UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS (Boston)

No. 1:25-cv-10814-WGY

COMMONWEALTH OF MASSACHUSETTS, et al,
Plaintiffs
vs.

ROBERT F. KENNEDY, JR., et al,
Defendants

No. 1:25-cv-10787-WGY

AMERICAN PUBLIC HEALTH ASSOCIATION, et al,
Plaintiffs
vs.

NATIONAL INSTITUTES OF HEALTH, et al,
Defendants

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For Hearing Before:
Judge William G. Young

Bench Trial, Phase 1
(Closings)

United States District Court
District of Massachusetts (Boston.)
One Courthouse Way
Boston, Massachusetts 02210
Monday, June 16, 2025

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P R O C E E D I N G S

(Begins, 10:00 a.m.)

THE CLERK: The Court will hear Civil Action Number 25-10787, the American Public Health Association, et al vs. the National Institutes of Health, et al and 25-10814, the Commonwealth of Massachusetts, et al vs. Robert F. Kennedy, Jr., et al.

THE COURT: Good morning. These two cases I've authorized internet access, so it's appropriate that I say that if you are viewing these proceedings via the internet, the rules of the court remain in full force and effect, and that is to say there is no taping, streaming, rebroadcast, screen shots, or other transcription of these proceedings.

This is the final argument in Phase 1 of this Administrative Procedure Act case. I'm pushing the administrative record out of the way. (Moves pile of documents.) Counsel will understand that I am prepared for final argument. I do not claim to have read the entire administrative record.

As we discussed, argument will proceed first with the plaintiffs, dividing an hour, should they take that long, and then with the defendants, dividing an hour. That isn't an invitation to use all that time. I am prepared for the final argument.

Mr. Cedrone, I will hear you. I assume it's you. Go ahead.

MR. CEDRONE: Good morning, your Honor, Gerard Cedrone from the Massachusetts Attorney General's office for the plaintiff states in the '814 case. We plan to divide our time roughly equally, so I will speak for no more than a half an hour.

We're asking the Court to set aside the challenged directives and the terminations that flow from those directives. With the time I have I'd like to address first the defendants' threshold arguments, then explain why the challenged directives violate the APA and the Constitution, and finally say a few words about remedies.

THE COURT: Maybe -- I want you to -- your argument organization makes sense, but you said "set aside the challenged directives," and one of the things I'll ask everyone, if I were to do that, if I were, under the Administrative Procedure Act, to set aside the challenged directives -- declare, for whatever imperfect reason that some or all were of no force and effect, um, life then, it seems to me, proceeds as though they did not exist, and I'm not clear for the need for injunctive relief as to the Administrative Procedure Act claim. Get to that whenever it suits you.

Go ahead.

MR. CEDRONE: Understood, your Honor, and, um, I will be speaking to remedies and the injunctive relief piece.

THE COURT: Thank you.

MR. CEDRONE: Maybe before jumping into sort of the specifics, I also just wanted to take a step back. We've been living with these facts for a while now, but I'd like to reiterate how unusual they are.

In the past few months, defendants have taken actions that are unprecedented in the history of the NIH, they issued directives that summarily ban research on 7 discrete topics, and they implemented those directives by canceling over 800 grants to the plaintiff states' institutions. And I can't emphasize enough just how extraordinary that is. In a typical year NIH cancels 1, maybe 2 grants, and here we have 800 and counting just to the plaintiff states, just in our case alone since January. That's 800 terminations affecting real people, including patients who lost critical medical treatments, researchers who lost years of work, and students who've seen their educational opportunities disappear.

Given that dramatic change and that dramatic departure from past-agency practice, you would expect to

see a robust administrative record, one with careful explanation, one that weighs various pros and cons, one that gives serious consideration to the real harms that happen to people when hundreds of studies are cancelled with no prior notice. Instead the record has none of that. There are obviously hefty binders, but what you have throughout those binders, over and over and over again, is repetition of the same paragraphs.

So with that said, let me speak first to the defendants' threshold arguments. The defendants' principal argument is that the Court should not even consider the legality of the directives because those directives are not final agency actions. That's incorrect. And the simplest way I can think to explain it is that between January and the termination of our grants, defendants clearly made a final policy decision to blacklist 7 discrete topics, that's the policy decision that we're challenging.

Now we think it's clear from the record that that policy decision is memorialized in, is consummated by, is distilled in these directives that we identified, but we don't think defendants can dispute the basic point that, before terminating our actual grants, they made a policy decision to blacklist certain topics, and that's what we're challenging.

And I would compare that action to the policy decision that your Honor currently has in front of you in the ***American Association of University Professors v. Rubio*** case, where your Honor decided, as a preliminary matter, but recognized that even an unwritten policy in that case of targeting certain students for deportation can be a final agency action. Here we think we're in an even stronger position. It's not just that there's some unwritten policy in the ether, the defendants have actually reduced it to writing in the directives that we put in front of you.

And that's consistent with our challenging these policies as a final agency action. It's consistent with the statutory text, the Section 551 of the APA defines an "agency action" to include rules, which means "statements of general applicability with future effects." That's exactly what these directives are, they're directives that ban research into certain topics and direct agency personnel to act accordingly.

One final point on this final agency action question. We think it's clear that the challenged directives are final agency actions themselves. Even if we were wrong about that, there is no dispute, and the defendants concede at Page 12 of their principal brief, that the termination decisions are final agency actions,

and under Section 704 of the APA, final agency actions -- the review of a final agency action includes the review of any antecedent, interlocutory, or other decisions that merge into the final decision.

And so with all of that said, we think your Honor has already ruled on this in our case as a preliminary matter, we don't think defendants have given any reason to disturb your preliminary ruling that these -- that both the directives and the terminations that flow from them are final agency action.

I do want to address, before getting to the merits of the case, two more minor points on the defendants' threshold arguments that I just want to be sure are clear. One is that the defendants argued in their reply brief that a February 21st directive, that we've called the "Memoli directive," and I know there's different nomenclature floating around, but this is a February 21st directive at Page 2930 of the administrative record. The defendants argue in their reply brief that that's not properly in this case because we didn't call it out by name in our complaint, but that's wrong for two reasons.

The first is that our complaint makes clear, at Paragraphs 116 to 117, that the directives we're challenging -- that the directives we are challenging

include the universe of directives, including the directives that had been kept secret or that were not public at that point, um, that had the effect of blacklisting these certain topics. The February 21st directive falls squarely within that language.

And second, regardless of what we said in our complaint, defendants put this February 21st directive in the administrative record. So by their actions they've acknowledged that this February 21st memorandum is something that defendants considered or relied upon in reaching their decision. So they can't put that directive in the administrative record and then say it's not part of the case, that's not what the administrative record is.

The last minor point before pivoting to the merits relates to their argument that we lack standing to challenge the rescission of "NOFOs," which are "Notices Of Funding Opportunities" that announce grant opportunities. So defendants, um, haven't challenged the State's standing in general, um, but there's one minor piece, this rescission of NOFOs.

THE COURT: Well actually I have a question on that. What is it that you want with respect to those?

MR. CEDRONE: So just as, um, setting aside the challenged directive means, under the APA, you treat the

directives as if it never existed, because these notices of funding opportunity were pulled down based solely on the directives, um, the notices of funding opportunity should be restored.

THE COURT: I'm a pedestrian thinker, so help me here.

As I understand it -- and if I'm wrong, I want to corrected, the grants that are -- the grants that are at issue in this first phase are grants that had been funded by Congressional appropriation and were proceeding, but because of the challenged directives, were "terminated," um, an appropriate word.

I've got that right?

MR. CEDRONE: I think that's right, your Honor.

THE COURT: All right. And I think I understand that.

But even if the -- what do you expect? Should you prevail on that, I can -- I think I understand what should happen to -- if the challenges are gone, the money is there for this fiscal year, and the Congressional will is clear, they have provided the funds which the NIH has allocated and implemented, as it always has, so what about these NOFOs, um, what should happen?

MR. CEDRONE: Right, so I think there's two

things. One, I think it's largely relevant to the second phase of the case where we're talking about delays, but I wanted to address it today, as it's in the defendants' brief. But I think it's largely more relevant to the second phase of the case.

But the second point is that, um, the government, and the federal government produced a supplement to the administrative record on Friday, and at Page 6960, and the two pages that follow, there's a spreadsheet that lists NOFOs that have been "unpublished," in the language that they've used, with grants corresponding to them. At least some of those grants -- and these, as I understand it, are awarded grants, correspond to the plaintiff states. And we think we have standing, we think this is largely an issue for the second phase. But to the extent that the unpublishing of NOFOs has been a mechanism for terminating grants or part of terminating grants, we think that the Court can set it aside. But it is admittedly a very small part of this first phase, if it's relevant at all.

So turning then to the merits. The challenged directives violate, as we've explained, the Administrative Procedure Act and the Constitution. Let me start with the Administrative Procedure Act.

We obviously go through the various doctrinal

reasons in the brief why the directives are arbitrary and capricious. I think it's easiest to explain by looking at a particular example.

So in the brief we talk about a particular grant that was terminated, at Page 1364 of the record, it's a grant to the University of California entitled "Genetic and Social Determinants of Pharmacological Health Outcomes in Ancestrally-Diverse Populations." And admittedly I'm not scientist, but my understanding of this project is it's looking at how people of different genetic backgrounds might respond differently to pharmaceutical products, in the way it's absorbed by your body, in the way your body processes it, and so on. And that grant was cancelled. The cancellation language is at Page 1369 of the record.

Your Honor is very familiar with this paragraph by now, it's the standard DEI paragraph that reads: "It's the policy of NIH not to prioritize research programs related to DEI," and so on and so on. And ending with, you know, the assertion that "worse so-called 'Diversity Equity and Inclusion studies' are often" -- (Interruption by zoom.) "are often used to support unlawful discrimination on the basis of race and other protected characteristics." It's the same stock paragraph that repeats itself throughout the directives

and throughout the terminations. And what is stunning from the record is the lack of any support beyond those conclusory words.

So first, and perhaps most prominently, there is no definition anywhere in the record, despite repeated requests from this Court, for what the government even considers "DEI" to mean. I think -- I would have thought we could all agree that that term can have positive or, you know, laudable connotations. So the government never even defines what is so-called "prohibited DEI."

But even beyond that, the agency doesn't explain how that language, those conclusory statements, are consistent with statutes that Congress has enacted, very clearly expressing a preference and a priority for advancing research into health disparities, for understanding the health conditions of underrepresented groups. They haven't explained how that language in those conclusory statements are consistent with a strategic plan that NIH promulgated and that Congress requires NIH to promulgate.

And perhaps most, I think remarkably, they -- you know there's some, um, striking factual assertions in there. So that paragraph, as I mentioned, says -- asserts that DEI studies are, quote, "often used to

support unlawful discrimination on the basis of race." That is a serious charge, and you would expect, with a charge of that magnitude, there would be some explanation somewhere in the record of how the agency came to that conclusion, what it relied on in reaching that conclusion, why it determined that one study, but not another runs afoul of that principle, and there is absolutely nothing like that.

When you strip away the hundreds of termination letters and the challenged directives from the binders that your Honor has in front of you, there is nothing left. And it is hard to reconcile that complete absence of explanation and evidence with the magnitude of the policy changes that the agency has enacted here. That's not what the Administrative Procedure Act requires.

And I would like to linger for a moment, before moving on to the other points on one particular aspect of the arbitrary and capricious nature of the Agency's decision, which is their failure to consider reliance interests.

The Supreme Court has said, again and again, that when an agency is changing its policies, particularly an entrenched policy, it has to consider reliance interests, it has to consider ways that the public and regulated parties have come to rely on the agency's

steady position. We cite numerous cases in our brief, ***The Department of Homeland Security against Regents of the University of California, and Cena Motor Cars, SEC vs. Fox.*** Actually just a few months ago, this term, the Supreme Court reiterated the point in a case called ***Wages and White Lines --***

(Interruption via zoom.)

THE COURT: Where does that come from?

THE CLERK: It's the zoom, Judge.

(Pause.)

MR. CEDRONE: Should I continue?

THE COURT: No, you continue.

MR. CEDRONE: Okay.

So the law is clear. When an agency is changing position, it has to at least consider and grapple with reliance interests. And we have gone through, in the briefing, some of the significant reliance interests that are at stake here.

So particularly close to home, Docket 7745, "Walking through the Impacts on the University of Massachusetts." UMass Chan Medical School has laid off 209 employees, it's cut the 2025 graduate program from 70 students to 10. It's frozen all hiring. And a similar thing for UMass Amherst, rescinding funding from 100 accepted applicants and reducing admissions by half

for its School of Public Health.

And that's not to mention the harm to patients. We walk through in the briefing studies that support patients who are receiving treatment for risk of suicide whose programs have been closed down. We walk through in the briefing the lost data. One example from Docket 7725 is a Rutgers' study, it's a longitudinal study of alcohol abuse among youth and minors. And the declaration detailed how, when a study is interrupted, your ability to recruit participants and track them over time in a longitudinal study --

THE COURT: Don't let me throw you off, but I'm going to stick to the time, and you have about 10 minutes. And I have expressed a concern about straight-out discrimination here, racial discrimination, discrimination on the basis of one's -- how one lives out their sexuality, and possibly, and I'm much less certain about this, possibly discrimination against women's health issues.

Are you going to address any of those? Do you think they bear on this first, um, this first phase?

MR. CEDRONE: We haven't raised an expressed claim of racial or sexual discrimination. I think it's, um -- I think it's hard to look at what the agency has done here and, um, walk away with the view that it's

consistent with not only the values in the Public Health Service Act, which requires, um, thoughtful consideration and the promotion of minority health, um, women's health, and the health of sexual and gender minorities. And so I think that's -- that's the way we have seen it as being relevant to this case, is that not only are there these overarching constitutional and statutory principles and other statutes, but the Public Health Service Act itself states a Congressional priority for advancing the health of underrepresented groups, for advancing women's health, for advancing the health of sexual and gender minorities. And so that last statute in particular is Section 283(p), which we cite in our briefing.

I do not understand -- and that gets beyond the arbitrary and capricious point to the contrary-to-statute point, I don't understand how the agency can adopt these policies that it's adopted in these boilerplate paragraphs consistent with those Congressional policies. The defendants accuse us of trying to substitute our policy judgment for that of the agency? No, what we're arguing is that the agency has substituted its policy judgment for that of Congress.

The agency might believe, and the defendants might believe, as fervently as they like, that, um, that NIH

shouldn't be advancing the health of transgender Americans, shouldn't be studying, um, you know disparities in underrepresented communities, they might believe that very fervently, but Congress chose a different course in the statute and the agency is required to carry it out.

And just on the reliance point, just to close out that point. It's important not only to walk through the reliance interests at stake, but the complete absence of any discussion of those interests in the record.

I would have thought that an agency that was taking seriously canceling, um -- banning research into certain topics and canceling projects that flowed from those topics would at least have considered those serious reliance interests and there is nothing to that effect in the record.

The defendants can say, "Well you can look at the termination letters and infer that the agency must have considered reliance interests, because obviously when you cancel a project, people had been relying on it, and they chose to do so anyway." But that is not how this works, that is not what the APA requires. The APA requires the agency actually to grapple with those issues in the record and explain why it's doing what it's doing. And it's a procedural requirement, but it's

not an empty formality. The reason the APA required that is because we think that agencies reach better substantive decisions when they're required to confront the things that they're doing, and they haven't done that here.

In the interests of time, I know I've addressed the contrary-to-statute point, we also argue in the briefing that the agency's decision is contrary to regulation. Um, I'll say on that briefly that obviously an argument that requires carefully parsing through the regulations, the regulatory history, um, the two basic points I would make on that argument is: Number 1, the defendants are arguing that we're trying to turn this into a contract case. It's been clear from the outset that we're not raising contract claims, we're asking the Court to construe a regulation that they invoke and directives that they promulgate. We're asking the Court to decide that that regulation doesn't mean what the defendants say it means. That is the ordinary business of a court hearing an APA claim.

And the second point on the contrary-to-regulation argument that I would leave the Court is, that at the end of the day, when you have all of these arguments walking through the statutory provisions, the regulation, um, cannot mean what the defendants say it

means because it would not be structured and worded and located in that way. They essentially read this regulation to say that an agency can cancel any project, at any time, with no prior notice. And if the regulation meant that, this would be a surprising way to grant that power, to say the least.

We also, as we've explained --

THE COURT: About 5 more minutes.

Go ahead.

MR. CEDRONE: Understood, your Honor.

We've also explained that the challenged directives violate the Constitution and are ultra vires. Our constitutional claim -- I'll just address briefly to emphasize that --

THE COURT: It's a disfavored claim in light of the breathe of the Administrative Procedure Act, as I understand it, but I'll hear you.

MR. CEDRONE: I understand. And even with that, um -- even with that nature of, um -- even with that said, the one piece that the constitutional claim addresses that the APA claim doesn't is the failure to spend appropriated money. And I just would like to emphasize the constitutional claim and ultra vires claim, before moving on to remedies, that these claims span both phases of the case, we think there's a --

THE COURT: But that gets to the question I posed at the outset. So now, in the 4 minutes remaining, I really want an answer to that question.

Were you to prevail, assume you prevail, at least as to the grants, the NOFOs, we'll see, if that were to happen, isn't it enough simply to vacate the, um, challenged directives as arbitrary and capricious, say they're of no force and effect, illegal, and then, one would expect, that given the landscape, the undisputed landscape here, the appropriated grant-specific money would flow? You'd expect that, wouldn't you?

MR. CEDRONE: We would expect that. Let me explain I think one reason why I think an injunction is still appropriate and one other APA remedy that we're asking for.

So not only, in our view, should the Court set aside the challenged directives under the APA, it should also set aside the termination decisions that flow from it. As you see in the record, the termination decisions use the same boilerplate language, so one should follow from the other.

I agree with your Honor that that relief gets us much of what we are asking for and I agree that one would expect from that, um, would flow an appropriate result. The reason we think an injunction is still

appropriate is that the record, even though it demonstrates an underlying policy, it's been a bit of a game of Whac-a-mole, there are these different directives and defendants -- you know you point to one and defendants say, "That's not the directive that actually encapsulates this policy," so you point to another. And so the injunction gets at the idea that we're challenging these directives, but at its core we're challenging the policy that underlies it. And we think the plaintiffs need, especially given the harms at stake here, prospective relief, not just a set-aside of the directives and of the terminations that have flowed from them.

That's how we understand the defendants are requesting to take cross-examination of the witnesses that support our request for an injunction, so we don't want that piece of the case to delay what we think is appropriate relief that is currently ripe for decision, which is relief under the APA, um, that sets aside the challenged directives and the terminations.

And unless your Honor has further questions, I'm happy to yield the Court to my APHA colleagues. Thank you.

THE COURT: Thank you. And I appreciate it.

Counsel?

MR. PARRENO: Good morning, your Honor, Kenneth Parreno on behalf of the APHA plaintiffs.

THE COURT: Yes, Mr. Parreno, I'll hear you.

MR. PARRENO: It's good to see you again, your Honor. I'll be splitting argument today with Ms. Meeropol, um, and transition accordingly.

I want to start by, just very briefly, talking about who our clients are. Our clients are researchers and organizations of researchers who are dedicated to their work.

THE COURT: Well let me ask this question, which may be a little aside the point.

You have supplied, at the Court's direction, a finite list of the grants that we're talking about, very similar to that, um, put forward by the various states, and I've just been hearing about them. Whatever happens in this case -- well were anything to happen favorable to your clients, Rule 52 of the Rules of Civil Procedure require a written opinion. And so this is not -- it doesn't require a written opinion, but eventually in this case there's going to be a full written opinion.

I don't understand why those grants, should you prevail, ought not be listed in an appendix to that opinion? I don't understand why not?

MR. PARRENO: Your Honor, if I may? Ms. Meeropol

will address the remedy, the question of the --

THE COURT: Fine. Go ahead.

MR. PARRENO: But we'll address that as well. I thank your Honor for that opportunity.

THE COURT: Yes, go ahead.

(Knocks over microphone.)

MR. PARRENO: Sorry about that.

Is that better?

THE COURT: Yes, go ahead.

MR. PARRENO: So these researchers comprise hundreds of individuals who are working on thousands of projects, some of which are at issue here, benefiting millions of Americans with their work on public health and advancing the scientific effort. That's what was disrupted by the defendants' actions. And I will focus first on the arbitrary and capricious nature of their actions.

Defendants' actions, the directives, both through their development and through their implementation, are arbitrary and capricious for three reasons. First, they do not represent the reasoned decision-making that is required of the Administrative Procedure Act. Second, they are unexplained, about-faced in policy. And third, they do not properly address the reliance interests that are at stake. They don't even consider them, much less

weigh them. I'll start with the reasoned decision-making.

My colleague, Mr. Cedrone, already emphasized the sheer stunning lack of analysis data, evidence underlying the directives themselves. No working definitions. No evidence establishing, for example, so-called "DEI studies" ultimately do not enhance health, lengthen life, or decrease illness. I won't belabor that point, um, for the sake of efficiency, we've argued that in our brief and Mr. Cedrone covered that point. But what I would like to do at this time, as to the reasoned decision-making, is to highlight what actually was in the record and how that further emphasizes the arbitrary and capricious decision-making that occurred here.

First, what is in the record shows a slap-dash decision-making process. What was revealed from a series of e-mails is that often NIH officials would take just minutes to make decisions that affected hundreds of researchers and millions of lives.

For example, and I know that your Honor is familiar -- is familiar with the record, but I do want to highlight a couple of examples to highlight this.

On March 11th, 2025, that's AR 3820, it took Matt Memoli 6 minutes to review 6 grants and to conclude that

all of them aren't aligned with agency priorities.

On May 9th, it took him just 2 minutes to review, quote, "several grants."

THE COURT: "Him" is who?

MR. PARRENO: I'm sorry?

THE COURT: "Him" is who?

MR. PARRENO: I'm sorry, your Honor, that's Matt Memoli, again, at AR 3452. These are just a couple of illustrative examples that reflect the slap-dash nature of how this review is occurring.

And as defendants acknowledge in their own certification in this case, in ECF Number 86-1, these grant files, for each of these grants, are hundreds if not thousands of pages long. It just strains credulity that any meaningful review can occur in a matter of minutes, much less 2 minutes.

Second, what also is in the record reflects that that slap-dash decision-making was in fact encouraged from the top down.

On June 13th, the defendants produced, um, in response with this Court's order on a motion to complete what is at AR 6963. That is a document that was provided to program officers to assess pending grant awards or actions for the purpose of alignment with the directives.

That document, like the rest of the record, reflects no working definitions of these forbidden topics, no guidance on how they actually analyze grants for these topics, and in fact includes the line, which is very telling, where when asked to provide or elaborate on the analysis, the document says explicitly, "No details are necessary." That's what the agency was saying from the top down.

Third, and still in the reasoned decision-making province, is that officials outside of NIH were calling the shots here. What's clear from the record is that the directives themselves are explicitly spelling out a process where HHS is directing and identifying these terminations, so that NIH officials are in turn just rubber-stamping them, not providing any review, and in fact are required to issue termination letters.

For example, on March 25th, the revised priorities directive at AR 3220, highlights that point, as does the May 7th directive at AR 3554.

In addition to that, the drafting and implementation of the directives also reflect this same sort of outside influence. Individuals outside of NIH were charged with identifying these grants, um, and that included individuals at HHS, for example, Rachel Riley, um, and in the record as well some individuals from the

so-called "Department of Government Efficiency," and that includes an individual named Brad Smith, and that's at AR 3752.

The point here is this isn't the sort of reasoned decision-making that we would expect and is required under the APA, what this is is a slap-dash harried effort to rubber stamp an ideological purge. That is not what the APA requires.

THE COURT: Well when you say an "ideological purge," what do you mean?

MR. PARRENO: What I mean here, your Honor, is that there had been statements in their directives that had been put out in a conclusory and boilerplate manner with no evidence and no data backing them up. What's missing here is that sort of reasoned analysis that is required of the agency.

Second, and I'll briefly discuss, um, the about-face nature, because I believe Mr. Cedrone addressed, in great detail, the reliance interests at stake.

So this is an improper about-face in agency policy. The issue here isn't that an agency can't change its policy, it's that the APA imposes specific requirements for such a change, especially where, as here, there are underlying facts that, um, contradict

the new priorities or policies.

So when defendants, in their briefing, are talking about this just boiling down to a policy-interest disagreement, that's just plain disingenuous, the issue here is that there's no explanation for why there was this about-face. Defendants are right, there needs to be an assessment and a reassessment, but there is neither here.

And in the interests of time, I will just turn very quickly to one question of jurisdiction, before turning this over to Ms. Meeropol. My, um -- Mr. Cedrone has made a number of points in the jurisdictional issue that we join as well, and it's highlighted in our brief, but I would like to emphasize that we still maintain that appeals of grant terminations do not strip this Court of its jurisdiction.

The terminations that were made pursuant to those directives and the directives themselves are final agency actions that are the consummation of decision-making and have legal consequences. And importantly, what the record shows repeatedly from these termination letters is the sheer utility of these terminations -- of, sorry, the appeal process of these terminations.

THE COURT: And in fact the letters themselves frequently say "No correction is possible," as I read it.

Is that correct?

MR. PARRENO: "No correction is possible," your Honor, and "The premise of this grant is incompatible with agency priorities," and "No modification of the project could align it with agency priorities." If that's not futility, your Honor, I don't know what is.

So I'll go ahead and -- and if there's no more questions about these two issues, your Honor, I will go ahead and turn it over to Ms. Meeropol, who will address the remedy issues.

THE COURT: Thank you.

Ms. Meeropol.

MS. MEEROPOL: Thank you, your Honor, Rachel Meeropol from the ACLU.

I want to cover the APA plaintiffs' contrary-to-law claims, the withdrawal of funding opportunities, and the scope of vacatur. Based on your Honor's questions so far this morning, I'd like to actually start at the end and talk about vacatur first.

THE COURT: So would I.

Go ahead.

MS. MEEROPOL: Perfect.

So I agree with the way my colleagues from the states have largely framed the issue, I'd like to take a minute to talk about exactly what the scope of vacatur looks like, um, should your Honor choose to set aside agency action.

Setting aside agency action is an indivisible remedy, and that means it necessarily benefits nonparties. If the Court finds that the directives --

THE COURT: Wait a minute. Wait a minute. It may have implications, but I've been clear from the beginning, that's why I wanted this list of grants. Suppose that's right -- I misspoke. Forgive me.

At best -- at best you're here, you've listed these grants. If I accept these various arguments -- and we're just talking Phase 1 now, and I declare all of these directives, um, arbitrary and capricious, void and of no effect, this is -- I -- this is the United States District Court, that has an effect on these litigants who have standing who have challenged these grants.

Now once judgment enters under the -- the judgment -- again assuming that you're winning here -- and don't take anything from that, but assume that. If you win here, that's the judgment, because I -- either way I propose to enter a judgment on Phase 1 just as soon as I can to allow an appeal. So that -- well, um,

others who haven't sued, who haven't challenged their grants, may well have to deal with the defendants in other cases.

Is that legally incorrect?

MS. MEEROPOL: Your Honor has discretion to scope -- to design the scope of relief in this case just as you put forward.

THE COURT: All right.

MS. MEEROPOL: But give me 5 minutes for me to attempt to convince you --

THE COURT: Go ahead.

MS. MEEROPOL: -- that you may issue an order that is larger in scope. And here is why.

THE COURT: Go ahead.

MS. MEEROPOL: So first I would direct your Honor to Justice Kavanaugh's concurrence in ***Corner Post*** where he lays out the history of how the Supreme Court has, um, looked at what it means to vacate or set aside an agency action, and the degree to which even when individuals who are not before the --

(Interruption zoom.)

MS. MEEROPOL: -- even when individuals are not before the Court, they sometimes reap the benefit of setting aside that agency action, and that is because 7062 is authorization by Congress to set aside the

agency's action that is far broader in scope than what we think of as an injunction or sort of the concerns that we've heard from courts recently about possible nation-wide injunctions.

So if we look at the precedents that we've cited in our cases. Um --

THE COURT: I want to follow your argument, because I'm interested in it.

You're saying this is not a nation-wide injunction issue, this flows from the Congressional intent -- and you've cited a Supreme Court case, in passing the APA, the statute which governs here?

MS. MEEROPOL: That's correct, your Honor.

THE COURT: And that's the basis of your argument?

MS. MEEROPOL: Yes, we can look at the language of 7062 itself, which says to set aside agency actions that are arbitrary and capricious or contrary to law.

Looking at the leading D.C. Circuit case, um, ***Allied Video v. U.S. Nuclear Regulatory Commission*** on the question of whether a remand about vacatur is appropriate, which is not an issue presented in this case. When the D.C. Circuit actually looked to create the, um, the various factors that courts should consider about whether to remand about vacatur, one of the factors was how disruptive is this decision going to be?

And the Court, in deciding in that case that vacatur would be too disruptive, said that's because vacating this rule would require the agency to refund all the fees it had collected in that case, not just the fees of individuals who were before the Court, but all of the fees.

The APA allows agency action -- allows the Court to set aside agency action that is unlawful and stops, and the Court is empowered through that, not just to set aside all of the unlawful terminations that our clients and a number of our client organizations have put before the Court, but that -- but if you look at how the Ninth Circuit has put it, "Agency action that" --

THE COURT: I'm not sure that -- wait a second. I just want you to use your time effectively, because I'm responsive to this argument.

MS. MEEROPOL: Yes.

THE COURT: Assume you win, as to these grants, et cetera, and you win in the manner that Mr. Cedrone, um, framed it, that the directives are declared arbitrary and capricious, have no force an effect, in essence are illegal, as are the terminations to these contracts -- to these grants, not contracts. All right, suppose that. Now -- and that's as far as we go.

I'm sensitive to the fact that this is an equity

case, that's why there's no jury sitting there, and whatever I do in a written opinion, or conceivably however I express myself today, or in the near future -- and I say this with respect, you people aren't going away, we're going to be back here. Isn't that an issue that I need not reach today? But you're not giving it away if you answer "Yes." So as I would say, if it was a trial, "Your rights are saved." Well it is a trial, but if it was a jury trial.

Do you hear what I'm saying?

MS. MEEROPOL: I do. I do, your Honor. You need not reach it. My point is that you are empowered to reach it. And that is because agency action that is taken in violation of the law is void, it has no legal impact, and this Court can set aside all the actions that flowed from the directives.

And that's a good segue, if I may, because I see that I'm already short of time and I do want to make sure to talk a little bit about the withdrawal of funding opportunities. Unless your Honor wants to talk more about vacatur?

THE COURT: No, no, only on the part that I pushed back on him, on Mr. Cedrone. He says, "Look we live in the real world," he says "Now, if you're going to enter judgment on this part -- win or lose, if you're going to

enter judgment, if it goes our way, we want an injunction in the real world." And I'm saying, "Well wait a second, once I've explained the law, you know one can presume" -- I always did back when I was a Superior Court Justice and the executive was the Commonwealth of Massachusetts, I rarely entered an injunction -- and Mr. Cedrone, coming from that office, can go back and check, because once you've told them what to do, they'd appeal of course, and I welcomed it. But they do it. And he says, "Well, real world, Judge, that's not going to happen today, we need an injunction."

But what I'm asking you. If I were to stop short of an injunction, but, well, you win otherwise -- maybe not as far as I'm listing here, but for today, if that were to happen -- or when I get myself together, um, if that were to happen, um, don't you think they'll follow a reasoned opinion?

MS. MEEROPOL: I would hope so, your Honor.

THE COURT: Well more than that, you'd expect it.

MS. MEEROPOL: I would expect it last year, I don't know if I would expect it this year.

THE COURT: Well let's be clear, I do expect it. Well enough on this, I do expect it. If that were to happen, I expect it. And again, nobody's going anywhere.

MS. MEEROPOL: We certainly aren't, your Honor.

THE COURT: Suppose it doesn't, we'll all be in this courtroom again and then I'll have that record before me. But that's not for today.

Go ahead as to what you want to cover.

MS. MEEROPOL: Um, before I move off vacatur, I would just ask your Honor to look at one of the cases we've cited in our briefs, um, ***Montana Wildlife Federation vs. Holland***, which is a case where the Court vacated a Bureau of Land Management policy around oil and gas leases, and then vacated all of the leases under that policy, not just the ones belonging to the parties that were before the Court. In fact the lease owners weren't before the Court at all, it was individuals challenging those leases who were before the Court.

And now I'll move on to the withdrawal-of-funding opportunities. I want to be clear on what we're challenging here and what we're not, um, because our perspective on this is slightly different than what I think we've heard so far this morning. And that's because the withdrawal-of-funding opportunities had several different legal consequences here.

First, the withdrawal-of-funding opportunities require -- the directives themselves require unpublishing these massive numbers of funding

opportunities, and they also require terminating multi-year grants by prohibiting noncompetitive renewals under the unpublished notices of funding opportunities. And we cited cases in our briefing, um, most notably ***Policy and Research LLC***, which explains that a failure to provide a noncompetitive renewal is tantamount to a termination and must be reviewed by the Court in the same way. And finally, because of the unpublishing, the directives prohibit the award of new grants under unpublished notices.

THE COURT: But that leads me to this. What is it you want me to do beyond declaring the directives and these non -- to take down these opportunities, void and of no effect, what more? Yeah, that's my question.

MS. MEEROPOL: Unwind all of the implementation of the directives. Require that NIH republish the funding opportunities that were unpublished in an arbitrary and capricious manner. Require that NIH vacate the terminations that occurred under those unpublished notices-of-funding opportunities through the failure to award competitive renewals. And order NIH to act on the applications that were pending before it when it unpublished the notices-of-funding opportunities.

THE COURT: Well if the bar to action is removed, isn't that what we've been talking about, one expects

they'll go on and do what they're supposed to do, which is act.

MS. MEEROPOL: Well certainly the regulations require them to do so. The regulations require that they evaluate every application that has been submitted taking into account scientific merit and through the peer-review process. But they have not done that for each of these unpublished, um, notices-of-funding opportunities. They haven't denied the application. They haven't delayed the application.

THE COURT: It's undisputed. It's undisputed, the record, of what's happened. Yes.

So again, suppose the directives are void and of no effect, suppose that, and, um, I agree with you, suppose these, um -- the effect of requiring competitive review year by year stifles multi-year grants, I understand that, so suppose I knock that out, um -- just suppose it, then things will go on, won't they?

MS. MEEROPOL: Yes, but in the interest of absolute clarity and to ensure NIH takes the steps it is regulatorily required to take -- and it is not doing so right now, despite the regulations require it, we think in the interest of ensuring that --

THE COURT: Well it's not doing it now because it's following the directives that, as we stand here

today, are in effect.

MS. MEEROPOL: Yes, that's certainly correct, your Honor, and certainly vacating the directives is the most essential component of the relief that we are seeking under the APA here. But the agency may need to be explicitly told that vacating the directives means unwinding all ways in which the directives have been implemented, and that includes their unpublishing of funding opportunities and their refusal, in violation of the regulations, to act on those applications through the peer-review process, through an evaluation of their scientific merit.

Now if I may, your Honor, I'd like to turn to our contrary-to-statute arguments briefly. And here, um, I would just start by saying that, you know, it is clear that Congress has mandated that NIH increase diversity in the biomedical research field, and that excludes through NRSA training grants and early-career investigator opportunities. So I want to highlight, um, a stark take away from the briefs and the record.

THE COURT: And the statute is the PSHA?

MS. MEEROPOL: The PSHA, but also, if you look at 288(a)(4), that sets forth, um, NRSA training requirements, and 283(O)(b)(2) talks about recruitment, um, in the context of early-career investigators.

THE COURT: These are statutory requirements?

MS. MEEROPOL: Statutory requirements, yes, your Honor.

THE COURT: Thank you.

MS. MEEROPOL: As we explained in our opening brief, every single program created by NIH specifically geared to increasing the diversity of the biomedical research field has been terminated.

THE COURT: 5 more minutes.

MS. MEEROPOL: Thank you, your Honor.

Because I have 5 minutes, I want to make sure I say one thing and then I'm going to come back to the statute, if you'll bear with me here.

THE COURT: Sure.

MS. MEEROPOL: I do want to say that defendants have challenged standing only with respect to the withdrawal of the notice-of-funding opportunities. And, um, on the other hand, they have never challenged the standing of our individual plaintiffs. But we have an individual plaintiff, Ms. Dee Mathis, who has explained that she applied for a mosaic grant, which is one of these unpublished opportunities, and she explains how -- because the opportunity was unpublished, even though she knows her application was reviewed, she never got the benefit of that review, and she's had no action on her

application.

So I just want to be clear that, to the extent their complaint about standing is about the failure to provide an individual who has, um, applied for one of these opportunities, we very clearly have one of those individuals.

Moving back to contrary-to-statute. We explained, in our opening brief, that every single program created by NIH specifically geared at increasing diversity has been cancelled, while the training programs that don't focus on increasing diversity have been retained. And the administrative record your Honor has just received bears this out.

I could read the record cites right now of a case that would be helpful to your Honor, because we weren't able to put that into our briefing, um, but I'm conscious of time, so I'm going to base that on -- your Honor told me not to, so I won't do it.

So, for example, the mosaic grant cancelled at AR 4309. The Mark program cancelled at AR 3741.

THE COURT: Just so you know, I'm not saying don't do it.

MS. MEEROPOL: Okay.

THE COURT: No one's going anywhere, no one has precluded post-hearing submissions.

MS. MEEROPOL: Should your Honor --

THE COURT: We talked about our procedure. You say -- the point you're making is the conclusory point, every single program designed to address or increase diversity is cancelled. That's what you're saying?

MS. MEEROPOL: That's what I said, and they have not disputed it, and the record bears it out. But we would also appreciate the opportunity, if it would aid your Honor, to provide a list of the citations for the new record.

THE COURT: I have not told you not to.

MS. MEEROPOL: Okay.

Finally, NIH also must prioritize research into health disparities and minority health issues. Defendants insist that they're only prohibiting DEI, that they still fund health-disparities research. But the record shows that a grant about cervical cancer screening and follow-up delays among Latinos was terminated as being --

THE COURT: But Mr. Cedrone made the point that at least at the time of this action, DEI was nowhere defined, isn't that right?

MS. MEEROPOL: That's correct. And we know from the way they're implementing the directives, that NIH understands DEI to include medical research into who

bears the burden of disease in this country, which is precisely what Congress has mandated for research. They are targeting here exactly what Congress has required them to research.

And your Honor asked about the degree to which there's discrimination happening here. And I do think it is through the contrary-to-statute claim argument that your Honor can get at the way research that, um, is essential to ensure minority health -- not just majority health in this country, is being terminated.

If your Honor has no further questions, I'll sit down.

THE COURT: Thank you.

Mr. Ports.

MR. PORTS: Thank you, your Honor. Tom Ports from the United States Department of Justice.

Your Honor has asked some very practical questions and, um, defendants would like to walk through the case in a practical manner, and we believe that doing so leads to the conclusion that we should win. And so I'll walk through in five steps along the lines of what I think the Court will want to address and what it has shown interest in.

So the first thing that needs to be determined is what is the final agency action? We say it's the grant

terminations, they say it's something else, and that could be a couple of things, and we'll talk about that first.

Second, what was the agency's reasons for the terminations? Everyone agrees these are laid out. There are a finite number of them. We've walked through them in our briefs. We say they're sufficient. They say they are not. And we can talk about that.

The question is -- or third, do those reasons analyze, examine the pertinent evidence, consider the relevant factors, and articulate a satisfactory explanation, including a rational connection between the facts found and the choice made? We believe it does.

Moving on to four. Assuming we survive those reviews, have plaintiffs proved that it's, for some other reason, in violation of the statute or regulation?

And then the last, if the Court nonetheless determines the defendants lose, what exactly should the order do here? And address remedy.

Starting at the top, which we believe is very very important and underlies the Court's questions and what the Court was driving at, um, if your Honor doesn't mind, we have printed each of the 8 so-called "challenged directives," we have them in a binder, and for convenient reference we think it's helpful to look

at each of them, um, because that's -- well it goes back and forth. There are, I guess, three ways to look at the terminations here -- or four really.

One thing as, um, I think the state plaintiffs are most explicit in saying, is the challenge here is to the agencies selecting a policy, setting a priority, a research priority. So that's Number 1, is just they challenge the agencies setting up research priorities that they don't agree with, and they think that it --

THE COURT: Well that's not how they frame it.

MR. PORTS: Your Honor, it's been a few different things. I believe Mr. Cedrone said that they're not necessarily challenging these 8 challenged directives, they are challenging, quote, "the underlying policy," "the underlying research priority decision," and that is exactly what Mr. Cedrone said, and that's one way to look at it. So we can look at these 8 documents or we can look at the challenge to the research priority. We think both of those would be inappropriate and we'll explain why.

Other options? I guess there's two more. We can look at the e-mails directing terminations that have a -- that collect a series of grants. Now those are directives to terminate. And then we have what we believe is the true final agency action, the

terminations themselves. This meets Stephanie Spears' two-prong test that represents the final decision of the agency, is the consummation of the decision-making process, and it has legal effect to terminate the grants. So that is what defendants believe you're ultimately looking at and these are listed on the spreadsheets the plaintiffs have presented here.

So starting at the top. These so-called "challenged directives" do not meet -- unlike the terminations don't meet the Stephanie Spears' test.

(Interruption zoom.)

If we look at Tab Number 1, the first tab, this is a policy directive. It says "Stop sending out miscommunications until the presidential appointee or some political appointee has reviewed a new publication." This is standard. It happens when a new administration comes in. It ended before the lawsuit.

We don't think this is a challenged directive that they care about so much here. Now it did lead to delays, we acknowledge that, and because meetings were cancelled for a time, meetings have since restarted.

Defendants mentioned in the status conference that we would ask the Court to take judicial notice of the Federal Register notices that we have cited that, um, say so. We have physical copies of those for all the

parties, if the Court would like them, otherwise they are cited in our brief, and they're simply Federal Register notices saying that NIH has scheduled meetings. So if the Court would like these --

THE COURT: So the record is clear, I'm prepared to take judicial notice of the Federal Register --

MR. PORTS: Thank you, your Honor.

THE COURT: -- that the Federal Register says what it says.

MR. PORTS: Yes, your Honor, thank you.

Moving on to the second so-called "challenged directive." This is the February 10th Secretarial Directive on DEI-related funding. It expresses a policy preference and it implements a review. It says "grants may be terminated."

So here we do know that NIH is setting a research priority preference and it's conducting a review. It hasn't made any decision to terminate -- well this document does not terminate or direct any terminations, that is not in here, it's conducting a review, we don't believe that to be final.

Next is the February 12th directive. This is the first so-called "Lauer memo." This directive says, based on various injunctions and Court orders, you know "Follow those directives, follow those orders, resume

issuing grants, and just make sure everything proceeds without -- without respect to, um, research priorities." There's no harm from this directive to plaintiffs, this is not something that they, um, that we've been saying they could challenge and try to set aside.

The next document, Number 4, Challenge Directive 4, February 13th, it's a supplemental Lauer memo. This says they're, um, "restricting funding where a program takes part in DEI, which is to remain in place until the review's complete." So again, this doesn't terminate any grants, it places a temporary restriction. It was subsequently terminated. This directive here was superseded, this is no longer in effect. Instead, um, it's been replaced and rescinded. So that is no more. It didn't direct terminations in the first instance and it has been rescinded regardless.

Number 5, we reach the February 21st, Dr. Memoli memo. This one expresses a need to ensure that NIH is not supporting low-value and off-mission projects. It does express a research priority.

THE COURT: It does not define "DEI"?

MR. PORTS: No, your Honor, it does not. And I'll touch on that in a moment.

It ultimately says that programs that do not meet priorities may be terminated. Similarly this directive

does not direct anyone to enter any terminations.

Moving on to Number 6. Importantly, before we move on to Number 6, it's important to note here that terminations occurred. Dr. Memoli directed the terminations after Number 6 -- or after Number 5, I apologize, and before Number 6. So after his memo, before any of the Bulls guidances started. So there are three guidances on -- signed by Michelle Gould and the terminations occurred before that.

So to the extent that any of these three are the challenged directives, terminations that preceded them cannot be affected by these. And we'll note that nothing before this had said "You must terminate anything," they just expressed priorities sadly to terminate and the termination occurs by an e-mail directive attaching a list of grants.

Looking at the Bull's directives.

THE COURT: Well where are we now? We're at 6?

MR. PORTS: Yes, your Honor, we're on Number 6. This is labeled March 20, 2025. It's the first Bulls guidance. And it walks through not issuing a solely -- a grant solely based on a deprioritized filing and how -- well, first of all, it rescinded the February 13th memo. But it walks through priorities on what to do to adapt to make sure that research products that have

scientific value, in the judgment of NIH and its priorities, should be able to continue, while removing parts that, um, that NIH does not want to fund. And it is not directing any terminations, this is an entirely prospective guidance about future grants.

Number 7, the second Bulls guidance. This one here refers to essentially the language and other things and they refer to -- essentially Dr. Memoli made a decision, sent terminations, and this talks about the language to use when implementing the terminations, which are a separate directive from Number 7. So again this isn't telling anyone to terminate things, it's just saying "Where we have a decision, this is what to do."

And, um, the third of those Bulls guidances, Number 8, um, this is -- it suffers the same problems as the first two. So this one isn't helpful.

If we turn to the most --

THE COURT: I don't understand what you just said about 8?

MR. PORTS: I apologize, your Honor.

This is similarly not final, it does not direct any terminations, it's involved in a review, it's involved in like the agency's management of its process, so the terminations are --

THE COURT: So where do these thousands of the

terminations come from?

MR. PORTS: These terminations actually were made by Dr. Memoli, your Honor. I get there's two -- the termination decisions are made by Dr. Memoli attaching --

THE COURT: All of the ones we're concerned with here?

MR. PORTS: Any termination, yes.

THE COURT: All right.

MR. PORTS: So that if the challenge is to not issuing a grant, issuing a future grant --

THE COURT: And he did that over a short period of time, didn't he?

MR. PORTS: Your Honor, the plaintiffs do challenge the amount of time that he took to actually review these spreadsheets after receiving them and argue that that is arbitrary and capricious. And that is, we would say, your Honor, a question, a challenge to the termination, the e-mail termination, whether that was arbitrary and capricious, which is separate from the research priority. And that is a more narrow ruling and is appropriate -- is more appropriate to review than a broader policy statement of what NIH will prioritize or will not prioritize.

THE COURT: Wait a minute. Okay, now I'm

appreciating your argument, and I want to appreciate it. Here's what I heard you just say.

If this Court were to vacate certain terminations or all of the terminations based on the conduct of Dr. Memoli, that result, from your point of view, is preferable to an opinion that takes issue with these challenged directives on the ground, as I hear your argument, that they either don't direct the terminations or state policies of HHS and NIH, which are beyond the purview of this Court, they have the right to their policies.

Do I understand?

MR. PORTS: Yes, your Honor. We're moving down a funnel essentially from a very broad statement of "These are policies" and then you have the e-mails directing terminations, and then we have the actual final agency action that represents the consummation and the agency's reasons, which are the termination letters which are sent pursuant to that e-mail. And so we believe that it's the letter that is the termination and it's the notices of awards that are amended that represent the final agency action.

THE COURT: So this Dr. Memoli, when he scurries around and does whatever he does, he does that, I take it -- but I have to review the record more thoroughly,

he does that pursuant to e-mails, right?

MR. PORTS: Um --

THE COURT: I mean where does he get his direction?

MR. PORTS: The decisions to terminate grants were Dr. Memoli's decisions, is that what you're asking, your Honor? He's making the decisions based on --

THE COURT: I'm asking how it works, as a practical matter, as an existential matter?

MR. PORTS: The record here shows that Dr. Memoli received these lists of grants --

THE COURT: That's a careful answer, but I'm asking you -- to the extent that you know, and you're an Officer of the Court, as a practical matter, how did we get from these challenged directives to these -- and I'll focus just on the terminations that are before this Court, and if it's Dr. Memoli who did it, what was he looking at when he made those determinations? Beyond the grants themselves, what instructions was he looking at? I'll ask that.

What was he looking at?

MR. PORTS: Sure, your Honor.

So to -- to answer the question as to the challenged directives, how do we get from the challenged directives to Dr. Memoli's directive to terminate grants

that are attached to the e-mails? I will say, first of all, that the last three challenged directives, 6, 7, 8, the Bulls directives, they have nothing to do with Dr. Memoli's directive to terminate, these are sort of instructions to ICs about their reviews and about any future grants to --

THE COURT: "ICs" are who?

MR. PORTS: "Institutes and Centers." NIH is divided into --

THE COURT: Understood, they're the various defendants here.

MR. PORTS: So these last three have nothing to do with that.

The February 21st Memoli memo states his priorities. And now as far as the -- the details of --

THE COURT: Well that's an order, isn't it?

MR. PORTS: It is a statement of his priorities and a statement of things that may be terminated pursuant to them, but it doesn't terminate anything, it's a statement of research priorities, your Honor.

THE COURT: Which goes out to the various subinstitutes, the ICs?

MR. PORTS: Yes, your Honor, it informs them of Dr. Memoli's priorities and states that they may be terminated and --

THE COURT: And he's the man, I mean he's the -- in a bureaucracy, he's the one who's giving the directives?

MR. PORTS: He is the Acting Director of NIH, your Honor, yes, he has that authority.

THE COURT: I see.

MR. PORTS: And then the directives are sent -- the determinations directed to terminate are sent by him, they are his decisions, um, and that is my -- that is my understanding, as an Officer of the Court, of the statements. And otherwise the details of his review and what he did, I can't speak beyond the record.

THE COURT: And I'm not asking you to. The record is what it is, the timing and the like. And I thank you.

Go ahead.

MR. PORTS: Um, thank you, your Honor.

So that was the -- what is the program. But what is the challenged -- if the Court is setting something aside, holding something to be arbitrary and capricious, that is, getting towards "What could be that be?" Again, the defendants submit it is the ultimate terminations of, um, grants, not anything earlier, because all of the earlier things are --

THE COURT: I understand. You've made that point.

MR. PORTS: Thank you, your Honor.

Next we address what are the agency's reasons in any given termination?

As the parties recognize, there are a handful of reasons why Dr. Memoli directed the termination of grants. The language is provided, that is provided in each grant termination decision. And, um, we in our briefs walk through why we believe it doesn't meet the arbitrary and capricious standard.

And we will start by saying the standard of arbitrary and capricious, there is a presumption that it is valid. It need only be reasoned. A Court will uphold a decision of less-than-ideal clarity if the agency's path is discernable. And in our -- in our brief, um, we --

THE COURT: Looking at these letters, and I've looked at many of them, they're ipse dixit, there's no support. The action must be both reasoned, as I understand the controlling law, reasoned and reasonable. And in an earlier hearing I asked -- I looked at some of this conclusory language and I said, "Well I didn't understand that."

Is that so, that they are not, um, leading to valid results, they're not expending the money correctly? How do I know that? I know they say that.

But just saying it is not sufficient.

And I'm not suggesting a pretext here, I'm suggesting they're so conclusory that it doesn't provide me a basis for a rational review to make the determination, um, whether it's arbitrary and capricious. There's nothing more than these, um, just conclusory statements.

You say that's enough. "DEI" is never defined. The language in one of them, it says "Worse still" and then it comes a litany of things that might be of concern, and there's no explanation of how they're of concern or, um, the like, they're just there, um, and over a very short period of time.

MR. PORTS: Thank you, your Honor.

So starting with your point that "DEI" is never defined. I'm looking at Tab 8 of the binder I just gave you, it's the page -- the 10th page, this has the various lists for terminations, um, the list of reasons for terminations.

And I'll note that this one, Number 2, says "DEI:" And this is the justification language where a grant is directed to be terminated, this is the agency's reason for termination. And I will note that --

THE COURT: Wait a minute, I'm not clear where you are. You're on Tab 8 --

MR. PORTS: 10.

THE COURT: And on Page --

MR. PORTS: 10, which is 3226.

THE COURT: Thank you very much. I'm on Page 10.

MR. PORTS: And just looking at the second bullet point, your Honor.

Now it does not say "Terminate DEI grants," and leave it without definition, the agency's stated reason is, quote: "Research programs based primarily on artificial and nonscientific categories" --

THE COURT: No, it doesn't say that, it starts saying, "DEI," and then your point is there's a colon?

MR. PORTS: Correct, your Honor.

THE COURT: All right, I follow. I'm reading it.

MR. PORTS: "Research programs based primarily on artificial and nonscientific categories, including the" --

THE COURT: Yes, and it has the language which so many of these -- go down to the sentence, "Worse, so-called 'Diversity Equity and Inclusion,'" and then comes the dread quote: "DEI are often used to support unlawful discrimination." Where's the support for that, any support, any rational explanation?

You see I do understand. Believe me, I understand that the extirpation of affirmative action is a -- is

today a valid government position. I understand that. Affirmative action had various invidious, um, calculus based upon race. I understand that. But that's not a license to discriminate.

So I'm asking you, just explain to me, um, "often used to support unlawful discrimination," I see no evidence of that? I mean in this record, point me to anywhere in this record where it's pointed out that any particular grant or group of grants is being used to support unlawful discrimination on the basis of race. From what I can see, it's the reverse. But, um, point it out to me.

MR. PORTS: Thank you, your Honor. Beyond the statement here, I -- there's nothing that I can point the Court to as far as --

THE COURT: I understand. All right. So that's as close to a definition as we've got?

MR. PORTS: That is the agency's reasoning.

THE COURT: I do understand, that that's what's proffered.

Go ahead.

(Pause.)

MR. PORTS: Thank you, your Honor.

Now moving on to the fourth topic then, the terminations do not violate laws or regulations. Here

the plaintiffs -- first of all, if the Court determines that these are arbitrary or capricious, or an abuse of discretion, there's no need to reach this question. But if the Court were to reach the question, um, we find the regulation does not violate -- the terminations don't violate the regulations because the, um, the relevant regulation, 45 CFR 75 at 372 is --

THE COURT: I'm more concerned -- actually forgive me for interrupting, but just to be transparent.

With respect to the interpretation of the regulations, I've got to reflect on the particular challenged regulation and the like. But how much is the statutory language that Congress has used? Don't -- don't these directives, and isn't the practical effect of these terminations flat-out violate what Congress, the people's representative, has, um -- who have enacted it into law, don't they violate it?

MR. PORTS: Respectfully, your Honor, no, they do not. And we'll start with, um, here plaintiffs have -- at least the APHA plaintiffs, as we say in our response brief, admit that in order to construe these terminations as prohibiting research into health disparities, they need to be "recast," that is the word they use. And research into health disparities? NIH has renewed research into health disparities, including

research that requires that the researchers themselves be members of the health disparity communities.

And so we would submit, and I state it as well in the hearing, that the defendants intended to offer, um, examples of 13 grants that NIH has not terminated, that many of them have been renewed after the challenged directives that authorized research into health disparities, minority-related health, and topics along those lines. That, we would submit, clearly cannot be what the intent is here and that none of these laws --

THE COURT: What cannot be what the intent is?

MR. PORTS: To unlawfully discriminate, in some sort of way, um, is the -- is the question that was the concern.

THE COURT: The fact that you have allowed and reinstated 13?

MR. PORTS: I apologize, your Honor?

THE COURT: Is that what you -- is that your argument? I'm trying to understand. The fact that you've reinstated 13?

MR. PORTS: Well, your Honor, these are examples of other grants that have been renewed after the challenged directives that authorized research into health disparities and required that members of the health disparity community be researchers. And so the

assertion that this is a prohibition on that type of research, which is favored by certain statutes, is factually incorrect.

THE COURT: But you agree that it's favored by certain statutes. It's favored? It's required. It's not "favored"?

MR. PORTS: Well respectfully, your Honor, we would look at the statutes and I would argue that the language and the terminations do not violate the statutes.

So to take an example, um -- looking at the statutory language. So -- but before I do that, your Honor, I would like to move into evidence, um, certified records of the notices of award.

THE COURT: Well could you answer that question? You were about to and I'm very interested in the answer.

MR. PORTS: Yes, your Honor, I just didn't want to forget to --

THE COURT: The statutory language.

MR. PORTS: Yes, your Honor.

So I'm looking at Page 26 of the States' brief, that's 126, it uses the language here:

"Challenged directives prohibiting research related to gender identity runs headlong into a provision instructing the NIH Director to, quote,

'encourage efforts to improve research related to the health of sexual and gender minority populations,' 42 USC, Section 283(p)."

And I'll note that that is the section that -- my example is the section that the States called out in its opening remarks.

If we look at the -- if we turn back to the document that we were looking at before, Tab 8, Page 10, 3226, "Transgender Issues:"

"Research programs based on gender identity are often unscientific, have little identifiable return on investment, and do nothing to enhance the health of many Americans. Many such studies ignore, rather than seriously examine biological realities. It's the policy of NIH not to prioritize these research programs."

Your Honor, this statement here about the terminations is, in the judgment of NIH, "Improving research related to the health of sexual and gender minority populations." It is the judgment that this research is not -- is not scientifically valuable, and it is --

THE COURT: Wait. Wait a minute, please. And I'm truly trying to understand.

You just quoted to me, and I believe accurately, the statute, where you started, quote, "Encourage

efforts," and then you jumped from there to this language in your Tab 8, Page 10, which I'm looking at.

MR. PORTS: Yes, your Honor.

THE COURT: And you say somehow the language in Tab 8 encourages these efforts that Congress has required?

MR. PORTS: Your Honor, the key language is "to improve research." And this is a judgment that this research, although arguably related to sexual and gender minorities, is not good research to pursue.

THE COURT: Despite what Congress has said?

MR. PORTS: Your Honor, respectfully Congress has not said that research programs based on gender identity, it's not what this says, it says "improve research related to the health of sexual and gender minorities." And this -- the Secretary or the Director of NIH can make a judgment on what is an improvement of research and what is research that is not worth pursuing. And by not pursuing research that --

THE COURT: So Congress has -- in other words, I recognize that legislation is difficult, and it is, it's a difficult government endeavor, and so because of the language they have used -- of course the Congress has never dealt with an administration that has taken the positions that this administration has. So, um, they're

writing in a different milieu, I suggest to you.

But "encouraged efforts," you think that mandate -- I read that as a mandate of the people's representatives assembled in Congress, and they have now made that law. The Director has decided that, um, in his judgment, um, that this is not, um -- I want to be fair to the specific language, he says, it's his judgment that "Such, um, research, um, does not," I take it, Dr. Memoli, in his judgment, um, "is not valid research."

Is that correct?

MR. PORTS: The key language, your Honor, in the statute is to "improve research," and that leaves a -- that leaves a great deal of discretion to HHS and NIH to say what is "improving research." And this is not valuable and it's a --

THE COURT: Thank you. Thank you, that answers my question, it's that language -- Congress's mandate, you point out, is to "improve research." And he decides this doesn't improve research?

MR. PORTS: Yes.

THE COURT: But it's not explained anywhere, um, how that's so, um, beyond the edict here? Correct me. It isn't explained? It's a judgment, but it's not explained?

MR. PORTS: Your Honor, I have nothing beyond the agency's stated reasoning for the termination.

THE COURT: Thank you. Understood.

Go ahead.

MR. PORTS: Moving on to other topics, um, immediately following that. This is the next line from the States' brief:

"The aspects of the challenged directives, the States' characterization of blacklisting research related to covid, cannot be squared with the statute mandating the NIH Director to advance the discovery and preclinical development of medical products for priority virus families and other viral pathogens with the significant potential to cause a pandemic."

First of all, your Honor, I'll note that, um, although I have not reviewed all of the recently-filed list of grants, at the time that we were writing a response brief, based on the initial list of grants, we didn't have any terminations for covid research. APHA said in their reply that they did. I would respectfully say that's mistaken, although a couple of them said "covid" in the name of the grant. The reason given by NIH for termination was "vaccine hesitancy."

But putting that aside, um, the reason for terminating these grants was:

"The end of the pandemic provides cause for terminating covid-related grant funds. These grant funds were issued for a limited purpose, to ameliorate the effects of the pandemic. But now that the pandemic is over, the grant funding is no longer necessary."

Again this is not inconsistent with the statutory language.

THE COURT: I heard -- and this is an expert record and it's not evidence, but I heard recently that 300 people die a week in the United States from covid. Of course probably an equal number die from the flu. I don't know.

Go ahead.

MR. PORTS: So the language for termination is not inconsistent with the statute here. Again, this is NIH's judgment about what is a priority virus family. Is covid still likely to cause a pandemic? And it says that the pandemic is over. And so this is a judgment call and it doesn't contradict the statute.

Again, with vaccines, just because a statute says the word "vaccine" doesn't mean that the NIH must prioritize research into vaccine hesitancy. The language of the statute quoted by the state is to, quote, "Support efforts" -- "Support efforts to," quote, "develop affordable new and improved vaccines." There's

nothing in any of these directives about prohibiting the development of affordable new and improved vaccines. And that is so with each of these actions. They mention some of the same words, but the actions are -- they do not violate them.

The ultimate challenge is that the plaintiffs disagree with NIH's conclusions or that, cited in the conclusion, that NIH did this thing arbitrary and capricious. But there's no violation of statutes here, um, if we actually look at the statutes and look at the language that NIH provided.

And that moves us on to the fifth point, which I believe is the most, um, the one the Court just asked about, and, um, that is that if the Court rules against the defendants, what is the appropriate remedy here? And, um, the ultimate question about what is the result of the Court's order turns a lot on what the Court determines to be the final agency action that it is vacating and remanding.

And so the 8 challenged directives that we went through have said -- none of them direct a termination, require a termination, they set priorities. And so, um, it's difficult to -- vacating them similarly doesn't reverse the termination, those are separate decisions, separate actions.

THE COURT: And that may be right. I mean Mr. Cedrone made it clear that he was seeking, if that was where the Court went, not to stop with any one or more of these challenged records, but to vacate the termination orders.

MR. PORTS: Yes, your Honor.

THE COURT: And your position?

Go ahead.

MR. PORTS: And our position is that if the Court vacates the termination orders, then that reinstates the grants. There's no need for a preliminary injunction. If that's what the Court said it would do is what it would do, then the defendants would comply.

THE COURT: It is my duty to ask you, and I do so both with respect and the utmost seriousness, were I to do that, are you going to -- is the agency -- I'm not talking about you. Are the defendants here, starting with the Cabinet Secretary and other high officials, the now Director of the NIH and the individual ICs, are they going to -- preserving all their rights to appeal, if I were to do that, are they going to obey promptly?

MR. PORTS: Yes, your Honor, I would expect the defendants to comply.

THE COURT: You expect them to comply?

MR. PORTS: Your Honor, there is a presumption

that the defendants will comply.

THE COURT: There is a presumption they will comply. And you're telling me, as an Officer of the Court, you expect them to comply?

MR. PORTS: Yes, your Honor.

THE COURT: Thank you. All right.

MR. PORTS: I began moving in the certified records that show the notices of awards that have been not terminated that deal with the various topics that plaintiffs say are prohibited. If I may move them into evidence? They have a certification, a record of regularly-conducted activity attesting to their authenticity.

THE COURT: No objection to my receiving these?

(Silence.)

THE COURT: I hear none. They may be received and they will be part of the record.

MR. PORTS: Yes, your Honor.

I will say that APHA had asked that -- so this is a subset of the 16 initial grants that were listed as, um, active at the time of the opposition to the PI. So this is 13 that continue to be active. And they asked to be moved in -- or they requested 26. This is 13 of 26. They requested the opportunity to move in the rest as different documents. We do not object if they were

going to move for that, just to put that on the record.

THE COURT: So I'll take all 26.

All right.

MR. CEDRONE: No objection to them being received into evidence preserving all arguments to the weight they should be given, if any.

THE COURT: I understand that.

MS. MEEROPOL: And the same for the APHA plaintiffs, your Honor.

THE COURT: In a multi party case the objection or statement of one is the statement of the others, on that side of the "versus," unless you want to take a different position. They are received and part of the record.

Thank you very much.

All right, now as we discussed, here's what's going to happen. I'm taking this matter under advisement.

At 2:00, Ms. Belmont is going to ask you whether you want me to stay my hand, because you're talking. If you both agree, you can be sure that the Court will agree.

I've said, and I reiterate, that this case warrants a thorough written opinion. I recognize that we've only talked about Phase 1 and indeed we've talked

about the contours of Phase 1, and when I say a "thorough written opinion," it's focused on Phase 1. And at an appropriate time, however it comes out, I would enter an order that the interests of justice are that there be a separate judgment so it can be immediately appealed by whoever wants to appeal.

If you say you want to -- if you tell her you want me to stay my hand, the Court will honor it. If any of you want to hear if I have anything to say, she'll tell me that. I don't need to know who. It's up to me whether I see my way clear to say anything at all today.

It goes without saying that I am very grateful both for the briefing and the extraordinarily fine oral arguments made by counsel. We'll take the matter under advisement.

We'll recess.

(Recess, 12:50 a.m.)

(Resumed, 2:00 p.m.)

THE COURT: This case warrants and will receive a full written opinion. At the same time, this case commenced with a request for a preliminary injunction, and the Court takes that very seriously. And the parties, and I include all the parties, have stepped up to afford the Court the chance to make findings and rulings upon an adequate record.

I have worked on the case really since the day it was filed. I still must further reflect upon the extensive record, the extensive administrative record before the Court, and I intend to do so.

But there are some findings and rulings that the Court's efforts, aided by you all, and aided by the Court's law clerks, that I'm able to make today, and in the interests of justice, I'm going to do it, right now.

These are -- well let me start really by saying what I'm not going to address, and nothing I say now should, um, implicate or suggest any finding yet to be made, though the Court reserves its right to make such findings upon a more thorough review of the record or, as we will see, as the record comes to be more fully developed.

So I am not -- well I have limited today's remarks, at least the first phrase, because I'm going to stop and let you ask questions, and then I have something else to say. But the first-phase remarks this afternoon are limited entirely to the claims under the Administrative Procedure Act, and nothing else.

Even as to the claims under the Administrative Procedure Act, the Court makes no rulings. I have the data on which I could make them, but I do not today make any ruling on conflicts with the challenged directives

or terminations and the governing statutes and regulations save -- that is the Administrative Procedure Act itself is a governing statute. Likewise, um, I am not today going to endeavor to interpret any of the governing regulations.

There is evidence here that, um -- that these directives are at least a part of the process that led us to the terminations that, um, we are dealing with in this case, there was some input of some sort by some representative of DOGE. The Court makes no finding either way -- either way as to that, but reserves its right further to consider that matter.

The Court has expressed a concern, a very real concern about discrimination here. I'll have more to say about that after our break.

One of the things that concerns the Court is that there is more than a little evidence here of, um, discrimination on issues of women's health. I make no such finding. I reserve the right to make that finding should I come to be satisfied, by a fair preponderance of the evidence, that such discrimination exists. So those are the things I'm not making any findings on.

As to my remarks today, they are necessarily conclusory. I've challenged the defendants for making conclusory statements, and perhaps I'm going to make

some, but I do so only in the interests of justice and for expedition, I am satisfied that everything I say now is fully supported by the evidentiary record, and, um, in the full written opinion I will, um, have ample recourse to that record. And I reserve my right to make further subsidiary, um, factual determinations, and draw further legal conclusions. But what I say now decides the points to which I speak, having in mind there's going to be a full written opinion that will follow. So let me address the first part of what I want to say.

The Court, on the administrative record, rules that the parties before it have standing. The Court, having carefully considered the briefs and the oral arguments, treats the challenged directives as a whole, as a process, does not break them down into discrete paragraphs, and rules that when treated as a whole, these directives constitute final agency action under the Administrative Procedure Act, Sections 551 and 704.

When you look at these directives, 7 different explanations are offered for agency action. The law, as to the adequacy of such explanations, I -- I would take it, though there are many cases, but the one I want to refer to specifically is Judge Gorsuch's opinion for the Court in ***Ohio vs. Environmental Protection Agency***, found at 603 United States at 279, um -- well the PIN cite

will be 144 Supreme Court 2040 at 2024. And there, speaking for the Court, Justice Gorsuch says:

"An agency" -- and I'm omitting citations. "An agency action qualifies as, quote, 'arbitrary' or, quote, 'capricious' if it is not, quote, 'reasonable' and 'reasonably explained.' In reviewing an agency's action under that standard, a Court is not, quote, 'to substitute its judgment for that of the agency,' closed quote, but it must ensure, among other things, that the agency has offered a satisfactory explanation for its action, including a rational connection between the facts found and the choice made. Accordingly, an agency cannot simply ignore an important aspect of the problem."

This Court finds and rules that the explanations are bereft of reasoning virtually in their entirety. These edicts are nothing more than conclusory, unsupported by factual development.

Moreover, in -- as presented to this Court, there is no reasoned argument as to the reliance interests of the many parties affected. It's well to have recourse precisely to the statute under which this Court -- the Act of Congress under which this Court draws its authority for the conclusions and rulings that the Court makes.

I quote paragraph -- not paragraph, Section 706, "Scope of Review of the Administrative Procedure Act." This -- this defines, in this aspect of the case, the powers of this United States District Court in circumstances. This power is derived directly from the statute enacted by the people's representatives in both Houses of Congress. It trumps any regulation. It trumps any order, directive, or edict. Here is what it says:

"To the extent necessary to decision and when presented, the reviewing Court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of an agency action."

Then, in Paragraph 2, it empowers the Court to "Hold unlawful and set aside agency action, findings, and conclusions, found to be" -- and I here have reliance on Subparagraph A, "arbitrary and capricious."

This Court rules that the determinations -- that the challenged directives, excuse me, taken as a whole are -- and each of them are, when taken as a whole, arbitrary and capricious, they are of no force and effect, they are void and illegal. And so are each of the terminations before this Court declared arbitrary and capricious, void, and of no effect, they are illegal

and they are vacated and set aside.

I looked up and spotted Ms. Meeropol and I should be specific.

I am not now deciding anything beyond the ruling I just made. That does not mean that in further consideration of the NOFO claims, I could not, or I could not further analyze the argument that was made by those plaintiffs. All I'm saying is I am not now doing that, I'm not ready, nor am I sufficiently confident to do it. I'm speaking only to those things about which I -- a careful review satisfies me that on that ground -- on the grounds I have announced, I am confident in the action that the Court takes.

Having done that, the Court, um, at least sitting this afternoon, accepts the representation of the government counsel, I'm sure made after careful consideration, that he expects that the defendants promptly will comply with the, um, decisions as to the law made by this Court, and I'm relying on that. The Court -- because the case goes on, the Court has continuing jurisdiction. And if these -- this vacation of these particular grant terminations, the vacation of these directives, taken as a whole, um, does not result in forthwith, um, disbursement of funds both appropriated by the Congress of the United States and

allocated heretofore by the defendant agencies, if that doesn't happen forthwith, the Court has ample jurisdiction.

But as I stated earlier, I do come from a kindler, gentler period of jurisprudence when, if a Court of competent jurisdiction -- and this Court is such a court, declares the law authoritatively, executive agencies are presumed to put that declaration into effect, that's the authorization of the Congress in the Administrative Procedure Act. And based on the representation of counsel, I have every reason to believe that will be done.

Now to give effect to the few conclusory findings I have made and the rulings I have thus-far made, the plaintiffs are charged with, forthwith, tomorrow will be soon enough, um, preparing a partial but final judgment as to these issues. I will enter that final judgment, um, under Federal Rule of Civil Procedure 54(d), in the interests of justice so that there is a basis for an immediate appeal, should anyone wish to appeal.

There is more to this case. I very much understand that. I both welcome any such appeal, but it is my duty to move as rapidly as careful and conscientious analysis permits, and I believe I have given it to so much of this action as I have just spoken

to.

I have more to say on another topic, but this is a good time to stop and simply go around and see if there are any questions. This is not a time to argue or seek to reargue, just are there any questions about what the Court has found and ruled. Questions. And we'll go in the order of the argument.

Mr. Cedrone?

(Pause.)

MR. CEDRONE: No, your Honor, I think it's clear.

THE COURT: Fine.

Mr. Parreno?

MR. PARRENO: No, your Honor, no questions.

THE COURT: And, Mr. Ports, any questions?

MS. PORTER: I want to make sure that we're clear that this -- the order applies to all grants listed by the plaintiffs, that's both sets of plaintiffs, as most recently updated, um, any orders to set them aside and terminate them, to vacate them, and set them aside.

So everything on that list?

THE COURT: That is the list to which I have referenced. Your question is perfectly appropriate. That's what I'm speaking about.

MS. PORTER: Okay, thank you, your Honor.

THE COURT: All right.

Any other questions?

MS. PORTER: Does this apply to, I guess, the status of, um, grants listed where there have been no action, no affirmative action by the agency other than maybe, um --

THE COURT: I think I've made myself clear. I have a list and I've acted on it.

MS. PORTER: Okay, thank you, your Honor.

THE COURT: All right.

Now I have something else to say.

MR. PARRENO: Your Honor, if I may?

THE COURT: Yes.

MR. PARRENO: What, um, just to make it clear, what counsel on the other side has addressed has raised another question for us, and perhaps if I may raise it with the Court?

We wish to ask the Court for the opportunity to provide one additional list of plaintiff members, grants of plaintiff members that have not yet been provided to the Court, and we're prepared to, um, provide that.

THE COURT: Work it out with them. If they oppose, I will take that into account. But work it out with them.

MR. PARRENO: Yes, thank you, your Honor.

THE COURT: Now there's another aspect of this

case, a darker aspect, one that I take very seriously, and it's this.

I could not -- I cannot, as a United States District Judge, read this record without coming to the conclusion, and I draw this conclusion -- I am hesitant to draw this conclusion, but I have an unflinching obligation to draw it, that this represents racial discrimination and discrimination against America's LGBTQ community, that's what this is. I would be blind not to call it out. My duty is to call it out. And I do so.

Now clearly I have no hesitancy in enjoining racial discrimination, I said during the course of the argument, and it is the law and I must uphold it, and I have no hesitancy in upholding it. The extirpation of affirmative action is a legitimate government policy. It is not a license to discriminate on the basis of color. It simply is not. That's what the Civil War amendments are about. Any discrimination, any discrimination by our government is so wrong that it requires the Court to enjoin it, and at an appropriate time I'm going to do it.

Having said that, I welcome -- if the parties wish, though I don't require any extension of the record, evidence as to harm so that I may more carefully

and accurately frame such an injunction. That's racial discrimination.

It is palpably clear that these directives and that the set of terminated, um, grants here also are designed to, um, frustrate, to stop research that may bear on the health -- we're talking about health here, the health of Americans, of our LGBTQ community. That's appalling. Having said it, I have very real questions about whether this Court has the power to enjoin it. I do not assert such a power, though I find the record will be clear to anyone that it has and is occurring under this, um, under what's going on.

Now I'm speaking only of health care, I'm speaking only of the parties before me, nothing else. I don't have a record as to that. It's not the province of this Court just to invade against discrimination. But on this record, these two aspects of discrimination are so clear that I would fail in my duty if I did not note it.

And so the parties are invited, as to those two aspects and -- though I make no finding with respect to it, any harm to the issues involving women's health. Gender differences are an appropriate area of research and research and, um, trying to advance the frontiers of science so that all Americans have the best health care that we can afford.

You will meet and inform the Court as to when -- if any party wishes -- I am bound by case-in-controversy, I say what I will receive evidence on, but I do not require anything. I've said everything that I am able to say. And while there's another phase to this case, on this discrimination issue, I am prepared to receive evidence, but I do not require it.

If the parties wish to present evidence, you'll inform me as to when you're prepared to begin such evidentiary -- because defense counsel is correct, they have the right to cross-examine as to that, and at least as to any discrimination as to LGBTQ people, they -- it may very well be that while I can recognize it and call it out, I have no power to enter injunctions with respect to it. But I'm certainly open to considering that.

But let me say something about racial discrimination here. I've never seen a record where racial discrimination was so palpable. I've sat on this bench now for 40 years, I've never seen government racial discrimination like this. And I confine my remarks to this record, to health care. And I ask myself, how -- how can this be, because on this record anyway, I don't see anyone pushing back against it?

I don't -- take a look at the people who have been

named as defendants here, one of them is a cabinet-level officer. The other one is, not the same individual, but is now the Director of the National Institutes of Health. And though I needed help as to what an "IC" is, there are other distinguished, um, at the National Institutes of Health level and their subsidiary institutes, these are distinguished doctors, they are people whose profession has been devoted to the American people, to our society. All our society. They are all American citizens.

Now I don't claim any high moral ground here. I'm a United States District Judge, I have the protections that the Founders wrote into the Constitution, along with imposing upon me a duty to speak the truth in every case, and I try to do that. And so I've asked myself, what if I didn't have those protections? What if my job was on the line, my profession, all the career to which I have devoted whatever poor skill I have, would I have stood up against all of this? Would I have said, "You can't do this, you are bearing down on people of color because of their color. The Constitution will not permit that." I see nothing in this record.

And, you know, when I ask myself that question, without the protections of --

(Phone rings.)

THE COURT: I was going pretty well there.

(Laughter.)

THE COURT: Okay.

-- without the protections of an independent judiciary so necessary to our society, as I know my own heart, I do not have an answer to that question, for myself, and that makes me unutterably sad.

And so we're going to recess. But is it true of our society as a whole, have we fallen so low? Have we no shame?

We'll recess.

(Recess, 2:35 p.m.)

C E R T I F I C A T E

I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER, do hereby certify that the forgoing transcript of the record is a true and accurate transcription of my stenographic notes, before Judge William G. Young, on Monday, June 16, 2025, to the best of my skill and ability.

/s/ Richard H. Romanow 06-23-25
_____
RICHARD H. ROMANOW Date