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MEMORANDUM

April 10, 2025

TO: TRIBAL HOUSING CLIENTS

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

RE: ***Funding Freeze Litigation Updates – 1st Cir. Denial of Stay of Prelim. Inj. & FEMA Funding Dispute***

As discussed in our previous updates on the funding freeze cases, both the U.S. District Court for the District of Columbia in the Nonprofits case[1] and the U.S. District Court for the District of Rhode Island in the States case[2] issued preliminary injunctions enjoining categorical freezes of federal funds and requiring certain funding streams to flow while the cases are litigated. This memorandum addresses several developments in the States case that have occurred since the preliminary injunction (PI) was imposed: first, the denial by the First Circuit of the government's request to stay enforcement of the PI order while it appeals the order; and, second, the District Court's recent decision to stay an order enforcing the PI with regard to certain FEMA funds the Plaintiff States allege continue to be withheld in violation of the PI order.

1st Circuit Denial of Request to Stay PI Order. As we noted in a previous memorandum, the government has appealed the District Court's PI order in the States case to the First Circuit Court of Appeals. On the same day it filed its notice of appeal, the government also filed with the First Circuit an emergency motion to stay enforcement of the PI order while the First Circuit considers the appeal. That motion to stay was quickly briefed by the parties, and, on March 26, the First Circuit issued an opinion denying the government's motion to stay enforcement of the PI, which is discussed in detail below. As a result of the First Circuit's denial, the PI will remain in effect as the case proceeds on the merits in the District Court and as the government's appeal of the PI order proceeds in the First Circuit.

In order to obtain a stay of the PI order, the government had the burden of satisfying a four-factor test by: (1) making a strong showing that it is likely to succeed on the merits of its appeal of the PI order, (2) showing that it would be irreparably harmed absent a stay of the PI order, (3) showing that a stay would not substantially injure the other parties interested in the case, and (4) showing that a stay would be in the public interest. The First Circuit found that the government failed to make a sufficient showing on any one of these four factors and, therefore, denied the stay.

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[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).

With regard to the first factor—the Agency Defendants' likelihood of success on the merits of the appeal—the government had argued that the District Court's PI order was unlawful because it "appear[ed] '[i]n the guise of litigation under the APA," which may only be brought in response to final agency action, and the case here "is in fact 'unmoored from any specific agency action,'" and is really a "'broad programmatic attack'" on the entire funding programs of numerous federal agencies.[3] The First Circuit rejected this characterization of the case. The Circuit noted that the type of "'broad programmatic attack[s]'" for which APA litigation is unavailable are those that "seek wholesale programmatic improvements by court decree by couching [an agency's] . . . program" in and of itself "as an unlawful agency action."[4] That is because the APA "does not permit a generic challenge to all aspects of a program, as though [the program] itself constitute[s] a final agency action."[5] But here, the First Circuit explained, by contrast, the District Court had specifically determined that the Plaintiff States' "APA claims do challenge discrete final agency actions," namely, "the decisions by the Agency Defendants to implement broad, categorical freezes on obligated funds."[6]

Furthermore, the government had argued that the PI was improper because it was untethered to "the supposed flaws in the OMB [memo]," and thus was too sweeping in its terms, enjoining lawful as well as unlawful conduct as a result.[7] The First Circuit noted, however, that the District Court had explicitly contended with the government's assertions in hearings and briefings before it that the funding freezes were "'purely the result of independent agency decisions rather than" the result of the OMB memo or specific Executive Orders (EOs), and it had found these assertions were "disingenuous."[8] Because the government did not "meaningfully engage with this aspect of the District Court's analysis" in requesting a stay of the PI, let alone explain or show why or how the District Court's findings in this regard are likely incorrect, the First Circuit found that the government failed to carry its burden of making a strong showing that it is likely to succeed on the merits of its appeal of the PI order on this front, as well.

Finally, with regard to an assertion made by the government that the PI is improper because it "interfere[s] with the Agency Defendants' ability to lawfully carry out the President's directives," the First Circuit noted, again, that the government failed to "meaningfully address" the District Court's findings that the Defendant Agencies adopted categorical funding freezes, rather than individualized determinations to pause funding in accordance with a Presidential directive and compliance with each paused funding stream's relevant legal authorities and grant terms. By failing to address these District Court's findings in its request for a stay, the government again failed to show how the

[3] Opinion at 30, *New York v. Trump*, No. 25-1236 (1st Cir. Mar. 26, 2025).
[4] *Id.* at 32 (quotations omitted and cleaned up).
[5] *Id.* (quotations omitted and cleaned up).
[6] *Id.* at 33.
[7] *Id.* at 38.
[8] *Id.*

District Court's order is incorrect and, thus, failed to carry its burden of making a strong showing of success on the merits of its appeal.

With regard to the second factor—irreparable harm to the Agency Defendants absent a stay of the PI—the government had contended that the PI, if not stayed during the pendency of the appeal, would harm the Defendant Agencies because it "'interferes with agencies' ability to exercise their lawful authorities to implement the President's policy directives.'"[9] But, the First Circuit noted, the PI order does not bar all pauses of federal funds, but rather only "enjoins the discrete final agency actions to adopt the broad, categorical freezes challenged" by the Plaintiff States in this case.[10] Because the government entirely failed to support its premise that the PI was inappropriately enjoining lawfully implemented pauses of federal funds—i.e., by providing examples and facts to back up such claims—the First Circuit found that the government failed to make a sufficient showing that the Agency Defendants would be irreparably harmed absent a stay of the PI.[11]

In addition, the Agency Defendants had contended that they would face irreparable monetary harm absent a stay by having to disburse funds to the Plaintiff States during the pendency of the litigation which they would not later be able to claw back if the court finds in their favor in the case. In response to this argument, the First Circuit noted that the government had "devote[d] only [a] single sentence" to this point in its briefing and failed to "identify [any] authority [or] offer [any] reasoning suggesting that this would" in fact be the case if the government is victorious.[12] Again, the First Circuit found the government's efforts insufficient to show the Agency Defendants would suffer irreparable harm absent a stay of the PI.

With regard to the fourth factor—whether the public interest weighs in favor of a stay—the First Circuit noted that the government "rel[ied] entirely on the[] same contentions" it had relied on in arguing the second factor.[13] Accordingly, the First Circuit found that the government failed to satisfy its burden on the fourth factor, as well, for the same reasons outlined above.

As to the third factor—whether the Agency Defendants could show that the other parties interested in the case would not be substantially injured by a stay of the PI order—the Agency Defendants had contended that the Plaintiff States "'have no cognizable interest in receiving federal funds to which they are not legally entitled or on a timeline that is not legally compelled.'"[14] However, the First Circuit viewed this argument as merely a repackaging of the government's earlier argument that the PI is supposedly enjoining lawful agency conduct (*i.e.*, lawful pauses in federal funding based on

[9] *Id.* at 43.
[10] *Id.*
[11] *Id.*
[12] *Id.* at 46.
[13] *Id.*
[14] *Id.*

individualized determinations in conformance with applicable legal authorities and grant terms)—which the Court had found the government completely failed to substantiate with any evidence—and, accordingly, the Court rejected it.[15]

Moreover, the First Circuit found that the Plaintiff States had supplied ample evidence, as the District Court had found, that they would suffer irreparable injury without a PI, including injuries in the forms of: "the obligation of new debt; the inability to pay existing debt; impediments to planning, hiring, and operations; and disruptions to research projects by state universities."[16] Because the Agency Defendants had not presented any explanations or evidence to refute that such injuries would be substantial or irreparable, the Court found that the government failed to satisfy its burden of making a sufficient showing on the third factor.[17]

Accordingly, finding that the Agency Defendants had failed to satisfy any of the four factors required for a stay of the District Court's PI order, the First Circuit denied the government's stay request. For now, the PI remains in effect as the case progresses.

FEMA Funding Issue. While the government's appeal of the PI order is before the First Circuit, the parties are engaged in an ongoing dispute in the District Court regarding FEMA funds that have continued to be withheld from the Plaintiff States even after imposition of the PI.

As discussed in our previous memoranda, the District Court had ordered FEMA to file a status report in mid-March confirming its compliance with the terms of the PI order in light of briefing and evidence submitted by the Plaintiff States identifying numerous FEMA grants that appeared to remain frozen. In its status report, FEMA argued that the vast majority of funds identified by the Plaintiff States as being frozen are simply undergoing a manual review process the agency is now using to evaluate grant projects, activities, and source documentation before releasing funds for reimbursement. FEMA argued this manual review process is permitted under FEMA's authorities governing its management of grant programs and, therefore, complies with the PI order. The Plaintiff States responded to the status report, countering that FEMA's actions constituted precisely the type of broad-sweeping pause on funds pending individualized reviews of specific grant terms and relevant authorities that the PI order forbids.

The District Court did not weigh in on the matter at that point, so, on March 24, the Plaintiff States filed a motion to enforce the PI order, requesting that the District Court order FEMA to cease freezing millions of dollars in obligated funds, some of which have been frozen since early February.[18] In their motion, the Plaintiff States

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[15] *Id.* at 47.
[16] *Id.* at 48.
[17] *Id.*
[18] Pls.' Renewed 2d Mot. to Enforce the Ct.'s Orders Pertaining to Freeze of FEMA Funds, *New York v. Trump*, No. 1:25-cv-00039 (D.R.I. Mar. 24, 2025), ECF No. 168.

identified a broad swath of frozen FEMA funding streams, including some grants the subrecipients of which are local and tribal governments.[19] The Plaintiff States argued that the pause, implemented under the guise of a manual review process, is exactly the type of broad, categorical, and indefinite pause of funds without any individualized assessment or basis that was initially implemented by the OMB memo and related EOs that the District Court has specifically enjoined.[20] They also argued that the government has misconstrued FEMA's regulatory authorities and that the sections the federal government has identified in the Code of Federal Regulations as support for FEMA's manual review process do not, in fact, authorize such a process.[21]

In response to the Plaintiff States' motion for enforcement, the government contended that FEMA is complying with the PI.[22] The government argued that "FEMA's manual review process has nothing to do with the OMB [memo], and is expressly *not* a pause or freeze on funding—it is instead a change to the manner in which FEMA processes and *approves* payment requests."[23] Even if the manual review process constitutes a pause or freeze, though, the government asserted that it is a permissible one because FEMA's legal and regulatory authorities governing how the agency manages disbursement of funds authorizes such a process, and, therefore, FEMA's actions are specifically grounded in the agency's relevant legal authorities and do not constitute the kind of categorical pause or freeze disallowed by the PI order.[24] Finally, the government contended that, regardless, procedurally, the Plaintiff States' motion for enforcement is not the proper vehicle for challenging FEMA's conduct, asserting that Plaintiffs' claims of improper withholding of funds are really breach of contract claims at their core, which would be subject to the specific remedies available under the terms of each funding agreement and which the District Court does not have jurisdiction under the Administrative Procedure Act (APA) to decide in this case.[25]

In a decision filed on April 4, the District Court initially sided with the Plaintiff States.[26] The District Court found that no provision within the federal regulations cited by FEMA as legal authority allowing the agency to implement a manual review process actually grants the agency such authority to implement a process that, the District Court found, effectively amounts to "an indefinite categorical manual review process with no clear end."[27] In any event, the District Court found that the Plaintiff States had "presented evidence," including memoranda issued by Department of Homeland Security Secretary Kristi Noem and Acting FEMA Administrator Cameron Hamilton, that "strongly suggests that FEMA is implementing th[e] manual review process based,

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[19] *Id.* at 5.
[20] *See id.* at 7–8.
[21] *See id.* at 8–9.
[22] Defs.' Opp'n to Pls.' Renewed 2d Mot. to Enforce Regarding FEMA Funding at 1, *New York v. Trump*, No. 1:25-cv-39-JJM-PAS (D.R.I. Mar. 27, 2025), ECF No. 172.
[23] *Id.* at 2, 5–10 (emphasis in original).
[24] *Id.* at 10–12.
[25] *Id.* at 2–5.
[26] Mem. & Order, *New York v. Trump*, No. 1:25-cv-39-JJM-PAS (D.R.I. Apr. 4, 2025), ECF No. 175.
[27] *Id.* at 9–10.

covertly, on" a direction to categorically freeze funds in a January 20, 2025, EO entitled *Protecting the American People Against Invasions*, which type of action the District Court specifically enjoined in its PI order through its direction that the government is prohibited from: "'pausing, freezing, blocking, canceling, suspending, terminating, or otherwise impeding the disbursement of appropriated federal funds to the States . . . based on the [OMB memo] or any other materially similar order, memorandum, directive, policy, or practice under which the federal government imposes or applies a categorical pause or freeze of funding appropriated by Congress.'"[28] Determining that FEMA's manual review process thus violates the PI order, the District Court ordered that:

> 1. Throughout the duration of the preliminary injunction order, FEMA must immediately cease the challenged manual review process implemented pursuant to Secretary Noem's "Direction on Grants to Non-governmental Organizations" and "Restricting Grant Funding for Sanctuary Jurisdictions" memoranda—including the manual review process as described in Cameron Hamilton's March 20, 2025 Memorandum to DHS Secretary Noem.
> 2. FEMA must immediately comply with the plain text of the preliminary injunction order not to pause or otherwise impede the disbursement of the appropriated federal funds to the States based on funding freezes dictated, described, or implied by Executive Orders issued by the President before the rescission of the [OMB memo], which includes sections 17 and 19 of the *Invasion* Executive Order.
> 3. FEMA must provide direct notice of [the District Court's enforcement order] and notice of the Court's preliminary injunction order to FEMA's leadership and all FEMA staff who administer these FEMA grants and other federal financial assistance. FEMA shall provide confirmation of these notices, including the names of recipients . . . .[29]

However, on April 5, the day after the District Court issued its FEMA enforcement order, the government filed an emergency motion for reconsideration of the order or to have the order stayed pending an appeal in light of a decision issued by the U.S. Supreme Court on April 4 in another case, *Department of Education v. California*.[30] In that case, which involves a challenge by a coalition of states to the federal government's refusal to continue paying money under specific grants, the Supreme Court granted a stay of a preliminary injunction based on a finding that the federal government is likely to win its appeal of the preliminary injunction by showing that the district court lacked jurisdiction under the APA to enter the order. The government now contends in the States case that the Supreme Court's decision in *Department of Education* "plainly vindicates" its

[28] *Id.* at 10, 13–14 (emphasis added).
[29] *Id.* at 14–15.
[30] Defs.' Emergency Mot. for Reconsideration or for Stay Pending Appeal of Order Enforcing Prelim. Inj. as to FEMA Funding, *New York v. Trump*, No. 1:25-cv-39-JJM-PAS (D.R.I. Apr. 5, 2025), ECF No. 176.

position that the District Court does not have jurisdiction over the Plaintiff States' allegations with regard to FEMA.[31] The government argues that the States case is factually analogous to the *Department of Education* case, and that, therefore, the same rationale the Supreme Court applied in *Department of Education* to determine that the district court in that case likely did not have jurisdiction to enter a preliminary injunction also applies in the States case to foreclose the District Court's jurisdiction to enter the FEMA enforcement order—*i.e.*, an order, as the government characterizes it, "compelling continued payment of funds under . . . particular FEMA grants."[32]

In an April 6 response to the government's emergency motion, the Plaintiff States argue against any reconsideration or stay of the FEMA enforcement order for several reasons.[33] First, they argue that the emergency motion is an improper collateral attack on the PI order itself, and they contend that a motion for reconsideration is not the appropriate vehicle for the government to now argue its theory that the District Court does not have jurisdiction under the APA to grant the relief it did in the PI order or subsequently with regard to FEMA, specifically.[34] Second, the Plaintiff States argue that reconsideration is not warranted because *Department of Education* is factually distinguishable and does not support the government's position in this case. They argue that while *Department of Education* concerns the cancelation of certain education grants based, purportedly, on the specific terms of those grants, this case does not challenge the government's termination of any particular grants based on specific contract terms pertaining thereto but rather challenges any implementation of "'broad, categorical freezes on obligated funds' while *deciding* whether it would be lawful or appropriate to cease disbursing those funds altogether."[35] The type of claims at issue in this case are thus properly APA claims, not contract-based claims like those at issue in *Department of Education*, the Plaintiff States maintain.[36] Third, the Plaintiff States argue that the enforcement order against FEMA should not be stayed because the government must show that it would likely succeed on the merits of an appeal of that order in order to get a stay, but, as discussed above, they contend *Department of Education* has no bearing on this case, so they contend that the government cannot make the adequate showing, and, in any event, that the FEMA enforcement order is not a final judgment and thus is not actually appealable.[37]

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[31] *Id.* at 1.
[32] *Id.* at 4.
[33] Pls.' Opp'n to Mot. to Reconsider or Stay, *New York v. Trump*, No. 1:25-cv-39-JJM-PAS (D.R.I. Apr. 6, 2025), ECF No. 179.
[34] *See id.* at 1–2.
[35] *Id.* at 4.
[36] *See id.* at 4–5.
[37] *See id.* at 6–7.

In an April 7 reply brief supporting its emergency motion for reconsideration, the government reiterated and elaborated on its stance that "the Court's preliminary injunction, issued based on claims arising under the [APA], cannot possibly reach individual, grant-specific disputes," like those involving FEMA, and, instead, that "[j]urisdiction to resolve such grant-specific disputes properly lies with the Court of Federal Claims pursuant to the Tucker Act"—not with the District Court.[38]

Also on April 7, the District Court entered a text order staying its FEMA enforcement order until further ruling on the government's emergency motion for reconsideration. Accordingly, while the PI order remains in effect, the District Court's subsequent order with regard to FEMA is not enforceable, at least for the time being.

Conclusion

If you have questions or would like additional information about anything discussed above, please do not hesitate to contact me at egoodman@hobbsstraus.com or by phone at (503) 242-1745.

[38] Defs.' Reply Mem. in Supp. of Emergency Mot. for Reconsideration or for Stay Pending Appeal of Order Enforcing Prelim. Inj. as to FEMA Funding at 2, *New York v. Trump*, No. 1:25-cv-39-JJM-PAS (D.R.I. Apr. 7, 2025), ECF No. 181.