GOVERNING FOR IMPACT

Challenging Funding Conditions Imposed by the Executive Branch

September 2025
Issue Brief

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I. INTRODUCTION

The Trump administration has attempted to consolidate its authority over federal funding decisions despite Congress's power of the purse under Article I of the U.S. Constitution.[1] As part of this strategy, the administration is amending conditions attached to a variety of federal funds that flow to states, localities, and private entities. If successful, these efforts would allow the administration to steer large amounts of money away from entities that refuse to comply with the administration's policy priorities, including rolling back anti-discrimination protections,[2] ramping up immigration enforcement,[3] and targeting sexual and gender minorities.[4]

This Issue Brief outlines various legal claims that litigants might bring against the Trump administration's efforts to condition federal grants. First, it illustrates the various mechanisms that the Trump administration might use to impose such conditions. Second, it identifies several sources of law upon which litigants might draw in challenging such efforts. These include arguments that the administration lacks statutory authority to impose particular conditions, that the conditions violate the Constitution's Spending Clause, and that the agency imposing the conditions acted arbitrarily and capriciously. Finally, the Issue Brief closes with a discussion of considerations for litigators, including whether and how the Spending Clause might be available to private entity litigants and how litigants might attempt to ensure that their cases can be heard in district court rather than being channeled to the Court of Federal Claims.

[1] *See, e.g.*, Zachary Price et al., *Appropriations Presidentialism*, 114 Georgetown Law Journal Online 1 (2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5202418.

[2] *See, e.g.*, Executive Order 14173, Ending Illegal Discrimination and Restoring Merit-Based Opportunity, 90 Fed. Reg. 8634 (Jan. 21, 2025).

[3] *See, e.g.*, Executive Order 14159, Protecting the American People Against Invasion, 90 Fed. Reg. 8443 (Jan. 20, 2025).

[4] *See, e.g.*, Executive Order 14168, Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government, 90 Fed. Reg. 8616 (Jan. 20, 2025).

II. THE TRUMP ADMINISTRATION'S ATTEMPTS TO CONDITION FUNDING

The Trump administration has sought to impose conditions upon new and existing federal grants in at least three different ways—through executive orders (EOs) announcing new funding conditions, agency rules and guidance changing or adding conditions, and grant documents imposing conditions on recipients.

Executive orders announcing new funding conditions. President Trump has repeatedly issued EOs directing the conditioning of federal funding on recipients' assent to the administration's policy priorities. The EOs' language varies in specificity but generally directs disbursing agencies to ensure recipients' compliance with existing, modified, or new conditions. For example, EO 14173 directed federal agencies to "include in every contract or grant award" several terms, including one requiring funding recipients "to certify that [they] do[] not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws."[5] And EO 14168 somewhat vaguely required that agencies "assess grant conditions and grantee preferences and ensure grant funds do not promote gender ideology."[6] EOs are generally not self-executing, however, and their directives are usually implemented by federal agencies, as described next.

Agency rules and guidance changing or adding conditions. Agencies themselves issue regulations and guidance documents that add or change funding conditions

[5] EO 14173 § 3(b)(iv)(A).

[6] *Id.* § 3(g). The administration has issued several other EOs conditioning funding, including with respect to sanctuary jurisdictions (EO 14159, Protecting the American People Against Invasion, 90 Fed. Reg. 8443 (Jan. 20, 2025); EO 14218, Ending Taxpayer Subsidization of Open Borders, 90 Fed. Reg. 1058 (Feb. 19, 2025); EO 14287, Protecting American Communities From Criminal Aliens, 90 Fed. Reg. 18761 (Apr. 28, 2025)); transgender individuals' rights and gender affirming care (EO 14187, Protecting Children From Chemical and Surgical Mutilation, 90 FR 8771 (Jan. 28, 2025); EO 14201, Keeping Men Out of Women's Sports, 90 Fed. Reg. 9279 (Feb. 5, 2025)); elections (EO 14248, Preserving and Protecting the Integrity of American Elections, 90 Fed. Reg. 14005 (Mar. 25, 2025)); the media (EO 14290, Ending Taxpayer Subsidization of Biased Media, 90 Fed. Reg. 19415 (May 1, 2025)); covid-19 vaccine mandates (EO 14214, Keeping Education Accessible and Ending COVID-19 Vaccine Mandates in Schools, 90 Fed. Reg. 9949 (Feb. 14, 2025)); medical research (EO 14292, Improving the Safety and Security of Biological Research, 90 Fed. Reg. 19611 (May 5, 2025)); and cashless bail (EO 14342, Taking Steps To End Cashless Bail To Protect Americans, 90 Fed. Reg. 42129 (Aug. 25, 2025)).

across their grant programs.[7] In so doing, agencies might cite an EO directing their actions,[8] or interpret existing statutory language as requiring or authorizing them to impose new or modified conditions.[9]

Agency conditions in grant documents. With or without an EO or agency rule, agencies often condition funding simply by creating or modifying conditions in new or existing grant documents.[10] Such conditions usually appear in revised notices of funding opportunities (commonly referred to as "NOFOs") or funding opportunity announcements, but can also appear as agency directives that have the effect of modifying funding conditions across a series of grants.[11] For example, in June 2025 the Department of Justice sent a letter to municipal education agencies in California demanding that, as a condition of their preexisting federal funding, they certify that they do not follow a state policy promoting students' ability to participate in sports consistent with their gender identity.[12]

* * *

Whatever the mechanism through which a condition is imposed, the Trump administration might cite a variety of authorities as supposedly authorizing it. The President might cite his constitutional authority to carry out the laws,[13] and agencies

[7] *See, e.g., R.I. Latino Arts v. Nat'l Endowments for the Arts*, 2025 WL 2689296, at *4 (D.R.I. Sept. 19, 2025) (granting summary judgment against NEA's implementation of the EO on "gender ideology"); Compl. at 30-31, *New Jersey v. U.S. Dep't of Justice*, No. 1:25-cv-00404 (D.R.I. filed Aug. 18, 2025) (noting that various DOJ offices issued guidance to implement an executive order).

[8] *See, e.g.*, *San Francisco v. Trump*, No. 25-cv-1350, 2025 WL 1282637, at *1-2 (N.D. Cal. May 3, 2025) (discussing the "Bondi directive," which sought to implement EO 14159 at DOJ).

[9] *See, e.g.*, *New York v. U.S. Dep't of Health & Hum. Servs.*, 414 F. Supp. 3d 475 (S.D.N.Y. 2019) (striking down a rule interpreting statutes as authorizing termination of funding for noncompliant recipients).

[10] *See, e.g.*, *Martin Luther King, Jr. Cnty. v. Turner*, No. 2:25-cv-814, 2025 WL 1582368, at *17 (W.D. Wash. June 3, 2025) (considering a condition that the recipient "'shall not use any Grant Funds to fund or promote elective abortions, as required by E.O. 14182'"), *appeal pending*, No. 25-3664 (9th Cir.).

[11] *See, e.g.*, *Illinois v. Fed. Emergency Mgmt. Agency*, No. CV 25-206 WES, 2025 WL 2716277, at *2 (D.R.I. Sept. 24, 2025) (discussing Department of Homeland Security's revision of the "terms and conditions governing all federal grants it oversees") (emphasis in original).

[12] Compl. at 2, *California v. U.S. Dep't of Justice*, No. 3:25-cv-4863 (N.D. Cal. filed Jun. 9, 2025).

[13] U.S. Const. art. II, § 3.

might claim that an EO,[14] a Supreme Court case,[15] or a funding statute[16] requires or permits the Executive Branch to impose a particular condition.

III. POTENTIAL CHALLENGES TO FUNDING CONDITIONS

Litigants might bring a number of claims in challenging the Trump administration's attempts to impose or modify funding conditions. In general, claims might be asserted under the Administrative Procedure Act's (APA) prohibition on agency action that is taken "in excess of statutory … authority,"[17] "not in accordance with law,"[18] or in a manner that is "arbitrary" and "capricious."[19] In some situations, including where the President himself issues the challenged condition, litigants might instead invoke nonstatutory review.[20]

A. Lack of Statutory Authority

"[W]hen it comes to spending, the President has none of his own constitutional powers to rely upon,"[21] and "an agency literally has no power to act … unless and until Congress confers power upon it."[22] So litigants might argue that Congress did not

[14] *See, e.g.*, *Turner*, 2025 WL 1582368, at *17.

[15] *See, e.g.*, *NAACP v. U.S. Dep't of Educ.*, 779 F. Supp. 3d 53, 59-60 (D.D.C. 2025) (discussing a Department of Education Dear Colleague Letter that interpreted *Students for Fair Admissions v. Harvard*, 600 U.S. 181 (2023), to prohibit race-conscious policies in federally-funded school districts).

[16] *See Turner*, 2025 WL 1582368 at *15 (discussing agency's reliance on statute's "catchall" provision).

[17] 5 U.S.C. § 706(2)(C).

[18] 5 U.S.C. § 706(2)(A).

[19] *Id.*

[20] *See* GFI, *Nonstatutory Review* (May 2025), https://governingforimpact.org/wp-content/uploads/2025/05/Nonstatutory-Review.pdf.

[21] *City & Cnty. of San Francisco v. Trump*, 897 F.3d 1225, 1233-34 (9th Cir. 2018) (quotation omitted).

[22] *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

authorize the Executive Branch to impose or modify a particular condition. Such claims might come in at least three basic varieties.

First, litigants might argue that a condition conflicts with the statute authorizing the spending in the first place.[23] Citing dictionary definitions and using canons of statutory interpretation, litigants might explain that a condition interpreting a statutory condition on funding in fact misconstrues it (or, as one case put it, "stretch[es] the statutory language beyond hope of recognition"[24]). For example, grant conditions that vaguely prohibit so-called "DEI" might conflict with statutes designed to steer money toward underrepresented recipients.[25] Additionally, when a statute contains a "catchall" provision that permits agencies to attach conditions to funding, litigants might argue that the challenged conditions are not "of the same kind" as the statutory conditions or other language that surrounds them.[26]

Second, litigants might argue that a condition conflicts with other statutes that constrain the agency's authority.[27] For example, litigants might assert that a

[23] *See, e.g.*, *City of Providence v. Barr*, 954 F.3d 23, 32-45 (1st Cir. 2020) (finding that none of the several statutory provisions proffered by DOJ actually authorized the challenged condition); *Rhode Island Latino Arts*, 2025 WL 2689296, at *12-13 (finding that the National Endowments for the Arts' organic statute did not confer authority on the agency to disfavor certain viewpoints); *Turner*, 2025 WL 1582368, at *15, 21 (granting preliminary injunction where a statute did not explicitly authorize various funding conditions related to DEI, abortion, and transgender issues, and where the statute's catchall provision did not support such conditions); *Tennessee v. Cardona*, 762 F. Supp. 3d 615, 624 (E.D. Ky. 2025), as amended (Jan. 10, 2025) (holding that Title IX's prohibition on sex discrimination did not authorize the Department of Education to condition Title IX funding on requiring nondiscrimination based on sexual orientation and gender identity), *appeal pending*, Nos. 25-5205, 25-5206 (6th Cir.); *see also* Compl. at 40, *New Jersey*, No. 1:25-cv-404 (asserting a lack of statutory authority for challenged conditions); Compl. at 44-45, *Planned Parenthood of Greater N.Y. v. U.S. Dep't of Health & Human Servs.* No. 25-cv-2453 (D.D.C. filed Jul. 29, 2025) (same).

[24] *City of Providence*, 954 F.3d at 32 (rejecting an interpretation of the word "programmatic" that was significantly broader than how the word was used elsewhere in the relevant spending statute); *see, e.g.*, *Am. Fed'n of Teachers v. Dep't of Educ.*, No. CV SAG-25-628, 2025 WL 2374697, at *24 (D. Md. Aug. 14, 2025) (finding that a Department of Education Dear Colleague Letter interfered with local and state curriculum-setting authorities that were protected by statute).

[25] *See, e.g.*, *Thakur v. Trump*, No. 25-cv-4737, 2025 WL 1734471, at *12 (N.D. Cal. June 23, 2025) (in the context of a case challenging grant terminations, granting preliminary injunction to stop terminations that targeted diversity efforts when the underlying funding statute specifically encouraged diversity efforts), *stay pending appeal denied*, 2025 WL 2414835 (9th Cir. Aug. 21, 2025).

[26] *Turner*, 2025 WL 1582368, at *15 (quotation omitted).

[27] *See, e.g.*, *New York*, 414 F. Supp. 3d at 536-39 (finding that funding conditions conflicted with Title VII and the Emergency Medical Treatment and Labor Act); *see also* Mem. of Law in Support of Pls.' Mot. for P.I. at 28, *City of Chelsea v. Trump*, No. 1:25-cv-10442 (D. Md. filed Jun. 3, 2025).

challenged condition is "incompatible with the will of Congress" because it violates, or demands that funding recipients violate, antidiscrimination laws or other statutes that apply to the agency or recipient.[28]

Third, when agencies add or modify conditions via regulatory action, litigants might argue that Congress has not conferred the requisite substantive rulemaking authority.[29] For example, litigants could argue that the relevant statutes confer "housekeeping" rather than "substantive" rulemaking authority and therefore could not support a rulemaking imposing additional conditions on federal funding.[30]

B. Violation of the Spending Clause

In what is known as the Spending Clause, the Constitution authorizes Congress to "spend money in aid of the 'general welfare.'"[31] In a series of seminal cases — including *South Dakota v. Dole* and *National Federation of Independent Business (NFIB) v. Sebelius*[32] — the Supreme Court has interpreted the Spending Clause as placing five restrictions on the imposition of funding-related conditions.[33] First, when Congress wants to impose conditions on federal funding, it must do so "clearly and unambiguously."[34] Second, "to ensur[e] that Spending Clause legislation does not undermine the status of [s]tates as independent sovereigns," Congress cannot impose "conditions" that take the "form of threats to terminate other significant independent grants"[35] — in other words, "'the financial inducement offered by Congress'" cannot be "'so coercive as to pass the point at which pressure turns into

[28] *PFLAG, Inc. v. Trump*, 769 F. Supp. 3d 405, 442 (D. Md. 2025) (granting preliminary injunction where condition concerning sexual orientation and gender identity conflicted with antidiscrimination statutes); *see, e.g.*, *S.F. A.I.D.S. Found. v. Trump*, No. 25-cv-1824, 2025 WL 1621636, at *25 (N.D. Cal. June 9, 2025) (finding that grant terminations based on equity work conflicted with various statutes promoting equity considerations), *appeal pending*, No. 25-4988 (9th Cir.); *New York*, 414 F. Supp. 3d at 536.

[29] *See, e.g.*, *New York*, 414 F. Supp. 3d at 533.

[30] *See, e.g.*, *id.* at 522.

[31] *Helvering v. Davis*, 301 U.S. 619, 640 (1937) (quoting U.S. Const. art. I, § 8, cl. 1).

[32] *South Dakota v. Dole*, 483 U.S. 203 (1987); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

[33] *See Medina v. Planned Parenthood S. Atl.*, 145 S. Ct. 2219, 2232 n.4 (2025).

[34] *Id.*

[35] *NFIB, 567 U.S. at 577.*

compulsion.'"[36] Third, grant conditions cannot be used to induce recipient states to violate the Constitution.[37] Fourth, grant conditions must relate "to the federal interest in particular national projects or programs."[38] Fifth, "'the exercise of the spending power must be in pursuit of the general welfare,' rather than private or merely local interests."[39]

Litigants might argue that a condition on federal funding imposed by the Executive Branch violates one or more of these restrictions on the spending power.

1. Ambiguity

Litigants might assert that a condition on federal funding is impermissibly ambiguous in at least two ways.

First, they might assert that funding recipients lacked proper notice from Congress that the Executive Branch would or could impose the challenged condition on the funding, and therefore were "surpris[ed]" by the condition.[40] The Spending Clause requires that "'*Congress* speak with a clear voice'" when imposing funding conditions, and the Supreme Court recently reaffirmed that nothing "less than clear statutory language can supply [s]tates with the unambiguous notice required."[41] Thus, litigants might assert that the relevant statute did not "unambiguously" give notice of a particular condition.[42] As a result, litigants can claim that the Executive Branch

[36] *Id.* at 580 (quoting *Dole*, 483 U.S. at 211) (some internal quotation marks omitted).

[37] *Dole*, 483 U.S. at 208; *see Gruver v. La. Bd. of Supervisors for La. State Univ. Agric. & Mech. Coll.*, 959 F.3d 178, 182 (5th Cir. 2020).

[38] *Dole*, 483 U.S. at 207 (quotation omitted).

[39] *Medina*, 145 S. Ct. at 2232 n.4 (quoting *Dole*, 483 U.S. at 207) (some internal quotation marks omitted).

[40] *NFIB*, 567 U.S. at 584 (Congress's spending power "does not include surprising participating [s]tates with post-acceptance or 'retroactive' conditions." (quoting *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 25 (1981))).

[41] *Medina*, 145 S. Ct. at 2238 n.8 (quoting *Pennhurst*, 451 U.S. at 17).

[42] *Texas v. Cardona*, 743 F. Supp. 3d 824, 885 (N.D. Tex. 2024) (quotation omitted) (finding that Title IX did not authorize conditions imposed by guidance documents prohibiting discrimination based on gender identity); *see also* Compl. at 22, *California*, No. 3:25-cv-4863 ("There is no statute that clearly states that funds provided by Defendants are conditioned on the recipient certifying to Defendants that it does not allow K-12 students to participate in athletic programs in accordance with their gender identity (or to join co-ed teams).").

improperly "usurp[ed] Congress's spending power by dictating conditions … that are not authorized by" statute.[43]

Second, litigants might argue that, even if a statute *does* authorize a particular condition, the condition itself, as imposed by the Executive Branch, is not sufficiently clear. An Executive Branch-imposed condition might be ambiguous if it "declines to discuss how" it "will apply in various situations" or if it leaves "open multiple questions."[44] For example, litigants might criticize the Executive Branch's failure to offer definitions of key terms that define the sweep of the conditions, or to illustrate how funding recipients are required to comply.[45]

2. Coercion

While Congress can legitimately place conditions on the use of funds themselves and Congress is permitted to use funding conditions to "create incentives for [s]tates to act in accordance with federal policies," where conditions "take the form of threats to terminate other significant independent grants," state and local government litigants might argue that the threats are "'so coercive as to pass the point at which pressure turns into compulsion.'"[46] Such compulsion against "independent sovereigns" offends basic federalism principles.[47] To succeed on a coercion claim, a litigant must establish two things.

First, litigants must show that a funding condition constitutes not a direct condition on the use of the conditioned funds, but a "threat[] to terminate other significant independent grants."[48] One particularly extreme example might be the Trump administration's statements that noncompliance with a new immigration

[43] *Texas*, 743 F. Supp. 3d at 885-86.

[44] *Id.* at 886.

[45] *See, e.g.*, *id.* at 886 n.135 (identifying various facts and circumstances illustrating a funding condition's ambiguity); *see also* Mem. of Law in Supp. of Pls.' Mot. for P.I. at 28, *City of Chelsea v. Trump*, No. 1:25-cv-10442 (D. Md. filed Jun. 3, 2025); Compl. at 44, *New Jersey*, No. 1:25-cv-404; *Illinois*, 2025 WL 2716277, at *14.

[46] *NFIB*, 567 U.S. at 577, 580 (quoting *Dole*, 483 U.S. at 211).

[47] *Id.* at 577.

[48] *Id.* at 580.

enforcement condition written into Department of Justice grants could result in the withdrawal of *all* federal funding to a state or locality.[49]

Second, litigants must demonstrate that the financial penalty of noncompliance with the challenged condition is "so coercive as to pass the point at which pressure turns into compulsion."[50] While the Supreme Court has established no precise threshold at which a penalty becomes too coercive, it has offered two examples that stake out the poles. In *South Dakota v. Dole*, the Court upheld a law that stripped five percent of a state's federal highway funding if the state declined to increase its drinking age to 21.[51] The Court described threatening five percent of highway funding as a "relatively mild encouragement,"[52] and subsequently observed that "the federal funds at stake constituted less than half of one percent of South Dakota's budget at the time."[53] In *NFIB*, on the other hand, the Court invalidated an Affordable Care Act provision threatening the entirety of a state's federal contribution for traditional Medicaid if the state declined to implement a new expanded Medicaid program.[54] The enormity of the financial threat— the "threatened loss of over 10 percent of a [s]tate's overall budget"—meant that the provision left states with no choice and constituted "economic dragooning."[55] Lower courts applying *Dole* and *NFIB* have relied upon the size of the threats in each case as guideposts for measuring when permissible pressure becomes impermissible compulsion.[56]

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[49] *Cnty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 533 (N.D. Cal. 2017) (concluding that an executive order that threatened withdrawal of all federal grants to sanctuary jurisdictions was unconstitutionally coercive). *But see Tennessee v. U.S. Dep't of Agric.*, 665 F. Supp. 3d 880, 917 (E.D. Tenn. 2023) (finding that a final rule clarifying nondiscrimination conditions was not coercive because it conditioned the use of the funds themselves and did not require "implementation of an entirely new regulatory program")).

[50] *NFIB*, 567 U.S. at 580 (quoting *Dole*, 483 U.S. at 211) (some internal quotation marks omitted).

[51] 483 U.S. at 211.

[52] *Id.*

[53] *NFIB*, 567 U.S. at 581.

[54] *Id.* at 585. In total, "[s]even Justices concluded that the penalty of taking away existing Medicaid funding from states which declined to sign up for the new expanded Medicaid program was unconstitutional," but the plurality and dissenting opinions differed slightly in their reasoning. *Mayhew v. Burwell*, 772 F.3d 80, 88 (1st Cir. 2014). The plurality's holding was arguably narrower and lower courts have therefore held that its reasoning governs. *See, e.g.*, *id.*

[55] *NFIB*, 567 U.S. at 582.

[56] *See, e.g.*, *Miss. Comm'n on Env'tl Quality v. EPA*, 790 F.3d 138, 178 (D.C. Cir. 2015); *New York*, 414 F. Supp. 3d at 570.

Thus, state and local government litigants[57] challenging a funding condition as coercive might analogize it to that in *NFIB* and contrast it with that in *Dole.*[58] Litigants might typically focus on the size of the noncompliance penalty as a percentage of the recipient's annual budget.[59] But they might also emphasize the absolute dollar value of the threat[60] or the qualitative impact that such a penalty could have on the recipient or other impacted parties.[61] For example, litigants might highlight a recipient's historical dependence on the threatened funding and the integration of the federal program into its administrative operations.[62]

3. Independent Constitutional Bar

Litigants might argue that a condition attempts "to induce" recipients "to engage in activities that would themselves be unconstitutional."[63] For example, litigants during the second Trump term have already brought cases asserting that the Trump administration's actions would require them to violate the Equal Protection Clause by discriminating on the basis of sex[64] or offend individuals' constitutional rights by

[57] As discussed in Section IV(A), this prong is grounded in federalism concerns and so is likely available only to state and local government litigants.

[58] *See, e.g.*, *New York*, 414 F. Supp. 3d at 570 (finding that because the challenged condition "threaten[ed] not a small percentage of the [s]tates' federal health care funding, but literally *all* of it," *NFIB* was "a more apt analogy" than *Dole*).

[59] *See, e.g.*, *City & Cnty. of San Francisco*, 2025 WL 1282637, at *30 (explaining that a condition was coercive where it threatened "*all* federal funding, which can account for as much as 31% of a locality's annual budget").

[60] *See, e.g.*, *id.* at *14 (reviewing localities' claims that they would face severe budget deficits should they lose the threatened funding, including that they "would likely be forced to cut services, including public safety services").

[61] *See, e.g.*, *id.* at *37 (finding that "[i]t is coercive to be prohibited from receiving any funding from DOJ, regardless of the percentage of the plaintiffs' budget that DOJ funding currently constitutes"); *Illinois*, 2025 WL 2716277, at *14 (noting that the coercion was "more pronounced because the threatened funds involve essential public safety responsibilities").

[62] *See NFIB*, 567 U.S. at 581 (explaining that "the [s]tates have developed intricate statutory and administrative regimes over the course of many decades to implement their objectives under existing Medicaid"); *see, e.g.*, *New York v. U.S. Dep't of Justice*, No. 1:25-cv-00345, 2025 WL 2618023, slip op. at 18 (D.R.I. filed Sept. 10, 2025).

[63] *Dole*, 483 U.S. at 210.

[64] *See, e.g.*, Compl. at 3, *California*, No. 3:25-cv-4863 (arguing that the DOJ's actions would compel California to violate Equal Protection rights of students); Compl. at 37-38, *Martin Luther King Cnty. v. Turner*, No. 2:25-cv-813 (W. D. Wash. filed May 2, 2025) (arguing that the grant agreements would cause recipients to discriminate on the basis of gender identity and sex).

detaining them without probable cause.[65] This theory could extend to a variety of constitutional protections.[66]

4. Relatedness

Litigants might argue that a condition is "unrelated 'to the federal interest in particular national projects or programs,'" or otherwise lacks a nexus with the purpose of the funding to which it is attached.[67] This requirement has been described as a "low bar,"[68] may only be available to state and local government litigants,[69] and the Supreme Court has yet to invalidate a condition on this basis. Yet litigants might still pursue these arguments, particularly alongside other Spending Clause arguments, due to the uniquely political nature of some Trump administration funding conditions[70] and the complete lack of relation between them and the funding to which they attach. For example, a court took issue with the Trump administration's efforts to condition all federal funding on recipients' adoption of certain immigration policies because the conditions were "without a nexus to the affected funds."[71]

5. General Welfare

Finally, litigants might claim that a challenged condition is not "'in pursuit of the general welfare'" and instead promotes "private or merely local interests."[72] Among

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[65] *See, e.g.*, Compl. at 33, *City of Chelsea v. Trump*, No. 1:25-cv-10442 (D. Md. filed Feb. 23, 2025) (arguing that the sanctuary cities order would force the city to detain individuals without a finding of probable cause).

[66] *See Dole*, 483 U.S. at 210-11 ("[F]or example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress' broad spending power.").

[67] *Dole*, 483 U.S. at 207 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)).

[68] *City of Los Angeles v. Barr*, 929 F.3d 1163, 1176 (9th Cir. 2019).

[69] *See infra* Section IV(A).

[70] *See, e.g.*, Compl. at 76, *Massachusetts v. Kennedy*, No. 1:25-cv-10814, (D. Mass. filed Apr. 4, 2025) ("[T]he delays and terminations are not related to the federal interest in NIH research — to support and encourage scientific research — and instead are related to policies and political factors.").

[71] *City & Cnty. of San Francisco*, 2025 WL 1282637, at *30; *see also Illinois*, 2025 WL 2716277, at *14 (finding that the agency failed to establish a sufficient connection between immigration-related conditions and grants for "disaster relief, fire safety, dam safety, and emergency preparedness").

[72] *Medina*, 145 S. Ct. at 2232 n.4 (quoting *Dole*, 483 U.S. at 207) (quotation omitted).

the Spending Clause claims surveyed here, this one may be the most challenging for litigants: the Supreme Court has previously suggested that the standard is so lax as to be almost nonjusticiable,[73] and lower courts typically only give it a cursory examination.[74] But litigants might still include the claim alongside others when a condition arguably advances "private or merely local interests," given that the Supreme Court recently described the requirement as having *some* bite,[75] and has discussed deference under the Spending Clause as being owed to *Congress*, not to the Executive Branch.[76]

C. Arbitrary and Capricious

Litigants might also challenge funding conditions under the APA's requirement that courts "hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary" or "capricious."[77] As the Supreme Court explained in the seminal *State Farm* decision, agency action is 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, [or] offered an explanation for its decision that runs counter to the evidence before the agency, or [if the agency action] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[78]

The Court has elaborated on these factors, requiring more searching review of agency actions that represent a change in position and prohibiting pretextual justifications for actions. GFI has elsewhere written about various ways that agency

[73] *See Dole*, 483 U.S. at 207 & n.2.

[74] *See, e.g.*, *Mayweathers v. Newland*, 314 F.3d 1062, 1067 (9th Cir. 2002) (acknowledging that the challenged statute fell within a "long tradition of federal legislation designed to guard against unfair bias and infringement on fundamental freedom").

[75] *Medina*, 145 S. Ct. at 2230 (explaining that the prevailing view allows "Congress the power to raise and appropriate money for objects of [g]eneral (as opposed to local) importance" but not "a power to do whatever else should appear to Congress conducive to the [g]eneral [w]elfare" (quotation omitted).

[76] *Dole*, 483 U.S. at 207 n.2 (1987); *see also Madison v. Virginia*, 474 F.3d 118, 124 (4th Cir. 2006).

[77] 5 U.S.C. § 706(2)(A).

[78] *Motor Vehicle Manufacturers' Ass'n v. State Farm Mutual Auto. Insur. Co.*, 463 U.S. 29, 43 (1983).

action can be challenged under this standard,[79] but three might apply particularly well to Executive Branch funding conditions.

Failure of explanation. Litigants might argue that an agency imposing a condition failed the most basic task of "articulat[ing] a satisfactory explanation for its action."[80] A condition might be vulnerable if the agency offered little or no justification for attaching it to a particular set of funds[81] or if the justification is inconsistent with the agency's other actions or statements.[82] Particularly relevant here, litigants might argue that agencies' "rote incorporation of executive orders—especially ones involving politically charged policy matters that … bear no substantive relation to the agency's underlying action—does not constitute 'reasoned decisionmaking.'"[83]

Wrong factors. Litigants might also take issue if an agency "relied on factors which Congress has not intended it to consider" or "entirely failed to consider an important aspect of the problem" in imposing a condition.[84] An agency's action cannot be "unmoored from the purposes and concerns" of a particular statute, regardless of whether the statute explicitly identifies values and priorities that the agency must implement.[85] And the requirement that agencies consider important aspects of the problem at least includes potential consequences from the imposition of the condition.[86]

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[79] *See, e.g.*, GFI, *Arbitrary-and-Capricious Challenges* (May 2025), https://governingforimpact.org/wp-content/uploads/2025/05/Arbitrary-and-Capricious-Challenges.pdf; GFI, *Challenging Agency Action Based on Pretextual Reasons* (May 2025), https://governingforimpact.org/wp-content/uploads/2025/05/Challenging-Agency-Action-Based-on-Pretextual-Reasons.pdf.

[80] *State Farm*, 463 U.S. at 43.

[81] *R.I. Latino Arts*, 2025 WL 2689296, at *14 (criticizing an agency's reasoning for being "devoid of reasoned policy analysis" and "devoted instead to defending the NEA's decision on legal grounds").

[82] *See, e.g.*, *New York*, 414 F. Supp. 3d at 542 (finding that a rule imposing conditions on HHS funding was arbitrary and capricious in part because the agency's description of the problem it was purportedly trying to solve did not match the evidence before the agency).

[83] *Turner*, 2025 WL 1582368, at *17; *see also R.I. Latino Arts*, 2025 WL 2689296, at *14 ("the NEA has made no effort to justify its policy on any grounds aside from complying with the EO"); *Illinois*, 2025 WL 2716277, at *12 ("DHS cannot avoid the arbitrary and capricious analysis simply by claiming it was acting at the instruction of the President").

[84] *State Farm*, 463 U.S. at 43.

[85] *Judulang v. Holder*, 565 U.S. 42, 64 (2011); *see, e.g. Tennessee*, 762 F. Supp. 3d at 626 (finding Title IX funding condition rule prohibiting certain sex-segregated facilities arbitrary and capricious because Congress had routinely approved of such facilities).

[86] *See, e.g.*, *Thakur*, 2025 WL 1734471, at *15 (criticizing the agency for failing to consider important factors like reliance interests, the waste produced by halting grants mid-stream, or the loss to the

Neglecting reliance interests implicated by a change in position. Under the "change-in-position" doctrine,[87] courts are more searching in their review of an agency's rationale when, among other things, the action represents a change from a prior policy that "engendered serious reliance interests."[88] Policies governing grant eligibility often implicate "serious reliance interests," as a disruption in funding can be disastrous for recipients.[89] To that end, litigants might emphasize the extent to which various parties, including funding recipients themselves, have shaped their programs and activities around the receipt of funding and any prior funding conditions.[90] Once they have established serious reliance interests in a prior policy, litigants might then challenge the agency's failure to sufficiently consider those interests and justify its new policy.

D. Other Claims

Depending on the circumstances and the form that an agency's funding condition takes, other claims might be available. For example, if a funding condition was issued without notice and comment and imposes legally binding obligations or prohibitions on regulated parties, a litigant might argue that the condition was invalidly promulgated.[91] Although the APA permits agencies to bypass notice-and-comment requirements for rules related to grants, some agencies have waived reliance on that

public of quality research); *New York*, 414 F. Supp. 3d at 555 (lamenting the agency's failure to consider emergency situations in its health care rule).

[87] *FDA v. Wages & White Lion Invs., LLC,* 145 S. Ct. 898, 916 (2025).

[88] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

[89] *See, e.g.*, *Nat'l Council of Nonprofits v. Off. of Mgmt. & Budget*, 775 F. Supp. 3d 100, 125 (D.D.C. 2025) (in the context of a case challenging a freeze on federal funding, noting that for some funding recipients "[m]issing a single payment could require immediate firings or the discontinuation of entire programs"), *appeal pending*, No. 25-5148 (D.C. Cir.).

[90] *See, e.g.*, *New York*, 414 F. Supp. 3d at 552 ("As the administrative record chronicles in impressive detail, plaintiffs and other funding recipients have relied on—they have shaped their conduct around—HHS's" prior policy."); *Am. Fed'n of Teachers*, 2025 WL 2374697, at *22 (highlighting recipients' reliance on the agency's prior position and explaining that, "where [an agency] seeks to use [its] viewpoints to alter the legal landscape and to impose new obligations on regulated persons, it must consider evidence and demonstrate appropriate consideration of relevant facts").

[91] *See* GFI, *Notice & Comment I: Legislative Rules and Guidance Documents* (May 2025), https://governingforimpact.org/wp-content/uploads/2025/05/Notice-and-Comment-Part-1-Legislative-Rules-and-Guidance-Documents.pdf; *see, e.g., Am. Fed'n of Teachers*, 2025 WL 2374697, at *19 (finding that a letter imposing new obligations on recipients of federal education funds had not been issued through notice and comment and was therefore invalid).

exception,[92] and other statutes may impose additional or different procedural requirements.[93] To the extent that imposition of a new condition results in a failure of an agency to spend appropriated money, various impoundment claims may lie.[94] When a condition requires recipients to "certify" compliance or offer other information to the government, it might be subject to the Paperwork Reduction Act's requirements.[95] And, of course, even outside the Spending Clause context, a spending condition may not violate a private recipient's constitutional rights.[96]

IV. LITIGATION CONSIDERATIONS

In assessing their options, litigants might consider the extent to which private entities can assert claims under the Spending Clause and how to pursue challenges to funding conditions in federal district court in the face of any arguments that they must instead be brought in the Court of Federal Claims.

A. Private Entities and the Spending Clause

Although many Spending Clause cases consider challenges to funding conditions brought by states and localities, we are not aware of any case expressly holding that

[92] 5 U.S.C. § 553(a)(2); *see* GFI, *Notice & Comment II: Good Cause and Other Exceptions* 11-12 (May 2025) (describing the proprietary exception and Richardson waivers), https://governingforimpact.org/wp-content/uploads/2025/05/Notice-and-Comment-Part-II-Good-Cause-and-Other-Exceptions.pdf.

[93] *See, e.g.*, *Azar v. Allina Health Servs.*, 587 U.S. 566, 569-70 (2019) (describing a Medicare statute, 42 U.S.C. § 1395hh, that requires notice and comment).

[94] *See* GFI, *Challenging Unlawful Impoundments* (Feb. 2025), https://governingforimpact.org/wp-content/uploads/2025/02/Impoundment-Primer-2-1-24-final.pdf; *see also* GFI, *Seeking Remedies in Impoundment Cases When Funding Is Poised to Expire* (Aug. 2025), https://governingforimpact.org/wp-content/uploads/2025/08/Impoundment-Remedies-final.pdf.

[95] *See, e.g.*, *Am. Fed'n of Teachers*, 2025 WL 2374697, at *19.

[96] *See, e.g.*, *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 221 (2013) (holding that a funding condition violated the First Amendment); *Rhode Island Latino Arts*, 2025 WL 2689296, at *4 (same); *Am. Fed'n of Teachers*, 2025 WL 2374697, at *28-31 (finding that new conditions were void for vagueness under the Fifth Amendment); *Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump*, 767 F. Supp. 3d 243, 271 (D. Md.), *opinion clarified*, 769 F. Supp. 3d 465 (D. Md. 2025) (finding likelihood of success with respect to First and Fifth amendment claims challenging anti-DEI conditions), *appeal pending*, No. 25-1189 (4th Cir.).

private entities may not bring claims under that clause.[97] Of the five types of Spending Clause claims surveyed above, the one seemingly least rooted in federalism concerns—and thus most likely available to private entities—is the requirement that funding conditions be unambiguous.[98] On the other hand, the Supreme Court has justified the anti-coercion doctrine[99] and relatedness requirement[100] on federalism grounds, suggesting that they may be less applicable to private entities. Regardless, outside the Spending Clause context, a private entity could challenge a condition that violated the entity's own constitutional rights.[101]

B. Overcoming the Tucker Act

Litigants challenging funding conditions imposed by the Executive Branch have strong arguments to overcome any assertion by the government that, under the Tucker Act, district courts lack jurisdiction over such claims. The Tucker Act confers jurisdiction on the Court of Federal Claims (CFC) "to render judgment upon any claim against the United States founded … upon any express or implied contract with the United States."[102] Litigants challenging funding conditions may wish to avoid the CFC in favor of district court because the CFC generally can award only money damages

[97] *See generally* Cong. Research Serv., *Funding Conditions: Constitutional Limits on Congress's Spending Power* (Jul. 1, 2021), https://www.congress.gov/crs-product/R46827.

[98] The Supreme Court has described this requirement as rooted in the fact that "[w]hen Congress enacts legislation under its spending power, that legislation is 'in the nature of a contract.'" *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 181-82 (2005) (quoting *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). Yet the Court went on to offer a prototypical example: "'in return for federal funds, the States agree to comply with federally imposed conditions.'" *Id.* (quoting *Pennhurst*, 451 U.S. at 17).

[99] *See NFIB*, 567 U.S. 519; *see, e.g.*, *Boehringer Ingelheim Pharms., Inc. v. United States Dep't of Health & Hum. Servs.*, No. 24-2092, 2025 WL 2248727, at *8 (2d Cir. Aug. 7, 2025) ("[T]he Supreme Court's holding in *NFIB* very clearly derived from federalism concerns."); *Northport Health Servs. of Ark., LLC v. U.S. Dep't of Health & Hum. Servs.*, 438 F. Supp. 3d 956, 970 (W.D. Ark. 2020), *aff'd,* 14 F.4th 856 (8th Cir. 2021).

[100] *See New York v. United States*, 505 U.S. 144, 167 (1992) (noting that, without a relatedness requirement, "the spending power could render academic the Constitution's other grants and limits of federal authority," and that "it is not unusual" that "the recipient of federal funds is a [s]tate").

[101] *See, e.g.*, *Agency for Int'l Dev.*, 570 U.S. at 221.

[102] 20 U.S.C. § 1491(a)(1).

and not equitable relief such as a preliminary injunction, and litigants usually cannot raise most constitutional or statutory claims in the CFC.[103]

Several courts have recently determined that the Tucker Act does not require challenges to funding conditions to be brought in the CFC.[104] These courts have generally held that such a challenge is not "essentially a contract action."[105] In determining whether a challenge is essentially a contract action that must be pursued in the CFC, the D.C. Circuit applies a two-part inquiry that assesses (1) the "source of the rights upon which the plaintiff bases its claims," and (2) the "type of relief sought."[106]

First, as outlined above, the "source of the rights" in challenges to funding conditions is not a contractual device but rather is the Constitution, a statute, a regulation, or some combination of these. In such challenges litigants "do not argue that the terms of their federal awards bar the newly imposed conditions," but rather "challenge the lawfulness of the conditions based on statutory and constitutional rights."[107] Indeed, in some cases litigants may not possess a government contract at all, particularly if they seek to apply for federal funding without being subject to an unlawful condition.[108] Such "claims are not 'founded … upon any express or implied contract with the United States.'"[109]

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[103] *See* GFI, *Challenging Federal Award Terminations* (March 2025), https://governingforimpact.org/wp-content/uploads/2025/03/Challenging-Federal-Award-Terminations-2.pdfl *see also* Daniel Jacobson & John Lewis, *Overcoming the Tucker Act After* Department of Education v. California, Lawfare (Apr. 17, 2025), https://www.lawfaremedia.org/article/overcoming-the-tucker-act-after-department-of-education-v.-california.

[104] *See, e.g.*, *Illinois*, 2025 WL 2716277, at *9; *California v. Dep't of Transp.*, No. 25-cv-208, 2025 WL 1711531, at *1 (D.R.I. June 19, 2025); *Turner*, 2025 WL 1582368, at *12; *S.F. Unified Sch. Dist. v. AmeriCorps*, No. 25-cv-2425, 2025 WL 1180729, at *7 (N.D. Cal. Apr. 23, 2025); *R.I. Coal. Against Domestic Violence v. Bondi*, No. CV 25-279 WES, 2025 WL 2271867, at *5 (D.R.I. Aug. 8, 2025). One district court has held otherwise, but that case is likely distinguishable due to its unique facts (the agency had designated the plaintiffs as "high-risk" and changed their funding method) and the relief sought by the plaintiffs (an order "requiring that" the plaintiffs "receive funds"). *See Fairfax Cnty. Sch. Bd. v. McMahon*, No. 1:25-CV-1432 (RDA/LRV), 2025 WL 2598622 (E.D. Va. Sept. 5, 2025).

[105] *Yee v. Jewell*, 228 F. Supp. 3d 48, 56 (D.D.C. 2017).

[106] *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 968 (D.C. Cir. 1982).

[107] *S.F. Unified Sch. Dist.*, 2025 WL 1180729, at *9.

[108] *R.I. Coalition Against Domestic Violence*, 2025 WL 2271867, at *5.

[109] *Id.* (alteration in the original) (quoting 28 U.S.C. § 1491(a)(1)).

Second, litigants challenging funding conditions generally seek injunctive and declaratory relief prohibiting the government from imposing the unlawful condition, rather than anything that resembles a "naked money judgement."[110] Litigants are most likely seeking to vindicate their and others' rights to access grant funding that is free of unlawful conditions.[111] "[T]he fact that the relief requested may eventually result in disbursement of the money to Plaintiffs does not change the nature of the relief sought."[112]

The Supreme Court's recent Tucker Act shadow docket orders in *Department of Education v. California*[113] and *National Institutes of Health v. American Public Health Association*[114] are distinguishable. Both concerned challenges to grant *terminations*, not grant *conditions*.[115] Indeed, to the extent *NIH* has any relevance to challenges to funding conditions, it should aid litigants seeking to avoid the CFC: the Court did not disturb the lower court orders to the extent that they vacated the agency's guidance governing its grantmaking, which may be analogous to agency decisions imposing funding conditions.[116]

[110] *Bowen v. Massachusetts*, 487 U.S. 879, 905 (1988).

[111] *See, e.g.*, *Turner*, 2025 WL 1582368 at *11 (finding jurisdiction because the litigants sought "a specific remedy: the right to enter into the Grant Agreements without the challenged funding conditions").

[112] *Id.* (collecting cases).

[113] 145 S. Ct. 966 (2025).

[114] 145 S. Ct. 2658 (2025).

[115] *See S.F. Unified Sch. Dist.*, 2025 WL 1180729, at *9 (distinguishing *California* on this ground); *Turner*, 2025 WL 1582368 at *12 (same); *Nat'l Institutes of Health*, 145 S. Ct. at 2658-62 (granting the government's stay application as to the grant termination order, but not the vacatur of agency grantmaking policy).

[116] 2025 WL 2415669 at *1; *see id.* at *2 (Barrett, J., concurring).

V. CONCLUSION

As the Trump administration continues to reach for control over federal spending, various parties—and the courts—may nonetheless be able to protect Congress's power of the purse through litigation.