No. 24A910

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF EDUCATION, ET AL.,
Applicants,
v.
STATE OF CALIFORNIA, ET AL.

ON APPLICATION TO VACATE THE ORDER ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF *AMICUS CURIAE* NATIONAL CENTER FOR LEARNING DISABILITIES IN OPPOSITION TO APPLICATION TO VACATE

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INTERESTS OF AMICUS CURIAE[1]

For more than 45 years, the National Center for Learning Disabilities (NCLD) has worked to improve the lives of Americans with learning disabilities. NCLD partners with educators, students, and families to advance research and advocate for policies that address barriers to those with learning disabilities. Students with learning disabilities face particularly great barriers due to the lack of proper funding and resources to support their academic success. Students with learning disabilities can achieve commensurate with their peers, but that requires the evidence-based services and support needed to fulfill their potential.

NCLD thus has an immense interest in the Department of Education's Supporting Effective Educator Development (SEED) and Teacher Quality Partnership (TQP) grant programs, both of which have been placed in jeopardy by the Department's termination of nearly all grants under these programs. The SEED and TQP grant programs are two tested pathways to securing profession-ready educators for all students, and especially for students with disabilities. These programs have historically demonstrated efficacy in recruiting and retaining high quality teacher candidates and preparing those candidates with evidence-based, high-leverage practices. Slashing these programs has direct and unequivocally detrimental impacts on the students, families, and educators that NCLD serves.

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[1] Pursuant to Supreme Court Rule 37.6, the National Center for Learning Disabilities affirms that no counsel for a party authored this brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than the National Center for Learning Disabilities or its counsel made such a monetary contribution.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Over the last two months, the Executive Branch has carried out an unprecedented campaign of terminating federal grants, *en masse*, whenever the Administration disfavors the congressional policies embodied in those grants. In purpose and effect, the Executive Branch has used this campaign to wipe away entire statutory programs that Congress has mandated, and to impound funds that Congress has appropriated for those programs. When these grant terminations have been challenged in court, the Administration has made barely any effort to defend them as lawful on the merits, but instead has invoked jurisdictional arguments to deny stakeholders any avenue for restoring the programs. The Administration's principal defense has been that the Tucker Act "impliedly forbids" plaintiffs from bringing claims under the Administrative Procedure Act (APA) to restore their grants and the underlying programs. Through the instant application, Applicants ask this Court to greenlight their effort to use the Tucker Act as a shield for their unlawful efforts to nullify duly enacted statutes.

This Court should decline that invitation. Applicants' Tucker Act defense fails as a matter of law for at least four independent reasons. *First*, Applicants' argument that the Tucker Act "impliedly forbids" any APA claims that would "compel payments" by the federal government clearly conflicts with this Court's decision in *Bowen v. Massachusetts*, 487 U.S. 879 (1988), where this Court held that district courts have jurisdiction over APA claims seeking specific relief even where those claims will result in the government having to "pay money." *Second*, this

Court has twice rejected the very predicate of Applicants' theory—that the Court of Federal Claims has exclusive jurisdiction that precludes otherwise actionable APA claims. This Court made clear in *Bowen* and *Maine Community Health Options v. United States*, 590 U.S. 296 (2020), that the Court of Federal Claims' jurisdiction under 28 U.S.C. § 1491(a)(1) is not exclusive and in fact "yields" to the APA where the criteria for bringing an APA claim are otherwise met.

Third, the States' claim cannot "belong[] in the Court of Federal Claims," App. 11, given that the Court of Federal Claims would lack jurisdiction over the States' claim. The Court of Federal Claims' jurisdiction to hear claims grounded in federal statutes is limited to statutes that are "money-mandating." Neither 5 U.S.C. § 706(2)(A)'s prohibition on arbitrary-and-capricious agency action, nor the statutes creating the grant programs in this case, are money-mandating because they do not mandate the payment of money to specific entities in specific amounts. Moreover, the Court of Federal Claims would not have jurisdiction to provide the equitable relief that the States seek, which is the restoration of their grants to carry out the programs for the good of their citizens. The Federal Circuit has specifically held that the Court of Federal Claims lacks jurisdiction over actions brought by grantees seeking to obtain their grant funds. And as the D.C. Circuit has correctly held, the Tucker Act cannot "impliedly forbid" an APA claim where the Court of Federal Claims would lack jurisdiction over the claim.

Fourth, the States' grants are not subject to the Tucker Act at all because they are grants, not "contracts." Congress has expressly distinguished federal

grants from federal contracts, and Congress even made clear in enacting the APA's sovereign immunity waiver that the waiver would apply to APA claims relating to the administration of federal grants. Moreover, these grants cannot be deemed "contracts" given that they do not provide any direct, tangible benefit to the federal government. The grants lack the requisite consideration to the federal government needed to qualify as a contract under the Tucker Act.

Applicants have no likelihood of success on their Tucker Act defense under this Court's precedents, and the public interest overwhelmingly weighs against allowing the Executive Branch to use grant terminations to subvert Congress' constitutional power to make the laws of this nation and dictate its spending. The application should be denied.

ARGUMENT

I. This Court Should Not *Sub Silentio* Overrule *Bowen*

Applicants do not contend that the district court lacked jurisdiction under 5 U.S.C. § 702 because the States' claims are for "money damages." Nor could Applicants make such an argument given *Bowen*, where this Court held that APA claims seeking "specific relief" through an injunction are not claims for "money damages," even if the relief results in the federal government having to "pay money" to the plaintiff. 487 U.S. at 893-900. The Court distinguished "money damages," which provide compensation as a "substitute" for the government's performance of its obligations, from specific relief that provides the plaintiff "the very thing to which [it is] entitled." *Id.* at 895, 901, 910 (quoting *Md. Dep't of Human Resources v.*

Dep't of Health & Human Servs., 763 F.2d 1441 (D.C. Cir. 1985) (Bork, J.)). *Bowen* thus held that § 702's waiver of sovereign immunity can apply even where the relief sought will result in the payment of money.

Yet Applicants now repackage the federal government's "money damages" argument rejected in *Bowen*, contending that the Tucker Act "impliedly forbids" district court jurisdiction under § 702 over any APA claims that seek to "compel payments." Application ("App.") 12. Applicants make clear many times over that their jurisdictional argument starts and ends with the fact that the relief granted by the district court would result in the federal government having to "pay" money to grantees. App. 1, 2, 3, 4, 12, 13, 17.

Applicants' theory is plainly irreconcilable with *Bowen*. Applicants assert that "parties that seek to access funds that the government is purportedly obligated to pay under . . . grants must typically proceed under the Tucker Act, not the APA." But *Bowen* held the opposite: the district court had jurisdiction under the APA to enjoin the federal government's refusal to make a payment to a recipient of a "grant-in-aid program." 487 U.S. at 898-900. More broadly, Applicants' theory—that the Tucker Act "forbids" a district court from having jurisdiction over equitable APA claims whenever the relief will result in the payment of money—cannot be squared with *Bowen*'s holding that "a federal district court has jurisdiction" under § 702 even if the relief sought results in court "orders for the payment of money," so long as the APA claim is for "specific relief" providing the thing to which the plaintiff is

entitled. 487 U.S. at 882, 888-901. *Bowen*'s jurisdictional holding would be a dead letter if Applicant's theory of § 702 were correct.[2]

This Court should decline Applicants' request to *sub silentio* overrule *Bowen*. The Court certainly should not abrogate 37-year-old precedent in the posture of an emergency application.

II. This Court Has Held That the Tucker Act Does Not Preclude District Court Jurisdiction Over Otherwise Actionable APA Claims

Applicants' argument conflicts with this Court's precedent yet more. The entire predicate of Applicants' theory is that the Court of Federal Claims' jurisdiction under 28 U.S.C. § 1491(a)(1) is exclusive, such that otherwise actionable APA claims cannot be brought in district court if the Court of Federal Claims would have jurisdiction over some variant of the claims. But this Court has said the opposite—twice.

In *Bowen*, this Court held the following in upholding the district court's jurisdiction:

> It is often assumed that the Court of Federal Claims has exclusive jurisdiction of Tucker Act claims for more than $10,000. . . . That assumption is not based on any language in the Tucker Act granting such exclusive jurisdiction to the Claims Court. Rather, that court's jurisdiction is "exclusive" only to the extent that Congress has not granted any other court authority to hear the claims that may be decided by the Claims Court. If, however, § 702 of the APA is construed to authorize a district court to grant monetary relief—other than traditional "money damages"—as an incident to the complete relief

[2] The D.C. Circuit has recognized that its line of cases regarding the "impliedly forbids" clause of § 702 contradicts *Bowen*. *See Transohio Sav. Bank v. Dir., Off. of Thrift Supervision*, 967 F.2d 598, 612-13 (D.C. Cir. 1992) (there is "a strong case that, after *Bowen*, the Tucker Act should not be read to 'impliedly forbid' under the APA the bringing in district court of contract actions for specific relief").

> that is appropriate in the review of agency action, the fact that the purely monetary aspects of the case could have been decided in the Claims Court is not sufficient reason to bar that aspect of the relief available in a district court.

Id. at 910 n.48. Far from finding that the Tucker Act operates to the exclusion of APA claims, this Court approvingly quoted a district court opinion that: "The policies of the APA take precedence over the purposes of the Tucker Act. In the conflict between two statutes, established principles of statutory construction mandate a broad construction of the APA and a narrow interpretation of the Tucker Act." *Id.* at 908 n.46 (quotation omitted).

Applying this principle, the Court held that the mere prospect of obtaining money damages in the Court of Federal Claims did not provide an "adequate remedy" under 5 U.S.C. § 704 that precludes an APA claim . Just "because monetary relief against the United States is available in the Claims Court under the Tucker Act" does not "oust a district court of its normal jurisdiction under the APA." *Bowen*, 487 U.S. at 904.

This Court reaffirmed the hierarchy of the two statutes just five years ago in *Maine Community Health*, 590 U.S. 296. The Court held that "[t]he Tucker Act *yields . . . when the Administrative Procedure Act . . . provides an avenue for relief*." *Id.* at 323-34 (emphasis added).

Applicants rest their entire theory on their reading of lower court precedents, but they ignore *this Court's* precedents. This Court has squarely held that the Tucker Act does not stand in the way of the APA's waiver of sovereign immunity for otherwise actionable APA claims.

III. The States Cannot Bring Their Claims in the Court of Federal Claims

Applicants' Tucker Act defense independently fails because the Court of Federal Claims would lack jurisdiction over the States' arbitrary-and-capricious claim. Applicants rely heavily on D.C. Circuit precedent, but they neglect to mention that the D.C. Circuit has "categorically reject[ed] the suggestion that a federal district court can be deprived of jurisdiction by the Tucker Act when no jurisdiction lies in the Court of Federal Claims." *Tootle v. Sec'y of the Navy*, 446 F.3d 167, 176 (D.C. Cir. 2006). That makes sense in the context of § 702's "impliedly forbids" clause: "[t]here cannot be exclusive jurisdiction under the Tucker Act if there is no jurisdiction under the Tucker Act." *Id.* at 177; *see also Yee v. Jewell*, 228 F. Supp. 3d 48, 56 (D.D.C. 2017).

Here, Applicants insist that this case "belongs in the Court of Federal Claims," App. 11, but the Court of Federal Claims would lack jurisdiction over Applicants' arbitrary-and-capricious claim for two separate reasons: the relevant statutes are not "money-mandating," and the States seek equitable relief. Indeed, the Federal Circuit has specifically held that the Court of Federal Claims lacks jurisdiction over claims by grantees seeking access to grant funds.

A. The Relevant Statutes Are Not Money-Mandating

Although contractors may bring breach of contract claims in the Court of Federal Claims, to bring suit in that court based on constitutional or statutory provisions, the relevant provision must be "money-mandating." *Maine Cmty.*, 590 U.S. at 322-23. A constitutional or statutory provision is money-mandating only if it

"can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Id.* at 323 (quotation omitted). This test is met where particular individuals are "entitled" to be paid particular amounts of money under the relevant provisions. *Doe v. United States*, 463 F.3d 1314, 1324 (Fed. Cir. 2006). It is "rare" that statutes meet this stringent test. *Maine Cmty.*, 590 U.S. at 324.

The States' arbitrary-and-capricious claim is not for breach of contract, and none of the relevant statutes are money-mandating. Section 706(2)(A) of Title 5 is certainly not money-mandating. On its face, this APA provision does not mandate the payment of any funds, let alone to the States specifically for these grant programs. The Court of Federal Claims has consistently held for this reason that it lacks jurisdiction over arbitrary-and-capricious claims pursuant to § 706(2)(A). *See, e.g.*, *Harlem Globetrotters Int'l, Inc. v. United States*, 168 Fed. Cl. 31, 42-43 (2023).

Consider therefore the consequences of Applicants' argument. Applicants do not deny that the grant terminations here constitute "final agency action." 5 U.S.C. § 704. But they seek to invent a new exception to the bedrock principle of administrative law that final agency actions may be challenged as arbitrary and capricious. Under Applicants' theory, grant terminations are the only type of final agency actions that cannot be challenged in *any* court as arbitrary and capricious, even when there are clear standards to apply for purposes of § 701(a)(2). That suggestion is foreign to administrative law and an emergency application is not the forum to rely upon such a novel proposition.

In addition, the statutory provisions creating the grant programs at issue here are not money-mandating. The statutes do not "entitle[]" any entity to an award. *Doe*, 463 F.3d at 1324. Rather, the Secretary of Education awards the grants "on a competitive basis" among a pool of applicants. 20 U.S.C. §§ 1022a(a), 6672(a). The States therefore could not rely on these statutes to bring suit in the Court of Federal Claims.[3]

In this regard, it should be noted that many of the lawsuits challenging the Administration's termination of grants and cooperative agreements raise claims under statutory and constitutional provisions that are not "money-mandating" under Federal Circuit precedent. *See* App. 2 n.1 (citing cases). For example, some of the cases assert APA claims based on the constitutional separation of powers, and the Federal Circuit has held that the Court of Federal Claims lacks jurisdiction over claims under "the separation of powers" because this constitutional principle does "not mandate payment of money by the government." *LeBlanc v. United States*, 50 F.3d 1025, 1028 (Fed. Cir. 1995). The same is true for most if not all of the appropriations laws and program-creating statutory provisions that some plaintiffs rely upon in the pending cases. Thus, even if the Court were to grant the Application on the basis that the Tucker Act impliedly forbids arbitrary-and-capricious grant termination claims for some reason unique to arbitrary-and-

[3] Even if the statutes were formula grants entitling particular entities to grants of particular amounts of money, they would not be money-mandating. Federal Circuit precedent holds that such statutes still are not "money-mandating" if the grant funds are "subject to restrictions and constraints" set out in grant agreements. *Nat'l Ctr. for Mfg. Scis. v. United States*, 114 F.3d 196, 199 (Fed. Cir. 1997).

capricious claims, the Court should make clear its reasoning does not apply to other APA claims that are grounded in substantive constitutional and statutory provisions that are not money-mandating.

B. The States Seek Equitable Relief

The Court of Federal Claims would also lack jurisdiction over the States' claims because the States seek equitable relief that the Court of Federal Claims cannot provide. For claims brought under § 1491(a), the Court of Federal Claims may grant injunctive relief only if it is "an incident of and collateral to" a money judgment. 28 U.S.C. § 1491(a)(2). The States in this case seek only equitable relief and no money judgment. As the district court explained below, that equitable relief carries considerable value to the States and their citizens that could not be compensated through a future money judgment. App. 8a. Because the Court of Federal Claims would lack jurisdiction to provide this equitable relief to the States, the Tucker Act cannot deprive the district court of jurisdiction to grant relief on the States' claims. *See Lummi Tribe of the Lummi Rsrv., Wash. v. United States*, 870 F.3d 1313, 1318 (Fed. Cir. 2017); *Nat'l Ctr.*, 114 F.3d at 199.

C. Federal Circuit Precedent Forecloses the Court of Federal Claims Having Jurisdiction in This Case

Federal Circuit precedent removes any doubt that Applicants are wrong that the States' suit "belongs in the Court of Federal Claims." App. 11. Based on the two considerations cited above, the Federal Circuit has squarely held that the Court of Federal Claims lacks jurisdiction over claims by grantees or putative grantees seeking access to grant funds.

In *National Center for Manufacturing Sciences*, a grantee filed suit against the Air Force seeking "specific performance of [a] Cooperative Agreement" and "access to" funds that Congress appropriated for the grant program. 114 F.3d at 198-99, 201. The Federal Circuit held that the district court had jurisdiction over the claims and reversed the district court's order transferring the case to the Court of Federal Claims. The Federal Circuit held that even if the appropriations statute entitled the plaintiff to the grant funds, the relief awarded to the plaintiff would not be the type of "unconditional payment" of funds that the Court of Federal Claims may grant as monetary damages. *Id.* at 198-99. The plaintiff instead would receive access to grant funds "subject to restrictions and constrains" under a cooperative agreement. *Id.* at 198, 201. Given this fact, jurisdiction to award specific performance and access to the grant funds existed in the district court rather than the Court of Federal Claims. *See id.*

In *Lummi Tribe*, the Federal Circuit even more explicitly held that the Court of Federal Claims is "without jurisdiction" to order relief that provides grantees access to grant funds to carry out grant activities. 870 F.3d at 1317. The court held that the relevant statute, which set forth a formula for the grant amounts to which the plaintiff was entitled, was not "money-mandating" because any disbursement of funds would be pursuant to a "strings-attached" grant agreement. *Id.* at 1317-18. Because the grantee did not have a right to "a free and clear transfer of money," the Court of Federal Claims lacked jurisdiction to grant the plaintiff relief. *Id.* at 1319.

The "disbursement of funds" to the grantee required equitable relief that is "not within the Claims Court's purview." *Id.* at 1318-19.

These cases make clear that if the instant case were dismissed for lack of jurisdiction and the States re-filed in the Court of Federal Claims seeking access to their grant funds, the Court of Federal Claims would have no choice but to dismiss for lack of jurisdiction as well. The D.C. Circuit is correct to "categorically reject[]" such an outcome. *Tootle*, 446 F.3d at 176.

IV. Most Federal Grants Are Not "Contracts" Subject to the Tucker Act

Applicants' request can be denied for an even more straightforward reason in this case: federal grants such as those here are not "contracts" subject to the Tucker Act at all. Section 1491(a)(1) provides the Court of Federal Claims jurisdiction only over disputes founded upon an "express or implied contract with the United States." 20 U.S.C. § 1491(a)(1). Applicants assert that these federal grants have the "characteristics" of a contract, App. 14, but Congress has explicitly distinguished federal contracts from federal grants. And the grants here could not be considered contracts subject to the Tucker Act because they lack the requisite consideration to the federal government.

In the Federal Grant and Cooperative Agreement Act, Congress distinguished federal procurement "contracts" from "grant agreements" and "cooperative agreements." A "procurement contract" exists where "the principal purpose of the instrument is to acquire . . . property or services for the direct benefit or use of the United States Government." 31 U.S.C. § 6303. In contrast, an agency

"shall use" a "grant agreement" or a "cooperative agreement" where "the principal purpose of the relationship is to transfer a thing of value to the State or local government or other recipient to carry out a public purpose." *Id.* §§ 6304, 6305. Large portions of the U.S. Code and the Code of Federal Regulations adhere to this distinction between grants and contracts. *Compare* U.S. Code, title 41 (regulating "Public Contracts") *and* 48 C.F.R. 1.000 *et seq.* (prescribing the Federal Acquisition Regulation System for contracts), *with* 2 C.F.R. part 200 (providing guidance on the administration of "Federal financial assistance," which is defined to include "grants" and "cooperative agreements" but not "contracts").

In fact, in enacting § 702's sovereign immunity waiver, Congress specifically stated that it intended to waive sovereign immunity for APA claims regarding the "administration of Federal grant-in-aid programs." *Bowen*, 487 U.S. at 900 (quoting H.R. Rep. No. 1656, at 9 (1976); S. Rep. No. 996, at 8 (1976)). *Bowen* relied on this stated intent in reaching its holding, and there is nothing in the Tucker Act's text or history suggesting that Congress intended to pare back § 702's express purpose of granting APA jurisdiction over grant administration claims.

Here, Congress directed the Department of Education to award "grants," not contracts, under the relevant statutory programs. 20 U.S.C. §§ 1022a(a), 6672(a). That choice must be honored. Congress has made clear that federal grants and contracts serve distinct purposes, and that district courts have jurisdiction to adjudicate APA claims over the administration of grants. Applicants' attempt to conflate the two for purposes of the Tucker Act should be rejected.

But even if grant agreements could sometimes be considered contracts for purposes of the Tucker Act, the grants here are not because they do not provide the needed "consideration" to the federal government. Some lower courts have held that, to qualify as a "contract" under the Tucker Act, grants and cooperative agreements must provide consideration that "render[s] a benefit to the government." *Am. Near E. Refugee Aid v. U.S. Agency for Int'l Dev.*, 703 F. Supp. 3d 126, 132 (D.D.C. 2023) (quotation omitted). That benefit must be "tangible and direct, rather than generalized or incidental." *Id.* (quotations omitted). Merely advancing U.S. "policy interests" or providing a "generalized benefit" for the public good does not qualify as a benefit to the federal government in the Tucker Act context; the benefit must be more direct, such as a "financial benefit." *Id.* at 133-34; *St. Bernard Parish Gov't v. United States*, 134 Fed. Cl. 730, 736 (2017).

Most grants and cooperative agreements do not provide such direct benefits to the federal government. That appears to be the case here. The statutes direct the provision of grants to improve "student achievement" and "the quality of prospective and new teachers," 20 U.S.C. § 1022, and to support the "development" of teachers and school administrators, *id.* § 6672. These programs serve critical policy purposes, but they do not provide direct financial or other tangible benefits to the federal government. As such, they cannot be considered "contracts" under the Tucker Act.

V. The Big Picture: Applicants Seek to Nullify Congressionally Mandated Programs and Funding

Finally, in assessing the public interest, this Court should consider Applicants' request in the context of the Executive Branch's broader efforts to use

grant terminations to nullify congressionally mandated programs and to impound funds that Congress appropriated for those programs. This case illustrates those efforts. Congress mandated that the Department of Education "shall award" Supporting Effective Education Development (SEED) Grants. 20 U.S.C. § 6672(a). Congress annually appropriates vast sums of money to the Department of Education to carry out this and other grant programs. *See, e.g.*, Pub. L. 118-47, 138 Stat. 460, 665 (Mar. 23, 2024) (appropriating funds for carrying out the Every Student Succeeds Act, which requires SEED grants, among other statutes). But now, after Applicants purportedly "reviewed each . . . SEED grant individual," App. 5-6, Applicants have terminated virtually all SEED grants, rendering this statutorily mandated program defunct. *See* App. 22a (noting that the Department of Education terminated 104 of 109 SEED and Teacher Quality Partnership (TQP) grants).

The same pattern can be found in many other cases where grantees are challenging their terminations, including the cases cited in Applicants' foreboding first footnote. *See, e.g.*, *Climate United Fund v. Citibank, N.A.*, No. 25-cv-698, 2025 WL 842360 (D.D.C. Mar. 18, 2025) (challenge to the Environmental Protection Agency's termination of all grants under a multi-billion-dollar statutory program for which Congress mandated that all funds be obligated by September 30, 2024).

Applicants point to the high-dollar figures of the grants in those cases, but those figures illustrate a very different separation-of-powers problem than Applicants imagine. The injunctions against the Executive Branch's termination of

such sums do not demonstrate a judiciary engaged in an "unconstitutional reign as self-appointed managers of Executive Branch funding." App. 2. They show that the Executive Branch has sought to usurp Congress' constitutional role in prescribing the laws of this country and exercising the power of the purse. Applicants repeatedly assert that the order below prevents them from implementing the Executive Branch's "views," "policies," "prerogatives," and vision for the nation's "fiscal health." App. 2, 3, 24, 25, 26. But it is Congress' policies and fiscal decisions that matter. If the Executive Branch seeks to "chang[e] direction on hundreds of billions of dollars of government largesse that the Executive Branch considers contrary to the United States' interests and fiscal health," App. 3, its recourse is to lobby Congress to repeal these programs or not appropriate funds to them in the future. Courts, meanwhile, should continue to play their constitutional role in blocking Executive Branch action that does not comply with the law.[4]

[4] It bears noting, however, that Applicants' Tucker Act argument would not apply to nonstatutory causes of action, such as claims to enjoin Applicants from violating the Constitution or statutes. Applicants have conceded in the lower courts that their Tucker Act argument does not apply to such nonstatutory claims. 3/8/25 Tr. at 87, *Aids Vaccine Advocacy Coalition v. Dep't of State*, No. 1:25-cv-400-AHA (D.D.C. Mar. 8, 2025), ECF No. 56. That concession is for good reason. Applicants' Tucker Act theory is specific § 702's sovereign immunity waiver for APA claims. With nonstatutory causes of action, plaintiffs need not rely upon the APA's sovereign immunity waiver, because where an "'officer is not doing the business which the sovereign has empowered him to do,'" "there is no sovereign immunity to waive—it never attached in the first place." *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1329 (D.C. Cir. 1996) (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949)). Thus, even if the Court grants the Application to vacate the temporary restraining order, the Court should avoid any suggestion that granting the application signals that other, non-APA claims against the termination of grants would be precluded as well.

CONCLUSION

The Court should deny the application to vacate the district court's order.

Respectfully submitted.

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