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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Rita F. Lin, Judge

NEETA THAKUR, et al.,	)	
	)	
Plaintiffs,	)	
	)	
VS.	)	**NO. C 25-04737 RFL**
	)	
DONALD J. TRUMP, in his official capacity as President of the United States, et al.,	)	
	)	
Defendants.	)	

San Francisco, California
Tuesday, November 17, 2026

TRANSCRIPT OF PROCEEDINGS

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Tuesday - November 17, 2026 **1:35 p.m.**

P R O C E E D I N G S

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THE CLERK: Calling civil action 25-4737, Thakur, et al. versus Trump, et al.

Counsel, I'm going to need you to come to the podium.

(Pause in the proceedings.)

THE CLERK: Go ahead, thank you.

MR. McLORG: Good afternoon, Your Honor, Kyle McLorg on behalf of the Plaintiffs, and I'm joined today by Kevin Budner and Claudia Polsky. I'm going to be responding to Your Honor's one -- first, second and third questions, and then Mr. Budner is going to be responding to the fourth and Ms. Polsky to the fifth.

MS. BARRAGAN: Good afternoon, Your Honor, Kathryn Barragan from the Department of Justice appearing on behalf of the Defendants. I'm joined by my colleague Eric Beckenhauer, who is just sitting with me at counsel table today.

THE COURT: Good afternoon to both of you.

I know I put out some questions last week, but I thought before I went through those, it might be helpful for me to just give you kind of a general sense of how I'm looking at the claim. I will reserve time at the end after we go through the questions for you to let me know anything else you think is important for me to know about the case before I take it under

submission.

But we are here on obviously Plaintiff's claim that the Department of Energy violated the equal protection -- (audio interruption.)

COURT REPORTER: Hello, Your Honor. This is the court reporter. The audio just completely cut out on Zoom, everything. I see your mouth moving, but I'm not hearing anything.

(Pause in the proceedings.)

COURT REPORTER: Now it's back.

THE COURT: So, I think the last thing you got is we are obviously here on Plaintiffs' claim --

COURT REPORTER: Yes.

THE COURT: So, we are obviously here on Plaintiffs' claim that the Department of Energy violated the equal protection clause when it terminated green energy grants only in blue states.

As I understand it, DOE developed this list of 624 grants that it wanted to terminate based on agency priorities.

And then in October 2025, DOE terminated 284 of those grants. Except for one that was in Canada, all of those were in blue states; meaning states that had two democratic senators and who had voted for Kamala Harris in the 2024 election. The rest of the grants that were not terminated were all in red states.

I understand that DOE essentially made three pretty extraordinary admissions in this case.

First, DOE admitted that this October 2025 decision was not, quote, based on any programmatic statutory cost reduction or performance based factors.

Two, DOE admitted that those grants -- those 284 grants, they were selected, quote, based solely on the political identity of the grant recipient state; that is, whether it was a blue state or not.

And third, DOE conceded that these grants location in a blue state had, quote, no rational connection to, quote, DOE's past or current agency priorities.

So, I understand DOE saying that it did this to force the democrats to come to the table to end the government shutdown; but when Congress gave this money to DOE, it told DOE to award grants based on certain criteria.

And when Congress formed DOE, it did so for DOE to pursue certain statutory purposes; and none of those appear to be political affiliation or political pressure.

So, I have a hard time understanding DOE's position. I mean, as I see it, the agency has essentially admitted that its sole purpose in selecting these 284 grants was to -- a factor that it was not authorized by Congress to consider.

It's a really unusual situation to have an agency stand up and admit in court that it was doing something that it wasn't

allowed to do.

And I know that I don't have jurisdiction over an APA claim under the case law. The Ninth Circuit has given me that direction with respect to other claims in the case.

So, I can understand why there is no consequence to the agency admitting that in this courtroom; but I want to pause on how extraordinary that is.

And then I'm also having a hard time seeing then how that passes the test for equal protection. Equal protection requires the Government to draw distinctions based on legitimate governmental interests; and I just -- I'm not seeing how something the agency is not allowed to consider under the law is a legitimate governmental interest.

And I really would like to focus on that issue, and I think that's what a lot of my questions are directed at.

So, let's just start with question number 1, which is: By law agencies must be able to justify their actions based on the priorities that Congress instructed them to consider. How can an agency have a legitimate interest in advancing something the agency is not legally authorized to consider?

MS. BARRAGAN: Thank you, Your Honor. So, as Your Honor noted, DOE entered into fact stipulations in this case that sort of lay out the groundwork behind the decisions made here.

And as the stipulations begin in May 2025, DOE conducted a

portfolio review process of over 2,000 grants on an individualized basis to determine whether those grants were aligned with particular agency energy priorities.

And consistent with its Executive Branch obligation to clear funding decisions with OMB, DOE submitted to OMB a list of 624 grants from that 2,000 grant review that it had designated as termination or cancel.

And those 624 grants were in both blue states as well as non-blue states, and the political geography of a particular grantee was not considered during the PRP process.

And then in October 2025, OMB identified a subset of the 624 grants on DOE's aforementioned lists for inclusion in a tranche of termination notices.

And, as Your Honor stated, in October 2025 DOE terminated 284 grants that were identified by OMB and sent letters notifying grantees of the termination. And in those letters, they -- DOE stated that the particular award that was terminated no longer effectuates agency program goals or priorities under 2 C.F.R. Section 200.340. And --

THE COURT: Let me just pause on that for a minute. I know that in the letter you said that they had picked these grants for termination based on agency priorities, but really there were a lot of grants that were in the identical situation that weren't terminated.

So, was that really accurate as a description of what the

agency was doing? I see you stipulating now that, no, in fact, we picked those 284 out of the 600 based on political affiliation.

MS. BARRAGAN: So, it depends on at which stage you look at; but it remains true that for the 284 grants, there still had been this individualized review based on agency priorities underpinning the ultimate termination decision here.

So, it remains true that those 284 grants that were terminated, were terminated because of a decision -- a determination that they no longer aligned with particular agency priorities. And so, then the question --

THE COURT: Is that the way the equal protection law works, though? As I understand it, equal protection law looks at the distinctions that the Government draws. It doesn't -- I mean, for example, the Government couldn't list out a number of grants that it believed needed to be terminated for agency priorities and then say, We are only going to terminate the ones where the grantee has an Asian last name.

We would be looking at the -- at that decision to terminate only those where the grantee had an Asian last name and assessing whether that violated equal protection. We wouldn't say, Oh, it's okay because the whole pool came from a group of grants that were legitimately slated for termination; right.

MS. BARRAGAN: So, I have two thoughts based on

Your Honor's hypothetical. I think if there was a termination based on the last name of a grantee, I think that would not be a rational basis review in the equal protection context. That would be a strict scrutiny. So, it would be a different standard of review.

I think the question here is, okay, we have these grants that were all identified based on a failure to align with agency priorities, but then only a subset were terminated of these similarly situated grants.

And if the proximate cause of that termination was due to political considerations, is it still permissible under rational basis review? And the Government's position is that it is still permissible even though the proximate cause of those termination decisions was based on political considerations.

THE COURT: Do you have any case law that -- that says that for -- I understand what you are saying, that my hypothetical is -- involves a heightened scrutiny situation because it is a race-based distinction.

But even just staying in the heightened scrutiny context, the focus is on the classification drawn, the distinction drawn, why would the focus be at a different point in time for rational basis scrutiny than for heightened scrutiny? Is there case law that supports that concept?

MS. BARRAGAN: So, Your Honor, I think this gets to

your second question -- but I will go ahead and discuss it now -- which is the *XP Vehicles* case in DDC -- it is then Judge Ketanji Brown Jackson's opinion -- and that case is similar to the situation that we have here.

It was also a loan -- in the loan context similar to the grants context. And in that case the Department of Energy had awarded a particular loan to one entity while denying the plaintiffs' loan applications. And the posture of that case was at the motion to dismiss stage.

And so, because it was at that stage, the court accepted as true the allegations in the complaint including that the awarded loan applicant and the plaintiffs who were denied were similarly situated and that their applications were equally as meritorious; insofar as both applicants would equally further Department of Energy's purposes.

But nevertheless, despite that similarly situated context, the plaintiff had alleged that the proximate cause for awarding the grant to a different entity than the plaintiffs was because of a number of different political considerations at play.

And despite the fact that there were political considerations, the court did still find that rational basis review had been satisfied in that case.

And it's important to note too, though, that that case similarly to the situation here, there was also an arbitrary and capricious claim; and the court found that that claim

should not have been dismissed, but the court did grant dismissal of the equal protection claim under rational basis review on the grounds that even if there were political considerations at play, the fact that there was still a rational reason to award the loan to one particularly -- particular entity based on agency priorities, that there wasn't a constitutional concern there.

THE COURT: I did see that case that you cited, but I'm having a hard time squaring it with the concept that we have to look at the reason for the classification drawn; that the Government has to have some reason for picking these 284 out of the 600 odd grants at issue. What's your response to that?

MS. BARRAGAN: Sure, Your Honor. I think another maybe challenge here is that in these particular cases where we are involving the Executive Branch agency decision making, these cases are generally brought under the APA only; and they don't -- that's one of the reasons why, for your second question, we only have the one particular case, which is ***XP Vehicles*** because it is somewhat rare to see both of these claims brought together.

So, generally speaking, these would only be brought under an APA challenge. But in the legislative context, which is where most of these equal protection cases arise, we often see sort of political considerations at play in line drawing by a

legislature.

So, the *American Bus Association* case, which is one that we have cited in our briefing, that's the one where a legislature or Congress, rather, decided to award Seattle, specifically, a special carve-out so that they could have bus transportation to baseball games, I believe.

And so, there were probably other cities that would also benefit from a similar Congressional carve-out for buses to be sent to baseball games within that city; but there was no issue with the political considerations influencing Congress' decision to only provide that carve-out to one particular city.

Because it's still -- excuse me --

THE COURT: Is it different in a situation where it's clear that this isn't just the first step in the process or this isn't a situation in which political considerations are part of the mix but are the sole basis for the decision?

MS. BARRAGAN: So, the Government's position is these are not the sole basis for the decision because of the underlying PRP review process, and the initial identification of these grants is no longer in alignment with agency priorities; but I do recognize that the proximate cause was these political considerations, as Your Honor stated.

THE COURT: Okay. Let me give Plaintiff an opportunity to respond.

MR. McLORG: Thank you, Your Honor, just a few brief

points. I want to address the *XP Vehicles* case and the finding that there was a rational basis in that case. I think it gets to the heart of the Court's question, which is that when there is an equal protection challenge to an executive agency's action, the rational basis needs to -- in part be based on factors that Congress authorized the agency to consider.

And in the *XP Vehicles*' case, the rational basis was stated in the complaint itself about what the Department of Energy's denial of the loan application was. It was based on the fact that the energy storage system that the plaintiff was developing did not constitute a qualifying component under the terms of the Energy Independence & Security Act.

And so, when the Court asks: Does an executive agency have a legitimate interest in authorizing or making a decision based on things Congress did not authorize it to consider, that case does not help the Government here.

I think the standard that's set forth in *State Farm* and then incorporated into the *Ursack* decision is that if an agency acts arbitrarily and capriciously in the context of subjecting the plaintiff to disparate treatment, then that means that their decision lacks a rational basis.

Your Honor, you put forth an example of, perhaps, they terminate all grants based on fact that someone has an Asian last name. I agree with the Government, that that would subject it to a higher standard of scrutiny.

But if the Government were to terminate all grants to people who had blue eyes, it would still be based on rational basis review at that point in time; and it would fail the rational basis test because it doesn't have any connection to any legitimate government interest that the Department of Energy is authorized to consider.

And lastly, just briefly, Your Honor -- and I think we have addressed this in our briefing pretty significantly but I just wanted to point out -- the stipulations do not indicate that the list of 624 grants resulted in terminations.

Stipulation 2 refers to grants that were proposed to be terminated, so does stipulation 3. The 624 grant list included proposals to terminate awards.

And then stipulation 4 identifies the fact that OMB identified these grants for inclusion in a tranche of termination notices.

And then stipulation 5, DOE subsequently announced that it had terminated those grants.

And as Your Honor knows from our supplemental briefing, we have pointed out with evidence that Energy Secretary Chris Wright has testified that the PRP process is complete and no more grants are being terminated.

And so, this is not a one step at a time thing. They terminated 283 grants based on political identity. The remaining identically situated grants were never terminated and

are not going to be.

THE COURT: Well, I do have a question for you. I was trying to think about hypotheticals. And, you know, I can think of situations where maybe it would be legitimate for an agency to think about something beyond its statutory priorities in -- in making decisions.

So, the hypo I was thinking of was, you know, imagine we are back in the COVID pandemic and the DMV decides that it's going to authorize certain licenses without requiring an in-person driving test the way it normally would to try to limit the spread of COVID.

Now, obviously, you know, probably -- I haven't gone and checked the DMV statute, but I imagine that spreading -- stopping the spread of infectious disease is probably not within the DMV's statutory ambit in terms of ensuring traffic safety, regulating motor vehicles -- but, you know, would it be the case that stopping the spread of COVID would be not a legitimate government interest for the DMV to consider as it was going through this process?

Is it really true that agencies should be limited to what's within their statutory authorization for equal protection purposes?

MR. McLORG: Thank you for the question, Your Honor. I think your question would depend on what the statutory framework that authorizes the DMV to do what it does, what it

says.

Your hypothetical also doesn't seem to deal with a situation where there is disparate treatment. Perhaps there would be a circumstance where there would be. I do think the answer and the teachings of the *Ursack* decision and the other decisions including *State Farm* are; that agencies are constrained by what Congress says that they can and can't do or what the state legislature, if it is a case of state legislature, says that it can and can't do.

And this situation is just so far afield of something like that; that Your Honor asked the Government to identify any statute that might permit the Department of Energy to consider politics in its decision making; and the Government could come up with none.

And so, I just think that your hypothetical sounds closer to a close call situation than this. This is not a close situation.

THE COURT: Okay. Let me move to question 2. Maybe we already addressed this. I asked the Government to identify some cases. Obviously Defendants cite numerous cases describing how rational basis review applies to distinctions drawn by legislatures, but I asked if the Government could identify any cases in which a distinction drawn by an agency was found to be rationally related to a legitimate government interest under the equal protection clause even though the

distinction was not based at all on any statutory priorities Congress authorized the agency to consider?

I know you mentioned the *XP* case. Is that the one case that you have identified?

MS. BARRAGAN: Yes, that's the key case that we have identified, Your Honor. And if I may, my friend on the other side mentioned that there was this second distinction between the two applications, which was that the Plaintiffs' applications had been denied due to a lack of qualifying component.

But based on my review of that case, I don't see anything in the case that said that that was a distinction between the awardee and those who had been denied the applications.

The court makes clear that the applications were considered equally as meritorious. And even if there were political considerations between the grant of one and the denial of other, that still satisfied rational basis review.

If I may back up just to respond on the *Ursack* point, if that's all right with Your Honor.

THE COURT: Yes.

MS. BARRAGAN: Thank you. So, *Ursack* -- on reviewing *Ursack*, I think it points out a legitimate point, which is that rational basis review and arbitrary and capricious review are certainly similar in that they require the reviewing court to find a rational reason for a challenged agency action.

But I think reading *Ursack*, as the Plaintiffs do here, to essentially adopt an arbitrary and capricious review wholesale would raise some concerns. It would essentially completely change the burden of an equal protection rational basis review for a particular agency and would essentially constitutionalize arbitrary and capricious review.

You know, under regular rational basis review, the burden is not on the agency to justify its actions. The burden is on the Plaintiffs to explain -- to essentially say that every potential rational basis is not present.

And arbitrary and capricious under *State Farm* is a much higher standard of review, and it requires the agency to articulate a particular explanation behind its decision; and it essentially puts the burden on the agency.

And I think *Ursack* -- it is difficult to read that wholesale adoption of arbitrary and capricious review in the constitutional context from *Ursack* because *Ursack* upheld the APA challenge.

So, it found that the particular agency decision there was not arbitrary and capricious.

And so, once you found that the higher standard is met, *Ursack* didn't have to go through the process of finding that the more easily satisfied rational basis review standard was also met; and I think that's clear in the language of the Ninth Circuit's decision where they essentially say that the equal

protection argument can be folded into the APA argument.

And then going off of that, if we were to adopt the arbitrary and capricious standard in the constitutional context when there is an agency action, I think -- as Your Honor's hypothetical raises -- this would raise some problems because it would mean that the agency would have to tie every consideration for its particular decision to something explicitly stated in the statute.

And so, going to the COVID hypothetical that Your Honor raised, this would essentially prevent an agency from making a decision not based on, like, a particular statutory directive from Congress but making it in line with a broader policy decision that a particular administration might come in with.

So -- and I think even in an arbitrary and capricious context, such a broader policy decision or a political goal isn't necessarily failing the APA or the equal protection clause.

So, in *Department of Commerce v. New York*, the Supreme Court -- that's the case that involved Department of Commerce's decision to reinstate the citizenship question on the census -- and it turned out that the reason for that reinstatement was pretextual and that was that the Department of Justice had asked to enforce the Voting Rights Act through the inclusion of the citizenship question on a census.

But importantly, in that decision Justice Roberts made

clear that had the DOJ reason not been pretextual, if that had been the real reason for reinstating the citizenship question, that would have been perfectly kosher because there is no problem with one federal agency or a state agency helping another particular agency to implement a particular policy goal or a broader policy goal of a particular administration.

And so, I think if we took the arbitrary and capricious standard and put it in the constitutional context, that would lead to a lot of real-world implications for Executive Branch agencies in that they might be more limited in cases such as the hypothetical that Your Honor raised; responding to a pandemic like COVID-19.

Similarly under President Biden, there were a number of executive orders to implement whole of government initiatives, including combating climate change; and there was an executive order that directed a number of different agencies -- including those as seemingly unrelated to climate change as the Department of Treasury -- to take certain actions -- finance-related actions to further a goal of environmental protectionism.

And so, I think if the Executive Branch was limited to only considering something in a particular statute, it would prevent that sort of flexibility that you would need.

And there are other context too where this might lead to negative implications.

So, in the leadership context, if there is a particular individual or let's say there are three individuals who are all equally as qualified to farther agency's particular goals, there might be other considerations beyond those laid out in a particular statute that would qualify someone to lead a particular agency. There might be political considerations at play to ultimately choose one person over the other. There might be broader policy considerations at play.

THE COURT: One question I have is whether there is something different about drawing that classification when the purpose is to punish. So, I'm thinking -- I was thinking back to that quote in ***Romer versus Evans*** when the Supreme Court said that by requiring that a classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging a group burdened by the law.

And I think what is odd about this situation is that the Government has stipulated that its reason for selecting these 284 grants for termination out of the potential 600 was purely essentially to punish blue states, to bring political pressure to bear on the democratic party.

And I understand that the point the Government is making is that this punishment had downstream effects that were legitimate.

But, is it -- is there some difference when a

classification is drawn for the express purpose of disadvantaging a particular group?

MS. BARRAGAN: Well, Your Honor, I'm not sure I would agree with the statement that the stipulations state that there was an intention to punish particular groups.

I think it just simply states that there were political considerations behind the particular decision that was ultimately made.

And in terms of the particular context here with grants, as we stated in our briefing, we see this as generally as zero-sum game, when you have this particular lump sum grant context with these grants that are competitively awarded, if -- in these context with these limited funds, even the awarding of a grant necessarily means that another entity loses out on those funds and could potentially be considered punished in some way by that decision, whether it is awarding of the grants or taking away of the grants.

THE COURT: Well, I mean, didn't the President tweet right around the same time that the point of this was to punish the democrats to make them come to the bargaining table? You know, I don't remember the exact words of the tweet; but I mean, I can understand the point was to bring political pressure to bear by coercing the other party to come to the negotiating table.

I get what you are saying, it is fair play and harp all

politics. But I wonder whether the equal protection clause is really about making sure that the Government is trying to advance the public interest and not to, you know, harm a particular person in order to coerce them to cooperate.

I have heartburn about that being something that the equal protection clause permits. What do you have to say about that?

MS. BARRAGAN: Sure, Your Honor. So, I think this gets to our briefing in this case about pork barrel politics and trading; that such considerations are routine and political -- in the political branches, and there may be concerns under arbitrary and capricious review, APA review and the agency context there.

But in terms of raising a constitutional concern, our position is that rational basis review permits political considerations as part of decision making process.

THE COURT: I want to go back to your earlier point about constitutionalizing the APA review. In just re-reading some of the -- the foundational cases about rational basis review and why the courts allow post hoc rationalizations and put the burden on the plaintiff to disprove every possible government -- legitimate government reason for the distinction, it seems like most of those cases are really focused on how hard it is to figure out what the legislature was trying to do.

And it's not the legislature's job to explain for the court to look at later why it was doing what it was doing; but

we have very few of these cases in the agency context because, as I said earlier, it is very rare for the agency to just announce it was drawing a distinction that was not related to its priorities.

So, it -- it doesn't seem to me that the rational that the courts have adopted for placing the burden on the plaintiff and the allowing post hoc rationalization necessarily applies appropriately in a situation where you have a government actor that's an agency.

Help me understand why you think it still makes sense to -- to apply equal protection law in that way.

MS. BARRAGAN: So, Your Honor, agencies engage in quasi-legislative activities all the time. Part of agency decision making necessarily requires line drawing and distinguishing between entities.

And, again, going back to ***XP Vehicles***, the constitutional question was analyzed in the same way that it would be if it were a legislative decision; and there are other cases that we have cited in our briefing where agency actions are similarly analyzed under the standard, the usual rational basis review standard.

And I believe it is ***F.C.C v. Beechcraft***, [sic] which just simply states that state actors are subject to the standard and not necessarily limiting that particular standard to the legislative context.

(Pause in proceedings.)

THE COURT: Let me give Plaintiffs an opportunity to respond.

MR. McLORG: Thank you, Your Honor. First, just briefly on Department of Commerce, the -- there is a couple of issues with Department of Commerce.

One is that the standard of review for that, that was an animus based claim. As Your Honor knows, your preliminary injunction order already rejected the idea that this was going to be subject to that rational basis with bite standard.

Regardless, they were not able to establish animus. And so, the rationality question, the Court never reached it. So, it doesn't really answer this question of whether or not this can provide the Department of Energy a rational basis.

On ***Ursack***, Your Honor, I think the holding is very explicit. The Ninth Circuit holds that the standard of rational basis review, quote, is identical to arbitrary and capricious review under the APA.

That remains the law in this circuit. The ***Agua Caliente*** decision reiterated that.

And I just want to point out, the plaintiffs in ***Ursack*** asserted separate arbitrary and capricious and equal protection claims, and the equal protection claim failed because of the fact that there was a rational basis for the distinction that the government drew in turning down the plaintiff's

application.

The other bases under arbitrary and capricious that succeeded in that case succeeded but they were not -- they didn't involve disparate treatment; right. And so, that's the distinction that we see in these cases.

On pork barrel politics, Your Honor, I think the ***Earth Island Institute versus Hogarth*** decision from the Ninth Circuit forecloses this idea that an executive agency gets to get involved in Congressional wheeling and dealing.

That case makes clear the Secretary of Commerce enacting on a Congressional statute was not authorized to consider in a material way politics at all. And it wasn't because the statute said that the Secretary couldn't. It was because it wasn't authorized by the statute and he did it any way, and the Ninth Circuit invalidated his decision.

Because that was an arbitrary and capricious decision, that gets imported into the equal protection rational basis review standard in this case. And that holding is on point.

The last thing that I want to say is my Counsel here referred to the idea that agencies do quasi-legislative things. I agree with that. At times agencies are conferred -- are delegated the authority to pass regulations and things like that.

This was not a quasi-legislative action that the Department of Energy took here. This was -- grants had already

been awarded. They made a decision to pull these grants back. That's not a rule. That's an action.

And so, that brings us into the *Ursack* category of things or the *Earth Island* category of things, not regulatory rule making.

THE COURT: What's your response to the concept that it -- adopting this type of rule would make it impossible for agencies to decide to assist one another or to consider, you know, broader things like a global pandemic or, you know, that need to avoid climate change or address, you know, reasons for picking particular leaders that might not map on to the agency's specific statute?

MR. McLORG: My response to that, Your Honor, would be that would also be true because the APA exists; and I don't think that the effects are as wide reaching as Counsel for the Government brings to this because equal protection claims remain about disparate treatment.

So, if the issue is, is that in doing those things an executive agency treated two categories of similarly situated individuals differently, then, yes, they are subject to judicial review to determine whether or not they had a rational basis to do this; but that would also be true because the APA exists and would apply to those agency's actions as well.

THE COURT: Right. It would be prohibited from doing that and under the APA any way. In the unusual situation in

which a global pandemic would have zero effect on the agency's ambit, it is hard to imagine things that would be so wide ranging and yet not touch on the agency's statutory priorities ton some level.

MR. McLORG: Yeah, that's right.

THE COURT: One question I had for the Government related to this is that -- I had been wondering if -- you know, you can imagine a situation in which the -- a government agency terminated -- say, DOE terminated all funding, every grant but also all funding for any activity in any blue state for the same reason; in order to motivate democrats to end the government shutdown.

Would the Government consider that to be rationally related? I mean, is there some -- legitimate government interest, is there some point in which this becomes just too attenuated?

MS. BARRAGAN: So, Your Honor, I certainly think that hypothetical that you laid out would raise concerns under the APA and arbitrary and capricious review. I think it becomes less clear if that's a constitutional concern for a political branch.

But certainly under the APA, that would raise concerns if the reason wasn't sufficiently explained under the *State Farm* standard.

THE COURT: But what about under the constitutional

standard, do you have a view on whether that would be permissible?

MS. BARRAGAN: So, the Government's view is that under rational basis review, political considerations are permissible under the review.

And here, in particular we have this underlying rational basis that is tied to the agency's particular goals in the grant termination decision. So, it's not solely a political based decision.

THE COURT: I mean, what if Congress just decided to end all funding to blue states, period, in order to motivate -- I mean, that would certainly motivate the end of a government shutdown. Is that rationally related to a legitimate government purpose? Is that a legitimate distinction for Congress to draw?

MS. BARRAGAN: So, under that particular distinction, I don't think it would raise any concerns of animus or heightened scrutiny. So, I don't think that would cause an issue for rational basis review purposes.

THE COURT: Okay. Plaintiffs also -- this is a question for Plaintiffs. Plaintiffs argue that -- as we were just discussing -- the equal protection analysis for agency actions is equivalent to an arbitrary and capricious analysis under the APA.

If the analyses are the same, is Plaintiffs' equal

protection claim effectively an APA claim that has to be heard in the Court of Federal Claims under the Tucker Act?

MR. McLORG: Thank you, Your Honor. The answer to your question is no. This is an equal protection claim. It is a constitutional claim. It's not subject to the Tucker Act.

This Court has held that constitutional claims are not subject to the Tucker Act. The Ninth Circuit has held -- the Government has already conceded in this case in arguments before the Ninth Circuit that the First Amendment claims are not subject to the Tucker Act in Court of Federal Claims jurisdiction.

And the Supreme Court yesterday in denying the Government's petition for writ of cert has impliedly held that the constitutional claim that was at issue in that petition is not subject to the Tucker Act.

As Your Honor noted in the *California versus Wright* decision, all federal courts have a continuing obligation to check for subject matter jurisdiction.

If the Supreme Court believed that there was a subject matter jurisdiction issue with the First Amendment claim, it could have taken up cert and so held but it didn't.

The Ninth Circuit held in *North Star Alaska 3 versus United States* that for Tucker Act purposes, the jurisdiction issue turns on the source of the rights on which the plaintiff bases their claims.

The source of the rights for this equal protection claim is the Fifth Amendment. And the *Ursack* decision does not change that. What it does is it borrows from the Administrative Procedures Act the standard of review or the analytical framework for one element of the equal protection claim.

So -- and I know it is sort of -- it seems like it's maybe an afterthought in this case, the Plaintiffs here still needed to establish that they were similarly situated to another category of individuals and that they were treated disparately. Those two things have been stipulated in this case, but those are not elements of an arbitrary and capricious claim.

And the *Ursack* decision shows that because the Ninth Circuit looked at both the APA claims that didn't involve disparate treatment and the equal protection claim that did, and it issued different rulings on those two different claims.

I just wanted to point out, Your Honor, as you noted in *California versus Wright*, the Supreme Court's decisions in Department of Education and NIH both expressly limited their holdings to the APA's waiver of sovereign immunity. And the Court of Federal Claims does not have jurisdiction to afford equitable relief for constitutional claims.

And, so, as you noted in *California versus Wright*, in order for Congress to foreclose a remedy for a constitutional violation, it must demonstrate its intent to do that by clear

and convincing evidence. That's the *Sierra Club* decision.

And on this point, it is dispositive because both the Federal Circuit and the Court of Federal Claims have held that they don't have jurisdiction to hear equal protection claims because the Fifth Amendment is not money mandating.

For that, Your Honor, I would direct the Court to *LeBlanc versus United States*. This is 1995 Federal Circuit decision, 50 F.3d, 1025 at 1028 where the court observed that plaintiff's equal protection claim was not a sufficient basis for jurisdiction because it does not mandate payment of money to the government.

I will also note that two weeks ago, the Federal Circuit reaffirmed the *LeBlanc* holding in *Ellis versus United States*. That's 2026 Westlaw 3318789 at page 2.

And lastly, Your Honor, I will point the Court to *Ross versus United States*. That's 155 Fed. Claims 792 at page 798. And I will quote from the Court of Federal Claims -- this was in 2021 -- (as read:) "It is well settled to entertain claims arising under the equal protection clause because the equal protection clause is not money mandating."

So, just to sum this up, Your Honor, with such clear foreclosure of the ability to get relief in the Court of Federal Claims, the idea that the arbitrary and capricious framework getting brought into the rational basis analysis just as a subpart means that this is suddenly subject to the Tucker

Act, there is no basis for the Court to reach that conclusion.

THE COURT: Let me give the Government an opportunity to respond.

MS. BARRAGAN: Thank you, Your Honor. So, as an initial matter, my friend on the other side mentioned the Supreme Court's cert denial petition yesterday. It is settled law that you are not supposed to infer any statement on the law, one way or the other, based on the denial of a cert petition.

So, as far as the Government is concerned, the Ninth Circuit case still applies in the same way that it did before the cert petition was granted or denied. We are not supposed to read anything with respect to the Tucker Act based on a denial of a cert petition.

So, based on the Ninth Circuit's decision in this case and the Supreme Court's earlier decisions in *NIH* and *Department of Education v. California*, those have both held that in the termination -- in the grant termination context, an APA, arbitrary and capricious claim, is essentially a disguised breach of contract claim that must be heard in the Court of Federal Claims. And the Ninth Circuit in this case adopted that reasoning and for that reason found that the arbitrary and capricious claims in this case must be heard in the Court of Federal Claims.

And if we adopt the idea that arbitrary and capricious

review in the APA is essentially the same standard to be used for rational basis review, it seems like the particular analysis here would be the same as an analysis undertaken in the Court of Federal Claims in the APA arbitrary and capricious context.

And so, essentially both claims then would be akin to arguing that the Government terminated the grants for a reason not allowed under the grant itself or under the contract itself, and the requested relief -- like the Supreme Court stated in *NIH* -- would essentially be asking the Government to specifically perform on a contract or to pay money damages under that particular contract. So, both elements of --

THE COURT: Do you know of any particular cases where a court has found that an equal protection claim needs to go to the Court of Federal Claims under the Tucker Act? We couldn't find any, and I'm curious if you know of any.

MS. BARRAGAN: So, Your Honor, I am not aware of any, but I think this case -- the situation here is quite unique in that we have a unique challenge to an agency action and this question of whether the rational basis review standard would be the same as an APA arbitrary and capricious review.

And I do think this would essentially -- it would be quite similar to the *Dalton v. Specter* argument that has also been raised in different context in this case, which is essentially this idea that an APA claim shouldn't be repackaged as a

constitutional claim.

And the Supreme Court recently in *The Friends of the Ruidosa Church* -- it is the recent border wall decision -- reiterated the *Dalton v. Specter* principle, which is that in that context it was an ultra vires claim should not be a workaround for an APA, an excessive statutory authority claim.

And I think if the two standards of review for arbitrary and capricious and rational basis review are essentially made to be the same thing, that would also be sort of a way to work around the arbitrary and capricious standard and an arbitrary and capricious claim to bring a constitutional claim instead that would involve the same --

THE COURT: Is it a workaround if the equal protection is there -- the equal protection clause is there to protect different interests, to protect the requirement that the Government draw valid distinctions between people and not discriminate against or disadvantage people for reasons that are unfair, essentially, or treat them as unequal for reasons that are against the law?

That's a very different interest than the APA protects, which is the APA protects the division of labor between Congress and the agency and makes sure that agency decision making is reasoned and it has a different interest that it protects.

So, is it fair to really regard the equal protection

clause as a workaround to the APA even if it imports components of that analysis?

MS. BARRAGAN: Well, I think if we adopt the same standard articulated in *State Farm*, the question would become whether the agency's action was reasonably related to the relevant statutes; and those statutes are incorporated by reference in the contracts here including the stated reason for the termination decisions under the particular regulation that allows for termination due to a determination that there has been a change in agency priorities.

And so, to analyze that, you would have to look at the particular contract. And so, that seems under the *Megapulse* test under the first prong, we would essentially -- we would be analyzing a contract-based claim. And I think this is especially true here where the Court of Federal Claims generally takes -- uses the same standard in evaluating breach of contract claims as the APA arbitrary and capricious standard.

So, it seems like you would have a situation where the Court of Federal Claims would be undertaking the same analysis for a claim brought in that court as would be taken in a district court under this equal protection challenge, which seems like a bizarre outcome to me.

THE COURT: What about the fact that in Justice Barrett's decision in *Department of Education*, there is

really -- well, and in *NIH* -- there is really this emphasis on the -- the waiver of sovereign immunity in the APA?

Obviously, there is a lot of case law supporting the context that the waiver of sovereign immunity in the APA is to be -- we don't presume that Congress waived sovereign immunity unless it came out and did that.

And the presumption really runs the other way in the constitutional context. In other words, we generally presume the court has jurisdiction to hear constitutional claims.

What do you make of that difference? Is that a reason for treating an equal protection claim differently because it doesn't rely on the APA's implied waiver?

MS. BARRAGAN: So, I think Justice Barrett's concurrence in *NIH* had to do with a policy memorandum versus the grant termination distinction. So, our position would be that this is a challenge to the grant termination, not any underlying policy memo.

And so, it should be -- as the court held in *NIH*, it should be heard in the Court of Federal Claims under the *Megapulse* test both because it is a contract-based claim and because the relief -- the type of relief essentially sought is contract based.

THE COURT: I know there might be more to say on this, but I want to -- in the interest of time -- move on to a couple of questions; but there will be time at the end if there is

anything else folks want me to know.

So, question number 4 is really for Plaintiffs also. I won't read the whole thing, but Plaintiffs have proposed a broader DOE class.

And my question is: Why is this class not similarly limited to people who were named as principal researchers, investigators or project leaders? And other than for purposes of numerosity, why does it matter if these other faculty staff, academic employees and employees are included in the proposed class?

MR. BUDNER: Good afternoon, Your Honor, Kevin Budner from Lieff Cabraser.

The short answer to your question, taking them in reverse order, is that other than for the purposes of numerosity, it does not matter. The same relief will apply indivisibly to the same 13 grants regardless.

If Your Honor has -- has no concerns about the numerosity analysis and is inclined to maintain the same class definition structure as the previously certified classes, then it need not include those researchers who were not claimed as PIs, project leaders, etc. on the grant applications themselves.

Stepping back to the first part of your question -- why did we do it this way -- I think there was a good reason. The DOE is in some sense differently situated or at least it accentuates why it would be appropriate to expand the

definition to include those who were not expressly named in the applications; and that is because the grants that are typically awarded by the DOE are so large.

And in that context as a practical matter -- and our declarations confirm this -- it is common practice for the applications to identify roles -- sometimes roles -- but unusual to identify all of the people who have yet to be hired to do critical work on these grants once the funds are awarded.

And these are people who -- as the declarations and as the evidence confirm -- do critical work and who give a lot to these research projects and who consequently lost a lot when those grants were terminated unlawfully.

The declarations confirm that they suffered these non-PI, non-project leader proposed class members, suffered the same kinds of financial, career and reputational injuries that Your Honor has already confirmed confer standing. And the Ninth Circuit has confirmed as well.

I'm mindful that you have spent a lot of time out here. I have a longer answer to address numerosity. If the Court has any concerns about how to limit it, there are other ways -- there are ways to draw lines differently, which I'm happy to address if it comes up.

THE COURT: I thought the issue was pretty well briefed. So, I don't have a lot of questions about that. I don't have questions for the Government about Plaintiffs'

answer but you will have time at the end if there's something else you want me to know about that.

Let me ask question 5 then. Plaintiffs are proposing including a new named Plaintiff, but I had a question about why it matters if that person is added -- that's Dr. Boettcher is added as a named Plaintiff and class representative.

MS. POLSKY: Yes, Your Honor, good afternoon, Claudia Polsky for Berkeley Law for the Plaintiffs.

The short answer here is that it does not matter whether the Court chooses to treat Dr. Boettcher as a Plaintiff and class representative or simply as a non-Plaintiff/declarant.

To the extent the Court is curious about why we sought the late addition of Dr. Boettcher, there are really two reasons. One is that we wanted to give the Court a fuller picture of the nature and extent of harms to many researchers who were not affiliated with the ARCHES project given that Defendants were pushing very hard on the issue of standing.

The second related issue is that we were concerned that although we had a non-ARCHES' Plaintiff already in the form of Dr. Louise Bedsworth, who lost her direct air capture grant, DOE over the summer was making overtures to Dr. Bedsworth indicating that it intended to restore her grant; and we were concerned that she might be out and wanted to give, again, the Court a full picture of the effects on both ARCHES and non-ARCHES grant terminees.

As it turns out, DOE has not to this day responded to Dr. Bedsworth's request that it indicate whether it will confer a no-cost extension, which has made it impossible to resume research. The grantees are very close to the original end date of their grant. And so, the project is functionally paralyzed; and she remains an adequate, a typical Plaintiff. Thank you, Your Honor.

THE COURT: Thank you. That was everything I had on my list of questions, but I did have one other that I wanted -- two other things that I wanted to ask you about.

One was the for the Government. I asked the Plaintiffs to submit -- I asked both sides but, I mean, I think yours is a little more simple. I asked the parties to submit a proposed order so I could see the relief that they were seeking.

Is there anything you want me to know about the relief that Plaintiffs were seeking? I know you didn't have a chance to address that in the briefing.

MS. BARRAGAN: Oh, thank you, Your Honor. This might touch on something that I wanted to raise with Your Honor as a housekeeping matter about the Supreme Court cert petition denial.

THE COURT: That was my next question.

MS. BARRAGAN: Well, maybe that's jumping to your next question. So, in terms of the relief the Plaintiffs are seeking, I think our requested relief or proposed order

addresses our positions on all of the specifications they have in their proposed order. But to the extent there's any ambiguities or questions there, I would be happy to discuss it with Your Honor.

THE COURT: I didn't have any. I just wanted to make sure you had an opportunity to say something if you had something you wanted to say.

That brings me to my other question I had, which is a housekeeping matter -- I guess you could call it -- the Supreme Court has -- as we have all noted -- declined review of the Ninth Circuit's preliminary injunction ruling. And I know that we had originally stayed a lot of the claims in order to wait to hear from the Supreme Court on that.

Should we lift the stay? Do the parties want to meet and confer on a proposed briefing schedule for the remainder of the claims? How would you-all like to proceed or have you-all discussed that topic already?

MR. McLORG: Your Honor, we have. Ms. Barragan reached out last night. We have agreed to submit a joint statement within 15 days. And so, if you want to order that, then we will confer and we will come up with a plan on how to move forward with those remaining claims.

THE COURT: Great. I will order that.

And one question I had for you-all is, I have a vague sense that there is some other cases that are -- involve

similar issues that -- and I'm not sure where we are in the process. Are there other cases that are in the pipeline for certiorari that are very closely related to this one?

MS. BARRAGAN: So, Your Honor, there is the cert petition that is currently pending in *Climate United*, which will address the same Tucker Act claims. I believe they are -- I would have to look at the specifics, but I believe there was a separation of powers claim in that case. And so, there is a question of whether under the Tucker Act that should be brought in the Court of Federal Claims. That petition is still pending.

In terms of other developments, I would be happy to check. And if there is anything that comes up, I could, you know, provide a supplemental notice to the Court. That's the one that I'm aware of.

THE COURT: Okay. I didn't have a sense anything was so imminent that we should wait -- hold off a little longer before we set the schedule. Let's just set the schedule in 15 days. And if something happens that is really exciting, I'm sure you will let me know about it.

MR. McLORG: Sounds good, Your Honor.

THE COURT: Great.

MS. BARRAGAN: Yes, Your Honor.

THE COURT: I promised you-all a final opportunity to address anything else you wanted to let me know. I will give

the Government the first opportunity and then Plaintiffs.

MS. BARRAGAN: Thank you, Your Honor. So, just briefly going back to Your Honor's fourth and fifth questions in this case, the proposed class for Department of Energy is broader than anything articulated in Plaintiffs' operative complaint and broader than the previously provisionally certified classes in this case. As the Plaintiffs stated, this is because of numerosity concerns.

If the Department of Energy class were limited to PIs or project leaders on these particular grants, they would not meet the general numerosity metric that Your Honor has articulated, that requires 40 individuals.

And separately, as we stated in our briefing, we think there's standing concerns with the Ph.D. students who are named -- excuse me -- not named but who have been involved in some way on these grants. And the declarations that the Plaintiffs have put forth shows that there is varying levels of involvement with these particular individuals.

And so, as we stated in our briefing -- I won't go into length here -- but we do think there are concerns here with both standing and then for class certification of the Department of Energy class, we think there are commonalty and typicality concerns.

And then finally on the fifth question about Dr. Boettcher, as we stated extensively in our opening brief,

we think because Dr. Boettcher is not pleaded in the operative complaint and the time to file an amended complaint has passed and we think it is improper to seek to add Boettcher as a class representative at summary judgment for the first time.

THE COURT: Okay. Thank you.

MR. McLORG: Your Honor, Mr. Budner has a brief response on class cert; and then I will deliver some closing remarks.

MR. BUDNER: Thank you, Your Honor. I'm just going to add a couple of quick statistics on the numerosity analysis just so it will be in the record if the Court is inclined to refer to this later.

This is going to be bean counting, which the Court has already told us in Rule (b)(2) -- Rule 23(b)(2) context, we don't need to do. It is relaxed.

Let's just start with the count of PIs that the -- DOE's own count at docket 165 at 10; that's 14. That does not include Dr. Narayanan; that's 15. It doesn't include Mosley or Davis, the project leaders from two grants that were reinstated in other litigation; that's 17.

Then add all the people who were expressly named on the grant applications in the record. So, their names are in the applications. They are just not -- they are named as, quote-unquote, key personnel but not project leaders; that's Breunig, Weber and Brouwer; and that's docket 158-9 at 45 to

46. Now we are at 20.

Then you add class members who may not have been identified by name but whose roles were expressly identified in the grant applications. That would be one post doc, one grad student with Dr. Long's grant -- that's docket 212-1 -- and the names ultimately associated are Sharma and Furukawa. That's two Ph.D., two post docs and one Ph.D. level from Dr. Boettcher's grant. That's docket 217-2 at 15. That's seven more. We are well beyond 25 plus, which satisfies even what Department of Energy has conceded would be the threshold in a 23(b)(2) injunctive relief class, all of which is simply to say there are lots of ways to slice this.

Your Honor need not even go as far as we suggested in the briefing to have a definite objective leave to find ascertainable class. And I'm setting the bar even higher than it needs to be set in this context. That's simply for illustrative purposes on class certification and numerosity. Thank you, Your Honor.

MS. BARRAGAN: Your Honor, if I may respond.

THE COURT: You may.

MS. BARRAGAN: I'm sorry. That particular calculation I don't think was in the briefing, so it's hard for me to offer a response with there is three different record citations for that. So, I just want to note that I don't think we have had an opportunity to respond to that way to slice and dice

numerosity.

THE COURT: Okay. Noted.

MR. McLORG: Your Honor, I have about three minutes of prepared remarks. I'm mindful of the Court's time. If you are in a hurry, I can forego them.

THE COURT: I don't think it makes sense to hear prepared remarks. I just wanted to make sure if there was anything else you need to respond to, that you had an opportunity to do so.

MR. McLORG: There is nothing else, Your Honor. Thank you very much for your time.

THE COURT: Thank you. I appreciate it. Be well.

MS. BARRAGAN: Thank you, Your Honor.

(Proceedings adjourned at 2:39 p.m.)

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CERTIFICATE OF REPORTER

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

DATE: November 19, 2026

Marla F. Knox, CSR No. 14421, RPR, CRR, RMR
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