

## 9th Circ. Judge Rips Feds For 'Trying To Suppress Speech'

By **Dorothy Atkins**

Law360 (November 14, 2025, 10:09 PM EST) -- A Ninth Circuit panel expressed doubts Friday about the Trump administration's request to reconsider an order reinstating billions of dollars in University of California research grants in light of a recent U.S. Supreme Court ruling, with one judge objecting that "the government is trying to suppress, to penalize speech."

U.S. Circuit Court Judge Richard A. Paez's comment came during a hearing before a three-judge panel in San Francisco on the Trump administration's **request** for the appellate court to reconsider its **August decision** upholding a classwide preliminary injunction in the wake of the U.S. Supreme Court's **American Public Health Association v. National Institutes of Health**  **ruling**.

The **injunction** in this case requires the U.S. Environmental Protection Agency, the National Science Foundation and the National Endowment for the Humanities to reinstate grants awarded to University of California researchers that were terminated following Trump's **executive orders** overturning diversity, equity and inclusion, or DEI, efforts and other initiatives.

But Yaakov M. Roth argued on behalf of the government Friday that in their NIH decision, the majority justices allowed the NIH to cut hundreds of grant programs tied to vaccines, transgender issues, DEI, COVID-19 and climate change, among other issues. The majority did so based on the finding that under the Tucker Act, the plaintiffs' claims likely belonged in the U.S. Court of Federal Claims, a specialized forum for government contract disputes, and not in district court.

Roth argued that in this case, the researchers "disguised" their breach of contract claims as Administrative Procedure Act claims alleging the grant terminations were arbitrary and capricious, and so the Tucker Act should also govern this dispute.

But all three judges on the Ninth Circuit panel questioned Roth on the government's legal theory, while noting there are also First Amendment claims at issue in addition to APA claims.

Under questioning by U.S. Circuit Court Judge Roopali H. Desai, Roth acknowledged the government would not have consented to jurisdiction in Federal Claims Court since that court can only award monetary damages and not equitable relief, which the researchers in this case are seeking.

The government's position is that no court has jurisdiction to decide the plaintiffs' APA claims in this case, Roth argued.

U.S. Circuit Court Judge Morgan Christen also got Roth to concede that Trump's executive orders didn't target specific college programs, but instead focused on DEI initiatives.

However, Roth replied that the distinction didn't matter, to which Judge Christen replied, "It matters because once they decide to fund, they can't discriminate on the basis of viewpoint."

Judge Christen also observed there is a "strong presumption" of judicial reviewability. But Roth responded the claims are only reviewable "at the behest of certain persons," who are contracting parties and not beneficiaries, which is "the principle of the Tucker Act."

"If the statute allows for review by certain people, that doesn't mean everyone gets to go around it and go to federal court," Roth said.

But Judge Desai told Roth "the difficulty" with the government's Tucker Act argument is that the NIH ruling could have made, but didn't, the distinction between contracting parties and grant beneficiaries like researchers.

"There was no discussion about the researchers and what would happen to their claims," she said. "The absence of direction to those individuals leaves me to think that the court didn't address the issue."

Judge Paez also noted that in the NIH decision, Justice Amy Coney Barrett "hedged a bit" in her concurrence regarding when grant terminations should be subject to judicial review, and he said "it's kind of odd" that Justice Barrett contemplated policy-related challenges and damages-related challenges proceed in two different courts.

Like Judge Christen, Judge Paez also asked Roth whether the government believes there is no distinction between lawmakers' initial decision to fund the grants for a broad range of research, and Trump's orders to end the grants, which was more narrowly focused on DEI.

Roth replied that "from a First Amendment standpoint," there is no distinction between the two decisions.

But Judge Paez appeared exasperated by Roth's response.

"Even though they are terminating grants because they further or they promote DEI? Why isn't that a penalty?" Judge Paez asked. "The government is trying to suppress, to penalize speech."

Roth disagreed that ending the grants constitutes a penalty or suppression, or that the First Amendment claims could shield grants from being terminated.

"It's a decision not to continue funding, and if you can make that decision at 'Time A,' I don't understand why the First Amendment would say you're now no longer allowed to make it at 'Time B,'" Roth said

But Judge Christen pointed out that there is currently no evidence in the record to suggest these grants were initially awarded specifically because they mentioned DEI. Instead, the evidence suggests they were awarded based on "a whole host of criteria," the judge said.

Erwin Chemerinsky, dean of the University of California, Berkeley School of Law, argued on behalf of the plaintiffs that the case challenges Trump's decision to end billions of dollars of grants with little explanation, "without a semblance of due process" and based on the perceived viewpoint of the research.

Chemerinsky cited the Ninth Circuit's recent **majority ruling** in *Community Legal Services in East Palo Alto et al. v. U.S. Department of Health and Human Services et al.*, in which the majority rejected the notion that there can be such a "jurisdictional catch-22" in which no court can consider the APA claims.

Chemerinsky also argued that the Supreme Court has instructed the law must explicitly state that no court has jurisdiction over claims, and such a conclusion can never be inferred. There is additionally no case law to suggest somebody who has an Article III injury can't sue, and the NIH case doesn't apply to the claims at issue in this case, since they're being pursued by researchers, who face "tremendous" harm from the cuts, he argued.

He added that the high court's **National Endowment for the Arts v. Finley**  ruling and other cases instruct that the government can't discriminate against viewpoints in divvying out research grants.

"The government can't leverage its power to try to censor particular ideas ... and it's what the government did here," Chemerinsky argued. "They were terminating specific grants because they disagreed with the viewpoint."

At the end of the hearing, the panel took the arguments under consideration.

U.S. Circuit Court Judges Richard A. Paez, Morgan Christen and Roopali H. Desai sat on the panel for the Ninth Circuit.

The researchers were represented during the hearing by Erwin Chemerinsky of the University of California, Berkeley School of Law.

The federal government was represented during the hearing by Yaakov M. Roth of the U.S. Department of Justice's Civil Division.

The appeal is Neeta Thakur et al. v. Donald Trump et al., case number 25-4249, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Bonnie Eslinger. Editing by Lakshna Mehta.