

No. 25-4249

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

NEETA THAKUR, on behalf of themselves
and all others similarly situated; et al.,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, in his official capacity as
President of the United States; et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California
District Court Case No. 3:25-cv-04737

**APPELLANTS' RESPONSE TO MOTION FOR RECONSIDERATION
OR RECONSIDERATION EN BANC**

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INTRODUCTION

As the panel concluded, *National Institutes of Health v. American Public Health Association (NIH)*, 145 S. Ct. 2658 (2025), holds that the Tucker Act precludes district-court jurisdiction over plaintiffs' APA claims challenging grant terminations. Plaintiffs bury the lede, devoting a mere two paragraphs near the end of their motion to distinguishing *NIH*. Mot. 15–16. But the Supreme Court's grant of a stay in what plaintiffs previously conceded was a "nearly identical" case, Stay Opp. 8, controls this Court's disposition of "like cases," *Trump v. Boyle*, 145 S. Ct. 2653, 2654 (2025); *see also NIH*, 145 S. Ct. at 2664 (Gorsuch, J., concurring in part and dissenting in part) (explaining that the Supreme Court's stay decisions "bind[] lower courts").

In *NIH*, the Supreme Court stayed a district-court order vacating the government's grant terminations because the district court lacked jurisdiction under the APA. Plaintiffs offer no sound basis for ignoring *NIH*, which, like this case, involved plaintiff-researchers who were not parties to the grant. It makes no difference that *NIH* also included plaintiffs who were parties to the grant; the Supreme Court stayed the *NIH* order with respect to all plaintiffs.

Plaintiffs' sole effort to distinguish *NIH* is in any event mistaken even apart from the Supreme Court's recent teachings. Plaintiffs consistently conflate the absence of any judicial forum to resolve a dispute, which is disfavored, with a congressional determination that judicial review may only be obtained by certain parties, which is commonplace. Congress regularly limits particular types of suits to particular plaintiffs,

and the Supreme Court has squarely held that in those circumstances other, less-affected plaintiffs may not bring suit. *See, e.g., Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 352–53 (1984). It is entirely unremarkable that contract disputes like the ones at issue here may be brought only by the parties to the contract. What would be extraordinary would be if the parties to the contract were entitled only to a contract claim in the Court of Federal Claims, while non-parties to the contract are entitled to bring an APA claim and obtain remedies, such as specific performance, that are unavailable to the parties to the contract. Indeed, a principal function of the APA’s implied-preclusion rule is to block that type of circumvention of Congress’s specialized remedial schemes. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 215 (2012).

Plaintiffs’ reliance on *Community Legal Services in East Palo Alto v. HHS*, 137 F.4th 932 (9th Cir. 2025), is misplaced. *Community Legal Services* concerned a claim that this Court considered statutory rather than contractual; the Court accordingly did not consider the Tucker Act to be implicated at all. Yet even plaintiffs no longer dispute that the claims here are contractual in origin and that the parties to the grant agreements would therefore only be able to pursue them in the Court of Federal Claims. And in any event, *Community Legal Services* was a stay decision issued before the Supreme Court’s superseding stay decision in *NIH*.

The panel’s amended order correctly held the district court lacks jurisdiction over plaintiffs’ APA claims,¹ and the motion to reconsider should be denied. Plaintiffs’ request for rehearing en banc fails for the same reasons, in addition to the fact that plaintiffs seek review in the stay posture and a merits decision will be forthcoming.

BACKGROUND

1. Shortly after inauguration, the President issued several Executive Orders setting forth his Administration’s priorities. The Order “Ending Radical and Wasteful Government [Diversity, Equity, and Inclusion (DEI)] Programs and Preferencing” instructed agencies to “terminate, to the maximum extent allowed by law, ... ‘equity-related’ grants or contracts.” Exec. Order No. 14151, § 2(b)(i), 90 Fed. Reg. 8339, 8339 (Jan. 29, 2025). The Order “Ending Illegal Discrimination and Restoring Merit-Based Opportunity” similarly ordered the termination of certain DEI-related “mandates, requirements, programs, or activities, as appropriate.” Exec. Order No. 14173, § 3(c)(iii), 90 Fed. Reg. 8633, 8634 (Jan. 31, 2025). Other Executive Orders “instruct[ed] federal agencies to terminate, review, or revise federal grants” for additional reasons. ER-13 (discussing Executive Orders 14168, 14154, 14217, 14238, 14158, and 14222).

¹ This rehearing petition concerns only plaintiffs’ APA claims. Plaintiffs asserted other claims, and received injunctive relief based on a First Amendment claim. While the panel denied the government’s request to stay the First Amendment portion of the injunction, the government has not sought rehearing of that portion of either the panel’s original or amended stay decision, though it continues to contest the district court’s First Amendment analysis at the merits stage. *See* Opening Br. 12–19.

2. Accordingly, the defendant agencies reviewed their existing grant portfolios. These programs are highly selective. ER-11–12. The agencies exercise significant discretion when determining which grants to fund or continue funding based on how the projects advance agency goals.

Federal regulations generally specify the conditions under which awarded grants may be terminated. *See, e.g.*, 2 C.F.R. §§ 200.309, .339(c), .343. Section 200.340, simply titled “[t]ermination,” reserves authority to terminate grants “pursuant to the terms and conditions of the Federal award, including, to the extent authorized by law, if an award no longer effectuates the program goals or agency priorities.” Awardees are thus informed that awards may be terminated based on changed priorities. The agencies invoked this authority to terminate certain grants they concluded no longer aligned with agency priorities.

3. The named plaintiffs for the preliminary injunction on appeal are six individual faculty members or researchers at University of California (UC) institutions who were listed on grant applications terminated by the Environmental Protection Agency (EPA), the National Endowment for the Humanities (NEH), and the National Science Foundation (NSF). ER-166. None of the named plaintiffs received any such grant directly. They moved to certify a class of all similarly situated UC researchers, Dkt. 18, and sought reinstatement of grants by 16 federal agencies, Dkt. 7.

The district court certified two overlapping classes. The class relevant to this APA claim, the Form Termination Class, covers grants “that are terminated by means

of a form termination notice that does not provide a grant-specific explanation for the termination that states the reason for the change to the original award decision and considers the reliance interests at stake, from and after January 20, 2025.” ER-56–57.

The district court granted plaintiffs’ request for an injunction requiring the reinstatement of grants. The court rejected the government’s reliance on the Tucker Act, which generally precludes APA claims premised on contracts with the government, for two reasons. First, the court concluded that a claim that contract “terminations [were] carried out in an arbitrary and capricious manner does not rest on a contention that Defendants breached the terms of any contract.” ER-43–44. Second, the court reasoned that even if the Tucker Act bars claims by grant recipients, the court could resolve similar claims by nonparties to the grants. ER-42–43. Having found jurisdiction, the court concluded “Plaintiffs are ... likely to succeed in showing that the mass grant terminations carried out via form letters were conducted in a manner that was arbitrary and capricious.” ER-30. And the court further determined that the equities weighed in favor of injunctive relief, as plaintiffs faced irreparable harm if they could not receive federal funding from the grants. ER-52–53.

The district court limited the injunction to the three defendant agencies (EPA, NEH, and NSF) who had terminated a grant which listed a plaintiff named in the then-operative complaint. ER-64–65. Plaintiffs have since amended their complaint and sought injunctive relief against additional agencies—Department of Defense,

Department of Transportation, National Institutes for Health, and Department of Energy—on the same basic theories. *See* Mot. 7 n.3.

The district court denied the government’s request for a stay pending appeal. ER-66–67.

4. The government sought a stay pending appeal, which a panel of this Court initially denied in full.² With respect to the APA claims, the panel rejected the government’s argument that the Tucker Act precludes district-court jurisdiction over the Form Termination Class’s APA claim on the basis that neither the source of plaintiffs’ asserted interest in funding, nor the relief requested, are contractual in nature. *Thakur v. Trump*, 148 F.4th 1096, 1103–04 (9th Cir. 2025), *withdrawn and superseded by* 2025 WL 3760650 (9th Cir. Dec. 23, 2025).

Later the same day, the Supreme Court granted a stay in *NIH*. Citing its recent decision in *Department of Education v. California*, 604 U.S. 650 (2025) (per curiam), the Court held that APA claims substantially similar to the claims here—that research grants were arbitrarily and capriciously terminated—are precluded by the Tucker Act. 145 S. Ct. at 2659; *see also id.* at 2661 (Barrett, J., concurring). And it further determined that the government faced irreparable harm. *Id.* at 2659 (majority op.).

² The government initially did not seek relief on behalf of NSF, but once the district court interpreted its injunction broadly to prohibit subsequent suspensions of grants by NSF, the government requested that the injunction be stayed as to NSF on the same grounds that applied to the other movants.

Based on that decision, the government sought rehearing in this case of the panel's stay order as to the APA claim. Pursuant to orders from this Court, plaintiffs filed a response and the government filed a reply. While the rehearing petition with respect to the original stay decision remained pending, the panel heard oral argument on the merits.

On December 23, 2025, the panel issued a unanimous, amended stay order partially granting the government's motion to stay the district court's preliminary injunction. The panel concluded that the government was likely to prevail on the argument that the district court lacked jurisdiction over plaintiffs' APA claim, but the panel left in place the denial of a stay with respect to plaintiffs' First Amendment claim. Relevant here, the Court explained that it is "bound by *NIH*, which held that the APA's limited waiver of sovereign immunity did 'not provide the District Court with jurisdiction to adjudicate' similar APA claims challenging grant terminations." Op. 10 (quoting *NIH*, 1345 S. Ct. at 2659).

Plaintiffs moved for reconsideration on December 29, 2025, of the panel's partial grant of a stay. The Court ordered the government to file a response.

ARGUMENT

I. The Panel's Amended Order Correctly Follows The Supreme Court's Controlling Decision in *NIH*

Plaintiffs ask the en banc Court to decide whether researchers (who are not parties to the grant) can bring APA claims challenging grant terminations—and, in

particular, whether an order suspending the grant terminations should be stayed pending appeal. But plaintiffs cannot meet the high bar required for en banc review, as the panel's amended order is entirely consistent with the Supreme Court's recent orders in similar grant termination cases.

The panel's grant of a stay as to the APA claims is clearly correct in light of the Supreme Court's repeated recognition that district courts lack jurisdiction over APA claims challenging grant terminations. *Nat'l Insts. of Health v. Am. Pub. Health Ass'n*, 145 S. Ct. 2658, 2659 (2025) (*NIH*); *Dep't of Educ. v. California*, 604 U.S. 650, 651 (2025) (*per curiam*). In *California*, the Court stayed a district-court injunction based on APA claims challenging the government's termination of grant agreements; as the Court explained, the "APA's waiver of sovereign immunity does not apply 'if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.'" 604 U.S. at 651 (quoting 5 U.S.C. § 702). The Tucker Act grants exclusive jurisdiction to "the Court of Federal Claims ... over suits based on 'any express or implied contract with the United States.'" *Id.* (quoting 28 U.S.C. § 1491(a)(1)). Relying on *California*, the Supreme Court in *NIH* stayed a district court order vacating an agency's termination of research-related grants, concluding that the APA's "limited waiver of [sovereign] immunity does not provide [district courts] with jurisdiction to adjudicate claims 'based on' [federal] grants or to order relief designed to enforce any 'obligation to pay money' pursuant to those grants." *NIH*, 145 S. Ct. at 2658 (quoting *California*, 604 U.S. at 650) (first

alteration in original). That decision controls this case. *See Trump v. Boyle*, 145 S. Ct. 2653, 2654 (2025); *NIH*, 145 S. Ct. at 2663–64 (Gorsuch, J., concurring in part).

Recognizing it was “bound by *NIH*,” the panel correctly amended its original stay order with respect to the APA claims. Op. 10. Plaintiffs’ APA claims alleging that the government arbitrarily and capriciously terminated research-related grants are nearly identical to the claims considered by the Supreme Court in *NIH*. And like in the district court in *NIH*, the district court’s order “vacating the Government’s termination of various research-related grants” and reinstating the grants constitutes relief “designed to enforce an[] ‘obligation to pay money’ pursuant to those grants.” *NIH*, 145 S. Ct. at 2659. *NIH* is thus on all fours with this case, and the panel properly followed it.

II. Plaintiffs’ Arguments For Rehearing Are Unavailing

Plaintiffs do not dispute that their claims are contract claims under *NIH*. Instead, plaintiffs primarily contend that rehearing en banc is necessary because the panel’s amended order effectively precludes them from obtaining review of their contract claims in any court, a point they assert makes this case different from *NIH*. The problem for plaintiffs is that the *NIH* plaintiffs also included researchers who, like plaintiffs here, were not parties to the grant agreements, and the Supreme Court stayed the district court’s order as to all the plaintiffs. And in any event, the Supreme Court has long recognized that Congress, by establishing a remedial scheme, may impliedly limit relief to a particular class of plaintiffs, thereby precluding judicial review for everyone else. The Tucker Act is one such scheme, and it limits relief for contract

claims against the government to only those who are themselves parties to the contract. Plaintiffs offer no sound basis for upending that statutory scheme. This Court's decision in *Community Legal Services* does not, as plaintiffs contend, hold otherwise, and in any event precedes the Supreme Court's decision in *NIH*.

A. Although plaintiffs try to distance this case from *NIH*, it is undisputed that *NIH* also involved researchers who, like plaintiffs here, were not parties to the grant agreements at issue. *See* Mot. 15. The Supreme Court stayed the district-court order as to *all* the plaintiffs; it did not distinguish between parties and nonparties to the grant agreements. There is no basis for plaintiffs' apparent view that teachers could have brought the same claims and secured the same relief rejected by the Supreme Court in *California*, or that some of the *NIH* plaintiffs who were individual researchers were entitled to the relief that the Court stayed.

That some of the plaintiffs in *NIH* were parties to the grants and thus could sue in the Court of Federal Claims makes no difference. Jurisdiction is determined with respect to each claim. *See, e.g., Nippon Miniature Bearing Corp. v. Weise*, 230 F.3d 1131, 1135 (9th Cir. 2000); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984). It cannot be, as plaintiffs suggest, that a district court has jurisdiction over contract claims when all the plaintiffs are nonparties to a contract, but lacks jurisdiction over the same claims when the plaintiffs include both parties *and* nonparties to the contract. Put simply, had Thakur and the University of California both brought this case, it is clear after *NIH* that the district court would lack jurisdiction over Thakur's APA claim. The

proposition that omitting the University of California somehow solves Thakur's jurisdictional problem is nonsensical.

And to the extent plaintiffs suggest (Mot. 15–16) that *NIH* is, at least in part, wrongly decided, that is an astonishing position, and one that has no import here as this Court cannot disregard Supreme Court decisions it considers wrongly decided. *See NIH*, 145 S. Ct. at 2663 (Gorsuch, J., concurring) (“Lower court judges may sometimes disagree with th[e Supreme] Court’s decisions, but they are never free to defy them.”).

B. In any event, plaintiffs are wrong in viewing the panel’s stay order as precluding all judicial review of the validity of the contract terminations. It plainly does not. The parties to the contracts would be entitled to bring contract claims in the Court of Federal Claims under the Tucker Act, and it is the availability of such review that impliedly precludes APA claims.³

The cases on which plaintiffs rely (Mot. 13), which invoked a presumption in favor of judicial review, are thus inapposite. Instead, the relevant Supreme Court precedent is *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984). There, the Agricultural Marketing Agreement Act of 1937 authorized the Secretary of Agriculture to “to issue milk market orders setting the minimum prices that handlers (those who process dairy products) must pay to producers (dairy farmers) for their milk products.”

³The panel’s amended order also acknowledges that plaintiffs’ First Amendment claims are reviewable and declined to stay that portion of the injunction. *See infra* p. 3 n.1. Contrary to plaintiffs’ assertion (Mot. 10), the government has not argued on appeal that the Tucker Act precludes the plaintiffs’ First Amendment claims.

Id. at 341–42. Congress provided “a mechanism by which dairy handlers could obtain review of the Secretary’s market orders” in court after exhausting administrative remedies. *Id.* at 346. Consumers—rather than dairy handlers—tried to bring an APA action challenging a milk marketing order. The court of appeals—echoing the plaintiffs’ arguments here—concluded the APA claims were not precluded because of “the presumption favoring judicial review” and because preclusion would “leave consumers without a judicial remedy.” *Id.* at 348–49. The Supreme Court reversed. “[W]hen a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons,” the Supreme Court explained, “judicial review of those issues at the behest of other persons may be found to be impliedly precluded.” *Id.* at 349.

So too here. Congress created a review scheme for direct recipients of grant funding. It would not be logical to allow indirect recipients to bring APA claims challenging the government’s grant terminations while barring direct recipients of the grants from bringing those same claims. *See Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians v. Patchak*, 567 U.S. 209, 215 (2012) (explaining that the APA’s preclusion-carveout provision “prevents plaintiffs from exploiting the APA’s waiver to evade limitations on suit contained in other statutes”). As the Supreme Court has long recognized, when Congress establishes a remedial scheme with limitations on the parties who can seek relief, the proper inference is not that other parties can seek relief

without regard to the remedial scheme's limitations, but rather that other parties cannot seek relief at all. *Block*, 467 U.S. at 345–49.

Driving the point home, the Supreme Court in *Block* recognized that under the milk-marketing scheme, there were certain orders that dairy handlers lacked standing to challenge, and the Court explained that APA suits by others were allowed in that narrow circumstance lest judicial review be unavailable to any party. 467 U.S. at 351–52. But plaintiffs make no argument here that there is any category of contract termination that would be unreviewable by any party, only that these particular plaintiffs cannot bring a contract action. That is insufficient under longstanding Supreme Court precedent.

Plaintiffs are thus wrong to suggest that Congress can never impliedly limit relief to specific parties. Limiting claims to the parties most directly affected by an action, as opposed to precluding judicial review of an action altogether, is commonplace. *See Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 399 (1987) (“The essential inquiry is whether Congress intended for a particular class of plaintiffs to be relied upon to challenge agency disregard of the law.” (cleaned up)); *Glob. Health Council v. Trump*, 153 F.4th 1, 18–20 (D.C. Cir. 2025) (holding that the Impoundment Control Act, which contemplates claims by Comptroller General, impliedly precludes APA claims by private plaintiffs), *reb'g en banc denied*, Order (Aug. 28, 2025). Plaintiffs fail to acknowledge any of these cases, much less the longstanding Supreme Court precedent holding that APA claims are impliedly precluded when Congress enacts a comprehensive remedial scheme, even when that scheme limits relief to certain parties.

Plaintiffs’ theory also makes no sense. It would mean that when Congress establishes a legislative scheme precluding APA review for certain claims and limiting the class of persons who may bring those claims and the venue in which they can be brought, it nonetheless leaves open an APA remedy in any court for anyone outside that class. This would “frustrate achievement” of the Tucker Act’s “statutory purposes,” *Block*, 467 U.S. at 352, as it would undermine Congress’ legislative scheme to allow indirect recipients of grant funding to bring APA claims challenging the government’s grant terminations when direct recipients of the grants are barred from bringing those same claims. *See Patchak*, 567 U.S. at 215. The Tucker Act cannot be so easily evaded.

C. Plaintiffs wrongly contend that the panel’s amended order conflicts with *Community Legal Services in East Palo Alto v. U.S. Department of Health & Human Services*, in which this Court held in a stay posture, and before the Supreme Court’s decision in *NIH*, that the Tucker Act did not preclude an APA contrary-to-law claim challenging whether the withdrawal of government funding for counsel in certain immigration proceedings violated statutory and regulatory requirements. 137 F.4th 932, 936–39 (9th Cir. 2025). According to plaintiffs, *Community Legal Services* must be broadly read to mean that the Tucker Act does not preclude contract claims brought by nonparties to a contract. That reading cannot be squared with the Supreme Court’s decision in *NIH*, and in any event overstates this Court’s holding in *Community Legal Services*.

Procedurally, there is no basis for altering the panel’s decision here, which aligns with the Supreme Court’s stay decision in *NIH*, based on this Court’s earlier-in-time stay decision in *Community Legal Services*. To the extent there is any conflict between plaintiffs’ reading of *Community Legal Services* and the panel decision, that conflict simply follows from the Supreme Court’s decision in *NIH* and does not warrant en banc review. See *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (“[W]here intervening Supreme Court authority is clearly irreconcilable with ... prior circuit authority,” the latter is “effectively overruled.”).

As to the merits, plaintiffs overstate *Community Legal Services*. The panel’s decision in that case was premised on the Court’s conclusion that the subcontractors’ asserted rights and remedies were statutory or regulatory rather than contractual because the relevant statute and regulation ostensibly conferred an independent right to certain legal services, antecedent to any contract. 137 F.4th at 938–39; see also *Community Legal Servs. in E. Palo Alto v. United States Dep’t of Health & Hum. Servs.*, 155 F.4th 1099, 1104 (9th Cir. 2025) (denying rehearing en banc because the plaintiffs’ claims were “grounded in the Government’s statutory and regulatory obligations,” and noting that “[t]he non-contractual source of Plaintiffs’ rights is dispositive”). Here, by contrast, there is no longer any dispute that plaintiffs’ APA claims are contractual rather than statutory. That alone makes this case distinct from *Community Legal Services*.

Plaintiffs rely heavily on the Court’s statement in *Community Legal Services* that “there cannot be exclusive jurisdiction under the Tucker Act if there is no jurisdiction

under the Tucker Act.” Mot. 11 (quoting 137 F.4th at 939). According to plaintiffs, because they could not bring their contract claims in the Court of Federal Claims, their contract claims are not precluded by the Tucker Act and may be brought in federal district court. That is wrong. The issue in *Community Legal Services* was whether the plaintiff’s claims were contractual, and thus whether the Tucker Act applied at all. Because the Court concluded plaintiffs’ claims arose from a statute and regulation rather than any contract, the Court held that the Tucker Act did not apply, and thus that there could not be jurisdiction (for anyone) under the Tucker Act. While the Court also noted that the subcontractors in that case would “not have standing to sue the government under the Tucker Act,” the case did not turn on that point. 137 F.4th at 939. Rather, the Court’s decision was fundamentally premised on its conclusion that the plaintiffs’ claims were statutory or regulatory rather than contractual, and thus the Tucker Act was not implicated at all. Here, there is no dispute that the Tucker Act would confer jurisdiction over claims by the parties to the contract challenging the grant terminations. The only question is whether non-parties can evade the Act’s jurisdictional and remedial limits by suing in district court under the APA. As a matter of both law and common sense, the answer is no.

CONCLUSION

The Court should deny the motion for reconsideration.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Ninth Circuit Rule 40-1, this response contains 4,122 words, and it complies with Federal Rule of Appellate Procedure 32(a)(4)–(6) because it was prepared in a proportionally spaced typeface using Microsoft Word in Garamond 14-point font.

/s/ Derek Weiss

Derek Weiss