**CHANGE Judicial Update No. 6**
**Supreme Court Allows Order Requiring USAID to Pay Past Due Amounts through February 13; Trump's DEI/DEIA and "Woke Gender Ideology" Executive Order Face TRO and Additional Court Challenges: Key Population Programming Should be Permissible**
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***Supreme Court Upholds Portion of TRO Requiring Prompt Payment of Foreign Assistance Funds***

Since CHANGE's Judicial Update 5, there have been several developments in two important foreign assistance freeze cases brought by AVAC and Global Health Council et al (Plaintiffs) against the government (Defendants). The case had resulted in a temporary restraining order (TRO) dated Feb. 13, 2025, and a second TRO dated Feb. 20, 2025, denying a finding of civil contempt but finding that the defendants had ignored the initial TRO and were seeking post-hoc rationalizations for the enjoined agency action.

In the first TRO decision, Defendants were ordered *"to immediately cease [the blanket suspension] and to take all necessary steps to honor the terms of contracts, grants, cooperative agreements, loans, and other federal foreign assistance awards that were in existence as of January 19, 2025, including but not limited to disbursing all funds payable under those terms*."

In the second TRO decision, the Court noted Defendants' representation "that some contracts at issue may include terms that allow them to be modified or terminated in certain circumstances" reasoning therefore that "it would be overbroad to enjoin Defendants from taking action to enforce the terms of particular contracts, including with respect to expirations, modifications, or terminations pursuant to contractual provisions." Accordingly, the TRO clarified that "nothing in this order shall prohibit the Restrained Defendants from enforcing the terms of contracts or grants."

Rather than abide by this second TRO, the Defendants continued their non-compliance prompting yet another motion by the Plaintiffs to enforce TRO compliance. At a hearing held on Feb. 25, the Court granted a motion for a proposed order **requiring the Defendants to pay all sums due for work completed by 11:59 on Feb. 26**. The Court further ordered that t**he Defendants take no actions to impede and instead to ensure prompt payment of appropriated foreign assistance funds going forward.**

In stunning defiance of the Feb. 25 prompt-and-continuing-payment order, the State Department and USAID terminated nearly 10,000 grants on Feb. 26, relying on the portion of the second TRO allegedly granting Defendants' rights to assess existing grants according to "convenience clauses" allowing unfettered, discretionary termination or modification and pursuant to other, unspecific legal authority.

The awards slated for termination included 5,800 from USAID and 4,100 from the State Department, many of which had been granted waivers to provide lifesaving humanitarian aid according to Devex. In a status report to the District Court on Feb. 26, the Defendants further asserted that Secretary of State Rubio had "individually reviewed" all previously terminated programs and determined in a "good faith, individualized assessment of [each contract or grant" that doing so was in the country's national interest. The termination notices thereafter received were devoid of more specific grounds for termination. *(In a more recent development, CHANGE is receiving notice that some terminated foreign assistance recipients are receiving rescission notices requesting resumption of work*.)

After a failed request for a stay of the new prompt-payment order at the District Court and the First Circuit Court of Appeals, on Feb. 26, the Defendant's petitioned the Supreme Court. Chief Justice Roberts entered a temporary stay pending review by the full court. But on March 5, 2025, the Supreme Court rejected the motion for a stay and remanded the case to the District Court with the following instructions:

> Given that the deadline in the challenged order has now passed, and in light of the ongoing preliminary injunction proceedings, the District Court should clarify what obligations the Government must fulfill to ensure compliance with the temporary restraining order, with due regard for the feasibility of any compliance timelines.

The decision was 5-4, with the four dissenting judges issuing an opinion challenging the District Court's jurisdiction and discretion to grant the challenged order.

Even though the Supreme Court decision effectively allowed a new order requiring payment of past due funding estimated at $1.5-$2 billion, the Supreme Court order is quite narrow. The Supreme Court did not rule substantively on the underlying merits of the District Court's TROs, nor the Administration's further efforts to dismantle USAID, its payment systems, and its workforce.

The District Court must now decide a new timeline for payment and then consider the much broader content of its TRO with respect to unlawful stop work/funding freeze order, which is

complicated by the dismantling of USAID and the abrupt termination of 10,000 projects. These issues were partially addressed at a hearing for a preliminary injunction held on March 6. A new order was entered ordering payment of overdue amount to Plaintiffs by the end of March 11. A further order on other delayed payments and a decision on broader preliminary injunction issues will be issued by March 10, 2025.

Will the District Court find that the alleged case-by-case review process was fundamentally flawed and that dismantling USAID and 90+% of foreign assistance in such an abrupt manner runs afoul of the Constitution, the Impoundment Act, and the Administrative Procedures Act? Will it order reestablishment of USAID and even if it does how quickly can rescission orders be issued and funding resumed? On a more pragmatic level, can the broken pieces of implementers be put back together and will implementers be willing to do so with the future of US global health assistance to be further decided by a compliant Congress that can disestablish USAID formally and refuse to authorize foreign assistance funding?

There has been another important development in the Rhode Island case brought by twenty-two States challenging the broader Trump funding freeze for all federal agencies. Judge McConnell, the presiding judge, entered a Preliminary Injunction ordering disbursement of appropriated federal funds to States and to refrain from any effort to deny, delay, or terminate such disbursement pursuant any blanket suspension order.

Although the preliminary injunction only directly requires disbursements to States, the Court was emphatic in finding that the Trump Administration had continued to thwart the expenditures of money appropriated by Congress in violation of constitutional provisions governing separation of powers and Executive functions. “Some funding has been restored in federal funding portals, but others appear to have been removed,” McConnell said. “And nothing in the defendants’ briefing or oral presentation reassures the states that federal agencies, under the Executive’s directives, will fulfill their funding obligations in the future.” The legal challenge in this case is quite analogous to the foreign assistance freeze cases and provides additional authority for the unlawfulness of that freeze.

***Court Cases Challenging DEI/DEIA and “Gender Ideology Extremism” Executive Orders Can and Should be Used to Justify Continuing Key Population Programming in PEPFAR and Other Global Health Activities***

As also reported in CHANGE Judicial Update 5, there have been court challenges to President Trump’s illegal executive orders challenging diversity, equity, inclusion, and accessibility activities and activities that involve “extreme gender ideology,” including recognition of transgender and other gender diverse people (Executive Orders 14151, 14173, 14168). Additional cases have been filed.

In the first case to have a court order, National Association of Diversity Officers in Higher Education v. Trump, 1:25-cv-00333, (D. Maryland), the plaintiff diversity officer challenged the attack on DEI/DEIA initiatives in higher education. On February 21, the Court issued a

preliminary injunction against enforcement of the offending EOs based on several claims: violation of the spending clause and separation of powers, unconstitutional vagueness, "deterrence of principles," and free speech content/viewpoint discrimination. The preliminary injunction addressed the EOs' Contract and Grant Termination Provision, its certification Provision, and part of the Enforcement Threat Provision. Defendant Trump has appealed the preliminary injunction to the Fourth Circuit Court of Appeals.

In the second case, John Doe v U.S. Office of the Director of National Intelligence, et al., Civil Action No. 1:25-cv-300 (AJT/LRV) intelligence workers assigned to DEIA initiatives challenged having been placed on administrative leave. On Feb. 27, their request for injunctive relief was denied.

The third case filed, National Urban League v. Trump, 1:25-cv-00471 (D.D.C), challenged the impact of the DEI/DEIA/gender ideology extremism EOs on Plaintiffs' rights and ability to serve historically vulnerable and marginalized populations with respect to housing, HIV-related prevention and care, and equal protection against race-based discrimination, and on Plaintiffs' ability on advocate on behalf of those populations. The Plaintiffs alleged that the EOs violate freedom of speech, equal protection and due process rights, and the Administrative Procedure Act. In addition, they assert that the EOs are intentionally discriminatory and stigmatizing, suggesting the superiority of whites over racial minorities in terms of qualifications and competence. This case, awaiting hearing, is more directly relevant to our attempt to preserve foreign assistance for key and underserved population programming.

A fourth case, American Federal of Teachers v. U.S. Department of Education, was filed challenging a Dear Colleague Letter that expanded on the Supreme Court's decision banning race-based affirmative action in college admissions. The Letter threatened to withhold federal funding from schools with DEI programs; programs that teach about "systematic and structural racism" and about racial groups that bear unique moral burdens; that stigmatize students racially; or that otherwise factor race into educational environments. The complaint alleges that the Letter "radically resets ED's longstanding position on civil rights laws that guarantee equality and inclusion … ." "[E]ducation institutions and educators are left scrambling with only vague direction as to what might or might not be considered discrimination under the Letter and contending with a sword of Damocles threatening their federal funding." The letter announces sweeping conclusions about the existence of legal violations and "issues new interpretations of law unsupported by statutory provisions, court decisions, or any articulated reasoning." The complaint alleges that the Letter contradicts Title VI of the 1964 Civil Rights Act, which prohibits discrimination by programs that that receiving federal funds, the First Amendment speech rights of teachers, and infringes on the rights of students to hear perspectives the federal government finds objectionable, the Fifth Amendment (void for vagueness), and the Administrative Procedure Act.

Three other cases challenging Trump's Executive Order limits on gender-based activities and "gender ideology extremism" have been filed including San Francisco AIDS Foundation et al. v. Trump (primarily challenging the impact of the EOs on plaintiffs' ability to serve the needs of

transgender people), Rhode Island Latino Arts v. NEA (challenging the impact of their ability to affirm transgender and nonbinary identities and experiences in their projects) and Chicago Women in Trades v. Trump (challenging EO's impact on work to train and retain women in high-skilled trades) . Plaintiffs in these cases claim the EOs constitute viewpoint and content discrimination in violation of the First Amendment, violate the Due Process Clause of the Fifth Amendment and are void for vagueness, exceed the President's authority under Article II of the Constitution (usurping Congress's authority), and violate the Fifth Amendment's Equal Protection clause.

Despite the court order temporarily retraining the implementation of the challenged EOs, the Trump Administration continues to implement the EOs in other contexts. As one example, it has just been reported that the NIH has been instructed to identify and potentially cancel grants for projects studying transgender populations, gender identity, diversity, equity and inclusion (DEI) in the scientific workforce, environmental justice, and any other research that might be perceived to discriminate on the basis of race, gender, or ethnicity. At least 16 research projects have been cancelled; one of them was studying LGBT+ health.

**Key takeaways**

US-based recipients of foreign assistance funding have enforceable First Amendment protections against viewpoint and content discrimination, but those same protections do not extend to non-US entities or persons. However, the other DEIA, transgender, and gender-based programming rights do arguably extend to all foreign assistance implementers and sub implementers.

As discussed in a further Legal Update No. 7, global health foreign assistance recipients should be able to continue their programming focusing on meeting the unmet needs of high-risk and underserved populations, including via specialized and focused health programming for HIV key populations, women, and adolescent girls. The combined effect of the enjoined stop work/funding freeze TROs and the preliminary injunction against enforcement of DEI/DEIA Executive Orders should immunize foreign assistance recipients from adverse actions based on the challenged Executive Orders. Nonetheless, even as implementers are receiving rescissions of stop-work orders and terminations, they are being unlawfully asked to verify their compliance with DEI/DEIA and gender ideology extremism Executive Orders.

We suggest that funding recipients and implementers could consider reserving their rights as follows:

> We are aware that the DEI/DEIA Executive Orders upon which these questions are based have been temporarily enjoined on multiple grounds including unconstitutional vagueness. Similarly, we are aware that there are pending court cases challenging the legality and enforcement of the Gender Extremism Executive Order. While reserving our rights to protection from enforcement of the enjoined DEI/DEIA Executive Orders and the judicially challenged Gender Ideology Extremism Executive Order, we assert that our provision of services to people and populations based on their health needs and use of

differentiated and self-standing service models is not discriminatory and consistent with applicable law.