

APPENDIX

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Appendix A



SECRETARIAL DIRECTIVE ON DEI-RELATED FUNDING

February 10, 2025

The Department of Health and Human Services has an obligation to ensure that taxpayer dollars are used to advance the best interests of the government. This includes avoiding the expenditure of federal funds on programs, or with contractors or vendors, that promote or take part in diversity, equity, and inclusion (“DEI”) initiatives or any other initiatives that discriminate on the basis of race, color, religion, sex, national origin, or another protected characteristic. Contracts and grants that support DEI and similar discriminatory programs can violate Federal civil rights law and are inconsistent with the Department’s policy of improving the health and well-being of all Americans.

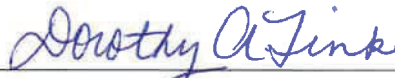
These contracts and grants can cause serious programmatic failures and yet it is currently impossible to access sufficient information from a centralized source within the Department of Health and Human Services to assess them. Specifically, there is no one method to determine whether payments the agency is making to contractors, vendors, and grantees for functions related to DEI and similar programs are contributing to the serious problems and acute harms DEI initiatives may pose to the Department’s compliance with Federal civil rights law as well as the Department’s policy of improving the health and well-being of all Americans. It is also currently impossible to assess whether payments the Department is making are free from fraud, abuse, and duplication, as well as to assess whether current contractual arrangements, vendor agreements, and grant awards related to these functions are in the best interests of the United States. *See* FAR 12.403(b), 49.101; 45 C.F.R. § 75.371-372. Finally, it is also impossible to determine with current systems whether current contracts and grant awards are tailored to ameliorate these specific problems and the broader problem of DEI and similar programs rather than exacerbate them. The Department has an obligation to ensure that no taxpayer dollars are lost to abuse or expended on anything other than advancing the best interests of the nation.

For these reasons, pursuant to, among other authorities, FAR 12.403(b) and 49.101 and 45 C.F.R. § 75.371- 372, the Secretary of Health and Human Services hereby DIRECTS as follows:

Agency personnel shall briefly pause all payments made to contractors, vendors, and grantees related to DEI and similar programs for internal review for payment integrity. Such review shall include but not be limited to a review for fraud, waste, abuse, and a review of the overall contracts and grants to determine whether those contracts or grants are in the best interest of the government and consistent with current policy priorities. In addition, if after review the Department has determined that a contract is inconsistent with Department priorities and no longer in the interest of the government, such contracts may be terminated pursuant to the Department’s authority to terminate for convenience contracts that are not “in the best interests of the Government,” see FAR 49.101(b); 12.403(b). Furthermore, grants may be terminated in accordance with federal law.

This Directive shall be implemented through the Department's contracts and payment management systems by personnel with responsibility for such systems who shall, in doing so, comply with all notice and procedural requirements in each affected award, agreement, or other instrument. Whenever a DEI or similar contract or grant is paused for review, Department personnel shall immediately send such payment to Scott Rowell, Deputy Chief of Staff for Operations, for prompt review to determine whether or not the payment is appropriate and should be made. Payments on paused contracts shall remain paused and already terminated contracts shall remain terminated pending completion of that review to the maximum extent permitted by law and all applicable notice and procedural requirements in the affected award, agreement, or other instrument.

I thank you for your attention to this matter, as well as your efforts to ensure that no taxpayer dollars are misspent.



Dorothy A. Fink, M.D., Acting Secretary

Appendix B

Directive on NIH Priorities

Agency: National Institutes of Health

Office of the Director

Action: Directive

FOR FURTHER INFORMATION CONTACT:

National Institutes of Health

Office of the Director

EFFECTIVE DATE: February 21, 2025

Restoring Scientific Integrity and Protecting the Public Investment in NIH Awards

The National Institutes of Health (NIH) is the largest public funder of biomedical and behavioral research in the world. The public trusts NIH with substantial funds to foster creative discoveries that will improve health and prevent disease in this Country. Accordingly, NIH is committed to promoting only the highest level of scientific integrity, public accountability, and social responsibility in the programs it funds. And NIH promises to prioritize the funding of projects that will generate a high return on the public's investment, so that taxpayer dollars are not going to waste. Every dollar should be used to make Americans live longer, healthier lives.

This mission requires NIH to ensure that it is not supporting low-value and off-mission research programs, including but not limited to studies based on diversity, equity, and inclusion (DEI) and gender identity. While this description of NIH's mission is consistent with recent Executive Orders issued by the President, I issue this directive based on my expertise and experience; consistent with NIH's own obligation to pursue effective, fiscally prudent research; and pursuant to NIH authorities that exist independently of, and precede, those Executive Orders.

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, DEI studies are often used to support unlawful discrimination on the basis of race and other protected characteristics, which harms the health of Americans. Therefore, it is the policy of NIH not to prioritize such research programs.

Likewise, research programs based on gender identity are often unscientific, have little identifiable return on investment, and do nothing to enhance the health of many Americans. Many such studies ignore, rather than seriously examine, biological realities. It is the policy of NIH not to prioritize these research programs either.

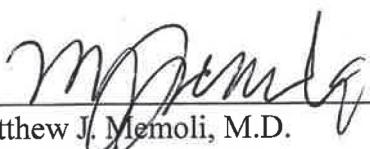
For these reasons and pursuant to, among other authorities, 42 U.S.C. § 282(b) and 45 C.F.R. Part 75 (45 C.F.R. §§ 75.207, 75.210, 75.371–373),¹ the Director of NIH hereby directs:

NIH personnel shall conduct an internal review of all contract solicitations and notices of funding opportunities; applications pending Type 1 and Type 2 awards; existing awards; cooperative agreements; and other transactions. Such review shall be aimed at ensuring NIH grants, contracts, cooperative agreements, and other transactions do not fund or support low-value and off-mission research activities or projects – including DEI and gender identity research activities and programs. NIH personnel should also ensure grants, contracts, cooperative agreements, and other transactions are free from fraud, abuse, and duplication, and are being implemented consistent with federal law.

This Directive shall be implemented by all relevant NIH personnel, including but not limited to those in the Office of Extramural Research, Office of Intramural Research, and the Division of Program Coordination, Planning, and Strategic Initiatives. Grants, contracts, cooperative agreements, and other transactions deemed inconsistent with NIH’s mission may, where permitted by applicable law, be subject to funding restrictions, terminated or partially terminated, paused, and/or not continued or renewed, in compliance with all procedural requirements.

Notwithstanding this Directive, and consistent with any court orders that may apply, no open award disbursements may be paused in reliance upon Office of Management and Budget Memorandum M-25-13 or any Executive Order underlying that Memorandum. Previous instructions ordering the immediate release of such funds remain in effect. Also, consistent with any court orders that may apply, this Directive does not instruct personnel to condition or withhold federal funding pursuant to Section 4 of Executive Order 14,187 (Protecting Children from Chemical and Surgical Mutilation) based on the fact that a healthcare entity or health professional provides care or treatment.

Dated: February 21, 2025


Matthew J. Memoli, M.D.
Acting Director of NIH

¹ To be clear, these citations are illustrative, not exhaustive. Further explanation of the range of statutory and regulatory authorities that support actions taken pursuant to this Directive will be issued as appropriate.

Appendix C

Staff Guidance –Award Assessments for Alignment with Agency Priorities - March 2025

Background

This staff guidance rescinds the guidance provided in the February 13, 2025, memo to IC Chief Grants Management Officers entitled Supplemental Guidance – NIH Review of Agency Priorities Based on the New Administration’s Goals. In accordance with the Secretarial Directive on DEI Related Funding (Appendix 1), NIH will no longer prioritize research and research training programs that focus on Diversity, Equity and Inclusion (DEI). Terminations that result from science that no longer effectuates NIH’s priorities must follow the appeals guidance below. All other terminations for noncompliance require, always, [appeal language](#).

Prior to issuing all awards (competing and non-competing) or approving requests for carryover, ICs must review the specific aims assess whether the proposed project contains any DEI research activities or DEI language that give the perception that NIH funds can be used to support these activities. To avoid issuing awards, in error, that support DEI activities ICs must take care to completely excise all DEI activities using the following categories.

Category 1: The sole purpose of the project is DEI related (e.g., diversity supplements or conference grant where the purpose of the meeting is diversity), and/or the application was received in response to a NOFO that was unpublished as outlined above.

- Action: ICs must not issue the award.

Category 2: Project partially supports DEI activities (i.e., the project may still be viable if those aims or activities are negotiated out, without significant changes from the original peer-reviewed scope) this means DEI activities are ancillary to the purpose of the project. In some cases, not readily visible. This category requires a scientific assessment and requires the GM to use the DEI Restriction Term of Award in Section IV of the Notice of Award, no exceptions will be allowed without a deviation from the Office of Policy for Extramural Research Administration (OPERA)/Office of Extramural Research (OER).

- Action 1: Funding IC must negotiate with the applicant/recipient to address the activities that are non-compliant, along with the associated funds that support those activities, obtain revised aims and budgets, and document the changes in the grant file.
- Action 2: Once the IC and the applicant/recipient have reached an agreement, issue the award and include the DEI Term and Condition of Award in Section IV of the Notice of Award. Hard funds restrictions are not required.
 - **Note:** If the IC and the applicant/recipient cannot reach an agreement, or the project is no longer viable without the DEI related activities, the IC cannot proceed with the award. For ongoing projects, the IC must work with OPERA to negotiate a bilateral termination of the project. Where bilateral termination cannot be reached, the IC must unilaterally terminate the project. Terminated awards (bilaterally or unilaterally) should follow the process identified in [Appendix 2](#).

Category 3: Project does not support DEI activities, but may contain language related to DEI (e.g., statement regarding institutional commitment to diversity in the ‘Facilities & Other Resources’ attachment and terminology related to structural racism—this is not all-inclusive).

- Action 1: Funding IC must request an updated application/RPPR with the DEI language removed.
- Action 2: Once the language has been removed, the IC may proceed with issuing the award.

Category 4: Project does not support any DEI activities

- Action: IC may proceed with issuing the award.



SECRETARIAL DIRECTIVE ON DEI-RELATED FUNDING

February 10, 2025

The Department of Health and Human Services has an obligation to ensure that taxpayer dollars are used to advance the best interests of the government. This includes avoiding the expenditure of federal funds on programs, or with contractors or vendors, that promote or take part in diversity, equity, and inclusion (“DEI”) initiatives or any other initiatives that discriminate on the basis of race, color, religion, sex, national origin, or another protected characteristic. Contracts and grants that support DEI and similar discriminatory programs can violate Federal civil rights law and are inconsistent with the Department’s policy of improving the health and well-being of all Americans.


These contracts and grants can cause serious programmatic failures and yet it is currently impossible to access sufficient information from a centralized source within the Department of Health and Human Services to assess them. Specifically, there is no one method to determine whether payments the agency is making to contractors, vendors, and grantees for functions related to DEI and similar programs are contributing to the serious problems and acute harms DEI initiatives may pose to the Department’s compliance with Federal civil rights law as well as the Department’s policy of improving the health and well-being of all Americans. It is also currently impossible to assess whether payments the Department is making are free from fraud, abuse, and duplication, as well as to assess whether current contractual arrangements, vendor agreements, and grant awards related to these functions are in the best interests of the United States. *See* FAR 12.403(b), 49.101; 45 C.F.R. § 75.371-372. Finally, it is also impossible to determine with current systems whether current contracts and grant awards are tailored to ameliorate these specific problems and the broader problem of DEI and similar programs rather than exacerbate them. The Department has an obligation to ensure that no taxpayer dollars are lost to abuse or expended on anything other than advancing the best interests of the nation.

For these reasons, pursuant to, among other authorities, FAR 12.403(b) and 49.101 and 45 C.F.R. § 75.371- 372, the Secretary of Health and Human Services hereby DIRECTS as follows:

Agency personnel shall briefly pause all payments made to contractors, vendors, and grantees related to DEI and similar programs for internal review for payment integrity. Such review shall include but not be limited to a review for fraud, waste, abuse, and a review of the overall contracts and grants to determine whether those contracts or grants are in the best interest of the government and consistent with current policy priorities. In addition, if after review the Department has determined that a contract is inconsistent with Department priorities and no longer in the interest of the government, such contracts may be terminated pursuant to the Department’s authority to terminate for convenience contracts that are not “in the best interests of the Government,” see FAR 49.101(b); 12.403(b). Furthermore, grants may be terminated in accordance with federal law.

This Directive shall be implemented through the Department's contracts and payment management systems by personnel with responsibility for such systems who shall, in doing so, comply with all notice and procedural requirements in each affected award, agreement, or other instrument. Whenever a DEI or similar contract or grant is paused for review, Department personnel shall immediately send such payment to Scott Rowell, Deputy Chief of Staff for Operations, for prompt review to determine whether or not the payment is appropriate and should be made. Payments on paused contracts shall remain paused and already terminated contracts shall remain terminated pending completion of that review to the maximum extent permitted by law and all applicable notice and procedural requirements in the affected award, agreement, or other instrument.

I thank you for your attention to this matter, as well as your efforts to ensure that no taxpayer dollars are misspent.



Dorothy A. Fink, M.D., Acting Secretary

Appendix 2 – Guidance for staff to use when terminating awards identified by HHS or the IC.

- Issue a revised NOA.
 - Change the budget and project period end dates to match the date of the termination letter.
 - Check PMS, determine amount of funds remaining, and deobligate the amount reflected in PMS when revising the NOA. Note: This applies to Multi-Year Funded Awards, as well. Work with FFR-C if you have questions regarding deobligating funds to avoid placing the recipient in debt collection.
 - Remove all future years from the project, where applicable. If the grant is in a no cost extension, and the HHS requests a termination, the project must be terminated
 - Use the following termination term: This award related to [select the appropriate example relevant to your project by choosing one of the highlighted examples DEI, China, or Transgender issues] no longer effectuates agency priorities. It is the policy of NIH not to further prioritize these research programs. Therefore, the award is terminated. [Refer to Appendix 3 for language provided to NIH by HHS.] Please be advised that your organization, as part of the orderly closeout process will need to submit the necessary closeout documents (i.e., Final Research Performance Progress Report, Final Invention Statement, and the Final Federal Financial Report (FFR)) within 120 days of the end of this grant to avoid unilateral closeout.
 - Insert restriction language that allows for the recipients to use a portion of funds to support the health and safety of patients and orderly closeout of the project.
 - Sample language for use: “Funds in the amount of \$xxxxxxx [insert \$ amount total cost] may be used to support patient safety and orderly closeout of the project. Funds used to support any other research activities will be disallowed and recovered.”
- Appeals language must be used (prior to October 1, 2025):
 - NIH is taking this enforcement action in accordance with [2 C.F.R. § 200.340](#) as implemented in [NIH GPS Section 8.5.2](#). This letter represents the final decision of the NIH. It shall be the final decision of the Department of Health and Human Services (HHS) unless within 30 days after receiving this decision you mail or email a written notice of appeal to Dr. Matthew Memoli.

Please include a copy of this decision, your appeal justification, total amount in dispute, and any material or documentation that will support your position. Finally, the appeal must be signed by the institutional official authorized to sign award applications and must be postmarked no later than 30 days after the postmarked date of this notice.
- Termination actions taken based on agency priorities do not require appeals language because the action was not based on administrative nor programmatic noncompliance

Appendix 3 – Language provided to NIH by HHS providing examples for research activities that NIH no longer supports.

- China: Bolstering Chinese universities does not enhance the American people’s quality of life or improve America’s position in the world. On the contrary, funding research in China contravenes American national-security interests and hinders America’s foreign-policy objectives.
- DEI: 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 discrimination on the basis of race and other protected characteristics, which harms the health of Americans. Therefore, it is the policy of NIH not to prioritize such research programs.
- Transgender issues: Research programs based on gender identity are often unscientific, have little identifiable return on investment, and do nothing to enhance the health of many Americans. Many such studies ignore, rather than seriously examine, biological realities. It is the policy of NIH not to prioritize these research programs.

Appendix 4 – Approved Term – Use for all Category 2 awards, i.e., renegotiated aims and associated budgets. Approval embedded below. ICs should use this term in the IC specific award conditions

Term and Condition of Award

NIH and the recipient have renegotiated the scope of this award. Pursuant to the revised scope, NIH funds may only be used to support activities within the revised scope of the award. NIH funds may not be used to support activities that are outside the revised scope of the award, including Diversity Equity and Inclusion (DEI) research or DEI-related research training activities or programs. Any funds used to support activities outside the scope will result in a disallowance of costs, and funds will be recovered.

This term is consistent with NIH’s ongoing internal review of NIH’s priorities and the alignment of awards with those priorities as well as a review of program integrity of awards. Such review includes, but is not limited to, a review for fraud, waste and abuse, and a review of the NIH portfolio to determine whether awards are in the best interests of the government and consistent with policy priorities. If recipients are unclear on whether a specific activity constitutes DEI or has questions regarding other activities that could be considered outside the scope of the award, refrain from drawing down funds and consult with the funding IC, particularly where the activity may impact the specific aims, goals, and objectives of the project.

Approval email from Dr. Memoli (Acting Director, NIH) on Friday, February 28, 2025.

Appendix D

From: [Bulls, Michelle \(NIH/OD\) \[E\]](#)
To: [Chief GMOs](#)
Cc: [Bulls, Michelle \(NIH/OD\) \[E\]](#); [Ta, Kristin \(NIH/OD\) \[E\]](#)
Subject: Award Revision Guidance and List of Terminated Grants via letter on 3/12
Date: Thursday, March 13, 2025 4:03:00 PM
Attachments: [Termination Categories 3.13.25.docx](#)
[Terminated Grants 3-12 no subprojects.xlsx](#)

Chiefs,

Attached are two items: 1) updated categories for you to use when issuing NOAs to officially terminate the awards where letters were issued, and 2) the list of termination letters that were issued yesterday. Please revise your NOAs related to the attached list by next **Wednesday, March 13, 2025, cob**. It is extremely important that issue the revised awards timely. If there are delays, please let me know and we can try to help somehow/some way. I appreciate you all.

Please save this guidance until we can clear the updated staff guidance, and you will need this to issue revised awards. Note: If your IC is not listed on the attached spreadsheet – no action is required, at this time.

Guidance for IC staff to use when terminating awards identified by HHS or the IC due to DEI or other agency priorities.

- Issue a revised NOA.
 1. Change the budget and project period end dates to match the date of the termination letter.
 2. OPERA will place a hard funds restriction on all documents within the excel spreadsheet. Do not deobligate any funds when you issue the revised award to terminate the projects. If there are no animals and humans, FFR-C will deobligate the awards after the Final FFRs are submitted. No deobligation actions required from the ICs.
 3. Remove all future years from the project, where applicable. If the grant is in a no cost extension, and HHS requests a termination, the project must be terminated.
 4. Termination Term to be used **DELETE THE OLD TERM RELATED TO DOLLAR AMOUNTS FOR HARD FUNDS RESTRICTIONS – IT IS NO LONGER APPLICABLE.**

It is the policy of NIH not to prioritize **[insert termination category language]**. Therefore, this project is terminated. **[RECIPIENT NAME]** may request funds to support patient safety and orderly closeout of the project. Funds used to support any other research activities will be disallowed and recovered. Please be advised that your organization, as part of the orderly closeout process will need to submit the necessary closeout documents (i.e., Final Research Performance Progress Report, Final Invention Statement, and the Final Federal Financial Report (FFR), **as applicable**) within 120 days of the end of this grant. NIH is taking this enforcement action in accordance with [2 C.F.R. § 200.340](#) as implemented in [NIH GPS Section 8.5.2](#). This revised award represents the final decision of the NIH. It shall be the final decision of the Department of Health and Human Services (HHS) unless within 30 days after receiving this decision you mail or email a written notice of appeal to Dr. Matthew Memoli. Please include a

copy of this decision, your appeal justification, total amount in dispute, and any material or documentation that will support your position. Finally, the appeal must be signed by the institutional official authorized to sign award applications and must be dated no later than 30 days after the date of this notice.

Thanks,
Michelle

Termination Categories

- China: Bolstering Chinese universities does not enhance the American people's quality of life or improve America's position in the world. On the contrary, funding research in China contravenes American national-security interests and hinders America's foreign-policy objectives.
- DEI: 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 discrimination on the basis of race and other protected characteristics, which harms the health of Americans. Therefore, it is the policy of NIH not to prioritize such research programs.
- Gender: Research programs based on gender identity are often unscientific, have little identifiable return on investment, and do nothing to enhance the health of many Americans. Many such studies ignore, rather than seriously examine, biological realities. It is the policy of NIH not to prioritize these research programs.
- Vaccine Hesitancy: It is the policy of NIH not to prioritize research activities that focuses gaining scientific knowledge on why individuals are hesitant to be vaccinated and/or explore ways to improve vaccine interest and commitment. NIH is obligated to carefully steward grant awards to ensure taxpayer dollars are used in ways that benefit the American people and improve their quality of life. Your project does not satisfy these criteria.

Appendix E

NIH Grants Management Staff Guidance – Award Assessments for Alignment with Agency Priorities – DRAFT

Final Issue Date: Pending NIH Director's updated priorities

Background

This staff guidance rescinds the guidance provided in the February 13, 2025, memo to IC Chief Grants Management Officers entitled Supplemental Guidance – NIH Review of Agency Priorities Based on the New Administration's Goals. In accordance with the Secretarial Directive on DEI Related Funding (Appendix 1), NIH will no longer prioritize research and research training programs that focus on Diversity, Equity and Inclusion (DEI). This guidance seeks to expand the scope of the categories within to include other agency priorities that will be defined by the Director, NIH. The Director will issue a guide notice to publicize the agency's updated priorities in an effort to be transparent as research priorities shift.

NOFO Guidance

NIH is required to submit forecast reports to HHS prior to issuing new or reissued Notices of Funding Opportunities (NOFO's) within the NIH Guide for Grants and Contracts and Grants.gov. See Appendix 5 for the workflow.

Award Guidance

Prior to issuing all awards (competing and non-competing, monetary and non-monetary (e.g., carryover requests, no-cost extensions, etc.)), ICO's must review the specific aims/major goals of the project to assess whether the proposed project contains any DEI and/or other research activities that are not an NIH/HHS priority/authority. To avoid issuing awards, in error, that support these activities ICO's must take care to completely excise all non-priority activities using the following categories.

ICO's should review the current application/RPPR under consideration, only. ICO's should not request retroactive changes to previous RPPRs and competitive applications to modify language related to research that has already been conducted.

Category 1: The sole purpose of the project is related to an area that is no longer an NIH/HHS priority/authority (e.g., diversity supplements, diversity fellowships, or conference grant where the purpose of the meeting is diversity, etc. after the priorities memo is issued), and/or the application was received in response to a NOFO that has been unpublished due to its focus on activities that are no longer an NIH/HHS priority/authority. Whether the NOFO was unpublished or expired naturally, if the sole purpose was DEI or another category that does not effectuate the NIH/HHS priorities, ICO's cannot make the award.

This applies to all projects, including phased awards, etc. Reminder: CGMOs requested access to the NOFO list, and NIH leadership provided the following interim process: CGMOs must consult with their Division of Extramural Activities (DEA) rep to obtain up to date information on NOFOs.

- **Action:** ICO's must not issue the award (competing or non-competing).

- For ongoing projects where NIH will not issue the next Type 5 (ICO determination not HHS list), the ICO must:
 - Issue a revised award to end the award at the end of the current budget period and remove all outyears. A termination letter is not required.
 - Add the action to the master spreadsheet located at: [OD OPERA Grant Action Tracking](#) (Access limited to CGMOs. CGMOs may email OPERA leadership to identify a delegate, if needed).
 - Include the following term in the revised NOA:

Term of Award:

Effective with this Notice of Award, this project is terminated. **[Insert appropriate category from Appendix 3, verbatim]**. Therefore, no additional funding will be awarded for this project, and all future years have been removed. If appropriate, **[RECIPIENT NAME]** may request funds to support patient safety and animal welfare to support an orderly phaseout of the project.

Requests to draw down funds must be submitted to OPERAFFRInquiries@od.nih.gov for prior approval, before submitting in the HHS Payment Management System. The request must include the drawdown amount, justification, and appropriate supporting documentation. Approval will only be provided for costs incurred prior to the date of termination (with proof of the date), or costs for patient safety or animal welfare, in support of an orderly phaseout of the project. Funds used to support any other research activities will be disallowed and recovered.

Please be advised that your organization, as part of the orderly phaseout process, will need to submit the necessary closeout documents (i.e., Final Research Performance Progress Report, Final Invention Statement, and the Final Federal Financial Report (FFR), **as applicable**) within **60** days (non-human subjects and animals) **120** days (human subjects and animals) after the end of this project.

This action aligns with [Termination - 2 C.F.R. § 200.340 \(a\)\(4\)](#). This is a final determination. If you wish to seek a reconsideration because you object to the ICO's termination, please submit a reconsideration request to [IC Director Name], Director, [IC Name].

- In this instance, there is no hard funds restriction required. The recipient will submit their Final FFR in accordance with the term and conditions, and any remaining funding will be deobligated by the FFR-C upon review and acceptance of the FFR.
- NOTE: OPERA recognizes that the closeout letters will be automatically sent, so we are working internally with the closeout support center staff to manage this process. If you receive inquiries, please point the inquirer to: OPERALeadership@nih.gov
- **No cost extension requests:** For **all NCE requests**, ICO's must determine if the sole purpose of the grant was to support research activities that are no longer an NIH/HHS

priority/authority and, if so, issue an award to immediately end the grant project (use disapproved extension term below). If the non-NIH/HHS priority/authority research activities are ancillary to the project, approve the extension (use approved extension term below). Reminder – even if a grant project is in an NCE, ICO staff must still determine if non-NIH/HHS priority/authority activities are proposed during the extension period. Extensions may only be approved for orderly phaseout, and funds may not be used to support any non-NIH/HHS priority/authority research activities.

- ICO's may use the following term of award when approving/disapproving NCEs:
 - **Term of Award (approved extension):** The no-cost extension has been approved for this project to support an orderly phaseout of the project, no other reasons are allowed. NIH grants funds must not be used to support [insert category – e.g., Diversity, Equity and Inclusion (DEI), COVID 19, etc.] research or research training activities or programs. Any funds used to support such activities will result in a disallowance of costs, and funds will be recovered.
 - **Term of Award (disapproved extension):** The no cost extension request for this project has been denied. Please proceed with orderly phaseout of the project. NIH grant funds must not be used to support [insert category – e.g., Diversity, Equity and Inclusion (DEI), gender identity, etc.] research or research training activities or programs.

Category 2: Project partially supports non-NIH/HHS priority/authority activities (i.e., the project may still be viable if those aims or activities are negotiated out, without significant changes from the original peer-reviewed scope). This means the non-NIH/HHS priority/authority activities are ancillary to the purpose of the project, in some cases, not readily visible. This category requires a scientific assessment and requires the GM to use the Restriction Term of Award (see Action 2) in Section IV of the Notice of Award. No exceptions will be allowed without a deviation from the Office of Policy for Extramural Research Administration (OPERA)/Office of Extramural Research (OER).

- Note: Activities required to comply with [NIH inclusion policies](#) are not considered DEI activities.
- **Action 1:** Funding ICO must negotiate with the applicant/recipient to address the activities that are non-compliant, along with the associated funds that support those activities, obtain revised aims and budgets, and document the changes in the grant file. The recipient/awardee cannot rebudget these funds, they must be recovered by the IC.
 - After an informal conversation, the ICO must send a written request to the AOR outlining what portion of the aims and budget must be modified to document the renegotiation process:
 - Sample language for requesting application updates from the AOR: It is the policy of NIH not to prioritize **[select one of the following: diversity, equity and inclusion (DEI) research programs, or other non-HHS/NIH priorities, or countries of concern]**. **[Funding IC]** has identified **[insert appropriate activity taken from the list above]** activities within section

[XXXX] of your application. Please work with the PD/PI to update the application sections and adjust the budget as appropriate to remove all [insert appropriate activity] activities and submit these updates to the Program Official and Grants Management Specialist for review and approval.

- Once the recipient responds and the ICO and the recipient agree to the changes, the ICO must direct the AOR to submit a revised face page, specific aims and budget via the prior approval module 'Other Request' type. See [eRA online help](#) for instructions.
- Once the ICO renegotiates the revised specific aims, the ICO must upload into the Additions for GM section of the grant folder the new aims. These must be uploaded under the file group "Award Documents: Revised Aims and Abstract".
- If the ICO renegotiates a revised budget, the ICO should update the GM workbook, as appropriate.
- **Action 2:** Once the ICO and the applicant/recipient have reached an agreement, and updated documents are received and properly filed as outlined above, issue the award and include the following Term and Condition of Award in Section IV of the Notice of Award. Hard funds restrictions are not required.

Term of Award (Approved 2/28/2025 – Refer to Appendix 4 for the approval from Dr. Memoli):

NIH and the recipient have renegotiated the scope of this award. Pursuant to the revised scope, NIH funds may only be used to support activities within the revised scope of the award. NIH funds may not be used to support activities that are outside the revised scope of the award, including [select one of the following: diversity, equity and inclusion (DEI) research programs, gender identity, vaccine hesitancy, climate change or countries of concern, e.g., China or South Africa, etc.] research or related research training activities or programs. Any funds used to support activities outside the scope will result in a disallowance of costs, and funds will be recovered.

This term is consistent with NIH's ongoing internal review of NIH's priorities and the alignment of awards with those priorities as well as a review of program integrity of awards. Such review includes, but is not limited to, a review for fraud, waste and abuse, and a review of the NIH portfolio to determine whether awards are in the best interests of the government and consistent with policy priorities. If recipients are unclear on whether a specific activity constitutes [select one of the following: diversity, equity and inclusion (DEI) research programs, vaccine hesitancy, climate change, etc.] or has questions regarding other activities that could be considered outside the scope of the award, refrain from drawing down funds and consult with the funding IC, particularly where the activity may impact the specific aims, goals, and objectives of the project.

- **Unable to remove activities that are not an NIH/HHS priority:** If the ICO and the applicant/recipient cannot reach an agreement, or the project is no longer viable without the non-compliant activities, the ICO cannot proceed with the award. For ongoing projects, the ICO must notify OPERA (OPERAleadership@nih.gov) and negotiate a bilateral termination of the project. For bilateral terminations, the ICO must issue a revised award to remove all outyears and include the following term in Section IV of the NOA.

NIH is bilaterally terminating this award effective [effective date] in accordance with the request dated [date], because the project does not align with NIH priorities. No additional funding will be awarded for this project, and all future years have been removed. If appropriate, [RECIPIENT NAME] may request funds to support patient safety and animal welfare to support an orderly phaseout of the project.

Requests to draw down funds must be submitted to OPERAFFRInquiries@od.nih.gov for prior approval, before submitting in the HHS Payment Management System. The request must include the drawdown amount, justification, and appropriate supporting documentation. Approval will only be provided for costs incurred prior to the date of termination (with proof of the date), or costs for patient safety or animal welfare, in support of an orderly phaseout of the project. Funds used to support any other research activities will be disallowed and recovered.

Please be advised that your organization, as part of the orderly phaseout process, will need to submit the necessary closeout documents (i.e., Final Research Performance Progress Report, Final Invention Statement, and the Final Federal Financial Report (FFR), **as applicable**) within **60** days (non-human subjects and animals) **120** days (human subjects and animals) after the end of this project.

Where bilateral termination cannot be reached, the ICO must unilaterally terminate the project. Unilaterally terminated awards should follow the process identified **Termination Type 3: ICO-Terminations** to send the termination letter and revise the award.

- **Diversity Supplements:** Type 5 Diversity supplements may no longer be awarded. For ongoing awards, ICO's must remove the diversity supplement activities prior to issuing the next Type 5 for the parent award and include the following term in Section IV of the NOA of the parent grant. The ICO must revise the Diversity Supplement award to remove all outyears. If diversity supplement outyears were included in the previous NOA, the ICO must revise the prior year award to remove references to those outyear commitments.

Term of Award: The diversity supplement associated with this project, [insert diversity supplement grant number], is being terminated. No additional funding will be awarded, and all future years have been removed. 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 discrimination on the basis of race and other protected classes, which harms the health of Americans. Therefore, it is the policy of NIH not to prioritize such research programs.

Funds issued for the Diversity Supplement may no longer be utilized and cannot be rebudgeted nor carried over to future years.

- **Conference Grants:** If a conference supported by an NIH grant focuses on scientific topics that are unrelated to DEI, but the conference itself is targeted at a specific population (e.g., underrepresented groups), the ICO must work with the applicant/recipient to open the conference up to all populations. If a negotiation to broaden the target audience is not feasible, or the conference is no longer viable, then the ICO must terminate the award following the process in **Category 1**.
- **Diversity Reports (e.g., Ts, R25, K12, and any others):** NIH is modifying the application instructions and RPPR instructions to remove requirements for diversity reports (e.g., Trainee Diversity Report). If ICOs receive these reports in applications or RPPRs, the IC should not review the report. These reports provide diversity related information, but do not involve specific DEI activities. ICOs must use the following term: “NIH no longer requires the [name of diversity table/plans]. Therefore, NIH did not review the [name of diversity table/plans] provided. NIH funding may not be used to support any diversity, equity or inclusion (DEI) activities”. Note: this section applies to diversity related reports, only. Other areas that are no longer NIH/HHS priorities/authority must be addressed under category 2 negotiations.
- **Administrative Supplement Requests:** Administrative supplement applications should be reviewed for any activities that are no longer NIH/HHS priorities/authority and modified as needed. ICOs do not need to retroactively review the competitive parent grant application— only the supplement application requires review.

Category 2B:

Prospective reviews by GM where the DEI and/or language in certain sections of the application has to be removed even though the project itself is not focused on DEI but may have language or have been awarded from a DEI NOFO that is expired/taken down for revision to go back up once the language is appropriately excised.

Examples below, and in these cases, ICO should consider using the Category 2 term of award but remove the negotiation language from the term. ICOs do not need to request revised materials from the recipients. However, the project title and/or abstract may need to be updated to remove any language that does not align with NIH/HHS priorities/authority. The changes must be noted in the grant file. Reminder: ICOs do not need to modify the historical record to modify language.

- Resource Section
- Biosketch
- RPPRs
- Letters of Support

Category 2C: Subprojects/cores terminated by HHS.

ICO's do not need to terminate the subprojects/cores. The funds can be restricted and recovered, unless there is a negotiation where a new subproject/core is identified that does not violate the priorities of the agency. The following actions will occur in these cases:

- OPERA will restrict the funds associated with the project and notify the ICO.
- The ICO must revise the award to remove the subproject/core, only and must not issue a termination letter nor termination language within the terms and conditions. ICO
- The revised award must include the following term in Section IV.

[Insert category from Appendix 3, verbatim]. Therefore, no additional funds may be used to support the activities under [insert subproject or core title], and all activities must cease, effective with the date of this revision. Funds used to support these activities will be disallowed and recovered. Funds issued for this subproject/core may no longer be utilized and cannot be rebudgeted nor carried over to future years.

Category 3: Project does not support any DEI or other activities that go against the HHS/NIH priorities.

- Action: ICO may proceed with issuing the award.

Category 4: Foreign Awards.

Note: Effective May 1, and until the details of the new foreign collaboration award structure are released, NIH will not issue awards to domestic or foreign entities (new, renewal or non-competing continuation), that include a subaward to a foreign entity. See [NOT-OD-25-104](#).

4A. Agency priorities:

- South Africa: Note: Currently (April/May 2025), continue to hold award actions related to entities in South Africa until final determinations are made by NIH leadership. This applies to both monetary and non-monetary award actions. ICOs may negotiate with recipients to remove activities in South Africa from ongoing awards as long as the project remains viable. **IMPORTANT NOTE: Funds may only be provided to entities in South Africa to support health and safety of human participants in clinical trials/clinical research.**
- China: Note: Currently (April/May 2025), hold on making awards to entities in China until the final determinations are made by NIH leadership. This applies to both monetary and non-monetary award actions. **IMPORTANT NOTE: ICOs may negotiate with recipients to remove activities in China from ongoing awards as**

long as the project remains viable, or a suitable domestic replacement is identified. Funds may only be provided to entities in China to support health and safety of human participants in clinical trials.

4B. Countries of Concern:

- The State Department's countries of concern lists are updated regularly. Therefore, ICOs must check the list annually prior to making new, renewal, and noncompeting continuation awards. Additionally, out of an abundance of caution related to the United States national security threats, if a country is added to either of the two lists below, ICO's must submit a request through FACTs to obtain State Department clearance. If clearance is not received within 14 days, the award cannot be made until it is received (i.e., new, renewal, and noncompeting continuations).
- At this time, ICO's should note in FACTs when awards (new, renewal, non-competing continuation) involve entities on the following State Department lists:
 - Countries in which the government of has engaged in or tolerated "particularly severe violations of religious freedom": [State Department Countries of Particular Concern](#)
 - Countries determined by the Secretary of State to have repeatedly provided support for acts of international terrorism: [State Sponsors of Terrorism](#)
- Awards may only be issued once State Department clearance is obtained. Do not assume approval unless a response is received from the State Department. The staff guidance on FACTs clearance will be updated to reflect this change. This applies to all direct foreign awards and foreign collaborations (monetary and non-monetary).

OPERA has not included the [Final Rule Restricting Transfer of Personal U.S. Data to Countries of Concern](#) (please consider this list related to sensitive or PII data is involved for clinical trials/clinical research) or [Office of Foreign Assets Control Sanctions List](#), as these are not factors in award decisions. In all cases, if there are questions contact the Fogarty International Center for expert assistance.

Termination Types:

As NIH implements the Director's agency's priorities, NIH will take various measures to integrate these priorities into the Institutes and Centers across the enterprise there are various types of terminations that may take place where the project cannot be renegotiated. As such, there steps that must be taken once the need for termination has been identified and/or provided.

Terminations that result from science that no longer effectuates NIH's priorities related to DEI, gender identity and other scientific areas do not require a formal appeals process. If a recipient requests an ICO to reconsider a termination action, the ICO can work with the recipient to determine whether the action will stand. All other terminations for noncompliance require the agency to include appeals language within the termination letter and NOA - [appeal language](#).

Type 1: HHS Departmental Authority Terminations.

- OPERA receives a list from the Director, NIH or designee.
- OPERA will issue termination letters on behalf of the IC Chief Grants Management Officers. The IC CGMO will be copied on the email with the termination letter.
 - **Supplements – Parent Award Terminated:** If a terminated award has active supplement(s), all supplement awards must be terminated along with the parent.
 - **Supplement Terminated Only:** If a termination letter references a supplement only, and not the parent award, then the supplement alone must be terminated following the instructions below.
 - **Linked (or equivalent) Awards:** If one linked (or equivalent) award is terminated, the ICO is only required to terminate the specific award noted in the letter. The IC must conduct a separate review to determine whether terminating that award will have a structural impact on the scientific design along with associated outcomes and act, as appropriate, to early terminate or allow the remaining awards to continue. Feel free to discuss with OPERA, as needed.
- When a termination letter is received, the ICO must:
 - Issue a revised NOA within 3 business days of the date the termination letter was issued to the recipient.
 - Change the budget and project period end dates to match the date of the termination letter.
 - OPERA will place a hard funds restriction on all PMS subaccounts as termination letters are issued. OPERA's Federal Financial Report Center (FFR-C) will deobligate the remaining funds after the Final FFRs are submitted. There is no deobligation action required from the ICO's.
 - Remove all future years from the project, where applicable. If the grant is in a no cost extension, and HHS requests a termination, the project must be terminated even in a no cost extension. If the grant is in a no cost extension, and HHS did not request a termination, follow the NCE guidance above.
 - Include the following Termination Term in the revised NOA:

This award is terminated effective [effective date]. [Insert category from Appendix 3, verbatim]. If appropriate, [RECIPIENT NAME] may request funds to support patient safety and animal welfare in support of an orderly phaseout of the project.

Requests to draw down funds must be submitted to OPERA@FFRInquiries@od.nih.gov for prior approval, before submitting in the HHS Payment Management System. The request must include the drawdown amount, justification, and appropriate supporting documentation. Approval will only be provided for costs incurred prior to the date of termination, or costs for patient safety or animal welfare, in support of an orderly phaseout of the project. Funds used to support any other research activities will be disallowed and recovered.

Please be advised that your organization, as part of the orderly phaseout process will need to submit the necessary closeout documents (i.e., Final Research Performance Progress Report, Final Invention Statement, and the Final Federal Financial Report (FFR), **as applicable**) within **60** days (non-human subjects) **120** days (human subjects and animals) after the end of this project.

NIH is taking this action in accordance with [2 C.F.R. § 200.340](#) as implemented in [NIH GPS Section 8.5.2](#). This revised award represents the final decision of the NIH. It shall be the final decision of the Department of Health and Human Services (HHS) unless within 30 days after receiving this decision you mail or email a written notice of appeal to Dr. Matthew Memoli. Please include a copy of this decision, your appeal justification, total amount in dispute, and any material or documentation that will support your position. Finally, the appeal must be signed by the institutional official authorized to sign award applications and must be dated no later than 30 days after the date of this notice.

- Note: Appeals language must be included **prior to** October 1, 2025. After October 1, 2025, when HHS will fully adopt 2 CFR 200, per [2 CFR 200.340](#), termination actions taken based on agency priorities are not appealable. This is different from terminations based on noncompliance (administrative and programmatic).
- eRA provides OPERA with daily reports on NOAs issued, so ICO's do not need to report to OPERA on each action completed.
- When a terminated award must be reinstated, OPERA will notify the IC.
- ICOs must issue a revised award and **replace** the previous termination language with the following term:
 - Effective with the date of this revised Notice of Award, funding for Project Number **[insert grant number]** is hereby fully reinstated; therefore, the termination letter dated **[insert date]** is rescinded without conditions. Funds made available to **[insert institution name]** used to support **[insert the title of the project]** are no longer restricted and are available for use in accordance with the terms and conditions of the award.
 - OPERA will coordinate with HHS PMS to lift the hard funds restriction and will copy Alan Whatley on the request to the ICO.

Screenshot: Example of reinstatement. **Note – please make it clear that previous termination term has been deleted or is no longer applicable.**

2:
OD**SECTION IV – AI SPECIFIC AWARD CONDITIONS – [REDACTED]**Type
NIH

Clinical Trial Indicator: No

This award does not support any NIH-defined Clinical Trials. See the NIH Grants Policy Statement Section 1.2 for NIH definition of Clinical Trial.

REVISED AWARD: Effective with the date of this revised Notice of Award, funding for Project Number 1R21 [REDACTED] is hereby fully reinstated; therefore, the termination letter dated 03/21/2025 is rescinded without conditions. Funds made available to UNIVERSITY [REDACTED] used to support "A [REDACTED] are no longer restricted and are available for use in accordance with the terms and conditions of the award.

Supersedes previous Notice of Award dated 03/22/2025. All other terms and conditions still apply to this award.

Directed Terminations.

- The Immediate Office of the NIH Director evaluates a program and determines that a program must be terminated due to agency priorities (e.g., COMPASS, FIRST). OPERA receives a list from OD. In such cases, this determination could impact multiple projects and each individual project under the program must be addressed.
- OPERA will issue termination letters on behalf of the IC Chief Grants Management Officers. The IC CGMO will be copied on the email with the termination letter.
 - **Supplements – Parent Award Terminated:** If a terminated award has active supplement(s), all supplement awards must be terminated along with the parent.
 - **Supplement Terminated Only:** If a termination letter references a supplement only, and not the parent award, then the supplement alone must be terminated following the instructions below.
 - **Linked (or equivalent) Awards:** If one linked (or equivalent) award is terminated, the IC is only required to terminate the specific award noted in the letter. The IC must conduct a separate review to determine whether terminating that award will have a structural impact on the scientific design along with associated outcomes and act, as appropriate, to early terminate or allow the remaining awards to continue. Feel free to discuss with OPERA, as needed.
- When a termination letter is received, the ICO must:
 - Issue a revised NOA within 3 business days of the date the termination letter was issued to the recipient.
 - Change the budget and project period end dates to match the date of the termination letter.
 - OPERA will place a hard funds restriction on all PMS subaccounts as termination letters are issued. OPERA's Federal Financial Report Center (FFR-C) will deobligate the remaining funds after the Final FFRs are submitted. There is no deobligation action required from the ICO's.
 - Remove all future years from the project, where applicable. If the grant is in a no cost extension, and HHS requests a termination, the project must be

terminated even in a no cost extension. If the grant is in a no cost extension, and HHS did not request a termination, follow the NCE guidance above.

- Include the following Termination Term in the revised NOA:

This award is terminated effective [insert effective date]. [Insert category from Appendix 3, verbatim]. If appropriate, [RECIPIENT NAME] may request funds to support patient safety and animal welfare in support of an orderly phaseout of the project.

Requests to draw down funds must be submitted to OPERAFFRInquiries@od.nih.gov for prior approval, before submitting in the HHS Payment Management System. The request must include the drawdown amount, justification, and appropriate supporting documentation. Approval will only be provided for costs incurred prior to the date of termination, or costs for patient safety or animal welfare, in support of an orderly phaseout of the project. Funds used to support any other research activities will be disallowed and recovered.

Please be advised that your organization, as part of the orderly phaseout process will need to submit the necessary closeout documents (i.e., Final Research Performance Progress Report, Final Invention Statement, and the Final Federal Financial Report (FFR), **as applicable**) within **60** days (non-human subjects and animals) **120** days (human subjects and animals) after the end of this project.

This is a final determination. If you wish to seek a reconsideration because you object to the ICO's termination, please submit a reconsideration request to [IC Director Name], Director, [IC Name].

- When a terminated award must be reinstated, OPERA will notify the ICO.
- Once alerted, ICO's must issue a revised award and **replace** the previous termination language with the following term:
 - Effective with the date of this revised Notice of Award, funding for Project Number [insert grant number] is hereby fully reinstated; therefore, the termination letter dated [insert date] is rescinded without conditions. Funds made available to [insert institution name] used to support [insert the title of the project] are no longer restricted and are available for use in accordance with the terms and conditions of the award.
 - OPERA will coordinate with HHS PMS to lift the hard funds restriction.

Tracking Note: eRA provides OPERA with daily reports on NOAs issued, so ICO's do not need to report to OPERA on each action completed.

Type 3: ICO- Terminations.

- **ICO conducts a portfolio analysis and determines that a project no longer effectuates the agencies priorities.**

- **Project cannot be renegotiated. The ICO must a letter to the recipient notifying them that the project will be terminated (see Appendix 8 for sample letter).**
 - Issue a revised NOA within 3 business days of the date the termination letter was issued to the recipient.
 - Change the budget and project period end dates to match the date of the termination letter.
 - The **ICO's** will place a hard funds restriction on all PMS subaccounts as termination letters are issued. OPERAs Federal Financial Report Center (FFR-C) will deobligate the remaining funds after the Final FFRs are submitted. There is no deobligation action required from the ICO's.
 - Remove all future years from the project, where applicable.
 - Include the following Termination Term in the revised NOA:

This award is terminated effective [insert effective date]. [Insert category from Appendix 3, verbatim]. If appropriate, [RECIPIENT NAME] may request funds to support patient safety and animal welfare in support of an orderly phaseout of the project.

Requests to draw down funds must be submitted to OPERAFFRInquiries@od.nih.gov for prior approval, before submitting in the HHS Payment Management System. The request must include the drawdown amount, justification, and appropriate supporting documentation. Approval will only be provided for costs incurred prior to the date of termination, or costs for patient safety or animal welfare, in support of an orderly phaseout of the project. Funds used to support any other research activities will be disallowed and recovered.

Please be advised that your organization, as part of the orderly phaseout process will need to submit the necessary closeout documents (i.e., Final Research Performance Progress Report, Final Invention Statement, and the Final Federal Financial Report (FFR), **as applicable**) within **60** days (non-human subjects and animals) **120** days (human subjects and animals) after the end of this project.

This is a final determination. If you wish to seek a reconsideration because you object to the ICO's termination, please submit a reconsideration request to [IC Director Name], Director, [IC Name].

Type 4: Bilateral Terminations.

The recipient and the ICO agree that the project is no longer viable, and the project cannot be saved upon the removal of the research that no longer aligns with agency's priorities. As such the ICO must:

- Request a bilateral termination letter from the recipient agreeing to terminate the project on the basis that the project is no longer viable with the aims that need to be negotiated out of the project.

- Issue a letter responding to the recipient's request notifying them that the ICO has accepted the bilateral termination and will issue a revised award to modify the project period end date to the date requested.
- ICO must issue a NOA to the recipient.
 - Change the budget and project period end dates to match the date of the termination letter.
 - The **ICO** will place a hard funds restriction on all PMS subaccounts as termination letters are issued. OPERAs Federal Financial Report Center (FFR-C) will deobligate the remaining funds after the Final FFRs are submitted. There is no deobligation action required from the ICO's.
 - Remove all future years from the project, where applicable. If the grant is in a no cost extension, and HHS requests a termination, the project must be terminated even in a no cost extension. If the grant is in a no cost extension, and HHS did not request a termination, follow the NCE guidance above.
 - Include the following Termination Term in the revised NOA:

NIH is bilaterally terminating this award effective [effective date] in accordance with the request dated [date], because the project does not align with NIH priorities. No additional funding will be awarded for this project, and all future years have been removed. If appropriate, [RECIPIENT NAME] may request funds to support patient safety and animal welfare to support an orderly phaseout of the project.

Requests to draw down funds must be submitted to OPERAFFRInquiries@od.nih.gov for prior approval, before submitting in the HHS Payment Management System. The request must include the drawdown amount, justification, and appropriate supporting documentation. Approval will only be provided for costs incurred prior to the date of termination, or costs for patient safety or animal welfare, in support of an orderly phaseout of the project. Funds used to support any other research activities will be disallowed and recovered.

Please be advised that your organization, as part of the orderly phaseout process will need to submit the necessary closeout documents (i.e., Final Research Performance Progress Report, Final Invention Statement, and the Final Federal Financial Report (FFR), **as applicable**) within **60** days (non-human subjects and animals) **120** days (human subjects and animals) after the end of this project.

Separation of Duties Guidance:

OPERA has issued a Separation of Duties (SOD) waiver for all CGMOs, specific to the HHS Departmental Authorities termination actions, to allow IC CGMOs to work up and issue termination actions. Copy available in [Teams](#).

Impacts on the Biomedical Workforce:

- **NRSA Payback:** NIH recognizes that award terminations may prematurely end the training period for NRSA fellows and trainees. Fellows and trainees may not have received sufficient training to be qualified to perform the service requirement before the grant terminated or may be unable to find employment opportunities due to the termination. NIH will accept payback waiver requests from trainees and fellows impacted by terminations. See NIH GPS [11.4.3.4](#) for instructions on submitting waiver requests.
- **Early-Stage Investigators (ESI):**
 - o Short Term Extension for ESI investigators: NIH will automatically extend the Early-Stage Investigator (ESI) eligibility period by four (4) months for all investigators whose ESI status was active during the period January 1, 2025, to May 31, 2025. NIH is implementing this short-term extension to assist ESI investigators – who are working under strict eligibility timelines – to remain competitive for NIH support. Updated ESI end dates will appear in eRA commons by June 1, 2025.
 - o **Restoring ESI status:** Investigators lose their [ESI eligibility](#) when they successfully compete for and receive a substantial independent research award. In the event an investigator's first substantial independent research award is terminated within the first three years of the project period, the investigator can request the reinstatement of ESI status, using the ESI Extensions request tool in eRA commons. To be eligible, an investigator's grant may not have been terminated due to misconduct or ethical violations. See [Requesting an Extension](#) for instructions.
- **K award eligibility:** NIH has implemented a temporary exception to the NIH GPS [Section 12.3.7](#), which generally limits eligibility for mentored career development (K) awards to those who have not previously been the recipient of such awards. NIH will allow individuals whose NIH-funded mentored career development awards were **ended on or after January 1, 2025**, to be eligible to apply for a new mentored career development award, contingent upon all other eligibility requirements being met. Investigators that meet all other NIH eligibility requirements for other mentored career awards may take advantage of applying for such awards to allow for the completion of the years that were remaining at the time the award ended.

Definition(s):

- **Gender-affirming care:** An array of services that may include medical, surgical, mental health, and non-medical services for transgender and nonbinary people. This includes, but is not limited to, therapy; mental health care; assistance with elements of a social transition (e.g., new name and pronouns, modification of clothing, voice training); evaluation of persistency of gender dysphoria, emotional and cognitive maturity, and coexisting psychological, medical, or social problems; puberty-suppressing medications; hormone therapy; and surgery. By way of clarification and not limitation, "gender-affirming care" includes patient care provided as part of research or education grants, including but not limited to routine services, ancillary services, outpatient services, inpatient services, and usual patient care received during the study.

Health Disparities: Pending.

CONFIDENTIAL

Appendix 1 – HHS’s Secretarial Directive on DEI-Related Funding – February 10, 2025.



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary
Washington, D.C. 20201**SECRETARIAL DIRECTIVE ON DEI-RELATED FUNDING**

February 10, 2025

The Department of Health and Human Services has an obligation to ensure that taxpayer dollars are used to advance the best interests of the government. This includes avoiding the expenditure of federal funds on programs, or with contractors or vendors, that promote or take part in diversity, equity, and inclusion (“DEI”) initiatives or any other initiatives that discriminate on the basis of race, color, religion, sex, national origin, or another protected characteristic. Contracts and grants that support DEI and similar discriminatory programs can violate Federal civil rights law and are inconsistent with the Department’s policy of improving the health and well-being of all Americans.

These contracts and grants can cause serious programmatic failures and yet it is currently impossible to access sufficient information from a centralized source within the Department of Health and Human Services to assess them. Specifically, there is no one method to determine whether payments the agency is making to contractors, vendors, and grantees for functions related to DEI and similar programs are contributing to the serious problems and acute harms DEI initiatives may pose to the Department’s compliance with Federal civil rights law as well as the Department’s policy of improving the health and well-being of all Americans. It is also currently impossible to assess whether payments the Department is making are free from fraud, abuse, and duplication, as well as to assess whether current contractual arrangements, vendor agreements, and grant awards related to these functions are in the best interests of the United States. *See* FAR 12.403(b), 49.101; 45 C.F.R. § 75.371-372. Finally, it is also impossible to determine with current systems whether current contracts and grant awards are tailored to ameliorate these specific problems and the broader problem of DEI and similar programs rather than exacerbate them. The Department has an obligation to ensure that no taxpayer dollars are lost to abuse or expended on anything other than advancing the best interests of the nation.

For these reasons, pursuant to, among other authorities, FAR 12.403(b) and 49.101 and 45 C.F.R. § 75.371- 372, the Secretary of Health and Human Services hereby DIRECTS as follows:

Agency personnel shall briefly pause all payments made to contractors, vendors, and grantees related to DEI and similar programs for internal review for payment integrity. Such review shall include but not be limited to a review for fraud, waste, abuse, and a review of the overall contracts and grants to determine whether those contracts or grants are in the best interest of the government and consistent with current policy priorities. In addition, if after review the Department has determined that a contract is inconsistent with Department priorities and no longer in the interest of the government, such contracts may be terminated pursuant to the Department’s authority to terminate for convenience contracts that are not “in the best interests of the Government,” see FAR 49.101(b); 12.403(b). Furthermore, grants may be terminated in accordance with federal law.

This Directive shall be implemented through the Department's contracts and payment management systems by personnel with responsibility for such systems who shall, in doing so, comply with all notice and procedural requirements in each affected award, agreement, or other instrument. Whenever a DEI or similar contract or grant is paused for review, Department personnel shall immediately send such payment to Scott Rowell, Deputy Chief of Staff for Operations, for prompt review to determine whether or not the payment is appropriate and should be made. Payments on paused contracts shall remain paused and already terminated contracts shall remain terminated pending completion of that review to the maximum extent permitted by law and all applicable notice and procedural requirements in the affected award, agreement, or other instrument.

I thank you for your attention to this matter, as well as your efforts to ensure that no taxpayer dollars are misspent.



Dorothy A. Fink, M.D., Acting Secretary

CONFIDENTIAL

Appendix 2 – Guidance for staff to use on specific programs, awards, supplements.

- **Supplements – Parent Award Terminated:** If a terminated award has active supplement(s), all supplement awards must be terminated along with the parent.
- **Supplement Terminated Only:** If a termination letter references a supplement only, and not the parent award, then the supplement alone must be terminated.
- **Linked (or equivalent) Awards:** If one linked award is terminated, the ICO is only required to terminate the specific award noted in the letter. The is should review and determine whether terminating that ward will have a structural impact on the scientific outcome originally intended by the ICO and act as appropriate on the remaining awards.
- **Diversity Tables** – Ignore and issue the grant using the term provided above.
- **Diversity Plans** – Ignore and issue the award using the term provided above.

Appendix 3 – Language provided to NIH by HHS providing examples for research activities that NIH no longer supports.

- China: “Bolstering Chinese universities does not enhance the American people’s quality of life or improve America’s position in the world. On the contrary, funding research in China contravenes American national-security interests and hinders America’s foreign-policy objectives.”
- DEI: “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 discrimination on the basis of race and other protected characteristics ICO’s, which harms the health of Americans. Therefore, it is the policy of NIH not to prioritize such research programs.”
- Gender-Affirming Care: “Research programs based on gender identity are often unscientific, have little identifiable return on investment, and do nothing to enhance the health of many Americans. Many such studies ignore, rather than seriously examine, biological realities. It is the policy of NIH not to prioritize these research programs.” **Reminder: At this time, do not terminate any grants related to gender identify/transgender without clearance from OER. All such actions must be approved before any terminations.**
- Vaccine Hesitancy: “It is the policy of NIH not to prioritize research activities that focuses gaining scientific knowledge on why individuals are hesitant to be vaccinated and/or explore ways to improve vaccine interest and commitment. NIH is obligated to carefully steward grant awards to ensure taxpayer dollars are used in ways that benefit the American people and improve their quality of life. Your project does not satisfy these criteria.”
- COVID (to be used for HHS/NIH OD directed terminations only): “The end of the pandemic provides cause to terminate COVID-related grant funds. These grant funds were issued for a limited purpose: to ameliorate the effects of the pandemic. Now that the pandemic is over, the grant funds are no longer necessary.” **Note: ICO’s may continue to support projects that funds general biology of coronavirus not linked to COVID-19. As ICO’s conduct in-house analysis of project portfolios related to COVID the term may change. Please work with OPERA to develop standard terms based on the outcome of the analysis.**
- Climate Change: “Not consistent with HHS/NIH priorities particularly in the area of health effects of climate change.”
- Influencing Public Opinion: “This project is terminated because it does not effectuate the NIH/HHS’ priorities; specifically, research related to attempts to influence the public’s opinion.”

Appendix 4 – Approved Term – Use for all Category 2 awards, i.e., renegotiated aims and associated budgets. Approval embedded below. ICO’s should use this term in the IC specific award conditions.

Approval email from Dr. Memoli (Acting Director, NIH) on Friday, February 28, 2025.

From: [Memoli, Matthew \(NIH/OD\) \[E\]](#)
To: [Bundesen, Liza \(NIH/OD\) \[E\]](#)
Cc: [Bulls, Michelle G. \(NIH/OD\) \[E\]](#); [Lankford, David \(NIH/OD\) \[E\]](#); [Butler, Benjamin \(NIH/OD\) \[E\]](#); [Jacobs, Anna \(NIH/OD\) \[E\]](#); [Burklow, John \(NIH/OD\) \[E\]](#)
Subject: Re: Clean Version of DEI Restriction Term - Final
Date: Friday, February 28, 2025 2:54:19 PM

approved

Matt

Get [Outlook for iOS](#)

From: Bundesen, Liza (NIH/OD) [E] <lbundese@mail.nih.gov>
Sent: Friday, February 28, 2025 2:53:21 PM
To: Memoli, Matthew (NIH/OD) [E] <matthew.memoli@nih.gov>
Cc: Bulls, Michelle G. (NIH/OD) [E] <michelle.bulls@nih.gov>; Lankford, David (NIH/OD) [E] <lankford@od31tm1.od.nih.gov>; Butler, Benjamin (NIH/OD) [E] <butlerben@mail.nih.gov>; Jacobs, Anna (NIH/OD) [E] <anna.jacobs2@nih.gov>; Burklow, John (NIH/OD) [E] <burklowj@od.nih.gov>
Subject: Clean Version of DEI Restriction Term - Final

Hi Matt,

Attached is the term and condition of award for your approval. Please let us know if you approve and we will implement.

Thank you,
Liza

Appendix 5 – Workflow for NOFO Forecasts and NOFO Approvals

- **Prioritization of NOFOs**

Owner	Action
ICO	<ul style="list-style-type: none"> • Sends a priority list of upcoming NOFOs in two categories: <ol style="list-style-type: none"> 1) those that already have Concept Clearance (Option A)¹. 2) those requiring Concept Clearance (Option B). <p>Note: This is a temporary step while process is being refined.</p>
Guide	<ul style="list-style-type: none"> • Maintains the data on ICO records, approvals needed (for example concept clearance), and priorities for publication in ICO Guide priorities spreadsheet.

- **Creation of Forecast Records**

Owner	Action
ICO	<ul style="list-style-type: none"> • Creates a forecast in FOAM for NOFOs prior to concept clearance and at least 6 months prior to the desired NOFO publication date. Forecast is used for approval of the concept by NIH and HHS. Note: Forecast information will become publicly available in Grants.gov after concept clearance is obtained. <ul style="list-style-type: none"> ○ Create a Forecast record. ○ Fill in required fields (red asterisks): NOFO type (PAR, PA, etc.), Title, Contact. ○ Click “Save”. ○ Click “Create NOITP” button within the NOFO record. ○ Select most recent <i>Forecast Template</i>. ○ Click “Save”. ○ Go to <i>Content</i> and fill in required fields (red asterisks). ○ Title, estimated date, related information (publication, first application, first awards, project start), eligibility – note, activity code not required. ○ Note: the forecast <i>Description</i> section is what NIH Leadership will be reviewing and requires the appropriate ICO leadership approval. ○ Save record and notify the Guide when the forecast is ready for leadership approval (see below). • Sends email to the Guide mailbox when ready for leadership approval <ul style="list-style-type: none"> ○ NIH Guide (NIH/OD) nihgguide@OD.NIH.GOV ○ Subject: NOITP ###-##-##-###- [IC Name] – [Desired Clearance Date] <ul style="list-style-type: none"> ▪ Note: the number is important because of the variety of draft versions in FOAM. ▪ Plan to implement FOAM task in future to remove dependence on email.

¹ For programmatic concepts that have already undergone concept clearance within the last five years, but the NOFO has not been published (for example, NOFO pending in FOAM or not yet drafted).

- **Preparing Forecasts for Leadership Approvals**

Owner	Action
Guide	<ul style="list-style-type: none"> • Indicates that the forecast is ready for review on the tracking spreadsheet (if not done through FOAM task).
Leadership Approval Contact	<ul style="list-style-type: none"> • Places relevant fields on a leadership approval spreadsheet and the Acting DDER is alerted when entries are ready for review.

- **(Acting) DDER and NIH Director Approvals**

Owner	Action
(Acting) DDER	<ul style="list-style-type: none"> • Reviews entries on leadership review spreadsheet and updates with approval outcome. • Notifies ICOs regarding the forecasts that are not approved.
Leadership Approval Contact	<ul style="list-style-type: none"> • Monitors the review spreadsheet and adds entries and dates on tracking spreadsheet • Notifies ICOs of approvals and indicates next steps.
ICO	<ul style="list-style-type: none"> • Archives the FOAM entries for those not approved. • Uploads the approval document into FOAM.

- **HHS Approval & Concept Clearance (if needed)**

Option A: After NIH Approval for NOFOs not requiring Concept Clearance

Owner	Action
Guide	<ul style="list-style-type: none"> • Sets NOITP status to “published” in FOAM once the content has been fully approved. • Notifies OPERA of the status via email.
OPERA	<ul style="list-style-type: none"> • Sends Forecast report to HHS². • Records forecasting information in Grants.gov (forecast is publicly available at Grants.gov, but not NIH Guide).
ICO	<ul style="list-style-type: none"> • Works on NOFO development: <ul style="list-style-type: none"> ○ Convert to the newest template in FOAM. ○ Ensure that the NOFO record indicates in Key Attributes that Concept Clearance has been obtained. ○ Check that the approval document(s) has been uploaded in FOAM. ○ For NOFOs in various stages of development, follow the standard processes for content development and approvals. ○ For NOFOs with previous OER approvals, ICO should upload a “compare documents” of the NOFO drafts into FOAM to verify that the ICO did not change any text except to align with current agency priorities. Note: FOAM has a compare documents feature.

² Until the Grants.gov Forecast functionality has been deployed in FOAM, OPERA will assist with manual updates of all of NIH’s NOFOs to Grants.gov monthly (by the 5th of each month—if the 5th falls on a holiday or weekend, we will act by the next business day).

	<ul style="list-style-type: none"> ○ Responds to all approval comments and tasks and indicates that the final NOFO draft is ready for NIH leadership approval.
--	---

Option B: After NIH Approval for NOFOs requiring Concept Clearance

Owner	Action
ICO	<ul style="list-style-type: none"> • After receiving NIH leadership approval, proceed with obtaining Concept Clearance. • Enters the Concept Clearance information in the Key Attributes of the FOAM record.
	<ul style="list-style-type: none"> • If no changes to the forecast are required after Concept Clearance, the steps described in Option A should be followed. • If the content of the forecast changes after Concept Clearance, the content must go back through leadership approvals.

• **NIH Leadership Review of Completed NOFOs**

Owner	Action
Leadership Approval Contact	<ul style="list-style-type: none"> • Downloads completed NOFOs to a folder (with hyperlinks embedded in the spreadsheet). • Places relevant fields on a NOFO NIH Leadership Approval spreadsheet. • Alerts NIH Leadership when entries are ready for review.
(Acting) DDER	<ul style="list-style-type: none"> • Notifies ICOs regarding the NOFOs that are not approved.
Leadership Approval Contact	<ul style="list-style-type: none"> • Notifies ICO, Guide, OPERA of approvals.
Guide	<ul style="list-style-type: none"> • Enters positive approvals in the FOAM record and publishes the NOFO.

Questions:

Inquiries about the Forecast requirements and processes should be directed to: Division of Grant Systems Integration, Office of Policy for Extramural Research Administration Office of Extramural Research: operasystemspolicy@nih.gov.

Inquiries about FOAM should be directed to the Guide: NIH Guide (NIH/OD) [nihguide@OD.NIH.GOV](mailto:.nihguide@OD.NIH.GOV).

Appendix 6 – Frequently Asked Questions

1. **When reviewing applications for activities that are no longer an NIH/HHS priority/authority, should ICO's review the content of Other Support submissions?**

Other Support is used to disclose the PIs ongoing activities and support and should not be modified. ICO's do not need to review Other Support for alignment with NIH/HHS priorities/authority.

2. **For phased awards where the second phase (i.e., Type 4) will not be awarded due to NIH/HHS priority/authority, how should the ICO notify the recipient that the Type 4 will not be issued?**

In these cases, ICO's must contact OPERA, and OPERA will issue a termination letter. Type 4 awards are subject to the availability of funds and/or agency priorities.

3. **When revising awards to terminate a project, how should the ICO respond to red bars in SEAR?**

The ICO should not contact recipients to request any additional information to address SEAR flags, because the project is being terminated. ICO's can clear the SEAR flag with a comment that the project is being terminated.

4. **If a project is terminated on an HHS list or a Type 5 is withheld because the project is no longer an NIH/HHS priority/authority, can the ICO issue a subsequent Type 2 award?**

No. If a project has been terminated due to agency priorities, it is no longer eligible for a renewal award.

5. **For recipients of K awards that are terminated due to NIH/HHS priority/authority, will eligibility requirements be modified to allow the individual to apply for another K award?**

Yes, NIH will allow recipients of terminated K awards to submit applications for new K awards.

6. **If a PD/PI receives a 'substantial NIH independent research award' and loses ESI status, but the award is terminated, can the PD/PI have their ESI status reinstated?**

Yes. Investigators can request the reinstatement of ESI status, using the ESI Extensions request tool in eRA commons. See [Requesting an Extension](#) for instructions.

7. **When ICO's issue revised NOAs to terminate awards, do they have to use the exact language provided by HHS in the termination term?**

Yes, ICO's must use the exact language provided in Appendix 3, with no edits.

8. **Can ICO's make awards for applications that came in under a NOFO that has expired (not unpublished) if the NOFO's sole purpose was DEI or another category that does not effectuate the NIH/HHS priorities?**

No. Whether unpublished or expired, if the sole purpose was DEI or another category that does not effectuate the NIH/HHS priorities, ICO's cannot make the award. For updated information on

NOFOs, CGMOs must contact their DEA rep.

9. If a NOFO is taken down for modification, and re-posted, can ICO's issue awards in response to that NOFO?

Yes. If the NOFO has been modified and reposted, ICO's may proceed with making awards after confirming that the award aligns with agency priorities.

10. If an ICO is modifying a Type 5 restore full amount, does the ICO need to conduct a review of the project activities as outlined in this guidance?

Yes. All monetary revisions are subject to this guidance.

11. Can ICO's approve requests from recipients to modify the project title?

Requests to change project titles must be submitted as a prior approval request. Changes to titles may only be made in the context of negotiations to remove activities/language that do not align with HHS/NIH priorities/authority. Title changes should only be made alongside associated changes to the abstract and specific aims.

12. When ICO's receive questions from recipients regarding HHS terminations, what should they do?

ICO's should not engage in discussions with recipients regarding HHS directed terminations. ICO's must direct recipients to submit any appeals to Dr. Memoli, as outlined in the termination letter.

13. For terminations where the ICO is making the determination, who is listed as the point of contact for appeals?

An ICO determination that an award no longer aligns with agency priorities is not appealable. Therefore, appeals language is not included in the termination term. Recipients may contact the IC Director to request a reconsideration of the ICO determination.

14. What is the difference between an HHS-directed termination vs. and ICO or OD determination to terminate a project?

For HHS directed terminations, the template letter and appeals language were provided by HHS, and must be used as is. When an ICO or the OD determines that an award no longer aligns with agency priorities, the termination is made in accordance with [2 CFR 200.340\(a\)\(4\)](#). This is not a termination for material failure to comply with the terms and conditions of award and is not appealable.

15. When will the Final RPPR become available for recipients to prepare and submit?

The F-RPPR link will open once the project period has ended.

16. Can recipients draw down funds after the stated termination date?

For activities that were incurred on or before the termination date, with supporting documentation, NIH will approve the payment. For costs after the project period end date, outside of patient safety and animal welfare, costs will not be approved.

17. When will the Federal Financial Report (FFR) become available in PMS for recipients to submit?

The FFR will become available once the project period has been updated via a Notice of Award. Recipients should direct any questions to PMS or the OPERA FFRC.

18. Will recipients have the standard 120-day period following the termination date to submit closeout reports?

Because there are no new activities after the date of termination, NIH is directing that all closeout reports be submitted within 60 days of the termination unless animals or human subjects are involved.

19. If an ICO negotiates a change in a foreign site (e.g., South Africa to Nigeria), can the funds be rebudgeted from the original site to a new site?

Yes. Funds can be rebudgeted to conduct the activities at a new site as long as the site is domestic. All new foreign collaborations will need to follow the new structure once rolled out. If research aims are fully removed from a project, the funds cannot be rebudgeted for another purpose.

20. For awards that were terminated before the term and condition of award was modified to provide instructions for requesting approval of drawdowns, how should ICO's notify the recipient of the process?

When ICO's receive questions from recipients about the process for requesting drawdowns, the ICO must notify the recipient that they should contact the OPERA FFRC (OPERAFFRInquiries@od.nih.gov) for prior approval. The request must include details related to human subjects or animal welfare or outline that the costs were incurred prior to the termination date. The recipient must provide supporting documentation.

21. If a recipient requests prior approval to change a performance site from South Africa to another location, can the ICO approve the change?

Yes. ICO's may approve change to move activities from South Africa to another site. At this time, awards involving South Africa remain on hold. ICO's should not initiate negotiations or restrict funds.

- 22. Does the COVID category apply to long-COVID and pandemic preparedness research? Or is it focused only on the immediate COVID-19 pandemic response.**

The COVID category relates to awards made to address the immediate COVID-19 pandemic response. Awards to support general biology of coronavirus, long COVID and pandemic preparedness, at this time, may continue.

- 23. If a letter of support on a training grant references a university resource for DEI, but the abstract and aims do not include any DEI activities, does the letter of support need to be revised?**

No. Under the concepts outlined in Category 2B, updated documents are not required to modify language when there are no DEI activities under the project.

- 24. For diversity fellowships awarded prior to January 20, 2025, are recipients permitted to activate their awards?**

Yes. Recipients may activate the fellowship. ICO's must review these awards in accordance with this staff guidance, and future funds must not be awarded.

- 25. For joint NIH-NSF programs, where the initial application came in to NIH via a 'dummy' NOFO, can ICO's negotiate the award to remove any activities that do not align with NIH/HHS priority/authority?**

Yes. These awards must be reviewed, and any unallowable activities must be negotiated out.

- 26. If NIH funds were awarded to support conference attendance, and the conference has a session on DEI, can the recipient use the NIH funds to attend?**

No. NIH funds may not be used to pay for participation in a conference that includes DEI sessions or activities.

- 27. If a conference proposes a session on DEI (e.g., DEI Power Hour), can the ICO negotiate with the recipient to remove those activities from the conference agenda?**

Yes. The ICO can negotiate with the applicant/recipient to remove the DEI activities.

- 28. For programs that have been terminated, in whole (e.g. MOSAIC K99/R00), will there be any central announcement, or should ICO's proceed with revising awards in accordance with the staff guidance.**

In these cases, the NOFO will be unpublished. There will not be any other announcement. ICO's should take action on the awards as outlined in this staff guidance.

Appendix 7 – Managing PMS Hard Funds Restrictions

OPERA directs PMS to hard funds restrict awards terminated as a result of agency priorities and HHS authorities.

Recipients are required to request approval from OPERA (OPERAFFRInquiries@od.nih.gov) before any draw that occurs after the termination. The request must include details related to human subjects or animal welfare and provide supporting documentation. These are the only approvals that will be issued. OPERA will work with the ICO to facilitate approvals and facilitate lifting restrictions in PMS. After approval is issued, the recipient can request the drawdown in PMS. Note: Any other costs that are not related to human subject protection or animal welfare will not be approved. No exceptions.

Recipients are also required to request approval from OPERA to lift the restriction for payments of costs incurred on or before the date of the termination. For costs incurred, with supporting documentation, on or before the date of the termination, OPERA will work with PMS to lift the restriction as appropriate.

Note: Balances reported to HHS will change, as drawdowns are approved as outlined above. Reports to HHS will be updated as balances are modified. OPERA is responsible for maintaining up to date information for HHS reporting.

When recipients draw funds in PMS, they normally request funds from multiple awards within a single draw request. For awards terminated as a result of agency priorities and HHS authorities, recipients cannot request funds from multiple awards within a single draw request. Each draw request must contain only one terminated award. If a recipient combines a draw request for a terminated award with any other award, the request will be rejected.

Entity Restrictions:

At times, HHS or NIH may place a hard funds restriction on an entity in PMS, at the entity level, during compliance reviews. When this occurs, OPERA will notify ICO's. During the restriction period, ICO's should hold awards to the institution until the restriction is lifted.

Appendix 8 – Template ICO Termination letter.

[Address block & date]

[Authorized Organization Representative]:

Funding for Project Number [INSERT] is hereby terminated pursuant to the 2024 National Institutes of Health (“NIH”) [Grants Policy Statement](#), and 2 C.F.R. § [200.340\(a\)\(4\)](#). This letter serves as a termination notice.

The 2024 Policy Statement applies to your project because NIH approved your grant on [INSERT DATE], and “obligations for federal grants are generally determined by the laws, regulations, and terms in effect at the time the grant was awarded, as outlined in the Notice of Award (NOA) or grant agreement”. This “includes the terms and conditions of NIH grants and cooperative agreements and is incorporated by reference in all NIH grant and cooperative agreement awards.”

According to the Policy Statement, “NIH may ... terminate the grant in whole or in part as outlined in 2 CFR Part 200.340.” At the time your grant was issued, 2 C.F.R. § 200.340(a)(4) permitted termination “[b]y the Federal awarding agency or pass-through entity, to the greatest extent authorized by law, if an award no longer effectuates the program goals or agency priorities.”

This project no longer effectuates agency priorities. [insert termination category language (e.g., DEI) verbatim]. Therefore, there is no modification of the project that would align with agency priorities.

Although “NIH [generally will suspend](#) (rather than immediately terminate) a grant and allow the recipient an opportunity to take appropriate corrective action before NIH makes a termination decision,” no corrective action is possible here.

Costs resulting from financial obligations incurred after termination are not allowable. Nothing in this notice excuses either NIH or you from complying with the closeout obligations imposed by [2 C.F.R. §200.344](#). However, due to the immediate termination of this project, NIH may require a shortened timeframe to submit closeout reports. Details will be provided in the revised NOA issued by the Grants Management Official.

This is a final determination. If you wish to seek a reconsideration because you object to the ICO’s termination, please submit a reconsideration request to [IC Director Name], Director, [IC Name].

Sincerely,

IC CGMO

Appendix F

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS (Boston)

3 No. 1:25-cv-10814-WGY

4
5 COMMONWEALTH OF MASSACHUSETTS, et al,
6 Plaintiffs

7 vs.

8
9 ROBERT F. KENNEDY, JR., et al,
10 Defendants

11 *****

12
13 For Hearing Before:
14 Judge William G. Young

15 Case Management Conference

16
17 United States District Court
18 District of Massachusetts (Boston.)
19 One Courthouse Way
20 Boston, Massachusetts 02210
21 Tuesday, May 13, 2025

22 *****

23 REPORTER: RICHARD H. ROMANOW, RPR
24 Official Court Reporter
25 United States District Court
One Courthouse Way, Room 5510, Boston, MA 02210
rhr3tubas@aol.com

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Email: Anuj.khetarpal@usdoj.gov

For Defendants

1 P R O C E E D I N G S

2 (Begins, 2:00 p.m.)

3 THE CLERK: The Court will hear Civil Action
4 25-10814, the Commonwealth of Massachusetts, et al
5 versus Robert F. Kennedy, Jr., et al.

6 THE COURT: Good afternoon. I have permitted
7 internet access for this hearing, though it's
8 appropriate that I say that if you are attending this
9 hearing via the internet, you must observe all the rules
10 of court, that is to say you must keep your microphone
11 muted, there is to be no taping, streaming, rebroadcast,
12 screen shots, or other transcription of these
13 proceedings.

14 Well, good afternoon, counsel. You've seen the
15 Court's order, um, and the first order of business is to
16 -- now that I am satisfied that this court has, um,
17 jurisdiction, to entertain the motion for a preliminary
18 injunction. I do, after some consideration, pursuant to
19 Federal Rule of Civil Procedure 65(a), collapse further
20 hearing on the motion for a preliminary injunction with
21 trial on the merits, and I am going to use this hearing
22 as a, um, really a case management conference.

23 I acknowledge the -- and I appreciate the
24 plaintiff states' listing of the specific grants which
25 are at issue, though this does not preclude them from

1 coming up with additional data. I more carefully
2 reviewed your complaint, and in fact at Paragraph 152
3 you say, "perhaps more than 100" actually.

4 What's the count here? It's 500 and something,
5 isn't it?

6 MS. DIRKS: Yes, your Honor. Katherine Dirks for
7 Massachusetts. I don't know the final tally, it might
8 have been 563 or so. But I don't have it in front of
9 me.

10 THE COURT: Well the exact amount is not
11 important, but our count is roughly the same.

12 Let me take just a moment and try to explain what
13 I'm doing.

14 It has been this Court's practice, when injunctive
15 relief is sought, um, in most cases, to make use of Rule
16 65(a) and, um, move promptly to the merits. It has been
17 the Court's considered opinion that a trial, with
18 evidence, with all the safeguards of a trial, is to be
19 preferred to affidavits where -- which I have called in
20 other circumstances, "The Potemkin villages of modern
21 American litigation, all lawyer-created flash and no
22 interior architecture." I am a person who believes in
23 cross-examination. And, um, because federal court
24 proceedings are unfortunately too slow and too
25 expensive, I think it makes sense to deal with the

1 actual reality. So I followed my usual procedure. And
2 now -- and I say this candidly, I don't know what to do.

3 I had another of these cases, spawned by the
4 actions of the current administration -- and I don't
5 compare them in any way, and they're completely
6 separate, but I have a case involving alleged free
7 speech rights, and I did the same thing. And to me the
8 case is a knotty case, but the prima facie proof seems
9 pretty obvious. That's not obvious here. Or rather I'm
10 not sure how to grab hold of this case.

11 This case primarily is an Administrative Procedure
12 Act case. Such cases proceed usually, though I'm
13 authorized to make modifications, on a record, and, um,
14 the record, um, supplemented by argument, is as close as
15 we get.

16 Here the case is a rather sprawling case, um, I
17 don't mean that critically, that's just the nature of
18 the claims here, that it is this Court's obligation now
19 promptly to address. So I'm groping for a way to do
20 just that, to address the claims promptly, and I am very
21 much open to advice from counsel. This is not the only
22 case on the Court's docket. And I recognize that many
23 other cases have dealt with similar situations by
24 denying or granting preliminary injunctions. We'll see
25 if I can't get to the merits and, um, work through some

1 of this very promptly.

2 So without committing ourselves in any way, I did
3 want to quote you something really beautiful, that we,
4 um, held the investiture for Magistrate Judge Jessica
5 Hedges last week and she spoke and spoke brilliantly.
6 But there was one phrase that she used that has stuck
7 with me, and I'm sure I will refer to it frequently.
8 She says, "Judges must be brave, meticulous, thoughtful.
9 They are invited to these virtues by lawyers who are
10 brave, meticulous, and thoughtful." And that, in all
11 candor, is what I invite now.

12 So here's what I'm thinking as a way to start, and
13 I -- this does not deal with all the issues, but it
14 promptly, or as promptly as I can conceive, deals with
15 some. Now -- and I'll sketch it out. But don't think
16 I'm wedded to this. I think I'm being candid.

17 I'm very grateful to the, um, document provided me
18 by the plaintiffs. Let me say -- this activity in
19 Congress about nationwide injunctions, I'm not one who
20 believed in nationwide injunctions. I had always
21 thought that you dealt with the parties before you, that
22 you could bind the parties before you, give them relief
23 and enjoin them, if necessary, but nonparties, the
24 government could always -- they can always appeal, the
25 right is to appeal, but the government could, as I

1 learned it in law school, say they don't accede to the
2 decision of the District Court and therefore the
3 decision of the District Court would have effect only to
4 the parties who came before the Court and have their
5 matters adjudicated. So I approach this case believing
6 that that is the appropriate approach.

7 So this spreadsheet and these 500-and-however-many
8 grants there are pretty much defines -- well, no, it
9 doesn't, because you were asking for relief more
10 prospectively as to what you're thinking comes down the
11 Pike, and I'm not dismissing things. I guess I do want
12 to say I was told, in one of these hearings, that there
13 were like 800 grants. Well grants to institutions in
14 states other than the plaintiffs' states, this Court
15 doesn't speak to, doesn't purport to adjudicate, and
16 I -- and any injunction, if ever an injunction were to
17 issue, wouldn't apply, um, save as to specific grants or
18 specific institutions, specific states that are called
19 out. So here's what I'm thinking, but it's only a first
20 shot.

21 I'm struck by the fact that the letters of
22 termination here are -- they're not all identical, but
23 they're virtually identical, and they were issued in
24 March on or about just a few days. I mean they all came
25 out in a great blast. And they set forth, as much as I

1 can understand, the government's position here. So let
2 me just quote from an exemplar letter and tell you both
3 my concerns and where I think we might fill it.

4 So I'm picking out one issued on March 21st to
5 Ayain Denson, the University of Massachusetts at
6 Amherst, and I'm just picking it out. After some
7 citations, it, um -- and there's this paragraph, and
8 I'll just go sentence by sentence.

9 "This award no longer affects agency priorities."
10 Well one imagines that that's so, um, and I have some
11 concern for statutory mandates. But I understand it
12 does not. I'll accept that it does not. And then there
13 comes this sentence.

14 "Research programs based on gender identity are
15 often unscientific." I don't know that. And there's a
16 comma. And then it says, "have little identifiable
17 return on investment." I don't know that. Maybe that's
18 so. And then another comma. "And do nothing to enhance
19 the health of many Americans." I don't know that.

20 Then the next sentence says, "Many such studies"
21 -- no reference to the particular study at hand here.
22 "Many such standards ignore rather than seriously
23 examine biological realities." I don't know that. "It
24 is the policy of NIH not to prioritize these research
25 programs." Again that's a policy statement. I don't

1 take issue with it for the moment.

2 The next paragraph. "Although," and then they're
3 quoting, "NIH generally will suspend rather than
4 immediately terminate a grant and allow a recipient an
5 opportunity to take appropriate correction action before
6 NIH makes a termination decision," closed quote. "No
7 correction" -- "No corrective action is possible here."
8 I don't see why that's so? But we could examine that.

9 And then on the next page, and I'm not going to
10 quote this, but there is a reference to an
11 "administrative appeal." That's one exemplar.

12 Another exemplar, um, has an added sentence, um,
13 to what I've read -- and this one comes from a letter of
14 the same date to a Chake Camara, the University of
15 Massachusetts Medical School in Worcester, and after a
16 couple of the sentences I've read, comes this sentence.
17 "Worse, so-called Diversity, Equity, and Inclusion, DEI
18 studies, are often used to support unlawful
19 discrimination on the basis of race and other protected
20 characteristics, which harms the health of Americans."
21 I didn't know that. And I don't know it.

22 Now because these letters are common -- and you
23 see where I'm going here, I'm, um, channeling, if you
24 will, Justice Kagan's dissent. If there's basis for
25 this, maybe so, but if there's no basis for these

1 factual statements -- put aside the ones I term "policy
2 statements," if there's no factual basis for these
3 statements, grant by grant, then it's arguable that they
4 are -- the terminations are arbitrary and capricious,
5 and the Court, on the statements alone, could, um, order
6 an injunction that reinstates the grant, with all its
7 terms and conditions, as though the letter never was
8 issued.

9 Now that doesn't get the plaintiffs entirely where
10 they want to go, but it gets them a significant way
11 there, it seems to me, if that were true. Congress of
12 course can change the laws, Congress can do that, and
13 maybe they will. And we're talking only now about a way
14 to start in as to these specific regs.

15 If in fact there are studies that support any of
16 these factual statements, or any internal analysis that
17 support those statements, certainly the NIH, the
18 defendants here, they have to have the full and fair
19 opportunity to lay that analysis out before this Court.
20 The fact they didn't state it doesn't mean that it
21 doesn't exist.

22 Likewise, perhaps it doesn't exist in writing.
23 Perhaps some official looked -- actually looked at a
24 grant or looked at a group of grants and came to this
25 conclusion with some sort of analysis, and, um, the

1 record on which this Court could act should include
2 affidavits from those individuals. I have to say, given
3 the framework here, that while I would accept such
4 affidavits, I would expect that they be produced to
5 testify and be cross-examined.

6 Now that's a -- another part of the record here.
7 If an appeal has been taken by any of these grant
8 recipients, the appeal, the results of the appeal, and
9 any documents that reflect the discussion, um, in the
10 appeal, should be before the Court, and I'm entitled to
11 look at them and see whether any of these grants -- and
12 the grant has to be evaluated on the specifics of the
13 grant.

14 At least my understanding of medical research, but
15 I stand to be corrected, is that it -- it should take
16 account of race and gender. Sickle-cell anemia is more
17 prevalent in a particular race. A certain type of
18 cancer is, um, affects Ashkenazi Jews more than other
19 people. I believe that it is the received medical
20 wisdom that, um, gender differences are significant in
21 providing the best possible medical care. So it can't
22 be that we're just going to ignore those.

23 And, um, when I look at -- and I've -- you filed
24 it timely, but I've spent the time since it was filed
25 looking at this, it really does seem that, um, many of

1 these grants go to study, anyway, vulnerable
2 populations. That's how I understand the medicine to
3 work. That doesn't seem illogical to this Court, to, um
4 -- well these are my concerns.

5 So if we started there -- and in terms of
6 procedure, if we started there, we created a record for
7 these, the Court ruled on that record that the actions
8 were or were not arbitrary and capricious, and then
9 under Rule 54(d), (1) I'm required to write an opinion,
10 and I expect to, as to each variation that, um, I may
11 have to deal with, but I can immediately -- once I'm
12 satisfied that I've thoroughly reviewed the record, I
13 can immediately enter a partial judgment under Rule
14 54(d) because the interests of justice require it. If
15 the states lose or a state loses or some states lose as
16 to some grant, I'd enter judgment. An appeal from an
17 actual record with a decision can take place.

18 And contrary-wise, if I entered any such
19 injunction that a grant, the termination of the grant
20 was arbitrary and capricious, again I'm not going to sit
21 on it, I'm going to enter in a -- in an area where one
22 expects that Congress -- and indeed will expect that the
23 agency may alter its or put out different guidance, this
24 may, um -- it would be permanent only until the legal
25 framework changes.

1 And I recognize that I'm groping, but let me start
2 with the plaintiffs.

3 Can you think of any way to get at this better?

4 MS. DIRKS: Um, your Honor, again Katherine Dirks
5 from Massachusetts, I'll just preface by saying your
6 comment about Judge Hedge's statement about lawyers
7 inviting the bench, the Court to think of things a
8 different way, that really spoke to me. I really see
9 that as my role, and I want to thank you for that, and I
10 think maybe I can apply some of that principle here
11 today.

12 THE COURT: Thank her.

13 MS. DIRKS: I will.

14 THE COURT: There's much other wisdom in what she
15 had to say, but that was the part I was able to quote.
16 And you're right to pick up on it, because it inspired
17 me.

18 Please.

19 MS. DIRKS: My invitation is as follows, and it
20 calls for hearkening back to how we frame these
21 allegations in our amended complaint. Which is that we
22 are not alleging that the terminations themselves are
23 the final agency action and we are not asking the Court
24 to conduct an individualized review of termination
25 decisions, or other grant-based decisions, the final

1 agency actions that we are challenging are the
2 directives, the challenged directives. And we're
3 seeking ultimately, at the end of the day, for those
4 directives to be vacated, and for the implementation of
5 those directives to be enjoined.

6 Now we realize that the implementation comes in
7 the form of the grants we've listed here and we believe
8 that list will grow as we confirm further details with
9 our clients, and crafting the relief might require some
10 individualized identification of grants, but as to
11 liability and as to the vacatur of the agency action, it
12 is the challenged directives and the decision-making as
13 to those directives that we're seeking to present to the
14 Court.

15 THE COURT: How do we put together the record on
16 which the Court is going to make its decision?

17 MS. DIRKS: So we have initiated a conference with
18 the Department of Justice and federal defendants on that
19 question. As to the administrative record for the
20 challenged directives, that will be a more finite
21 universe because it's a discrete list of directives, and
22 that could be somewhat contained.

23 Now should there -- might there be some need for
24 discovery? Potentially, yes, your Honor, because of the
25 fact that some of these directives have not been made

1 publicly available, um, and we already have seen some
2 deposition testimony in other cases regarding some of
3 the murkiness behind the development of those directives
4 that might require putting someone in a chair for a
5 30(b)(6) deposition, for instance, and there might be
6 some redesignation of 30(b)(6) witnesses. But we still
7 think that the universe of discovery there is quite
8 contained, and we could move on a very expedited
9 schedule or a resolution of the challenged directives,
10 both the administrative record and a very very
11 narrowly-tailored set of discovery for those issues that
12 might be encompassed in the administrative record.

13 THE COURT: How long?

14 MS. DIRKS: We think that 14 days for the
15 administrative record would be sufficient. Now we have
16 had conversations with federal defendants there, we
17 think that is not quite what they could live with, and
18 we understand that and will obviously let them have
19 their turn.

20 THE COURT: Well let me hear from --

21 MS. DIRKS: But we think 14 days for that, and an
22 additional 14 days for resolving any other fact issues
23 that might not be encompassed in the administrative
24 record. But that does leave the question of the
25 implementation question, and we can visit that, your

1 Honor. Um -- and if I could just tag on one piece of it
2 that might not be in the administrative record.

3 Our understanding -- and this is to some extent in
4 the PI papers, is that the ultimate decision as to what
5 grants would be terminated was not granular, it was not
6 on a program-officer basis, rather a blast e-mail went
7 out saying, "Here are the hundreds of grants being
8 terminated today, program officers get your notices
9 out." And so it really should be a finite list of
10 e-mails.

11 It might not be what, um, will be defined as the
12 "administrative record," because that might post-date
13 the directive itself, but there is a discrete period of
14 time in which the directives were implemented. And it
15 does not require individual deposition testimony from
16 every program officer, it really is, um, a request for a
17 production of documents that would be very specifically
18 defined and could be produced with a few e-mails, is our
19 understanding.

20 So we would look to a bench trial. You know we've
21 often discussed summary judgment versus trial and the
22 Court has, um, indicated, at the last hearing, that
23 there might be disputes of fact, and that we're hearing
24 today from the Court that the Court is anticipating some
25 sort of dispute -- some disputes of fact that would

1 require in-court resolution and testimony. And so our
2 inclination would be to not do summary judgment and
3 instead put this on for trial, trial to resolve as much
4 as we can through proposed findings of fact, so that we
5 identify the short list, hopefully a short list of
6 disputed facts, we can have a condensed bench trial, um,
7 and can move this to a final resolution as quickly as
8 possible.

9 THE COURT: Thank you. And that is very helpful.

10 Mr. Ports, what do you think of all this? You can
11 go back to my meandering as well and, um, give me your
12 thoughts. I much appreciate it.

13 MR. PORTS: Yes, your Honor.

14 I'll say the United States' thinking about the
15 case is more aligned with what your Honor seems was
16 describing than what Mr. Dirks described with her --
17 involving discovery and trial and things along those
18 lines.

19 As your Honor stated at the beginning, this is an
20 APA case at core, that the Court has ruled it would be
21 decided as an APA case. Such cases need to be decided
22 based on the agency's stated reason at the time it took
23 an action and the documents that it considered in taking
24 that action.

25 So there is -- there's a final agency action that

1 plaintiffs fall back in their brief was -- it's the
2 grant terminations, that's what we end up with as the
3 final agency action. Which although we said can't be
4 challenged, I'll put that aside and not revisit our
5 argument previously on this point. But, you know, we
6 would agree that that's final, it has a legal
7 consequence.

8 Your Honor mentioned appeals. Where an appeal is
9 ongoing, there it is not final any longer, although
10 there was a legal consequence with the termination that
11 has reopened the agency's decision-making and the agency
12 has not stated its final position on the matter, it is
13 currently considering it.

14 But so putting aside the appeals that are ongoing,
15 because they've been reopened, whether terminated and
16 have been appealed, looking just at the terminated
17 grants where there is no appeal, as your Honor
18 described, there are a variety of reasons that grants
19 would no longer effectuate agency priorities.

20 It -- we believe that the agency could compile an
21 administrative record for those grant terminations. As
22 long as the record from each individual grant file
23 could, um, with agreement, include the termination
24 letter itself and the notice of award and the agency
25 could avoid going through the hundreds of additional

1 pages that are in individualized grant files that may
2 contain sensitive information that can't be disclosed,
3 if we included the grant termination and the notice of
4 award to provide those stated reasons of the agency in
5 terminating a grant, and the background on the grant,
6 what is the award that was terminated, then we believe
7 we could compile an administrative record of what the
8 agency -- the decision-maker considered in terminating
9 those grants, in 30 days.

10 I will say, your Honor, that's a good deal longer
11 than what plaintiffs had asked for here, but it is after
12 substantial back and forth and consideration within the
13 agency about how fast it could proceed, and it is
14 shorter than the agency would prefer. And in asking for
15 30 days we are seeking to move quickly and offer the
16 fastest possible time that we could.

17 After, um, you know plaintiffs identify 7
18 challenged directives that they say are the things that
19 they are challenging, um, that the agency would
20 presumably be looking at to compile administrative
21 records for each of those purportedly-filed agency
22 actions -- and that will require looking at what a
23 decision-maker considered, and some of the
24 decision-makers are no longer with the agency, and this
25 will take time and review, and we believe that 30 days

1 is reasonable for that.

2 After that, we believe that the Court is correct,
3 this case could be decided based on cross-
4 motions -- well I won't say "correct." What I
5 understood the Court was insinuating was that the case
6 could likely be decided on cross-motions for summary
7 judgment after that unless -- unless we were to provide
8 a declaration or some additional justification that is
9 not apparent in a document or on the face of the
10 termination, in which case we understand the Court would
11 want to allow for cross-examination. But if we did not
12 do that, the Court would be able to review based on the
13 record, and the termination and their justifications
14 would rise and fall based on what is in the
15 administrative record. And if the Court finds that it
16 is insufficient, then, yes, we believe the Court could
17 make its ruling based on that record.

18 But there is no need or justification for
19 discovery, certainly not before an administrative record
20 has been filed, certainly not before plaintiffs have
21 demonstrated that the administrative record is
22 incomplete, which we would say is a requirement.

23 In order to order discovery, there must first be a
24 finding that the administrative record isn't complete
25 and that one of the very limited circumstances that

1 allows for extra-record discovery exists, um, and that
2 mostly -- that typically happens in the case of pretext.
3 And I don't think there's any allegation that there's
4 pretext for why these grants were terminated, it is
5 clear on the face of the grants why the agency has said
6 to terminate the grants.

7 And so we would propose that we could file the
8 administrative record in 30 days and then the parties
9 could file cross-motions for summary judgment
10 thereafter, and then proceed to a prompt end and proper
11 resolution of this matter in that way.

12 THE COURT: Well both of you are talking sensibly
13 and I -- we're not going to, um -- neither one of you is
14 going to prevail in their entirety, but that's not
15 surprising.

16 This Court operates on an intentionally-practical
17 and programmatic basis. I'm starting a significant
18 MS-13 trial on the 2nd of June. I really think that
19 case is going to go. I expect that it will go a couple
20 weeks. That takes us up to the 14th of June, "Flag
21 Day."

22 Whenever that case finishes, um, I'm prepared to
23 address this case, or at least part of this case. I
24 know the plaintiffs' allegations go further than what
25 either one of us -- what anyone who has spoken is

1 talking about, and I'm not dismissing anything, though
2 change could settle or throw it by the boards.

3 So if I'm going to look for you around the 16th of
4 June, that's not for filing papers, that's for being
5 ready to go. Clearly the NIH was prepared by March to
6 send out these notices following these directives. So
7 it does seem to me that I ought to have a -- now this is
8 the 13th. I ought to have -- if we're going to have the
9 appropriate administrative record, by Monday the 2nd of
10 June, and briefs may be filed simultaneously with reply
11 briefs thereafter.

12 And I'm getting ahead of myself, actually I work
13 for Ms. Belmont. Let me ask her.

14 Assuming that the case on the 2nd of June runs two
15 weeks, what do we have on the 16th?

16 THE CLERK: We're free.

17 THE COURT: Well we're not free now, we're --

18 I propose a hearing on the 16th. And I'm not one
19 to micromanage. What the government says, um, makes
20 sense to the Court. I want to encourage you to work out
21 disputes, and all I can say is I'm not going anywhere.
22 If I set this down for a hearing on the 16th of June, if
23 that hearing is just on the record, because you've
24 worked things out, so be it. If there's a dispute as to
25 whether I should take evidence starting on the 16th of

1 June, you'll let me know. And, um, my effort will be --
2 though whatever order happens will happen, and then to
3 follow it up with a written opinion just as rapidly as I
4 can.

5 Now, um, if I left things like that, recognizing
6 that there may be more to this case than we have
7 discussed today, do the plaintiffs have any questions?

8 MS. DIRKS: Um, yes, your Honor. Um, not a long
9 list. I promise.

10 One thing we haven't mentioned or focused on today
11 is our unreasonable delay claim, and that does seem to
12 be the one area that, um, would benefit most from, um,
13 live testimony or where there was the most room for --

14 THE COURT: I couldn't agree more.

15 MS. DIRKS: -- and the most room for factual
16 disputes.

17 THE COURT: But that's going to take some time.
18 So I was positing, um -- you know this idea of cross --
19 I know what the -- how these cases are handled. If we
20 get an agreed-upon record, I don't know that we -- it's
21 not strictly cross-motions for summary judgment where as
22 to each side I have to lean against their position, if
23 we had an agreed-upon record, then I draw the natural
24 and probable inferences from that record. I give both
25 sides an equal chance to argue the disputed -- it's a

1 mixed question of law and fact, the arbitrary and
2 capricious issue. I'm not answering your question, I'm
3 going back.

4 So the reason -- while I agree with you, that's
5 going to take evidence, um, and we've got to start
6 somewhere.

7 Do you want to start that this week or this month?

8 MS. DIRKS: I guess, your Honor, I -- I stand
9 corrected, with gratitude, that maybe I should ask the
10 more basic question.

11 When you say "briefs," your Honor, are you
12 referring to specifically Rule 56 motions for summary
13 judgment or a legal brief in support of --

14 THE COURT: A legal -- in support of a final
15 decision on the issue, as you frame it, of whether these
16 directives are unsupportable under the Administrative
17 Procedure Act. And they will say, "Here is the record.
18 Here are our reasons. They're all satisfactory reasons,
19 under the Constitution, as the legal framework." And
20 it's not for me, the Court, to make policy
21 determinations, if policy determinations are
22 permissible.

23 There are some statutory -- at least prior
24 Congresses have instructed the NIH, for example, to be
25 sure that they include women in their research studies,

1 to be sure that they include children in their research
2 studies, and I take it to encompass the science that,
3 um, you want to capture the data on which proper health
4 decisions can be made. But I don't mean to talk over
5 you.

6 When do you want to go on the unreasonable delay?

7 MS. DIRKS: Um, so if I -- I just want to make
8 sure I understand the proposal that I'm reacting to,
9 your Honor.

10 So with June 16th, it would be, um, briefing on
11 the, um, the grant terminations piece of the case as to
12 the challenged directives, and without the need to get
13 into individualized, um, grants. Right?

14 THE COURT: Don't you characterize what I said.
15 We'll see.

16 MS. DIRKS: All right, that's why I wanted to make
17 sure I'm clarifying it, so I can understand what we're
18 briefing.

19 THE COURT: I'm -- really, I'm trying to force you
20 into -- both of you, into an agreed-upon record.
21 There's advantages to having an agreed-upon record. If
22 you can't, I'll settle it. I'm not hesitant to settle
23 it. But I'm always transparent about what I'm thinking.

24 So you've corrected me on my idea, my approach,
25 and focused me more on the directives quite right. NIH

1 counsel properly says, "But really let's look at these
2 directives." Work that out and, I expect on the 16th,
3 if things work -- if things work on the 16th, I will
4 have an agreed-upon record, I will have, um, briefs, I
5 will hear argument, um, and if I can see my way clear to
6 action -- but I don't promise anything on that day, but
7 then I will take it under advisement. If I can't get my
8 arms around it, I'll be saying, "But I want this
9 witness" or "You can't really get there from here
10 without something." I can't see now. But I respect you
11 both -- I respect you all, and that's what I'm thinking.

12 You then say -- well let's focus on that piece.
13 Without you characterizing it, the -- the terminations
14 and the grant terminations piece, I hope to deal with on
15 the 16th, to be followed by a decision, which is
16 immediately appealable once I get the decision out, and
17 it's based upon an agreed-upon record. That's where I'm
18 hoping to go.

19 So still sticking with the plaintiffs. We haven't
20 dealt with unreasonable delay, but are you -- do you
21 understand that and can you work with that at least for
22 today?

23 MS. DIRKS: Yes, your Honor, with one additional
24 question. And we welcome this, your Honor, and I want
25 to thank you for the June 16th date, because that

1 reflects our need for urgency.

2 One question. When the Court said that, um,
3 briefs would be filed simultaneously, was that
4 simultaneously with the administrative record, which
5 would be due June 2nd, or simultaneous with each other?

6 THE COURT: No, no, no, not simultaneous with the
7 administrative record. But it's not like you people
8 don't know the other side. The lawyering has been, and
9 I'm grateful, exemplary.

10 MS. DIRKS: Thank you, your Honor.

11 THE COURT: One thing that can be said about the
12 NIH, whether it's the way they express it, I don't know
13 the basis for that, but it's not like they're secretive
14 about what they're doing. Okay?

15 MS. DIRKS: Um, that works very well, your Honor.
16 But there's still the question pending about
17 unreasonable delay? I'm happy to take that up now or
18 later.

19 THE COURT: No, let's go now to the NIH.

20 My discussion with her is, um, can you work with
21 her in that schedule?

22 MR. PORTS: Um, yes, your Honor, we will do our
23 absolute best to have a record prepared by the 2nd.

24 THE COURT: All right. If you don't, I'm likely
25 to, um, conclude that nothing exists. But that's

1 neither here nor there. But that's what I expect, on
2 the 2nd.

3 Now unreasonable delay. How do you want to handle
4 that?

5 MS. DIRKS: Um, your Honor, we think it makes
6 sense to -- we could schedule it now or schedule it at
7 another time, a second hearing on that case, your Honor.
8 The reason why I hesitate from committing to doing -- to
9 tackling that on the June 16th date is because there
10 might be more need for fact-gathering there and more
11 disputed facts that would not be contained within an
12 administrative record because --

13 THE COURT: I have another hearing at 3:00.

14 MS. DIRKS: I'm sorry, your Honor.

15 THE COURT: Again, it's always the practicalities
16 of each day. Are you suggesting I hold another status
17 conference or are you suggesting that we go forward on
18 the order I've entered now, and as you -- and you are
19 working together, zealous advocates for their own
20 position can work together, and I urge you -- I'm going
21 to depend on it.

22 So what are you suggesting?

23 MS. DIRKS: Um, either we schedule a hearing now,
24 your Honor, on unreasonable delay and the parties work
25 backwards from there, the alternative would be for the

1 parties to propose a schedule, um, and an earliest date.

2 THE COURT: Why don't you -- why don't you do that
3 and you don't have to agree on it. Your schedule may
4 not be their schedule.

5 All I can say is I'm not insensitive to what I've
6 done when I've collapsed further hearing on a
7 preliminary injunction with trial on the merits. It's
8 imperative that we all step up and give a reasoned, I
9 hope to say, "brave, meticulous, and thoughtful
10 opinion," that resolves what I am responsible for
11 resolving at the earliest possible date. This wasn't
12 "Okay, I collapse it with trial on the merits, when in
13 the next year are we going to have the trial?"

14 So I'm going to leave you. I'm not going
15 anywhere. Get Ms. Belmont, she's wonderful, and, um --
16 and it will be a status conference. It's not suddenly
17 you come in here and I'm going to say "Well where are
18 the witnesses?" We'll have a status conference when you
19 know the issues that you think I need to address. But
20 that can be as early as next week or at such other
21 reasonable time.

22 MS. DIRKS: That works well, your Honor. Thank
23 you.

24 THE COURT: The government?

25 MR. PORTS: Thank you, your Honor.

1 THE COURT: Good. It's good to see you. I look
2 forward to working with you.

3 And again, any case can be settled. If this case
4 is settled, a simple phone call to Ms. Belmont is all
5 that's required. We'll stand in recess. Thank you very
6 much.

7 (Ends, 2:50 p.m.)

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C E R T I F I C A T E

I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER, do hereby certify that the forgoing transcript of the record is a true and accurate transcription of my stenographic notes, before Judge William G. Young, on Tuesday, May 13, 2025, to the best of my skill and ability.

/s/ Richard H. Romanow 05-16-25

RICHARD H. ROMANOW Date

Appendix G

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS (Boston)

3 No. 1:25-cv-10814-WGY

4 COMMONWEALTH OF MASSACHUSETTS, et al,
5 Plaintiffs

6 vs.

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

9 No. 1:25-cv-10787-WGY

10 AMERICAN PUBLIC HEALTH ASSOCIATION, et al,
11 Plaintiffs

12 vs.

13 NATIONAL INSTITUTES OF HEALTH, et al,
14 Defendants

15 *****

16 For Hearing Before:
17 Judge William G. Young

18 Status Conference

19 United States District Court
20 District of Massachusetts (Boston.)
21 One Courthouse Way
22 Boston, Massachusetts 02210
23 Tuesday, June 3, 2025

24 *****

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

1 P R O C E E D I N G S

2 (Begins, 11:00 a.m.)

3 THE CLERK: Civil Matter 25-10787, the American
4 Public Health Association, et al vs. the National
5 Institute of Health, et al, and 25-10814, the
6 Commonwealth of Massachusetts et al, vs. Kennedy, et al.

7 THE COURT: Well good morning counsel. We won't
8 go through having everyone introduce themselves, but
9 when you speak, if you could remember to introduce
10 yourself, simply so that the Court Reporter's record is
11 accurate. Let me tee up what I think I want to do here
12 and, um, where we're going to go.

13 I wanted to have this status conference because
14 there is the second of these two related cases, and I
15 wanted to, um, have a conference where all parties could
16 be present and, um, see the extent and the order in
17 which they could be consolidated. So that was my
18 purpose in calling this conference.

19 Or I should say, as I have in other such hearings,
20 I have authorized internet access to this conference.
21 Having done so, let me say, if you are attending this
22 conference via the internet, have in mind the rules of
23 court remain in full force and effect, which means
24 there's no taping, streaming, rebroadcast, screen shots,
25 or other transcription of these proceedings.

1 So, um, coincident with my scheduling the
2 conference, um, various things have been done in the, um
3 -- I've been given a proposed schedule for further
4 proceedings in the first of the two cases and, um, in
5 very large measure it makes perfect sense, though I want
6 to make some comments about it, and emendations. But I
7 am very grateful to the parties for the manner in which
8 you're working together.

9 Second, consistent with the Court's order in the
10 first of the two cases -- or at least in the first of
11 the two cases, the government has, consistent with the
12 Court's order, um, filed the administrative record.
13 Here it is. You will understand I haven't looked at it
14 since the 2nd of June. But a question to government
15 counsel.

16 Is this the record as you see it in both cases or
17 just the first?

18 MR. PORTS: Thank you, your Honor. Tom Ports for
19 the government.

20 This record is the -- it is the government's
21 position that this is and will be the record for both
22 cases. I will say that -- and we had some discussion
23 about this earlier, um, all parties met at 9:30 today in
24 the U.S. Attorney's Office. The United States believed,
25 as the Court previewed the last time, that there are a

1 handful of discrete reasons why grants were terminated.
2 If you look at the different paragraphs, they tend to
3 line up across the various terminations.

4 We have compiled all -- everything considered
5 directly and indirectly for those reasons. It does not
6 include the actual termination documents for all of the
7 PDFs in the, um, the related case. So the second-filed
8 case, we don't have all of the actual termination
9 documents. However we believe it is very unlikely that
10 there will be any other reasons or justifications, and
11 therefore this record is sufficient and contains
12 everything directly or indirectly for that case as well.

13 I can represent that what I told the plaintiffs
14 that I would suggest, in the second-filed case, is if
15 plaintiffs would let us know or let the Court know, by
16 the 5th, if there is any other justification that is not
17 included in a termination record in that record, then we
18 can promptly complete the record for the second case
19 with anything in addition, and, um, then everything will
20 be thoroughly complete and we'd be able to proceed with
21 everything by the 16th. We think that's very unlikely
22 that there are any different reasons. But, um, it is of
23 course possible. And we think that is a way to proceed
24 and resolve everything in Phase 1 together.

25 THE COURT: Thank you, that's a direct answer to

1 my question and I appreciate it.

2 Now, um --

3 MS. AKSELROD: Your Honor, um --

4 THE COURT: Yes?

5 MS. AKSELROD: May I respond on behalf of the APHA
6 plaintiffs with regard to the completeness of the record
7 or would you like me to wait on that?

8 THE COURT: I'd like you to wait.

9 MS. AKSELROD: Thank you, your Honor.

10 THE COURT: Saying I thank you, doesn't mean
11 that's it. And let's jump right there.

12 In point of fact, um, I've been reflecting on what
13 has been filed thus far and in two respects, um, if --
14 if I don't have this in the record, I expect it by the
15 16th. So let me start with that. If it's there, fine.

16 But I read Footnote 1 on this schedule for further
17 proceedings and respectfully, um, the defense either
18 misunderstood or mischaracterizes the Court's view. I
19 do think the very first issue to be considered is, um,
20 the challenged directives, and so I need a record with
21 respect to the challenged directives.

22 Specifically I expect -- I've come to understand
23 that in this iterative process, the various universities
24 were putting out algorithms about how to write grants
25 and, um, "Stay away from this word," and "Don't say

1 that," and the like, "if you're seeking a grant." So
2 one imagines, given the speed with which the defendants
3 acted here, that there was guidance to the people who
4 made the determinations, or the person who made the
5 determination, and I expect it. I expect to see it. If
6 there's an algorithm, if there's guidance, wherever it
7 came from, I want to see what it is. The record to be
8 supplemented in that respect.

9 Second, I've also come across this database called
10 "Grant Watch," which is really rather intriguing, um,
11 and since everybody seems to look at Grant Watch for,
12 um, the data concerning grants from the NIH, recognizing
13 that this case, um, certainly in its Phase 1 is
14 limited -- let me be very clear, is limited to grants
15 terminated, not restored, not expired, that, um, in the
16 first case, and the second case, the list with which
17 we're working -- and to the extent we can pare that list
18 down by settlement or otherwise, that's a good thing.
19 But, um, I think Grant Watch may best qualify, um --
20 save the government's rights, they may want to brief
21 this, but I think it qualifies under Federal Rule of
22 Evidence 80317. This is like a, um -- like a
23 "Physician's Desk Reference" or something.

24 So the parties are free, because the universe of
25 grants of course goes well beyond the grant that, um,

1 whatever I have to say about the challenged directives,
2 any relief, if any there is, has to do only with the,
3 um, grants that are, at least the first phase, that are
4 listed in the materials already filed.

5 So let me turn to this document now, which I do
6 think is very helpful.

7 So the government, um, has filed its position on
8 the, um, administrative record, um, and whether or not
9 the defense agrees with it -- and that's the reason I
10 cut counsel off, the proposal here sets forth very
11 prompt time limits for challenging the completeness of
12 the administrative record. I'm not going anywhere. It
13 makes perfect sense. I seek to hold myself to the --
14 and hold you to the, um, what's set forth on Page 2 in
15 Paragraph, um, 2 and 3 of the proposed schedule.

16 And again, the government has every right to
17 contend that the record is complete and that the
18 supplementation is either irrelevant or, um, it ought
19 not be supplemented. But I've said what I'm looking for
20 here.

21 Now we're on for the 16th. I propose to give you
22 -- it's on at 10:00 on the 16th. I think we can thrash
23 our way through the argument here in the morning, and
24 the morning to me lasts till 1:00 -- um, from 10:00 till
25 1:00, I may need a brief recess, but I think we can

1 thrash our way through.

2 Now then we get to this proposed second phase.

3 And I agree that that will be heard thereafter, um, and
4 here I see the parties differ markedly. Let me be as
5 helpful as I can as to what I expect will follow.

6 You people have shown some amenability to
7 resolving this partially or, one can always hope,
8 wholly, um, with respect to certain or more of the
9 challenged grants, so I want to know, at least in
10 general -- and I recognize this is jury-waived, but I
11 will start off the proceedings at 10:00 on the 16th.
12 And again, I'll do this at the sidebar. The parties can
13 agree to private resolution, and I will say, "Well have
14 you settled any of this, and if so, what?" And you'll
15 tell me. And those conferences will be sealed. We
16 won't get into substance at all. And then we'll spend
17 the rest of the morning talking about, um, really the
18 first phase of the case, the applicable law and what can
19 be discerned from the administrative record.

20 Then close on to 1:00, I will say -- and maybe it
21 will go faster than that, but maybe not, I will say,
22 "Well, um, now that you've heard me" -- and I've done --
23 I've followed this technique in other cases, so I want
24 you to know it now. "Now that you've heard my questions
25 and my concerns and how I dealt with the answers and the

1 like, um, you tell me, do you want me to stay my hand
2 for any particular period of time, because you could
3 work out this part of it, or you could work out all of
4 it, or" -- and you'd both have to agree, or you'd say,
5 "No, we want the decision."

6 And then I will say, um -- but I'm giving a range
7 here because I have no idea where we'll be at 1:00 on
8 the 16th, I will say, um -- it goes from nothing, in
9 which I will say, "I'll take the matter under
10 advisement, thank you very much," and that's what you'll
11 hear from me until, at minimum, some order comes out,
12 and at maximum, the full opinion comes out. That's one
13 end of the spectrum.

14 The other end of the -- well I'm not going to be
15 able to -- I really am looking forward to the 16th. I
16 have no preconceived notions about this case. I'm going
17 to tell you the concern I have, but that's downstream.

18 So, um, all I'll say -- a combination like this,
19 it won't be any opinion, but I'll say, "Well, you know I
20 think" -- because I'm very sensitive that this started
21 out with a preliminary injunction collapsed into trial
22 on the merits, I'll say, "I think it's coming out, at
23 least in this area, this way or that way or whatever."
24 And, um, maybe I will be sufficiently confident to enter
25 an order. Most likely I will not. But, um, the

1 likelihood probably will be that an order will precede
2 the full opinion, because I will have the full record,
3 I'll have the advantage of your briefs and your
4 arguments, and, um, cases don't -- unlike fine wine,
5 don't get any better with delay. So they'll be at least
6 a partial order, probably pretty fast, on the first
7 phase of the case. Unless you tell me the other, you
8 say, "No, stay your hand for a week, two weeks,
9 whatever, maybe we'll work it out."

10 Then, when you see the way I see this case, once
11 that's out there, the rest of it is writing, and it
12 implicates of course the second phase, because if it
13 goes all the government's way, I don't see much to the
14 second phase. And he tells me there isn't much to the
15 second phase anyway. Maybe that's right, maybe that's
16 not right.

17 If it goes significantly the plaintiff's way, the
18 second phase is, in my mind, a different consideration.
19 But the schedule that is posited here -- and I have full
20 respect for the government saying that the
21 administrative record is the, um, is appropriate, and
22 only appropriate, um, actually the way you've written it
23 is fully satisfactory to me, because it says -- and I'm
24 now on Page 4 of the government's, I guess -- I take it
25 it's the government's proposal? Yes, the defendants'

1 position. I think their schedule makes good sense.
2 And, um, at least -- and I propose then to adhere to it.
3 You said "the conclusion of the Phase 1," I propose to
4 adopt it, and within 7 days, the motion to dismiss,
5 within 10 days, etc., as it appears on Page 4.

6 Now let me stop there and ask for questions and
7 I'll resolve whatever needs to be resolved, I hope, and
8 then we'll move to the second of the two cases, which I
9 hope you will tell me can be resolved on the same
10 schedule, and the first case, we'll agree. But we
11 haven't had everyone in court until today.

12 So here's my concern. And my concern is an
13 unformulated concern, because it comes only -- I don't
14 have the advantage of the administrative record, so
15 candidly it comes from these, um, just looking at the
16 initial spreadsheet and the subject matter of these
17 various grants, um, I -- I have real concerns about
18 evenhandedness here.

19 I have concerns about -- and about health care. I
20 have concerns about black Americans. I have concerns
21 about women. I have concerns about, um, legitimate
22 gender issues having to do with health. But don't any
23 of you take this as prejudging anything. It isn't.
24 It's just the Court's attempt to be fully transparent
25 and to grapple with the issues that the Court is duty-

1 bound to grapple with.

2 So -- and for the first round, questions? And
3 we'll start with the plaintiffs, questions on those
4 things? I had not thought of this as an argument
5 session, which is not to foreclose argument, if it's
6 necessary, but I came prepared for scheduling and not
7 argument.

8 So the plaintiffs, please.

9 MR. CEDRONE: Good morning, your Honor, Gerard
10 Cedrone for the Massachusetts Attorney General's Office
11 on behalf of the plaintiffs in the states' case. I
12 wanted to raise two issues related to the scheduling on
13 Phase 2 and react to, um, your Honor's statements about
14 the schedule there. The first relates to the question
15 of discovery and the second relates to the schedule more
16 generally.

17 First, as we previewed here briefly, we do believe
18 that discovery is appropriate on most claims and that
19 they're not properly limited to the administrative
20 record. I don't want to -- if your Honor's not
21 expecting argument today, I don't want to launch into an
22 argument, but we do stress that we think that's
23 appropriate and are happy to brief that or argue that
24 today or at another time, because we do think
25 unreasonable delay claims, unlike claims under Section

1 7062, the essence of the claim is there is no final
2 agency action, and so unlike --

3 THE COURT: You're now getting into --

4 MR. CEDRONE: I'm straying into argument, yes.

5 THE COURT: But I'm following, and so I think I
6 can make a direct answer.

7 I'm not surprised by what you're saying. The
8 schedule that now I've tentatively adopted, once we're
9 concluded with the first phase, you can expect they'll
10 move to dismiss. I'll entertain it. I'll rule on it.
11 But we'll assume you survive it. Though I express no
12 opinion. And as part and parcel of that, one imagines I
13 will hear fully the need for extra-record development.
14 And, um, again, that's his last paragraph in the
15 proposal. So we will then, to the extent -- don't think
16 I'm with you here, but we're trying to tease out an
17 intelligent way forward, then we'll talk about the
18 schedule to get at that.

19 Does that answer your question?

20 MR. CEDRONE: It does, your Honor. And that leads
21 me to the second question or issue that I wanted to
22 highlight with the schedule. We are concerned that this
23 schedule here, especially for a claim that is grounded
24 in undue-delay risks, moving the resolution of these
25 issues close to the end of the government's fiscal year,

1 so this contemplates that after Phase 1 is completed,
2 they'll be a week for them to move to dismiss, and then
3 however long that takes to resolve --

4 THE COURT: You want it faster?

5 MR. CEDRONE: I do, I think we should walk and
6 chew gum. If they have, you know, a motion to dismiss
7 on those claims, they've had our --

8 THE COURT: You've got a -- (Laughs.) I think I
9 can walk and chew gum, um, and I don't hear you to
10 suggest otherwise.

11 What schedule do you suggest?

12 MR. CEDRONE: No, I'm suggesting that the federal
13 government respectfully should walk and chew gum. We
14 can litigate Phase 1 while I think they file any motion
15 to dismiss that they have, you know, in short order, and
16 produce any administrative record on the second phase in
17 short order. They've had our complaint since April,
18 they've had a --

19 THE COURT: Well the logic though is that I ought
20 to hear and in my mind react to Phase 1. Now -- you
21 know the truth is, now that we've engaged, I'm going as
22 fast as I can, and when I say, "Well maybe I'll make an
23 order" -- orders get revised in the discipline of
24 writing full opinions. But I, at least conceptually,
25 I'm prepared to take that risk however it comes out.

1 But, um, maybe I should say that, um, not within 7 days,
2 but if they have a motion to dismiss as to Phase 2, the
3 motion to dismiss must be filed, um, coincident with
4 Phase 1, the 16th?

5 MR. CEDRONE: We think at least that would be
6 appropriate. And I just want to be clear, I was not
7 suggesting that --

8 THE COURT: Of course you were not. Of course you
9 were not.

10 MR. CEDRONE: (Laughs.) We appreciate the
11 dispatch with which this Court acts.

12 THE COURT: As in any case, we're all here
13 together reaching out for justice. That's my concept of
14 the thing.

15 So to be fair, I'll modify it. If they want to
16 dismiss, um, the second phase, any motion to dismiss the
17 second phase will be filed no later than -- filed, not
18 entertained on the 16th, but filed no later than the
19 16th. The rest of it all stands.

20 Doesn't that make sense?

21 MR. CEDRONE: I think that would be appropriate.
22 And the other, I think, suggestion we would have is that
23 30 days --

24 THE COURT: If I knock that out, or to the extent
25 I deny it, we'll give them 30 days to prepare the

1 record.

2 How's that?

3 MR. CEDRONE: I think that's a bit long,
4 respectfully, your Honor. It's longer than they were
5 given to produce the record for Phase 1.

6 THE COURT: You said he didn't think -- well
7 actually --

8 Mr. Ports, you said there wouldn't be much problem
9 in producing the record for Phase 2, would there?

10 MR. PORTS: I believe I'm not -- I'm not sure what
11 your Honor is referring to. We would request 30 days to
12 file the Phase 2 record, um, as we've requested here. I
13 can also respond to filing it coincident with the
14 hearing on the 16th as well. If we can do that, if
15 that's the Court's order, we believe there would be some
16 benefit from going through the proceeding, hearing the
17 Court's thinking, and having a sense of the resolution,
18 before we file our motion to dismiss on Phase 2, which
19 is why we propose 7 days, which is, we believe, a very
20 short period of time that would allow us to focus on
21 Phase 1 and get it resolved. I understand the Court's
22 thinking, to perhaps get a preliminary ruling, um, get a
23 better understanding of Phase 2 at the time we move to
24 dismiss.

25 So we do think that there is a benefit to 7 days

1 or at least some period of days after the 16th.

2 THE COURT: Okay. How about this? How about
3 this? We'll have the hearing on the 16th. I'll do the
4 best I can, whatever that is. But that's substantive,
5 that will be the findings and rulings. Any motion to
6 dismiss need not be filed on the 16th, but must be filed
7 by the 20th. And then, rather than 30 days, we'll give
8 you until the, um, 9th of July to file the
9 administrative record.

10 How's that?

11 MR. PORTS: Thank you, your Honor, we -- that
12 seems to be --

13 THE COURT: You really --

14 (Zoom interference.)

15 MR. PORTS: Yes, your Honor.

16 THE COURT: Well that's an intelligent and
17 lawyer-like answer.

18 Now, Mr. Cedrone, I -- I'm trying to be fair.
19 That's acceptable to you?

20 MR. CEDRONE: Thank you, your Honor. It is.

21 THE COURT: And I'll again try, um, consistent
22 with other obligations, to address it promptly.

23 Other questions?

24 MR. CEDRONE: I don't believe so for the state
25 plaintiffs.

1 THE COURT: Yeah.

2 MR. PORTS: For defendants, we just want to
3 clarify that yesterday we received three deposition
4 notices for next week, requests for production and
5 interrogatory responses related to Phase 2, and we just
6 wanted to make clear that the defendants need not
7 respond to these until -- unless and until there's any
8 motion to complete or supplement the record and a ruling
9 on that in Phase 2 from the Court.

10 THE COURT: I think that makes sense, but then
11 we're not going to be waiting, so you'd better line
12 those people up, and you'd better be thinking about the
13 answers to interrogatories, because I will give a very
14 short time for discovery.

15 You understand?

16 MR. PORTS: If the Court orders that discovery is
17 appropriate.

18 THE COURT: If we get there.

19 MR. PORTS: Understood, your Honor.

20 THE COURT: Right. They told you what they want.
21 Be thinking about it.

22 MR. PORTS: Yes, your Honor.

23 THE COURT: All right.

24 Now let's turn to the second case. And my thought
25 is, um, in view of Mr. Ports saying that but-for

1 individual notices on the specific grants that you have
2 now filed, he doesn't anticipate anything else, can we
3 treat the second case coincident with the first and hear
4 you on the 16th?

5 MS. AKSELROD: Your Honor, Olga Akselrod with the
6 ACLU on behalf of the APHA plaintiffs.

7 We are absolutely in favor of consolidating our
8 proceedings with the June 16th hearing and believe that,
9 um, the record as to the directives, um, may well decide
10 many many of the issues in this case. But there is a
11 difference in terms of the record that has been produced
12 in the states' case and the record that has been
13 produced in our case.

14 As you know, in the states' case the individual
15 termination ARs have been produced, and those are set to
16 be produced, um, by the defendants on June 16th in our
17 case.

18 We have, um, proposed that the parties meet and
19 confer on June 5th, um, which would give us enough time
20 to review what has been, um -- what has been provided as
21 to the ARs in the states' case. The defendants have
22 proposed potential stipulations that may obviate the
23 need for, um, submitting the individual terminations AR
24 in our case, and we just need the parties to have a
25 little more time for us to review the record, um, and

1 also to figure out whether such stipulations would be
2 sufficient.

3 THE COURT: All right. Yeah, look, I gave them
4 day for day what I gave the states from your start time.

5 MS. AKSELROD: Yes, your Honor.

6 THE COURT: I'm not -- I'm not going to revise
7 that. I did that having thought it through. Having
8 said that, there is so much to be gained by agreement.
9 And I urge -- but I am not ordering, and I'm not setting
10 interim dates, further agreement.

11 I hear you say that you will -- however it works
12 out, if you don't agree, you want to be heard and argue
13 as to these directives, and, to the extent you can
14 legally, you want to argue as to, um, grant terminations
15 in your case on the 16th.

16 Right?

17 MS. AKSELROD: Yes, your Honor.

18 THE COURT: And I propose, in that 3 hours, to
19 hear you. And I propose -- I intend to hold myself
20 ready for argument in -- I'm calling it the "second
21 case," but only that's because it -- how it emerged into
22 my consciousness. It's not "second" in any way and I've
23 spoken to it on an individual basis.

24 So I'm simply going to hold you to that. We'll do
25 the first phase and then we'll see where we are.

1 MS. AKSELROD: Thank you, your Honor.

2 And we would propose that on June 6th, we would be
3 able to provide the Court with a status report as to the
4 parties' discussions and what if any additional ARs may
5 need to be produced, and a proposed sort of
6 supplemental, um, schedule for how to deal with those.

7 THE COURT: Well you're looking for a court order.
8 You can file anything you want.

9 I do enjoy meeting with you all. Really that's
10 not a personal thing, there's much to be said for the
11 management and the joint efforts that everyone is
12 putting into these two cases. At the same time, I'm not
13 big on status conferences.

14 So you file what you want. I'll do -- I won't say
15 "what I want," but I will enter a due-appropriate order
16 or no order. I have the case now entrained for argument
17 on the 16th. I've got a lot of stuff to look at. I
18 suggested other things I want to look at and I do want
19 to look at them. And I have legal work to do. And I
20 intend to give you a full and fair hearing on the 16th.

21 If I hear no other questions, I think we can --

22 MS. AKSELROD: Your Honor, I do have a few more
23 questions.

24 THE COURT: Yes, go right ahead.

25 MS. AKSELROD: So -- well, first of all, I just

1 wanted to raise that the parties, um, did have some
2 additional discussions over the course of the last two
3 days on some modification to the schedule that was, um,
4 proposed by the states and the defendants in that case.
5 And I understand your Honor has adopted that schedule.
6 We think that that schedule also makes a lot of sense in
7 virtually every way. But the parties have agreed to a
8 couple of modifications.

9 THE COURT: If you agree to them, put them in
10 writing and let me know.

11 MS. AKSELROD: Perfect. Thank you, your Honor.

12 Secondly, um, I just wanted to clarify. So, first
13 of all, of course to the extent that the parties are not
14 able to reach stipulations, um, by June 5th, we would be
15 arguing based on the directives AR, um, and wouldn't
16 have the benefit of being able to make argument with
17 regards to the grant termination AR, which we're not
18 receiving until June 16th. So I just wanted to clarify
19 that we will be prepared to argue as to the directives
20 AR. We believe that the grant terminations can be
21 resolved through the directives AR. If the Court finds
22 that is unlawful, then relief would flow to those. But
23 we just wanted to be clear that there may be a
24 limitation as to what we argue.

25 THE COURT: You're making yourself clear.

1 MS. AKSELROD: Perfect. Thank you, your Honor.

2 And one, um, other clarification that I just
3 wanted to raise with regard to the scope of Phase 2, um,
4 and this is one of the ways that our case differs a
5 little bit with regard to how I think this Court has
6 framed Phase 2, which so far has been about unreasonable
7 delay and 7061. And I just wanted to raise that in
8 addition to 7061 claims, the APHA plaintiffs have also
9 brought 7062 claims on behalf of the applicant.

10 THE COURT: I understand. I've ruled on -- I've
11 treated their argument as a motion to dismiss and I've
12 ruled on it. Believe me, I understand what your
13 complaint raises.

14 MS. AKSELROD: Yes, your Honor, thank you. And
15 that is of course also a difference in the schedule
16 since, um, the motion to dismiss, as you've just noted,
17 has already been heard in our case.

18 I just wanted to also raise that, from our
19 perspective, the June 16th hearing as to the directives,
20 um, could give relief not only as to the grant
21 terminations, but also as to the suspension of applicant
22 processes based on the directives.

23 THE COURT: I will tell you, in all candor, I had
24 not thought of that. Now you may be arguing that, but
25 I'm trying to get my hands around this case, and, um,

1 while relief as to people actually -- as to grants
2 actually terminated is potential, that's why I wanted
3 the list. So -- and that will be the Court's focus.

4 Obviously it's your complaint and you raise any
5 claim you wish. I've ruled on a motion to dismiss.
6 It's my duty to adjudicate the claims. Um, but that's
7 my response.

8 I think I'm -- the public officials are wrong to
9 say we're only going to talk about the grant
10 terminations, not these directives. I want to know all
11 about these directives. I want to know where they came
12 from. I want to know why there were no edits. And this
13 business, which is fulsomely set forth in your
14 complaint, we'll hear at least all about that. I want a
15 full record as to those directives. And then I want to
16 see how it plays out in cutting off funding for grants
17 approved. That's what I thought we were talking about.

18 Now I guess all I can say is that's the Court's
19 focus and it will be the Court's focus on the 16th. You
20 can feel free to raise anything that the complaint
21 raises. But when we talk about potential orders and the
22 like, um, I'm limiting it to these plaintiffs, these
23 grant -- Phase 1, these grant terminations. Now there
24 is a Phase 2. I'm not expressing any opinion on that.

25 Is that helpful?

1 MS. AKSELROD: Yes, your Honor, it is. I think we
2 may, um, with the Court's permission, still spend a bit
3 of time explaining how the directives expressly require
4 an applicant --

5 THE COURT: You will, on the 16th, and you will
6 not think that I am, um, prejudging it if you spend that
7 little time towards the end.

8 MS. AKSELROD: Thank you, your Honor.

9 THE COURT: All right.

10 Any other questions?

11 And again, hope springs eternal. If you resolve
12 this matter or a significant portion of it, a simple
13 call to Ms. Belmont is all that's necessary.

14 Yes, Mr. Ports?

15 MR. PORTS: Yes, your Honor. Thank you.

16 I wanted to clarify regarding the supplementing of
17 guidance about what is contained in the administrative
18 record.

19 Although it is the defendants' position that the
20 grant terminations should be reviewed, the
21 administrative record contains well-challenged
22 directives, um, the -- where the challenged directives
23 were considered, directly or indirectly, in the grant
24 terminations, they're a part of that administrative
25 record. Where they were not, we have provided separate

1 administrative records for the other, um, challenged
2 directives, to the extent we have had record IDs.

3 THE COURT: You'll appreciate that I haven't
4 reviewed it, and so if I've misspoken, it's solely
5 because I have not yet had the chance to review it all.

6 All right.

7 MR. CEDRONE: Your Honor --

8 THE COURT: I have another obligation here.

9 MR. CEDRONE: I just want to clarify what was just
10 established, which is that, um, having heard your
11 Honor's views and admonitions, that the administrative
12 record in the states' case is complete, um, in the
13 government's view.

14 THE COURT: He said it was.

15 MR. CEDRONE: Okay, I just wanted to make sure of
16 that.

17 THE COURT: While I'm operating -- we talk about
18 "clarifications," um, the question is, um, that
19 "clarifications" all, respectfully, have to go to me.
20 I'm telling you what I think Mr. Ports has represented,
21 that I have a complete administrative record as to the,
22 um, challenged declarations. That's what I heard him
23 say. And that -- well I'll stop there.

24 MR. CEDRONE: Thank you, your Honor.

25 THE COURT: Lest I clarify my own clarifications.

1 Thank you all.

2 We'll stand in recess.

3 (Ends, 11:45 a.m.)

4
5 C E R T I F I C A T E

6
7 I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER, do
8 hereby certify that the forgoing transcript of the
9 record is a true and accurate transcription of my
10 stenographic notes, before Judge William G. Young, on
11 Tuesday, June 2, 2025, to the best of my skill and
12 ability.

13
14
15
16 /s/ Richard H. Romanow 06-05-25

17 _____
18 RICHARD H. ROMANOW Date
19
20
21
22
23
24
25

Appendix H

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS (Boston)

3 No. 1:25-cv-10814-WGY

4 COMMONWEALTH OF MASSACHUSETTS, et al,
5 Plaintiffs

6 vs.

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

9 No. 1:25-cv-10787-WGY

10 AMERICAN PUBLIC HEALTH ASSOCIATION, et al,
11 Plaintiffs

12 vs.

13 NATIONAL INSTITUTES OF HEALTH, et al,
14 Defendants

15 *****

16 For Hearing Before:
17 Judge William G. Young

18 Bench Trial, Phase 1
19 (Closings)

20 United States District Court
21 District of Massachusetts (Boston.)
22 One Courthouse Way
23 Boston, Massachusetts 02210
24 Monday, June 16, 2025

25 *****

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

1 P R O C E E D I N G S

2 (Begins, 10:00 a.m.)

3 THE CLERK: The Court will hear Civil Action
4 Number 25-10787, the American Public Health Association,
5 et al vs. the National Institutes of Health, et al and
6 25-10814, the Commonwealth of Massachusetts, et al vs.
7 Robert F. Kennedy, Jr., et al.

8 THE COURT: Good morning. These two cases I've
9 authorized internet access, so it's appropriate that I
10 say that if you are viewing these proceedings via the
11 internet, the rules of the court remain in full force
12 and effect, and that is to say there is no taping,
13 streaming, rebroadcast, screen shots, or other
14 transcription of these proceedings.

15 This is the final argument in Phase 1 of this
16 Administrative Procedure Act case. I'm pushing the
17 administrative record out of the way. (Moves pile of
18 documents.) Counsel will understand that I am prepared
19 for final argument. I do not claim to have read the
20 entire administrative record.

21 As we discussed, argument will proceed first with
22 the plaintiffs, dividing an hour, should they take that
23 long, and then with the defendants, dividing an hour.
24 That isn't an invitation to use all that time. I am
25 prepared for the final argument.

1 Mr. Cedrone, I will hear you. I assume it's you.
2 Go ahead.

3 MR. CEDRONE: Good morning, your Honor, Gerard
4 Cedrone from the Massachusetts Attorney General's office
5 for the plaintiff states in the '814 case. We plan to
6 divide our time roughly equally, so I will speak for no
7 more than a half an hour.

8 We're asking the Court to set aside the challenged
9 directives and the terminations that flow from those
10 directives. With the time I have I'd like to address
11 first the defendants' threshold arguments, then explain
12 why the challenged directives violate the APA and the
13 Constitution, and finally say a few words about
14 remedies.

15 THE COURT: Maybe -- I want you to -- your
16 argument organization makes sense, but you said "set
17 aside the challenged directives," and one of the things
18 I'll ask everyone, if I were to do that, if I were,
19 under the Administrative Procedure Act, to set aside the
20 challenged directives -- declare, for whatever imperfect
21 reason that some or all were of no force and effect, um,
22 life then, it seems to me, proceeds as though they did
23 not exist, and I'm not clear for the need for injunctive
24 relief as to the Administrative Procedure Act claim.
25 Get to that whenever it suits you.

1 Go ahead.

2 MR. CEDRONE: Understood, your Honor, and, um, I
3 will be speaking to remedies and the injunctive relief
4 piece.

5 THE COURT: Thank you.

6 MR. CEDRONE: Maybe before jumping into sort of
7 the specifics, I also just wanted to take a step back.
8 We've been living with these facts for a while now, but
9 I'd like to reiterate how unusual they are.

10 In the past few months, defendants have taken
11 actions that are unprecedented in the history of the
12 NIH, they issued directives that summarily ban research
13 on 7 discrete topics, and they implemented those
14 directives by canceling over 800 grants to the plaintiff
15 states' institutions. And I can't emphasize enough just
16 how extraordinary that is. In a typical year NIH
17 cancels 1, maybe 2 grants, and here we have 800 and
18 counting just to the plaintiff states, just in our case
19 alone since January. That's 800 terminations affecting
20 real people, including patients who lost critical
21 medical treatments, researchers who lost years of work,
22 and students who've seen their educational opportunities
23 disappear.

24 Given that dramatic change and that dramatic
25 departure from past-agency practice, you would expect to

1 see a robust administrative record, one with careful
2 explanation, one that weighs various pros and cons, one
3 that gives serious consideration to the real harms that
4 happen to people when hundreds of studies are cancelled
5 with no prior notice. Instead the record has none of
6 that. There are obviously hefty binders, but what you
7 have throughout those binders, over and over and over
8 again, is repetition of the same paragraphs.

9 So with that said, let me speak first to the
10 defendants' threshold arguments. The defendants'
11 principal argument is that the Court should not even
12 consider the legality of the directives because those
13 directives are not final agency actions. That's
14 incorrect. And the simplest way I can think to explain
15 it is that between January and the termination of our
16 grants, defendants clearly made a final policy decision
17 to blacklist 7 discrete topics, that's the policy
18 decision that we're challenging.

19 Now we think it's clear from the record that that
20 policy decision is memorialized in, is consummated by,
21 is distilled in these directives that we identified, but
22 we don't think defendants can dispute the basic point
23 that, before terminating our actual grants, they made a
24 policy decision to blacklist certain topics, and that's
25 what we're challenging.

1 And I would compare that action to the policy
2 decision that your Honor currently has in front of you
3 in the ***American Association of University Professors v.***
4 ***Rubio*** case, where your Honor decided, as a preliminary
5 matter, but recognized that even an unwritten policy in
6 that case of targeting certain students for deportation
7 can be a final agency action. Here we think we're in an
8 even stronger position. It's not just that there's some
9 unwritten policy in the ether, the defendants have
10 actually reduced it to writing in the directives that we
11 put in front of you.

12 And that's consistent with our challenging these
13 policies as a final agency action. It's consistent with
14 the statutory text, the Section 551 of the APA defines
15 an "agency action" to include rules, which means
16 "statements of general applicability with future
17 effects." That's exactly what these directives are,
18 they're directives that ban research into certain topics
19 and direct agency personnel to act accordingly.

20 One final point on this final agency action
21 question. We think it's clear that the challenged
22 directives are final agency actions themselves. Even if
23 we were wrong about that, there is no dispute, and the
24 defendants concede at Page 12 of their principal brief,
25 that the termination decisions are final agency actions,

1 and under Section 704 of the APA, final agency
2 actions -- the review of a final agency action includes
3 the review of any antecedent, interlocutory, or other
4 decisions that merge into the final decision.

5 And so with all of that said, we think your Honor
6 has already ruled on this in our case as a preliminary
7 matter, we don't think defendants have given any reason
8 to disturb your preliminary ruling that these -- that
9 both the directives and the terminations that flow from
10 them are final agency action.

11 I do want to address, before getting to the merits
12 of the case, two more minor points on the defendants'
13 threshold arguments that I just want to be sure are
14 clear. One is that the defendants argued in their reply
15 brief that a February 21st directive, that we've called
16 the "Memoli directive," and I know there's different
17 nomenclature floating around, but this is a February
18 21st directive at Page 2930 of the administrative
19 record. The defendants argue in their reply brief that
20 that's not properly in this case because we didn't call
21 it out by name in our complaint, but that's wrong for
22 two reasons.

23 The first is that our complaint makes clear, at
24 Paragraphs 116 to 117, that the directives we're
25 challenging -- that the directives we are challenging

1 include the universe of directives, including the
2 directives that had been kept secret or that were not
3 public at that point, um, that had the effect of
4 blacklisting these certain topics. The February 21st
5 directive falls squarely within that language.

6 And second, regardless of what we said in our
7 complaint, defendants put this February 21st directive
8 in the administrative record. So by their actions
9 they've acknowledged that this February 21st memorandum
10 is something that defendants considered or relied upon
11 in reaching their decision. So they can't put that
12 directive in the administrative record and then say it's
13 not part of the case, that's not what the administrative
14 record is.

15 The last minor point before pivoting to the merits
16 relates to their argument that we lack standing to
17 challenge the rescission of "NOFOs," which are "Notices
18 Of Funding Opportunities" that announce grant
19 opportunities. So defendants, um, haven't challenged
20 the State's standing in general, um, but there's one
21 minor piece, this rescission of NOFOs.

22 THE COURT: Well actually I have a question on
23 that. What is it that you want with respect to those?

24 MR. CEDRONE: So just as, um, setting aside the
25 challenged directive means, under the APA, you treat the

1 directives as if it never existed, because these notices
2 of funding opportunity were pulled down based solely on
3 the directives, um, the notices of funding opportunity
4 should be restored.

5 THE COURT: I'm a pedestrian thinker, so help me
6 here.

7 As I understand it -- and if I'm wrong, I want to
8 corrected, the grants that are -- the grants that are at
9 issue in this first phase are grants that had been
10 funded by Congressional appropriation and were
11 proceeding, but because of the challenged directives,
12 were "terminated," um, an appropriate word.

13 I've got that right?

14 MR. CEDRONE: I think that's right, your Honor.

15 THE COURT: All right. And I think I understand
16 that.

17 But even if the -- what do you expect? Should you
18 prevail on that, I can -- I think I understand what
19 should happen to -- if the challenges are gone, the
20 money is there for this fiscal year, and the
21 Congressional will is clear, they have provided the
22 funds which the NIH has allocated and implemented, as it
23 always has, so what about these NOFOs, um, what should
24 happen?

25 MR. CEDRONE: Right, so I think there's two

1 things. One, I think it's largely relevant to the
2 second phase of the case where we're talking about
3 delays, but I wanted to address it today, as it's in the
4 defendants' brief. But I think it's largely more
5 relevant to the second phase of the case.

6 But the second point is that, um, the government,
7 and the federal government produced a supplement to the
8 administrative record on Friday, and at Page 6960, and
9 the two pages that follow, there's a spreadsheet that
10 lists NOFOs that have been "unpublished," in the
11 language that they've used, with grants corresponding to
12 them. At least some of those grants -- and these, as I
13 understand it, are awarded grants, correspond to the
14 plaintiff states. And we think we have standing, we
15 think this is largely an issue for the second phase.
16 But to the extent that the unpublishing of NOFOs has
17 been a mechanism for terminating grants or part of
18 terminating grants, we think that the Court can set it
19 aside. But it is admittedly a very small part of this
20 first phase, if it's relevant at all.

21 So turning then to the merits. The challenged
22 directives violate, as we've explained, the
23 Administrative Procedure Act and the Constitution. Let
24 me start with the Administrative Procedure Act.

25 We obviously go through the various doctrinal

1 reasons in the brief why the directives are arbitrary
2 and capricious. I think it's easiest to explain by
3 looking at a particular example.

4 So in the brief we talk about a particular grant
5 that was terminated, at Page 1364 of the record, it's a
6 grant to the University of California entitled "Genetic
7 and Social Determinants of Pharmacological Health
8 Outcomes in Ancestrally-Diverse Populations." And
9 admittedly I'm not scientist, but my understanding of
10 this project is it's looking at how people of different
11 genetic backgrounds might respond differently to
12 pharmaceutical products, in the way it's absorbed by
13 your body, in the way your body processes it, and so on.
14 And that grant was cancelled. The cancellation language
15 is at Page 1369 of the record.

16 Your Honor is very familiar with this paragraph by
17 now, it's the standard DEI paragraph that reads: "It's
18 the policy of NIH not to prioritize research programs
19 related to DEI," and so on and so on. And ending with,
20 you know, the assertion that "worse so-called 'Diversity
21 Equity and Inclusion studies' are often" --
22 (Interruption by zoom.) "are often used to support
23 unlawful discrimination on the basis of race and other
24 protected characteristics." It's the same stock
25 paragraph that repeats itself throughout the directives

1 and throughout the terminations. And what is stunning
2 from the record is the lack of any support beyond those
3 conclusory words.

4 So first, and perhaps most prominently, there is
5 no definition anywhere in the record, despite repeated
6 requests from this Court, for what the government even
7 considers "DEI" to mean. I think -- I would have
8 thought we could all agree that that term can have
9 positive or, you know, laudable connotations. So the
10 government never even defines what is so-called
11 "prohibited DEI."

12 But even beyond that, the agency doesn't explain
13 how that language, those conclusory statements, are
14 consistent with statutes that Congress has enacted, very
15 clearly expressing a preference and a priority for
16 advancing research into health disparities, for
17 understanding the health conditions of underrepresented
18 groups. They haven't explained how that language in
19 those conclusory statements are consistent with a
20 strategic plan that NIH promulgated and that Congress
21 requires NIH to promulgate.

22 And perhaps most, I think remarkably, they -- you
23 know there's some, um, striking factual assertions in
24 there. So that paragraph, as I mentioned, says --
25 asserts that DEI studies are, quote, "often used to

1 support unlawful discrimination on the basis of race."
2 That is a serious charge, and you would expect, with a
3 charge of that magnitude, there would be some
4 explanation somewhere in the record of how the agency
5 came to that conclusion, what it relied on in reaching
6 that conclusion, why it determined that one study, but
7 not another runs afoul of that principle, and there is
8 absolutely nothing like that.

9 When you strip away the hundreds of termination
10 letters and the challenged directives from the binders
11 that your Honor has in front of you, there is nothing
12 left. And it is hard to reconcile that complete absence
13 of explanation and evidence with the magnitude of the
14 policy changes that the agency has enacted here. That's
15 not what the Administrative Procedure Act requires.

16 And I would like to linger for a moment, before
17 moving on to the other points on one particular aspect
18 of the arbitrary and capricious nature of the Agency's
19 decision, which is their failure to consider reliance
20 interests.

21 The Supreme Court has said, again and again, that
22 when an agency is changing its policies, particularly an
23 entrenched policy, it has to consider reliance
24 interests, it has to consider ways that the public and
25 regulated parties have come to rely on the agency's

1 steady position. We cite numerous cases in our brief,
2 ***The Department of Homeland Security against Regents of***
3 ***the University of California, and Cena Motor Cars, SEC***
4 ***vs. Fox.*** Actually just a few months ago, this term, the
5 Supreme Court reiterated the point in a case called
6 ***Wages and White Lines --***

7 (Interruption via zoom.)

8 THE COURT: Where does that come from?

9 THE CLERK: It's the zoom, Judge.

10 (Pause.)

11 MR. CEDRONE: Should I continue?

12 THE COURT: No, you continue.

13 MR. CEDRONE: Okay.

14 So the law is clear. When an agency is changing
15 position, it has to at least consider and grapple with
16 reliance interests. And we have gone through, in the
17 briefing, some of the significant reliance interests
18 that are at stake here.

19 So particularly close to home, Docket 7745,
20 "Walking through the Impacts on the University of
21 Massachusetts." UMass Chan Medical School has laid off
22 209 employees, it's cut the 2025 graduate program from
23 70 students to 10. It's frozen all hiring. And a
24 similar thing for UMass Amherst, rescinding funding from
25 100 accepted applicants and reducing admissions by half

1 for its School of Public Health.

2 And that's not to mention the harm to patients.
3 We walk through in the briefing studies that support
4 patients who are receiving treatment for risk of suicide
5 whose programs have been closed down. We walk through
6 in the briefing the lost data. One example from Docket
7 7725 is a Rutgers' study, it's a longitudinal study of
8 alcohol abuse among youth and minors. And the
9 declaration detailed how, when a study is interrupted,
10 your ability to recruit participants and track them over
11 time in a longitudinal study --

12 THE COURT: Don't let me throw you off, but I'm
13 going to stick to the time, and you have about 10
14 minutes. And I have expressed a concern about
15 straight-out discrimination here, racial discrimination,
16 discrimination on the basis of one's -- how one lives
17 out their sexuality, and possibly, and I'm much less
18 certain about this, possibly discrimination against
19 women's health issues.

20 Are you going to address any of those? Do you
21 think they bear on this first, um, this first phase?

22 MR. CEDRONE: We haven't raised an expressed claim
23 of racial or sexual discrimination. I think it's, um --
24 I think it's hard to look at what the agency has done
25 here and, um, walk away with the view that it's

1 consistent with not only the values in the Public Health
2 Service Act, which requires, um, thoughtful
3 consideration and the promotion of minority health, um,
4 women's health, and the health of sexual and gender
5 minorities. And so I think that's -- that's the way we
6 have seen it as being relevant to this case, is that not
7 only are there these overarching constitutional and
8 statutory principles and other statutes, but the Public
9 Health Service Act itself states a Congressional
10 priority for advancing the health of underrepresented
11 groups, for advancing women's health, for advancing the
12 health of sexual and gender minorities. And so that
13 last statute in particular is Section 283(p), which we
14 cite in our briefing.

15 I do not understand -- and that gets beyond the
16 arbitrary and capricious point to the contrary-to-
17 statute point, I don't understand how the agency can
18 adopt these policies that it's adopted in these
19 boilerplate paragraphs consistent with those
20 Congressional policies. The defendants accuse us of
21 trying to substitute our policy judgment for that of the
22 agency? No, what we're arguing is that the agency has
23 substituted its policy judgment for that of Congress.

24 The agency might believe, and the defendants might
25 believe, as fervently as they like, that, um, that NIH

1 shouldn't be advancing the health of transgender
2 Americans, shouldn't be studying, um, you know
3 disparities in underrepresented communities, they might
4 believe that very fervently, but Congress chose a
5 different course in the statute and the agency is
6 required to carry it out.

7 And just on the reliance point, just to close out
8 that point. It's important not only to walk through the
9 reliance interests at stake, but the complete absence of
10 any discussion of those interests in the record.

11 I would have thought that an agency that was
12 taking seriously canceling, um -- banning research into
13 certain topics and canceling projects that flowed from
14 those topics would at least have considered those
15 serious reliance interests and there is nothing to that
16 effect in the record.

17 The defendants can say, "Well you can look at the
18 termination letters and infer that the agency must have
19 considered reliance interests, because obviously when
20 you cancel a project, people had been relying on it, and
21 they chose to do so anyway." But that is not how this
22 works, that is not what the APA requires. The APA
23 requires the agency actually to grapple with those
24 issues in the record and explain why it's doing what
25 it's doing. And it's a procedural requirement, but it's

1 not an empty formality. The reason the APA required
2 that is because we think that agencies reach better
3 substantive decisions when they're required to confront
4 the things that they're doing, and they haven't done
5 that here.

6 In the interests of time, I know I've addressed
7 the contrary-to-statute point, we also argue in the
8 briefing that the agency's decision is contrary to
9 regulation. Um, I'll say on that briefly that obviously
10 an argument that requires carefully parsing through the
11 regulations, the regulatory history, um, the two basic
12 points I would make on that argument is: Number 1, the
13 defendants are arguing that we're trying to turn this
14 into a contract case. It's been clear from the outset
15 that we're not raising contract claims, we're asking the
16 Court to construe a regulation that they invoke and
17 directives that they promulgate. We're asking the Court
18 to decide that that regulation doesn't mean what the
19 defendants say it means. That is the ordinary business
20 of a court hearing an APA claim.

21 And the second point on the contrary-to-regulation
22 argument that I would leave the Court is, that at the
23 end of the day, when you have all of these arguments
24 walking through the statutory provisions, the
25 regulation, um, cannot mean what the defendants say it

1 means because it would not be structured and worded and
2 located in that way. They essentially read this
3 regulation to say that an agency can cancel any project,
4 at any time, with no prior notice. And if the
5 regulation meant that, this would be a surprising way to
6 grant that power, to say the least.

7 We also, as we've explained --

8 THE COURT: About 5 more minutes.

9 Go ahead.

10 MR. CEDRONE: Understood, your Honor.

11 We've also explained that the challenged
12 directives violate the Constitution and are ultra vires.
13 Our constitutional claim -- I'll just address briefly to
14 emphasize that --

15 THE COURT: It's a disfavored claim in light of
16 the breathe of the Administrative Procedure Act, as I
17 understand it, but I'll hear you.

18 MR. CEDRONE: I understand. And even with that,
19 um -- even with that nature of, um -- even with that
20 said, the one piece that the constitutional claim
21 addresses that the APA claim doesn't is the failure to
22 spend appropriated money. And I just would like to
23 emphasize the constitutional claim and ultra vires
24 claim, before moving on to remedies, that these claims
25 span both phases of the case, we think there's a --

1 THE COURT: But that gets to the question I posed
2 at the outset. So now, in the 4 minutes remaining, I
3 really want an answer to that question.

4 Were you to prevail, assume you prevail, at least
5 as to the grants, the NOFOs, we'll see, if that were to
6 happen, isn't it enough simply to vacate the, um,
7 challenged directives as arbitrary and capricious, say
8 they're of no force and effect, illegal, and then, one
9 would expect, that given the landscape, the undisputed
10 landscape here, the appropriated grant-specific money
11 would flow? You'd expect that, wouldn't you?

12 MR. CEDRONE: We would expect that. Let me
13 explain I think one reason why I think an injunction is
14 still appropriate and one other APA remedy that we're
15 asking for.

16 So not only, in our view, should the Court set
17 aside the challenged directives under the APA, it should
18 also set aside the termination decisions that flow from
19 it. As you see in the record, the termination decisions
20 use the same boilerplate language, so one should follow
21 from the other.

22 I agree with your Honor that that relief gets us
23 much of what we are asking for and I agree that one
24 would expect from that, um, would flow an appropriate
25 result. The reason we think an injunction is still

1 appropriate is that the record, even though it
2 demonstrates an underlying policy, it's been a bit of a
3 game of Whac-a-mole, there are these different
4 directives and defendants -- you know you point to one
5 and defendants say, "That's not the directive that
6 actually encapsulates this policy," so you point to
7 another. And so the injunction gets at the idea that
8 we're challenging these directives, but at its core
9 we're challenging the policy that underlies it. And we
10 think the plaintiffs need, especially given the harms at
11 stake here, prospective relief, not just a set-aside of
12 the directives and of the terminations that have flowed
13 from them.

14 That's how we understand the defendants are
15 requesting to take cross-examination of the witnesses
16 that support our request for an injunction, so we don't
17 want that piece of the case to delay what we think is
18 appropriate relief that is currently ripe for decision,
19 which is relief under the APA, um, that sets aside the
20 challenged directives and the terminations.

21 And unless your Honor has further questions, I'm
22 happy to yield the Court to my APHA colleagues. Thank
23 you.

24 THE COURT: Thank you. And I appreciate it.

25 Counsel?

1 MR. PARRENO: Good morning, your Honor, Kenneth
2 Parreno on behalf of the APHA plaintiffs.

3 THE COURT: Yes, Mr. Parreno, I'll hear you.

4 MR. PARRENO: It's good to see you again, your
5 Honor. I'll be splitting argument today with
6 Ms. Meeropol, um, and transition accordingly.

7 I want to start by, just very briefly, talking
8 about who our clients are. Our clients are researchers
9 and organizations of researchers who are dedicated to
10 their work.

11 THE COURT: Well let me ask this question, which
12 may be a little aside the point.

13 You have supplied, at the Court's direction, a
14 finite list of the grants that we're talking about, very
15 similar to that, um, put forward by the various states,
16 and I've just been hearing about them. Whatever happens
17 in this case -- well were anything to happen favorable
18 to your clients, Rule 52 of the Rules of Civil Procedure
19 require a written opinion. And so this is not -- it
20 doesn't require a written opinion, but eventually in
21 this case there's going to be a full written opinion.

22 I don't understand why those grants, should you
23 prevail, ought not be listed in an appendix to that
24 opinion? I don't understand why not?

25 MR. PARRENO: Your Honor, if I may? Ms. Meeropol

1 will address the remedy, the question of the --

2 THE COURT: Fine. Go ahead.

3 MR. PARRENO: But we'll address that as well. I
4 thank your Honor for that opportunity.

5 THE COURT: Yes, go ahead.

6 (Knocks over microphone.)

7 MR. PARRENO: Sorry about that.

8 Is that better?

9 THE COURT: Yes, go ahead.

10 MR. PARRENO: So these researchers comprise
11 hundreds of individuals who are working on thousands of
12 projects, some of which are at issue here, benefiting
13 millions of Americans with their work on public health
14 and advancing the scientific effort. That's what was
15 disrupted by the defendants' actions. And I will focus
16 first on the arbitrary and capricious nature of their
17 actions.

18 Defendants' actions, the directives, both through
19 their development and through their implementation, are
20 arbitrary and capricious for three reasons. First, they
21 do not represent the reasoned decision-making that is
22 required of the Administrative Procedure Act. Second,
23 they are unexplained, about-faced in policy. And third,
24 they do not properly address the reliance interests that
25 are at stake. They don't even consider them, much less

1 weigh them. I'll start with the reasoned decision-
2 making.

3 My colleague, Mr. Cedrone, already emphasized the
4 sheer stunning lack of analysis data, evidence
5 underlying the directives themselves. No working
6 definitions. No evidence establishing, for example,
7 so-called "DEI studies" ultimately do not enhance
8 health, lengthen life, or decrease illness. I won't
9 belabor that point, um, for the sake of efficiency,
10 we've argued that in our brief and Mr. Cedrone covered
11 that point. But what I would like to do at this time,
12 as to the reasoned decision-making, is to highlight what
13 actually was in the record and how that further
14 emphasizes the arbitrary and capricious decision-making
15 that occurred here.

16 First, what is in the record shows a slap-dash
17 decision-making process. What was revealed from a
18 series of e-mails is that often NIH officials would take
19 just minutes to make decisions that affected hundreds of
20 researchers and millions of lives.

21 For example, and I know that your Honor is
22 familiar -- is familiar with the record, but I do want
23 to highlight a couple of examples to highlight this.

24 On March 11th, 2025, that's AR 3820, it took Matt
25 Memoli 6 minutes to review 6 grants and to conclude that

1 all of them aren't aligned with agency priorities.

2 On May 9th, it took him just 2 minutes to review,
3 quote, "several grants."

4 THE COURT: "Him" is who?

5 MR. PARRENO: I'm sorry?

6 THE COURT: "Him" is who?

7 MR. PARRENO: I'm sorry, your Honor, that's Matt
8 Memoli, again, at AR 3452. These are just a couple of
9 illustrative examples that reflect the slap-dash nature
10 of how this review is occurring.

11 And as defendants acknowledge in their own
12 certification in this case, in ECF Number 86-1, these
13 grant files, for each of these grants, are hundreds if
14 not thousands of pages long. It just strains credulity
15 that any meaningful review can occur in a matter of
16 minutes, much less 2 minutes.

17 Second, what also is in the record reflects that
18 that slap-dash decision-making was in fact encouraged
19 from the top down.

20 On June 13th, the defendants produced, um, in
21 response with this Court's order on a motion to complete
22 what is at AR 6963. That is a document that was
23 provided to program officers to assess pending grant
24 awards or actions for the purpose of alignment with the
25 directives.

1 That document, like the rest of the record,
2 reflects no working definitions of these forbidden
3 topics, no guidance on how they actually analyze grants
4 for these topics, and in fact includes the line, which
5 is very telling, where when asked to provide or
6 elaborate on the analysis, the document says explicitly,
7 "No details are necessary." That's what the agency was
8 saying from the top down.

9 Third, and still in the reasoned decision-making
10 province, is that officials outside of NIH were calling
11 the shots here. What's clear from the record is that
12 the directives themselves are explicitly spelling out a
13 process where HHS is directing and identifying these
14 terminations, so that NIH officials are in turn just
15 rubber-stamping them, not providing any review, and in
16 fact are required to issue termination letters.

17 For example, on March 25th, the revised priorities
18 directive at AR 3220, highlights that point, as does the
19 May 7th directive at AR 3554.

20 In addition to that, the drafting and
21 implementation of the directives also reflect this same
22 sort of outside influence. Individuals outside of NIH
23 were charged with identifying these grants, um, and that
24 included individuals at HHS, for example, Rachel Riley,
25 um, and in the record as well some individuals from the

1 so-called "Department of Government Efficiency," and
2 that includes an individual named Brad Smith, and that's
3 at AR 3752.

4 The point here is this isn't the sort of reasoned
5 decision-making that we would expect and is required
6 under the APA, what this is is a slap-dash harried
7 effort to rubber stamp an ideological purge. That is
8 not what the APA requires.

9 THE COURT: Well when you say an "ideological
10 purge," what do you mean?

11 MR. PARRENO: What I mean here, your Honor, is
12 that there had been statements in their directives that
13 had been put out in a conclusory and boilerplate manner
14 with no evidence and no data backing them up. What's
15 missing here is that sort of reasoned analysis that is
16 required of the agency.

17 Second, and I'll briefly discuss, um, the
18 about-face nature, because I believe Mr. Cedrone
19 addressed, in great detail, the reliance interests at
20 stake.

21 So this is an improper about-face in agency
22 policy. The issue here isn't that an agency can't
23 change its policy, it's that the APA imposes specific
24 requirements for such a change, especially where, as
25 here, there are underlying facts that, um, contradict

1 the new priorities or policies.

2 So when defendants, in their briefing, are talking
3 about this just boiling down to a policy-interest
4 disagreement, that's just plain disingenuous, the issue
5 here is that there's no explanation for why there was
6 this about-face. Defendants are right, there needs to
7 be an assessment and a reassessment, but there is
8 neither here.

9 And in the interests of time, I will just turn
10 very quickly to one question of jurisdiction, before
11 turning this over to Ms. Meeropol. My, um --
12 Mr. Cedrone has made a number of points in the
13 jurisdictional issue that we join as well, and it's
14 highlighted in our brief, but I would like to emphasize
15 that we still maintain that appeals of grant
16 terminations do not strip this Court of its
17 jurisdiction.

18 The terminations that were made pursuant to those
19 directives and the directives themselves are final
20 agency actions that are the consummation of
21 decision-making and have legal consequences. And
22 importantly, what the record shows repeatedly from these
23 termination letters is the sheer utility of these
24 terminations -- of, sorry, the appeal process of these
25 terminations.

1 THE COURT: And in fact the letters themselves
2 frequently say "No correction is possible," as I read
3 it.

4 Is that correct?

5 MR. PARRENO: "No correction is possible," your
6 Honor, and "The premise of this grant is incompatible
7 with agency priorities," and "No modification of the
8 project could align it with agency priorities." If
9 that's not futility, your Honor, I don't know what is.

10 So I'll go ahead and -- and if there's no more
11 questions about these two issues, your Honor, I will go
12 ahead and turn it over to Ms. Meeropol, who will address
13 the remedy issues.

14 THE COURT: Thank you.

15 Ms. Meeropol.

16 MS. MEEROPOL: Thank you, your Honor, Rachel
17 Meeropol from the ACLU.

18 I want to cover the APA plaintiffs'
19 contrary-to-law claims, the withdrawal of funding
20 opportunities, and the scope of vacatur. Based on your
21 Honor's questions so far this morning, I'd like to
22 actually start at the end and talk about vacatur first.

23 THE COURT: So would I.

24 Go ahead.

25 MS. MEEROPOL: Perfect.

1 So I agree with the way my colleagues from the
2 states have largely framed the issue, I'd like to take a
3 minute to talk about exactly what the scope of vacatur
4 looks like, um, should your Honor choose to set aside
5 agency action.

6 Setting aside agency action is an indivisible
7 remedy, and that means it necessarily benefits
8 nonparties. If the Court finds that the directives --

9 THE COURT: Wait a minute. Wait a minute. It may
10 have implications, but I've been clear from the
11 beginning, that's why I wanted this list of grants.
12 Suppose that's right -- I misspoke. Forgive me.

13 At best -- at best you're here, you've listed
14 these grants. If I accept these various arguments --
15 and we're just talking Phase 1 now, and I declare all of
16 these directives, um, arbitrary and capricious, void and
17 of no effect, this is -- I -- this is the United States
18 District Court, that has an effect on these litigants
19 who have standing who have challenged these grants.

20 Now once judgment enters under the -- the
21 judgment -- again assuming that you're winning here --
22 and don't take anything from that, but assume that. If
23 you win here, that's the judgment, because I -- either
24 way I propose to enter a judgment on Phase 1 just as
25 soon as I can to allow an appeal. So that -- well, um,

1 others who haven't sued, who haven't challenged their
2 grants, may well have to deal with the defendants in
3 other cases.

4 Is that legally incorrect?

5 MS. MEEROPOL: Your Honor has discretion to scope
6 -- to design the scope of relief in this case just as
7 you put forward.

8 THE COURT: All right.

9 MS. MEEROPOL: But give me 5 minutes for me to
10 attempt to convince you --

11 THE COURT: Go ahead.

12 MS. MEEROPOL: -- that you may issue an order that
13 is larger in scope. And here is why.

14 THE COURT: Go ahead.

15 MS. MEEROPOL: So first I would direct your Honor
16 to Justice Kavanaugh's concurrence in **Corner Post** where
17 he lays out the history of how the Supreme Court has,
18 um, looked at what it means to vacate or set aside an
19 agency action, and the degree to which even when
20 individuals who are not before the --

21 (Interruption zoom.)

22 MS. MEEROPOL: -- even when individuals are not
23 before the Court, they sometimes reap the benefit of
24 setting aside that agency action, and that is because
25 7062 is authorization by Congress to set aside the

1 agency's action that is far broader in scope than what
2 we think of as an injunction or sort of the concerns
3 that we've heard from courts recently about possible
4 nation-wide injunctions.

5 So if we look at the precedents that we've cited
6 in our cases. Um --

7 THE COURT: I want to follow your argument,
8 because I'm interested in it.

9 You're saying this is not a nation-wide injunction
10 issue, this flows from the Congressional intent -- and
11 you've cited a Supreme Court case, in passing the APA,
12 the statute which governs here?

13 MS. MEEROPOL: That's correct, your Honor.

14 THE COURT: And that's the basis of your argument?

15 MS. MEEROPOL: Yes, we can look at the language of
16 7062 itself, which says to set aside agency actions that
17 are arbitrary and capricious or contrary to law.

18 Looking at the leading D.C. Circuit case, um,
19 **Allied Video v. U.S. Nuclear Regulatory Commission** on
20 the question of whether a remand about vacatur is
21 appropriate, which is not an issue presented in this
22 case. When the D.C. Circuit actually looked to create
23 the, um, the various factors that courts should consider
24 about whether to remand about vacatur, one of the
25 factors was how disruptive is this decision going to be?

1 And the Court, in deciding in that case that vacatur
2 would be too disruptive, said that's because vacating
3 this rule would require the agency to refund all the
4 fees it had collected in that case, not just the fees of
5 individuals who were before the Court, but all of the
6 fees.

7 The APA allows agency action -- allows the Court
8 to set aside agency action that is unlawful and stops,
9 and the Court is empowered through that, not just to set
10 aside all of the unlawful terminations that our clients
11 and a number of our client organizations have put before
12 the Court, but that -- but if you look at how the Ninth
13 Circuit has put it, "Agency action that" --

14 THE COURT: I'm not sure that -- wait a second. I
15 just want you to use your time effectively, because I'm
16 responsive to this argument.

17 MS. MEEROPOL: Yes.

18 THE COURT: Assume you win, as to these grants, et
19 cetera, and you win in the manner that Mr. Cedrone, um,
20 framed it, that the directives are declared arbitrary
21 and capricious, have no force an effect, in essence are
22 illegal, as are the terminations to these contracts --
23 to these grants, not contracts. All right, suppose
24 that. Now -- and that's as far as we go.

25 I'm sensitive to the fact that this is an equity

1 case, that's why there's no jury sitting there, and
2 whatever I do in a written opinion, or conceivably
3 however I express myself today, or in the near future --
4 and I say this with respect, you people aren't going
5 away, we're going to be back here. Isn't that an issue
6 that I need not reach today? But you're not giving it
7 away if you answer "Yes." So as I would say, if it was
8 a trial, "Your rights are saved." Well it is a trial,
9 but if it was a jury trial.

10 Do you hear what I'm saying?

11 MS. MEEROPOL: I do. I do, your Honor. You need
12 not reach it. My point is that you are empowered to
13 reach it. And that is because agency action that is
14 taken in violation of the law is void, it has no legal
15 impact, and this Court can set aside all the actions
16 that flowed from the directives.

17 And that's a good segue, if I may, because I see
18 that I'm already short of time and I do want to make
19 sure to talk a little bit about the withdrawal of
20 funding opportunities. Unless your Honor wants to talk
21 more about vacatur?

22 THE COURT: No, no, only on the part that I pushed
23 back on him, on Mr. Cedrone. He says, "Look we live in
24 the real world," he says "Now, if you're going to enter
25 judgment on this part -- win or lose, if you're going to

1 enter judgment, if it goes our way, we want an
2 injunction in the real world." And I'm saying, "Well
3 wait a second, once I've explained the law, you know one
4 can presume" -- I always did back when I was a Superior
5 Court Justice and the executive was the Commonwealth of
6 Massachusetts, I rarely entered an injunction -- and
7 Mr. Cedrone, coming from that office, can go back and
8 check, because once you've told them what to do, they'd
9 appeal of course, and I welcomed it. But they do it.
10 And he says, "Well, real world, Judge, that's not going
11 to happen today, we need an injunction."

12 But what I'm asking you. If I were to stop short
13 of an injunction, but, well, you win otherwise -- maybe
14 not as far as I'm listing here, but for today, if that
15 were to happen -- or when I get myself together, um, if
16 that were to happen, um, don't you think they'll follow
17 a reasoned opinion?

18 MS. MEEROPOL: I would hope so, your Honor.

19 THE COURT: Well more than that, you'd expect it.

20 MS. MEEROPOL: I would expect it last year, I
21 don't know if I would expect it this year.

22 THE COURT: Well let's be clear, I do expect it.
23 Well enough on this, I do expect it. If that were to
24 happen, I expect it. And again, nobody's going
25 anywhere.

1 MS. MEEROPOL: We certainly aren't, your Honor.

2 THE COURT: Suppose it doesn't, we'll all be in
3 this courtroom again and then I'll have that record
4 before me. But that's not for today.

5 Go ahead as to what you want to cover.

6 MS. MEEROPOL: Um, before I move off vacatur, I
7 would just ask your Honor to look at one of the cases
8 we've cited in our briefs, um, **Montana Wildlife**
9 **Federation vs. Holland**, which is a case where the Court
10 vacated a Bureau of Land Management policy around oil
11 and gas leases, and then vacated all of the leases under
12 that policy, not just the ones belonging to the parties
13 that were before the Court. In fact the lease owners
14 weren't before the Court at all, it was individuals
15 challenging those leases who were before the Court.

16 And now I'll move on to the withdrawal-of-funding
17 opportunities. I want to be clear on what we're
18 challenging here and what we're not, um, because our
19 perspective on this is slightly different than what I
20 think we've heard so far this morning. And that's
21 because the withdrawal-of-funding opportunities had
22 several different legal consequences here.

23 First, the withdrawal-of-funding opportunities
24 require -- the directives themselves require
25 unpublishing these massive numbers of funding

1 opportunities, and they also require terminating multi-
2 year grants by prohibiting noncompetitive renewals under
3 the unpublished notices of funding opportunities. And
4 we cited cases in our briefing, um, most notably **Policy**
5 **and Research LLC**, which explains that a failure to
6 provide a noncompetitive renewal is tantamount to a
7 termination and must be reviewed by the Court in the
8 same way. And finally, because of the unpublishing, the
9 directives prohibit the award of new grants under
10 unpublished notices.

11 THE COURT: But that leads me to this. What is it
12 you want me to do beyond declaring the directives and
13 these non -- to take down these opportunities, void and
14 of no effect, what more? Yeah, that's my question.

15 MS. MEEROPOL: Unwind all of the implementation of
16 the directives. Require that NIH republish the funding
17 opportunities that were unpublished in an arbitrary and
18 capricious manner. Require that NIH vacate the
19 terminations that occurred under those unpublished
20 notices-of-funding opportunities through the failure to
21 award competitive renewals. And order NIH to act on the
22 applications that were pending before it when it
23 unpublished the notices-of-funding opportunities.

24 THE COURT: Well if the bar to action is removed,
25 isn't that what we've been talking about, one expects

1 they'll go on and do what they're supposed to do, which
2 is act.

3 MS. MEEROPOL: Well certainly the regulations
4 require them to do so. The regulations require that
5 they evaluate every application that has been submitted
6 taking into account scientific merit and through the
7 peer-review process. But they have not done that for
8 each of these unpublished, um, notices-of-funding
9 opportunities. They haven't denied the application.
10 They haven't delayed the application.

11 THE COURT: It's undisputed. It's undisputed, the
12 record, of what's happened. Yes.

13 So again, suppose the directives are void and of
14 no effect, suppose that, and, um, I agree with you,
15 suppose these, um -- the effect of requiring competitive
16 review year by year stifles multi-year grants, I
17 understand that, so suppose I knock that out, um -- just
18 suppose it, then things will go on, won't they?

19 MS. MEEROPOL: Yes, but in the interest of
20 absolute clarity and to ensure NIH takes the steps it is
21 regulatorily required to take -- and it is not doing so
22 right now, despite the regulations require it, we think
23 in the interest of ensuring that --

24 THE COURT: Well it's not doing it now because
25 it's following the directives that, as we stand here

1 today, are in effect.

2 MS. MEEROPOL: Yes, that's certainly correct, your
3 Honor, and certainly vacating the directives is the most
4 essential component of the relief that we are seeking
5 under the APA here. But the agency may need to be
6 explicitly told that vacating the directives means
7 unwinding all ways in which the directives have been
8 implemented, and that includes their unpublishing of
9 funding opportunities and their refusal, in violation of
10 the regulations, to act on those applications through
11 the peer-review process, through an evaluation of their
12 scientific merit.

13 Now if I may, your Honor, I'd like to turn to our
14 contrary-to-statute arguments briefly. And here, um, I
15 would just start by saying that, you know, it is clear
16 that Congress has mandated that NIH increase diversity
17 in the biomedical research field, and that excludes
18 through NRSA training grants and early-career
19 investigator opportunities. So I want to highlight, um,
20 a stark take away from the briefs and the record.

21 THE COURT: And the statute is the PSHA?

22 MS. MEEROPOL: The PSHA, but also, if you look at
23 288(a)(4), that sets forth, um, NRSA training
24 requirements, and 283(0)(b)(2) talks about recruitment,
25 um, in the context of early-career investigators.

1 THE COURT: These are statutory requirements?

2 MS. MEEROPOL: Statutory requirements, yes, your
3 Honor.

4 THE COURT: Thank you.

5 MS. MEEROPOL: As we explained in our opening
6 brief, every single program created by NIH specifically
7 geared to increasing the diversity of the biomedical
8 research field has been terminated.

9 THE COURT: 5 more minutes.

10 MS. MEEROPOL: Thank you, your Honor.

11 Because I have 5 minutes, I want to make sure I
12 say one thing and then I'm going to come back to the
13 statute, if you'll bear with me here.

14 THE COURT: Sure.

15 MS. MEEROPOL: I do want to say that defendants
16 have challenged standing only with respect to the
17 withdrawal of the notice-of-funding opportunities. And,
18 um, on the other hand, they have never challenged the
19 standing of our individual plaintiffs. But we have an
20 individual plaintiff, Ms. Dee Mathis, who has explained
21 that she applied for a mosaic grant, which is one of
22 these unpublished opportunities, and she explains how --
23 because the opportunity was unpublished, even though she
24 knows her application was reviewed, she never got the
25 benefit of that review, and she's had no action on her

1 application.

2 So I just want to be clear that, to the extent
3 their complaint about standing is about the failure to
4 provide an individual who has, um, applied for one of
5 these opportunities, we very clearly have one of those
6 individuals.

7 Moving back to contrary-to-statute. We explained,
8 in our opening brief, that every single program created
9 by NIH specifically geared at increasing diversity has
10 been cancelled, while the training programs that don't
11 focus on increasing diversity have been retained. And
12 the administrative record your Honor has just received
13 bears this out.

14 I could read the record cites right now of a case
15 that would be helpful to your Honor, because we weren't
16 able to put that into our briefing, um, but I'm
17 conscious of time, so I'm going to base that on -- your
18 Honor told me not to, so I won't do it.

19 So, for example, the mosaic grant cancelled at AR
20 4309. The Mark program cancelled at AR 3741.

21 THE COURT: Just so you know, I'm not saying don't
22 do it.

23 MS. MEEROPOL: Okay.

24 THE COURT: No one's going anywhere, no one has
25 precluded post-hearing submissions.

1 MS. MEEROPOL: Should your Honor --

2 THE COURT: We talked about our procedure. You
3 say -- the point you're making is the conclusory point,
4 every single program designed to address or increase
5 diversity is cancelled. That's what you're saying?

6 MS. MEEROPOL: That's what I said, and they have
7 not disputed it, and the record bears it out. But we
8 would also appreciate the opportunity, if it would aid
9 your Honor, to provide a list of the citations for the
10 new record.

11 THE COURT: I have not told you not to.

12 MS. MEEROPOL: Okay.

13 Finally, NIH also must prioritize research into
14 health disparities and minority health issues.
15 Defendants insist that they're only prohibiting DEI,
16 that they still fund health-disparities research. But
17 the record shows that a grant about cervical cancer
18 screening and follow-up delays among Latinos was
19 terminated as being --

20 THE COURT: But Mr. Cedrone made the point that at
21 least at the time of this action, DEI was nowhere
22 defined, isn't that right?

23 MS. MEEROPOL: That's correct. And we know from
24 the way they're implementing the directives, that NIH
25 understands DEI to include medical research into who

1 bears the burden of disease in this country, which is
2 precisely what Congress has mandated for research. They
3 are targeting here exactly what Congress has required
4 them to research.

5 And your Honor asked about the degree to which
6 there's discrimination happening here. And I do think
7 it is through the contrary-to-statute claim argument
8 that your Honor can get at the way research that, um, is
9 essential to ensure minority health -- not just majority
10 health in this country, is being terminated.

11 If your Honor has no further questions, I'll sit
12 down.

13 THE COURT: Thank you.

14 Mr. Ports.

15 MR. PORTS: Thank you, your Honor. Tom Ports from
16 the United States Department of Justice.

17 Your Honor has asked some very practical questions
18 and, um, defendants would like to walk through the case
19 in a practical manner, and we believe that doing so
20 leads to the conclusion that we should win. And so I'll
21 walk through in five steps along the lines of what I
22 think the Court will want to address and what it has
23 shown interest in.

24 So the first thing that needs to be determined is
25 what is the final agency action? We say it's the grant

1 terminations, they say it's something else, and that
2 could be a couple of things, and we'll talk about that
3 first.

4 Second, what was the agency's reasons for the
5 terminations? Everyone agrees these are laid out.
6 There are a finite number of them. We've walked through
7 them in our briefs. We say they're sufficient. They
8 say they are not. And we can talk about that.

9 The question is -- or third, do those reasons
10 analyze, examine the pertinent evidence, consider the
11 relevant factors, and articulate a satisfactory
12 explanation, including a rational connection between the
13 facts found and the choice made? We believe it does.

14 Moving on to four. Assuming we survive those
15 reviews, have plaintiffs proved that it's, for some
16 other reason, in violation of the statute or regulation?

17 And then the last, if the Court nonetheless
18 determines the defendants lose, what exactly should the
19 order do here? And address remedy.

20 Starting at the top, which we believe is very very
21 important and underlies the Court's questions and what
22 the Court was driving at, um, if your Honor doesn't
23 mind, we have printed each of the 8 so-called
24 "challenged directives," we have them in a binder, and
25 for convenient reference we think it's helpful to look

1 at each of them, um, because that's -- well it goes back
2 and forth. There are, I guess, three ways to look at
3 the terminations here -- or four really.

4 One thing as, um, I think the state plaintiffs are
5 most explicit in saying, is the challenge here is to the
6 agencies selecting a policy, setting a priority, a
7 research priority. So that's Number 1, is just they
8 challenge the agencies setting up research priorities
9 that they don't agree with, and they think that it --

10 THE COURT: Well that's not how they frame it.

11 MR. PORTS: Your Honor, it's been a few different
12 things. I believe Mr. Cedrone said that they're not
13 necessarily challenging these 8 challenged directives,
14 they are challenging, quote, "the underlying policy,"
15 "the underlying research priority decision," and that is
16 exactly what Mr. Cedrone said, and that's one way to
17 look at it. So we can look at these 8 documents or we
18 can look at the challenge to the research priority. We
19 think both of those would be inappropriate and we'll
20 explain why.

21 Other options? I guess there's two more. We can
22 look at the e-mails directing terminations that have a
23 -- that collect a series of grants. Now those are
24 directives to terminate. And then we have what we
25 believe is the true final agency action, the

1 terminations themselves. This meets Stephanie Spears'
2 two-prong test that represents the final decision of the
3 agency, is the consummation of the decision-making
4 process, and it has legal effect to terminate the
5 grants. So that is what defendants believe you're
6 ultimately looking at and these are listed on the
7 spreadsheets the plaintiffs have presented here.

8 So starting at the top. These so-called
9 "challenged directives" do not meet -- unlike the
10 terminations don't meet the Stephanie Spears' test.

11 (Interruption zoom.)

12 If we look at Tab Number 1, the first tab, this is
13 a policy directive. It says "Stop sending out
14 miscommunications until the presidential appointee or
15 some political appointee has reviewed a new
16 publication." This is standard. It happens when a new
17 administration comes in. It ended before the lawsuit.

18 We don't think this is a challenged directive that
19 they care about so much here. Now it did lead to
20 delays, we acknowledge that, and because meetings were
21 cancelled for a time, meetings have since restarted.

22 Defendants mentioned in the status conference that
23 we would ask the Court to take judicial notice of the
24 Federal Register notices that we have cited that, um,
25 say so. We have physical copies of those for all the

1 parties, if the Court would like them, otherwise they
2 are cited in our brief, and they're simply Federal
3 Register notices saying that NIH has scheduled meetings.
4 So if the Court would like these --

5 THE COURT: So the record is clear, I'm prepared
6 to take judicial notice of the Federal Register --

7 MR. PORTS: Thank you, your Honor.

8 THE COURT: -- that the Federal Register says what
9 it says.

10 MR. PORTS: Yes, your Honor, thank you.

11 Moving on to the second so-called "challenged
12 directive." This is the February 10th Secretarial
13 Directive on DEI-related funding. It expresses a policy
14 preference and it implements a review. It says "grants
15 may be terminated."

16 So here we do know that NIH is setting a research
17 priority preference and it's conducting a review. It
18 hasn't made any decision to terminate -- well this
19 document does not terminate or direct any terminations,
20 that is not in here, it's conducting a review, we don't
21 believe that to be final.

22 Next is the February 12th directive. This is the
23 first so-called "Lauer memo." This directive says,
24 based on various injunctions and Court orders, you know
25 "Follow those directives, follow those orders, resume

1 issuing grants, and just make sure everything proceeds
2 without -- without respect to, um, research priorities."
3 There's no harm from this directive to plaintiffs, this
4 is not something that they, um, that we've been saying
5 they could challenge and try to set aside.

6 The next document, Number 4, Challenge Directive
7 4, February 13th, it's a supplemental Lauer memo. This
8 says they're, um, "restricting funding where a program
9 takes part in DEI, which is to remain in place until the
10 review's complete." So again, this doesn't terminate
11 any grants, it places a temporary restriction. It was
12 subsequently terminated. This directive here was
13 superseded, this is no longer in effect. Instead, um,
14 it's been replaced and rescinded. So that is no more.
15 It didn't direct terminations in the first instance and
16 it has been rescinded regardless.

17 Number 5, we reach the February 21st, Dr. Memoli
18 memo. This one expresses a need to ensure that NIH is
19 not supporting low-value and off-mission projects. It
20 does express a research priority.

21 THE COURT: It does not define "DEI"?

22 MR. PORTS: No, your Honor, it does not. And I'll
23 touch on that in a moment.

24 It ultimately says that programs that do not meet
25 priorities may be terminated. Similarly this directive

1 does not direct anyone to enter any terminations.

2 Moving on to Number 6. Importantly, before we
3 move on to Number 6, it's important to note here that
4 terminations occurred. Dr. Memoli directed the
5 terminations after Number 6 -- or after Number 5, I
6 apologize, and before Number 6. So after his memo,
7 before any of the Bulls guidances started. So there are
8 three guidances on -- signed by Michelle Gould and the
9 terminations occurred before that.

10 So to the extent that any of these three are the
11 challenged directives, terminations that preceded them
12 cannot be affected by these. And we'll note that
13 nothing before this had said "You must terminate
14 anything," they just expressed priorities sadly to
15 terminate and the termination occurs by an e-mail
16 directive attaching a list of grants.

17 Looking at the Bull's directives.

18 THE COURT: Well where are we now? We're at 6?

19 MR. PORTS: Yes, your Honor, we're on Number 6.
20 This is labeled March 20, 2025. It's the first Bulls
21 guidance. And it walks through not issuing a solely --
22 a grant solely based on a deprioritized filing and how
23 -- well, first of all, it rescinded the February 13th
24 memo. But it walks through priorities on what to do to
25 adapt to make sure that research products that have

1 scientific value, in the judgment of NIH and its
2 priorities, should be able to continue, while removing
3 parts that, um, that NIH does not want to fund. And it
4 is not directing any terminations, this is an entirely
5 prospective guidance about future grants.

6 Number 7, the second Bulls guidance. This one
7 here refers to essentially the language and other things
8 and they refer to -- essentially Dr. Memoli made a
9 decision, sent terminations, and this talks about the
10 language to use when implementing the terminations,
11 which are a separate directive from Number 7. So again
12 this isn't telling anyone to terminate things, it's just
13 saying "Where we have a decision, this is what to do."

14 And, um, the third of those Bulls guidances,
15 Number 8, um, this is -- it suffers the same problems as
16 the first two. So this one isn't helpful.

17 If we turn to the most --

18 THE COURT: I don't understand what you just said
19 about 8?

20 MR. PORTS: I apologize, your Honor.

21 This is similarly not final, it does not direct
22 any terminations, it's involved in a review, it's
23 involved in like the agency's management of its process,
24 so the terminations are --

25 THE COURT: So where do these thousands of the

1 terminations come from?

2 MR. PORTS: These terminations actually were made
3 by Dr. Memoli, your Honor. I get there's two -- the
4 termination decisions are made by Dr. Memoli attaching
5 --

6 THE COURT: All of the ones we're concerned with
7 here?

8 MR. PORTS: Any termination, yes.

9 THE COURT: All right.

10 MR. PORTS: So that if the challenge is to not
11 issuing a grant, issuing a future grant --

12 THE COURT: And he did that over a short period of
13 time, didn't he?

14 MR. PORTS: Your Honor, the plaintiffs do
15 challenge the amount of time that he took to actually
16 review these spreadsheets after receiving them and argue
17 that that is arbitrary and capricious. And that is, we
18 would say, your Honor, a question, a challenge to the
19 termination, the e-mail termination, whether that was
20 arbitrary and capricious, which is separate from the
21 research priority. And that is a more narrow ruling and
22 is appropriate -- is more appropriate to review than a
23 broader policy statement of what NIH will prioritize or
24 will not prioritize.

25 THE COURT: Wait a minute. Okay, now I'm

1 appreciating your argument, and I want to appreciate it.
2 Here's what I heard you just say.

3 If this Court were to vacate certain terminations
4 or all of the terminations based on the conduct of
5 Dr. Memoli, that result, from your point of view, is
6 preferable to an opinion that takes issue with these
7 challenged directives on the ground, as I hear your
8 argument, that they either don't direct the terminations
9 or state policies of HHS and NIH, which are beyond the
10 purview of this Court, they have the right to their
11 policies.

12 Do I understand?

13 MR. PORTS: Yes, your Honor. We're moving down a
14 funnel essentially from a very broad statement of "These
15 are policies" and then you have the e-mails directing
16 terminations, and then we have the actual final agency
17 action that represents the consummation and the agency's
18 reasons, which are the termination letters which are
19 sent pursuant to that e-mail. And so we believe that
20 it's the letter that is the termination and it's the
21 notices of awards that are amended that represent the
22 final agency action.

23 THE COURT: So this Dr. Memoli, when he scurries
24 around and does whatever he does, he does that, I take
25 it -- but I have to review the record more thoroughly,

1 he does that pursuant to e-mails, right?

2 MR. PORTS: Um --

3 THE COURT: I mean where does he get his
4 direction?

5 MR. PORTS: The decisions to terminate grants were
6 Dr. Memoli's decisions, is that what you're asking, your
7 Honor? He's making the decisions based on --

8 THE COURT: I'm asking how it works, as a
9 practical matter, as an existential matter?

10 MR. PORTS: The record here shows that Dr. Memoli
11 received these lists of grants --

12 THE COURT: That's a careful answer, but I'm
13 asking you -- to the extent that you know, and you're an
14 Officer of the Court, as a practical matter, how did we
15 get from these challenged directives to these -- and
16 I'll focus just on the terminations that are before this
17 Court, and if it's Dr. Memoli who did it, what was he
18 looking at when he made those determinations? Beyond
19 the grants themselves, what instructions was he looking
20 at? I'll ask that.

21 What was he looking at?

22 MR. PORTS: Sure, your Honor.

23 So to -- to answer the question as to the
24 challenged directives, how do we get from the challenged
25 directives to Dr. Memoli's directive to terminate grants

1 that are attached to the e-mails? I will say, first of
2 all, that the last three challenged directives, 6, 7, 8,
3 the Bulls directives, they have nothing to do with
4 Dr. Memoli's directive to terminate, these are sort of
5 instructions to ICs about their reviews and about any
6 future grants to --

7 THE COURT: "ICs" are who?

8 MR. PORTS: "Institutes and Centers." NIH is
9 divided into --

10 THE COURT: Understood, they're the various
11 defendants here.

12 MR. PORTS: So these last three have nothing to do
13 with that.

14 The February 21st Memoli memo states his
15 priorities. And now as far as the -- the details of --

16 THE COURT: Well that's an order, isn't it?

17 MR. PORTS: It is a statement of his priorities
18 and a statement of things that may be terminated
19 pursuant to them, but it doesn't terminate anything,
20 it's a statement of research priorities, your Honor.

21 THE COURT: Which goes out to the various
22 subinstitutes, the ICs?

23 MR. PORTS: Yes, your Honor, it informs them of
24 Dr. Memoli's priorities and states that they may be
25 terminated and --

1 THE COURT: And he's the man, I mean he's the --
2 in a bureaucracy, he's the one who's giving the
3 directives?

4 MR. PORTS: He is the Acting Director of NIH, your
5 Honor, yes, he has that authority.

6 THE COURT: I see.

7 MR. PORTS: And then the directives are sent --
8 the determinations directed to terminate are sent by
9 him, they are his decisions, um, and that is my -- that
10 is my understanding, as an Officer of the Court, of the
11 statements. And otherwise the details of his review and
12 what he did, I can't speak beyond the record.

13 THE COURT: And I'm not asking you to. The record
14 is what it is, the timing and the like. And I thank
15 you.

16 Go ahead.

17 MR. PORTS: Um, thank you, your Honor.

18 So that was the -- what is the program. But what
19 is the challenged -- if the Court is setting something
20 aside, holding something to be arbitrary and capricious,
21 that is, getting towards "What could be that be?"
22 Again, the defendants submit it is the ultimate
23 terminations of, um, grants, not anything earlier,
24 because all of the earlier things are --

25 THE COURT: I understand. You've made that point.

1 MR. PORTS: Thank you, your Honor.

2 Next we address what are the agency's reasons in
3 any given termination?

4 As the parties recognize, there are a handful of
5 reasons why Dr. Memoli directed the termination of
6 grants. The language is provided, that is provided in
7 each grant termination decision. And, um, we in our
8 briefs walk through why we believe it doesn't meet the
9 arbitrary and capricious standard.

10 And we will start by saying the standard of
11 arbitrary and capricious, there is a presumption that it
12 is valid. It need only be reasoned. A Court will
13 uphold a decision of less-than-ideal clarity if the
14 agency's path is discernable. And in our -- in our
15 brief, um, we --

16 THE COURT: Looking at these letters, and I've
17 looked at many of them, they're ipse dixit, there's no
18 support. The action must be both reasoned, as I
19 understand the controlling law, reasoned and reasonable.
20 And in an earlier hearing I asked -- I looked at some of
21 this conclusory language and I said, "Well I didn't
22 understand that."

23 Is that so, that they are not, um, leading to
24 valid results, they're not expending the money
25 correctly? How do I know that? I know they say that.

1 MR. PORTS: 10.

2 THE COURT: And on Page --

3 MR. PORTS: 10, which is 3226.

4 THE COURT: Thank you very much. I'm on Page 10.

5 MR. PORTS: And just looking at the second bullet
6 point, your Honor.

7 Now it does not say "Terminate DEI grants," and
8 leave it without definition, the agency's stated reason
9 is, quote: "Research programs based primarily on
10 artificial and nonscientific categories" --

11 THE COURT: No, it doesn't say that, it starts
12 saying, "DEI," and then your point is there's a colon?

13 MR. PORTS: Correct, your Honor.

14 THE COURT: All right, I follow. I'm reading it.

15 MR. PORTS: "Research programs based primarily on
16 artificial and nonscientific categories, including the"
17 --

18 THE COURT: Yes, and it has the language which so
19 many of these -- go down to the sentence, "Worse,
20 so-called 'Diversity Equity and Inclusion,'" and then
21 comes the dread quote: "DEI are often used to support
22 unlawful discrimination." Where's the support for that,
23 any support, any rational explanation?

24 You see I do understand. Believe me, I understand
25 that the extirpation of affirmative action is a -- is

1 today a valid government position. I understand that.
2 Affirmative action had various invidious, um, calculus
3 based upon race. I understand that. But that's not a
4 license to discriminate.

5 So I'm asking you, just explain to me, um, "often
6 used to support unlawful discrimination," I see no
7 evidence of that? I mean in this record, point me to
8 anywhere in this record where it's pointed out that any
9 particular grant or group of grants is being used to
10 support unlawful discrimination on the basis of race.
11 From what I can see, it's the reverse. But, um, point
12 it out to me.

13 MR. PORTS: Thank you, your Honor. Beyond the
14 statement here, I -- there's nothing that I can point
15 the Court to as far as --

16 THE COURT: I understand. All right. So that's
17 as close to a definition as we've got?

18 MR. PORTS: That is the agency's reasoning.

19 THE COURT: I do understand, that that's what's
20 proffered.

21 Go ahead.

22 (Pause.)

23 MR. PORTS: Thank you, your Honor.

24 Now moving on to the fourth topic then, the
25 terminations do not violate laws or regulations. Here

1 the plaintiffs -- first of all, if the Court determines
2 that these are arbitrary or capricious, or an abuse of
3 discretion, there's no need to reach this question. But
4 if the Court were to reach the question, um, we find the
5 regulation does not violate -- the terminations don't
6 violate the regulations because the, um, the relevant
7 regulation, 45 CFR 75 at 372 is --

8 THE COURT: I'm more concerned -- actually forgive
9 me for interrupting, but just to be transparent.

10 With respect to the interpretation of the
11 regulations, I've got to reflect on the particular
12 challenged regulation and the like. But how much is the
13 statutory language that Congress has used? Don't --
14 don't these directives, and isn't the practical effect
15 of these terminations flat-out violate what Congress,
16 the people's representative, has, um -- who have enacted
17 it into law, don't they violate it?

18 MR. PORTS: Respectfully, your Honor, no, they do
19 not. And we'll start with, um, here plaintiffs have --
20 at least the APHA plaintiffs, as we say in our response
21 brief, admit that in order to construe these
22 terminations as prohibiting research into health
23 disparities, they need to be "recast," that is the word
24 they use. And research into health disparities? NIH
25 has renewed research into health disparities, including

1 research that requires that the researchers themselves
2 be members of the health disparity communities.

3 And so we would submit, and I state it as well in
4 the hearing, that the defendants intended to offer, um,
5 examples of 13 grants that NIH has not terminated, that
6 many of them have been renewed after the challenged
7 directives that authorized research into health
8 disparities, minority-related health, and topics along
9 those lines. That, we would submit, clearly cannot be
10 what the intent is here and that none of these laws --

11 THE COURT: What cannot be what the intent is?

12 MR. PORTS: To unlawfully discriminate, in some
13 sort of way, um, is the -- is the question that was the
14 concern.

15 THE COURT: The fact that you have allowed and
16 reinstated 13?

17 MR. PORTS: I apologize, your Honor?

18 THE COURT: Is that what you -- is that your
19 argument? I'm trying to understand. The fact that
20 you've reinstated 13?

21 MR. PORTS: Well, your Honor, these are examples
22 of other grants that have been renewed after the
23 challenged directives that authorized research into
24 health disparities and required that members of the
25 health disparity community be researchers. And so the

1 assertion that this is a prohibition on that type of
2 research, which is favored by certain statutes, is
3 factually incorrect.

4 THE COURT: But you agree that it's favored by
5 certain statutes. It's favored? It's required. It's
6 not "favored"?

7 MR. PORTS: Well respectfully, your Honor, we
8 would look at the statutes and I would argue that the
9 language and the terminations do not violate the
10 statutes.

11 So to take an example, um -- looking at the
12 statutory language. So -- but before I do that, your
13 Honor, I would like to move into evidence, um, certified
14 records of the notices of award.

15 THE COURT: Well could you answer that question?
16 You were about to and I'm very interested in the answer.

17 MR. PORTS: Yes, your Honor, I just didn't want to
18 forget to --

19 THE COURT: The statutory language.

20 MR. PORTS: Yes, your Honor.

21 So I'm looking at Page 26 of the States' brief,
22 that's 126, it uses the language here:

23 "Challenged directives prohibiting research
24 related to gender identity runs headlong into a
25 provision instructing the NIH Director to, quote,

1 'encourage efforts to improve research related to the
2 health of sexual and gender minority populations,' 42
3 USC, Section 283(p)."

4 And I'll note that that is the section that -- my
5 example is the section that the States called out in its
6 opening remarks.

7 If we look at the -- if we turn back to the
8 document that we were looking at before, Tab 8, Page 10,
9 3226, "Transgender Issues:"

10 "Research programs based on gender identity are
11 often unscientific, have little identifiable return on
12 investment, and do nothing to enhance the health of many
13 Americans. Many such studies ignore, rather than
14 seriously examine biological realities. It's the policy
15 of NIH not to prioritize these research programs."

16 Your Honor, this statement here about the
17 terminations is, in the judgment of NIH, "Improving
18 research related to the health of sexual and gender
19 minority populations." It is the judgment that this
20 research is not -- is not scientifically valuable, and
21 it is --

22 THE COURT: Wait. Wait a minute, please. And I'm
23 truly trying to understand.

24 You just quoted to me, and I believe accurately,
25 the statute, where you started, quote, "Encourage

1 efforts," and then you jumped from there to this
2 language in your Tab 8, Page 10, which I'm looking at.

3 MR. PORTS: Yes, your Honor.

4 THE COURT: And you say somehow the language in
5 Tab 8 encourages these efforts that Congress has
6 required?

7 MR. PORTS: Your Honor, the key language is "to
8 improve research." And this is a judgment that this
9 research, although arguably related to sexual and gender
10 minorities, is not good research to pursue.

11 THE COURT: Despite what Congress has said?

12 MR. PORTS: Your Honor, respectfully Congress has
13 not said that research programs based on gender
14 identity, it's not what this says, it says "improve
15 research related to the health of sexual and gender
16 minorities." And this -- the Secretary or the Director
17 of NIH can make a judgment on what is an improvement of
18 research and what is research that is not worth
19 pursuing. And by not pursuing research that --

20 THE COURT: So Congress has -- in other words, I
21 recognize that legislation is difficult, and it is, it's
22 a difficult government endeavor, and so because of the
23 language they have used -- of course the Congress has
24 never dealt with an administration that has taken the
25 positions that this administration has. So, um, they're

1 writing in a different milieu, I suggest to you.

2 But "encouraged efforts," you think that mandate
3 -- I read that as a mandate of the people's
4 representatives assembled in Congress, and they have now
5 made that law. The Director has decided that, um, in
6 his judgment, um, that this is not, um -- I want to be
7 fair to the specific language, he says, it's his
8 judgment that "Such, um, research, um, does not," I take
9 it, Dr. Memoli, in his judgment, um, "is not valid
10 research."

11 Is that correct?

12 MR. PORTS: The key language, your Honor, in the
13 statute is to "improve research," and that leaves a --
14 that leaves a great deal of discretion to HHS and NIH to
15 say what is "improving research." And this is not
16 valuable and it's a --

17 THE COURT: Thank you. Thank you, that answers my
18 question, it's that language -- Congress's mandate, you
19 point out, is to "improve research." And he decides
20 this doesn't improve research?

21 MR. PORTS: Yes.

22 THE COURT: But it's not explained anywhere, um,
23 how that's so, um, beyond the edict here? Correct me.
24 It isn't explained? It's a judgment, but it's not
25 explained?

1 MR. PORTS: Your Honor, I have nothing beyond the
2 agency's stated reasoning for the termination.

3 THE COURT: Thank you. Understood.

4 Go ahead.

5 MR. PORTS: Moving on to other topics, um,
6 immediately following that. This is the next line from
7 the States' brief:

8 "The aspects of the challenged directives, the
9 States' characterization of blacklisting research
10 related to covid, cannot be squared with the statute
11 mandating the NIH Director to advance the discovery and
12 preclinical development of medical products for priority
13 virus families and other viral pathogens with the
14 significant potential to cause a pandemic."

15 First of all, your Honor, I'll note that, um,
16 although I have not reviewed all of the recently-filed
17 list of grants, at the time that we were writing a
18 response brief, based on the initial list of grants, we
19 didn't have any terminations for covid research. APHA
20 said in their reply that they did. I would respectfully
21 say that's mistaken, although a couple of them said
22 "covid" in the name of the grant. The reason given by
23 NIH for termination was "vaccine hesitancy."

24 But putting that aside, um, the reason for
25 terminating these grants was:

1 "The end of the pandemic provides cause for
2 terminating covid-related grant funds. These grant
3 funds were issued for a limited purpose, to ameliorate
4 the effects of the pandemic. But now that the pandemic
5 is over, the grant funding is no longer necessary."

6 Again this is not inconsistent with the statutory
7 language.

8 THE COURT: I heard -- and this is an expert
9 record and it's not evidence, but I heard recently that
10 300 people die a week in the United States from covid.
11 Of course probably an equal number die from the flu. I
12 don't know.

13 Go ahead.

14 MR. PORTS: So the language for termination is not
15 inconsistent with the statute here. Again, this is
16 NIH's judgment about what is a priority virus family.
17 Is covid still likely to cause a pandemic? And it says
18 that the pandemic is over. And so this is a judgment
19 call and it doesn't contradict the statute.

20 Again, with vaccines, just because a statute says
21 the word "vaccine" doesn't mean that the NIH must
22 prioritize research into vaccine hesitancy. The
23 language of the statute quoted by the state is to,
24 quote, "Support efforts" -- "Support efforts to," quote,
25 "develop affordable new and improved vaccines." There's

1 nothing in any of these directives about prohibiting the
2 development of affordable new and improved vaccines.
3 And that is so with each of these actions. They mention
4 some of the same words, but the actions are -- they do
5 not violate them.

6 The ultimate challenge is that the plaintiffs
7 disagree with NIH's conclusions or that, cited in the
8 conclusion, that NIH did this thing arbitrary and
9 capricious. But there's no violation of statutes here,
10 um, if we actually look at the statutes and look at the
11 language that NIH provided.

12 And that moves us on to the fifth point, which I
13 believe is the most, um, the one the Court just asked
14 about, and, um, that is that if the Court rules against
15 the defendants, what is the appropriate remedy here?
16 And, um, the ultimate question about what is the result
17 of the Court's order turns a lot on what the Court
18 determines to be the final agency action that it is
19 vacating and remanding.

20 And so the 8 challenged directives that we went
21 through have said -- none of them direct a termination,
22 require a termination, they set priorities. And so, um,
23 it's difficult to -- vacating them similarly doesn't
24 reverse the termination, those are separate decisions,
25 separate actions.

1 THE COURT: And that may be right. I mean
2 Mr. Cedrone made it clear that he was seeking, if that
3 was where the Court went, not to stop with any one or
4 more of these challenged records, but to vacate the
5 termination orders.

6 MR. PORTS: Yes, your Honor.

7 THE COURT: And your position?

8 Go ahead.

9 MR. PORTS: And our position is that if the Court
10 vacates the termination orders, then that reinstates the
11 grants. There's no need for a preliminary injunction.
12 If that's what the Court said it would do is what it
13 would do, then the defendants would comply.

14 THE COURT: It is my duty to ask you, and I do so
15 both with respect and the utmost seriousness, were I to
16 do that, are you going to -- is the agency -- I'm not
17 talking about you. Are the defendants here, starting
18 with the Cabinet Secretary and other high officials, the
19 now Director of the NIH and the individual ICs, are they
20 going to -- preserving all their rights to appeal, if I
21 were to do that, are they going to obey promptly?

22 MR. PORTS: Yes, your Honor, I would expect the
23 defendants to comply.

24 THE COURT: You expect them to comply?

25 MR. PORTS: Your Honor, there is a presumption

1 that the defendants will comply.

2 THE COURT: There is a presumption they will
3 comply. And you're telling me, as an Officer of the
4 Court, you expect them to comply?

5 MR. PORTS: Yes, your Honor.

6 THE COURT: Thank you. All right.

7 MR. PORTS: I began moving in the certified
8 records that show the notices of awards that have been
9 not terminated that deal with the various topics that
10 plaintiffs say are prohibited. If I may move them into
11 evidence? They have a certification, a record of
12 regularly-conducted activity attesting to their
13 authenticity.

14 THE COURT: No objection to my receiving these?

15 (Silence.)

16 THE COURT: I hear none. They may be received and
17 they will be part of the record.

18 MR. PORTS: Yes, your Honor.

19 I will say that APHA had asked that -- so this is
20 a subset of the 16 initial grants that were listed as,
21 um, active at the time of the opposition to the PI. So
22 this is 13 that continue to be active. And they asked
23 to be moved in -- or they requested 26. This is 13 of
24 26. They requested the opportunity to move in the rest
25 as different documents. We do not object if they were

1 going to move for that, just to put that on the record.

2 THE COURT: So I'll take all 26.

3 All right.

4 MR. CEDRONE: No objection to them being received
5 into evidence preserving all arguments to the weight
6 they should be given, if any.

7 THE COURT: I understand that.

8 MS. MEEROPOL: And the same for the APHA
9 plaintiffs, your Honor.

10 THE COURT: In a multi party case the objection or
11 statement of one is the statement of the others, on that
12 side of the "versus," unless you want to take a
13 different position. They are received and part of the
14 record.

15 Thank you very much.

16 All right, now as we discussed, here's what's
17 going to happen. I'm taking this matter under
18 advisement.

19 At 2:00, Ms. Belmont is going to ask you whether
20 you want me to stay my hand, because you're talking. If
21 you both agree, you can be sure that the Court will
22 agree.

23 I've said, and I reiterate, that this case
24 warrants a thorough written opinion. I recognize that
25 we've only talked about Phase 1 and indeed we've talked

1 about the contours of Phase 1, and when I say a
2 "thorough written opinion," it's focused on Phase 1.
3 And at an appropriate time, however it comes out, I
4 would enter an order that the interests of justice are
5 that there be a separate judgment so it can be
6 immediately appealed by whoever wants to appeal.

7 If you say you want to -- if you tell her you want
8 me to stay my hand, the Court will honor it. If any of
9 you want to hear if I have anything to say, she'll tell
10 me that. I don't need to know who. It's up to me
11 whether I see my way clear to say anything at all today.

12 It goes without saying that I am very grateful
13 both for the briefing and the extraordinarily fine oral
14 arguments made by counsel. We'll take the matter under
15 advisement.

16 We'll recess.

17 (Recess, 12:50 a.m.)

18 (Resumed, 2:00 p.m.)

19 THE COURT: This case warrants and will receive a
20 full written opinion. At the same time, this case
21 commenced with a request for a preliminary injunction,
22 and the Court takes that very seriously. And the
23 parties, and I include all the parties, have stepped up
24 to afford the Court the chance to make findings and
25 rulings upon an adequate record.

1 I have worked on the case really since the day it
2 was filed. I still must further reflect upon the
3 extensive record, the extensive administrative record
4 before the Court, and I intend to do so.

5 But there are some findings and rulings that the
6 Court's efforts, aided by you all, and aided by the
7 Court's law clerks, that I'm able to make today, and in
8 the interests of justice, I'm going to do it, right now.

9 These are -- well let me start really by saying
10 what I'm not going to address, and nothing I say now
11 should, um, implicate or suggest any finding yet to be
12 made, though the Court reserves its right to make such
13 findings upon a more thorough review of the record or,
14 as we will see, as the record comes to be more fully
15 developed.

16 So I am not -- well I have limited today's
17 remarks, at least the first phrase, because I'm going to
18 stop and let you ask questions, and then I have
19 something else to say. But the first-phase remarks this
20 afternoon are limited entirely to the claims under the
21 Administrative Procedure Act, and nothing else.

22 Even as to the claims under the Administrative
23 Procedure Act, the Court makes no rulings. I have the
24 data on which I could make them, but I do not today make
25 any ruling on conflicts with the challenged directives

1 or terminations and the governing statutes and
2 regulations save -- that is the Administrative Procedure
3 Act itself is a governing statute. Likewise, um, I am
4 not today going to endeavor to interpret any of the
5 governing regulations.

6 There is evidence here that, um -- that these
7 directives are at least a part of the process that led
8 us to the terminations that, um, we are dealing with in
9 this case, there was some input of some sort by some
10 representative of DOGE. The Court makes no finding
11 either way -- either way as to that, but reserves its
12 right further to consider that matter.

13 The Court has expressed a concern, a very real
14 concern about discrimination here. I'll have more to
15 say about that after our break.

16 One of the things that concerns the Court is that
17 there is more than a little evidence here of, um,
18 discrimination on issues of women's health. I make no
19 such finding. I reserve the right to make that finding
20 should I come to be satisfied, by a fair preponderance
21 of the evidence, that such discrimination exists. So
22 those are the things I'm not making any findings on.

23 As to my remarks today, they are necessarily
24 conclusory. I've challenged the defendants for making
25 conclusory statements, and perhaps I'm going to make

1 some, but I do so only in the interests of justice and
2 for expedition, I am satisfied that everything I say now
3 is fully supported by the evidentiary record, and, um,
4 in the full written opinion I will, um, have ample
5 recourse to that record. And I reserve my right to make
6 further subsidiary, um, factual determinations, and draw
7 further legal conclusions. But what I say now decides
8 the points to which I speak, having in mind there's
9 going to be a full written opinion that will follow. So
10 let me address the first part of what I want to say.

11 The Court, on the administrative record, rules
12 that the parties before it have standing. The Court,
13 having carefully considered the briefs and the oral
14 arguments, treats the challenged directives as a whole,
15 as a process, does not break them down into discrete
16 paragraphs, and rules that when treated as a whole,
17 these directives constitute final agency action under
18 the Administrative Procedure Act, Sections 551 and 704.

19 When you look at these directives, 7 different
20 explanations are offered for agency action. The law, as
21 to the adequacy of such explanations, I -- I would take
22 it, though there are many cases, but the one I want to
23 refer to specifically is Judge Gorsuch's opinion for the
24 Court in *Ohio vs. Environmental Protection Agency*, found
25 at 603 United States at 279, um -- well the PIN cite

1 will be 144 Supreme Court 2040 at 2024. And there,
2 speaking for the Court, Justice Gorsuch says:

3 "An agency" -- and I'm omitting citations. "An
4 agency action qualifies as, quote, 'arbitrary' or,
5 quote, 'capricious' if it is not, quote, 'reasonable'
6 and 'reasonably explained.' In reviewing an agency's
7 action under that standard, a Court is not, quote, 'to
8 substitute its judgment for that of the agency,' closed
9 quote, but it must ensure, among other things, that the
10 agency has offered a satisfactory explanation for its
11 action, including a rational connection between the
12 facts found and the choice made. Accordingly, an agency
13 cannot simply ignore an important aspect of the
14 problem."

15 This Court finds and rules that the explanations
16 are bereft of reasoning virtually in their entirety.
17 These edicts are nothing more than conclusory,
18 unsupported by factual development.

19 Moreover, in -- as presented to this Court, there
20 is no reasoned argument as to the reliance interests of
21 the many parties affected. It's well to have recourse
22 precisely to the statute under which this Court -- the
23 Act of Congress under which this Court draws its
24 authority for the conclusions and rulings that the Court
25 makes.

1 I quote paragraph -- not paragraph, Section 706,
2 "Scope of Review of the Administrative Procedure Act."
3 This -- this defines, in this aspect of the case, the
4 powers of this United States District Court in
5 circumstances. This power is derived directly from the
6 statute enacted by the people's representatives in both
7 Houses of Congress. It trumps any regulation. It
8 trumps any order, directive, or edict. Here is what it
9 says:

10 "To the extent necessary to decision and when
11 presented, the reviewing Court shall decide all relevant
12 questions of law, interpret constitutional and statutory
13 provisions, and determine the meaning or applicability
14 of an agency action."

15 Then, in Paragraph 2, it empowers the Court to
16 "Hold unlawful and set aside agency action, findings,
17 and conclusions, found to be" -- and I here have
18 reliance on Subparagraph A, "arbitrary and capricious."

19 This Court rules that the determinations -- that
20 the challenged directives, excuse me, taken as a whole
21 are -- and each of them are, when taken as a whole,
22 arbitrary and capricious, they are of no force and
23 effect, they are void and illegal. And so are each of
24 the terminations before this Court declared arbitrary
25 and capricious, void, and of no effect, they are illegal

1 and they are vacated and set aside.

2 I looked up and spotted Ms. Meeropol and I should
3 be specific.

4 I am not now deciding anything beyond the ruling I
5 just made. That does not mean that in further
6 consideration of the NOFO claims, I could not, or I
7 could not further analyze the argument that was made by
8 those plaintiffs. All I'm saying is I am not now doing
9 that, I'm not ready, nor am I sufficiently confident to
10 do it. I'm speaking only to those things about which I
11 -- a careful review satisfies me that on that ground --
12 on the grounds I have announced, I am confident in the
13 action that the Court takes.

14 Having done that, the Court, um, at least sitting
15 this afternoon, accepts the representation of the
16 government counsel, I'm sure made after careful
17 consideration, that he expects that the defendants
18 promptly will comply with the, um, decisions as to the
19 law made by this Court, and I'm relying on that. The
20 Court -- because the case goes on, the Court has
21 continuing jurisdiction. And if these -- this vacation
22 of these particular grant terminations, the vacation of
23 these directives, taken as a whole, um, does not result
24 in forthwith, um, disbursement of funds both
25 appropriated by the Congress of the United States and

1 allocated heretofore by the defendant agencies, if that
2 doesn't happen forthwith, the Court has ample
3 jurisdiction.

4 But as I stated earlier, I do come from a kindler,
5 gentler period of jurisprudence when, if a Court of
6 competent jurisdiction -- and this Court is such a
7 court, declares the law authoritatively, executive
8 agencies are presumed to put that declaration into
9 effect, that's the authorization of the Congress in the
10 Administrative Procedure Act. And based on the
11 representation of counsel, I have every reason to
12 believe that will be done.

13 Now to give effect to the few conclusory findings
14 I have made and the rulings I have thus-far made, the
15 plaintiffs are charged with, forthwith, tomorrow will be
16 soon enough, um, preparing a partial but final judgment
17 as to these issues. I will enter that final judgment,
18 um, under Federal Rule of Civil Procedure 54(d), in the
19 interests of justice so that there is a basis for an
20 immediate appeal, should anyone wish to appeal.

21 There is more to this case. I very much
22 understand that. I both welcome any such appeal, but it
23 is my duty to move as rapidly as careful and
24 conscientious analysis permits, and I believe I have
25 given it to so much of this action as I have just spoken

1 to.

2 I have more to say on another topic, but this is a
3 good time to stop and simply go around and see if there
4 are any questions. This is not a time to argue or seek
5 to reargue, just are there any questions about what the
6 Court has found and ruled. Questions. And we'll go in
7 the order of the argument.

8 Mr. Cedrone?

9 (Pause.)

10 MR. CEDRONE: No, your Honor, I think it's clear.

11 THE COURT: Fine.

12 Mr. Parreno?

13 MR. PARRENO: No, your Honor, no questions.

14 THE COURT: And, Mr. Ports, any questions?

15 MS. PORTER: I want to make sure that we're clear
16 that this -- the order applies to all grants listed by
17 the plaintiffs, that's both sets of plaintiffs, as most
18 recently updated, um, any orders to set them aside and
19 terminate them, to vacate them, and set them aside.

20 So everything on that list?

21 THE COURT: That is the list to which I have
22 referenced. Your question is perfectly appropriate.
23 That's what I'm speaking about.

24 MS. PORTER: Okay, thank you, your Honor.

25 THE COURT: All right.

1 Any other questions?

2 MS. PORTER: Does this apply to, I guess, the
3 status of, um, grants listed where there have been no
4 action, no affirmative action by the agency other than
5 maybe, um --

6 THE COURT: I think I've made myself clear. I
7 have a list and I've acted on it.

8 MS. PORTER: Okay, thank you, your Honor.

9 THE COURT: All right.

10 Now I have something else to say.

11 MR. PARRENO: Your Honor, if I may?

12 THE COURT: Yes.

13 MR. PARRENO: What, um, just to make it clear,
14 what counsel on the other side has addressed has raised
15 another question for us, and perhaps if I may raise it
16 with the Court?

17 We wish to ask the Court for the opportunity to
18 provide one additional list of plaintiff members, grants
19 of plaintiff members that have not yet been provided to
20 the Court, and we're prepared to, um, provide that.

21 THE COURT: Work it out with them. If they
22 oppose, I will take that into account. But work it out
23 with them.

24 MR. PARRENO: Yes, thank you, your Honor.

25 THE COURT: Now there's another aspect of this

1 case, a darker aspect, one that I take very seriously,
2 and it's this.

3 I could not -- I cannot, as a United States
4 District Judge, read this record without coming to the
5 conclusion, and I draw this conclusion -- I am hesitant
6 to draw this conclusion, but I have an unflinching
7 obligation to draw it, that this represents racial
8 discrimination and discrimination against America's
9 LGBTQ community, that's what this is. I would be blind
10 not to call it out. My duty is to call it out. And I
11 do so.

12 Now clearly I have no hesitancy in enjoining
13 racial discrimination, I said during the course of the
14 argument, and it is the law and I must uphold it, and I
15 have no hesitancy in upholding it. The extirpation of
16 affirmative action is a legitimate government policy.
17 It is not a license to discriminate on the basis of
18 color. It simply is not. That's what the Civil War
19 amendments are about. Any discrimination, any
20 discrimination by our government is so wrong that it
21 requires the Court to enjoin it, and at an appropriate
22 time I'm going to do it.

23 Having said that, I welcome -- if the parties
24 wish, though I don't require any extension of the
25 record, evidence as to harm so that I may more carefully

1 and accurately frame such an injunction. That's racial
2 discrimination.

3 It is palpably clear that these directives and
4 that the set of terminated, um, grants here also are
5 designed to, um, frustrate, to stop research that may
6 bear on the health -- we're talking about health here,
7 the health of Americans, of our LGBTQ community. That's
8 appalling. Having said it, I have very real questions
9 about whether this Court has the power to enjoin it. I
10 do not assert such a power, though I find the record
11 will be clear to anyone that it has and is occurring
12 under this, um, under what's going on.

13 Now I'm speaking only of health care, I'm speaking
14 only of the parties before me, nothing else. I don't
15 have a record as to that. It's not the province of this
16 Court just to invade against discrimination. But on
17 this record, these two aspects of discrimination are so
18 clear that I would fail in my duty if I did not note it.

19 And so the parties are invited, as to those two
20 aspects and -- though I make no finding with respect to
21 it, any harm to the issues involving women's health.
22 Gender differences are an appropriate area of research
23 and research and, um, trying to advance the frontiers of
24 science so that all Americans have the best health care
25 that we can afford.

1 You will meet and inform the Court as to when --
2 if any party wishes -- I am bound by case-in-
3 controversy, I say what I will receive evidence on, but
4 I do not require anything. I've said everything that I
5 am able to say. And while there's another phase to this
6 case, on this discrimination issue, I am prepared to
7 receive evidence, but I do not require it.

8 If the parties wish to present evidence, you'll
9 inform me as to when you're prepared to begin such
10 evidentiary -- because defense counsel is correct, they
11 have the right to cross-examine as to that, and at least
12 as to any discrimination as to LGBTQ people, they -- it
13 may very well be that while I can recognize it and call
14 it out, I have no power to enter injunctions with
15 respect to it. But I'm certainly open to considering
16 that.

17 But let me say something about racial
18 discrimination here. I've never seen a record where
19 racial discrimination was so palpable. I've sat on this
20 bench now for 40 years, I've never seen government
21 racial discrimination like this. And I confine my
22 remarks to this record, to health care. And I ask
23 myself, how -- how can this be, because on this record
24 anyway, I don't see anyone pushing back against it?

25 I don't -- take a look at the people who have been

1 named as defendants here, one of them is a cabinet-level
2 officer. The other one is, not the same individual, but
3 is now the Director of the National Institutes of
4 Health. And though I needed help as to what an "IC" is,
5 there are other distinguished, um, at the National
6 Institutes of Health level and their subsidiary
7 institutes, these are distinguished doctors, they are
8 people whose profession has been devoted to the American
9 people, to our society. All our society. They are all
10 American citizens.

11 Now I don't claim any high moral ground here. I'm
12 a United States District Judge, I have the protections
13 that the Founders wrote into the Constitution, along
14 with imposing upon me a duty to speak the truth in every
15 case, and I try to do that. And so I've asked myself,
16 what if I didn't have those protections? What if my job
17 was on the line, my profession, all the career to which
18 I have devoted whatever poor skill I have, would I have
19 stood up against all of this? Would I have said, "You
20 can't do this, you are bearing down on people of color
21 because of their color. The Constitution will not
22 permit that." I see nothing in this record.

23 And, you know, when I ask myself that question,
24 without the protections of --

25 (Phone rings.)

1 THE COURT: I was going pretty well there.

2 (Laughter.)

3 THE COURT: Okay.

4 -- without the protections of an independent
5 judiciary so necessary to our society, as I know my own
6 heart, I do not have an answer to that question, for
7 myself, and that makes me unutterably sad.

8 And so we're going to recess. But is it true of
9 our society as a whole, have we fallen so low? Have we
10 no shame?

11 We'll recess.

12 (Recess, 2:35 p.m.)

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C E R T I F I C A T E

I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER, do hereby certify that the forgoing transcript of the record is a true and accurate transcription of my stenographic notes, before Judge William G. Young, on Monday, June 16, 2025, to the best of my skill and ability.

/s/ Richard H. Romanow 06-23-25

RICHARD H. ROMANOW Date