH grant process," despite defendants' obligation to "'take[] into account'" any "'serious reliance interests'" when formulating a "'new policy.'" *Id.* at 133a (quoting *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). The court thus held that "the Challenged Directives are arbitrary and capricious under Section 706(2)(A), as are the concomitant grant terminations." *Id.* at 134a.[10]

4. Defendants moved the district court for a stay pending appeal, raising only their argument that the Tucker Act divested the court of jurisdiction. D. Ct. Doc.

[10] In the remainder of its opinion, the district court found for the plaintiff states on their contrary-to-regulation claim (Count 2) and denied relief on their contrary-to-statute claim (Count 1). S.G. App. 134a-140a. Neither determination is part of the Rule 54(b) judgment currently before this Court. The district court also stated in its oral and written decisions that defendants had engaged in racial- and gender-based discrimination in adopting and implementing the Challenged Directives, and it indicated that it plans to permanently enjoin such discrimination. *Id.* at 45a n. 4, 164a-168a. These separate issues likewise are not encompassed within the Rule 54(b) judgment. The plaintiff states have not pressed freestanding claims for race- or gender-based discrimination in this case. *See* D. Ct. Doc. 75.

154, at 1-2. The district court denied the motion the next day, reaffirming its jurisdictional ruling and finding, on the equities, that a stay would cause the plaintiff states irreparable harm. S.G. App. 142a-147a.

**B. First Circuit**

The First Circuit likewise declined to stay the district court's final judgment.[11]

1. Starting with jurisdiction, the First Circuit canvassed three on-point decisions from this Court: *Bowen*, *Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204 (2002), and *California*. First, in *Bowen*, this Court held that Massachusetts could challenge certain agency decisions "under the APA in federal district court" because the Commonwealth sought prospective "declaratory and equitable relief" and the district court's orders "were not money judgments." S.G. App. 15a. As the First Circuit explained, "*Bowen* held that although the district court's orders ultimately would lead to the disbursement of funds by the federal government," that result "did not negate the district court's jurisdiction" because it was "a mere by-product of th[e] court's primary function of reviewing the [agency's decision]." *Id.* at 16a (quoting 487 U.S. at 910). Second, in *Great-West*, this Court considered claims by plaintiffs seeking "to recover 'money past due under a contract'"—*viz.*, an "employee benefit plan." *Id.* at 16a (quoting 534 U.S. at 210-211). The First Circuit noted that

[11] Defendants claim (Appl. 19) that the First Circuit "sat on the case . . . for two weeks." But defendants hardly acted with dispatch. The district court issued its oral ruling on June 16, entered judgment on June 23, and denied defendants' district-court stay motion on June 24. Defendants noticed their appeal that same day—yet waited until near the close of business on July 3 (the eve of a Friday federal holiday), to seek a stay from the appeals court. And in doing so, they asked the First Circuit to address several issues they had not raised in their district-court stay motion.

the claim in that case—which arose under ERISA and did not implicate the Tucker Act—"could not be brought in federal court" because it "was 'quintessentially an action at law,' not an action for equitable relief." *Id.* at 17a (quoting 534 U.S. at 210). Third, in *California*, this Court recently granted the government's application for a stay of a TRO. That order, the First Circuit explained, "framed *Bowen* (a case that belonged in federal district court) and *Great-West* (a case that did not) as representing two ends of the jurisdictional spectrum." *Id.* at 18a.

Applying these cases to the present dispute, the First Circuit held that the district court likely had jurisdiction. The First Circuit emphasized that the district court's judgment contained two distinct components—one vacating the Challenged Directives, another vacating resulting grant terminations—and held that defendants "d[id] not develop an[y] argument that the district court lacked jurisdiction to" make the first determination. S.G. App. 19a. And even if defendants had preserved that argument, the First Circuit held, "the district court clearly had jurisdiction to grant 'prospective relief' that will govern 'the rather complex ongoing relationships' between the Department and grant recipients." *Id.* (quoting *Bowen*, 487 U.S. at 905).

The First Circuit also held that defendants were unlikely to show that the district court lacked jurisdiction to make the second determination. *Id.* The court explained that this case was "much closer to *Bowen* than *Great-West*" because (1) the district court "did not award 'past due sums,' but rather provided declaratory relief that is unavailable in the Court of Federal Claims," and (2) "neither the plaintiffs' claims nor the court's orders depend on the terms or conditions of any contract." *Id.*

at 19a-20a. And the court explained that this case was "distinguish[able] . . . from *California*" because the district court here (1) "did not 'enforce a contractual obligation to pay money,'" and (2) "neither examined any of the plaintiffs' grant terms nor interpreted them in reaching its ruling that the grant terminations must be set aside." *Id.* at 19a-22a (quoting *California*, 145 S. Ct. at 968).

2. The First Circuit next rejected defendants' argument that the grant terminations were committed to agency discretion. *Id.* at 24a-26a. As the court explained, defendants forfeited this argument by failing to raise it in their district-court stay application. *Id.* at 25a; *see* Fed. R. App. P. 8(a)(1). And in any event, the First Circuit held, the district court did not second-guess discretionary funding decisions; rather, it reviewed the agency's decisions using "judicially manageable standards" from statutes and regulations. S.G. App. 26a.

3. On the merits of plaintiffs' arbitrary-and-capricious claim, the First Circuit held that defendants had "failed to carry [their] burden of showing" a likelihood of success. *Id.* Summarizing the district court's findings, the First Circuit explained that "[defendants'] decisions rested on circular reasoning, included no explanation for the about-face in agency-wide policy, and entirely ignored significant reliance interests." *Id.* at 27a-28a.

4. Finally, the First Circuit found that the balance of equities weighed against a stay. The court observed that the plaintiff states has "cited specific federal regulations that provide for [defendants'] ability to recoup improperly expended funds," and defendants had not argued "that those regulations are inapplicable." *Id.*

at 31a. Meanwhile, the plaintiff states had provided unrebutted evidence that "the abrupt cutoff in funding" would "cause their studies . . . to lose validity; require animal subjects to be euthanized; force researchers with 'project-specific knowledge and experience' to leave; delay treatment for patients enrolled in 'clinical trials for life-saving medications or procedures'; and force the closure of community health clinics that provide preventative treatment for infectious diseases." *Id.* at 31a-32a (quotation marks omitted). Defendants, the First Circuit found, had "fail[ed] to address any of the[se] non-monetary harms," which "cannot be remedied by belated payment." *Id.* at 32a. As for the public interest, defendants had failed to "refute the plaintiffs' contentions that a stay would result in the setback of 'life-saving research by years if not decades' and would eliminate funding for 'urgent public health issues.'" *Id.* at 33a.

## ARGUMENT

Because a stay "intru[des] into the ordinary processes of administration and judicial review," the issuance of a stay "is not a matter of right." *Nken* v. *Holder*, 556 U.S. 418, 427 (2009). Instead, "the burden is on" the movant to demonstrate that it is "likel[y] [to] succe[ed]" on appeal and that "the equities favor a stay." *Dep't of Educ.* v. *Louisiana*, 603 U.S. 866, 868 (2024). Defendants cannot clear that bar.

### I. Defendants are unlikely to succeed on appeal.

#### A. The district court, not the Court of Federal Claims, had jurisdiction over plaintiffs' arbitrary-and-capricious claim.

The district court's final judgment had two distinct components. In Paragraph I, it set aside the Challenged Directives under 5 U.S.C. §706(2)(A). S.G. App. 152a. In Paragraph II, it set aside the resulting grant terminations under §706(2)(A). S.G.

App. 152a. The court had jurisdiction to do both.

### 1. Defendants do not meaningfully challenge the district court's jurisdiction to vacate the Challenged Directives.

Defendants' stay motion in the First Circuit "d[id] not develop an argument that the district court lacked jurisdiction" to award the relief outlined in Paragraph I—*i.e.*, to "vacat[e] the Challenged Directives." S.G. App. 19a. And even if defendants had preserved that argument, it runs straight into the relevant statutory text. Under the APA, district courts may review and set aside "agency action[s]" that prospectively govern agency decisions. 5 U.S.C. §706(2)(A). These reviewable "agency action[s]" include agency "rule[s]," a term the APA defines broadly to include any "statement[s] of general . . . applicability and future effect" that "implement, interpret, or prescribe law or policy." *Id.* §§551(4), 551(13). The Challenged Directives easily satisfy that definition, as the district court held. S.G. App. 77a-79a. Defendants do not contest that holding—indeed, they admit (Appl. 33) that the directives are "uniform polic[ies]" with "global[]" application independent of any specific grant terminations. The APA thus makes them reviewable.

Citing their jurisdictional objection to the downstream termination decisions, defendants contend (Appl. 25) that vacatur of the Challenged Directives and vacatur of the resulting terminations "merge" here. As an initial matter, the district court had jurisdiction over the terminations, *see infra*, at 23-29, so defendants' merger theory gets them nowhere. And regardless, the theory's premise is wrong. Vacatur of the Challenged Directives extends beyond just reinstatement of terminated grants: it also precludes defendants from taking *any* action against the plaintiff states based

on the directives. So, for example, defendants cannot use the directives' now-invalidated reasoning to deny a pending application for a new grant. Nor could they rely on the directives to initiate an enforcement action against a plaintiff state. *See* A.R. 4080. Trying to dodge these obvious implications of the judgment, defendants argue (Appl. 25) that the proceedings below "focused only on the termination of *existing* grants." That characterization is false, as the district court was forced to remind defendants over[12] and over[13] and over.[14] Defendants also note (Appl. 26) that the district court has deferred certain still-pending claims (concerning defendants' delay in adjudicating pending grant applications) to a forthcoming phase of the litigation. But whatever the scope of Phase Two, it does not include the basic validity of the Challenged Directives. That question is settled: the Challenged Directives have been "vacated and set aside pursuant to §706(2)," meaning they are "void, illegal, and of no force and effect" as to the plaintiff states.[15] S.G. App. 152a. Defendants identify no jurisdictional impediment to that portion of the judgment.

**2. The district court had jurisdiction to vacate the resulting grant terminations, too.**

Paragraph II of the district court's judgment was also jurisdictionally proper. A party injured by an agency decision may sue under the APA for "relief other than

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[12] State App. 87a (explaining that defendants "misunderstood or mischaracterize[d] the Court's view" in suggesting that the first phase concerned only terminations).

[13] State App. 106a ("[Defendants] are wrong to say we're only going to talk about the grant terminations, not these directives.").

[14] S.G. App. 115a (rejecting "attempts to narrow the action to grant terminations").

[15] Because the judgment extends "only to the parties," S.G. App. 12a, nothing in this case bars defendants from applying the Challenged Directives to nonparties.

money damages" unless another statute "expressly or impliedly forbids the relief which is sought." 5 U.S.C. §702. Defendants do not argue that the first condition applies here: plaintiffs never sought, and the court below did not award, any money damages. Nor do defendants identify any statute that *expressly* forbids plaintiffs' relief. Instead, defendants argue only that the Tucker Act *impliedly* barred plaintiffs from challenging the termination of their grants in district court. As this Court has explained, however, "[w]hen a statute 'is not addressed to the type of grievance which the plaintiff seeks to assert,' then the statute cannot prevent an APA suit" under §702. *Match-E-Be-Nash-She-Wish Band* v. *Patchak*, 567 U.S. 209, 216 (2012) (quoting May 10, 1976, letter of Asst. A.G. Scalia). For several reasons, that is the case here. *See Katz* v. *Cisneros*, 16 F.3d 1204, 1210 (Fed. Cir. 1994) (explaining that the Tucker Act cannot "impliedly forbid[] relief under the APA" if it "is not applicable").

**a. Plaintiffs pressed noncontractual rights and the district court awarded noncontractual relief.**

In determining whether a plaintiff's claim falls within the APA or the Tucker Act, courts ask whether the claim is "essentially a contract dispute." *Am. Sci. & Eng'g, Inc.* v. *Califano*, 571 F.2d 58, 61 (1st Cir. 1978). To answer that question, courts often follow the widely adopted test from *Megapulse, Inc.* v. *Lewis*, 672 F.2d 959 (D.C. Cir. 1982), which examines (1) "the source of the rights upon which the plaintiff bases its claims," and (2) "the type of relief sought." *Id.* at 968; *see* Appl. 21 (adopting the *Megapulse* test). Here, both of these factors show that plaintiffs' challenge to the termination of their NIH grants belonged in the district court.

i. Start with the source of the rights underlying the plaintiff states' claim.

In challenging the termination of their grants, plaintiffs did not press their rights under any contract clause, but instead invoked their rights under the APA. More specifically, the plaintiff states argued that the terminations were based exclusively on agency policies (the Challenged Directives) that were arbitrary and capricious under §706(2)(A). As the First Circuit observed, the resolution of that claim in no way "depend[ed] on the terms or conditions of any contract." S.G. App. 20a. Indeed, defendants did not even include grant agreements for many of the terminated projects in the administrative record—an inexplicable choice if this really were "a contract dispute through and through." Appl. 25. Nor did the courts below have to parse any contract terms to resolve plaintiffs' challenge. *See Md. Dep't of Hum. Res.* v. *HHS*, 763 F.2d 1441, 1449 (D.C. Cir. 1985) (*MDHR*) (Bork, J.) (explaining that claims that "turn[ed] on the interpretation of statutes and regulations rather than on the interpretation of an agreement" were "not contract claims for Tucker Act purposes"); *Bowen*, 487 U.S. at 894-901 (adopting *MDHR*'s reasoning). Instead, the district court needed only to evaluate the Challenged Directives, because defendants' termination decisions rested *exclusively* on those admittedly "uniform polic[ies]" (Appl. 33).

Defendants' argument that, "[w]ithout a grant agreement, [plaintiffs] would have had no right to payment in the first place" (Appl. 21) reimagines plaintiffs' complaint into something it is not. Plaintiffs have never asserted a "right to payment." And the fact that defendants' unlawful conduct *affected* plaintiffs' reimbursements does not "automatically transform [this] action," through "some mystical metamorphosis," "into one on the contract." *Megapulse*, 672 F.2d at 968. Were it otherwise,

the APA's inclusion of "grant[s] of money" among the kinds of "agency action[s]" subject to APA review would be a nullity. 5 U.S.C. §551(11)(A), (13).

Defendants also argue that this action is contractual because defendants' grants incorporate by reference certain OMB guidance regarding grant terminations. Appl. 25 (citing 2 C.F.R. §200.340(a)(4)). But even if defendants were correct that this nonbinding guidance is part of NIH grant agreements (*but see* D. Ct. Doc. 135, at 7-9), that does not change the jurisdictional calculus: the putative contractual term is not "the source of [any] rights" that plaintiffs are asserting. *Megapulse*, 672 F.3d 968.[16] The source of those rights is, rather, the APA's guarantee of freedom from arbitrary and capricious agency decisionmaking.

ii. The nature of the relief sought and awarded below further confirms that plaintiffs' claims are not contractual. *See id.* As the First Circuit explained, the district court's judgment was declaratory, not injunctive or monetary; it simply set aside the Challenged Directives and resulting grant terminations. S.G. App. 12a. That mirrors the relief in *Bowen*. There, as here, Massachusetts did not receive money "in *compensation* for the damage sustained by the failure of the Federal Government to pay as mandated." 487 U.S. at 900. Instead, like in this case, it obtained "specific relief" setting aside challenged government action—which a district court has

[16] Defendants observe (Appl. 25) that the district court discussed §200.340 in its decision and accuse the appeals court of "overlook[ing]" its supposed incorporation into the agreements. But the district court's discussion of §200.340 appeared in Part IV-D of its opinion (S.G. App. 134a-138a), which addressed a separate claim, Count 2, that was not part of the partial final judgment and is thus irrelevant for present purposes. Even if it were relevant, moreover, that claim was properly brought in the district court because it also is not a contract claim. *See* D. Ct. Doc. 101, at 11.

jurisdiction to grant. *Id.* at 895; *see also Dep't of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 262 (1999) (explaining that "*Bowen*'s interpretation of § 702 . . . hinged on the distinction between specific relief and substitute relief").

Defendants' insistence (Appl. 21-22) that *Bowen* considered only whether the Tucker Act was an adequate alternative remedy under 5 U.S.C. §704, and not whether it impliedly forbids certain relief within the meaning of §702, does not help them for two reasons. First, everything the Court said about *why* the Tucker Act was an inadequate remedy vis-à-vis the APA—including that it is "tailored" to provide "compensation" for "particular categories of past injuries or labors," 487 U.S. at 904 n. 39—makes clear that the Tucker Act does not contemplate the plaintiff states' forward-looking, specific relief here. Second, as noted above, this Court later confirmed that a "statute cannot prevent an APA suit" by implication if it "is not addressed to the type of grievance which the plaintiff seeks to assert." *Match-E-Be-Nash-She-Wish*, 567 U.S. at 216. Thus, *Bowen*'s recognition that the Tucker Act is "addressed to" a different "type of grievance" than the one the plaintiffs here "seek[] to assert," *id.*, defeats defendants' reliance on §702's "impliedly forbids" language.

Defendants also argue (Appl. 22) that the judgment below functionally compels the payment of money, but nothing in it requires the government to disburse any funds. To be sure, because the Challenged Directives are unenforceable, and because the resulting terminations have been set aside, plaintiffs' universities may once again seek reimbursement for their work. But they must do so consistent with the usual rules and regulations before any payments will occur. *E.g.*, A.R. 3987-4025. As

*Bowen* makes clear, a chain of causation (even a fairly predictable chain) that might lead to payment does not convert an APA claim into a contract claim: an "action for specific relief" under the APA is not a damages suit merely because a judgment might "require the payment of money by the federal government." 487 U.S. at 893-894.

Finally, Defendants insist (Appl. 22) that the relief in this case was contractual because it effectively ordered specific performance, a contractual remedy. But again, the district court did not have to examine any contract terms to discern the scope of plaintiffs' rights or defendants' obligations. *See supra*, at 25. And its judgment did not order defendants to perform any part of a contract. *See supra*, at 16. The district court ordered *specific relief* under the APA, not *specific performance* under a contract.

**b. The parties' complex, ongoing relationship shows that this is a quintessential APA suit.**

This Court has also looked to the nature of the parties' relationship to assess whether a claim properly arises under the Tucker Act or the APA. As this Court recently reiterated, "the Administrative Procedure Act is tailored to managing the relationships between States and the Federal Government that occur over time and that involve constantly shifting balance sheets, while the Tucker Act is suited to remedying particular categories of past injuries or labors for which various federal statutes provide compensation." *Me. Cmty. Health Options* v. *United States*, 590 U.S. 296, 327 (2020) (quotation marks and brackets omitted) (quoting *Bowen*, 487 U.S. at 904 n. 39). So whereas "the litigants' 'complex ongoing relationship'" in *Bowen* supported jurisdiction in the district court, *id.* (quoting 487 U.S. at 905), the plaintiff's claim for "sums already calculated, past due, and designed to compensate for

completed labors" in *Maine Community* "l[ay] in the Tucker Act's heartland," *id.*

That dichotomy points the way to the right answer here: the district court had jurisdiction. As in *Bowen*, this case arises out of a "complex ongoing relationship" with "constantly shifting balance sheets" between the plaintiff states and the federal government. *Id.* Take just one of the plaintiff state's universities: the University of California. That institution receives thousands of NIH grants every year and, at any given time, has thousands more applications pending. Defendants' adoption and implementation of the Challenged Directives touched virtually every aspect of that dynamic partnership. And that is just *one* of several public universities in *one* of the sixteen plaintiff states. The APA is "tailored" to provide a uniform answer to the intricate legal issues arising from the Challenged Directives' impact on those relationships. *Id.* A multiplicity of separate Tucker Act suits is not. *See id.*

**3. Defendants' arguments would create an intolerable jurisdictional void.**

Defendants' contrary arguments not only contradict the governing statutes and established legal tests—they would deprive parties of their ability to seek meaningful relief for arbitrary agency decisionmaking. Defendants argue that federal district courts lack the jurisdiction to set aside the Challenged Directives and reinstate terminated grants. But the Court of Federal Claims cannot award that relief; its authority is generally limited to awarding retrospective monetary relief. 28 U.S.C. §1491(a); *Ferreiro* v. *United States*, 501 F.3d 1349, 1353 n. 3 (Fed. Cir. 2007).

The upshot: on defendants' view, *no* court has the power to vacate an illegal agency policy relating to federal grants or to prospectively reinstate grants canceled

in light of such an illegal policy. That has some startling implications. Imagine, for example, that NIH were to adopt a formal policy barring a distinct category of researchers or organizations—say, Black doctors, or religious colleges, or veterans, or pregnant women—from receiving NIH grants. And imagine that, after adopting this policy, NIH were to cancel all outstanding grants to recipients in the targeted group. On defendants' theory, no court could grant prospective relief in those circumstances.

That result would violate the APA's "basic presumption of judicial review." *Weyerhaeuser Co.* v. *U.S. Fish & Wildlife Serv.*, 586 U.S. 9, 22 (2018); *see Tootle* v. *Sec'y of the Navy*, 446 F.3d 167, 176 (D.C. Cir. 2006) (describing as "troublesome" the "claim that *neither* the Court of Federal Claims *nor* the District Court has jurisdiction"). For that reason, too, the government's jurisdictional objection is incorrect.

**4. *California* does not compel a different result.**

In the face of these issues, defendants insist that *California* is a "materially identical case" that "'squarely control[s]'" here. Appl. 22 (quoting *Trump* v. *Boyle*, No. 25A11, slip op. at 1 (U.S. July 23, 2025)). The First Circuit correctly rejected that argument, because *California* is distinguishable in several fundamental ways.

First, as the court of appeals held, "neither the district court's orders nor the plaintiffs' claims in this case are premised upon the individual terms of the grant agreements." S.G. App. 22a. In *California*, by contrast, "the terms and conditions of each individual grant award [were] at issue," 132 F.4th at 96-97; *see* S.G. App. 23a ("[A]t least one of the respondents' claims for relief in *California* depended on the terms and conditions of the grant awards, a fact that the government highlighted for the Court."). That distinction matters: as discussed above, the source of a plaintiff's

asserted rights is a key consideration in assessing whether a case falls under the APA or the Tucker Act. *See supra*, at 24-26.

Second, the court of appeals explained that "the district court's orders—both as to the Challenged Directives and the grant terminations—provide[d] declaratory relief that is well within the scope of the APA." S.G. App. 20a. The district court "specifically declined to enter an injunction," *id.* at 12a, and its judgment did not award damages or order the payout of any money. It is thus different from the TRO in *California*, which, according to this Court, "ordered 'the Government to pay out past-due grant obligations.'" *Id.* at 21a (quoting 145 S. Ct. at 968).

Third, the emergency application in *California* arose out of a TRO. The federal government argued there that the TRO posture would "strongly incentivize[]" grant recipients to draw down $65 million before the TRO expired. Appl. to Vacate at 25-26, *California*, No. 24A910 (March 26, 2025). Here, however, defendants seek review of final judgment. Plaintiffs cannot draw down funds with abandon; they must comply with detailed rules for the timing and content of reimbursement requests. *E.g.*, A.R. 3987-4025. And, as described in more detail below, defendants have undisputed mechanisms to recoup any funds paid during the appeal in the event that they ultimately succeed on the merits. *See infra*, at 37-38.

Fourth, this Court stated that the grantees in *California* had the means to "keep their programs running" while the federal government pursued its appeal. 145 S. Ct. at 969. Here, the plaintiff states undisputedly lack such resources. *See supra*, at 14 & n. 9. Moreover, they face undisputed "non-monetary harms" that "cannot be

remedied by belated payment." S.G. App. 32a; *see supra*, at 21 (noting defendants' failure to contest these harms). In all these ways, this case differs from *California*.

In recent weeks, numerous courts have rejected the federal government's efforts to shunt every case involving federal funding into Tucker Act litigation. *See* Appl. 4 n. 1. Defendants condemn these decisions as "defiance" of "epidemic proportions." Appl. 4. The reality is more prosaic: the government is trying to stretch *California* beyond its context and beyond what the Court actually said. As the applicable legal standards make clear (*see supra*, at 23-29), each case must be evaluated on its own terms. Here, that evaluation shows that this case does not sound in contract.

**B. The pertinent decisions are not committed to agency discretion.**

Defendants next argue (Appl. 27-29) that the disputed policies were "committed to agency discretion." 5 U.S.C. §701(a)(2). But the First Circuit held that defendants forfeited that argument because they failed to raise it in their district-court stay motion. S.G. App. 24a-25a; *cf.* S. Ct. R. 23.3. Defendants respond (Appl. 29) that their district-court motion purported to incorporate by reference *every single argument* they had previously made in the case. That is not how issue preservation works in our system of adversarial adjudication, where courts "rely on the parties to frame the issues for decision." *United States* v. *Sineneng-Smith*, 590 U.S. 371, 375 (2020).

Waiver aside, defendants are wrong that the plaintiff states' arbitrary-and-capricious claim implicates matters committed to agency discretion. This Court has "read the exception in §701(a)(2) quite narrowly, restricting it to those rare circumstances" in which "a court would have *no meaningful standard* against which to judge" the agency's actions. *Weyerhaeuser*, 586 U.S. at 23 (quotation marks omitted)

(emphasis added). This case does not present one of those "rare circumstances."

Defendants' contrary argument mischaracterizes plaintiffs' claims. Plaintiffs are not challenging NIH's discretionary funding decisions—they are challenging a "uniform policy" with "global[]" application (Appl. 33) under the familiar arbitrary-and-capricious standard. Citing *Lincoln* v. *Vigil*, 508 U.S. 182, 193 (1993), defendants argue (Appl. 28) that "[l]ump-sum appropriations . . . leave it to the agency to decide how 'resources are best spent.'" But nothing in *Lincoln* created a lump-sum exception to agencies' §706(2)(A) obligations. In other words, discretion over resource allocation does not bar review of whether an agency gave a reasoned explanation and complied with statutory requirements. *Am. Med. Ass'n* v. *Reno*, 57 F.3d 1129, 1134-1135 (D.C. Cir. 1995); *see Union of Concerned Scientists* v. *Wheeler*, 954 F.3d 11, 18 n. 5 (1st Cir. 2020) (agency discretion over "individual hiring decisions" does not preclude review of "agency-wide policy"). That is the sort of review the district court undertook here.

### C. Defendants' actions were arbitrary and capricious.

"An agency action qualifies as 'arbitrary' or 'capricious' if it is not reasonable and reasonably explained." *Ohio* v. *EPA*, 603 U.S. 279, 292 (2024) (quotation marks omitted). Breaking from past agency practice is also arbitrary and capricious if the agency fails to "assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *Dep't of Homeland Security* v. *Regents of the Univ. of California*, 591 U.S. 1, 33 (2020) (*DHS*). The challenged agency actions fail both of those tests.

1. In promulgating the Challenged Directives and terminating plaintiffs' grants, defendants failed to "offer[] a satisfactory explanation for [their] action[s],

including a rational connection between the facts found and the choice made." *Ohio*, 603 U.S. at 292 (quotation marks omitted). As the district court found, nothing backed up the directives' conclusory assertions: the certified record consists almost entirely of the directives themselves and boilerplate letters parroting the directives. *See* S.G. App. 27a-29a. Take the directives' statement that "DEI studies are often used to support unlawful discrimination on the basis of race and other protected characteristics." State App. 5a. Although this is an empirical claim, defendants have not identified "a shred of evidence" in the record to substantiate it. S.G. App. 130a-131a.

Defendants also failed to explain the meaning of the standards imposed by the directives. For example, a key component of the directives is a ban on "so-called diversity, equity, and inclusion ('DEI') studies." State App. 38a. But nothing in the record clarifies what a "DEI study" *is*. And defendants' attorneys were unable to explain the concept in court—other than by pointing back to the phrase itself. *See id.* at 169a (60:13-18). Plaintiffs are not quibbling about a failure to "define every term in every internal guidance document" (Appl. 31); they are challenging defendants' failure to define *the key term* in the disputed agency policy.

In purporting to forbid what they cannot even define, defendants have left the plaintiff states—not to mention the public—with important unanswered questions. As described above, for example, defendants canceled some grants that funded health programs centered on Black churches, while sparing others. *See supra*, at 12-13. Why were some of these studies "DEI studies," but others not? Why is a study of opioids' and stimulants' effect on the brain a "DEI study"? *See supra*, at 9-10. Why

does studying the tuberculosis bacterium's impermeability to pharmaceutical compounds constitute unscientific "DEI"? *See supra*, at 10. And how is a researcher supposed to comply with NIH's new policy going forward? It's anyone's guess.

Defendants scoff (Appl. 32) that "it is hardly a mystery that grants on topics like 'structural racism and discrimination' and 'daily diar[ies] for bisexual+ young adults' involve DEI." But that derisive response brushes aside the fact that defendants' thinking on these supposedly clear examples *is*, in fact, something of a mystery. The second study they mention, for example, examined alcohol-related physical and psychological abuse among bisexual young adults. The study adopted a "rigorous, 60-day, daily diary approach" under which 100 participants logged reports of their alcohol use, instances of domestic violence, and other factors in an effort to find useful correlations.[17] Is this a "DEI study" because it focused on bisexual young adults (a population disproportionately likely to experience both heavy drinking and domestic violence), rather than *all* young adults? Because it focused on *young* adults, rather than all age cohorts? Because it asked participants to log their experiences in diaries?[18] Defendants never say: they apparently know "DEI" when they see it—and they expect the public to read the tea leaves.

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[17] NIH RePORT, Project No. 1R21AA031548-01A1, *Daily Impact of Sexual Minority Stress on Alcohol-Related Intimate Partner Violence among Bisexual+ Young Adults: A Couples' Daily Diary Study*, https://bit.ly/1R21AA031548-01A1.

[18] Lest defendants' selective quotation of the word "diar[ies]" (Appl. 32) conjure up images of youthful journals: the term "diary" in this context refers to an established method for collecting self-reported data in health studies. *See generally, e.g.*, S. Schneider et al., *Ambulatory and Diary Methods Can Facilitate the Measurement of Patient-Reported Outcomes*, 25 Qual. Life Rsch. 497 (2016).

Defendants' claim (Appl. 32) that their decisions were reasonable because NIH staffers "used their 'scientific background' . . . to identify problematic grants" fails. The record makes clear—and defendants admit (Appl. 33)—that the Challenged Directives prohibited certain topics as a matter of overarching agency policy irrespective of any individual grant. Plaintiffs' arbitrary-and-capricious claim challenges that centralized policy decision. As a factual matter, moreover, there is no evidence that expert NIH staff ever had an opportunity to conduct any individualized, science-based review. Defendants' only citation (Appl. 32) is to testimony from another lawsuit describing how the process was "supposed" to work. S.G. App. 65a-66a n. 8. But the administrative record reflects that the opposite actually happened: grants were cancelled *en masse* at a speed that brooked any meaningful review. *See supra*, at 11-13.

2. Defendants also ignored reliance interests. This Court has repeatedly held that "[w]hen an agency changes course," it "must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." *DHS*, 591 U.S. at 30 (quotation marks omitted); *accord FDA* v. *Wages & White Lion Invs., LLC*, 145 S. Ct. 898, 918 (2025); *Encino Motorcars, LLC* v. *Navarro*, 579 U.S. 211, 221-222 (2016); *Fox*, 556 U.S. at 515. As the district court found, however, "there is no evidence that [defendants] even considered the reliance interests that naturally inure to NIH grant process." S.G. App. 133a; *see id.* at 27a-28a.

Defendants argue (Appl. 33-34) that they did not ignore plaintiffs' reliance interests because "NIH invited grantees to request transition funds 'to support an orderly phaseout of the project.'" That sidesteps the problem. As the district court

recognized, plaintiffs' public institutions organize their affairs around grant awards: they hire staff, extend admission offers, buy equipment, recruit study participants, and the like—often years in advance. S.G. App. 133a-134a; *see supra*, at 13. Defendants gave *no* consideration in the record to the fact that shuttering a project midstream wastes these efforts. *See supra*, at 17-20; *infra*, at 38-39. And defendants' blithe response (Appl. 34) that "[g]rantees can hardly claim unfair surprise" when a new administration adopts new policies ignores how significantly defendants broke from past practice here. In a typical decade, NIH will cancel only a handful of grants midstream. Since January, it has canceled nearly a thousand grants *to the plaintiff states alone*. The notion that no one relies on these awards is farcical.

## II. The remaining stay factors militate against a stay.

### A. The judgment does not irreparably harm defendants.

Defendants must establish irreparable harm to secure a stay—indeed, doing so is "critical." *Nken*, 556 U.S. 434. But their arguments on this point are, like the Challenged Directives themselves, utterly conclusory.

Defendants claim (Appl. 36-37) that the judgment will harm "the public fisc" by "obligating it to disburse grant funds." As an initial matter, plaintiffs may not simply draw down large sums of money at will; as discussed, they must comply with detailed rules and regulations governing how and when they may seek reimbursement for specific project-related costs. *E.g.*, A.R. 3987-4025. Regardless, as plaintiffs have previously explained (D. Ct. Doc. 78, at 40; Pl. States' C.A. Stay Opp. 27-28), defendants have mechanisms to recover any funds improperly paid to grantees. For example, NIH payment policies allow the agency to "identify and administratively

recover funds paid to a recipient at any time during the life cycle of a grant." A.R. 4080 (§8.5.4). And OPM guidance provides for post-closeout adjustments and refunds and recollection of "unallowable" costs. 2 C.F.R. §§200.345, 200.410; *see also id.* §200.346 (explaining that excess payments to grantees "constitute a debt to the Federal Government"). Defendants did not argue to the First Circuit—and they do not argue in this Court—"that those regulations are inapplicable." S.G. App. 31a. Instead, they speculate (Appl. 36-37) that plaintiffs might someday raise an objection to the invocation of those mechanisms, but that kind of amorphous speculation does not satisfy *defendants'* burden to establish irreparable harm.

Defendants also argue that the district court's order causes irreparable harm by "prevent[ing] the Government from enforcing its policies." Appl. 37 (quoting *Trump* v. *CASA, Inc.*, 145 S. Ct. 2540, 2561 (2025)). But *CASA* held only that a federal court improperly intrudes on the executive branch "[w]hen a federal court enters a universal injunction against the Government." 145 S. Ct. at 2561. There is no support for the notion that the federal government suffers *per se* irreparable harm any time a district court enters final judgment against it in an APA case.

**B. Granting a stay will harm plaintiffs and the public.**

The Court should also deny defendants' motion because the irreparable injuries to plaintiffs and the public outweigh any conceivable harms to defendants.

1. The factual record is undisputed: plaintiffs will suffer significant and irreparable harm if defendants can continue enforcing their unlawful directives. As described above, a stay would cause irreversible programmatic harms, such as the loss of data in longitudinal studies, euthanasia of animal test subjects, and spoiled

specimens. *See supra*, at 13. A stay would also impose irremediable operational burdens on the plaintiff states' institutions by forcing those institutions to lay off highly specialized staff, cut student enrollment, and even withdraw offers of admission to accepted applicants. *See supra*, at 13-14. Plaintiffs substantiated these harms through numerous detailed declarations. *See* D. Ct. Docs. 77-12 to 77-65. As the First Circuit explained, defendants "fail[ed] to address any of the[se] non-monetary harms," which "cannot be remedied by belated payment." S.G. App. 32a.

Faced with their lack of argument below, defendants resort to making up new facts in this Court. They wrongly state that "most of the respondents . . . 'have the financial wherewithal to keep their programs running.'" Appl. 37 (quoting *California*, 145 S. Ct. at 969). Defendants cite no evidence for that proposition—because they have none. The undisputed evidence in the record establishes the exact opposite: if the judgment below were put on hold, plaintiffs would not have the resources to continue running the terminated programs. *See supra*, at 14 & n. 9; S.G. App. 32a (First Circuit contrasting *California* because the plaintiff states here do not have "alternative university funds to continue work").

2. A stay would also harm the public. Plaintiffs and their public institutions use the grants at issue to promote the health of underserved and at-risk populations. As discussed above, for example, defendants canceled a clinical trial providing care for several dozen patients with a history of suicide attempts and current suicidal ideation. *See supra*, at 14. The canceled projects are also often the only treatment option for a particular condition or in a particular location—like a

terminated University of Hawai‘i study that provided the only HPV screening of its type in the state. *See supra*, at 14. A stay would thus needlessly jeopardize Americans' treatment options for pressing health conditions.

### C. Defendants have not shown a likelihood of certiorari.

To secure a stay in this posture, defendants must also establish a "reasonable probability" that the Court would ultimately grant certiorari. *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010). They have not done so. Defendants do not claim that the district court's rulings on agency discretion or the merits are certworthy; on those fronts, defendants seek only error correction. *See* Appl. 27-34. Defendants argue (Appl. 35) that there is "ongoing disagreement" in the lower courts over the jurisdictional question discussed above, but the appellate decisions that defendants cite all arose on emergency motions. Defendants offer no reason to think any disagreement will persist after the circuits in question have had a full chance to weigh in—much less that those courts are likely to reach different results *in factually similar cases*.

In any event, this case is a poor vehicle to resolve any split that might develop. As discussed above, this case involves a challenge to an overarching agency policy antecedent to any individual grant termination. Yet defendants have failed to develop any argument that the district court lacked jurisdiction to review that overarching policy. If the Court is to grant certiorari, it should be in a case with full adversary presentation of all the questions presented.

## CONCLUSION

The Court should deny defendants' application for a stay.

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Respectfully submitted.

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