CAPLAW Webinar Transcript

Legal Implications of the New Administration's First Moves: Executive Orders, Memos, and More (Part 1)

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[Jonathan Cohen, CAPLAW]
All right, everyone, welcome today to today's webinar. I'm Jon Cohen with CAPLAW , and I'm joined by my colleagues here as well. And this is a webinar, really to go over the legal implications of the new administration's first moves.

I know the last couple weeks have been a pretty hectic time, certainly in the federal grantee world, and we know there are a lot of questions out there related to what's going on and what's transpired. And so we're really here today to provide an update on the legal implications and to take your questions. This is part one of a two-part webinar series. Part two will be next week, on Wednesday, at the same time, 1pm Eastern. And really the second part of this webinar series will be focused on and guided by the questions that we get today.

And so throughout the course of this webinar, please do type any questions that you have into the chat. We will be saving that and we will be taking them back to confer with one another about those questions. Again, we know there are a lot, and we'll really be using those to guide our discussion in part two. You'll be hearing a lot from myself, as well as my colleagues today. We will try to get to any questions that we can today, but we do want to just lay that framework out today for some of the things that have that have happened, and provide you with information.

There are a couple additional housekeeping items – this webinar Is being recorded, so be aware of that. I don't believe you can unmute yourselves to speak. It is, you know, a traditional webinar in that sense. But again, you can use the chat to ask or pose any questions that you may have. With that said, we can move to the next slide.

As I mentioned, I'm joined by all of my colleagues today on this webinar, and all of us attorneys will probably be speaking at one point or another. You see me, Emily Center-Begeasi, Savanna Arral, as well as Allison Ma'luf are all here to talk about these issues with you. And here's what we'll be covering, essentially. So I mentioned at the outset, it's been a hectic couple of weeks. We've seen a lot of executive actions ongoing over the last couple of weeks. So we will be doing an overview, really, of executive orders memorandum – what they are, as well as – I'm sure you all know about the OMB Pause Memo that went out in late January about federal funding. We'll be talking through in pretty good depth some recent litigation that came out of these actions and these developments and the legal framework for them, as well as providing some more detail on some of those executive orders that really are ones we know CAAs are wondering about and have asked about with regard to certain topics, and so we'll be focusing in on a few of those towards the end of the presentation. So I will just jump right in again.

As I mentioned, any questions, please put them in the chat. We'll use that to guide us in our second part next week. But just wanted to talk really, really briefly – a broad overview of executive actions, what they are, and what some of those first moves are. And so I'm sure you've heard the terms executive orders as

well as executive memoranda over the last couple weeks. And so we wanted to provide a quick overview of essentially what those are, and what are the legal authority those carry.

And so first, with regard to executive orders, these really are written documents issued, signed, by the President, and they're really geared towards providing directives to manage federal government operations. And so a President issues a directive, it's not a statute – it's not a regulation – but it is legally binding, what they put out. So, for example, a President can issue an executive order to tell a federal agency to implement a particular rule. They can issue executive orders to declare a new policy or a new priority of their administration, and I'm sure we've all seen some of that over the last couple of weeks as well. But you know, these things happen all the time. When new administrations come in, they tend to involve different levels of recent rescissions of the prior administrations executive orders, as well as releasing of the current administration's new executive orders in the beginning of the administration.

There's also something called executive memorandums. These are really similar to executive orders. They still carry legal weight. They're sometimes used interchangeably. You may hear the terms used interchangeably. Really, the main difference between the two is the level of process. With regard to executive order, it is a little bit more formal than what you might see in an executive memoranda. But there's not too much difference with regard to the two types of executive actions there.

So in the first days, I mentioned it a couple of times, we all saw a number of executive orders and memos released by the White House on their website, and heard about a lot of them. This is just a sampling of some of them that we all saw. And Emily will be going into some greater detail about a few of these towards the end of the presentation. But I just wanted to give you sort of the scope. There were a great deal of executive orders and memos issued in those first few days, some of relevance to Community Action, many of which dealt with other issues, other matters, other priorities that the administration wanted to communicate to the country essentially. Next slide.

I think of major interest to many on the call, and certainly to us, was what is known as the OMB Pause Memo. So this was a memo M-25-13 that was issued on January 27 and this went out to the major heads of executive agencies in the federal government. And it essentially was a broad directive to temporarily freeze federal funds, starting essentially a day later, at 5pm on January 28. Now it was very broadly worded, and I know many here know about this already, but it caused quite a stir because it essentially said that federal agencies were going to take a look at – identify and review all the Federal assistance for all programs and activities to make sure that they were consistent with the President's policies and requirements, to make sure that they were consistent with those recent executive orders and memos that had been issued by the White House in the in the first few days of the administration.

This included also what was a frozen funds attachment. This was a lengthy essentially Excel sheet attachment with all kinds of federal programs listed there and talking about various issues of what was under review, so what was the scope, essentially, of the program. Did it implicate any of the executive orders that the President had issued and really asking agencies to really review program by program, what they were doing with their funding.

Also, the Pause Memo noted that by February 10, agencies would submit this information to OMB on these programs, projects, activities subject to the freeze. Again, very broadly worded, many interpreted it to mean that all federal funding was being paused for the time being while agencies conducted this review. As many of you saw, as many of you know, that created quite a situation, I would say. A lot of questions were being asked, you know, what funding is included in this? Is this all funding? How are we going to get funding? Does the administration have the authority to go about doing this? And so, given the broadly worded directive, as you might expect, there was some litigation filed pretty early on. So at

the next day, there was litigation filed, and Savanna is going to go through some details related to that litigation, what that means.

You also saw that next day "Fact Sheet" issued by the administration to really clarify, that programs not implicated by the executive orders – so those first few presidential executive orders that were issued on the first few days – so programs outside that scope were not included or not subject to the freeze. It noted that that the freeze was not impoundment, and we'll go through what that term means and what the importance of that term is. So the fact sheet specifically said this isn't impoundment, and it explicitly excluded programs from the freeze that provided direct benefits to individuals. Explicitly stated as well in the fact sheet [was] that programs like Head Start, rental assistance and other similar programs were not paused at the time. And so this, this fact sheet was an attempt by the administration to clarify that, "hey, we didn't mean all these things were included in that broad directive that we just issued yesterday."

However, litigation continued – and again, Savanna will mention litigation and some of the developments that occurred there that sort of ran simultaneously with these memos and these fact sheets that were being issued. But on January 29, OMB essentially rescinded the OMB Pause Memo and said, "Hey, we're rescinding this memo." The White House in some of its public statements still maintain that there was a freeze review of the funding that was ongoing, and then we're continuing to look at it. But officially, it rescinded that particular memo. And we'll talk about the implications of all this in a second.

Related to one of the one of the cases that was filed that Savanna will talk about, on February 2, 2025 some of you might have seen in your inbox from Grant Solutions, a notice from HHS or other federal agencies that provide grants, this particular language that said federal agencies cannot pause, freeze and impede, block, cancel or terminate any awards or obligations on the basis of the OMB memo or on the basis of the President's recently issued executive orders. And this really came about as a result of a temporary restraining order that was issued in one of those cases, which is all to say, litigation continues on this. But as a result of that litigation, even though the administration rescinded the memo, the funding freeze was deemed to not be applicable, and so hopefully funding is flowing today. Next slide please.

So a lot of these issues my colleagues are going to go into in greater depth, but I wanted to provide that overview really quickly over the last couple of weeks, to sort of set the context and set the stage. And as we're going through, here are some key questions, I think, to keep in mind, and that Savanna largely will be addressing when she talks about the developments. One is, since Congress appropriates federal funding, how much authority does the executive have over appropriated funds? So Savanna will be providing sort of an appropriations 101 for everyone, and talking about how, given the separation of powers that exists in our in our Constitution, Congress is really the branch of the federal government that appropriates funds. And so really, how much authority does the executive have over appropriated funds? Well, she'll talk about the extent of that authority that the executive has, how it relates to things like timing, you know, costs that it can incur, purposes of federal funding statutes and things like that.

Another question to keep in mind: if a federal statute authorizes funding for specific purposes and goals, how much flexibility does the executive have to determine allowable uses of the funding? Again, this is getting at that appropriations 101 that Savanna is going to be going through, and I think communicating there is some role for the executive to play with regard to this. However, there are some guardrails there that they have to abide by.

And then, really, lastly, who determines if the executive has exceeded its authority by withholding, delaying or transferring federal funding? We'll be talking about Congress's ability to do that as well as the courts, we'll talk about litigation – and I think we're seeing that play out – and then what happens if the executive branch exceeds its authority? I think that's, again, a matter that's currently playing out in the courts that you should be getting some more details on momentarily. And so with that, I will turn it over to Savanna to talk about the recent litigation.

[Savanna Arral, CAPLAW]
Awesome. Thanks, Jon. So my main goal with this section of today's webinar – it's going to be a lot of information – but it's to help you understand, first, the status of the recent legal challenges, because there's a few of them going on, and also what the courts have said so far about the legality of both the Pause Memo as well as some of the executive orders. I do want to mention that litigation can take a long time, and all of these cases are very much in the early stages.

As you can see on this list of dates, the first week of the new administration was mainly focused on the release of new executive orders and memos setting forth policies, but last week was centered on the release of this Pause Memo, and then the swift response of groups affected by the freeze and confusion around what was happening with federal funds because of the Pause Memo. So just to get us all on the same page, this slide is showing the major events from last week and early this week that followed the release of the Pause Memo, including the two court cases that I'm going to get into today, and the current dates of the temporary restraining orders, or TROs, that are currently in place.

You'll notice, based on these dates, that the TROs came quite quickly after the cases were filed, and that's because TROs are emergency relief that a court can grant while kind of everybody gets their ducks in order for further hearings. TROs typically last about 10 days, usually until there can be a hearing on what's called a preliminary injunction, meaning next week, we will likely see more concrete news about the status of these cases. However, we also know that the courts have required the parties to file some updates today actually about the status of their compliance with the TROs.

So backing up just slightly. Court words, lawyer words, injunctions 101. TROs and preliminary injunctions are a type of injunction, and injunctions are this extraordinary remedy that courts have to use in special cases where the court can alter or maintain the status quo. It's particularly where the time between when a case is filed and when a trial could happen could result in irreparable harm being done if the court doesn't force an action to stop or start.

The legal test for both TROs and preliminary injunctions varies a bit based on where a court is located, but it's generally this four-factor test using the factors listed out here. So first is the likelihood of success on the merits. How likely is it that the people that filed this case are going to eventually win it based on the information that's available right now? Second, the potential for, like I said, irreparable harm or injury. That's the crux of why a TRO is issued, because if it isn't, then something could happen that the court can't fix if they did wait. Third, the balance of relevant equities. This is where the court weighs the relative fairness and potential harm to each party if the TRO is or isn't granted. And then fourth, and sometimes this one is folded into the third factor, but it's the effect on the public interest. Would granting the TRO serve the general public in some way.

So each of the cases that I'm about to go into a little bit more in-depth currently has a TRO in place, and seems to be trending towards a preliminary injunction as well. Far down the road, we could be in conversations about permanent injunctions, which are a type of final judgment, like a sentence in a criminal case, and that has a slightly different test, so you might see that word get thrown around. I

also want to point out that failure to comply with an injunction at any stage of the case can result in a contempt of court charge and civil or criminal liability.

The first case that was filed in D.C. is called the National Council of Nonprofits vs. the Office of Management and Budget. In this case, the plaintiffs claimed that OMB had violated a statute called the Administrative Procedure Act, a federal statute, as well as the First Amendment of the Constitution, and exceeded OMB authority that was granted to it by Congress to manage the federal budget.

One procedural, legal point that I wanted to point out about this case. So OMB argued that since they rescinded the Pause Memo in the middle of this case, the case was what we call moot, which is a silly lawyer word, meaning that the case has been resolved, and therefore there's no actual dispute for the for the court to weigh in on. OMB wanted something called the doctrine of voluntary cessation to apply here. So they're saying, "We withdrew the memo without needing a court order. And therefore this case is not a real case." However, the court in this case and in the second case I'll talk about, did not think that there was sufficient evidence to show that the government would actually stop doing what the Pause Memo said, even though it was rescinded.

Based on the Press Secretary's tweets and examples of organizations around the country – I see some of them are even being put in the chat – of people still having issues receiving their federal funds following the Pause Memo being rescinded. This is particularly important because the federal government gets a great deal of grace in the voluntary cessation doctrine. Usually, when the government says "we will stop doing something, you don't need to get involved, court," the court believes them. And in this case, the court did not believe them.

When our most recent news alert went out about these cases and about the TROs, this case was in what's called an administrative stay, which is essentially a pause. It's kind of funny, there's lots of pauses going on here. But it's a pause that allows the proceeding to kind of stay in one place while parties again get their ducks in order. The court has since granted a TRO in this case, as well as the second case I'm going to talk about. The court granted this TRO based on the case that I that I mentioned, on those four factors, and in particular, the court found that the plaintiffs' APA argument – Administrative Procedures Act argument – that OMB actions are what's called arbitrary and capricious. It was likely a winner, so they said that that claim was likely to succeed on the merits. The court also did indicate in a footnote that there was some evidence to support the First Amendment and the authorizing statute claims as well. A court doesn't have to do that. At the TRO stage they only have to find that that one claim has the likelihood to succeed on the merits. This doesn't mean that the plaintiffs will win down the road, I want to be clear, but it does mean that there was enough evidence to convince the court at this stage about the likelihood that they would succeed.

And then the court in the National Council of Nonprofits case also focused on the scale of the pause, and OMB's lack of a measured approach or any kind of attempts to prevent chaos from occurring as a result of the memo. The court considered these things in determining that there would be irreparable harm and that the bounds of equities in the public interest favored the plaintiffs in this case. The court also acknowledged slightly briefly, that some of these claims raise serious constitutional questions about the separation of powers and required the court to think more carefully and have more information before making any kind of final decision.

So although this case was filed first, the court in the other case that I'm going to talk about second actually issued its TRO before this one. So timeline's getting a little funky. This just means that there are two TROs that are active simultaneously, not that one has power over the other.

The basics of the TRO in the D.C. case are exactly what's on this slide. OMB cannot implement, give effect to or reinstate the Pause Memo under a different name. With respect to open awards, OMB has to notify agencies who received the Pause Memo about the TRO and instruct them to release any paused disbursements of funds. OMB has to file a status report today, letting the court know that they have, in fact, been complying with the TRO. And the order – I didn't put this on the slide – but it also orders the parties to meet about the schedule for briefing on a preliminary injunction that should be filed today as well. We might not have access to it, because it's usually just, you know, between the parties and the court.

Now on to the second case, this is New York et al. v Trump in Rhode Island federal court. This case is 23 attorneys general from 23 states and D.C. who are suing President Trump, OMB and a very long list of federal agencies, and the agency heads for pretty similar claims as to the first case – so APA violations, separation of powers, constitutional infirmities.

Again, similarly to the first case, the Rhode Island court granted the TRO that was requested by the plaintiffs using the typical TRO test. However, the court in this case focused much more on the constitutional claims, while the D.C. court focused on those statutory APA claims, the arbitrary and capricious claim. This court in Rhode Island found that those constitutional claims about separation of powers were likely to succeed on the merits. This court was really concerned about the separation of powers and the lack of constitutional authority that it saw as not underlying the Pause Memo, to the point where the court actually listed the transgression of the separation of powers as a potential irreparable harm that could result from not granting a TRO In this case.

I will also note that this court refused to give the government leeway with voluntary cessation as well. So even though the Pause Memo was rescinded, the court didn't believe that anything would actually stop without a court order. The court order in the Rhode Island case also required the federal government to send notice to federal agencies about the TRO. We actually have a copy of that notice, and that is what I'm quoting from on this slide, rather than the court order directly.

So the administration, in accordance with the TRO, made it clear that agencies cannot do any sort of pausing of federal awards based on the Pause Memo or on the EOs. The administration's notice applied this requirement to all federal agencies, whether or not they were actually listed in that long list of agencies that were sued by the 23 states in D.C. And it also applies to all states whether or not their AG was in those 23 states and D.C., and also to future as well as current awards, at least for the time that the TRO was in place.

However, agencies can still continue with what we'll call business as usual. Agencies have some authority to pause, terminate, or suspend awards that existed before the Pause Memo, and they will continue to have that power. The TRO and the notice just mean that the agencies cannot do that – base their use of discretion on the Pause Memo or the EOs.

This brings me to a brief foray into the legal framework underlying the Pause Memo and these cases. So first will be grants administration 101, which will be followed by appropriations 101. So as I mentioned, agencies have always had some kind of discretion to suspend or terminate federal awards pursuant to the processes and triggers that are established by either a funding source statute or the Uniform Guidance. Federal awards, as I'm pretty sure everybody knows, are granted under contracts, grant agreements, which include terms and conditions that all of the parties – the grantee and the grantor – have to comply with. Often the T&Cs incorporate specific laws, regulations, contractual provisions, and failure to comply with those incorporated requirements, even if you disagree with them, can be the basis for a federal agency suspending or terminating a grant.

As you can see here that I've quoted, the Uniform Guidance provides certain circumstances under which an agency can terminate a grant. Some of these are what's listed here. The first that I've listed is where non-compliance cannot be remedied by imposing specific conditions. And in two, where the award no longer effectuates the program goals or agency priorities, except that this can only be done to the extent authorized by law and pursuant to those terms and conditions that bind agencies regarding termination. I want to point out that this last item is most likely relevant if a grant agreement contains what's called a termination for convenience provision, and it would probably be labeled that in your agreement.

Before I do appropriations 101, I know that there's probably tons of questions I've been seeing the chat just turn over in the corner of my eye here, and there will probably be more after these next couple of slides. So please keep putting questions in the chat and join us next week when we actually address those questions after we've had time to think about them.

So appropriations 101. Article 1 of the US Constitution gives Congress the power to direct and control federal spending, which is called the "power of the purse". Congress exercises this control in lots of different ways, particularly through enacting appropriations acts. Appropriations acts are laws that provide executive branch agencies with authority to incur obligations and spend federal funds. That's called budget authority.

Some more terminology that you've probably heard and will continue to hear about: Appropriated funds are funds that are available for an agency to use that Congress has made available. Obligated funds are funds that have been committed to be used for a specific purpose. Expended funds are funds that have been paid to release an obligation. Appropriated funds also come with limits that Congress has placed on them, and those follow them throughout whether they're appropriated, obligated or spent, which include the amount that an agency can spend, the time period that an agency can obligate that money before it expires, and then the purpose, or the purposes, that the money can be used for.

After Congress appropriates federal funds to agencies, the agencies have some discretion in how they move and allocate those funds, as part of their responsibility, honestly, to meet the limits and the rules that Congress placed on those funds. Just to be clear, this slide isn't super applicable to the TRO cases that we've just discussed, but it's good information to have, and it kind of completes the picture of appropriations 101 and helps you understand the authority of the federal government to administer federal funding.

Congress appropriates funds to agency "accounts", which is just a word that basically typically corresponds to a paragraph in an appropriations act. Agencies often have more than one account, and each account can cover one or more programs, projects or activities also known as PPAs. So within PPAs, agencies can usually decide where to put money to effectuate the goals of that PPA and the purpose that Congress appropriated that fund, those funds for.

We're talking about moving money between agency budget lines here. This was a normal and everyday agency practice. At an even higher level, movement can still be standard agency practice. Reprogramming is the word for the movement of funds within an agency account to use them for a different PPA. So generally, this is an allowable practice for agencies unless Congress prohibits or limits it via statute, including in an appropriations act. However, transfer, which is the movement of funds between accounts, is typically prohibited unless Congress authorizes it in a statute or Appropriations Act. Transfer includes movement between agencies – so agency A moves funds from their account to

agency B's account. Or within agencies –so agency A moves funds from account one to account two at that same agency. Both would require statutory permission from Congress to do. And regardless of what word best describes the movement of funds at an agency level, any restrictions that Congress has placed on those funds follow those funds wherever they go.

Last bit on appropriations: impoundment, another silly legal word. Impoundment is where the President attempts to prevent agencies from exercising the budget authority that has been granted to them by Congress. So backing up just slightly – like any legislation, if the President doesn't want an appropriations bill to become law, he can veto it. But once a bill is law, the President is bound by it as much as anybody else is, because of the separation of powers in our Constitution. However, historically, presidents have attempted to interfere with the appropriations process by impounding appropriated funds. So thus is born the Impoundment Control Act (ICA) of 1974 which was intended to standardize and limit when and how a president can temporarily withhold or request that Congress cancel appropriated funds.

The Government Accountability Office is tasked with oversight of this statute, of the ICA. The ICA provides the executive branch with two basic tools – one's called recission, which is hard to say, and deferral. Rescission is a President's request for a reduction in appropriated funding. And deferral is a president withholding or delaying the ability for an agency to obligate appropriated funding. For rescission, a president has to send a special message to Congress – the statute actually says this, "special message" – which proposes reductions in the appropriated funding.

And once Congress receives that message, the ICA provides expedited procedures for Congress to consider the proposal via what's called a rescission bill.

If Congress doesn't pass a rescission bill within 45 days of receiving the special message from the President, the ICA requires that those funds be made available to agencies for obligation. The proposal for a rescission from the president can be made for many reasons – fiscal reasons or policy reasons. For deferral, the president must also send a special message to Congress, which Congress can reject with what's called an impoundment resolution. Deferrals cannot, however, be used to extend funds beyond the time restriction that was placed on them by Congress, and therefore force them to expire. Deferral can also not be used for policy reasons. For example, because the President is opposed to a specific program. Delay, deferral has to relate to practical considerations that are very specifically stated in the text of the Impoundment Control Act.

And then lastly, there's this funky little concept called pocket rescission, which is where the President proposes a rescission within 45 days of the end of the fiscal year to avoid spending that portion of the appropriated funds. So since funds proposed for rescission are frozen while Congress decides how to act in that 45-day period, a pocket rescission is basically a deferral used to force funds to expire. The Government Accountability Office who oversees the ICA deemed that this was a violation – this practice was a violation of the ICA back in 2018.

And then finally, I'll leave you – before I kick this off to Emily – I'll leave you with, in addition to the cases that I just went over that are challenging the Pause Memo, there are a variety of cases that CAPLAW is aware of that are challenging specific executive orders on constitutional or statutory grounds. I'm sure there will be more, and we'll be following those cases to the extent that they impact the Community Action Network.

Some examples that you can see on this slide, Moe, which is a case where a transgender woman is challenging a Bureau of Prisons policy that would move her to a men's facility, and that policy is based

on the recent executive order on gender and sex. The National Association of Diversity Officers in Higher Education case is challenging – it's pretty much brand new – it's challenging the executive orders on DEI on due process and also separation of powers grounds. And then the RAICES case is focused on the executive orders on immigration and is, among other things, arguing that they violate the existing statutory scheme that protects people seeking asylum in the United States. There are other cases on other EOs and other administrative actions also on birthright citizenship, employee buyouts, DOGE as an executive advisory council. And as I said, we will be monitoring these to the extent that they impact CAAs. And with that, I will turn it over to Emily to talk about the EOs more in depth.

[Emily Center-Bregasi, CAPLAW]
Thank you. Hi everyone. Thanks again for joining us and for all the activity I can see in the chat.

So yes, I'll turn now to discussing the executive orders. And as Jon mentioned, just to reiterate, executive orders contain broad directives and are directed at the heads of federal agencies. Then those federal agencies use those broad instructions to inform how they're going to move forward within the bounds of existing law. And because there's existing legal frameworks already in place in many of the areas that the executive orders cover, it might take time for the practical implications of the orders to actually become clear.

For example, there might be more court cases fighting over those existing laws that interact with the executive orders as Savanna just mentioned. And so with that, I'll talk about some of the key executive orders we've seen in the last few weeks. Also, before I get to the substance of these orders, I wanted to mention that the terms on these slides I'm about to go through come directly from the executive orders themselves, if you're wondering where we get some of the terminology from.

And so with that, I'll turn to the first EO, which is Ending Radical and Wasteful DEI Programs and Preferencing. You might have likely heard of this EO that requires the end of DEI (Diversity, Equity and Inclusion) as well as DEIA, which includes accessibility as well – programs. And while the EO doesn't specifically set out what activities are considered illegal DEI, it emphasizes serving every person with equal dignity and respect.

Part of that EO directs each federal agency to do a number of things by March 21 of this year. We've included some of those things on this slide, but before going through those, I wanted to mention too that there's also a lot in these EOs, which we don't indicate on these slides, that are directed specifically to federal agency operations and stripping these DEI activities from federal agency operations themselves. But here on the slide, we focused more so on what the agencies are being directed to do with respect to their grantees.

A few of those things include terminating equity related grants and DEI or DEIA performance requirements for grantees, providing OMB with a list of all grantees who received federal funding to provide or advance DEI, DEIA, or environmental justice programs since January of 2021, and then assessing the operational impact and cost of those programs and policies. So another aspect of the EO that I want to note, of course, we all know it references mostly DEI and DEIA, but it also references this concept of environmental justice that I just want to point out.

And then moving down to this next one, Ending Illegal Discrimination and Restoring Merit-Based Opportunity. This EO revokes a prior EO and amendments to that EO, which addressed affirmative action for contractors. So this is essentially getting rid of those affirmative action requirements that were on federal contractors previously and then again, this EO too focuses on that illegal DEI and

DEIA concept, specifically those that address race and sex, and again, doesn't provide a definition of what actions rise to that level of illegal DEI, but instead focuses on this concept of eliminating preferences and discrimination. This EO directs federal agencies to terminate all discriminatory and illegal preferences, policies, activities and guidance or regulations, and it also directs federal agencies to require that grantees certify they don't operate programs promoting DEI that violate the applicable federal anti-discrimination laws.

And then finally, the EO directs federal agencies and the AG to, by May 21 of this year, issue a report focused on the private sector, which would identify the most egregious and discriminatory DEI practitioners, establish a plan to deter those DEI programs that constitute illegal discrimination, and also identify up to nine potential civil compliance investigations for each federal agency. So, identify up to nine organizations that are out of compliance. Those up to nine organizations will likely include large, publicly traded corporations or foundations with really large assets, but could also include large nonprofits or associations. Again, we won't know the full extent of these EOs' impact until further actions are taken. As Savanna mentioned, many of these are already being challenged in court, for example.

On that last slide, I referred to these existing anti-discrimination laws that already govern. What are those existing laws? Just for context, I want to give a brief overview of what those existing laws are prior to any of those EOs that we talked about. So the Equal Protection Clause of the 14th Amendment generally provides individuals protections against discrimination on the basis of race, gender, and other classifications. And then, within that framework, two major categories of anti-discrimination laws exist within the Civil Rights Act of 1964. The First is Title VII, which applies to employers and prohibits employers from making adverse employment decisions based on protected categories. The second is going to be Title VI, which applies to federal financial assistance and prohibits discrimination in programs or activities that receive federal financial assistance, meaning that CAAs are already prohibited from discriminating in the provision of their federally funded services.

And then I also want to mention briefly, there have been two major cases in this anti-discrimination law context in the past few years that really signaled to us the direction that we were headed with respect to affirmative action and DEI. Both of these cases kind of rejected these affirmative action and DEI activities by specific organizations. The first case you may have heard of was a Supreme Court case called the Students for Fair Admissions case. That's where Harvard and UNC's affirmative action programs were struck down in court. The Supreme Court found that those affirmative action plans were in violation of Title VI. That case only directly impacted higher education, but it definitely opened the door – from what we saw – to more lawsuits that challenge DEI and affirmative action plans through affirmative action programs.

And then the second case was what we call the Fearless Fund case. In that case, Fearless was a foundation that ran a contest that was only open to black women-owned businesses, where they offered every winner $20,000 to help grow their business. That contest was also struck down by the court for likely violating section 1981 of the Civil Rights Act. Section 1981 prohibits racial discrimination in contracting. Here, the interesting thing was that the court interpreted Fearless's grant contest as a contract, and then applied Section 1981 to their activities, which hadn't necessarily been done before. So while Section 1981 shouldn't necessarily apply to all CAAs or immediately impact your grant-making, since it applies mostly to contracts, it might influence where we're headed in the future of anti-discrimination laws generally. Again, this slide really represents what the general legal framework is over DEI and affirmative action, as set out in laws and court cases prior to this administration.

Next slide. Okay, so considering all of this, the next logical question, I think, might be what your agency should do if you have any existing DEI initiatives – what you should consider. Knowing what we know

now about the cases Savanna walked us through, we understand that currently, federal agencies cannot stop funding your agency based on the executive orders. That includes these DEI executive orders. However, while funding can't currently be impacted, it's likely that DEI is going to continue to be a focus of this administration.

There's a few general steps you could consider as you look ahead. First would be reviewing any potential existing DEI initiatives you might have. So reviewing them ideally with an attorney, both for their compliance with those existing anti-discrimination laws I just walked through, and also to assess the level of risk your organization is comfortable with moving forward. You might then decide to make certain changes to those DEI policies. You could decide to reframe and update some of your policies and activities. You could also decide to play it safe and stay cautious knowing the administration's views on DEI and choose to remove some of those DEI initiatives altogether. Regardless, you still have to ensure that your CAA is not discriminating in the workplace or in providing services. So if you move in that direction, your agency could still continue fostering a workplace and services that are inclusive and welcoming.

On the other hand, you might review your current policies with an attorney's help and recognize they're all non-discriminatory, they're all within the bounds of the law. You might decide to keep going on those for now and acknowledge the risk that might come with this, which could be potential increased scrutiny.

And then moving on to Protecting the American People Against Invasion. This executive order sets out the policy of the new administration that they'll faithfully execute immigration laws against undocumented immigrants. It directs the AG, it directs DHS to review federal grants that provide services to undocumented individuals for any waste, fraud, or abuse, and to ensure that those grants don't encourage violations of immigration laws. Now keep in mind, educating people about their rights under the law is not a violation of the law.

This executive order also then directs OMB to make sure all federal agencies stop the provision of public benefits to undocumented individuals who are not authorized to receive those benefits. So I want to maybe say that another way, and emphasize that this is saying the government will be putting a stop to undocumented individuals receiving benefits they're not authorized to receive. One thing we do know is that, for example, CSBG and Head Start services are available to undocumented immigrants. Those are services undocumented individuals are currently authorized to receive and may continue to receive.

And then we've seen the Department of Homeland Security already take action that suggests how it plans to enforce these immigration laws in accordance with this EO. DHS made a statement to rescind prior federal agency guidance that recognized sensitive areas, which include schools and churches. Those places were previously considered what we called sensitive areas where ICE couldn't conduct raids. Now, ICE is essentially permitted to conduct raids even in those sensitive areas, like schools or churches.

And DHS also indicated they'll be phasing out parole programs that aren't in accordance with the law. So the focus there was on humanitarian parole programs which allow people to come in for urgent humanitarian reasons. And then I just wanted to give one more little piece of background to that executive order. There's a lot of laws here in the immigration space, but the existing legal framework is mostly around what we call PRWORA or the Personal Responsibility and Work Opportunity Reconciliation Act. I just want to mention that's the governing law in this space already.

All right. And one of the big questions that arises that we've already heard when we hear about these immigration EOs might be, what should I do if immigration comes to my workplace? So I want to walk through some of the steps that you all might take if immigration does come to your workplace. I know there's lots of information out there on this topic, but we want to walk through it as well.

First, it's important to understand why immigration officials might be at the workplace. They could be there for a few reasons, one of which could be a Form I-9 audit. So that's when ICE comes to your business to check if you've followed the rules on Form I-9. Form I-9 is the form that confirms a worker's identity and authorization to work in the US. So it's required for all new employees, and you have to keep those I-9 forms for employees on file for a certain amount of time.

On the other hand, it could be an ICE raid. An ICE raid is going to be when ICE agents go to your worksite without warning as part of an investigation into an employer, or maybe to come to your organization to find a particular person or people. And ICE might try to question, detain or arrest people that they believe are in violation of immigration laws. And so it's important that your agency and agency staff know their rights with respect to any of these potential immigration actions. And in that effort, I think one of the important things to focus on would be training staff not to interact with ICE or allow ICE agents into private areas of your workplace. To do that, though, we need to understand your rights, both in public spaces and in private spaces.

So I wanted to talk for a moment about that. The difference between what a public space is versus what a private space is is based on constitutional law. Lots of constitutional law talk today. And then it's established further through case law. So usually it's really fact-specific to make that determination, but there's some general features of what would typically be considered a public area, things like the space is open to the public, frequent high traffic, there's maybe a lack of control over who can come in and out – whereas private spaces, on the other hand, would often have restricted access, such as only to families or staff. And maybe there's some sort of control of traffic over who comes in and who goes.

And so with that, I want to talk about protections in each of those areas. Public areas, ICE can enter any public area of your organization without permission. For example, I noted some of the characteristics, but public areas could be like a lobby or a waiting area – they can enter without permission. But remember that being in a public area does not give ICE the authority to stop or question or arrest just anyone. And then on the other hand, talking about private areas for a moment, nobody, including ICE, can enter private areas of your organization without either A) your permission or B) a judicial warrant. You are not required to give permission for ICE to enter if they don't already have a judicial warrant. So train your staff to ask if they have a copy of that warrant, and then to actually read that that warrant.

In terms of recognizing what a judicial warrant actually is, or what it might look like, it should be signed by a judge. It would say either US District Court or maybe a state court at the top. That's going to be different than administrative warrants. If ICE shows up with an administrative warrant, that does not give them permission to come into private spaces. An administrative warrant might look like something like having Department of Homeland Security at the top, but it wouldn't necessarily have the name of a court. If it's not from a court, ICE cannot use it to enter private spaces.

And then with all this in mind, and after training your staff on the basics of those elements of preparing for potential ICE raids, use that knowledge to ensure that your staff stays calm in the event that immigration comes to your organization. Train staff not to run but also, at the same time, not to necessarily interact with ICE agents if they don't have to. Staff are not required to help ICE agents by taking them to the employees that they have named on the warrant, or telling them if that person's work working that day, or sorting which individuals are which based on immigration status. And if ICE

does try to question or detain an individual, remember that the best way for anyone to protect their rights, always in any situation, is to remain silent and ask for an attorney.

And then the final step here is to document. So as ICE is leaving, especially if they're taking anyone with them, ask where they're being taken, record that information so that person can be found. After ICE leaves, no matter what has happened when they've been there, write down everything that you saw – so how many ICE agents were present, how they were dressed or armed, whether they mistreated anyone. Keep all of that information on record.

And then I want to note too, when we follow up to this webinar, we'll email out some of our resources on immigration topics. So we have some resources on ICE visits and immigrant eligibility for benefits that we'll share with you, but as always, we really encourage you to follow other resources that come out from immigration experts. One of those would be NILC, the National Immigration Law Center. We'll, of course, keep you all informed, but our friends at NILC work solely on immigration law, and put out some really fantastic resources that we want to suggest you all keep an eye on as well.

And then finally, one more executive order to talk about. This Executive Order establishes a policy to encourage energy and mineral exploration and production, eliminate electric vehicle mandates and promote consumer choice for goods. The executive order directs federal agencies to pause disbursements of funds that support the Green New Deal that were appropriated through the Inflation Reduction Act of 2022 and the Infrastructure Investment and Jobs Act. So that's things like funds for electric vehicle charging stations. To clarify the application of this EO, the White House almost immediately after releasing the EO, issued this memo to basically clarify again that pause in disbursement didn't apply to all of those funds appropriated under those two acts that I just mentioned, but rather the pause applies to funds that specifically interfere with this new policy focused on ramping up energy production through natural resources. So, not to worry, it looks like this does not affect all funding under those two acts that I've named.

And then with that, thank you so much for everyone's time. Thanks for joining us. We see all of your questions coming in, so feel free to drop more questions in the chat, especially ahead of our next webinar, part two, coming next week, where we'll try to answer most of those questions, and maybe our team has just a few minutes to respond to some of the questions that we've seen so far.

[Allison Ma'luf]
Yeah. Thank you guys so much for all of your input. It's been questions and some helpful updates with respect to what's going on in the field, and we're very thankful for that. I do want to just quickly note that the National Head Start Association sent some guidance out to the Head Start community that indicated that some of the reason for maybe some of the manual reviews of the requests for funding could be related to the fact that people are putting in requests for amounts that are beyond what they have either budgeted for or that is available to them currently at OHS, so they're having to manually review those requests. NHSA, the National Head Start Association, referred to that as an "overdraft". So anyway, there could be reasons that aren't associated to the EOs, because as was discussed here, the temporary restraining orders, both – especially the one from the Rhode Island federal district court – prohibit the federal government from making any decisions, pauses, freezes, whatnot, with respect to federal funding based on any of the executive orders that are currently out there. So those should not be triggering any delay that you are experiencing. And I saw some questions in there about that.

Someone also asked if we have any definitions for "illegal DEI" or "DEIA", and we do not. I think, as Emily indicated when she spoke, that all we know is that they're focused – and these are their terms

from the EO – they're focused really on race and sex, and they are focused on preferential and discriminatory treatment. They are very much promoting the concept that everyone should be treated equally. So we don't know exactly what would be considered illegal, but we do have those indicators as to where they're going, as well as the court cases that Emily discussed, can kind of give you a window into where we could be heading with respect to the application of those anti-discrimination laws, the Civil Rights Act, Title VI and Title VII, where those are going to be headed with respect to enforcement of those laws. Again, you still cannot discriminate on the basis of anyone falling within any of those protected classes that Emily talked about on the earlier slide.

A couple of people have asked about some recent correspondence that we've all received from OCS. One had to do with the Annual Report and the fact that they are removing from the Annual Report references to DEI or anything that indicates DEI, and the other one had to do with putting language on your website, recognizing that the website is partially or somewhat fully paid for – supported by – your grant funds that you receive from OCS, ACF, and that any views that you express on your website are those are your own, and not those of OCS and ACF.

So with respect to the Annual Report question first, as Emily mentioned – we didn't talk a lot about this – but those EOs – and as and as Jon explained – are really directed to the federal agency. And so it's my understanding, and maybe one of my colleagues will jump in here, that the that the temporary restraining order basically said that that the federal agency couldn't make any decisions with respect to, or take any action with respect to, the federal grants that they are facilitating, which would seem to indicate any action that would impact the grantee or sub grantee. I'm not sure if they would see that Annual Report as covered by the TROs or not, because that is a specific federal agency action. It is an interesting question whether or not the federal agency really has the authority to go in at this moment and start stripping those out based on the fact that these TROs are saying, "Pause, no action should be taken based on those memos." So not quite sure there where that is exactly headed, but we'll put some more thought to that and perhaps have a more nuanced response for you on that next week.

[Savanna]
I can say very briefly that based on the notice that was sent in response to the TRO to federal agencies from the presidential administration, it's focused on the freezing or pausing or canceling of funds, not of changes in policy at the agency level. So yes, they can't go in and stop funds from flowing based on these EOs or based on the OMB Pause Memo. But I don't see the same hook for changes in just agency level policies or reporting or reporting mechanisms, as long as the money isn't affected. However, depending on how some of those other cases that are on the executive orders specifically pan out, and whether or not a TRO was put in place, because some of those cases actually are asking for TROs or injunctions on the application of the executive order, completely we could see that change very quickly. A lot of this is just things are things are moving very fast and changing very quickly, and agencies are trying to respond. And sometimes the wires don't always line up.

[Allison]
Absolutely, and thank you for that clarification, Savanna, that's really, really helpful, and that's exactly where my head was initially going. So thank you. The other one, having to do with the language on your website. So there is a current requirement that is in the Appropriations Act that says that we all as federal grant recipients need to acknowledge the funds that we are receiving, when we are using them, to indicate how we are using them. And so you guys probably are aware of this – should be aware of this – with respect to any services or public relations work that you're doing, with respect to the services and programs that you're providing with those funds. And basically says that you'll have some level of acknowledgement that says, you know, this portion of funding – or all of this funding, or whatnot – was used to support this program, activity, service.

And so with respect to that language, there already is a piece of that language that is sort of required. We've gotten a lot of questions about, "Well, our website isn't necessarily paid for with these funds, or we have a bunch of different funds coming into our website from a bunch of different funding sources. So it's not just those funds." I think a key piece of that language is the second part that's on this slide, which is that none of the opinions that you're expressing or any sort of conclusions that you've arrived at could be attributed necessarily to ACF or OCS, it's just to you. That probably is their attempt at trying to put something out there to mitigate the impact of any activity that you may be doing that is not in line with the current administration's priorities.

Again, this is language that we've been using throughout and it also is noted in the grant policy statement that HHS puts out, and they just recently updated, they have similar language around acknowledgement that includes some of this terminology. All this to say, you have to use your judgment with respect to this language, but I think there are ways that you could modify it to more accurately reflect what your current situation is, and then include it on your website, to make sure that any information on your website that could be related to the programs or services that you are supporting with ACF or HHS funding, that none of those opinions or conclusions or whatnot associated with this activities and services could be attributed to OCS or ACF. It's quite possible that they could have been enforcing that for our websites prior to this point, and because of the current circumstances they're using that as a reason to go ahead and push that out to everyone. I don't know if anyone has anything to add with respect to that? No, did people shake their heads?

Okay. I'm just looking real fast. I had taken a few notes. Someone did ask – and I'm just going to real quickly touch on this – someone did ask about the new legal framework around regulation. I don't know Savanna, if you saw that question in there, but they were asking about it with respect to the rescission and deference actions that could be taken under the Impoundment Act. And so basically, the new legal framework, which was established by the U.S. Supreme Court opinion Loper Bright – which we have a very extensive article about on our website – is really talking about regulations that federal agencies could issue. And we are going to be putting out an article, hopefully by next week, that walks through much of what Savanna talked about with respect to appropriations and actions that a new administration can take, and we'll also include in there a bit about what's referred to as the Congressional Review Act, which gives Congress the ability to take down regulations that were finalized towards the end of the prior administration, and there's a whole bunch of timeframes and look backs and information like that, with respect to when Congress can take those actions and what those actions would look like.

And as a part of that, we have been discussing internally, well, even if Congress were to take those actions, there's still the Loper Bright case out there that basically puts deference regarding regulations that are passed back on the judicial system, as opposed to giving deference to the federal agency with respect to the interpretation of statutes via regulation. So just to back up just a minute, you know, when Congress passes a statute, it typically gives authority to one of the federal agencies to pass rules, guidance to help flesh out what compliance with that statute would look like. And so when new administrations come in, they really want to have the ability to have their understanding or interpretation within the bounds of the law that's already established, to have those sort of guide the way in which that administration will enforce those statutes.

And so there's a number of ways that they can do that. You might have heard in today's presentation of reference to the Administrative Procedures Act, which is the federal act that governs how an agency operates and how it will pass those regulations and what process it has to follow. And so if an administration wants to sort of kind of get rid of everything up to a point – because it can only go back

so far – the Congressional Review Act can only cover so many regulations from the prior administration. It could, if Congress and the President were aligned, kind of move in tandem to kind of tick through the different regulations and try to basically void them. And once they've been voided, no regulations addressing the same topics can be passed. So they do have to think sort of strategically about that, because there could be portions or parts of a set of regulations or rules that the administration may want to keep or may want to be able to pass further guidance on, and if they get rid of it, they won't be able to do

[Savanna]
I will also add – I went back and I found the question – and in direct response, I will say words like discretion and deference get thrown around a lot when you're talking about legal concepts, and so deference isn't something that just applies in in the regulation sense. You'll sometimes hear it talked about in agency ability to move around federal funds as well, but they're two separate things. So this regulatory process and this appropriations process both exist at the federal level, and they intersect at some points, but they're two separate things legally.

[Allison]
Yes, thank you. That's great. We've gotten quite a few questions around ICE and some more specifics around dealing with that, and we will spend a good bit likely of the next webinar talking some more about that. There's a question – I see at least one, there's probably more than one – around public versus private spaces, and that really is a fact-specific determination under the law. So it could ultimately be a decision by the courts. And so what we can provide you is with indicators of where the courts have gone with respect to determining what is a public versus a private space.

And so one of the indicators is who is allowed into that space? So someone specifically was asking, "Well, what if we're allowing parents into the space? Does that now make the Head Start space a public space?" And you know, if the space is restricted to the children, the teachers, the parents, there is some person that they have to pass through. Maybe there's a guard in the building, or there's some process that has to be followed through in order for the person to get back to where the classrooms are, then it's possible that the space that parents and children have access to is restricted in such a way that it would be considered a private space and not a public space. There's just a whole host of factors that will be looked at, characteristics that will be looked at to help inform when a space is public or private. I know that doesn't necessarily make you feel great with respect to, "I need to know it now." And so in the next webinar, we'll try to list out a few more of those that that could factor into decisions that are made on the ground with respect to if this space is public versus private.

There are other things you can do, like putting up signage to designate that this is a private space, but you do need to be thoughtful about it, is it truly a private space? In other words, is somebody able to open the front door of the building and walk down the hall and into a space that you've now deemed to be private, but that person is a friend of the organization, so they know that they can do that. You're going to have to exercise – you're going to be very diligent in how you are treating the spaces so that it truly falls within more of a private space versus a public space.

[Emily]
If I can, in our last minute, I'm happy to rapid fire go through a couple of the other immigration clarification questions so that everyone can leave here today with some clarity on some of those questions that are at least easy for me to answer in the next probably 30 seconds. One question was, if ICE comes in and asks for a specific employee, are we required to get that employee and bring them to ICE? No, you're not required to do that, not required to assist them in that way.

In terms of CSBG and Head Start services, yes, those services are currently available to undocumented immigrants. There was a question in the chat, you know, we're not necessarily saying that will change. That's how the law is right now, but it's obviously really hard to know what's coming in the immigration space. But we're just speaking to right now, CSBG and Head Start services are available to those undocumented immigrants.

And then I saw some questions about putting this into a toolkit or some other resource our guidance on ICE. We do have some guidance with respect to ICE visits and also guidance on immigration restrictions on eligibility for public benefits, and we'll provide that information when we follow up about the webinar next week – we'll send them over email.

[Allison]
Thank you, Emily. So we've hit time, but I see there's quite a few – or a handful of questions around, please cover concerns about CSBG. And I think maybe you're asking about maybe the existence of CSBG. Maybe, I'm not entirely sure. But to be clear, that is sort of outside of our territory with respect to how Congress is going to go about how they're going to manage CSBG, or whether or not they're going to continue to fund any and all of our programs. We really won't know that until the continuing resolution that's currently in place ends in, I believe, early March, and then Congress and the President work together to determine what Appropriations Act will go into place, hopefully, or another continuing resolution to fund the government through the end of the federal fiscal year, which is September 29/ September 30.

Okay, I think that's it for now. Thank you so much for all of these thoughts, questions. Again, we look forward to seeing everybody next week, next Wednesday. So please join us again. Bring all your questions with you and we're going to try to go through as many of them as we can. I don't know if any of my colleagues have anything else they want to say,

[Jon]
No, some great questions in the chat and we'll get to those next week. Thank you very much.

[Savanna]
Thanks for joining us, everybody.

[Allison]
Bye.