HOBBS STRAUS DEAN & WALKER

1899 L Street, NW, Suite 1200
Washington, DC 20036

T 202.822.8282
F 202.296.8834

HOBBSSTRAUS.COM

MEMORANDUM

February 24, 2025

TO: TRIBAL HOUSING CLIENTS

FROM: Ed Clay Goodman
HOBBS, STRAUS, DEAN & WALKER, LLP

RE: Trump Administration Pauses Federal Financial Assistance – Updates

Updates on Litigation Challenging the OMB Memo

As previously noted, two lawsuits were filed challenging the funding pause soon after the issuance of the OMB memo—one by a coalition of non-profits and small businesses in the U.S. District Court for the District of Columbia ("Nonprofits case")[1] and one by a coalition of 22 states and the District of Columbia in the U.S. District Court for the District of Rhode Island ("States case").[2] A third case challenging the funding pause has now been filed by Pennsylvania Governor Josh Shapiro and various Pennsylvania state agencies in the U.S. District Court for the Eastern District of Pennsylvania ("Pennsylvania Case").[3] Plaintiffs in the Pennsylvania Case have alleged, similar to the plaintiffs in the States case, various violations under the federal constitution and the Administrative Procedure Act ("APA").

Since our last update, the district courts in the Nonprofits and States cases have each held hearings on the respective plaintiffs' motions for preliminary injunctive relief to prohibit the federal government from enforcing or otherwise carrying out a funding pause on open awards pursuant to the OMB memo during the pendency of the cases.

Nonprofits Case. In the preliminary injunction ("PI") hearing in the Nonprofits case on February 20 and in their briefing on the matter, the Plaintiffs argued that they are likely to succeed on the merits of their claims that the OMB memo is arbitrary and capricious, exceeds the OMB's statutory authority, and contravenes the First Amendment, all in violation of the APA. Through declarations by their employees and employees of their member organizations, they put forth evidence showing that even a brief a pause in federal funding will likely cause them harm in the form of forcing them to cut vital

[1] *Nat'l Council of Nonprofits v. Off. Of Mgmt. & Budget*, No. 1:25-cv-00239 (D.D.C. filed Jan. 28, 2025).
[2] *New York v. Trump*, No. 1:25-cv-00039 (D.R.I. filed Jan. 28, 2025).
[3] *Shapiro v. U.S. Dep't of Interior*, No. 2:25-cv-00763-MSG (E.D. Pa. filed Feb. 13, 2025).

services, lay off employees, or cease operations altogether—harms from which they would not be able to recover, even if their federal funding streams were subsequently resumed. While they acknowledged that the freeze has mostly, if not entirely, thawed over the course of the last several weeks so that they and their members are now again able to draw down from those accounts, they maintained that the court's TRO was instrumental in bringing about the thaw, which they asserted shows an ongoing need for preliminary injunctive relief to ensure the continued flow of funding for open awards during the pendency of the litigation. This is so, the Plaintiffs argued, especially in light of evidence of what they characterized as a broader, ongoing mentality within the Executive Branch to freeze federal aid immediately without any individualized analysis of, or determination as to, a particular funding stream or the potential consequences of abruptly stopping it, and to ask questions—and possibly resume the funding—later.

Defendants, on the other hand, contended that OMB's subsequent memo rescinding the initial OMB memo ordering the funding freeze renders the Plaintiffs' claims in this case moot, or, at the very least, renders their need for a PI moot. They asserted that the Plaintiffs' request for a PI is problematic because it essentially boils down to a request that the court issue prospective relief to guard against a situation in which OMB *might* reimplement some sort of pause of federal funding in the future and, if OMB were to do so, that such a pause *might* impact Plaintiffs' and their members' open awards. More generally, the Defendants argued for a significantly narrower reading of the OMB memo and its directive to federal agencies to pause funding, claiming the OMB memo did not institute an across-the-board freeze of federal funding, as Plaintiffs characterize it as having done.

There was much discussion between about the impact of the subsequent OMB memo, which purported to interpret and further explicate the terms of the initial OMB memo, giving it narrow reach. While the Defendants insisted that the two documents should be read in tandem and that the court should rely on the subsequent guidance to the extent it finds any inconsistency between the two, the Plaintiffs argue that the subsequent guidance advances an interpretation of the initial OMB memo that is, at least in some ways, flatly at odds with the plain text of the initial memo and that unambiguous terms in the subsequent memo requires no clarification or elaborative explanation of their meaning and should be taken at face value.

The court's questions and parties' arguments centered on whether the initial OMB memo instituted a sweeping freeze on all federal funding through its directive to agencies to "pause all activities related to obligation or disbursement of all Federal financial assistance, and other relevant agency activities that may be implicated by the executive orders, including, *but not limited to,* financial assistance for foreign aid, nongovernmental organizations, DEI, woke gender ideology, and the green new deal," or whether it was narrower in effect as the subsequent guidance claimed. Judge AliKahn noted her view that the caveat "not limited to" seems to suggest, contrary to Defendants' assertions otherwise, that the initial OMB memo's freeze order was not cabined and plainly applied to potentially all federal assistance (except that which was explicitly excepted from its

purview, including "assistance received directly by individuals" and Medicare and Social Security benefits).

Our overall sense based on listening to the hearing is that the court is inclined to grant the Plaintiff's request and issue a PI, although the likely scope of a PI is difficult to gauge at this juncture. At the close of the hearing, Judge AliKahn indicated that the court's TRO remains in effect until the court rules on the Plaintiffs' motion for a PI, which she indicated the court would do in due course. Plaintiffs have requested a PI that would broadly prohibit the freezing of any open awards (not just their own and those of their members) during the pendency of the case. Defendants have requested that a PI, if any, be narrowly tailored to impact only the open awards of the Plaintiffs and their members and not interfere with agencies' lawful ability to pause federal funding pursuant to other authorities.

States Case. In the States case, Plaintiffs filed a First Amended Complaint on February 13. They asserted claims that the federal funding freeze is arbitrary and capricious, contrary to law and ultra vires (*i.e.*, beyond the authority of the Executive Branch permitted by statute) under the APA. They also asserted an equitable ultra vires claim against President Trump, alleging that the federal funding freeze is beyond the scope of authority conferred on the president. And they bring various constitutional claims, alleging that the freeze is a violation of separation of powers principles, the Spending Clause, the Presentment Clauses, the Appropriation Clause, and the Take Care Clause. They seek declaratory and injunctive relief that the freeze is unlawful or unconstitutional and vacatur of the freeze under the APA. Notably, these claims are slightly reframed from the way they appeared in the Plaintiffs' initial complaint, in which the Plaintiffs made effectively the same arguments but with regard to the OMB memo rather than the freeze itself. Filing the First Amended Complaint is clearly a response to arguments the Defendants have made so far in the case (for example, at the TRO stage) that the case is moot in light of the Administration's rescission of the OMB the memo. However, as discussed below, Defendants now also take issue with the present framing of Plaintiffs' claims, arguing that asserting that they are too amorphous because claims attacking the federal funding freeze do not adequately identify a particular action taken by the Administration with which the Plaintiffs take issue.

Oral argument on Plaintiffs' motion for a PI on February 21 seemed to generally track the parties' briefing submitted on the issue, although the livestream was down for a significant portion of the Plaintiffs' principal argument, so we were not able to track that portion of the hearing as closely as we had hoped to. In sum, Plaintiffs' argument for a PI is that the OMB memo effected a categorical federal funding freeze that resulted in the pausing of billions of dollars of funding to the Plaintiff States and their agencies—and to subgrantee non–state agency entities upon which the Plaintiffs rely to carry out certain functions related to the provision of vital state services—almost immediately and without any individualized determinations having been made with regard to particular grants or grant programs and their respective governing statutes. While some of the funding resumed in the several days following the issuance of the OMB memo, and much more of it resumed after the court issued a TRO prohibiting the federal government from

effectuating the OMB memo and its freeze directive while it considered a PI motion, the Plaintiffs contend that certain funding streams still have not resumed. They contend that the marked difference in the flow of federal funding before and after the TRO went into effect, along with significant factual evidence they have submitted to the court in the form of declarations and exhibits showing the impacts of the pause in funding and the ongoing pauses of some funding streams, supports the need for a PI to keep the Defendants from carrying out a categorical federal funding freeze during the pendency of the case.

During the portion of Plaintiffs' argument that we were able to listen to, the court's questions touched on issues related to the Plaintiffs' standing to bring the case and the nature of the alleged injuries experienced by the Plaintiffs due to the pause in funding (or those which they would likely experience due to an ongoing pause or subsequent similar pauses if a PI is not issued to prevent such things). A court may issue a PI only if the moving party shows, among other things, that it is likely to experience "irreparable harm" without one. Purely financial harm is not typically considered to constitute irreparable harm where damages would, in theory, be calculable and could provide adequate redress. On this point, Plaintiffs emphasized that their harms are more programmatic, rather than purely financial, in nature—their issue is not a dollar-for-dollar concern that the Plaintiff States will have to step in and take it upon themselves to fund services once funded through federal grants, but that they simply would be unable to plug in their own replacement funds on such a massive scale, meaning they would have to entirely overhaul their state budgets and entirely eliminate services and functions that are traditionally part and parcel to the role of state governments.

Defendants began their portion of the argument by once again trying to make the point that the case is moot in light of the rescission of the OMB memo, but the court quickly steered them away from that point, seemingly unconvinced by it. Defendants argued instead—as they have in their briefing—that the latest iteration of Plaintiffs' claims, which challenge the federal funding freeze versus the OMB memo specifically, are too amorphous for resolution by the court, and too amorphous for the court to be able to appropriately fashion any PI. The court also pushed back against this contention, noting that any such problem only arises because the Administration chose to put forth a broad, categorical funding freeze through the OMB. Nevertheless, Defendants continued to press their point that they believe the Plaintiffs' claims do not identify with enough specificity what particular action or actions of the Administration they are challenging. They maintain that the Plaintiffs' interpretation of the OMB memo and the funding freeze is overbroad and that the memo should instead be understood in tandem with subsequently issued guidance and the position advanced by the government in the litigation, as all the Executive intended to do through the OMB memo was to instruct agencies to pause funding related to a discrete number of topics *if* agencies determine they have the authority to do so under the statutes governing any particular grant or grant programs related to those topics.

In that same vein, Defendants concluded their argument by urging the Court to cabin the scope of a PI, if it issues one at all, in order to avoid inappropriately

constricting the Executive Branch from exercising its lawful discretion to review and potentially pause funding pursuant to a particular grant or program's governing statutes.

Ultimately, we believe it is probable the court will impose some sort of PI in this case as well, especially given that Judge McConnell noted the positive effect the TRO has proven to have so far. However, again, the likely scope of any PI is difficult to gauge. The court indicated that it hopes to issue a ruling on the PI motion within the next week. We will keep you updated with developments in the funding freeze cases.

Senator Murkowski's Senate Floor Speech

Since the President's diversity, equity, and inclusion (DEI) and environmental justice (EJ) Executive Orders (EOs) were issued in late January, Senator Lisa Murkowski (R-AK) has been working to clarify that they do not apply to Tribes. As a continuation of these efforts, she addressed her colleagues on the Senate floor on February 5, 2025. She made clear to her congressional colleagues what she has been clarifying to the new Administration: Tribes and Tribal programs do not receive federal funding based on DEI or EJ policies, but based on the federal government's trust responsibility and treaty obligations. Her message was the same as the one she delivered in a meeting with the Director of the Office of Management and Budget and in an official letter she sent him urging him to direct agencies to immediately reaffirm the unique treatment of Tribes based on their political and legal status recognized in the Constitution, treaties, Supreme Court decisions, and federal laws and policies.

Senator Murkowski acknowledged the Department of the Interior (Interior) for assuring in its January 30, 2025 Secretarial Order (SO) that Tribal programs at Interior funded under statutory authorities, treaty obligations, or the trust responsibility will not be impacted by its policies implementing the President's DEI, EJ, and gender EOs. She reiterated that this SO should be used as a template by other federal agencies. She also applauded the Department of Health and Human Services for its memorandum explicitly recognizing that Tribal programs are not subject to the new Administration's DEI and EJ policies. She ended with a call to action for the government to ensure that Tribes have clarity and assurance that Tribal programs will not be impacted by agency implementation of the President's EOs.

U.S. Department of Agriculture Funding

On February 12, 2025, a "halt spending flowchart" was reportedly emailed to budget officers at the U.S. Department of Agriculture (USDA). The flowchart was apparently meant to help USDA determine which programs should receive funding and which should not. It specified that much of the Inflation Reduction Act and Infrastructure Investment and Jobs Act funding should remain frozen, but it did not cite any specific legal authorities.

USDA released two press releases with updated information regarding their funding policies on February 14, 2025, titled *Secretary Rollins Takes Bold Action to Stop Wasteful Spending and Optimize USDA to Better Serve American Agriculture*, and on

February 20, 2025, titled *Secretary Rollins Releases the First Tranche of Funding Under Review*.

Tribal In-House Counsel Association's Discussion on Executive Action Updates and Potential Responses

Tribal In-House Counsel Association (TICA) speakers reported they're starting to see a lot of their clients' programs become collateral damage under the DEI and EJ EOs, including Violence Against Women Act grants and climate, energy, and agriculture initiatives. Agencies have started to issue SOs implementing these EOs. For example, the Department of Transportation issued an SO that allows them to unilaterally amend existing agreements to comply with the DEI EO and Unleashing American Energy EO, which puts programs such as those developing EV charging stations and clean energy projects at risk. The Native American Rights Fund (NARF) has created a form titled *Tracking Changes to Federal Programs for Tribal Nations and Tribal Citizens and Communities* that Tribal employees and advocates may fill out to help NARF track impacts to Tribes' federal funding access.

TICA speakers predicted that as federal agencies start implementing EOs, Tribes will experience funding pauses and increased grant scrutiny *in waves*. They emphasized the importance of Tribes staying alert and preparing for these waves. To lessen the impacts of each wave, their approach to working with the new Administration will be to continue to engage and educate federal officials on Tribes and their history with the federal government. The main request to the Administration will be a policy of regular Tribal consultation before taking action that may negatively impact Tribes, so that Tribes may support their efforts and policies by helping them avoid violations of their trust and treaty obligations. Major Tribal organizations reported they have had success building a relationship with the new Administration by volunteering to be a resource without being proscriptive.

Also, members of TICA said that three Department of Government Efficiency (DOGE) officials will likely be embedded at Interior—one at the Bureau of Indian Affairs, one at the Bureau of Indian Education, and one at the Bureau of Trust Funds Administration. TICA members are working to get people familiar with Tribes and Tribal affairs detailed to DOGE.

Finally, TICA speakers discussed the stop-work orders being issued by federal agencies to ensure each grant is in compliance with the relevant EOs. They advised Tribes to seek clarity and further guidance from the issuing agency and to review their specific grant agreements and dispute resolution clauses. Depending on the grant, those stop-work orders may not be enforceable because EOs cannot unilaterally change the government’s legal obligations under existing award agreements if it violates the terms of the award.

Ranking Members' Letter to Secretary Burgum

On February 20, 2025, Congresswoman Chellie Pingree (D-Maine) and Senator Jeff Merkley (D-Ore.), the top Democrats on the subcommittees that oversee funding for Interior, wrote a letter to Interior Secretary Doug Burgum urging him to revoke all personnel and funding actions that prevent the federal government from carrying out its treaty and trust responsibilities. They highlight that Indian country programs are already chronically underfunded and understaffed, and the freeze of federal funds owed to Tribes further jeopardizes the well-being of Tribal communities and the government-to-government relationship the federal government has with Tribal Nations. The full letter is available here.

Conclusion

If you have any questions about this memorandum, please contact me at egoodman@hobbsstraus.com or by phone at (503) 799-3924.