CHALLENGING UNLAWFUL IMPOUNDMENTS

February 2025
Issue Brief

The information in this document is provided for informational purposes only and does not contain legal advice, legal opinions, or any other form of advice regarding any specific facts or circumstances and does not create or constitute an attorney-client relationship. You should contact an attorney to obtain advice with respect to any particular legal matter and should not act upon any such information without seeking qualified legal counsel on your specific needs.

I. INTRODUCTION

President Trump's administration has begun to deliver on his campaign promise "to restore" what he has described as an "executive branch impoundment authority": a purported authority to refuse to distribute funds appropriated by Congress.[1] The President's advisors have not been shy about their unfounded belief that the Impoundment Control Act (ICA), 2 U.S.C. § 681 *et seq.*—a decades-old federal statute that restricts the executive branch's authority to refuse to spend funds that Congress has appropriated—is unconstitutional. Fortunately, litigants in two cases have already notched early victories against President Trump's efforts, in one case securing a stay and then rescission of one of those actions—"M-25-13," a directive issued by the Office of Management and Budget (OMB)—and, in the other, a temporary restraining order protecting the plaintiff states against the administration's funding freeze.

Nevertheless, the Trump administration's efforts to unlawfully impound funds based on the President's policy objections will likely continue. Several of President Trump's early executive actions have immediately frozen or set in motion the freezing of hundreds of billions of dollars that Congress appropriated. The Trump administration may also freeze funding in ways that are more difficult to track and challenge, including by directing individual agency officials to terminate federal grants on an ad hoc basis or behind closed doors. Such an approach may prompt a broader, sustained effort by parties who have unlawfully been denied funds to fully hold the administration accountable.

This Issue Brief provides initial thoughts on how litigants might effectively challenge the Trump administration's impoundment efforts. First, it provides background on the administration's actions thus far. Second, it identifies multiple legal claims that litigants might consider advancing, including challenges under the Impoundment Control Act, federal appropriations statutes, and the Constitution. And third, it offers some thoughts on how litigants might frame their lawsuits to anticipate and rebut common threshold defenses asserted by the government.

[1] *Agenda47: Using Impoundment to Cut Waste, Stop Inflation, and Crush the Deep State*, Trump Vance 2025 (June 20, 2023), https://perma.cc/9T6Z-5QHA.

II. TRUMP'S UNLAWFUL IMPOUNDMENTS

In just its first two weeks, the Trump administration has already issued a number of executive orders and other documents directing "pauses" in the disbursement of federal funds. In particular, two of the President's Day 1 executive orders direct federal agencies to immediately pause certain types of federal funding that Congress appropriated for particular purposes.

First, Executive Order 14154, titled "Unleashing American Energy," directed "[a]ll agencies" to "immediately pause the disbursement of funds appropriated through the Inflation Reduction Act of 2022 (Public Law 117-169) [(IRA)] or the Infrastructure Investment and Jobs Act (Public Law 117-58) [(Bipartisan Infrastructure Law)]."[2] Executive Order 14154 further directs agencies to review all of their federal financial assistance programs for consistency with the policy set forth in the Order and provide recommendations based on that review, and prohibits agencies from disbursing funds appropriated through the IRA and the Bipartisan Infrastructure Law "until the Director of OMB and Assistant to the President for Economic Policy have determined that such disbursements are consistent with any review recommendations they have chosen to adopt."[3] The Acting Director of OMB subsequently issued M-25-11, which purports to clarify that "[t]his pause"—of indeterminate length—"only applies to funds supporting programs, projects, or activities that may be implicated by the policy established in" the Order, i.e., "funds supporting the 'Green New Deal.'"[4] Executive Order 14154 thus *permanently* freezes the disbursement of so-called "Green New Deal" funds appropriated under these landmark laws, even where the funds have already been obligated to third parties through contracts, grants, and loans, unless OMB affirmatively approves the disbursement at some point in the future.

Second, Executive Order 14169, titled "Reevaluating and Realigning United States Foreign Aid," directs agencies to "immediately pause new obligations and disbursements of development assistance funds to foreign countries and implementing non-governmental organizations, international organizations, and contractors pending reviews of such programs for programmatic efficiency and consistency with United

[2] Exec. Order 14154 § 7(a), 90 Fed. Reg. 8353 (Jan. 20, 2025), https://www.federalregister.gov/documents/2025/01/29/2025-01956/unleashing-american-energy.

[3] *Id.*

[4] OMB, M-25-11 (Jan. 21, 2025), https://perma.cc/GW5W-SWY7.

States foreign policy, to be conducted within 90 days."[5] That pause has already upended numerous vital foreign aid programs,[6] with ripple effects for domestic firms.[7]

Several other executive orders put similar pressure on agencies to move swiftly to terminate certain categories of grants. Executive Order 14151, titled "Ending Radical and Wasteful Government DEI Programs and Preferencing," directs agencies to, within 60 days, "terminate, to the maximum extent allowed by law, … all … 'equity-related' grants or contracts."[8] And Executive Order 14173, titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity," directs the OMB Director to "[t]erminate all 'diversity,' 'equity,' 'equitable decision-making,' 'equitable deployment of financial and technical assistance,' 'advancing equity,' and like … programs[] or activities, as appropriate."[9]

The Trump administration's efforts to withhold funding have not been limited to these executive orders. On January 27, 2025, the Acting Director of OMB issued M-25-13, titled "Temporary Pause of Agency Grant, Loan, and Other Financial Assistance Programs."[10] As relevant here, M-25-13 directed all "Federal agencies," "to the extent permissible under applicable law," to "temporarily pause all activities related to obligation or disbursement of all Federal financial assistance, and other relevant agency activities that may be implicated by" Executive Orders 14151, 14154, 14169, and others, "including, but not limited to, financial assistance for foreign aid, nongovernmental organizations, DEI, woke gender ideology, and the green new deal." M-25-13 at 2 (emphasis omitted).[11] This "temporar[y] pause," of unspecified length,

[5] Exec. Order 14169 § 3(a), 90 Fed. Reg. 8619 (Jan. 20, 2025), https://www.federalregister.gov/documents/2025/01/30/2025-02091/reevaluating-and-realigning-united-states-foreign-aid.

[6] Tom Bateman, *How a US Freeze Upended Global Aid in a Matter of Days*, BBC (Jan. 29, 2025), https://perma.cc/4YHT-BEXV.

[7] Simon Lewis et al., *Hundreds of USAID Internal Contractors Put on Leave, Terminated Amid US Freeze on Global Aid*, Reuters (Jan. 29, 2025), https://www.reuters.com/world/us/hundreds-usaid-contractors-put-leave-terminated-amid-us-freeze-global-aid-2025-01-29/.

[8] Exec. Order 14151 § 2(b)(i), 90 Fed. Reg. 8339 (Jan. 20, 2025), https://www.federalregister.gov/documents/2025/01/29/2025-01953/ending-radical-and-wasteful-government-dei-programs-and-preferencing.

[9] Exec. Order 14173 § 3(c)(iii) (Jan. 21, 2025), https://www.federalregister.gov/documents/2025/01/31/2025-02097/ending-illegal-discrimination-and-restoring-merit-based-opportunity.

[10] M-25-13, OMB (Jan. 27, 2025), https://perma.cc/QMZ3-4EU6.

[11] Savings clauses such as "to the extent permissible under applicable law" are common in executive orders and agency documents, and should not provide a basis for upholding the Trump administration's directives. *See, e.g.*,

was to occur while all agencies "complete a comprehensive analysis of all of their Federal Financial assistance programs to identify" any "that may be implicated by any of the President's executive orders." *Id.* at 2.

Litigants filed suit to challenge M-25-13 virtually immediately. In one lawsuit brought by four non-profit organizations, the United States District Court for the District of Columbia entered an "administrative stay" restraining OMB from implementing M-25-13 "with respect to the disbursement of Federal funds under all open awards."[12]

The next day, the Acting Director of OMB rescinded M-25-13.[13] But according to the press, a White House official stated that, while M-25-13 had been rescinded, the review of Federal financial assistance programs that it directed would continue.[14] And, critically, the White House Press Secretary stated that the rescission of M-25-13 was "NOT a rescission of the federal funding freeze," and that "[t]he President's EO[]s on federal funding remain in full force and effect, and will be rigorously implemented."[15] Indeed, in response to inquiries from federal financial assistance recipients concerning their inability to draw down already-awarded funds, the Environmental Protection Agency (EPA) stated even after M-25-13's rescission that EPA was "temporarily pausing all activities related to the obligation or disbursement of EPA Federal financial assistance."[16] Citing such evidence, plaintiffs in another pending lawsuit—a coalition of 22 states and the District of Columbia—obtained a broader temporary restraining order that precludes a wide array of federal agencies and officials from taking action to "pause, freeze, impede, block, cancel, or terminate" their federal funding "except on the basis of the applicable authorizing statutes, regulations, and terms."[17]

HIAS, Inc. v. Trump, 985 F.3d 309, 325 (4th Cir. 2021) (citing *City & Cnty. of San Francisco v. Trump*, 897 F.3d 1225, 1238 (9th Cir. 2018)); *Tennessee v. Cardona*, 737 F. Supp. 3d 510, 546 (E.D. Ky. 2024).

[12] Order at 4-5, *Nat'l Council of Nonprofits v. OMB*, No. 25-cv-239 (D.D.C. Jan. 28, 2025), ECF No. 13, https://perma.cc/5C92-NBYE.

[13] OMB, M-25-14 (Jan. 29, 2025), https://perma.cc/GW2X-KKG5.

[14] Tweet by Aidan Quigley (Jan. 29, 2025), https://perma.cc/3VNE-2TDG.

[15] Tweet by Karoline Leavitt (White House Press Secretary) (Jan. 29, 2025), https://perma.cc/4HU4-VZ4G.

[16] Affirmation of Kenneth J. Sugarman ¶¶ 4-6, *New York v. Trump*, No. 1:25-cv-39 (D.R.I. Jan. 30, 2025), ECF No. 48-1, https://perma.cc/SLY5-LZ5B.

[17] Temporary Restraining Order at 11, *New York v. Trump*, No. 1:25-cv-39 (D.R.I. Jan. 31, 2025), ECF No. 50, https://perma.cc/43B7-V7VU.

More broadly, the President's advisors have repeatedly stated that they believe the President has inherent authority to withhold funds appropriated by Congress, and that the Impoundment Control Act, which permits such withholding only in narrow circumstances, is unconstitutional.[18] As explained below, these beliefs are wholly unfounded and, if acted upon, would represent an unprecedented and dangerous expansion of presidential power. Nevertheless, the Trump administration will likely continue its efforts to unlawfully impound federal funds unless courts intervene.

III. POTENTIAL LEGAL CLAIMS

Litigants seeking to challenge President Trump's executive orders and other administration efforts to impound federal funds might pursue several potential claims. Litigants might challenge any final agency actions implementing the President's executive orders under the Administrative Procedure Act (APA), which directs a court to "hold unlawful and set aside agency action" that is "not in accordance with law" or "in excess of statutory … authority." 5 U.S.C. § 706(2)(A), (C). Such claims could be predicated upon violations of the Impoundment Control Act, the underlying appropriations statutes, or the Constitution.[19] Litigants might also assert appropriations statute-based and constitutional challenges against President Trump's executive orders themselves as reasons that those orders are *ultra vires*.

For the reasons explained below, all of these claims might have a substantial likelihood of success, notwithstanding Trump administration officials' repeated assertions that the President has inherent authority to impound funds and that the ICA is unconstitutional. Indeed, Chief Justice Roberts and Justice Kavanaugh appear to have rejected this view of presidential authority.

[18] *See, e.g.*, Mark Paoletta et al., *The History of Impoundments Before the Impoundment Control Act of 1974*, Ctr. for Renewing Am. (June. 24, 2024), https://perma.cc/8TAY-B763. *But see* Zachary S. Price, *The President Has No Constitutional Power of Impoundment*, Yale J. on Reg. Notice & Comment (July 18, 2024), https://perma.cc/N48W-9QZV.

[19] While not addressed here, litigants might also be able to assert that agencies' actions to withhold funds violate agencies' grant regulations. *See, e.g.*, Robert Gordon, *Vast Carelessness*, Eating Policy (Jan. 29, 2025), https://perma.cc/9UK5-RV9E.

A. Claims Alleging Violations of the ICA

The Trump administration's actions in freezing the disbursement of appropriated funds constitute an unlawful "deferral" under the ICA. A "deferral" includes: "(A) withholding or delaying the obligation or expenditure of budget authority … provided for projects or activities; or (B) any other type of Executive action or inaction which effectively precludes the obligation or expenditure of budget authority." 2 U.S.C. § 682(1). Blocking the disbursement of certain appropriated funds, including funds that have already been obligated, constitutes a "withholding or delay" of the "expenditure of budget authority."

Under the ICA, the executive branch may defer appropriated funds only pursuant to a specific process, for specific reasons, and with respect to specific types of funds. Whenever the President or an agency seeks to defer funds "provided for a specific purpose or project," the President "shall" transmit a special message to Congress specifying the amount of funds to be deferred and the reasons for the deferral. 2 U.S.C. § 684(a). There are only three permissible reasons for deferring funds: (1) to provide for contingencies; (2) to achieve savings made possible by or through changes in requirements or greater efficiency of operations; or (3) as specifically provided by law. *Id.* § 684(b). The Government Accountability Office (GAO) has made clear that "policy reasons," including efforts to ensure funds are spent in accordance with the President's policy preferences, are not a proper basis for deferrals.[20] Finally, even where the executive branch follows the proper procedures and invokes one of the statutory grounds for deferral, the ICA does not permit deferrals beyond any date by which Congress has specified the funds must be obligated or distributed. *Id.* § 681(4).[21]

The freezes directed by President Trump's executive orders thus violate the ICA three times over. The President did not send a special message to Congress proposing the deferrals; he cited impermissible policy reasons as the basis for the pauses; and he froze some funds that Congress directed must be spent according to precise timeframes.[22]

---

[20] GAO, *Office of Management and Budget—Withholding of Ukraine Security Assistance*, B-331564, at 6 (Jan. 16, 2020), https://perma.cc/6TMT-3CH2.

[21] *See, e.g.*, GAO, B-205053 (Feb. 5, 1982), https://perma.cc/JB9E-BNEK.

[22] For example, Executive Order 14154's "immediate pause" identified "funds for electric vehicle charging stations made available through the National Electric Vehicle Infrastructure Formula Program," Exec. Order 14154 § 7(a), but the Bipartisan Infrastructure Law specifies that, "for *each* of fiscal years 2022 through 2026, the Secretary [of Transportation] shall distribute among the States the funds" for that Program appropriated by the Act according to a specified formula, Pub. L. 117-58, div. J, tit. VIII, 135 Stat. 429, 1422 (2021) (emphasis added).

Russ Vought, President Trump's nominee to serve as OMB Director, has stated that the executive orders do not violate the ICA because they are merely "programmatic delays."[23] Likewise, the Department of Justice's responses in the ongoing lawsuits against the OMB guidance have pointed to a court case and a GAO opinion that discussed programmatic delays, with DOJ asserting that these authorities establish that "temporary pauses in funding are commonplace and accepted by the Legislative Branch."[24] But as those very same authorities make clear, programmatic delays are meant "to *advance* congressional budgetary policies by ensuring that congressional programs are administered efficiently." *City of New Haven v. United States*, 809 F.2d 900, 909 (D.C. Cir. 1987). In contrast, delays "to ensure compliance with presidential policy prerogatives" are not permissible programmatic delays. B-331564, at 7. The delays under the President's Executive Order quite clearly are policy deferrals and not permissible programmatic delays.

In defending against claims invoking the ICA, the Department of Justice is likely to argue that private litigants may not sue over ICA violations, even under the APA, because the ICA sets forth a procedure by which the Comptroller General may challenge certain ICA violations. One district court has agreed with this argument. *See General Land Office v. Biden*, 722 F. Supp. 3d 710, 734-35 (S.D. Tex. 2024). But whether or not the Comptroller General's ability to bring certain kinds of claims might generally affect litigants' ability to assert ICA violations, the ICA does *not* create an alternative mechanism for the Comptroller General to bring suit with respect to implementation of President Trump's executive orders. The ICA authorizes the Comptroller General to bring suit over only one particular type of ICA violation—a refusal to make funds "available for obligation." 2 U.S.C. § 687. That provision does not address the type of ICA violations at issue here, where funds have already been obligated but the executive branch is delaying the expenditure of those funds. Because the ICA does not provide an alternative mechanism for judicial review of these kinds of violations, the statute should not be construed as precluding a private right of action, much less the typical cause of action under the APA.

B. Claims Alleging Violations of the Appropriations Statutes

Litigants might separately bring claims asserting that the President's executive orders and agencies' implementation thereof violate the underlying statutes that appropriated the funds. When Congress

[23] Aris Folley, *Democrats Grill Project 2025 Co-Author Over 'Illegal' Trump Funding Move*, The Hill (Jan. 22, 2025), https://thehill.com/homenews/senate/5100443-russell-vought-confirmation-hearing-trump-funding/.

[24] *E.g.*, Defs.' Resp. to Pls. Prop. Temporary Restraining Order 5, *New York v. Trump*, 1:25-cv-39, (D.R.I. Jan. 30, 2025), ECF No. 49, https://perma.cc/B9WT-ERVJ.

appropriates funds, Congress typically is directing the executive branch to obligate and expend the full amount of money appropriated. Congress legislates against the backdrop of the ICA in this regard; Congress knows that any action by the executive branch that intentionally delays or prevents the spending of amounts appropriated is not permissible. For this reason, where Congress wishes to give the executive branch discretion to spend less than the full amount appropriated, or even none of the funds, Congress uses specific language—e.g., that an agency is appropriated "sums not exceeding" or "up to" an amount for a particular purpose. *See, e.g.*, *CFPB v. Com. Fin. Servs. Ass'n*, 601 U.S. 416, 432-33 (2024); *id*. at 442-43 (Kagan, J., concurring). When Congress does not use such language, the statute appropriating funds requires the executive branch to make good-faith efforts to obligate and expend all the funds for the purpose for which they were appropriated.

Litigants therefore might argue that President Trump's executive orders violate the underlying statutes they cite, including the IRA and the Bipartisan Infrastructure Law. The executive orders permanently bar agencies from expending funds appropriated under those laws absent some future action by OMB affirmatively approving the use of funds. The executive orders thus violate the statutes' commands that the executive branch fully expend the funds that Congress appropriated.

Courts have invalidated executive branch actions that violate statutory directives to spend money. Most famously, in *Train v. City of New York*, 420 U.S. 35 (1975), the Supreme Court held that President Nixon had unlawfully directed the Environmental Protection Agency not to expend the full amount of money that Congress directed be spent under a statute. The Court interpreted the relevant statute to require the executive branch to spend the full amounts specified for a particular program, and the Court rejected the executive branch's argument that it had discretion to spend less. *Id.* at 42-49. The Court accordingly held that the EPA had to distribute the full sums of money. *Id.* at 41. Other courts since *Train* have upheld claims, including under the APA, that the executive branch was violating spending requirements of an appropriations statute. *See, e.g.*, *California v. Trump*, 963 F.3d 926 (9th Cir. 2020); *General Land Office*, 722 F. Supp. 3d at 743.

C. Claims Alleging Constitutional Violations

Finally, litigants might argue that President Trump's executive orders, and agency actions implementing the freezes that they direct, are unconstitutional under the separation of powers. The Constitution empowers Congress to make laws, U.S. Const. art. I, § 1, and requires the President to faithfully execute those laws, *id.* art. II, § 3. Congress's powers to set the policies of the nation are at their apex when it comes to spending money, as the Constitution "exclusively grants the power of the purse to Congress,

not the President. *San Francisco*, 897 F.3d at 1231 (citing U.S. Const. art. I, §§ 8, 9); *see also* Mem. from John G. Roberts, Jr. to Fred F. Fielding (Aug. 15, 1985), https://perma.cc/G5AA-GJAU ("[N]o area seems more clearly the province of Congress than the power of the purse.").

From these first principles, it has been long recognized that Presidents have no inherent constitutional authority to block, amend, or subvert appropriations enacted into law by Congress. "[T]he President is without authority to thwart congressional will by canceling appropriations passed by Congress." *San Francisco*, 897 F.3d at 1231; *see, e.g.*, *In re Aiken Cnty.*, 725 F.3d 255, 261 n.1 (D.C. Cir. 2013) (Kavanaugh, J.) ("'With respect to the suggestion that the President has a constitutional power to decline to spend appropriated funds, we must conclude that existence of such a broad power is supported by neither reason nor precedent.'" (quoting Mem. from William H. Rehnquist, Assistant Att'y Gen., Office of Legal Counsel, to Edward L. Morgan, Deputy Counsel to the President (Dec. 1, 1969), *reprinted in Executive Impoundment of Appropriated Funds: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 92d Cong. 279, 282 (1971))); *Clinton v. City of New York*, 524 U.S. 417, 468 (1998) (Scalia, J., concurring in part and dissenting in part) (explaining that, in *Train*, President Nixon's claim of a "constitutional right … to impound appropriated funds" was proven "wrong" (quotation omitted)).

Even if the constitutional text itself did not resolve the constitutional question (which it does), the ICA would. Because Congress, through the ICA, has expressly prohibited the President from impounding funds except as allowed under the law, the President's constitutional power is "at its lowest ebb," and the President must show that the Constitution affords him "conclusive and preclusive" authority in this field. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring); *see San Francisco*, 897 F.3d at 1234. The President cannot possibly make that showing with respect to the expenditure of federal funds, given that Constitution affords Congress and not the President the power of the purse.

Notably, both Chief Justice Roberts and Justice Kavanaugh have taken the view that the President lacks inherent constitutional authority to impound founds, and that the ICA therefore constitutionally constrains the President's actions. While at the Office of Legal Counsel in 1985, Roberts authored memos asserting that "as a general matter, the President has no independent constitutional authority to impound funds," Mem. for David L. Chew, Staff Secretary, at 2 (Aug. 15, 1985), https://perma.cc/G5AA-GJAU, and that he indeed "think[s] it clear" that the President's impoundment authority is "none in normal situations," Memo from Roberts to Fielding, *supra*. Roberts further described the ICA as having "granted and regulated" the President's authority to impound funds. Mem. for Chew, *supra*, at 1. And Justice Kavanaugh, while on the D.C. Circuit, opined that "the President does not have unilateral

authority to refuse to spend [appropriated] funds," and "[i]nstead," the President "must" follow the ICA's provisions. *In re Aiken Cnty.*, 725 F.3d at 261 n.1.

D. Historical Practice Does Not Demonstrate Presidential Authority to Impound

In defending against any of the above claims, the Trump administration is likely to assert the revisionist theory of now-OMB General Counsel Mark Paoletta—that historical practice establishes the President's constitutional authority to impound, and therefore any statute restricting such authority is unconstitutional. *See, e.g.*, Paoletta et al., *supra*. Although a full discussion of the historical record is outside the scope of this Issue Brief, historical practice is likely to play an important role in any litigation, and so we identify a few key points that litigants might stress.

First, Paoletta's historical account appears dubious. In particular, as to President Jefferson's purported impoundment of funds, which Paoletta cites as evidence of the constitutional understanding at the "founding," the statute appears to have afforded Jefferson discretion to spend less than the appropriated amount of funds, meaning Congress had actually authorized the President's action. *See, e.g.*, Price, *supra*. In other 19th century examples that Paoletta cites, the statutes similarly would have been read to grant the President discretion over how much to spend. *Id.*

Second, even if Paoletta's historical account were accurate, neither the Supreme Court nor any other court seems to have ruled on the legality of those impoundments, and thus there was never any judicial determination that the practice reflected an inherent constitutional power. To the contrary, even prior to the passage of the ICA, authorities concluded the opposite. William Rehnquist's Office of Legal Counsel memo rejecting an inherent constitutional power to impound, cited above, came in 1969. And in *Train*, the Supreme Court implicitly rejected the existence of any such inherent authority in upholding an order requiring the Executive Branch to disburse money over the President's objection. *See* 420 U.S. 35. Justice Scalia read *Train* to establish as much; he wrote that *Train* "proved [Nixon] wrong" that Presidents have a "clear" "constitutional right" to impound funds. *Clinton*, 524 U.S. at 468 (Scalia, J., concurring in part and dissenting in part).

Third, regardless of the legality of any impoundments pre-dating the ICA, Congress in enacting the ICA directly prohibited Presidents from taking such action. As explained, that specific statutory prohibition renders the President's constitutional power at its "lowest ebb," and the President cannot make the necessary showing of conclusive constitutional authority in this area. Historical examples of Presidents

taking a certain action *before* a statutory prohibition simply do not establish presidential authority to violate a statute *after* its enactment. Indeed, Paoletta cites no historical examples of presidential impoundments post-dating the ICA.

IV. THRESHOLD ISSUES

In defending against impoundment challenges, the government has raised and will continue to raise various standard threshold arguments. We believe that the government's potential defenses are unconvincing and below offer a few thoughts about how litigants might anticipate and rebut them.

A. Article III Standing and Irreparable Harm

To establish Article III standing, plaintiffs must show that they have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). These requirements are readily met by existing recipients of federal financial assistance who have been deprived of funding by the Trump administration's actions. "For standing purposes, a loss of even a small amount of money is ordinarily an 'injury.'" *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 464 (2017); *see also Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 5 (D.C. Cir. 2017) ("[T]he amount is irrelevant. A dollar of economic harm is still an injury-in-fact for standing purposes.").

To advance the strongest possible theory of harm, litigants might identify any forms of federal financial assistance they receive that have been paused and assemble facts to demonstrate that they were paused because of an unlawful impoundment decision (e.g., by showing that they relate to the subject matter of the President's executive orders and/or were suspended after an executive directive was promulgated). If a litigant decides to seek some form of expedited relief (e.g., a temporary restraining order or a preliminary injunction), it might also need to demonstrate how even a short-term denial of funding pending further review threatens to wreak "irreparable harm" on its operations or business, including by, for example, disrupting the entity's programs or forcing it to lay off staff. *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015).

B. APA Limitations

The APA contains two limitations on reviewability that are pertinent to efforts to bring the claims detailed above under the APA. However, to the extent litigants seek to challenge the President's Executive Orders themselves on an *ultra vires* theory (e.g., because they violate the underlying appropriations statutes or the Constitution), these limitations might not pose a barrier.

1. Final Agency Action

The Administrative Procedure Act is limited to review of "agency action," 5 U.S.C. § 704, which includes actions by some components of the Executive Office of the President, like OMB. *See, e.g.*, *Hyatt v. OMB*, 908 F.3d 1165, 1172 (9th Cir. 2018). Litigants might therefore focus their APA claims on actions taken by OPM or by other individual agencies, rather than on the President's executive orders themselves.

To be cognizable under the APA, agency action must also be "final," 5 U.S.C. § 704, in that it must (1) represent "the consummation of the agency's decisionmaking process," and (2) determine legal "rights or obligations." *Bennett v. Spear*, 520 U.S. 154, 156 (1997) (quotations omitted). Courts have interpreted the finality analysis as "flexible" and "pragmatic." *Abbott Labs. v. Gardner*, 387 U.S. 136, 150 (1967). Any decision to conclusively terminate an individual grant might easily meet these criteria. An effort to "pause" any such grants pending a purported "review process" may as well. "The mere possibility that an agency might reconsider" its decision "does not suffice to make an otherwise final agency action nonfinal." *Sackett v. EPA*, 566 U.S. 120, 127 (2012); *cf. Clean Air Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017) (explaining that an agency's decision to "grant[] an application for interim relief from a … standard while it reconsider[s] that standard … represents the final agency position on this issue, has the status of law, and has an immediate and direct effect on the parties") (quotation omitted); *Safari Club Int'l v. Jewell*, 842 F.3d 1280, 1289 (D.C. Cir. 2016) (time-limited "suspension was not a moving target, but a final and binding determination") (quotation omitted). In other words, even a brief "pause" is sufficiently final as to an entity's right to receive funding during the duration of that pause.

Litigants may also be able to assert challenges to categorical funding pauses, like a revised and reissued M-25-13, or to undisclosed attempts to achieve the same objectives. For example, M-25-13 directed that "Federal agencies must temporarily pause all activities related to obligation or disbursement of all Federal financial assistance," M-25-13 at 2, and thereby immediately terminated grantees' ability to access the grants to which they were lawfully entitled. Again, the possibility that an agency might later decide to switch a grant back on in the course of a case-by-case review process does not defeat finality. *See Sackett*, 566 U.S. at 127. Litigants might also remain alert to the possibility that agencies, including

OMB, will issue directives behind closed doors, and consider whether to challenge those directives, should evidence of them emerge. *Cf., e.g.*, *ABA v. Dep't of Educ.*, 370 F. Supp. 3d 1, 38 (D.D.C. 2019) (permitting plaintiffs to introduce extra-record evidence of hidden change in policy). Indeed, as noted above, the Press Secretary has publicly stated that the broad funding freeze detailed in M-25-13 remains in effect, even though M-25-13 has been rescinded. *See* Temporary Restraining Order at 10, *New York*, *supra* (holding matter was not moot because "[t]he substantive effect of the directive carries on").

2. Committed to Agency Discretion

The APA also contains a "'very narrow exception' to the presumption of reviewability" of agency action by precluding review of action "committed to agency discretion by law." *Campaign Legal Ctr. & Democracy 21 v. FEC*, 952 F.3d 352, 359 (D.C. Cir. 2020) (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)); *see* 5 U.S.C. § 701(a)(2). That exception applies to "certain categories of administrative decisions that courts traditionally have regarded as 'committed to agency discretion,'" *Physicians for Soc. Resp. v. Wheeler*, 956 F.3d 634, 642 (D.C. Cir. 2020) (quoting *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)), as well as instances where a statute "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion," *id.* (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)).

Neither prong of the exception would be applicable to any agency actions that seek to fulfill the Trump administration's directives to impound funds. Although agencies possess a certain amount of discretion to decide *how* to allocate appropriations "to meet permissible statutory objectives," they traditionally have not possessed the authority to "disregard statutory responsibilities" entirely by delaying or withholding appropriations on the basis of extrinsic policy grievances. *Lincoln*, 508 U.S. at 193. Nor is this a case where there is "no law … to apply," given that the Impoundment Control Act, the underlying appropriations statutes, and relevant agency regulations provide "judicially manageable standard[s]" for assessing the lawfulness of the agency's actions. *Shawnee Tribe v. Mnuchin*, 984 F.3d 94, 100 (D.C. Cir. 2021) (quotation omitted). In rebutting these arguments, it will be important to emphasize both the sweeping and unprecedented character of the Trump administration's actions, and to identify any applicable statutory provisions relating to any grants that have been suspended.

V. CONCLUSION

Parties who rely upon federal funding, particularly funding related to topics and programs that President Trump's executive orders have targeted, might prepare for a prolonged campaign to hold the President and his administration accountable under the law. In some respects, President Trump's impoundment efforts might resemble his repeated attempts to ban Muslims from entering the United States during his first term: an early blunderbuss order set aside in court, followed by more targeted and ostensibly rigorous actions that attempt to achieve the same result. Whatever form his efforts take, however, President Trump should be reminded that he does not have the authority to impound funds appropriated by Congress based on nothing more than his own political grievances and personal whims.

The information in this document is provided for informational purposes only and does not contain legal advice, legal opinions, or any other form of advice regarding any specific facts or circumstances and does not create or constitute an attorney-client relationship. You should contact an attorney to obtain advice with respect to any particular legal matter and should not act upon any such information without seeking qualified legal counsel on your specific needs.