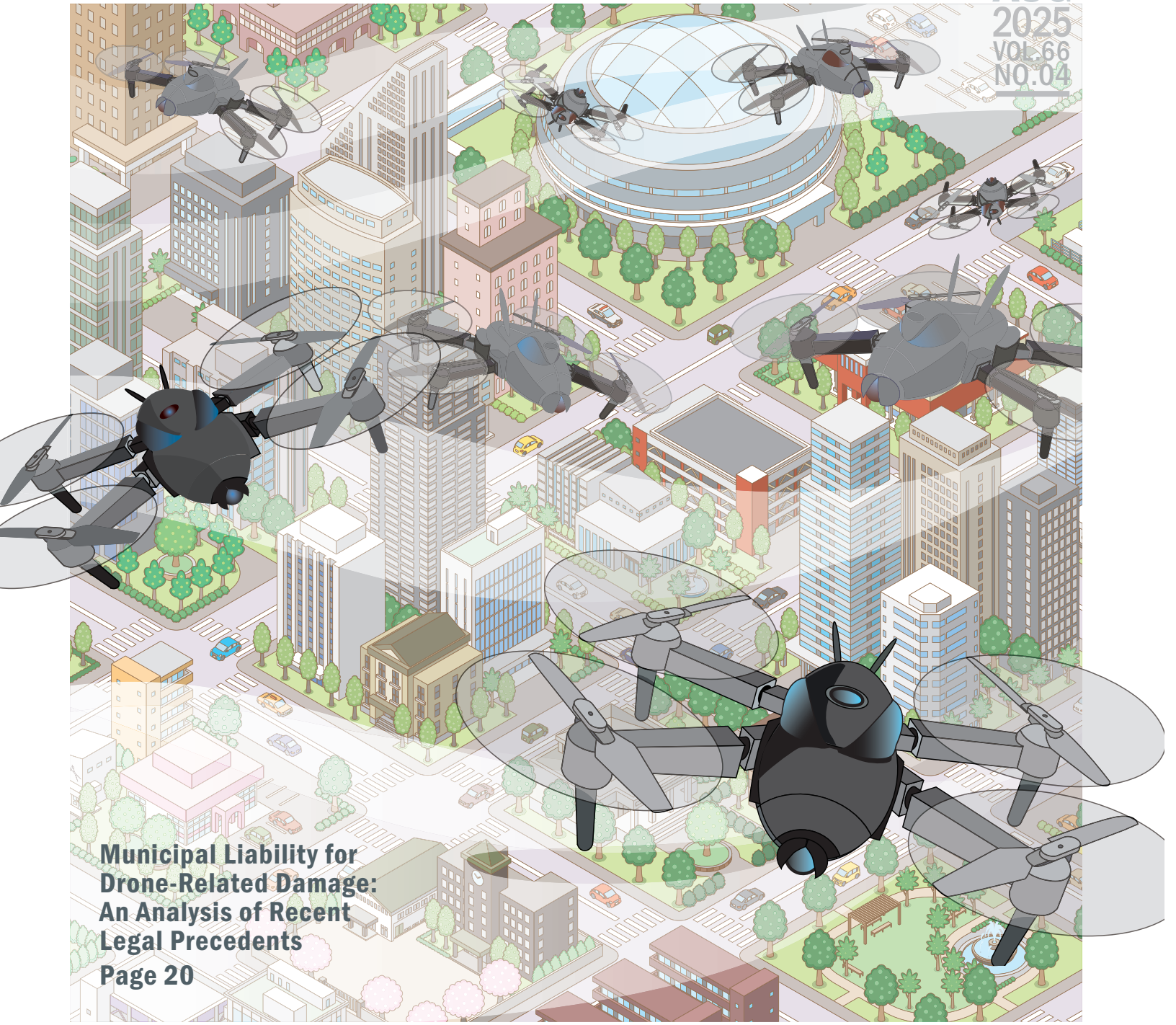
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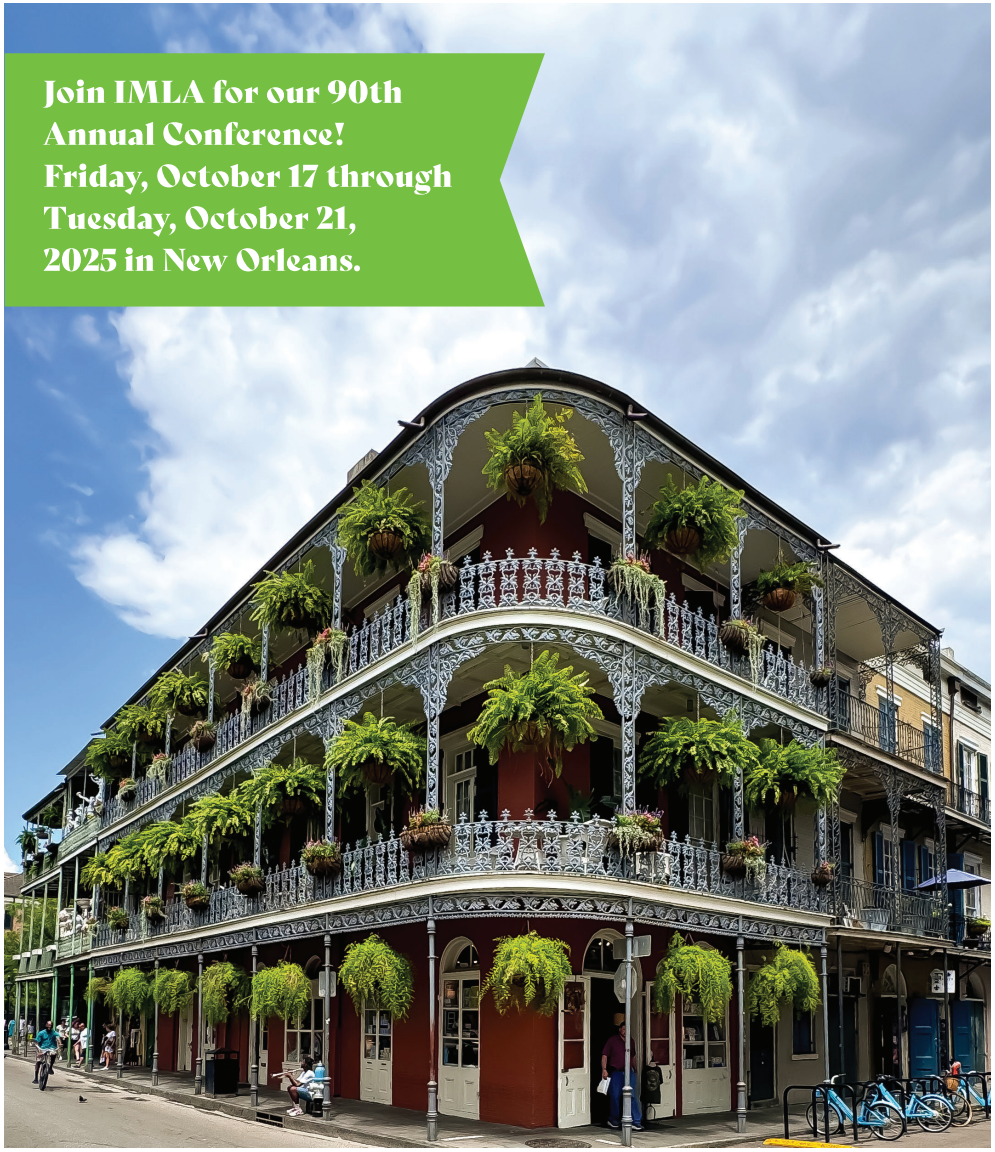
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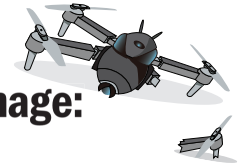


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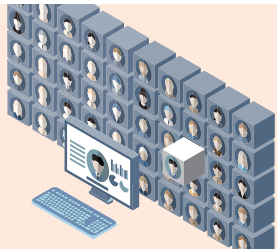
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Will DEI DIE?

Local Governments Challenge President Trump's DEI Orders

President Trump has threatened to withhold billions of congressionally approved federal funds from state and local governments. With a sea of injunctions being issued nationwide, the main question remains: Does President Trump have the power to use executive orders to order federal agencies to impound or change grant and contract terms for federal funds already approved by Congress?

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Executive Power and Executive Orders

Article II of the Constitution vests the president with executive power over the government, including the obligation to "take care that the laws be faithfully executed."[1] Although the U.S. Constitution neither addresses executive orders nor grants the President with power to issue them, executive orders are generally accepted as an inherent part of the President's authority.

An executive order is a written directive, signed by the President, published in the Federal Register, intended to have the force and effect of law.[2] The legal effect of those orders depends on a variety of factors. To have legal effect, those directives must be issued pursuant to one of the President's sources of power, as provided in Article II of the Constitution or, in limited circumstances, by a delegation of power from Congress. Only the current President may revoke standing executive orders. More importantly, executive orders cannot override federal laws and statutes.

Of the numerous executive orders President Trump issued since he began his second administration, this article will focus on: (1) Exec. Order 14151, *Ending Radical and Wasteful Government DEI Programs and Preferencing*[3] (the "D1 Order") and (2) Exec. Order 14173, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity*[4] (the "D2 Order"), (collectively, "the Orders").

The D1 Order directs the Director of the Office of Management and Budget, assisted by the Attorney General and the Director of the Office of Personnel Management, to "coordinate the termination of all discriminatory programs, including illegal DEI and "diversity, equity, inclusion, and accessibility" (DEIA) mandates, policies, programs, preferences, and activities in the Federal Government, *under whatever name they appear*."[5] The D2 Order directs the heads of each agency to include "in every contract or grant award" a term requiring the "counterparty or grant recipient to certify that it does not operate any programs promoting DEI" that would violate any applicable federal anti-discrimination laws.[6] This certification is in place for purposes of the False Claims Act (FCA), which imposes liability on "any person" who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval."[7] For FCA liability to attach, the alleged misrepresentation must be "material to the Government's payment decision"—an element the U.S. Supreme Court has called "demanding."[8] Each violation of the FCA is punishable by a civil penalty plus mandatory treble damages sustained by the federal government because of that violation.[9]

The D1 and D2 Orders require careful analysis by local governments given the potential FCA liability. Many local governments operate diversity, equity, and inclusion programs. The Biden administration required many grantees to highlight equity considerations in order to be eligible for grants. This directly conflicts with the Trump administration's about-face on DEI initiatives, without

defining what constitutes "illegal DEI," which means localities should proceed cautiously. The D1 Order requires each agency, department or commission head to take the following action withing 60 days of the Order, which includes to "terminate to the maximum extent allowed by law, all DEI, DEIA, and environmental justice offices and positions (including but not limited to Chief Diversity Officer positions); all equity plans, equity actions, initiatives, or programs, equity-related grants or contracts; and all DEI or DEIA performance requirements for employees, contractors, or grantees."[10]

There are several potential statutory and constitutional considerations with the Orders and many legal challenges to these Orders. This Article will examine several legal limitations, though additional legal challenges may be available as well.

Statutory Authorization for Executive Discretion in Allocation of Grant Sums

If federal funds are being withheld pursuant to Executive action, one place to review is the underlying statute authorizing the grant. The statute under which the grants are authorized may contain language on the extent (such as reduction or allocation) or existence of executive discretion. Absent congressionally provided discretion, the Orders are in violation of the statute and may exceed Executive authority as circumscribed by the Constitution.

In *Train v. City of New York*, the Supreme Court ruled that the Administrator of the Environmental Protection Agency was obligated to allocate all funds authorized by Congress under the Federal Water Pollution Control Act Amendments, despite President Nixon's directive to reduce them.[11] The Court held that the statutory language and legislative history made full allocation a legal requirement, leaving no room for discretionary reductions by the executive branch. This kind of unauthorized impoundment—a unilateral action taken by the executive branch to delay or cancel appropriations enacted into law—motivated Congress to pass a law regulating impoundments.

While the *Train* case was pending, Congress passed the Congressional Budget and Impoundment Control Act of 1974.[12] Title X of the Act imposes certain requirements on the President in postponing or withholding the use of authorized funds.[13] If the President determines that certain budget authority will not be required to carry out a particular program and is of the view that such authority should be rescinded, the President must submit a special message to Congress explaining the basis therefor.[14] For the rescission to be effective, Congress must approve it within 45 days.[15] Should the President desire to withhold or delay the obligation or expenditure of budget authority, he must submit a similar special message to Congress.[16] Either chamber may reject the President's recommendation by adopting a resolution disapproving the proposed deferral.[17] The Court's analysis in *Train* said the passing of the Impoundment Control Act did not affect its decision on its judicial interpretation of executive discretion as defined in the Federal Water Pollution Control Act.

The Administrative Procedure Act: Arbitrary and Capricious Agency Action

Local government may also allege that the imposition of the challenged conditions is arbitrary and capricious in violation of the Administrative Procedure Act. The APA provides for judicial review of "[a]gency action made reviewable by statute and final agency actions for which there is no other adequate remedy in a court."[18] The APA mandates that a court "shall … hold unlawful and set aside agency action … found to be … contrary to constitutional right, power, privilege, or immunity."[19] While local governments may bring claims under the APA, the federal government has been making jurisdictional arguments under the Tucker Act in many of these cases. The federal government argues that these claims sound in contract and should therefore be brought in the Court of Federal Claims as the exclusive remedy. Thus far, courts are mixed in their rulings on this issue, and those decisions are beyond the scope of this article. But counsel should be aware that these jurisdictional arguments exist.

Under the APA, an agency "must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made."[20] An agency rule will be found to be arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[21] Additionally, reversal or alteration of policy that constitutes an "unexplained inconsistency" can lead to a finding that the new policy is arbitrary and capricious.[22]

As the Orders create new, undefined obligations and an unexplained inconsistency between what is discriminatory under federal anti-discrimination laws and illegal DEI, local governments may consider an APA claim if the challenged conditions on the receipt of funding were arbitrary and capricious.

Congress's Spending Power

One of Congress's enumerated powers in the U.S. Constitution is its spending power, which empowers Congress to "provide for the common defense and general welfare of the United States."[23] The Spending Clause authorizes Congress to impose limits on the use of such funds to ensure they are used in the manner Congress intends.[24] Congress may attach conditions on the receipt of federal funds and has repeatedly employed the power "to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives."[25] Federal policy objectives that are not thought to be within Article I's enumerated legislative powers may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.

However, the spending powers over conditions on federal funding are not unlimited. In order for the conditions to be constitutional, the Supreme Court in *S. Dakota v. Dole*[26] provided they must be: (1) in pursuit of the general welfare,[27] (2) unambiguous,[28] (3) relate "to the federal interest in particular national projects or programs,[29] (4) not barred by other constitutional provisions,[30] and (5) non-coercive.[31]

To determine whether a given condition is impermissibly coercive, the U.S. Supreme Court decided in *National Federation of Independent Business (NFIB) v. Sebelius* that it depends on the "voluntariness of the states' choice to accept or decline" a particular condition and has emphasized that "theoretical voluntariness is not enough."[32] The Court invalidated a condition of the Affordable Care Act that required states to expand their Medicaid programs or forego not just Medicaid expansion funding but all federal Medicaid funding. The Court noted that federal Medicaid funding accounted for 10 percent of some states' total budgets. Given that substantial budgetary impact, the NFIB Court characterized the funding condition as "economic dragooning that leaves the states with no real option but to acquiesce in the Medicaid expansion."[33] However, the Court has declined to provide a bright-line test specifying what amount or type of funds affected by a federal funding condition fall on the coercive, rather than encouraging or enticing, side of the line. Thus, it is difficult to predict the outcome in current and future cases challenging the Orders, with any certainty.

By usurping Congress's power of the purse, the Executive Branch's imposition of conditions may violate the separation of powers. Conditions on grants pursuant to the Orders may also potentially violate the Spending Clause by adding ambiguous and potentially coercive conditions, considering the amount of federal funds at stake. James Madison argued to critics, who suggested the Constitution would dangerously concentrate power in a single central government, that the risk of abuse of such power was low because "the sword and purse are not to be given to the same member" of the government.[34] Madison explained that "[t]he purse is in the hands of the representatives of the people," who "have the appropriation of all moneys."[35]

First Amendment: Freedom of Speech

As a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds. This remains true when the objection is that a condition may affect the recipient's First Amendment rights.[36]

In *Agency for Intern. Dev. v. All. for Open Socy. Intern., Inc.*, Chief Justice Roberts held that the Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act's policy requirement—requiring organizations that receive funding under the Act to have a policy expressly opposing prostitution—violated First Amendment free speech protections.[26] The issue in the case was whether the government imposed the policy requirement as a condition on receiving federal funds. To answer yes, the Court distinguished between conditions that define the limits of the government spending program and conditions that seek to leverage funding to regulate speech outside the contours of the program itself.[27] The Court found the policy requirement to fall under the "outside of the contours of the program" by "compelling a grant recipient to adopt a particular belief as a condition of funding."[28]

The Court in *Agency* applied the "unconstitutional conditions" doctrine and invalidated the requirement. Under the doctrine, "the government may not place a condition on the receipt of a benefit or subsidy that infringes upon the recipient's constitutionally protected rights, even if the government has no obligation to offer the benefit in the first instance."[40] The Court has also applied the doctrine to scrutinize legislation that placed conditions on building permits, *Sheetz v. Cnty. of El Dorado*, 601 U.S. 267, 279 (2024), access to federal courts, *Terral v. Burke Constr. Co.*, 257 U.S. 529 (1922), and the right to travel, *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974).

Applying the *Agency* analysis to the D1 and D2 Orders and grant conditions requiring certification that the applicant does not operate any "illegal DEI," can be construed as an ongoing condition on grant recipients' speech and activities, a ground for terminating a grant after approval.[41] Grant recipients—called on by a federal agency to remove "DEI terms" from their grants—cannot avow the belief dictated by the new grant conditions when spending funds and then turn around and assert a contrary belief; *e.g.*, grant recipients cannot continue their diversity, inclusive and equitable policies, activities or programs using funds not related to the grant without fear of losing federal funds and risking FCA liability.[42]

At the end of the day, the federal, state, and local governments are all against discrimination. At the end of the day, the federal, state, and local governments are all against discrimination. However, the conditioning of federal funds on an ambiguous proscription against

"illegal DEI" may run afoul of the First Amendment.

Local Government Action[43]

Since the D1 and D2 Orders were issued, federal agencies have already directed their grant recipients to certify compliance that they do not operate any illegal DEI programs.[44] There have been several lawsuits challenging the D1 and D2 Orders.

In *Nat'l Ass'n of Diversity Officers in Higher Education v. Trump*, the federal district court for the District of Maryland granted a nationwide preliminary injunction in favor of the Plaintiffs, which included the City of Baltimore. According to the court's opinion, the City received a letter from the U.S. Department of Health and Human Services that demanded that Baltimore "immediately terminate" all activities "promoting 'diversity, equity, and inclusion'" "that are supported with funds from [a CDC] award" in light of the Orders.[45] Baltimore also received an email "from AmeriCorps informing [it] that three of [its] AmeriCorps grants had been flagged for review" because they contained words like "Diversity," "Equity," "Equity Action Plan," and "DEI" as well as "Environmental Justice" and "Climate Change."[46] The email asserted that within five days, Baltimore must either "(1) Certify that the awards, using proscribed language, 'compl[y] with all administration Executive Orders and do[] not include any activities that promote DEI activities'; (2) Stop providing noncompliant services . . . ; or (3) Forgo this AmeriCorps funding altogether."[47] On March 14, 2025, a three-judge panel of the Fourth Circuit unanimously agreed to stay the District of Maryland's preliminary injunction based on the factors under *Nken v. Holder*, a Supreme Court decision that sets the standard for a U.S. Court of Appeals to apply in considering whether to grant a stay of a district court's Order to allow an appellate court the time necessary to review the Order's legality.[48] Each judge wrote a concurring opinion. Two judges reserved their judgment "on how the administration enforces these Executive Orders, which may well implicate cognizable First and Fifth Amendment concerns.[49]

In *Chicago Women in Trades v. Trump*,[50] the Plaintiffs challenged President Trump's D1 and D2 Orders alleging violations of free speech under the First Amendment; the Due Process Clause of the Fifth Amendment for being unconstitutionally vague; and exceeding the president's statutory authority and usurping Congress's spending powers.[51] On April 14, 2025, the district court found that "the far-reaching impact of the Certification Provision combined with its encroachment on grantees' and contractors' First Amendment rights created the type of 'exceptional circumstances' in which 'the proper scope' of the injunctive relief is nationwide with regards to the Certification Provision."[52]

Finally, in *S.F. Unified Sch. Dist. v. AmeriCorps*, AmeriCorps announced that grant recipients "could only continue using grant funds for their approved purposes" if they agreed to implement the D1 and D2 Orders in their programs with only "a few days to either change their programs to eliminate any activities that promote DEI, promote 'gender ideology,' or address climate change or other environmental issues"—without explanation—or lose their AmeriCorps grant funding entirely. The court granted the plaintiffs' motion for a preliminary injunction on June 18, 2025.

Conclusion

While litigation may provide relief for some local governments, other localities will have to wait and see what will happen to their local policies as they pertain to the new conditions for current and future federal grant funding. Thus far, the district court decisions have issued many injunctions in favor of Plaintiffs (non-profit organizations and local governments), and appellate courts have reserved their judgments on future "as applied" challenges. In other words, litigants may have to show how the government's enforcement of the Orders violates any relevant statutes or the claimant's constitutional rights. The D1 and D2 Orders have left many local government diversity, equity, and inclusive programs, policies, and initiatives with uncertainty. For those looking to join discussions on these issues, please join IMLA's Diversity Working Group. **ML**

Endnotes

1. U.S. Const. Art. II, § 3.
2. Abigail A. Graber, Executive Orders: An Introduction, CONGRESS.GOV (Mar. 29, 2021), https://www.congress.gov/crs-product/R46738?q=%7B%22search%22%3A%22executive+orders+order%22%7D&s=1&r=1..
3. Exec. Order No. 14151, 90 Fed. Reg. 8339 (Jan. 29, 2025)
4. Exec. Order No. 14173, 90 Fed. Reg. 8633 (Jan. 21, 2025)
5. Exec. Order No. 14151 §2 (emphasis added).
6. *Id.* § 3(b)(iv)(A).
7. 31 U.S.C. § 3729(a)(1)(A).
8. *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 192, 194 (2016). See also *King County v. Turner*, No. 2:25-cv-00814 (May 2, 2025).
9. *Id.;* 31 U.S.C. § 3729(a); 28 C.F.R. § 85.5(a).
10. Exec. Order No. 14151 §2(b)(i).
11. 420 U.S. 35, 41 (1975); 33 U.S.C. §§ 1285, 1287 (1970 ed., Supp. III).
12. Pub. L. No. 93—344, 88 Stat. 297, 31 U.S.C. s 1301 et seq. (1970 ed., Supp. IV).
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. 5 U.S.C. §. 704.
19. 5 U.S.C. § 706(2)(B).
20. *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted); *Encino Motorcars, LLC v. Navarro,* 579 U.S. 211, 221 (2016) ("[A]n agency must give adequate reasons for its decisions.").
21. *Id.* at 43.
22. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967, 980–81 (2005)..
23. Art. I, § 8, cl. 1.
24. *Rust v. Sullivan,* 500 U.S. 173, 195, n. 4 (1991).
25. *Fullilove v. Klutznick,* 448 U.S. 448, 472–74 *(1980)*.
26. *S. Dakota v. Dole*, 483 U.S. 203, 207 (1987). See also *United States v. Butler*, 297 U.S. 1, 66 (1936). 483 U.S. 203 (1987).
27. See Helvering v. Davis, 301 U.S. 619, 640–641 (1937).
28. *Pennhurst State Sch. & Hospital v. Halderman*, supra, at 17, 101 S.Ct., at 1540.
29. *Massachusetts v. United States,* 435 U.S. 444, 461 (1978) (plurality opinion).
30. *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 269–270 (1985)
31. Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937).
32. 567 U.S. 519, 555 (2012).
33. *Id.* at 523.
34. 3 Debates in the Several State Conventions on the Adoption of the Federal Constitution 393 (Jonathan Elliot ed., 2d ed. 1836). See also Sierra Club v. Trump, 929 F.3d 670, 689 (9th Cir. 2019).
35*Id.*
36. *Agency for Intern. Dev. v. All. for Open Socy. Intern., Inc.* 570 U.S. 205, 214 (2013).37 Boggs v. Merideth, No. 3:15-cv-00315-TBR, 2017 U.S. Dist. LEXIS 40235 (W.D. Ky. Mar. 21, 2017).
Id. at 213-221.
38. *Id.*
39. *Id.* at 218.
40. *Perry v. Sinderman,* 408 U.S. 593, 597 (1972).
41. *Agency*, 570 U.S. at 218.
42. *Id.*
43. This is not an exhausted list of all pending cases and claims made against the Defendants in each case.
44. Yourish, *These Words Are Disappearing in the New Trump Administration*, The New York Times, March 7, 2025, https://www.nytimes.com/interactive/2025/03/07/us/trump-federal-agencies-websites-words-dei.html (visited June 1, 2025).
45. *Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump*, --- F. Supp. 3d ---, 2025 WL 573764, at *22 (D. Md. Feb. 21, 2025).
46. *Id.* at *22-23.
47. *Id.* at *23.
48. 556 U.S. 418 (2009)(considering four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.).
49. *Nat'l Ass'n of Diversity Officers in Higher Education v. Trump,* 4th Cir. R. 32.1, Concurring Op. at 4 n. 1(Diaz, C.J., concurring). See also *Id.* Concurring Op. at 7–8 (Harris, J., concurring).
50. No. 25-2005 (N.D. Ill. April 14, 2025).
51. *Id.*
52. *Id.* at *44 (ruling (citing City of Chicago v. Barr, 961 F.3d 882, 892 (7th Cir. 2020)). *Cf. National Urban League v. Trump*, No. 1:25-cv-00471, (D.D.C.) (A federal district court in Washington, D.C., denied preliminary injunction for the Plaintiffs who challenged the D1 and D2 Orders on facial challenges. The court said they would have standing and/or a likelihood to succeed on the merits with "as-applied" challenges.).



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