

No. 25-4249

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

NEETA THAKUR, et al.,

Plaintiffs-Appellees,

vs.

DONALD J. TRUMP, et al.,

Defendants and Appellants.

Appeal from United States District Court
Northern District of California
Hon. Rita F. Lin
U.S. District Court Case No. 3:25-cv-4737

**PLAINTIFFS' MOTION FOR RECONSIDERATION OR
RECONSIDERATION EN BANC**

**Farella Braun +
Martel LLP**

Anthony P. Schoenberg
Linda S. Gilleran
Donald E. Sobelman
Kyle A. McLorg
Dylan M. Silva
Katherine T. Balkoski
One Bush St., Suite 900
San Francisco, CA 94104
415.954.4400

**Lieff Cabraser Heimann
& Bernstein LLP**

Elizabeth J. Cabraser
Richard M. Heimann
Kevin R. Budner
Annie M. Wanless
Nabila M. Abdallah
275 Battery St., 29th Fl.
San Francisco, CA 94111
415.956.1000

Erwin Chemerinsky
Claudia Polsky
U.C. Berkeley School of
Law
Law Building
Berkeley, CA 94720-7200
510.642.6483

Attorneys for Plaintiffs-Appellees

TABLE OF CONTENTS

	Page
RULE 40 STATEMENT	1
PROCEDURAL HISTORY.....	4
I. The Panel’s Amended Order Would Mean that No Court Would Have Jurisdiction to Hear the Plaintiffs’ Claims Under the Administrative Procedure Act.....	8
II. The Panel’s Amended Order Conflicts with Ninth Circuit Precedent in Concluding that the Tucker Act Bars Federal District Court Jurisdiction Where the Court of Federal Claims Would Not Have Jurisdiction.....	11
III. The Complete Preclusion of Jurisdiction for Plaintiffs’ Claims Under the Administrative Procedure Act Is Inconsistent With Ninth Circuit Precedent and Raises an Issue of Exceptional Importance.....	13
CONCLUSION.....	17

TABLE OF AUTHORITIES

	Page
Cases	
<i>Abbott Lab’ys v. Gardner</i> , 387 U.S. 136 (1967).....	13
<i>Arce v. United States</i> , 899 F.3d 796 (9th Cir. 2018)	13
<i>Bowen v. Mich. Acad. of Fam. Physicians</i> , 476 U.S. 667 (1986).....	13
<i>Cienega Gardens v. United States</i> , 194 F.3d 1231 (Fed. Cir. 1998)	2, 9
<i>Cnty. Legal Servs. in East Palo Alto v. United States Dep’t of Health & Hum. Servs.</i> , 137 F.4th 932 (9th Cir. 2025), <i>reh. denied</i> 155 F. 4th 1099.....	2, 11, 12
<i>I.N.S. v. St. Cyr</i> , 533 U.S. 289 (2001).....	14
<i>Ibarra-Perez v. United States</i> , 154 F.4th 989 (9th Cir. 2025).....	13
<i>Loper Bright Enters. v. Raimondo</i> , 603 U.S. 369 (2024).....	16
<i>McNary v. Haitian Refugee Ctr., Inc.</i> , 498 U.S. 479 (1991).....	16
<i>Nat’l Insts. of Health v. Am. Pub. Health Ass’n (NIH v. APHA)</i> , 145 S.Ct. 2658 (2025).....	<i>passim</i>
<i>Powers v. McDonough</i> , No. 24-6338, --- F.4th ---, 2025 WL 3718737 (9th Cir. Dec. 23, 2025)	3, 14

TABLE OF AUTHORITIES
(continued)

	Page
<i>Ransom v. United States</i> , 900 F.2d 242 (Fed. Cir.1990)	9
<i>Thakur v. Trump</i> , 148 F.4th 1096 (9th Cir. 2025)	1, 7
<i>Tootle v. Sec’y of Navy</i> , 446 F.3d 167 (D.C. Cir. 2006).....	9, 11, 12
 Court Rules	
Fed. R. App. P. 40(d)(1)	8

RULE 40 STATEMENT

Reconsideration by the panel, or the full Court if necessary, is appropriate because the panel decision directly conflicts with recent Ninth Circuit decisions and because the ruling raises issues of exceptional importance concerning the jurisdiction of federal district courts.

This is a lawsuit brought by researchers and faculty of the University of California who have had grants terminated by federal agencies. The District Court issued a preliminary injunction against the termination of grants to two classes of Plaintiffs: A Form Termination Class whose grants had been terminated in an arbitrary and capricious manner in violation of the Administrative Procedure Act (APA), and an Equity Termination Class whose grants had been terminated based on the perceived viewpoint of the research in violation of the First Amendment. On August 21, 2025, the panel issued an Order denying the government's motion to stay the preliminary injunction as to both classes of Plaintiffs. *Thakur v. Trump*, 148 F.4th 1096 (9th Cir. 2025).

On December 23, 2025, the panel issued an Amended Order. As for the Form Termination class, the Amended Order stayed the preliminary injunction, concluding that Plaintiffs were unlikely to prevail on the merits because the Tucker Act precludes the District Court's jurisdiction over the APA claims. The panel based this conclusion on the Supreme Court's decision in *National Institutes of*

Health v. American Public Health Association, 145 S.Ct. 2658 (2025) (hereafter “*NIH v. APHA*”). Amended Order at 8. As for the Equity Termination Class, the Amended Order again denied the government’s request of a stay of the preliminary injunction. Amended Order at 10-18.

Plaintiffs seek reconsideration or reconsideration en banc as to the panel’s decision as to the Form Termination Class and its conclusion that the District Court lacked jurisdiction to hear the claims under the APA. As the government has argued, and as both the District Court and this Court have held, the Court of Federal Claims does not have jurisdiction to hear the Plaintiffs’ claims because they are not parties to the grants between the United States and the University of California. *See Cienega Gardens v. United States*, 194 F.3d 1231, 1239 (Fed. Cir. 1998) (only parties to a contract may sue the United States government in the Court of Federal Claims).

There is thus a direct conflict between the panel’s ruling and the Ninth Circuit’s decision in *Community Legal Services in East Palo Alto v. United States Department of Health and Human Services*, 137 F.4th 932 (9th Cir. 2025). In that case, the Court held that the Tucker Act does not bar jurisdiction in the District Court where the Court of Federal Claims would not have jurisdiction to hear the matter. The Court was explicit that the Tucker Act only precludes District Court jurisdiction where the case could be brought in the Court of Federal Claims. *See*

id. at 938-39. Moreover, the total preclusion of jurisdiction of any federal court to hear Plaintiffs' APA claims conflicts with the Ninth Circuit's repeated decisions, including its very recent holding in *Powers v. McDonough*, that "we construe jurisdiction-stripping statutes narrowly. '[E]xpress instructions of the Supreme Court, our precedent, and common sense' all prescribe a narrow construction of jurisdiction-stripping statutes except where their meaning is clear and unequivocal." No. 24-6338, --- F.4th ---, 2025 WL 3718737, at *11 (9th Cir. Dec. 23, 2025) (citations omitted).

The Amended Order of the panel involves questions of exceptional importance: Does the Tucker Act bar federal district court jurisdiction if there is no jurisdiction in the Court of Federal Claims? Should a statute be interpreted to bar federal district court jurisdiction if that would mean that no court has jurisdiction to hear the plaintiffs' claims? The Supreme Court's ruling in *NIH v. APHA* does not explicitly or implicitly address whether the Tucker Act bars federal district court jurisdiction in cases where the Court of Federal Claims would not have jurisdiction to hear the matter.

Thus, Plaintiffs respectfully request reconsideration or reconsideration en banc to resolve this conflict with recent Ninth Circuit decisions and to address an issue of vital importance in ensuring that plaintiffs have a legal venue in which to present their claims.

PROCEDURAL HISTORY

This is a lawsuit brought by University of California faculty and researchers who have been seriously injured by the termination of grants by the Trump administration in violation of federal law and the Constitution. The stakes for the researchers, for society, and for the world could not be higher. Once funds are cut off, research must stop. Laboratories must close. Staff is laid off; post-doctorate researchers and graduate students must leave. Papers are not published. Research, including for scientific and medical advances, ceases. Even if later somehow the research resumes, it is permanently and irreparably set back.

The University of California is the world's leading public research institution. Its ten campuses, three affiliate national laboratories, and dozens of institutes, centers, and facilities produce research that has changed the world, increased human knowledge, and contributed to the prominence and security of the United States and the health and welfare of all Americans.

Beginning January 20, 2025, President Trump issued Executive Orders directing agencies to terminate grants, including those related to disfavored topics, such as diversity, equity, and inclusion ("DEI"). The Environmental Protection Agency ("EPA"), National Science Foundation ("NSF"), and National Endowment for the Humanities ("NEH") implemented the President's orders by abruptly and unlawfully terminating grants *en masse*. They selected grants for termination using

keyword searches for what they deemed forbidden terms and concepts, and terminated them via form letters without any reasoned explanation.

The terminations dealt a devastating blow to leading researchers at the University of California who relied on such federal grants. *See* Order Granting Motion for Preliminary Injunction and Provisional Class Certification at 1-2 (June 23, 2025), Dkt. No. 54 (hereafter “Dist. Ct. Order”).¹ At the time of the filing of the Complaint, the Department of Government Efficiency website indicated that the federal government had terminated over \$324 million in grants to the University of California system. Compl. ¶ 112 (June 4, 2025), Dkt. No. 1; *see also* Dist. Ct. Order at 15. This is actually a significant underestimate, as it is limited to what was listed on the Department of Government Efficiency website, which was incomplete. Also, it does not include instances in which University of California researchers received sub-grants that were terminated.

On June 4, 2025, Plaintiffs, who are University of California researchers with terminated federal grants, filed their Class Action Complaint for Declaratory and Injunctive Relief. Dkt. No. 1. The District Court found that Plaintiffs were directly injured by the termination of the grants for their research and thus had standing to sue in federal court. The District Court granted Plaintiffs’ motion for a

¹ Unless otherwise indicated, “Dkt. No.” refers to the district court docket.

preliminary injunction, finding that Plaintiffs were likely to succeed on their Administrative Procedure Act and First Amendment claims and that “the balance of equities and the public interest strongly favor the entry of a preliminary injunction.”² Dist. Ct. Order at 2-3; 47-48; *see also* Dkt. No. 55 (Preliminary Injunction as to Agency Defendants).

Specifically, the District Court found that the termination of grants through form letters was arbitrary and capricious, in violation of the Administrative Procedure Act. The District Court also found that the termination of grants violated the First Amendment because the actions were based on the perceived viewpoint of the research. The District Court certified two classes of plaintiffs – those that had grants terminated by form letters (Form Termination Class) and those that had grants terminated based on their viewpoint (Equity Termination Class). The District Court imposed a preliminary injunction against the three federal agencies where Plaintiffs named in the Complaint had grants terminated:

² The District Court did not reach the other claims in Plaintiffs’ Complaint, including that the termination of grants violated separation of powers, the Impoundment Control Act, and due process of law. Dist. Ct. Order at 35. These issues were briefed in the District Court and remain a basis for injunctive relief. In issuing its Amended Order, the panel stated: “We express no opinion on Plaintiffs’ remaining constitutional and statutory claims, nor on whether it would be appropriate for the district court to certify other provisional classes based on those claims.” Amended Order at 18-19.

the Environmental Protection Agency, the National Endowment of the Humanities, and the National Science Foundation (hereafter, “Agency Defendants”).³

Pursuant to the District Court’s Order, Agency Defendants began reinstating grants, allowing Plaintiffs to access research funds and resume research. Dkt. Nos. 66, 72. Several weeks after the District Court issued the preliminary injunction, Defendants National Endowment of the Humanities and Environmental Protection Agency filed a motion in this Court to partially stay the preliminary injunction; the National Science Foundation did not join this motion.⁴

After briefing and oral argument, the panel denied the motion to stay in a published opinion. *Thakur*, 148 F.4th 1096. On December 23, 2025, the panel issued an Amended Order and granted the government’s motion to stay the

³ Subsequent to the panel’s Order on August 21, 2025, the District Court allowed Plaintiffs to amend their Complaint and issued a preliminary injunction against the Department of Defense, the Department of Transportation, and the National Institutes of Health. The District Court found that these agencies also violated the Administrative Procedure Act and the First Amendment. The Plaintiffs later moved to amend their Complaint to seek a preliminary injunction against the Department of Energy. That is now pending before the District Court.

⁴ The panel in its Amended Order noted the “government has not moved for NSF to join that motion.” Amended Order at 4 n.3. Thus, at this stage, the panel’s Amended Order staying the preliminary injunction as to the Form Termination Class applies only to the Environmental Protection Agency and the National Endowment of the Humanities.

preliminary injunction as to the Form Termination Class.⁵ The Amended Order did not stay the preliminary injunction as to the Equity Termination Class.

I. The Panel’s Amended Order Would Mean that No Court Would Have Jurisdiction to Hear the Plaintiffs’ Claims Under the Administrative Procedure Act.

The panel’s Amended Order concludes that the federal district court lacked jurisdiction to hear the Plaintiffs’ claims under the Administrative Procedure Act because the Tucker Act provides that such matters must be heard in the Court of Federal Claims.

As the Defendants have argued throughout this litigation, Plaintiffs—faculty members and researchers at the University of California—are not parties to the grant agreements with the United States that are at issue here. The grant agreements are between the United States and the University of California. *Thakur v. Trump*, No. 25-4249, App. Ct. Dkt. No. 26 (9th Cir. Aug. 7, 2025) (Appellant’s Br. at 38). The government emphasized this in its Opposition to Motion for Preliminary Injunction, stating that the Plaintiffs are “**Not Parties to Any Terminated Contract.**” Dkt. 35 at 17 (emphasis in original).

⁵ The government moved for Panel Reconsideration or Reconsideration En Banc for Published Order Denying Stay Pending Appeal. The panel, in its Order on December 23, 2025, stated: “Appellants’ motion for panel reconsideration or reconsideration en banc (Dkt. 51) is DENIED AS MOOT. Further motions for reconsideration are permitted pursuant to Fed. R. App. P. 40(d)(1); Ninth Cir. Gen. Order 5.3(a).” App. Ct. Dkt. 73.

The law is clear that only parties to contracts with the United States may bring a claim for breach of contract in the Court of Federal Claims. As the United States Court of Appeals for the Federal Circuit has stated: “[T]o maintain a cause of action pursuant to the Tucker Act that is based on a contract, the contract must be between the plaintiff and the government.” *Cienega Gardens*, 194 F.3d at 1239 (quoting *Ransom v. United States*, 900 F.2d 242, 244 (Fed. Cir.1990)); *see also Tootle v. Sec’y of Navy*, 446 F.3d 167, 176-77 (D.C. Cir. 2006).

This was exactly the conclusion of the District Court in issuing the preliminary injunction in this case:

Plaintiffs do not have the right to sue under the Tucker Act because they are not parties to a government contract. If Plaintiffs’ claims were sent to the Court of Federal Claims, binding precedent in that jurisdiction would require the suit to be dismissed for lack of jurisdiction and sent back to the district court. To “maintain a cause of action pursuant to the Tucker Act [in the Court of Federal Claims] that is based on a contract, the contract must be between the plaintiff and the government.” It is nonsensical to send Plaintiffs on a pointless round trip to the Court of Federal Claims.

Dist. Ct. Order at 36-37 (citing *Cienega Gardens*, 194 F.3d at 1239).

Indeed, the government has expressly argued throughout this litigation that no court would have jurisdiction to hear Plaintiffs’ claims. At a hearing in the District Court on September 18, 2025, the attorney for the government said the Plaintiffs “would not be able to bring it in the Court of Federal Claims because

they would be precluded from doing so.” Dist. Ct. Hrg. Tr. at 8-9 (Sept. 18, 2025). The government’s lawyer continued: “[I]ndividuals like these researchers—who are not intended to be the beneficiaries of these contracts—are precluded from bringing a suit either in District Court or in the Court of Federal Claims because it’s within the subject matter of the Tucker Act.” *Id.* at 12. The district court asked the government lawyer directly, “[I]s [it] the Government’s view the plaintiffs cannot sue anywhere on their First Amendment and APA claims?” The government’s lawyer responded, “Yes.” *Id.* The government has continued to take the same position on appeal.

Nothing in the panel’s initial decision or its Amended Order suggests that the Court of Federal Claims would have jurisdiction over the Plaintiffs’ claims. The panel does not disagree with the District Court’s conclusion that Plaintiffs cannot sue in the Court of Federal Claims because they are not parties to the grants from the United States government. The result of the panel’s decision that the District Court lacked jurisdiction over the APA claims is a total preclusion of jurisdiction. As a result, although the Plaintiffs are injured and have standing to sue, the panel decision leaves no court in which Plaintiffs will be able to bring their claims that the government acted illegally in terminating grants in a manner that is arbitrary and capricious in violation of the APA.

II. The Panel’s Amended Order Conflicts with Ninth Circuit Precedent in Concluding that the Tucker Act Bars Federal District Court Jurisdiction Where the Court of Federal Claims Would Not Have Jurisdiction.

In *Community Legal Services in East Palo Alto v. United States Department of Health and Human Services*, 137 F.4th 932 (9th Cir. 2025), the Court came to a conclusion directly opposite that of the panel’s Amended Order.

Community Legal Services involved a challenge under the APA to the government’s termination of funding for legal services for unaccompanied children in immigration proceedings. The government argued that the Tucker Act required that the matter be litigated in the Court of Federal Claims and that the district court therefore lacked jurisdiction. The Court rejected that argument and declared: “[T]here cannot be exclusive jurisdiction under the Tucker Act if there is no jurisdiction under the Tucker Act.’ For this reason, the D.C. Circuit has ‘categorically reject[ed] the suggestion that a federal district court can be deprived of jurisdiction by the Tucker Act when no jurisdiction lies in the Court of Federal Claims.’” 137 F.4th at 939 (quoting *Tootle*, 137 F.4th at 176-77). As the Court explained: “The result requested by the Government would mean that no court has jurisdiction to hear plaintiffs’ claims. Not only is this result contrary to common sense, but also conflicts with the ‘strong presumption favoring judicial review of administrative action’ that is embodied in the APA.” *Id.* (quotation omitted).

As Judges Fletcher and Koh further explained in a statement concerning the denial of rehearing and rehearing en banc in *Community Legal Services*, “courts ‘categorically reject the suggestion that a federal district court can be deprived of jurisdiction by the Tucker Act when no jurisdiction lies in the Court of Federal Claims.’” 155 F.4th 1099, 1102 (9th Cir. 2025) (mem.) (quoting *Tootle*, 446 F.3d at 176). Importantly, the Ninth Circuit denied rehearing and rehearing en banc in *Community Legal Services* after the Supreme Court’s ruling in *NIH v. APHA* (see 155 F.4th 1099, issued Oct. 10, 2025), and carefully distinguished that case.

It is impossible to reconcile the panel’s Amended Order here with the decision in *Community Legal Services of Palo Alto*. The panel in this case ruled that the District Court was deprived of jurisdiction even though none would exist in the Court of Federal Claims. But the court in *Community Legal Services* ruled that the District Court is not deprived of jurisdiction where the Court of Federal Claims would not have jurisdiction; the Tucker Act does not bar jurisdiction where it does not apply.

Only reconsideration or reconsideration en banc can resolve this conflict between recent decisions of panels of the United States Court of Appeals for the Ninth Circuit.

III. The Complete Preclusion of Jurisdiction for Plaintiffs' Claims Under the Administrative Procedure Act Is Inconsistent With Ninth Circuit Precedent and Raises an Issue of Exceptional Importance.

The Supreme Court frequently has stressed that there is a “strong presumption that Congress intends judicial review of administrative action.” *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 670 (1986). The Court has explained that “the Administrative Procedure Act . . . embodies the basic presumption of judicial review [O]nly upon a showing of ‘clear and convincing evidence’ of a contrary legislative intent should the courts restrict access to judicial review.” *Abbott Lab ’ys v. Gardner*, 387 U.S. 136, 140–41 (1967).

Likewise, the Ninth Circuit repeatedly has held that statutes should not be interpreted to completely preclude district court jurisdiction unless there is a clear and unequivocal statement from Congress that it desired to do so. *See, e.g., Ibarra-Perez v. United States*, 154 F.4th 989, 995 (9th Cir. 2025) (“‘[W]e are guided here . . . by the general rule to resolve any ambiguities in a jurisdiction-stripping statute in favor of the narrower interpretation,’ and by the ‘strong presumption in favor of judicial review.’”) (quotations omitted); *Arce v. United States*, 899 F.3d 796, 800–01 (9th Cir. 2018) (statutes restricting federal district court jurisdiction should be interpreted narrowly).

In fact, in another decision on December 23, 2025 (the same day as the panel’s Amended Order in this case), the Ninth Circuit stressed that statutes precluding jurisdiction must be construed “narrowly” and only should be deemed to preclude jurisdiction where “their meaning is clear and unequivocal.” *Powers*, No. 24-6338, --- F.4th ---, 2025 WL 3718737 at *11. The Court, quoting the Supreme Court, emphasized that when Congress creates legislation, there is a “strong presumption in favor of judicial review of administrative action.” *Id.* (quoting *I.N.S. v. St. Cyr*, 533 U.S. 289, 298 (2001)).

The panel’s conclusion in this case—that the District Court lacked jurisdiction to hear the APA claims even though the Plaintiffs could not sue in the Court of Federal Claims—cannot be reconciled with this strong presumption against a complete preclusion of jurisdiction. Nothing in the Tucker Act, or any Supreme Court decision or prior ruling of this Court, suggests that the Tucker Act precludes district court jurisdiction where the Court of Federal Claims would not have jurisdiction.

The panel based its conclusion on the Supreme Court’s ruling in *NIH v. APHA*, declaring: “We are bound by *NIH*, which held that the APA’s limited waiver of sovereign immunity did ‘not provide the District Court with jurisdiction to adjudicate’ similar APA claims challenging grant terminations.” Amended Order at 10 (quoting *NIH v. APHA*, 145 S.Ct. at 2658).

But the Supreme Court in *NIH v. APHA* did not consider, explicitly or implicitly, whether the Tucker Act would preclude district court jurisdiction in instances, like this case, where the Court of Federal Claims would not have jurisdiction. The explicit assumption of the Supreme Court's ruling was that the plaintiffs in that case could go to the Court of Federal Claims. *See NIH*, 145 S.Ct. at 2662 n.1 (Barrett, J., concurring) (noting the holding would *not* “leave[] the plaintiffs without any prospect of relief.”). By the government's own admission, that is not so here. *NIH v. APHA* thus does not provide a basis for concluding that the Tucker Act bars jurisdiction over matters that could not be brought in the Court of Federal Claims. Nothing in *NIH v. APHA* is inconsistent with the common sense proposition: The Tucker Act precludes district court jurisdiction only where it applies and vests jurisdiction in the Court of Federal Claims.

Although there were some researchers who were plaintiffs in *NIH v. APHA*, the Supreme Court did not consider them, or indicate whether they were precluded from suing in the federal district court since they could not sue in the Court of Federal Claims. In its brief opinion, the Supreme Court focused entirely on entities that could sue in that court. There is no indication whatsoever that the Supreme Court meant to interpret the Tucker Act to allow the complete preclusion of jurisdiction approved by the panel in its Amended Order. If this was the Supreme Court's conclusion, it surely would have said so in light of its past forceful

declaration that “given [the] well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action . . . it is most unlikely that Congress intended to foreclose all forms of meaningful judicial review.”

McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 496 (1991).

The complete preclusion of jurisdiction over Plaintiffs’ APA claims urged by the government and accepted by the panel is contrary to the Supreme Court’s command that “the Framers . . . envisioned that the final ‘interpretation of the laws’ would be ‘the proper and peculiar province of the courts.’” *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 385 (2024) (quoting *The Federalist* No. 78, p. 525 (A. Hamilton)).⁶ If no federal court can hear the Plaintiffs’ APA claims, then the federal agencies that terminated their grants will have the final word on what the APA means and whether their own actions violated it. That cannot be reconciled with the most basic definition of the judicial role and of checks and balances.

Whether the Tucker Act should be interpreted to preclude federal jurisdiction when it means that no court would have jurisdiction is thus an issue of exceptional importance. As this litigation reflects, the Trump administration has

⁶ *Loper Bright* held that the Administrative Procedure Act requires courts to exercise their independent judgment in deciding whether a federal agency acted within its statutory authority, overruling the *Chevron* doctrine of judicial deference to agency interpretation in cases of statutory ambiguity. 603 U.S. at 412-413.

terminated countless grants from federal agencies. Whether and when there is a complete preclusion of federal jurisdiction, as the government argues exists here, is thus an issue on which hundreds of millions of dollars, hundreds of careers, and future research breakthroughs depend.

The larger question is also of great significance: When, if ever, should federal statutes be interpreted to preclude any court from having jurisdiction where the law does not explicitly provide for this? Neither the panel nor *NIH v. APHA* addressed this critical question, and thus reconsideration and reconsideration en banc are necessary.

CONCLUSION

For these reasons, the Court should grant Plaintiffs' motion for panel reconsideration or reconsideration en banc.

Respectfully submitted,

December 29, 2025

By: /s/ Erwin Chemerinsky

**Farella Braun +
Martel LLP**

Anthony P. Schoenberg
Linda S. Gilleran
Donald E. Sobelman
Kyle A. McLorg
Dylan M. Silva
Katherine T. Balkoski
One Bush St., Suite 900
San Francisco, CA 94104
415.954.4400

**Lieff Cabraser Heimann
& Bernstein, LLP**

Elizabeth J. Cabraser
Richard M. Heimann
Kevin R. Budner
Annie M. Wanless
Nabila M. Abdallah
275 Battery St., 29th Fl.
San Francisco, CA 94111
415.956.1000

Erwin Chemerinsky
Claudia Polsky
U.C. Berkeley School of
Law
Law Building
Berkeley, CA 94720-7200
510.642.6483

Attorneys for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Ninth Circuit Rule 40-1, this motion contains 3,933 words, and it complies with Federal Rule of Appellate Procedure 32(a)(4)-(6) because it was prepared in a proportionally spaced typeface using Times New Roman 14-point font.

Dated: December 29, 2025

/s/ Annie M. Wanless

Annie M. Wanless

CERTIFICATE OF SERVICE

I certify that on December 29, 2025, I filed and served the foregoing document with the Clerk of the Court by causing a copy to be electronically filed via the appellate case management system. I also hereby certify that the participants in the case are registered ACMS users and will be served via ACMS.

/s/ Annie M. Wanless _____

FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 23 2025

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NEETA THAKUR, on behalf of themselves
and all others similarly situated; KEN
ALEX; NELL GREEN NYLEN; ROBERT
HIRST; CHRISTINE PHILLIOU; JEDDA
FOREMAN; ELI BERMAN; SUSAN
HANDY,

Plaintiffs - Appellees,

v.

DONALD J. TRUMP, in his official
capacity as President of the United States;
UNITED STATES DEPARTMENT OF
GOVERNMENT EFFICIENCY; AMY
GLEASON, in her official capacity as
Acting Administrator of the Department of
Government Efficiency; NATIONAL
SCIENCE FOUNDATION; BRIAN
STONE, in his official capacity as Acting
Director of the National Science
Foundation; NATIONAL ENDOWMENT
FOR THE HUMANITIES; MICHAEL
MCDONALD, in his official capacity as
Acting Chairman of the National
Endowment for the Humanities; UNITED
STATES ENVIRONMENTAL
PROTECTION AGENCY; LEE ZELDIN,
in his official capacity as Administrator of
the U.S. Environmental Protection Agency;
UNITED STATES DEPARTMENT OF
AGRICULTURE; BROOKE ROLLINS, in
her official capacity as Secretary of the U.S.

No. 25-4249

D.C. No.

3:25-cv-04737-RFL

AMENDED ORDER

Department of Agriculture; AMERICORPS, aka the Corporation for National and Community Service; JENNIFER BASTRESS TAHMASEBI, in her official capacity as Interim Agency Head of AmeriCorps; UNITED STATES DEPARTMENT OF DEFENSE; PETER HEGSETH, in his official capacity as Secretary of the U.S. Department of Defense; UNITED STATES DEPARTMENT OF EDUCATION; LINDA MCMAHON, in her official capacity as Secretary of the U.S. Department of Education; UNITED STATES DEPARTMENT OF ENERGY; CHRIS WRIGHT, in his official capacity as Secretary of Energy; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; ROBERT F. KENNEDY, Jr., in his official capacity as Secretary of the U.S. Department of Health and Human Services; UNITED STATES CENTERS FOR DISEASE CONTROL; MATTHEW BUZZELLI, in his official capacity as Acting Director of the Centers for Disease Control; UNITED STATES FOOD AND DRUG ADMINISTRATION; MARTIN A. MAKARY, in his official capacity as Commissioner of the Food and Drug Administration; UNITED STATES NATIONAL INSTITUTES OF HEALTH; JAYANTA BHATTACHARYA, in his official capacity as Director of the National Institutes of Health; INSTITUTE OF MUSEUM AND LIBRARY SERVICES; KEITH SONDERLING, in his official capacity as Acting Director of the Institute of Museum and Library Services; UNITED STATES DEPARTMENT OF THE INTERIOR; DOUG BURGUM, in his

official capacity as Secretary of the Interior;
UNITED STATES DEPARTMENT OF
STATE; MARCO RUBIO, in his official
capacity as Secretary of the U.S.
Department of State; UNITED STATES
DEPARTMENT OF TRANSPORTATION;
SEAN DUFFY, in his official capacity as
Secretary for the U.S. Department of
Transportation,

Defendants - Appellants.

Appeal from the United States District Court
for the Northern District of California
Rita F. Lin, District Judge, Presiding

Argued and Submitted July 31, 2025
San Francisco, California

Before: Richard A. Paez, Morgan B. Christen, and Roopali H. Desai, Circuit
Judges.

CHRISTEN, Circuit Judge:

On June 23, 2025, the district court issued a class-wide preliminary
injunction ordering three government agencies to reinstate research grants the
agencies had terminated pursuant to certain Executive Orders. The government
appealed and moved for a partial stay pending appeal of the preliminary
injunction.¹ We grant in part and deny in part the government's motion.

¹ The government's motion for partial stay requested relief by August 4, 2025, but did not invoke this court's rule governing emergency motions. Fed. R. App. P. 27-3. Instead, the government invoked Rule 27-1(3), which permits a movant to request relief by a date certain to avoid irreparable harm. Fed. R. App. P. 27-1(3).

FACTUAL BACKGROUND

Plaintiffs are six researchers at the University of California (UC) who applied for and received multi-year federal research grants from three agencies: the Environmental Protection Agency (EPA), the National Science Foundation (NSF), and the National Endowment for the Humanities (NEH).² On appeal, the government moves for a stay of the injunction only as it pertains to the research grants awarded by EPA and NEH, so we limit our discussion to those two agencies.³

In April 2025, EPA and NEH sent form letters to Plaintiffs notifying them that their grants were terminated. The EPA form letter states: “the award no longer effectuates the program goals or agency priorities. The objectives of the award are no longer consistent with EPA funding priorities.” The NEH form letter states: “[y]our grant no longer effectuates the agency’s needs and priorities,” and informs

The motion did not explain the government’s need for a ruling by August 4, 2025. At oral argument, however, the government stated that there was no specific reason that relief was requested by that date, other than the general urgency to avoid irreparable harm.

² Plaintiffs have since amended their complaint to include additional plaintiffs who received funding from other agencies.

³ On August 19, 2025, the government filed a citation of supplemental authorities requesting that NSF join the arguments raised in the government’s motion to stay the injunction. *See* Fed. R. App. P. 28(j). Because the government has not moved for NSF to join that motion, we do not address the request here.

the recipient that “NEH is repurposing its funding allocations in a new direction in furtherance of the President’s agenda.”

Plaintiffs allege that these terminations resulted from agency implementation of at least eight Executive Orders the President issued in January and February 2025: Executive Orders 14173, 14151, 14168, 14154, 14217, 14238, 14158, and 14222. Executive Orders 14173 and 14151 (the “DEI Executive Orders”) seek to eliminate diversity, equity, and inclusion (“DEI”) and diversity, equity, inclusion, and accessibility (“DEIA”) policies and initiatives from all aspects of the federal government. More specifically, Executive Order No. 14173, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity*, states that “critical and influential institutions of American society,” including the federal government and institutions of higher education, “have adopted and actively use dangerous, demeaning, and immoral race- and sex-based preferences under the guise of so-called ‘diversity, equity, and inclusion’ (DEI) or ‘diversity, equity, inclusion, and accessibility’ (DEIA) that can violate the civil-rights laws of this Nation.” 90 Fed. Reg. 8633, 8633 (Jan. 21, 2025). This Executive Order directs the Office of Management and Budget (OMB) to “[e]xcise references to DEI and DEIA principles under whatever name they may appear,” including federal grants. *Id.* at 8634. Executive Order No. 14151, *Ending Radical and Wasteful Government DEI Programs and Preferencing*, instructs “each agency, department, or commission

head,” to provide the director of OMB with a list of all “[f]ederal grantees who received [f]ederal funding to provide or advance DEI, DEIA, or ‘environmental justice’ programs, services, or activities since January 20, 2021.” 90 Fed. Reg. 8339, 8339–40 (Jan. 20, 2025). This Executive Order directs agency heads to assess the operational impact and cost of those specified grants and recommend action. *Id.* at 8340. It expressly directs agency heads to “terminate . . . all . . . ‘equity-related’ grants.” *Id.* at 8339. Similarly, Executive Order No. 14168, titled *Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government*, directs that “federal funds shall not be used to promote gender ideology.” 90 Fed. Reg. 8615, 8616 (Jan. 20, 2025).

The remaining Executive Orders reflect the various mechanisms through which the administration seeks to refocus or reduce government spending, including the establishment of the Department of Government Efficiency (DOGE). For example, Executive Orders 14217, 14158, and 14222 instruct OMB and federal agencies to work with DOGE to review existing grants and terminate those considered unnecessary in an effort to reduce federal spending. 90 Fed. Reg. 10577, 10577 (Feb. 19, 2025); 90 Fed. Reg. 8441, 8441 (Jan. 20, 2025); 90 Fed. Reg. 11095, 11095–96 (Feb. 26, 2025).

PROCEDURAL HISTORY

Plaintiffs filed suit on behalf of a proposed class of similarly situated UC

researchers against sixteen agencies, alleging that the mass termination of grants violated separation of powers, the First and Fifth Amendments of the Constitution, and the Administrative Procedure Act (APA). Plaintiffs sought an order vacating the grant terminations and a preliminary injunction enjoining the agencies from giving effect to those terminations.

The district court granted Plaintiffs' motion for a preliminary injunction and provisionally certified two classes of UC researchers: (1) those whose research grants were terminated by form letter without any grant-specific explanation (the "Form Termination Class"); and (2) those whose research grants were terminated because of the DEI Executive Orders (the "DEI Termination Class"). The court concluded that the Form Termination Class was likely to succeed on its claim that the terminations were arbitrary and capricious, and that the DEI Termination Class was likely to succeed on its claims that the terminations violated the First Amendment and were contrary to the agencies' congressionally mandated directives. The government appealed and moved for a partial stay of the district court's injunction.

ANALYSIS

We consider four factors when we decide whether to stay an injunction pending appeal: (1) has the stay applicant made a strong showing that she is likely to succeed on the merits; (2) will the applicant be irreparably injured absent a stay;

(3) will issuance of the stay substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Nken v. Holder*, 556 U.S. 418, 434 (2009). The party seeking a stay pending appeal—here, the government—bears the burden of establishing that these factors favor a stay. *See id.* at 433–34. The government’s motion challenges the injunction only as it applies to the EPA and NEH grants.

I. Likelihood of success on the merits

The government’s motion renews the arguments it made before the district court that: (1) the district court lacks jurisdiction over the Form Termination Class’s APA claim; (2) at least some members of the Form Termination Class lack standing; and (3) Plaintiffs are not likely to succeed on the merits of their claims.

A. Jurisdiction over the Form Termination Class’s APA claim

The government argues that the Tucker Act precludes district court jurisdiction over the Form Termination Class’s APA claim. In light of the Supreme Court’s decision in *National Institutes of Health v. American Public Health Ass’n (NIH)*, 145 S. Ct. 2658 (2025), we agree.

The Tucker Act gives the Court of Federal Claims jurisdiction “to render judgment upon any claim against the United States founded . . . upon any express or implied contract with the United States.” 28 U.S.C. § 1491(a)(1). Because this statute “grants consent to suit” and “impliedly forbids” declaratory and injunctive

relief, it precludes bringing contract claims against the United States in federal district court pursuant to the APA's waiver of sovereign immunity. 5 U.S.C. § 702. See *Tucson Airport Auth. v. Gen. Dynamics Corp.*, 136 F.3d 641, 645–46 (9th Cir. 1998). In other words, for contract claims against the United States seeking more than \$10,000, the Tucker Act confers exclusive jurisdiction on the Court of Federal Claims.⁴ *Id.*

The Tucker Act “‘impliedly forbid[s]’ an APA action seeking injunctive and declaratory relief only if that action is a ‘disguised’ breach-of-contract claim.” *United Aeronautical Corp. v. U.S. Air Force*, 80 F.4th 1017, 1026 (9th Cir. 2023) (quoting *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 968 (D.C. Cir. 1982)). To determine whether a claim is a disguised breach-of-contract claim, we apply the *Megapulse* test, which considers: (1) the source of the rights upon which the plaintiff bases its claims and (2) the type of relief sought (or appropriate). *N. Star Alaska v. United States*, 14 F.3d 36, 37 (9th Cir. 1994). If the plaintiff’s rights and remedies, as alleged, “are *statutorily* or *constitutionally* based, then district[] courts have jurisdiction,” but if those rights and remedies “are *contractually based* then

⁴ Pursuant to the Little Tucker Act, district courts have “concurrent jurisdiction with the claims court for actions not exceeding \$10,000.” *N. Star Alaska v. United States*, 9 F.3d 1430, 1432 (9th Cir. 1993) (en banc) (per curiam) (citing 28 U.S.C. § 1346(a)(2)).

only the Court of Federal Claims does.” *United Aeronautical*, 80 F.4th at 1026 (emphasis in original).

We are bound by *NIH*, which held that the APA’s limited waiver of sovereign immunity did “not provide the District Court with jurisdiction to adjudicate” similar APA claims challenging grant terminations. 145 S. Ct. at 2658. Here, the Form Termination Class challenges the government’s termination of research grants as arbitrary and capricious under the APA. *NIH* held that similar claims were “based on . . . research-related grants.” *Id.* (citation modified). Further, the Form Termination Class sought—and the district court awarded—vacatur of the termination notices and reinstatement of the terminated grants. *NIH* held that such relief is “designed to enforce an[] obligation to pay money pursuant to [the] grants” at issue. *Id.* (citation modified). Accordingly, we conclude the government has made a strong showing that it is likely to establish that the district court lacks jurisdiction to review the Form Termination Class’s APA claim.⁵

B. DEI Termination Class’s likelihood of success

The government argues that the district court abused its discretion when it concluded that the DEI Termination Class was likely to succeed on the merits of its

⁵ Because we conclude the government is likely to prevail on its argument that the district court lacks jurisdiction, we need not address whether the government is likely to succeed in showing that members of the Form Termination Class lack Article III standing, that the grant terminations are not reviewable under the APA, or that the grant terminations were reasonable.

First Amendment claim that the agencies unlawfully terminated their grants based on their viewpoint. The government relies on the significant flexibility it is afforded when acting as a patron to subsidize speech, as opposed to when it regulates speech as a sovereign. The government argues that it “can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest” to the exclusion of other activities. *Rust v. Sullivan*, 500 U.S. 173, 193 (1991); *Regan v. Tax’n With Representation of Wash.*, 461 U.S. 540, 549–50 (1983). In support, the government relies on *National Endowment for the Arts v. Finley* to argue that there is a First Amendment violation only when the government uses its sovereign power to “drive ‘certain ideas or viewpoints from the marketplace’”—not when the government simply ceases funding those ideas or viewpoints. 524 U.S. 569, 587 (1998) (citation omitted).

In our view, the government misreads *Finley*. There, Congress amended the National Endowment for the Arts’s (NEA) reauthorization bill to require that grant applications be evaluated by “taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.” *Id.* at 572 (citation omitted). The Plaintiffs, performance artists who applied for grants, brought a facial challenge to the amendment and argued that it violated their First Amendment rights. *Id.* at 577, 580. Importantly, the Plaintiffs “d[id]

not allege discrimination in any particular funding decision,” and therefore, the Supreme Court “ha[d] no occasion . . . to address an as-applied challenge in a situation where the denial of a grant may be shown to be the product of invidious viewpoint discrimination.” *Id.* at 586–87. The Court explained that “[i]f the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then [it] would confront a different case.” *Id.* at 587. The Court went on to emphasize that “*even in the provision of subsidies*, the Government may not ‘aim at the suppression of dangerous ideas.’” *Id.* (emphasis added) (citation modified) (quoting *Regan*, 461 U.S. at 550).

Contrary to the government’s argument, this case does not appear to be one in which an agency decided not to “fund a program.” *See Rust*, 500 U.S. at 193. Rather, it is one in which more than a dozen agencies selected particular grants for termination regardless of the programs through which they were funded, based on their connection to DEI, DEIA, and environmental justice. Thus, we “confront a different case” than *Finley* (where plaintiffs brought a facial challenge to Congress’s mandate that NEA consider standards of decency in awarding grants), *Rust* (where plaintiffs brought a facial challenge to HHS regulations interpreting Title X’s prohibition on funding for abortion services), and *Regan* (where plaintiffs brought a facial challenge to the IRS’s requirement that organizations refrain from lobbying to qualify for § 501(c)(3) tax-exempt status). Plaintiffs’ as-applied

challenge is closer to *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995). In that case, the University of Virginia made funds available to cover printing costs for student newspapers. *Id.* at 843. The University denied a Christian newspaper’s application for funds because the newspaper engaged in “religious activity” by “promot[ing] or manifest[ing] a particular belie[f] in or about a deity or an ultimate reality,” conduct prohibited by the University’s guidelines for student activity funding. *Id.* at 827. The Court concluded that the University “d[id] not exclude religion as a subject matter” but “select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints.” *Id.* at 831, 833, 835 (“[W]hen the State is the speaker, it may make content-based choices,” but “[h]aving offered to pay the third-party contractors on behalf of private speakers who convey their own messages, the [State] may not silence the expression of selected viewpoints.”).

Here, the record at this stage shows that the agencies selected grants for termination based on viewpoint. Indeed, at the oral argument held on July 31, 2025, the government did not meaningfully dispute that DEI, DEIA, and environmental justice are viewpoints. The agencies, the termination letters, and the Executive Orders do not define these terms, but dictionary definitions demonstrate that DEI, DEIA, and environmental justice are not merely neutral topics. Instead, the terms inherently convey the viewpoint that the exclusion of

historically disadvantaged groups is undesirable. *diversity, equity and inclusion*, Merriam-Webster, <https://perma.cc/84ZW-7JSR> (last visited Aug. 12, 2025) (“a set of values and related policies and practices focused on establishing a group culture of equitable and inclusive treatment and on attracting and retaining a diverse group of participants, including people who have historically been excluded or discriminated against”); *diversity, equity and inclusion*, Cambridge English Dictionary, <https://perma.cc/M2GS-L4UT> (last visited Aug. 12, 2025) (“the idea that all people should have equal rights and treatment and be welcomed and included, so that they do not experience any disadvantage because of belonging to a particular group, and that each person should be given the same opportunities as others according to their needs”); *environmental justice*, Cambridge English Dictionary, <https://perma.cc/V5CK-Z2GP> (last visited Aug. 12, 2025) (“the idea that all groups of people deserve to live in a clean and safe environment”).

We are bound by the bedrock principle that the government cannot “leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints” or “aim at the suppression of dangerous ideas” in the provision of subsidies. *Finley*, 524 U.S. at 587 (citation modified) (quoting *Regan*, 461 U.S. at 550). The government does not dispute that it terminated the subject grants because they promoted DEI, DEIA, or environmental justice; instead, it contends that government funding decisions need not be viewpoint neutral. We

agree that the government enjoys broad discretion in choosing which programs to fund, but we cannot reconcile the position the government advances here—that it is free to terminate funding even when it does so based on viewpoint—with binding Supreme Court authority. *See id.* We therefore conclude that the government has failed to make a strong showing that the district court abused its discretion when it concluded that the DEI Termination Class was likely to succeed on the merits of its First Amendment claim.

The agencies' implementation of the DEI Executive Orders reinforces our conclusion. Acting Chairman of NEH Michael McDonald stated in a declaration that, between January and April 2025, NEH staff reviewed open grants in light of the DEI Executive Orders, and NEH's "policy for selecting grants for termination at NEH focused first on identifying open grants that focused on or promoted (in whole or in part) 'environmental justice,' 'diversity, equity, and inclusion,' or 'diversity, equity, inclusion and accessibility,' and 'gender ideology.'" NEH created and used spreadsheets that identified grants as "either 'High, Medium, Low, or No Connection' in terms of the Executive Orders." Daniel Coogan, Deputy Assistant Administrator for Infrastructure and Extramural Resources in the EPA's Office of Mission Support, stated in a June 2025 declaration that the grant termination process "began by looking at grant titles and project descriptions." Although his declaration states that the EPA reviewed and terminated grants

“independent from” the Executive Orders, the EPA’s public announcements state the opposite. For example, on March 10, 2025, the EPA announced that it “cancelled grants and contracts related to DEI and environmental justice.” *EPA Administrator Lee Zeldin Cancels 400+ Grants in 4th Round of Cuts with DOGE, Saving Americans More than \$1.7B*, EPA (Mar. 10, 2025), <https://perma.cc/3P2M-6PUY>.

Because the current record suggests that the government aimed at the suppression of speech that views DEI, DEIA, and environmental justice favorably, the government has not shown that it is likely to succeed on the merits of its claim that the district court abused its discretion when it concluded the agencies likely terminated the grants based on viewpoint.⁶

II. Remaining *Nken* factors

The government argues that the preliminary injunction risks irreparable harm to the government and the public interest by: (1) interfering with the

⁶ Because we conclude the government failed to show that it was likely to succeed on the merits of its claim that the district court abused its discretion when it concluded that Plaintiffs were likely to succeed on their First Amendment claim, we do not reach the government’s argument challenging the class’s claim that the terminations were contrary to NEH’s enabling statute.

President's ability to carry out core Executive Branch policies, and (2) compelling the government to disburse funds that it cannot recover.⁷

The government first argues the district court's preliminary injunction will interfere with the Executive Branch's chosen policy agenda. This argument rests on the assumption that the government's conduct is lawful. But the government has not made a strong showing of a likelihood of success on the merits in regard to Plaintiffs' First Amendment claim, and the government "cannot suffer harm from an injunction that merely ends an unlawful practice." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013). Moreover, we have rejected the assertion that "the irreparable harm standard is satisfied by the fact of executive action alone." *Doe #1 v. Trump*, 957 F.3d 1050, 1059 (9th Cir. 2020). The government's first claimed harm is not irreparable because the government "may yet pursue and vindicate its interests in the full course of this litigation." *Washington v. Trump*, 847 F.3d 1151, 1168 (9th Cir. 2017) (per curiam).

The government also contends that it will be irreparably harmed because the district court's preliminary injunction requires it to disburse money it may never recover. "[W]hile the loss of money is not typically considered irreparable harm, that changes if the funds 'cannot be recouped' and are thus 'irrevocably

⁷ To the extent the government argues that the third and fourth factors merge, that is so when the government is the party opposing a stay, rather than the party seeking one, as it is here. *See Nken*, 556 U.S. at 435.

expended.” *NIH*, 145 S. Ct. at 2658 (citation omitted). Here, as in *NIH*, the government “faces such harm.” *Id.* Like the plaintiffs in *NIH*, Plaintiffs “do not state that they will repay grant money if the Government ultimately prevails.” *Id.*

We consider the final two *Nken* factors “if the first two factors are satisfied.” *Doe #1*, 957 F.3d at 1058. The government made such a showing as to the Form Termination Class, but not as to the DEI Termination Class. *See id.*

We are mindful of the Supreme Court’s decision in *NIH*, where the Court concluded that similar circumstances justified a stay. *NIH*, 145 S. Ct. at 2658. Although such orders “are not conclusive as to the merits, they inform how a court should exercise its equitable discretion in like cases.” *Trump v. Boyle*, 145 S. Ct. 2653, 2654 (2025). We conclude that the public interest would be harmed by requiring the agencies to continue to make payments pursuant to the grants, and that despite the harms identified by Plaintiffs, due consideration of the *Nken* factors warrants the entry of a stay as to the Form Termination Class. *See NIH*, 145 S. Ct. at 2658.

CONCLUSION

The government’s motion for partial stay pending appeal (Dkt. No. 7) is **GRANTED in part** as to the Form Termination Class and **DENIED in part** as to the DEI Termination Class. We express no opinion on Plaintiffs’ remaining constitutional and statutory claims, nor on whether it would be appropriate for the

district court to certify other provisional classes based on those claims.