

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Rita F. Lin, Judge

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

San Francisco, California
Friday, June 20, 2025

TRANSCRIPT OF REMOTE PROCEEDINGS

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Friday - June 20, 2025

10:01 a.m.

P R O C E E D I N G S

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

(Pause in proceedings.)

THE CLERK: Please be seated.
Calling Civil Case 25-4737, Thakur, et al., v. Trump,
et al.

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

MR. CHEMERINSKY: Erwin Chemerinsky for the
plaintiffs.

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

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

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

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

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

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

3 **THE COURT:** Good morning to all of you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 Let me ask both parties to send whoever is going to

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

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

10 **THE COURT:** Great. Thank you.

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

13 **THE COURT:** Thank you.

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

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

24 And then relatedly (as read):

25 "Why would traditional Article III standing rules

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

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

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

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

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

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

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

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

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

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

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

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

3 (Reporter interrupts for clarification of the record.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 But let's say the Sixth Amendment context --

1 (Reporter interrupts for clarification of the record.)

2 **MR. ALTABET:** Yes. I will.

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

6 **MR. ALTABET:** Yes, Your Honor.

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

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

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

25 **THE COURT:** So going back to the hypothetical that I

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

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

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

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

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

25 **THE COURT:** Is there case law saying that the

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

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

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

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

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

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

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

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

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

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

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

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

25 Then the nonprofit has employees. Does the nonprofit

1 employees have standing?

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

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

8 **MR. CHEMERINSKY:** Thank you, Your Honor.

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

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

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

25 I also think that the Government's premise

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

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

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

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

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

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

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

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

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

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

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

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

16 "Assuming plaintiffs have Article III standing to
17 bring their claims, do defendants contend that
18 plaintiffs' claims could actually be heard in
19 the Court of Federal Claims under the Tucker Act?"
20 Let's just start with that.

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

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

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

1 as our main case on this -- B-O-A-Z, Housing Authority -- a
2 2021 federal circuit case. And there, the topic matter was a
3 contract for public housing authority subsidies to states and
4 localities. It was through a statutory discretionary program,
5 and the Housing and Urban Development Agency created contracts
6 to send this subsidy money to states and localities to help
7 fund public housing. So it was for the benefit of the public.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 Am I understanding the Government's position
22 correctly?

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

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

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

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

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

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

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

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

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

7 **MR. CHEMERINSKY:** Thank you.

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

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

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

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

25 All of the causes of action of the complaint are for

1 constitutional and statutory violations.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 **MR. CHEMERINSKY:** Okay.

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

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

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

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

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

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

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

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

10 **THE COURT:** Thank you.

11 Last opportunity for the Government to respond.

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

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

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

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

1 Claims.

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

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

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

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

24 I think that kind of understanding applies here as
25 well.

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

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

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

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

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

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

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

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

1 vindicated."

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

7 **THE COURT:** Let's move to Question 3.

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

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

24 Let's start with plaintiffs on that.

25 **MS. CABRASER:** Good morning, Your Honor, Elizabeth

1 Cabraser.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 same thing as what we currently have.

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

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

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

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

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

1 objection to that.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 **MS. CABRASER:** Thank you, Your Honor.

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

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

1 representative for an agency-specific subclass.

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

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

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

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

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

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

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

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

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

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

1 considerations?

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

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

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

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

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

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

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

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

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

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

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

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

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

1 it. It's not necessary here.

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

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

13 And the named plaintiffs who had direct dealings with
14 only a few of those defendants could represent the entire
15 class. That's *Moore v. Comfed Savings Bank*, 908 F.2d 834, from
16 1990.

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

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

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

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

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

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

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

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

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

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

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

8 Help me just understand the interaction between these
9 two.

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

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

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

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

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

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

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

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

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

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

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

4 **MS. CABRASER:** Yes.

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

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

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

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

25 So if the Court decides to structure the class along

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

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

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

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

20 **THE COURT:** Anything further from defendants on that
21 topic?

22 **MR. ALTABET:** Yes, briefly.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 **MR. CHERMERINSKY:** The answer to your latter question,
11 Your Honor, is yes.

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

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

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

22 It says (as read):

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

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

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

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

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

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

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

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

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

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

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

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

2 So why is this different from that scenario?

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

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

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

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

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

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

7 **THE COURT:** Thank you.

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

12 **MR. CHEMERINSKY:** Thank you.

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

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

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

1 They'll have already lost their post-docs.

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

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

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

16 And here, I want to point this Court to what I think
17 is controlling Ninth Circuit law. The Ninth Circuit case that
18 I would point you to here is *Community Legal Services*
19 *v. Health & Human Services*, specifically at 137 F.4th 939 to
20 940.

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

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

4 That's not true for these termination of grants.

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

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

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

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

22 706(2)(C) allows you to set aside an agency action
23 when it violates a statute. And the one thing we haven't
24 mentioned this morning, here, is the Impoundment Control Act,
25 which is very specific that says that when Congress has

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

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

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

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

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

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

1 statutes?

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

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

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

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

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

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

25 So I think that's an important framing for thinking

1 about this case more broadly.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 **THE COURT:** Last word for the plaintiff.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 No court in the country has ever taken that position,

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

3 Thank you.

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

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

10 Thank you all.

11 **MR. CHEMERINSKY:** Thank you so much.

12 **THE CLERK:** Court is in recess.

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

14 ---o0o---

15 **CERTIFICATE OF REPORTER**

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

18
19 DATE: Saturday, June 21, 2025

20
21 
22

23 Ruth Levine Ekhaus, RMR, RDR, FCRR, CCG, CSR No. 12219
24 Official Reporter, U.S. District Court
25