No. 26-210

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

v.

NEETA THAKUR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

D. JOHN SAUER
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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The Ninth Circuit held that the First Amendment prohibits the government from terminating the funding of academic research projects, which had been awarded through highly competitive grant programs, based on the government's disagreement with the viewpoints furthered by those projects—specifically, a viewpoint favoring so-called "diversity, equity, and inclusion" (DEI). See Pet. App. 18a-25a. As the government explained (Pet. 12-20), that holding conflicts with this Court's decisions in *National Endowment for the Arts* v. *Finley*, 524 U.S. 569 (1998), and *Rust* v. *Sullivan*, 500 U.S. 173 (1991), which make clear that "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program," *id.* at 193.

Notably, respondents do not even try to dispute the government's showing (Pet. 21-24) that the question presented is exceptionally important and that this case is an excellent vehicle to resolve it. Moreover, they appear to concede that, under *Finley* and *Rust*, the government may consider the viewpoint of projects when *awarding* competitive grants. See Br. in Opp. 2, 19-21. They nevertheless argue that the government may not consider the viewpoint of projects when *terminating* such grants, and they oppose certiorari on the sole ground that there is no case squarely rejecting their position. See *id.* at 1-2, 18-20, 26-27. But that illusory distinction is irreconcilable with *Finley* and *Rust*.

The First Amendment is not a ratchet. Just as it allowed the Biden Administration to fund projects promoting "Racial Equity in STEM Education," Compl. ¶ 339, it allows the Trump Administration to defund those projects. In the competitive-grant context, the government may subsidize projects based on their viewpoint because selectively funding certain projects but not others, based on the government's own view of the public interest, abridges no one's speech. See *Finley*, 524 U.S. at 588 (citing *Rust*, 500 U.S. at 193). Respondents offer no coherent theory for why that fundamental principle would somehow apply differently to terminations than to initial awards, instead merely complaining about reliance interests that have nothing to do with the First Amendment. And tellingly, they cite no precedent adopting such a distinction. In short, respondents' position, like the Ninth Circuit's decision, is in direct conflict with *Finley* and *Rust*. This Court should grant certiorari and reverse.

A. The Decision Below Is Wrong

In attempting to evade *Finley* and *Rust*, the Ninth Circuit erroneously distinguished between facial and as-applied challenges, and it improperly extended the public-forum framework to the competitive-grant context. See Pet. 15-20. Notably, respondents do not defend either of those doctrinal missteps. Yet respondents' alternative efforts to rehabilitate the decision below fare no better.

1. Respondents principally argue that this case is distinguishable from *Finley* and *Rust* because it involves a decision to "terminate already approved funding," rather than the initial decision to fund. Br. in Opp. 20; see *id.* at 19-21. But respondents make no attempt to explain why or how that distinction should be relevant under the First Amendment. If the government may *award* funding for a project based on *agreement* with the viewpoints furthered by that project, there is no reason in law or logic that it cannot change policy and *terminate* funding for the project due to *disagreement* with the viewpoints furthered by the project. The government is not abridging anyone's speech in the latter case any more than in the former; in both, it is merely deciding what activities to subsidize based on its own views about the public interest—which *Finley* and *Rust* squarely hold is permissible. Pet. 12-15.

Respondents invoke (Br. in Opp. 20) various reliance interests, but whether a governmental action violates the First Amendment turns on whether it abridges the freedom of speech—not on whether it costs money. Respondents cannot smuggle into the First Amendment the cost-benefit calculus that is sometimes required under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 5 U.S.C. 701 *et seq.* Cf. *FCC* v. *Fox Televi-*

sion Stations, Inc., 556 U.S. 502, 516 (2009) (rejecting the converse gambit). And they certainly cannot do so after the Ninth Circuit held that their APA claims are barred by the Tucker Act, 28 U.S.C. 1491(a), and this Court's stay order in *National Institutes of Health* v. *American Public Health Association*, 145 S. Ct. 2658 (2025). See Pet. App. 25a n.9, 29a-30a.

Respondents' position that viewpoint-based grants can only be awarded, not terminated, would create perverse incentives for outgoing Administrations to issue millions or billions of dollars in taxpayer-funded grants based on viewpoint, secure in the knowledge that their successors will be unable to halt the flow of funds based on disagreement with that viewpoint. Such dead-hand control hardly serves the public interest. For example, while respondents tout the public benefits of University of California research into "MRI machines" and "cochlear implants," Br. in Opp. 9—which have no connection to the DEI projects at issue here—they notably do not claim similar benefits from "position[ing] science education institutions to facilitate conversations about racial equity," Pet. App. 49a. The First Amendment does not prevent the current Administration from rejecting the past Administration's ideological agenda and making the sensible policy judgment that taxpayer funds are better deployed ensuring that science education institutions educate about science.

2. Respondents emphasize the Court's statements that *Finley* would have been "a different case" if the agency had "leverage[d] its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints" or "if a subsidy [had been] 'manipulated' to have a 'coercive effect.'" Br. in Opp. 22-23 (quoting *Finley*, 524 U.S. at 586-587). They assert

"[t]hat is exactly what occurred in this case: the government chose to cut off funds based on its perception of the viewpoint expressed in the research." *Id.* at 23. But the statements in *Finley* "merely recognized that the government may not condition grants or subsidies on the recipient's engaging or refraining from engaging in expressive conduct 'that is separate and independent from the project that receives funds.'" Pet. 15 (quoting *Rust*, 500 U.S. at 196) (brackets and ellipsis omitted). Here, respondents admit their grants were terminated "based on the perceived viewpoint *of the research*," Br. in Opp. 23 (emphasis added)—thus making clear that the terminations are not the improper "leveraging of funds to control speech separate and independent from the project that receives funds." *Id.* at 26.

Indeed, respondents do not and could not contend that the government has in any way attempted to regulate or penalize their speech on their own dime and time. This case thus bears no resemblance to respondents' hypothetical where the government funds only research projects carried out by "those who voted for the President." Br. in Opp. 26. The government here terminated researchers' grants not because they support DEI projects in their outside activities, but because they were using the government's own funds to conduct DEI projects that the government no longer supports.

Respondents likewise are incorrect (Br. in Opp. 24) that the grant terminations "discriminate invidiously" and "suppress * * * undesirable ideas." The terminations merely reflect the government's decision not to subsidize viewpoints with which the government disagrees. This Court has repeatedly made clear that such decisions do not constitute impermissible "discrimination" or "suppression of dangerous ideas" under the

First Amendment. *Finley*, 524 U.S. at 587; *Rust*, 500 U.S. at 192. In fact, just as respondents concede that one Administration "could choose to not fund [family-planning] projects that counseled abortions," Br. in Opp. 21, the First Amendment does not prevent the next Administration from terminating funding for projects that counsel the opposite.

Respondents contend (Br. in Opp. 25) that *Finley* and other precedents have not held "that the First Amendment is violated *only* when the government seeks to leverage funding to regulate speech outside the contours of the program." But it is immaterial whether there may be other hypothetical ways to violate the First Amendment in the context of a competitive-grant program. This Court's precedents make clear that the First Amendment is *not* violated by what the government has *actually* done here—simply refusing to fund viewpoints expressed inside the funded program. See Pet. 12-17. As noted, respondents have expressly conceded that the government targeted viewpoints only within the contours of the funded research. See Br. in Opp. 23 (agreeing that the terminations were "based on the perceived viewpoint of the research" and "based on [the government's] perception of the viewpoint expressed in the research"). This case is thus squarely controlled by *Finley* and *Rust*.

3. Respondents claim (Br. in Opp. 23-24) that *Rosenberger* v. *Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995), "expressly disapproved of viewpoint discrimination in funding." But as they must immediately acknowledge, *Rosenberger* said only that "viewpoint-based restrictions" may be improper if the government "does not itself speak or subsidize transmittal of a message it favors[,] but instead expends

funds to encourage a diversity of views from private speakers." Br. in Opp. 24 (quoting *Rosenberger*, 515 U.S. at 834). Unlike the type of public forum at issue in *Rosenberger*, the competitive grants in this case were *not* intended to "encourage a diversity of views," and respondents have never argued otherwise. As we explained (Pet. 19), *Finley* could not have been clearer that *Rosenberger* does not extend to the competitive-grant context: "[T]he competitive process according to which the grants are allocated" "distinguish[es] this case from *Rosenberger*." 524 U.S. at 586. Yet respondents entirely ignore that statement.

4. Finally, respondents assert that "the termination of grants often was blatantly inconsistent with specific statutory mandates for funding." Br. in Opp. 21 (citing 20 U.S.C. 956(c)). That is a non sequitur. Whether the terminations violate a statutory restriction has nothing to do with whether they violate the First Amendment, which is the question presented here. The Ninth Circuit declined to rule on respondents' statutory claims, Pet. App. 15a; cf. *id.* at 61a-66a, and respondents have neither filed a cross-petition for a writ of certiorari nor sought to defend the judgment on that alternative ground. To the contrary, respondents effectively concede that they cannot do so. In asserting only that the grant terminations were "often" contrary to Section 956(c), Br. in Opp. 21, they tacitly admit that at least *some* of the grants at issue were terminated in compliance with that statute. (In fact, *all* of them were: Section 956(c) lists ten functions that NEH is *authorized* to perform through grantmaking; nothing in that provision can reasonably be read to *require* NEH to fund all or even any programs advocating DEI.) Accordingly, the Ninth Circuit's judgment necessarily rests on its

constitutional holding, confirming that the First Amendment question is squarely presented here.

B. The Decision Below Warrants Review

The decision below conflicts with this Court's precedents, in particular *Finley* and *Rust*. See Pet. 21. Respondents emphasize (Br. in Opp. 20) that "no prior case involved the government['s] terminating funding," whereas this case "involves cutting off funds already approved." As explained above, however, the reasoning of *Finley* and *Rust* draws no distinction between an initial award of a grant and a later termination, and respondents provide no justification for such a distinction. Moreover, even if those cases do not unambiguously compel reversal, this Court often grants plenary review of rulings in the First Amendment context that are "*questionable* under [the Court's] decisions." *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384, 390 (1993) (emphasis added); see Pet. 21 (citing additional cases). Respondents fail to mention, let alone distinguish, such cases. And here, the Ninth Circuit's decision is, at the very least, questionable under *Finley* and *Rust*.

Respondents otherwise have little to say about certworthiness. They do not dispute the importance of the question presented. See Pet. 21-23. Nor do they dispute that this case is an ideal vehicle in which to address the First Amendment issue, given that it was the sole basis for the Ninth Circuit's ruling (as just discussed) and there are no contested facts. See Pet. 23-24. Moreover, since the filing of the petition, the parties have agreed to stay further proceedings in the district court on the claims at issue here pending the disposition of the petition and any further proceedings in this Court, thereby ensuring that the preliminary injunction under

review will not become moot. See D. Ct. Doc. 228, at 1-2 (Sept. 1, 2026).

Respondents' only cursory argument against certworthiness is that the Court should await further percolation. See Br. in Opp. 27. But the arguments on both sides of the question presented have been fully aired in this case, and respondents do not identify any legal or factual differences in any other pending case that would affect this Court's resolution. Respondents also fail to address the government's concern that, if the ruling below is allowed to stand, it may effectively control nationwide because future plaintiffs may persuade district courts within the Ninth Circuit to grant relief on behalf of nationwide classes. See Pet. 22.

In sum, this case presents a pure question of law on an important First Amendment issue, and respondents do not argue otherwise. Review of the Ninth Cicuit's answer to that question is amply warranted in light of the serious tension, if not outright conflict, with this Court's precedents.

Respectfully submitted.

D. JOHN SAUER
Solicitor General

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