GOVERNING FOR IMPACT

Challenging Grant Policies and Terminations Separately After *NIH*

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Issue Brief

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I. INTRODUCTION

In August 2025, the Supreme Court issued a shadow-docket order in *National Institutes of Health v. American Public Health Association*, 145 S. Ct. 2658 (2025) (Mem.) (*NIH*) that, along with the Court's prior order in *Department of Education v. California*, 604 U.S. 650 (2025), signaled a significant shift in the jurisdictional landscape for challenges concerning federal grant terminations. In her controlling concurrence in *NIH*, Justice Barrett expressed her "preliminary judgment" that challenges to grant terminations cannot be brought in district court under the Administrative Procedure Act, but instead typically belong in the Court of Federal Claims (CFC) as contract matters under the Tucker Act.[1] At the same time, Justice Barrett stated that APA challenges to agency guidance, including guidance relating to the awarding and termination of grants, "belong in district court."[2]

This issue brief examines how Justice Barrett's framework is operating in practice, with an eye toward identifying how litigants might maintain district court challenges to agencies' grant policies while separately challenging grant terminations in the CFC—navigating the complex "[t]wo-track litigation" that Justice Barrett envisioned.[3] It thereby picks up where GFI's prior writings on challenging an array of federal funding actions have left off.[4]

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[1] 145 S. Ct. at 2662 (Barrett, J., concurring).

[2] *Id.*

[3] *Id.*

[4] GFI has previously written about how litigants might maintain grant-related claims in district court notwithstanding the Tucker Act, including through nonstatutory review and representing plaintiffs that have no privity of contract with the government. GFI, *Challenging Unlawful Federal Award Terminations: Overcoming the Tucker Act, 2026 Update* (Mar. 2026), https://governingforimpact.org/wp-content/uploads/2026/03/Overcoming-the-Tucker-Act-2026-Update.pdf. GFI has also written about situations where the Tucker Act should not apply, including challenges to agencies' grant conditions. GFI, *Challenging Funding Conditions Imposed by the Executive Branch* (Sept. 2025), https://governingforimpact.org/wp-content/uploads/2025/09/Funding-Conditions-Issue-Brief-final.pdf. For litigants who find themselves challenging grant terminations in the CFC, GFI has written about strategies for maximizing recovery. GFI, *Seeking Recovery for Unlawful Grant Terminations in the Court of Federal Claims* (Oct. 2025), https://governingforimpact.org/wp-content/uploads/2025/10/CFC-Issue-Brief.pdf. Finally, more broadly, GFI has addressed how litigants might challenge unlawful impoundments. GFI, *Challenging Unlawful Impoundments, 2026 Update* (Mar. 2026),

First, this issue brief provides a close reading of Justice Barrett's concurrence. Second, it describes how, as of this writing, courts across circuits have converged on an operational test for applying Justice Barrett's concurrence that categorizes claims based on whether they are prospective or retrospective in nature, with the latter being dismissed (potentially to be refiled in the CFC). Such a test works cleanly for many cases, but this law is still developing, and courts addressing some special cases have reached opposing conclusions. Finally, it identifies how courts and litigants are managing a sequencing problem that Justice Barrett identified but left unresolved: should litigants pursuing both tracks file in district court or the CFC first?

II. JUSTICE BARRETT'S CONCURRENCE

NIH arose from the government's application to stay a district court injunction covering both agency guidance documents—which announced that NIH would no longer fund research related to DEI, gender identity, or COVID-19—and NIH's resulting grant terminations.[5] The Supreme Court split 4-1-4, with four Justices finding that all of the litigants' claims should have been dismissed (and brought, if at all, in the CFC) and four finding that all of the claims could remain in district court.[6]

In her controlling concurrence, Justice Barrett drew a jurisdictional line between APA challenges to grant terminations, which she said are "founded upon" contract and therefore belong in the CFC, and challenges to "guidance documents," which she said could remain in district court.[7] "That the agency guidance discusses internal policies related to grants does not transform a challenge to that guidance into a claim 'founded … upon' contract that only the CFC can hear."[8]

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https://governingforimpact.org/wp-content/uploads/2026/03/Challenging-Unlawful-Impoundments-2026-Update.pdf.

[5] *NIH*, 145 S. Ct. at 2661 (Barrett, J., concurring).

[6] *Id.* at 2659.

[7] *Id.* at 2661 (Barrett, J., concurring) (quotation omitted).

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

In responding to her colleagues' suggestion that all of the litigants' claims could remain in district court because if that was "the right forum for the challenge to the guidance, it" was "necessarily also the right forum for the challenge to the grant terminations," Justice Barrett relied on two rationales: "logic and law."[9] Logically, she explained, "[v]acating the guidance does not reinstate terminated grants."[10] She observed that the district court had separately vacated the terminations and the guidance, and that if "one simply flowed from the other," the district court would have needed only to vacate the guidance alone.[11] Legally, she concluded that the "claims are legally distinct" because vacating a policy "does not necessarily void decisions made under it."[12]

Questions left open. In part due to the brevity of her two-page concurrence and in part due to *NIH*'s interim nature, Justice Barrett left several questions unanswered.

First, in a footnote, Justice Barrett rejected Justice Jackson's objection that plaintiffs would not be able to "obtain any effective relief at all" if they are left without a forum that is able to award grant reinstatement—a form of injunctive relief that the CFC generally cannot provide.[13] Justice Barrett responded by noting that "[e]ach forum has the authority to fully adjudicate the claims over which it has jurisdiction."[14] Whether the two forums together can deliver complete relief is a question that lower courts are beginning to answer.[15]

Second, while directing the claims to two different fora, Justice Barrett raised but did not answer the question of whether the district court and the CFC can operate simultaneously or must proceed sequentially.[16]

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[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.* at 2674 (Jackson, J., concurring in part and dissenting in part) (emphasis omitted); *see id.* at 2662 n.1 (Barrett, J., concurring); *see also* GFI, *Seeking Recovery for Unlawful Grant Terminations in the Court of Federal Claims* (Oct. 2025), *supra* note 4.

[14] *NIH*, 145 S. Ct. at 2662 n.1 (Barrett, J., concurring).

[15] *See infra* Section III.

[16] *NIH*, 145 S. Ct. at 2662 (Barrett, J., concurring); *see infra* Section IV.

Finally, Justice Barrett noted that, in *NIH*, both the district court and the court of appeals had "treated NIH's termination of grants and its issuance of guidance as distinct agency actions."[17] She did not indicate what her conclusion might have been had this not been the case, but did state that "plaintiffs cannot end-run" the CFC's exclusive jurisdiction over grant termination challenges "simply by packaging them with a challenge to agency guidance."[18] Courts faced with more complicated complaints and injunctions that fuse grant termination and grant guidance challenges have reached conflicting conclusions on whether and how Justice Barrett's framework ought to apply.[19]

III. APPLICATION IN LOWER COURTS

A survey of post-*NIH* opinions in district and appellate courts reveals that most courts implementing Justice Barrett's concurrence are converging on an operational test that focuses on whether a claim or district court order under review is prospective or retrospective in nature: claims challenging an agency policy that will be applied "'going forward'" are APA claims that belong in district court and claims against grant terminations that apply to retrospective conduct, seeking to undo a termination, are contract claims that belong in the CFC.[20] In applying such a test, courts have considered several factors:

- If there is no money currently past due, the claims are more likely to be prospective and thus belong in district court.[21]

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[17] *NIH*, 145 S. Ct. at 2661 (Barrett, J., concurring).

[18] *Id.* at 2661-62.

[19] *See infra* Section III(B).

[20] *Massachusetts v. Nat'l Institutes of Health*, 164 F.4th 1, 12 (1st Cir. 2026) (alterations omitted) (quoting *NIH*, 145 S. Ct. at 2661 (Barrett, J., concurring)); *see, e.g.*, *Washington v. U.S. Dep't of Educ.*, 161 F.4th 1136, 1140 (9th Cir. 2025) ("Because Plaintiff States' claims seek purely prospective relief ... the Government has not demonstrated a strong showing of success on the merits of its Tucker Act jurisdictional claim."); *New York v. Trump*, 171 F.4th 1, 27-28 (1st Cir. 2026) (assessing each paragraph of the district court order to determine whether it was forward or backward looking); *City of Chicago v. U.S. Dep't of Homeland Sec.*, 815 F. Supp. 3d 727, 748 (N.D. Ill. 2025) (dividing claims).

[21] *See, e.g.*, *Washington*, 161 F.4th at 1140 (plaintiffs "have not suffered nor sought any monetary damages"); *Ass'n of Am. Univs. v. Dep't of Def.*, 806 F. Supp. 3d 79, 93 (D. Mass. 2025) ("Plaintiffs have

- If vacatur does not automatically produce payment, the claims are more likely to be prospective. For example, vacatur might require a new, future decision by the agency concerning the award of funds rather than mandate payment to plaintiffs.[22]
- If the injunctive or declaratory relief requested or granted has significant value independent from the monetary relief, the claims are more likely to be prospective.[23]

A. Clear cases

Justice Barrett's framework applies most clearly where the relevant factors point in the same direction.

The First Circuit has developed the most substantial body of post-*NIH* case law and the clearest articulation of the prospective/retrospective test. In *Massachusetts v. National Institutes of Health*, the court considered the government's appeal of a district court injunction that vacated the NIH's newly announced policy of capping the reimbursement of "indirect costs" associated with NIH-funded research.[24] In assessing whether the district court had jurisdiction, the First Circuit applied Justice Barrett's *NIH* framework, finding that the claims were appropriately brought in district court because the plaintiffs did "not challenge any withholding of funds

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not yet suffered any loss. Nothing about the grants is currently 'past due.'" (footnote omitted) (quoting *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212 (2002)), *appeal pending*, No. 25-2184 (1st Cir.).

[22] *See, e.g.*, *Washington,* 161 F.4th at 1140 ("vacatur would not result in the automatic reinstatement or continuance of those grants or the payment of any money to grantees"); *Bd. of Educ. of the City Sch. Dist. of the City of New York v. U.S. Dep't of Educ.*, No. 25-CV-8547, 2026 WL 948205, at *4 (S.D.N.Y. Apr. 8, 2026) ("Defendants would have to make a continuation decision after vacatur for any funds to flow — none would flow as an immediate result."); *Council for Opportunity in Educ. v. U.S. Dep't of Educ.*, Nos. 25-cv-3491, 25-cv-3514, 2026 WL 120984, at *8 (D.D.C. Jan. 16, 2026) (similar).

[23] *See, e.g.*, *Appalachian Voices v. U.S. Envt'l Prot. Agency*, No. CV 25-1982, 2025 WL 2494905, at *6 (D.D.C. Aug. 29, 2025) ("Moreover, plaintiffs' requested declaration, holding that the termination of the grant awards is unlawful, does not have 'considerable value' independent of the 'future potential for monetary relief.'" (quoting *Kidwell v. Dep't of Army*, 56 F.3d 279, 284 (D.C. Cir. 1995))), *appeal pending*, No. 25-5333 (D.C. Cir.).

[24] 164 F.4th 1.

promised under grant agreements."[25] The court focused on the prospective nature of the relief requested by the plaintiffs and granted by the district court, emphasizing that the plaintiffs challenged "only the agency-wide guidance" that applied "going forward—a policy that affects future grants as much as it does current ones."[26] The guidance, the First Circuit continued, "is a precise analogue to the agency-wide guidance in [*NIH*], in which NIH announced that it would 'not fund research related to' certain topics '[g]oing forward.'"[27]

The First Circuit concluded its jurisdictional analysis by applying Justice Barrett's "logic and law" rationales. The court explained that the guidance was "a separate agency action from the withholding of funds promised under the grant agreements" and such withholding "would have occurred only if an individual grant recipient had sought to obtain funds at the negotiated rate, and NIH refused to provide the money sought."[28] Finally, because NIH "could have refused to provide the money sought under that particular grant pursuant to a different policy or some other reason entirely, … any judicial decision setting aside the withholding of funds would not have vacated the [guidance] itself, and vacating the [guidance] would not on its own have voided withholding decisions made under it."[29]

Two months later, in March 2026, the First Circuit again applied Justice Barrett's *NIH* framework, separately analyzing each paragraph of the district court's injunction against implementation of the funding freeze ordered in the first days of this Trump term.[30] The court found no issue with the injunction's provisions prohibiting implementation of the funding freeze in the future.[31] However, the injunction's provision ordering the agencies "'to release and transmit any disbursements … that were paused on the grounds of the'" guidance presented "a different story."[32] Even though the claims at issue (like those in *NIH*) did not "turn on the terms of any particular award," the court concluded that *NIH* required invalidation of the district

[25] *Id.* at 12.

[26] *Id.*

[27] *Id.* (quoting *NIH*, 145 S. Ct. at 2661 (Barrett, J., concurring)).

[28] *Id.*

[29] *Id.* (quotation omitted).

[30] *New York*, 171 F.4th at 27.

[31] *Id.*

[32] *Id.*

court's injunction "to the extent that it require[d]" the agencies to "make 'disbursements … on awarded grants'" and "'executed contracts.'"[33]

Various district courts have drawn similar prospective/retrospective lines. For example, in *City of Chicago v. Department of Homeland Security*, municipal recipients of grants designed to reduce overcrowding in immigration detention centers filed suit challenging agencies' withholding of funds and the elimination of the sheltering grant program.[34] The court found that it lacked jurisdiction over the plaintiffs' claims against the grant terminations because they, "like those in *NIH* and *California*, have already happened" and any remedy "would ultimately amount to an obligation to pay retrospective claims for money."[35] On the other hand, the court retained jurisdiction over the plaintiffs' challenges to the "government's decision to freeze funding and terminate the [shelter granting] program" because if those claims succeeded, they would not require the court "to reverse or vacate past grant terminations."[36]

Similarly, in *New York v. Administration for Children and Families*, the court retained jurisdiction over states' claims challenging the government's attempt to conditionally freeze $10 billion in funding.[37] Rather than "retrospectively contesting contractual grant terminations," the plaintiffs sought "to vacate a policy that establishe[d] purportedly unlawful additional conditions to their funding … and restrict[ed] the flow of future drawdown requests that the states ha[d] not yet even submitted for reimbursement."[38] Only the plaintiffs' "access to *future* funds" was at issue.[39]

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[33] *Id.* at 28.

[34] 815 F. Supp. 3d at 735.

[35] *Id.* at 747.

[36] *Id.*; *see* GFI, *Challenging Unlawful Federal Award Terminations: Overcoming the Tucker Act, 2026 Update*, *supra* note 4, at 8-10 (addressing program-level claims).

[37] No. 26-CV-172, 2026 WL 673848, at *1 (S.D.N.Y. Mar. 10, 2026).

[38] *Id.* at *12. Notably, the government did not contest jurisdiction. *Id.* As we have previously explained, litigants have generally had success keeping challenges to grant terms and conditions in district court. *See* GFI, *Challenging Unlawful Federal Award Terminations: Overcoming the Tucker Act, 2026 Update*, *supra* note 4, at 2 n.3; GFI, *Challenging Funding Conditions Imposed by the Executive Branch*, *supra* note 4, at 16-18.

[39] *Id.* (emphasis added).

B. Special cases

While the prospective/retrospective operational test cleanly resolves many cases under Justice Barrett's *NIH* framework, there are at least two situations that fall within a gray area in the jurisdictional divide: when forward- and backward-looking claims are one and the same or commingled.[40]

1. "Bad Faith"

One such circumstance arises when a plaintiff challenges an agency's decision to not issue a "continuation" award where the current grant period is set to end and such an award is needed to extend the grant. In these cases, the plaintiff *is* seeking to invalidate a decision that the government made in the past—indicating retrospectivity—but is seeking only to require that the government make a *new* decision regarding continuation in the future—indicating prospectivity. The requested relief does not automatically compel restoring or awarding a grant to the plaintiff, and thus does not necessarily result in the payments of money to the plaintiff. So far, to our knowledge, all courts to consider this kind of case have retained jurisdiction under the APA.

For example, in *Washington v. Department of Education*, the Ninth Circuit considered states' claims for declaratory and injunctive relief after the Department of Education sent discontinuation notices for multiyear grants supporting mental health programs in elementary and secondary schools.[41] The notices were distributed in April 2025 and would take effect in December 2025.[42] The district court granted the states' motion for preliminary injunction in October 2025, finding that the discontinuation decisions were likely arbitrary and capricious.[43] In seeking a stay pending appeal, the government argued that the district court's injunction was "formalistically focused on the label of plaintiffs' claims (APA, Spending Clause) and request for relief (injunction)," and that plaintiffs had impermissibly "disguised" what were actually

[40] *Council for Opportunity in Educ.*, 2026 WL 120984, at *7.

[41] 161 F.4th 1136 (9th Cir. 2025) (per curiam).

[42] *Washington v. U.S. Dep't of Educ.*, 807 F. Supp. 3d 1275, 1280 (W.D. Wash. 2025), *appeal dismissed*, No. 25-7157, 2026 WL 395718 (9th Cir. Jan. 14, 2026).

[43] *Id.* at 1286.

contract claims subject to the Tucker Act.[44] Concluding that the government's argument was not likely to succeed, the Ninth Circuit motions panel construed the plaintiffs' claims as "seek[ing] purely prospective relief."[45] The court noted that, "because grant continuances are not automatic," vacatur of the agency's discontinuation decision "would not result in the automatic reinstatement or continuance of" the grants; instead, the agency would only be bound to make a new determination as to whether it would continue the grant.[46] The government therefore had "not demonstrated a strong showing of success on the merits of its Tucker Act jurisdictional claim."[47]

In *Council for Opportunity in Education v. Department of Education*, the district court cited *Washington* and Justice Barrett's *NIH* concurrence in considering a similar dispute over discontinuation decisions.[48] The court found that "[a]ny order by the court vacating the discontinuation decisions is … not an order for the Department to pay money from its budget or the Treasury, which would be subject to Tucker Act restrictions, because, in the absence of the discontinuation decisions, [plaintiffs'] members are not entitled to any funds."[49] Likewise, in *Board of Education of the School District of the City of New York v. Department of Education*, the court vacated the Department of Education's non-continuation decision, analogizing it to the prospective policy guidance at issue in *NIH* and focusing on Justice Barrett's distinction between "an alleged violation of a contractual obligation to pay" and a "challenge to guidance that led to the alleged violation, which may be heard in a district court."[50]

2. Fused Claims

A complicated scenario arises where policy enactments and grant terminations happen simultaneously, or where plaintiffs' claims are difficult to separate along

[44] Emergency Mot. for Admin. Stay at 9, 11, *Washington v. U.S. Dep't of Educ.*, No. 25-7157. Dkt. Entry 7.1 (9th Cir. filed Nov. 14, 2025).

[45] *Washington*, 161 F.4th at 1140.

[46] *Id.* at 1139-40.

[47] *Id.* at 1140.

[48] 2026 WL 120984, at *8.

[49] *Id.* at *9.

[50] 2026 WL 948205, at *3.

prospective/retrospective lines. Courts facing these fused complaints in the immediate aftermath of *NIH* reached divergent results, reflecting the difficulty of applying Justice Barrett's framework before the prospective/retrospective test had fully developed. The more durable lesson from this line of cases is perhaps that plaintiffs challenging both agency policy and grant terminations need, in their district court case, to identify a forward-looking policy challenge with value independent of any particular grant's reinstatement. Where they can do so, bifurcation along Justice Barrett's line is available. Where they cannot — either because no separate prospective policy exists or because plaintiffs have linked all of their claims to the disbursement of frozen funds — courts have treated the complaint as an indivisible termination claim belonging in the CFC.

In *American Association of Physics Teachers v. National Science Foundation*, the district court took the former tack, holding that it likely had jurisdiction over certain of the plaintiffs' claims (even while denying plaintiffs' motion for preliminary injunction).[51] When National Science Foundation guidance announced a change in priorities and the agency "undertook a massive purge of previously awarded grants and other funding assistance," affected grantees sued and moved for a preliminary injunction to vacate the policy changes.[52] Although the plaintiffs never "overtly [sought] monetary relief, nor expressly invoke[d] contractual claims," the court identified their claims as essentially seeking the reversal of the mass terminations and therefore as falling outside district court jurisdiction under Justice Barrett's *NIH* framework.[53] The court reached this conclusion despite the fact that the plaintiffs disavowed seeking "past-due sums."[54] On the other hand, the court retained jurisdiction to the extent that the plaintiffs sought to vacate the guidance announcing the change in priorities, comparing it to the guidance at issue in *NIH* and finding that the relief plaintiffs sought with respect to it had "significant value independent of any monetary recovery" that might flow.[55]

In contrast, other courts have dismissed fused complaints in their entirety, declining to perform such bifurcation. In *Fairfax County School Board v. McMahon*, the court

[51] 804 F. Supp. 3d 45, 53 (D.D.C. 2025).

[52] *Id.* at 56-57 (quotation omitted).

[53] *Id.* at 60.

[54] *Id.* at 65 (quotation omitted).

[55] *Id.* at 66.

considered school districts' challenges to the Department of Education's decision to place them on "high-risk" status—a designation that restricts grantees' access to federal funds and subjects them to enhanced oversight—and to freeze their grants on that basis.[56] The court described the plaintiffs as "blurr[ing] the line," noting that "almost every time" they mentioned "the high-risk designation" it was tied to "the effect that this determination has had or will have on the disbursement of federal funds."[57] As a result, the court dismissed all claims, treating the complaint as an indivisible whole.[58]

Likewise, in *Appalachian Voices v. EPA* the court dismissed plaintiffs' claims concerning their environmental justice grants, which they attempted to frame as a programmatic challenge to the elimination of an entire grant program.[59] The court found that it lacked jurisdiction in large part because it viewed plaintiffs' requested injunctive and declaratory relief as having no "considerable value" independent of future monetary relief, regardless of how "artfully ple[]d."[60]

IV. SEQUENCING DISTRICT COURT AND CFC CLAIMS

Even where litigants separate prospective claims in district court from any retrospective claims in the CFC, such two-track litigation is complicated by 28 U.S.C. § 1500, a Reconstruction-era statute requiring certain sequencing where it applies.[61]

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[56] 798 F. Supp. 3d 563, 565 (E.D. Va. 2025), *appeal pending*, No. 25-2107 (4th Cir.) (quotation omitted).

[57] *Id.* at 570 (quotation omitted).

[58] *Id.* at 572.

[59] 2025 WL 2494905.

[60] *Id.* at *6 (quotation omitted).

[61] The statute was originally enacted "to curb duplicate lawsuits brought by residents of the Confederacy following the Civil War": those to recover for cotton taken by the government and those pursued against federal officials in other courts under tort law. *United States v. Tohono O'Odham Nation*, 563 U.S. 307, 311 (2011). Commentators have criticized the statute as "overly harsh, anachronistic, unfair, and in need of reform." Admin. Conference of the U.S., *Reform of 28 U.S.C. § 1500* (Dec. 6, 2012), https://www.acus.gov/document/reform-28-usc-section-1500 (footnote omitted).

Specifically, the statute strips the CFC of jurisdiction for "any claim for or in respect to which the plaintiff ... has pending in any other court any suit ... against the United States."[62] The statute "precludes [CFC] jurisdiction over any claim that shares 'substantially the same operative facts' with a claim pending in another court, even if the claims seek different relief."[63]

Justice Barrett left § 1500's potential implications to the side, explaining only that "[i]f the challenges to the guidance and grant terminations have the requisite factual overlap—and I am not sure that they do—the plaintiffs will have to proceed sequentially rather than simultaneously."[64] "But," she continued, the Court had "previously explained that the statutory scheme puts plaintiffs to precisely this choice," and "rejected the argument that it is unfair to require plaintiffs 'to choose between partial remedies available in different courts.'"[65]

Justice Jackson, on the other hand, raised § 1500 as potentially "forbid[ding]" Justice Barrett's two-track approach:

> Perhaps the district court and [CFC] actions can proceed *seriatim* rather than simultaneously, assuming the statute of limitations does not run in the meantime. But *seriatim* actions would raise tricky questions of issue and claim preclusion.... The Court grapples with none of these complexities before sending plaintiffs through the labyrinth it has created.[66]

Subsequently, grantees have sought to avoid § 1500 and any dispute concerning whether claims share "substantially the same operative facts" by filing their CFC complaints before filing in district court. This strategy relies on the Federal Circuit's order-of-filing rule, which holds that § 1500 does not bar CFC jurisdiction when the

[62] 28 U.S.C. § 1500.

[63] *NIH*, 145 S. Ct. at 2674 n.4 (Jackson, J., concurring in part and dissenting in part) (quoting *Tohono O'Odham Nation*, 563 U.S. at 317).

[64] *Id.* at 2662 (Barrett, J., concurring).

[65] *Id.* (citing and quoting *Tohono O'Odham Nation*, 563 U.S. at 316-17).

[66] *Id.* at 2674 n.4 (Jackson, J., concurring in part and dissenting in part) (emphasis omitted).

CFC case is filed first.[67] Although the Supreme Court has criticized this rule in dicta,[68] it remains the law of the Federal Circuit.[69]

So far, the CFC has applied the order-of-filing rule to retain jurisdiction even when there is parallel district court litigation. But in one such case, *Maryland Clean Energy Center*, the government successfully persuaded the CFC to issue a discretionary stay on judicial economy grounds — temporarily allowing the government to reap the benefits of § 1500 without actually invoking it.[70]

Several questions remain unanswered:

- First, is the Federal Circuit's order-of-filing rule at risk? If the Supreme Court overrules it, filing first in the CFC would no longer avoid § 1500. But litigants might prepare to defend the order-of-filing rule. The textual argument is straightforward: 28 U.S.C. § 1500 only bars the CFC from asserting jurisdiction where a relevant suit in another court is "pending."[71] When a litigant files first in the CFC, there is no such "pending" suit. And the CFC should maintain jurisdiction even after a parallel district court case is filed because of the "long-standing rule…that jurisdiction is determined at the time the suit is filed and, after vesting, cannot be ousted by subsequent events."[72]

- Second, do claims against guidance and grant termination tend to share the same facts under the Supreme Court's interpretation of § 1500? If they do not, § 1500 is no bar at all, even without the order-of-filing rule.

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[67] *See Tohono O'Odham Nation*, 563 U.S. at 314-15 (describing *Tecon Engineers, Inc. v. United States*, 170 Ct. Cl. 389 (1965)).

[68] *Id.* at 314 (criticizing the Federal Circuit for "allow[ing] its precedent to suppress the statute's aims" and rendering it "nugatory through construction").

[69] *See Res. Invs., Inc. v. United States*, 785 F.3d 660, 670 (Fed. Cir. 2015).

[70] Order Granting Stay, *Md. Clean Energy Ctr. v. U.S.*, No. 25-1738 C, ECF No. 58 (Fed. Cl. filed Jan. 21, 2026); *see* Def.'s Suppl. Br. in Supp. of Mot. to Stay at 2, *id.*, ECF No. 57 (Fed. Cl. Filed Jan. 9, 2026) ("We are not asserting the § 1500 jurisdictional bar here (which plaintiffs evaded only by initiating this action *one day* before their district court action)."); *see generally* Reed Shaw, *The Trump Administration's Legal Shell Game*, Lawfare (Mar. 4, 2026), https://www.lawfaremedia.org/article/the-trump-administration's-legal-shell-game.

[71] 28 U.S.C. § 1500.

[72] *F. Alderete Gen. Contractors, Inc. v. United States*, 715 F.2d 1476, 1480 (Fed. Cir. 1983); *see Cent. Pines Land Co. v. United States*, 697 F.3d 1360, 1364 (Fed. Cir. 2012).

- Third, will the CFC continue to stay its hand while related district court litigation proceeds to avoid redundant litigation, regardless of whether § 1500 applies?

With only a handful of grant termination cases filed in the CFC of which we are aware, it is too early to draw conclusions about how these questions will ultimately be answered.

V. CONCLUSION

Justice Barrett's two-step *NIH* framework is functioning as a jurisdictional sorting rule across multiple circuits. Courts have generally converged on a prospective/retrospective test to discern the difference between challenges to agency policies, which can remain in district court, and challenges to grant terminations, which must be pursued in the CFC. Special cases—particularly those involving grant non-continuation decisions and complaints that fuse guidance and termination claims—may present complexities. The sequencing questions Justice Barrett identified but did not resolve remain open. Most significantly, as of this writing no court has resolved whether guidance and termination claims share substantially the same operative facts under the Supreme Court's interpretation of 28 U.S.C. § 1500. If they do not, the order-of-filing workaround would be unnecessary, and it would seem to allow simultaneous two-track litigation to proceed without constraint.

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