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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 STATE OF NEW YORK, *et al.*,

4 Plaintiffs,

5 v.

25 Civ. 2990 (ER)

6 UNITED STATES DEPARTMENT OF
7 EDUCATION, *et al.*,

8 Defendants.

Oral Argument

New York, N.Y.
June 3, 2025
2:30 p.m.

9
10 Before:

11 HON. EDGARDO RAMOS,

12 District Judge

13
14 APPEARANCES

15 LETITIA JAMES

16 Attorney General for the State of New York

17 BY: ANDREW S. AMER

STEPHEN C. THOMPSON

18 Special Counsel

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United States Attorney for the

Southern District of New York

20 BY: DANA W. KUMAR

CHRISTOPHER K. CONNOLLY

21 Assistant United States Attorneys

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1 (Case called)

2 MR. AMER: Andrew Amer with the New York Attorney
3 General's Office.

4 MR. THOMPSON: Good afternoon, your Honor. Stephen
5 Thompson, also with the New York Attorney General's Office.

6 MS. KUMAR: Good afternoon, your Honor. Dana Kumar
7 with the U.S. Attorney's Office for the Southern District of
8 New York on behalf of the defendants.

9 MR. CONNOLLY: Good afternoon, your Honor.
10 Christopher Connolly from the U.S. Attorney's Office.

11 THE COURT: Good afternoon to you all.

12 Here we are again. Mr. Amer, let me begin with you.
13 What, if anything, has changed since last we were together, not
14 the first time, but the second time?

15 MR. AMER: There is one argument that's been raised
16 that is a threshold argument that the Court hasn't addressed
17 before from the defendants' opposition brief, which is a
18 threshold jurisdictional question, but otherwise, the issues
19 are largely disposed of under the law of the case doctrine.

20 THE COURT: This is the Tucker argument?

21 MR. AMER: Correct.

22 THE COURT: Ms. Kumar, will you be arguing?

23 MS. KUMAR: Yes, I will, your Honor.

24 THE COURT: Bring the microphone closer to you,
25 please.

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1 MS. KUMAR: Sure.

2 THE COURT: In the first go-round, plaintiffs actually
3 anticipated that you might make an argument based on the Tucker
4 case, and you did not, and so I assumed that the issue was
5 conceded. I don't know that anything has changed in
6 plaintiffs' position concerning the substance of their claims,
7 but your argument has now changed. Now you are asserting that
8 the Tucker Act prevents me from—divests me of jurisdiction
9 over this matter.

10 First of all, why the change of your position?

11 MS. KUMAR: Thank you, your Honor.

12 So, two reasons for why we think that the case changed
13 and that we raised the argument in our most recent opposition
14 to the plaintiffs' preliminary injunction motion. The first is
15 that it became apparent at the last oral argument before your
16 Honor on May 6 that what plaintiffs really are seeking here is
17 for payment of the funds under the grants. The initial
18 preliminary injunction motion focused more on the process by
19 which the Department was reviewing requests for reimbursement,
20 and at the argument, counsel for the plaintiffs said that they
21 were entitled to only a cursory or ministerial review of the
22 request submitted by the states. And if that's true, then, at
23 bottom, what the plaintiffs are really seeking is for the
24 Department to just pay out the funds pursuant to the grants,
25 and that, in our view, is clearly a Tucker Act issue and would

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1 mean that the case would have to be brought in the Court of
2 Federal Claims.

3 THE COURT: So, in other words, you are asserting that
4 plaintiffs changed their argument in their oral presentation
5 the first time that we were together, is that right?

6 MS. KUMAR: I would say that it became apparent to us
7 what the argument was, which we didn't fully appreciate in the
8 briefing.

9 THE COURT: I did not understand their papers to be
10 that nuanced. So what was it that you missed that became
11 apparent during the argument? That's what I'm trying to
12 understand.

13 MS. KUMAR: The thing that became apparent is that the
14 plaintiffs are seeking the money under the grants. And the
15 second reason that I think is related is in the revised
16 preliminary injunction order that the states submitted with
17 their second papers, as well as the second revised preliminary
18 injunction order that was submitted with the reply yesterday,
19 the plaintiffs make clear that they are seeking the prompt
20 payment—or the actual payment of the funds. The first order
21 simply asked for the Department to be enjoined from enforcing
22 the March 28 letter, but the second and third proposed orders
23 actually order the Department to process the payments,
24 essentially.

25 THE COURT: We'll get to Mr. Amer in a moment. But at

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1 a high level, I suppose that seems to me to be a distinction
2 without a difference, because what the plaintiffs are seeking
3 is that the process that was in place prior to the March 28
4 letter—was it?—changed substantially in ways that affected
5 the manner in which Congress had intended the program to run
6 and included limitations which Congress specifically did not
7 intend to be put in place; that the funds that were
8 appropriated for these educational purposes should be made
9 available, and that there should be flexibility in the states'
10 ability to use those funds.

11 What's different from what they're asking for now? My
12 understanding of what they're asking for now—and, again, we'll
13 get to Mr. Amer, and maybe he'll tell me that I'm wrong—is
14 that that process continue, and that because, perhaps, the way
15 that the Department of Education has behaved since we were last
16 together, some additional language might be necessary, right?

17 MS. KUMAR: Yes, your Honor, although I will say that
18 if what the plaintiffs view the process before as simply
19 Congress appropriated the funds and the states can use them for
20 whichever purpose they say with, as Mr. Amer put it, a cursory
21 or ministerial review, that, in effect, is payment of the money
22 requested by the plaintiffs, which seems to fall within the
23 Tucker Act.

24 THE COURT: Maybe the word *ministerial* is carrying a
25 bit too much weight in our discussions on both sides, because

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1 as I understood the plaintiffs' arguments, it's that these were
2 programs that had already been approved, and what remained was
3 for the work to be done and the appropriate vouchering to be
4 submitted. But that once it was submitted and accepted, then,
5 yeah, it would be a ministerial function to validate what had
6 already been approved and what the states had proven that they
7 had accomplished.

8 Are you putting more emphasis on that word than I just
9 did?

10 MS. KUMAR: No, I don't believe so, your Honor.

11 THE COURT: OK. Mr. Amer, has your position changed?

12 MR. AMER: It has not, your Honor. I mean, as you
13 pointed out correctly, your Honor, we included the request for
14 an order directing that the request be processed without delay
15 because of the conduct that we've witnessed since—really,
16 since May 6. And I don't think there's any dispute on this
17 record, particularly in light of the Ryder declaration that the
18 defendants have submitted, that there is this pre-March 28
19 review process that was in place that is very different from
20 the process they would like to put in place and tried to with
21 the March 28 letter and then again tried to with the May 11
22 letter that is far more onerous and searching, if you will.
23 And so when—

24 THE COURT: Let me ask you, how should I read the
25 Ryder declaration, because—it's a she, right?

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1 MR. AMER: Yes.

2 THE COURT: It appears to assert that the submissions
3 that have been made by the states since the May 6 order is
4 almost historic in their experience. Is that so, and if so,
5 what's your explanation for that?

6 MR. AMER: So, two responses—and let me say that I
7 think the brief characterizes her testimony in that way, but if
8 you actually read her testimony, it doesn't support that
9 characterization. As I understand it, Ms. Ryder is saying that
10 she looks at the pace of the requests that have come in only
11 since May 6—so since the Court's preliminary injunction
12 order—and she compares that to the requests that came in—and
13 I'm just quoting—"in the weeks before March 28, 2025." Is
14 that two weeks? Is that three weeks? Is that four weeks? We
15 have no idea. But it's certainly not the pace of requests
16 going all the way back to when this funding was made available.
17 I mean, as the record reflects, that's months prior to March.

18 So, at best, she's looking at the pace of requests in
19 the four-week period since May 6 compared to some very tiny
20 window of weeks in March. So it really doesn't reflect
21 anything other than that. And I think the easy explanation is
22 that there was a backlog created because, as of March 28,
23 defendants refused to allow the plaintiff states to submit
24 timely requests that would be deemed within the liquidation
25 period, and so states were not submitting those requests for

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1 the entire period from March 28 to May 6, and so you had a
2 backlog. And it would only be a matter of common sense that,
3 once the Court's injunction lifted the restriction, that not
4 only would you be submitting requests that come due in the
5 ordinary course, but you would be submitting requests for that
6 entire period where those requests were not permitted to be
7 submitted.

8 I also have to note a stark inconsistency in the
9 defendants' position here because, while they're arguing that
10 somehow the pace of the requests is extraordinarily high, the
11 whole theory of their need for rescission is that the
12 plaintiffs have been too slow to draw down the funds, that they
13 had enough time, and therefore they are justified in
14 terminating their liquidation periods because they've taken too
15 long. So it seems like they're trying to have it both ways and
16 create this catch-22, where historically they are claiming the
17 states should have been drawing down on the funds much more
18 quickly so that they would have drawn all their funds by
19 March 28, and yet now they're all bothered by the fact that
20 requests are coming in too fast.

21 THE COURT: I mean, I think—again, I may be wrong,
22 but this is just my reading of it—that the implication or the
23 suggestion that these requests are coming in arise from the
24 fact that the various states recognize that this is a source of
25 funds that may soon be drying up now that the Department of

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1 Education has taken a more close look at the particular
2 projects for which the funds were initially allowed.

3 I may be asking a question that you don't know with
4 respect to the facts, but do you know whether, in fact, there
5 was an increase in the levels of requests that were made for
6 reimbursement since May 6?

7 MR. AMER: Well, I don't have any reason to doubt the
8 requests that are listed in the chart that the declarant,
9 Ms. Ryder, put in, but I have no way of knowing whether that's
10 quicker, slower, or the same as the pace of requests going all
11 the way back to the beginning. All I will say is that this is
12 not anything more than the plaintiff states seeking to draw
13 down funds that have already been awarded to them for projects
14 that have already been approved. And if the ordinary process
15 works the way it's supposed to, as long as they are putting in
16 for funds that they have a legitimate right to seek, I don't
17 see why the pace has any relevance to this.

18 THE COURT: Well, let's go back to the Tucker issue.
19 Ms. Kumar indicates that it's clear now that, contrary to what
20 you argued in your papers initially, what this case is really
21 about is a request for payment on a contract, contracts between
22 the federal government and the various state educational
23 authorities, and that's what this is really about.

24 MR. AMER: Well, that's just not the case, your Honor.
25 We don't ask the Court to order the defendants to make any

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1 payments. We are asking them to process the payment requests
2 without delay, and we're asking for that because they have been
3 delaying the processing of these requests. Our case is the
4 same as it was the day it was filed. It's a case to enjoin an
5 administrative final agency action that rescinded the extension
6 approvals and terminated the liquidation periods. It's focused
7 on whether the education Department has properly exercised its
8 authority under 2 CFR—I think it's Section 200.344(c).

9 That's the way this case has been framed from day one,
10 and that's the way defendants have articulated the case in
11 their brief and in the May 11 letter. They acknowledge in the
12 May 11 letter that what they are seeking to do is premised on
13 their authority under the CFR. This has nothing to do with a
14 breach of contract or request to order money damages, so this
15 case falls squarely within 702 of the APA and the *Bowen* case,
16 your Honor.

17 THE COURT: Let me ask, just as a matter of curiosity,
18 is a "Dear Colleague" letter, is that a term of art in the
19 administrative state world?

20 MS. KUMAR: I think it's a term of art in the
21 education world, your Honor.

22 THE COURT: OK. Because it is referred to variously
23 as either the May 11 letter or the "Dear colleague" letter.

24 Ms. Kumar, I'll give you an opportunity to respond
25 on the Tucker issue.

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1 MS. KUMAR: Yes, your Honor. I mean, I think what I
2 said previously applied. And Mr. Amer just said the plaintiffs
3 are requesting the Department to process the payment, and so to
4 me that's a distinction without a difference to give the
5 payments to the states. For example, pursuant to the terms of
6 the revised order, if the Department denies a request for
7 payment, is that a violation of the order, or if the Department
8 says, you know, pursuant to the pre-March 28 policies in place,
9 this is a denial? I can't kind of think of a world where the
10 states would be fine with a denial of payment even though they
11 are not seeking payment under the grants. So maybe it's a
12 question of clarification for what is the order directing the
13 Department to do.

14 THE COURT: That's a fair point, Mr. Amer, because it
15 sounds like what you're—I mean, I think the way that I
16 articulated it initially that you agreed with was that what was
17 really happening was the process that was previously in place
18 was that certain projects had been approved and certain grants
19 had been approved for those purposes, and that the ministerial
20 aspect of it was simply that the states were required to submit
21 proof by way of vouchers, etc., that the approved programs had
22 been implemented in accordance with the information that was
23 previously provided to the Department of Education.

24 Are you saying something different now? Are you
25 saying now, as Ms. Kumar suggests, I think, that if you were to

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1 submit these vouchers for payments or applications for
2 payments, that failure to pay would be a violation?

3 MR. AMER: We're not saying that, your Honor, and I
4 want to make sure that my friend is not putting words into my
5 mouth. I certainly did not say that we are asking the Court to
6 order that they process payments without delay. I specifically
7 said we are asking that the Court order that they process our
8 requests for payment without delay, and those are very
9 different things. They should process the request, and however
10 they determine the outcome of that review, that's how those
11 requests will be determined. And what we are seeking is to
12 ensure that the process that is applied is what Ms. Ryder calls
13 the pre-March 28 process.

14 THE COURT: So, in other words, if I renew the
15 preliminary injunction and payments—applications are made for
16 reimbursement and one or another application is denied, that in
17 itself would not be a violation of the injunction?

18 MR. AMER: That's correct. We'd have to look and see
19 why they were denied, and if they were denied because there was
20 no satisfactory explanation of why, let's say, for example, the
21 grants were approved in the first place, I think that would run
22 afoul of the procedure that they're required to be applying.
23 We want to try and avoid a situation where, having been
24 enjoined from implementing this project-specific extension
25 request procedure that's outlined in their May 11 letter, they

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1 nevertheless through the back door seek to do that type of
2 searching review.

3 THE COURT: I find that, as I did last time, the
4 Tucker Act does not apply in this case. The plaintiffs are not
5 seeking payments pursuant to any type of a contract, as in
6 *Bowen*. Because the rights and remedies are statutorily or
7 constitutionally based rather than contractually based, the
8 Tucker Act does not apply and *Bowen* does. So, to the extent
9 that I made that particular finding the last time around—and
10 again, it wasn't argued, but it was not contested—I find that
11 the Court does have jurisdiction.

12 Now let's move on to the May 11 letter. What's
13 different in that letter, Ms. Kumar, from Secretary McMahon's
14 letter of March 28? Why come back on the basis of that letter?

15 MS. KUMAR: Well, your Honor, the May 11 letter more
16 fully explains the reasons why the Department has taken the
17 action that it is seeking to take, which is to rescind the
18 extension deadlines that were previously granted to the states.
19 It discusses the end of the pandemic, as was mentioned in the
20 March 28 letter, but it also mentions a report that discussed
21 losses in learning and whether they were cured by an increase
22 in funds, and it discusses several other things as laid out in
23 the letter.

24 So, pursuant to the regulation that Mr. Amer cited,
25 the Department does have discretion to change the deadlines

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1 that, within the statute, should have been met by January 2025,
2 and they were not. Obviously, the last administration extended
3 the extension, but, in the Department's view, it has now
4 exercised its discretion again and revised the extension.

5 THE COURT: Let's walk through that. I mean, I think
6 one of the new things that is in the May 11 letter is you refer
7 to a study. What is it, the ANEP? What is it?

8 MS. KUMAR: I think NAEP study.

9 THE COURT: NAEP. Tell me, what is that and what does
10 that purport to show?

11 MS. KUMAR: Pursuant to what the letter says, the
12 Department views that study as not making a clear connection
13 between an increase in funding and better outcomes for
14 students.

15 THE COURT: And you view that—or the Department of
16 Education views that as a failure of the various states to
17 properly implement the programs that were being funded by the
18 statutes?

19 MS. KUMAR: No, I don't think that that's right, your
20 Honor. I think that the Department views it as the money was
21 supposed to have been spent. It's been a significant time
22 since the pandemic was declared over, and because the value of
23 these very large funds being put to use in the schools is not
24 there, as the Department sees it, that the money could be put
25 to better uses, as it's put in the letter.

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1 THE COURT: Mr. Amer, what about that? I mean,
2 essentially, we would have expected after several years, after
3 they called the pandemic over, that we would have seen some
4 improvement in student outcomes.

5 MR. AMER: Well, I do think the results are mixed, and
6 that does show some holding ground in some areas, some loss in
7 others. But I also think the timing of that study makes it
8 unreasonable to rely on the test scores because the study—the
9 tests were administered in the first quarter of 2024. So it
10 doesn't take into account any impact that these programs have
11 been having since the first quarter of 2024.

12 I'd also submit, your Honor, that it's
13 counterintuitive to suggest that because students are
14 struggling and maybe show some signs of falling behind back in
15 the first quarter of 2024, that that means you should cut these
16 programs as opposed to continue them, because, clearly, it
17 indicates that at least in some areas students need more help
18 catching up. It also completely ignores the fact that these
19 funds are also intended for the social and emotional well-being
20 of students. It's also intended for teacher training, to
21 assist teachers in dealing with the unique aspects of teaching
22 remotely and teaching under these circumstances, and it ignores
23 the fact that these funds also go to infrastructure
24 improvements of the type that were underway and have been
25 halted, as your Honor noted last time.

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1 THE COURT: So it takes too narrow a view of the
2 extent to which these funds are being used effectively or
3 successfully?

4 MR. AMER: Yes. And I also think it takes an
5 unreasonable leap given the timing of when these tests were
6 administered, the fact that they were administered in the first
7 quarter of 2024.

8 THE COURT: Well, under these circumstances, would the
9 Department of Education be entitled to say: Well, you know, we
10 gave this money for these purposes, for these programs. These
11 programs don't seem to be working. Let's not continue to throw
12 good money after bad. Let's have a shift correction rather
13 than let's take this money away?

14 MR. AMER: So that's not the agency's call to make.
15 That would be Congress' call to make. And, in fact, in many
16 areas, Congress did revisit the issue of whether COVID funding
17 should remain on the table and, in specific instances, decided
18 it should and in other instances decided it shouldn't. And we
19 cite to the statutes where Congress pulls back COVID funding.
20 So the point is that it's not for the agency to second-guess
21 Congress' determination as to the purposes for which these
22 COVID funds should be put to use.

23 THE COURT: Ms. Kumar.

24 MS. KUMAR: I disagree with that, your Honor.
25 Congress appropriated the funds, but pursuant to the

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1 regulation, after January 2025, when the funds were mandated to
2 have been liquidated, Congress gave the Department of Education
3 the discretion to determine whether states could continue to
4 use those funds. The regulation specifically says "when
5 justified," and that is a discretionary power given to the
6 Department. So it is the Department that is the one that is
7 making these decisions after a certain time, and that power is
8 given to the Department by Congress.

9 THE COURT: But the Department changed its mind,
10 correct?

11 MS. KUMAR: Correct, your Honor.

12 THE COURT: And, therefore, don't you have to give a
13 reasonable rationale for the change in its mind?

14 MS. KUMAR: That's right, and I submit that the May 11
15 letter provides those reasonable justifications. And I'll
16 just note that at this stage of litigation, where we are, in a
17 preliminary injunction—we can more fully discuss and litigate
18 during the course of the litigation the merits of that report
19 and whether it was a reasonable or justified basis, but in the
20 meantime, as we previously discussed, the states are drawing
21 down hundreds of millions of dollars of money that the
22 Department will pay pursuant to the pre-March 28 process,
23 presumably, and it will be very difficult, if not impossible,
24 for the Department to recover that money if it ultimately
25 prevails in the litigation.

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1 THE COURT: Mr. Amer.

2 MR. AMER: Sorry, I just want to mention that I think
3 Ms. Kumar is entirely incorrect in her characterization of the
4 agency's discretion under the regulation. The discretion is
5 whether or not more time should be afforded to draw down the
6 funds. The discretion is not to revisit the types of programs
7 that are permissible under the statute. In other words, the
8 agency cannot and does not have the discretion to say we are no
9 longer allowing these funds to be used for infrastructure, and
10 we're no longer allowing these funds to be used to benefit the
11 social and emotional welfare. We are only allowing these funds
12 to be used for tutoring. That's not within the agency's
13 discretion. What's in their discretion is, OK, have you
14 justified why you need an additional X number of months to
15 spend this money on these programs?

16 THE COURT: In that regard, the letter, "Dear
17 Colleague" letter, suggests that the prior authorized
18 extensions were perhaps improvidently granted. Is that
19 something that I, at this juncture, can take into account, the
20 current administration's view of whether those extensions were
21 improvidently granted, Ms. Kumar?

22 MS. KUMAR: I think that your Honor has to rely on the
23 record in front of him, and the May 11 letter does take issue
24 with how the previous extensions were granted. And the
25 Department has now changed its position, which, in our view, it

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1 is allowed to do. And so, really, what's in front of the Court
2 is whether what is in the May 11 letter is reasonable and was
3 reasonable for the Department to take that position at this
4 time.

5 THE COURT: But also before the Court are the prior
6 applications and the prior determinations that were made that
7 the applications for extensions were carefully reviewed and
8 were granted. I believe I specifically asked the government at
9 that time: Do you have any information or any basis to
10 question those determinations that, in fact, each of the
11 applications was carefully reviewed and thereafter granted?
12 And I believe that the response that I received was that you
13 had no information in that regard, correct?

14 MS. KUMAR: Correct, based on the record in front of
15 the Court, there was no reason to doubt that.

16 MR. AMER: I'll just mention, your Honor, I don't
17 see how the record is any different today on that point than it
18 was on May 6. All you have is the May 11 letter. There's no
19 evidence in this record whatsoever that there was some
20 impropriety in the way that the Department previously reviewed
21 these extension requests.

22 THE COURT: Ms. Kumar, the plaintiffs make the point
23 in their reply that a lot of perhaps what we can discuss today,
24 if we discuss it, is already law of the case, including the
25 Court's finding that the Department of Education's

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1 letter—whether Secretary McMahon's letter or the "Dear
2 Colleague" letter—are final agency actions. I guess there was
3 no determination, obviously, on the "Dear Colleague" letter,
4 but it's to the same effect. And if I were to find that it was
5 a final agency action, do you disagree that that would be
6 consistent with the Court's finding with respect to the
7 March 28 letter?

8 MS. KUMAR: I don't think it would be inconsistent,
9 your Honor. The program set forth in the May 11 "Dear
10 Colleague" letter that is to utilize a project-specific review
11 is the same one that was contemplated in the March 28 and the
12 April 3 letters, so there's no difference there.

13 THE COURT: And with respect to the Court's finding of
14 irreparable harm, do you have any basis to argue that that
15 determination, some couple of weeks later, is not law of the
16 case?

17 MS. KUMAR: Yeah, your Honor, I think that there is a
18 slight difference now because the states have had more notice
19 regarding the Department's decisions. The May 11 letter
20 specifically gave the 14-day notice that was required by the
21 Court's preliminary injunction order. And so to the extent
22 that the states are able to draw down funds, they have been
23 able to, and the Department has paid out millions of dollars
24 since May 6 and since the issuance of the May 11 letter. So
25 the irreparable harm now really is on the Department side, as I

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1 mentioned, because the Department will be forced to pay out
2 money that it will be unable to recover, whereas the money is
3 still available to the states if they choose to avail
4 themselves of the project-specific system.

5 THE COURT: Help me understand that, Ms. Kumar,
6 because, again, what I have before me and what I understand the
7 situation to be is that the money that the plaintiffs are
8 requesting be paid are moneys that have already been approved
9 for projects that have already been approved. So how is the
10 government irreparably harmed, the federal government
11 irreparably harmed, if it is made to comply with obligations
12 that they took on initially in the first instance?

13 MS. KUMAR: Your Honor, it's the Department's view
14 that it is in the Department's discretion, after the
15 statutorily mandated period, to not grant extensions for the
16 states to liquidate funds. So if the Department determines
17 that on a project-specific basis a project—it's not justified
18 to extend a deadline for the state to utilize the funds for
19 that project, and so if the Department were to prevail in the
20 litigation and had paid out funds for a project that it
21 believed should not have been paid, it would be very difficult
22 to recover those funds.

23 THE COURT: But what about Mr. Amer's point that the
24 Department actually doesn't have the discretion to determine
25 that funds should not have been paid out for a particular

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1 program because this current administration does not believe
2 that those particular programs are worth funding?

3 MS. KUMAR: I disagree because the Department could
4 have rescinded—the Department did rescind the extension for
5 all extensions that have been granted for all programs. So the
6 Department has instituted a project-specific program, but I
7 don't believe that that's actually being challenged. But I
8 don't think there's a question that the Department—if the
9 Department in January 2025 had just said no to all of the
10 states' requests for extension, that would have been
11 permissible under the statute. So the Department does have
12 discretion to not allow the states to liquidate funds for
13 projects that were previously appropriated and approved.

14 THE COURT: Mr. Amer.

15 MR. AMER: A couple of points, your Honor: First, the
16 focus, obviously, under the irreparable harm prong is on the
17 plaintiffs' irreparable harm, and I don't understand how a
18 14-day notice period alleviates the irreparable harm that this
19 Court has already found exists and should therefore apply under
20 the law of the case. I mean, they can't be suggesting that the
21 staff that will need to be laid off somehow won't need to be
22 laid off because of 14 days of notice, or that these programs
23 that are going to be discontinued are somehow not going to be
24 discontinued, or that these infrastructure projects are somehow
25 going to be tidied up in the 14 days. Clearly, that's not the

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1 case.

2 If you look at Ms. Ryder's declaration, only less than
3 4 percent of the dollars that were requested since May 6 have
4 actually been approved and paid. So there's still an enormous
5 amount of funds that haven't been drawn down, and I just don't
6 see why anything that's occurred since May 6, when we had the
7 oral argument on the first motion, in any way undermines the
8 rationale that the Court applied in finding irreparable harm.
9 And as the Court observed, it remains the case that funds that
10 are untapped are not the education Department's funds to use
11 elsewhere on other pet projects of the Department. Those funds
12 are appropriated under COVID statutes for particular uses, and
13 it's not for the agency to try and claw them back to put them
14 to other uses.

15 THE COURT: Here's where I come down: I am going to
16 abide by my initial finding of several weeks ago that the
17 plaintiffs have established a likelihood of success on the
18 merits, both because the Department of Education's
19 determination to rescind the deadlines and apply the new
20 approval process is arbitrary and capricious and because it is
21 contrary to law. As I found before, I find that plaintiffs
22 will be irreparably harmed in the absence of preliminary relief
23 because of the cessation of programs that are already in place,
24 infrastructure projects that are already in place, employment
25 determinations that have already been made, and that the

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1 balance of equities tip in favor of the plaintiffs. I also
2 find that the injunction is in the public interest for those
3 same reasons.

4 I do, however, want to talk about the plaintiffs'
5 proposed preliminary injunction. It does have new language.
6 And, Mr. Amer, why don't you walk us through what it is that
7 you're specifically asking for in addition to what I previously
8 enjoined and why it is necessary.

9 MR. AMER: Sure. Paragraph 1 under—and this is the
10 revised proposed order that's attached to our reply brief.

11 THE COURT: Yes.

12 MR. AMER: So paragraph 1 is simply restating the
13 relief that was already granted on May 6.

14 Paragraph 2 would mirror that same relief with respect
15 to the May 11 letter.

16 Paragraph 3 is similar to what was in the prior
17 order—only, instead of a 14-day notice period, we're asking
18 for 30 days. And the reason for that is just to avoid the need
19 that we had here of putting a TRO in place. If there's going
20 to be yet a third effort—and I hope there isn't—but if there
21 is going to be yet a third effort to try and rescind extension
22 approvals and terminate the liquidation periods, it seems
23 unnecessary to have to seek a TRO in order to get everything
24 briefed and heard and decided. So by extending the notice
25 period from 14 days to 30 days, we would just have a

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1 preliminary injunction motion on a more routine schedule, and
2 that's the purpose for changing the number of days from 14 to
3 30.

4 Paragraph 4 is to address the conduct that we see
5 being played out here where, notwithstanding the injunction
6 that was issued on May 6, the way in which these requests
7 are—appear to be processed or are being processed is under a
8 review process that is different from the pre-March 28 process.
9 That was a process recognizing that requests were being
10 submitted in a timely way within the liquidation period, and
11 seems to be more akin to the onerous type process that they're
12 seeking, they were seeking, under this project-specific review
13 procedure.

14 So paragraph 4 is designed to ensure that the
15 Department doesn't seek to evade the spirit of the injunction,
16 and it would require the defendant to submit a status report
17 within one week outlining—like Ms. Ryder's declaration does,
18 but going all the way back to show all of the outstanding
19 requests, not just the ones that have been submitted since
20 May 6, and to have the Department indicate when those requests
21 will be processed.

22 And bear in mind, when the Department was receiving
23 requests through their online portal which predated
24 mid-February, these requests were being processed within one
25 business day. And so now we have requests going all the way

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1 back even to March 28 that still have not been processed, as
2 well as all of the requests in Ms. Ryder's declaration that
3 remain to be processed and that represent some 96 percent of
4 the dollars that are now under consideration.

5 THE COURT: I guess one of the concerns that I have
6 with respect to this request, Mr. Amer, is, because I read the
7 newspaper, I know that there have been substantial disruptions
8 at various agencies of the federal government. I don't know
9 the extent to which the Department of Education is working with
10 the same level of personnel or the same level of support that
11 it had—employee support that it had prior to the new
12 administration taking over. I know that the new administration
13 has been aggressively looking to find efficiencies where it
14 can. And I guess do you know or do you have any reason to
15 suspect that what's happening here is an affirmative
16 determination on the part of the Department of Education to
17 slow-walk these applications, or could it be something else?

18 MR. AMER: I think it's absolutely slow-walking. If
19 you look at the email exchanges that we've put in the record,
20 you can see what the Department is doing. They're coming back
21 and they're asking for information to justify that the projects
22 align with their priorities. It's going well beyond what they
23 should be looking at if they were truly reviewing these as
24 though they were timely liquidation—timely requests within the
25 liquidation period. That's why we attached the correspondence

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1 with the Department. This is unprecedented in terms of what we
2 understand from the plaintiffs' state education agencies in
3 terms of how these payment requests have been processed in the
4 past.

5 THE COURT: But I suppose you wouldn't begrudge the
6 Department of Education the ability to give somewhat more
7 exacting scrutiny to these applications than perhaps had been
8 made in the past?

9 MR. AMER: Well, it depends on what the purpose of
10 that exacting scrutiny is. If it's to reexamine the purpose
11 for which the funds have already been approved, then I don't
12 think that would be appropriate. That's looking into areas
13 that are not appropriate for the Department to be looking into.
14 That's second-guessing the decision to award the grant in the
15 first place, and it's second-guessing the decision to extend
16 the liquidation period.

17 THE COURT: Ms. Kumar.

18 MS. KUMAR: It's my understanding, your Honor, that
19 the Department is applying the pre-March 28 process, which
20 includes, though, ensuring that the requests that are being
21 submitted are supported by receipts; that the funds were, in
22 fact, obligated prior to September 2024 and are supported by
23 proper documentation. And there have been issues. For
24 example, according to Ms. Ryder's declaration, Pennsylvania
25 submitted a request for \$35 million, but it only has

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1 \$17 million available in funding. So that's probably just a
2 mistake on the part of Pennsylvania, but it means that the
3 Department has to—I'm sorry, it's Illinois, not Pennsylvania.
4 I don't want to disparage Pennsylvania—the Department has to
5 track to make sure that the requests that are being submitted
6 match up with what was requested.

7 THE COURT: But you take no issue with Mr. Amer's
8 observation that that—something like that would be, I take it,
9 noncontroversial, but if what was happening were the Department
10 of Education were taking a look at particular, say,
11 infrastructure projects and saying: Well, we don't believe
12 that our money should continue to be used to improve the school
13 system's in-place HVAC systems, for example; we don't believe
14 that is any further an appropriate use of our funds—

15 MS. KUMAR: I agree with that, your Honor, so long as
16 that project had been obligated and was being paid for, then it
17 should not be an issue.

18 THE COURT: OK. Because I guess, at base, I don't
19 want to impose a process that may not be attainable by the
20 Department of Education. I mean, it's fine as long as we agree
21 that so long as what is happening is that the Department is
22 making sure that the funds are being used for the programs that
23 they were approved for, then I would hesitate to say you have
24 to do it within X number of days.

25 MR. AMER: Which is why we chose not to say X number

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1 of days, and we hoped that the phrase "without delay" would
2 convey what we were intending. But if there's other language—

3 THE COURT: Then there's also a reporting requirement,
4 which, again, I don't know what the volume of these
5 applications are or whether or not such a reporting requirement
6 would put some burden on the Department that I ought not to be
7 putting on the Department.

8 MR. AMER: Although I do think the declaration from
9 Ms. Ryder makes it clear that providing that information is a
10 pretty easy task because that is—the information in her
11 declaration in the chart goes back to May 6. So it would
12 simply be including anything that predates that, you know, to
13 add to the chart, and then to indicate when those requests
14 would be processed. The point would be to be—have
15 transparency, for the Court to have transparency into what is
16 outstanding and when does the Department estimate that
17 these—this backlog will be cleared. And it's not asking the
18 Court to direct that the requests be processed in X number of
19 days, but it's simply to give everyone an understanding of what
20 we're looking at here.

21 THE COURT: And in that regard, I don't know that one
22 week is reasonable. It may very well be. As I sit here, I
23 have no way of determining whether or not that would be a
24 reasonable imposition.

25 MR. AMER: Nor do I. And maybe we can find out from—

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1 MS. KUMAR: It would be burdensome on the Department,
2 your Honor. As the Department is trying to adjudicate these
3 requests, it's also trying to implement the project-specific
4 process for the non-plaintiff states, and those states are also
5 making requests. So I don't think that we need paragraph 4 in
6 the order, but whatever the Court chooses to do.

7 THE COURT: I do think we need something to make sure
8 that these things are being processed. And, again, there is
9 certainly not enough before me to make a finding that the
10 Department of Education is affirmatively purposefully
11 slow-walking this to frustrate the Court's order, but, I guess,
12 all of which is to say I'm OK with the "without delay"
13 language, but I would not necessarily require a report or
14 status report within one week. So let's put in one month, and
15 if that turns out to be unduly burdensome, then I'll expect
16 to hear back from the Department of Education.

17 The other issue that I wanted to raise was the posting
18 of a security. Why is that necessary, Mr. Amer?

19 MR. AMER: So, it shouldn't be necessary, and that's
20 why we initially said in the first motion that we didn't
21 believe the plaintiff should post bond. But we are concerned
22 that there is legislation pending before Congress in H.R.1 that
23 would preclude the court from enforcing through contempt any
24 TRO or preliminary injunction that has no security posted. And
25 so we cited to that language in H.R.1, and out of an abundance

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1 of caution, we think it's prudent, in this order, to require
2 and for plaintiffs to post a nominal \$1,000 bond so that, in
3 the future, if the legislation is enacted in the form that it
4 presently exists, the Court would be in a position to enforce
5 the order through a contempt motion if there's noncompliance.

6 THE COURT: Is this the so-called "Big Beautiful
7 Bill"?

8 MR. AMER: That's what some have called it.

9 THE COURT: Ms. Kumar, obviously, that would be
10 speculative as to, first of all, whether it would pass and
11 whether it would pass in the current state. But, Ms. Kumar, do
12 you have a view?

13 MS. KUMAR: Your Honor, we requested a \$10,000 bond in
14 our brief pursuant to Rule 65, so we would still request that.
15 But if the Court chooses a lower amount, we'll abide by that.

16 MR. AMER: I would also add, by the way, that the
17 language in the bill as it presently exists would have it apply
18 retroactively to any order that was entered into before the
19 language is enacted. So it's not as though we can try and
20 amend an order upon the enactment of the statute and have
21 conduct that predates the amendment be subject to a contempt
22 motion.

23 THE COURT: I take it there's no practical difference
24 between \$1,000 and \$10,000 as the government has requested, so
25 a bond in the amount of \$1,000 will be posted. So can you

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1 submit a revised version, Mr. Amer?

2 MR. AMER: We will.

3 THE COURT: Other than that, is there anything else
4 that we need to do today, sir? How about a schedule going
5 forward?

6 MR. AMER: The only thing I would ask is that we
7 ensure that the TRO remains in place until the Court issues the
8 preliminary injunction, in case it doesn't get signed as soon
9 as we submit it. That way we're ensured—because I think it
10 expires today.

11 THE COURT: Very well. So I'll extend it through
12 the end of business tomorrow. I don't anticipate any
13 difficulties, technological or otherwise. We'll get that
14 signed and posted as soon as we receive it. But, again, for
15 the avoidance of doubt, the preliminary injunction will take
16 effect immediately.

17 Anything else from you, Ms. Kumar?

18 MS. KUMAR: Yes, your Honor. We, as stated in our
19 papers, request that the Court stay the preliminary injunction
20 order pending any appeal.

21 THE COURT: I believe the last time I denied that
22 motion. That motion is again denied.

23 I'll look forward to receiving that revised version,
24 Mr. Amer, and we are adjourned.

25 (Adjourned)