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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, et al., Plaintiffs, v. NATIONAL SCIENCE FOUNDATION; BRIAN STONE, in his official capacity as Acting Director of the National Science Foundation, Defendants.	Case No. 25-cv-4452-JPC

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF SCHOLARS IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTEREST OF AMICUS CURIAE

The National Association of Scholars ("NAS") files this brief in accordance with the Court's order of June 30, 2025.[1] ECF 76. NAS is a tax-exempt non-profit membership organization that seeks to uphold the traditional standards of higher education by prioritizing merit and achievement, fostering intellectual freedom, searching for the truth, and promoting virtuous citizenship. To further these goals, NAS defends the academic freedom of members and students through advocacy and investigates and publishes reports related to issues of academic freedom and integrity. NAS adamantly opposes the pernicious intrusion of Diversity, Equity, and Inclusion ("DEI") ideology within academia, particularly in the Science, Technology, Engineering, and Mathematics ("STEM") disciplines, and has conducted investigations and published reports and advocacy on this topic. *See, e.g.*, Mason D. Goad & Bruce R. Chartwell, *Ideological Intensification: A Quantitative Study of Diversity, Equity, and Inclusion in STEM Subjects at American Universities*, National Assoc. of Scholars (Nov. 28, 2022). NAS opposes DEI within academia, especially within higher education and advanced scientific research, because it emphasizes group identity, rather than prioritizing scientific merit, sound academic inquiry, and equal opportunity. Racial and gender preferences, such as those Plaintiffs advocate, are a hallmark of DEI ideology. NAS has members in STEM disciplines who regularly seek and have obtained federal research grants, including from the National Science Foundation. NAS has an interest in ensuring those members are not disadvantaged at competing for federal grants just because they don't fall within one of Plaintiffs' preferred identities.

INTRODUCTION

The National Association of Scholars ("NAS") files this brief in opposition to the Plaintiffs' motion for a preliminary injunction seeking to enjoin the implementation of the National

[1] No counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amicus or its counsel made such a monetary contribution.

Science Foundation's Priority Directive issued on April 18, 2025. ECF 1, Counts I through V. The Priority Directive announced that the National Science Foundation's efforts "should not preference some groups at the expense of others, or directly/indirectly exclude individuals or groups," and "[r]esearch projects with more narrow impact limited to subgroups of people based on protected class or characteristics do not effectuate NSF priorities." Accordingly, the National Science Foundation terminated certain projects that were inconsistent with the Priority Directive.

Contrary to Plaintiffs' argument, they are not likely to succeed on the merits of their claims that the Priority Directive and the termination of National Science Foundation grants pursuant to the directive are unlawful. Meanwhile, the relief they seek—an injunction that would reinstate en masse the terminated grants—would require this Court to order Defendants to act unlawfully. Plaintiffs' position on the terminated grants is at odds with the Supreme Court's holding in *Students for Fair Admission, Inc. v. President & Fellows of Harv. Coll.* (*SFFA v. Harvard*), which soundly rejected on Equal Protection grounds the notion that diversity in higher education is a compelling government interest justifying racial preferences. 600 U.S. 181, 216-18 (2023). Similarly, the Supreme Court has held that statutory gender preferences are extremely suspect, particularly classification based on broad gender stereotypes. *Sessions v. Morales-Santana*, 582 U.S. 47, 58-59 (2017). A Senate report found that many grants issued by the National Science Foundation promoted these kinds of unconstitutional race- and gender-based discrimination. ECF 63-2.

To the extent that Plaintiffs contend that Congress has mandated by statute gender and racial preferences with respect to the National Science Foundation's research funding decisions to achieve some vague standard of "equity" in STEM for underrepresented populations, that position is no long tenable, and should be rejected. Consequently, Plaintiffs are not more likely to prevail on the merits because what they seek is in direct contravention to the Equal Protection guarantees incorporated into the Fifth Amendment of the U.S. Constitution. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995).

BACKGROUND

Congress established the National Science Foundation (NSF) in 1950 "to initiate and support basic scientific research and programs to strengthen scientific research potential and science education programs at all levels in the mathematical, physical, medical, biological, social, and other sciences." 42 U.S.C. 1862(a)(1). Congress appropriates funds for NSF to allocate to research promising ideas "across all fields of science and engineering." 42 U.S.C. § 1862k(a)(6)(A). Congress has indicated that the pursuit of scientific and engineering research is an equal opportunity endeavor. *See* 42 U.S.C. § 1885.

On April 18, 2025, the leadership at NSF issued the Priority Directive which re-oriented NSF's research funding decisions to the original mission of pursuing basic scientific research focused on intellectual merit that had a broad, positive impact on the country. ECF 63-1. The Priority Directive emphasized that "[t]he principles of merit, competition, equal opportunity, and excellence are the bedrock of the NSF mission." *Id.* at 2. NSF issued the Priority Directive after the U.S. Senate Committee on Commerce, Science, & Transportation found that the Biden administration's NSF had politicized and undermined hard science disciplines by directing billions of dollars in federal funding to projects that promoted DEI tenets or "pushed onto science neo-Marxist perspectives about enduring class struggle." ECF 63-2 at 1. The 2024 Senate report demonstrated that instead of allocating scarce federal scientific research funding based on equal opportunity and scientific merit, the NSF utilized racial and gender preferences to award research grants. It funded research projects the aim of which was not scientific or intellectual merit, but the advancement of DEI ideology, social justice, and environmental justice. *See generally* ECF 63-2. The report concluded that these grants "exceeded congressional mandates by giving taxpayer money to certain researchers not due to the strength of the application but because the applicant identified a group of people as a discriminated, oppressed class." *Id.* at 1. The report found this misuse of federal funds particularly problematic because federal grants traditionally fuel the research and development necessary for the U.S. to retain its position as the world's economic hegemon. *Id.* at 5. More recent investigative reporting from the Manhattan Institute has revealed

NSF funding of constitutionally suspect hiring practices at major research universities. The programs are pursued under the guise fostering increased opportunities for underrepresented minorities and women, but in reality are blatant racial and gender preferences designed to circumvent state bans on DEI practices in higher education.[2] The Priority Directive represents a return by NSF to its core statutory mission to further intellectually meritorious scientific research.

NSF reviewed its funding awards to determine whether they aligned with the Priority Directive. Following this review, NSF terminated 1,665 total awards and sent termination letters explaining that termination of the award was necessary because it was not in alignment with current NSF priorities. (For context, NSF awarded approximately 11,000 grants in 2024.) *See* ECF 54 (Stone Decl.) ¶¶ 14, 20.

On May 28, 2025, the sixteen Plaintiff states filed suit against the NSF and its acting director. ECF 1 at ¶ 9.[3] Plaintiffs seek to enjoin NSF from implementing the Priority Directive, alleging that it violates the Administrative Procedures Act because it is arbitrary and capricious (Count I) and is contrary to law (Count II). The complaint also alleges that the Priority Directive violates Separation of Powers under the U.S. Constitution (Counts III & IV) and is *ultra vires* because NSF exceeded its Congressionally granted authority (Count V). The thrust of Plaintiffs' complaint is that Congress mandated "NSF to undertake activities for the specific purpose of increasing STEM participation by women, minorities, and people with disabilities" and the Priority

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[2] *See* John D. Sailor, *How a University Program Skirts DEI Bans*, CITY JOURNAL (Mar. 18, 2025), available at www.city-journal.org/article/rise-upp-national-science-foundation-grant-hiring-race-dei; John D. Sailor, *This Program Is Giving a Maryland University Millions to Hire for Diversity*, City Journal (Mar. 5, 2025), available at www.city-journal.org/article/national-science-foundation-university-of-maryland-baltimore-county-diversity-hiring.

[3] Part of Plaintiffs' complaint challenges NSF's new policy—the Indirect Cost Directive—to limit indirect costs to 15% for grants awarded to institutions of higher education. ECF 1 ¶ 7. Plaintiffs allege that the Indirect Cost Directive also violates the Administrative Procedures Act (Counts VI & VII). NAS does not take a position on these allegations other than to assert that the more money directed to actual, meritorious scientific research, rather than administrative and overhead costs, the better.

Directive violates that mandate. ECF 1 ¶ 37. Plaintiffs subsequently filed a motion for preliminary injunction and memorandum of law in support of the motion. ECF 6. Plaintiffs insist that Congress has mandated that NSF continue to "diversify" STEM fields and prioritize "equity"—not equality—when making research grant funding decisions. ECF 6 at 2, 18.

On June 30, 2025, the Court entered an order allowing NAS to file an amicus brief, which it now files to provide additional legal grounds and perspective as to why Plaintiffs' motion for a preliminary injunction should be denied. NAS is a non-profit 501(c)(3) membership organization that seeks to uphold the traditional standards of higher education by prioritizing merit and achievement, fostering intellectual freedom, searching for the truth, and promoting virtuous citizenship. NAS has been an outspoken critic of DEI ideology and initiatives within higher education. NAS believes that DEI is contrary to the traditional role of higher education. *See* ECF 63-3 ¶¶ 12-16. NAS members in STEM disciplines have sought and been awarded research grants from multiple federal agencies including NSF, and NAS has members who intend to continue to seek federal government funding for basic scientific research, including from NSF. ECF 63-3 ¶ 17. NAS and its members believe that STEM research funding should be awarded based on intellectual and scientific merit and contribution to the betterment of the Nation. ECF 63-3 ¶ 12. Similar to the Priority Directive, NAS is committed to "[t]he principles of merit, competition, equal opportunity, and excellence" within the STEM disciplines, and believes that research funding should be allocated based on those principles.

ARGUMENT

I. Plaintiffs' motion for preliminary injunction should be denied because their argument that Congress has mandated NSF use race and sex preferences would require NSF to violate the Equal Protection guarantees of the U.S. Constitution.

To obtain a preliminary injunction, a plaintiff must demonstrate that "he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Here, Plaintiffs cannot demonstrate they are

likely to succeed on the merits or that the balance of equities tip in their favor, or that an injunction is in the public interest. They fail on each of these factors because the relief they seek is essentially a demand that NSF act unconstitutionally by violating the Equal Protection guarantees incorporated in the Fifth Amendment. Administrative agencies, just like any department, branch, or other subpart of our government, must operate within the bounds set by the Constitution. If a governing statute is supposedly mandating unconstitutional action, then the agency cannot take that action, nor can a court order it to act unconstitutionally. *See generally* Administrative Procedure Act, 5 U.S.C. § 706; *cf. Mendelsohn v. Meese*, 686 F. Supp. 75, 81 (S.D.N.Y. 1988).

Plaintiffs contend that Congress has mandated that NSF allocate research funding to increase the participation of underrepresented minorities and women in STEM disciplines. ECF 1 ¶¶ 3, 37-38; ECF 6 at 2, 18. But Plaintiffs concede that the goal of increasing STEM participation by women and minorities has already been achieved. ECF 1 ¶ 43. Plaintiffs in fact seek to continue constitutionally suspect policies from the prior administration in which racial and gender preferences were used to allocate billions of dollars in research grants based on DEI-driven racial discrimination and outdated race and sex stereotypes.[4] Plaintiffs admit as much, arguing that Congress has mandated that NSF allocate research funds to "prioritiz[e] equity in STEM" with the aim to "diversify" those disciplines. ECF 6 at 18, 2. And Plaintiffs specifically ask the Court to block the termination or interruption of grants and restore the funding of any such grants that NSF terminated. ECF 5-1 ¶¶ 1, 3. Plaintiffs seek to enjoin implementation of the NSF's Priority Directive, which specifically rejected racial and gender preferences. ECF 63-1 at 2, 7-8. Consequently, Plaintiffs are asking for "substantially all the relief sought" which "cannot be undone even if defendant[s] prevail at a trial on the merits." *Tom Doherty Assocs. v. Saban Entm't, Inc.*, 60 F.3d 27, 34 (2d Cir. 1995); *see Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996)

[4] The Priority Directive notes that NSF is not abandoning efforts to increase participation in STEM, but is doing so "with the core goal of creating opportunities for all Americans" and emphasizes that projects aimed at expanding opportunities "cannot indirectly preference or exclude individuals or groups based on protected characteristics." ECF 63-1 at 2, 7.

(presumption of irreparable harm flows from alleged violation of constitutional right). But this requires that Plaintiffs meet a "higher standard" when seeking a preliminary injunction—and they already cannot meet the ordinary standard. *Tom Doherty Assocs.* 60 F.3d at 33.

In issuing and adhering to the Priority Directive, the NSF has realigned itself with the Constitution within its statutory framework. Indeed, in recent decisions the Supreme Court firmly rejected the use of overbroad and generalized stereotypes to justify racial or gender preferences. *See SFFA v. Harvard*, 600 U.S. at 221; *Morales-Santana*, 582 U.S. at 63 n.13. Any awards issued by the NSF based on racial or gender preferences would run afoul of this precedent and the Equal Protection guarantees, as would any statute mandating such. Accordingly, Plaintiffs cannot succeed on the merits because they seek unlawful agency action. Nor can Plaintiffs meet the "higher standard" because they cannot demonstrate that all the grants terminated pursuant to the Priority Directive comported with Equal Protection guarantees. For the same reason, the equities and public interest weigh against a preliminary injunction that would force the NSF to award funds pursuant to unconstitutional preferences and discrimination. Plaintiffs' motion should be denied.

A. Diversity and Equity are not compelling governmental interests justifying racial preferences for NSF research grants.

Plaintiffs contend that the Priority Directive is contrary to Congress's statutory mandate that NSF increase minority participation in STEM disciplines, and that NSF must do so by prioritizing minorities and women in making research funding decisions. ECF 6 at 16-17. In other words, Plaintiffs argue that Congress has mandated racial (and gender) preferences by NSF when allocating research funding. Prioritizing—preferencing—one or more racial groups over others, however, must satisfy strict scrutiny and thereby must have a compelling governmental interest. *Adarand*, 515 U.S. at 227. "[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989). Classifications based on race must be "reserved for remedial settings" because of the "danger of stigmatic harm" and "notions of racial inferiority" that lead to racial hostility. *Id.* Just as in the college admissions process, grant awards "are zero-sum. A benefit provided to some applicants but not others

necessarily advantages the former group at the expense of the latter." *SFFA v. Harvard*, 600 U.S. at 218-19. Plaintiffs cannot demonstrate a compelling interest here, particularly in light of the Supreme Court's holding in *SFFA v. Harvard*.

Generalized societal discrimination resulting in underrepresentation of certain minority groups in STEM disciplines cannot be the justification for NSF prioritizing certain minority groups. *See City of Richmond*, 488 U.S. at 496-98; *see also Associated Gen. Contractors v. City of New Haven*, 41 F.3d 62, 66 (2d Cir. 1994). Accordingly, Plaintiffs' argument that Congress has mandated racial prioritization or preferences with respect to NSF research funding because the country needs to fully utilize its human capital, and underrepresented minorities have been overlooked as a source of such capital must be rejected. ECF 1 ¶¶ 3, 35; ECF 6 at 16. Moreover, to the extent that Congress imposed a statutory mandate for NSF to prioritize or preference underrepresented minorities, Plaintiffs have failed to identify, either in the statutes or statutory history, any specific instances of discrimination by the NSF that would justify such prioritization as a remedy. Any alleged statutory mandate is thus constitutionally infirm because it is not narrowly tailored to address a specific harm. *See Adarand*, 515 U.S. at 235 ("Federal racial classifications, like those of a State, must serve a compelling government interest, and must be narrowly tailored to further than interest.").

Nor can Plaintiffs' assertion that Congress has mandated that NSF prioritize underrepresented minorities in awarding NSF grants to "diversify" STEM disciplines and achieve "equity in STEM" justify the race-based preferences they aim to reinstate. ECF 6 at 2, 18. When will the requisite level of diversity or equity be achieved? Plaintiffs do not say, nor can they. The Supreme Court cautioned in *SFFA v. Harvard* that racial preferences must always have a "logical end point." 600 U.S. at 221 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003)). The Court further emphasized that amorphous goals of racial proportionality (*i.e.*, equity) and diversity in higher education are not compelling government interests justifying racial preferences. *Id.* at 223-24. They are even less compelling in the context of scientific research. Plaintiffs' demand for "equity in STEM" is tantamount to the "outright racial balancing" that the Court specifically

condemned. *Id.* at 223. Indeed, "equity" and "balancing" are synonymous. *See* www.thesaurus.com/browse/balance. To the extent that the goals of "diversity" and "equity" in STEM are based on the view that there is "an inherent benefit race *qua* race," they rely on "impermissible racial stereotypes" that assume members of the same racial group always express some characteristic minority view or trait. *Id.* at 220 (cleaned up). Thus, the racial prioritization that Plaintiffs contend is mandated by Congress cannot be maintained because it is contrary to the Constitution's guarantee of Equal Protection. In contrast, the Priority Directive adheres to the Constitution's Equal Protection guarantees and in doing so enhances the credibility and legitimacy of NSF-sponsored scientific research. *See Johnson v. California*, 543 U.S. 499, 510-11 (2005) ("compliance with the [Constitution's] ban on racial discrimination … bolsters the legitimacy of the [government]").

B. Gender preferences for NSF grants cannot withstand Equal Protection scrutiny.

Plaintiffs also argue that Congress has mandated that NSF use gender preferences when awarding research grants in an effort to increase female representation in STEM disciplines. ECF 6 at 16-17. Again, Plaintiffs are not simply asking for greater outreach efforts to encourage greater participation by women in STEM disciplines. On the contrary, Plaintiffs are advocating for "equity in STEM." ECF 6 at 18. But just like the racial preferences that Plaintiffs contend are mandated by Congress, such gender preferences also run afoul of the Constitution's Equal Protection guarantee.

Although not subject to the strict scrutiny analysis applicable to racial preferences, gender preferences still must satisfy a high bar. In *Sessions v. Morales-Santana*, the Supreme Court emphasized that the government must show an "exceedingly persuasive justification" for a statutory gender preference. 582 U.S. at 58-59. There the Court found that an immigration statute that required unwed citizen fathers to have been in the United States ten times longer than unwed mothers violated the Constitution's Equal Protection guarantee. The Court noted that it had long "viewed with suspicion laws that rely on overbroad generalizations about the different talents,

capacities, or preferences of males and females." *Id.* at 62 (cleaned up). Thus, "if a 'statutory objective is to exclude or "protect" members of one gender' in reliance on 'fixed notions concerning [that gender's] roles and abilities,' the 'objective itself is illegitimate.'" *Id.* (quoting *Miss. Univ. v. Women v. Hogan*, 458 U.S. 718, 725 (1982)). In reaching its conclusion, the Court noted the fundamental distinction of disparate treatment of biological sex differences—which are more defensible—versus those based on gender stereotypes and generalizations. *Morales-Santana*, 582 U.S. at 66; *accord Dale v. Barr*, 973 F.3d 133, 143 (2d Cir. 2020) (noting difference between "gender classifications based on biological distinctions" and those based on "antiquated gender stereotypes").

In this instance, although the Plaintiffs assert that Congress has mandated a gender preference to increase female participation in the STEM disciplines, ECF 1 ¶¶ 3, 37, 41; ECF 6 at 2, 16-17, they concede that Congress's goal has already been achieved by acknowledging the doubling of women in STEM roles over the past 30 years. ECF 1 ¶ 43. Thus, the 45-year-old statutes Plaintiffs rest their argument on are, by Plaintiffs' own admission, outdated gender stereotypes. Plaintiffs' continued insistence that Congress has mandated that NSF utilize gender preferences when allocating research funds is not about seeking increased participation for women according to the principles of fairness and equal opportunity. Rather the Plaintiffs insist that Congress's mandate be used to achieve "equity in STEM" (ECF 6 at 18), a goal that is not Constitutionally permissible.

* * *

Accordingly, Plaintiffs are not likely to succeed on the merits, nor do the equities or public interest support the injunctive relief they seek. Instead, Plaintiffs ask this Court to order Defendants to act unconstitutionally by issuing grant funding, en masse, that violates the constitutional guarantee of equal protection under the law.

CONCLUSION

For the foregoing reasons, the Court should deny the Plaintiffs' motion for preliminary

injunction with respect to the Priority Directive.

Dated: July 7, 2025

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Certificate of Service

The undersigned certifies she electronically filed the foregoing Memorandum of Law and associated exhibits via the CM/ECF system for the Southern District of New York, thus sending the Objection and declarations and exhibits to the Clerk of the Court and also effecting service on all attorneys registered for electronic filing.

Dated: July 7, 2025

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