No. 25-1727

IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

ASSOCIATION OF AMERICAN UNIVERSITIES; AMERICAN COUNCIL ON EDUCATION; ASSOCIATION OF PUBLIC AND LAND-GRANT UNIVERSITIES; BROWN UNIVERSITY; CALIFORNIA INSTITUTE OF TECHNOLOGY; CORNELL UNIVERSITY; BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS; MASSACHUSETTS INSTITUTE OF TECHNOLOGY; REGENTS OF THE UNIVERSITY OF MICHIGAN; BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY; TRUSTEES OF PRINCETON UNIVERSITY; UNIVERSITY OF ROCHESTER,

Plaintiffs-Appellees,

v.

DEPARTMENT OF ENERGY; CHRIS WRIGHT, in the official capacity as Secretary of the Department of Energy,

Defendants-Appellants.

On Appeal from the United States District Court for the District of Massachusetts

REPLY BRIEF FOR APPELLANTS

BRETT A. SHUMATE
Assistant Attorney General

AUGUST E. FLENTJE
JENNIFER L. UTRECHT
Attorneys, Appellate Staff
Civil Division, Room 7710
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 353-9039

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes:

Regulations:

Other Authorities:

INTRODUCTION

In a "Policy Flash" issued in April 2025, the Department of Energy announced a new policy governing the reimbursement of "facilities and administrative" or "indirect" research costs to institutions of higher education that are recipients of Department research grants. Specifically, the Policy Flash states that future grant awards to these institutions "will default" to a 15% indirect cost reimbursement rate. ADD.54. The Policy Flash also announces that the Department is—under separate notice and guidance—"undertaking action to terminate all grant awards to [institutions of higher education] that do not conform with this updated policy." ADD.54.[1]

Contrary to plaintiffs' assertions, the Policy Flash does not violate regulations governing the Department's approval of indirect cost rates. Plaintiffs assert that the regulations require federal agencies to use negotiated rates embodied in Negotiated Indirect Cost Rate Agreements except in allegedly narrow circumstances. But the governing regulation has no such

[1] On January 27, 2026, the Department of Energy issued a new guidance announcing that the Policy Flash at issue in this litigation had been superseded by legislation enacted on January 23, 2026 and was "no longer in effect" as of the effective date of that legislation. Dep't of Energy, *PF 2026-30 Indirect Cost Rates, Policy Flashes and Financial Assistance Letter No Longer in Effect Due to the Commerce, Justice, Science; Energy and Water Development; and Interior and Environment Appropriations Act, 2026* (Jan. 27, 2026), https://perma.cc/RSJ7-E26F.

limitation. Instead, that regulation provides that federal agencies "may use a rate different from the negotiated rate" for a "class of Federal awards . . . when approved by the awarding Federal agency in accordance with paragraph (c)(3) of this section." 2 C.F.R. § 200.414(c)(1). Subsection (c)(3), in turn, does not impose any substantive limitations on the Department's actions to exercise that authority to use a different rate for a class of awards. Rather, it sets forth a procedural requirement—it tasks the Department with defining the class and making publicly available "the policies, procedures and general decision-making criteria that their programs will follow to seek and justify deviations from negotiated rates." *Id.* § 200.414(c)(3). That is exactly what the Policy Flash does: it publicly announces a "polic[y]" that will be used on a prospective basis to "justify," *id.*, the approval of grants that "use a rate different from the negotiated rate," *id.* § 200.414(c)(1). That justification applies to a finite "class of Federal awards"—awards to institutions of higher education. *Id.*

This case thus differs significantly from this Court's recent decision in *Massachusetts v. NIH*, Nos. 25-1343, 25-1344, 25-1345, 2026 WL 26059 (1st Cir. Jan. 5, 2026), which declared a less targeted effort to curb indirect costs by the National Institutes of Health (NIH) to violate substantively identical regulations that govern grants administered by that agency. There, this Court recognized that the relevant regulation permits NIH to approve a deviation from the negotiated indirect cost rate for a "class" of federal awards. *Id.* at *10 (quotation marks omitted). But in contrast to the Department of Energy's Policy Flash, plaintiffs in *Massachusetts* challenged NIH's announcement of a 15% indirect cost rate for *all* future NIH grants, not simply grants to institutions of higher education. *Id.* This Court held that the Supplemental Guidance was unlawful because the policy was not limited to a "finite subset of all federal awards." *Id.*

This Court also held that NIH's substantively identical regulations require a "two-step sequential process" that requires the agency to set forth its policies *before* approving a deviation. *Massachusetts*, 2026 WL 26059, at *11. The Court held that the NIH Supplemental Guidance, which "impose[d] a 15% rate" effective immediately on existing grants "in one fell swoop," violated this requirement. *Id.* (quotation marks omitted); *see also id.* (noting that NIH "concede[d] that it did not abide by a two-step sequential process"). But the Policy Flash does not have this same effect. On its face, the Policy Flash simply states the Department's new policy that future grants to institutions of higher education will "default" to a 15% rate. That announcement has no immediate effect, because the Department does not "use a rate different from the negotiated rate" until it actually approves a grant with those terms. 2 C.F.R. § 200.414(c)(1). Nor does the Policy Flash purport to "approve" a lower rate for existing grants. Instead, it states only that the Department is undertaking separate actions to terminate existing grants that reflect a higher indirect cost rate. ADD.54. Put differently, the Policy Flash does not violate the two-step process described in *Massachusetts*, it instead serves as the first step in that process.[2]

The Policy Flash is also reasonable and reasonably explained. Although succinctly stated, the Department explained its reasoning for adopting a default 15% indirect-cost reimbursement rate for institutions of higher education, including that spending on indirect costs crowds out funding for direct medical research. Plaintiffs' suggestion that the Department should have given an even fuller explanation finds no footing in the Administrative Procedure Act's (APA) requirements. And plaintiffs' concern about reliance interests is particularly misplaced with respect to the portion of the Policy Flash that announces a policy that applies to future grants; plaintiffs can have no legally protectible reliance interests in grants that have not yet been awarded.

---

[2] *Massachusetts* also held that the Tucker Act did not preclude district court jurisdiction over plaintiffs' challenge to the NIH Supplemental Guidance. 2026 WL 26059, at *4-6. For the reasons explained in the government's opening brief in this case, the government believes that this was erroneous, and it preserves those jurisdictional arguments for further review.

Finally, plaintiffs erroneously claim that the Policy Flash is impermissibly retroactive. The announcement of a rate policy that applies to future grants plainly cannot be retroactive. And even as to existing grants, the Policy Flash applies only on a prospective basis, not to costs previously incurred. For the reasons set forth below, this Court should reverse.

ARGUMENT

I. The District Court Lacked Subject-Matter Jurisdiction Over Plaintiffs' Claims

The Administrative Procedure Act provides a limited waiver of the federal government's sovereign immunity for claims seeking non-monetary relief, but that waiver does not apply "'if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.'" *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 215 (2012) (quoting 5 U.S.C. § 702). That carve-out "prevents plaintiffs from exploiting the APA's waiver to evade limitations on suit contained in other statutes." *Id.*; *see, e.g.*, *Berman v. United States*, 264 F.3d 16, 21 (1st Cir. 2001) (holding that § 702 did not waive immunity where "other statute"—there, a tax statute—"expressly forbids" the relief sought (quotation marks omitted)).

The government's opening brief established that the Tucker Act precludes jurisdiction over plaintiffs' challenge to the portion of the Policy Flash that affects the terms for their existing grants. Opening Br. 21-38. That

Act provides that the "United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded" on "any express or implied contract with the United States." 28 U.S.C. § 1491(a)(1). The Tucker Act thus "impliedly forbids" bringing "contract actions" against "the government in a federal district court." *Albrecht v. Committee on Emp. Benefits of the Fed. Rsrv. Emp. Benefits Sys.*, 357 F.3d 62, 67-68 (D.C. Cir. 2004) (quotation marks omitted). This includes actions, like plaintiffs' here, seeking to "protect their right to maintain" the indirect cost reimbursement rates incorporated into their existing grant awards. ADD.14 (emphasis omitted).

After plaintiffs' response brief was filed in this case, this Court decided *Massachusetts v. NIH*, Nos. 25-1343, 25-1344, 25-1345, 2026 WL 26059 (1st Cir. Jan. 5, 2026), which held that the Tucker Act did not preclude an APA suit challenging an NIH policy that announced an across-the-board cap on indirect cost rates for all future grants and for existing grants to institutions of higher education. *Id.* at *5-6, *10. In support of this, this Court relied upon *NIH v. American Public Health Ass'n* (*APHA*), 145 S. Ct. 2658 (2025), in which the Supreme Court stayed a district court order enjoining the termination of various grants but declined to stay an order that enjoined various guidance documents setting forth a policy of prohibiting NIH from funding certain types of research. *Massachusetts*, 2026 WL 26059, at *4-5. Citing Justice Barrett's "controlling concurrence" in that case, this Court reasoned that a majority of the Supreme Court believed that challenges to "agency-wide policies"—as opposed to "challenges to the withholding of contractually awarded funds that result from those policies"—belong in district court. *Id.* at *5. From this, the Court concluded that plaintiffs could properly challenge the NIH policy in district court, because the issuance of the guidance announcing that policy "is a separate agency action from the withholding of funds promised under the grant agreements." *Id.* at *6.

The government recognizes that this Court's rejection of the Tucker Act argument in *Massachusetts* likely forecloses its jurisdictional arguments in this related appeal. Nevertheless, we briefly reiterate those arguments here in order to preserve our arguments that *Massachusetts* was wrongly decided for further review. Although *Massachusetts* correctly recognizes that the APA does not permit district courts "to order relief designed to enforce any '"obligation to pay money"'" under a grant, *APHA*, 145 S. Ct. at 2659 (quoting *Department of Educ. v. California*, 604 U.S. 650, 651 (2025) (per curiam)), the Tucker Act's preclusive scope is not limited to claims in which a party challenges the withholding of contractually awarded funds. Rather, it encompasses *any* claim "founded" on "any express or implied contract with the United States." 28

U.S.C. § 1491(a)(1). That is why a majority of the Supreme Court in *APHA* held that the APA both prohibits district courts from issuing an order "designed to enforce any '"obligation to pay money"' pursuant to those grants" *and* "does not provide the District Court with jurisdiction to adjudicate claims 'based on' the research-related grants." 145 S. Ct. at 2659.

Furthermore, unlike the agency guidance describing how institutions and components of NIH should exercise their discretion relating to grants in *APHA*, plaintiffs' challenge to the Policy Flash is not "legally distinct" from a breach of contract claim. 145 S. Ct. at 2661 (Barrett, J., concurring in the partial grant of the application for stay). As discussed below (*infra* pp. 10-18), plaintiffs' principal contention on the merits is that the Department's governing regulations require the Department to announce the policies, decision-making criteria, and procedures that will be used in the future to justify the Department's approval of the use of an indirect cost rate that deviates from the recipients' negotiated indirect cost rates. Plaintiffs claim that the Policy Flash is unlawful because it simultaneously announces the policy and approves the use of a default rate other than the negotiated rate.

That argument assumes that the Policy Flash is self-executing and immediately alters the terms of plaintiffs' existing grants. And if that is the case, then the Policy Flash is not merely a prospective guidance, it *is* the agency's announcement of new contractual terms. The Tucker Act precludes the district court from vacating that announcement, as such relief amounts to an order requiring the Department to perform according to their plaintiffs' preferred contractual terms. *See Spectrum Leasing Corp. v. United States*, 764 F.2d 891, 895 (D.C. Cir. 1985); *see also* Restatement (Second) of Contracts § 357 cmt. A (A.L.I. 1981), Westlaw (database updated Oct. 2024) ("An order of specific performance . . . orders a party to render the performance that he promised."); *Albrecht*, 357 F.3d at 67-68 ("[T]he Tucker Act impliedly forbids—in APA terms—not only the district court awards of money damages, which the Claims Court may grant, but also injunctive relief, which the Claims Court may not." (quotation marks omitted)); *Coggeshall Dev. Corp. v. Diamond*, 884 F.2d 1, 3 (1st Cir. 1989) ("Federal courts do not have the power to order specific performance by the United States of its alleged contractual obligations."); *Berman*, 264 F.3d at 21.

In a footnote, plaintiffs urge that the Policy Flash is "legally distinct" from any breach of contract claim because the Policy Flash states that termination of existing grants would occur "under separate notice and guidance." Br. 29 n.3 (quotation marks omitted). Plaintiffs suggest that this demonstrates that, like the guidance in *APHA*, the district court had authority to vacate the Policy Flash because "'vacating the guidance does not necessarily void decisions made under it.'" Br. 29 (quoting *APHA*, 145 S. Ct. at 2661 (Barrett, J., concurring in the partial grant of the application for stay)). But accepting this premise only underscores the flaws in plaintiffs' arguments on the merits. If the Policy Flash is *not* self-executing and some future action is required before the policy announced in the Policy Flash is incorporated into the terms of existing or future grants, then the Policy Flash serves as advanced notice of the Department's justifications for future use of a rate other than the negotiated rate, which is entirely consistent with plaintiffs' view of what the governing regulation requires.[3]

II. The Policy Flash Is Lawful

A. The Policy Flash Is Authorized By Regulation And Is Reasonably Explained

1. As the government's opening brief explained, the Policy Flash is consistent with, and indeed was issued expressly pursuant to, the applicable

[3] As plaintiffs note, the government agrees that the Tucker Act does not serve as an impediment to plaintiffs' challenge to the portions of the Policy Flash that announce a policy governing future grants. Br. 27; Opening Br. 37. But the relevant distinction we draw is not between existing and future grants, but rather, between agency actions that immediately alter the terms of existing contracts and those that merely guide future decisions. *APHA* suggests that challenges to the latter may proceed under the APA. *See APHA*, 145 S. Ct. at 2661-63 (Barrett, J., concurring in the partial grant of the application for stay). But challenges to the former clearly belong in the Court of Federal Claims, because vacating such actions would effectively mandate specific performance under the contract. *Cf. id.*

regulation governing indirect costs. That regulation provides that agencies generally will adhere to "negotiated rate[s]" for indirect costs. 2 C.F.R. § 200.414(c)(1). But it also provides an express authorization for agencies to depart from that approach. *See id.*

Specifically, agencies "may use a rate different from the negotiated rate for either a class of Federal awards or a single Federal award only when required by Federal statute or regulation, or when approved by the awarding Federal agency in accordance with paragraph (c)(3) of this section." 2 C.F.R. § 200.414(c)(1). Subsection (c)(3), in turn, provides that the "Federal agency must implement, and make publicly available, the policies, procedures and general decision-making criteria that their programs will follow to seek and justify deviations from negotiated rates." *Id.* § 200.414(c)(3). In other words, the regulation expressly contemplates that the Department may deviate from negotiated indirect-cost rates for a "class of Federal awards" provided that the Department publicizes "the policies, procedures and general decision-making criteria" that it will follow when approving deviations from the negotiated rates. *Id.* § 200.414(c)(1), (3).

That is what the Department of Energy did here. The Policy Flash—which is titled "Adjusting Department of Energy Grant Policy for Institutions of Higher Education (IHE)"—serves as the Department's public announcement of "the policies, procedures and general decision-making criteria" that it will use when approving grants whose terms deviate from negotiated rates. 2 C.F.R. § 200.414(c)(1), (3). The document announces the Department's new policy: that the Department will default to a 15% rate for all grants to institutions of higher education in order to "better balance the Department's twin aims of funding meaningful research and upholding its fiduciary duties to the American people" by directing more money from indirect costs to direct research or other appropriate uses. ADD.54. The Policy Flash also addresses the "procedures" that will apply to implement this policy. First, "[a]ll future Department grant awards to [institutions of higher education] will default to this 15 percent indirect cost rate." ADD.54. Second, the Policy Flash states that the Department is undertaking action to terminate grant awards to institutions of higher education that do not conform with the updated policy pursuant to 2 C.F.R. § 200.340(a), (b), and that recipients "subject to termination will receive separate notice and guidance." ADD.54.

Accordingly, the Department's issuance and implementation of the Policy Flash is unlike the indirect cost policy at issue in *Massachusetts*. 2026 WL 26059. That case concerned an NIH "Supplemental Guidance" that announced that the NIH would impose "a standard indirect rate of 15% across *all* NIH grants for indirect costs in lieu of a separately negotiated rate for indirect costs in every grant." *Id.* at *3 (emphasis added) (quotation marks omitted). This Court held that NIH's Supplemental Guidance violated substantively identical indirect-cost regulations governing NIH-administered grants for two reasons, neither of which are applicable to the Department of Energy's Policy Flash.

First, this Court noted that NIH's substantively identical regulation permits NIH to approve the use of a rate different than the negotiated rate for a "class of Federal awards." *Massachusetts*, 2026 WL 26059, at *10. This Court held that this means that NIH can approve a deviation for a "finite subset of all federal awards," but cannot issue a policy that, by its terms, "applies to more than grants awarded to [institutions of higher education]" and instead includes *all* awards issued by a particular agency. *Id.* Second, this Court held that the governing regulation provides for a "two-step sequential process": (1) "NIH announces 'the policies, procedures and general decision making criteria' upon which it 'will' -- in the future -- base its deviation decisions," and (2) NIH later "applies those policies, procedures, and criteria to determine whether a departure from the negotiated rate for a given award or an appropriately defined class of awards is 'justified.'" *Id.* at *11 (alteration omitted). This Court held that NIH had "concede[d] that it did not abide by a two-step sequential process in issuing the Supplemental Guidance" and therefore that the Supplemental Guidance violated the relevant regulation. *Id.*

By contrast, here, the Policy Flash plainly applies *only* to a "finite subset of all federal awards"—grants to institutions of higher education. *Massachusetts*, 2026 WL 26059, at *10; *see* ADD.53. Further, unlike the Supplemental Guidance at issue in *Massachusetts*, which made existing grants automatically subject to reimbursement at a 15% rate without need for future actions or approval and which NIH "concede[d]" did not comply with a two-step process, *Massachusetts*, 2026 WL 26059, at *11, the Policy Flash does not violate any requirement that there must be some temporal distance between the announcement of new policies, procedures, or decision-making criteria and the Department's approval of a grant with a non-negotiated rate. Rather, the Policy Flash sets forth a policy that a 15% rate will be the "default" the Department uses when approving future grants to institutions of higher education. But that announcement has no immediate effect; the agency does not "use" a rate that differs from the negotiated rate within the meaning of Subsection (c)(1) until a grant incorporating that rate into its terms has been approved by the awarding agency. Thus, for future grants, the two-step process of *Massachusetts* is readily met.

The same is likewise true with respect to the portion of the Policy Flash that affects existing grants. As already discussed above (at pp. 7-10), plaintiffs have argued in support of jurisdiction that their challenge to the Policy Flash is legally distinct from any breach of contract claim because vacating the Policy Flash does not require the government to void any contract-related determinations. *See* Br. 29-30. Plaintiffs thus seemingly concede that the Policy Flash has no immediate effect on the rates of existing grants but simply guides future agency grant determinations. There thus can be no merit to plaintiffs' argument that the Policy Flash violates the "sequential" process that *Massachusetts* describes. Rather, the Policy Flash represents the first step in that sequential process: it provides notice of the policy that will be used to justify further actions.

Indeed, the Policy Flash itself says the Department is undertaking separate action—under separate notice and guidance—to terminate all existing grant awards to institutions of higher education "that do not conform with this updated policy." ADD.54. And the business day following the issuance of the Policy Flash, plaintiffs received a notice informing them that the Department was conditionally terminating their grant awards and that they could "avoid termination of the[ir] grant awards" by renegotiating the grants and confirming agreement to "an updated indirect cost rate of 15 percent . . . effective as of

May 14, 2025"—30 days after the Policy Flash. JA287; JA371. This demonstrates that the Policy Flash is the first step this Court required in *Massachusetts* – it announces a policy that satisfies the procedural notice required by Subsection (c)(3). Consistent with plaintiffs' view of the regulatory requirements, the policy and procedures detailed in the Policy Flash will later be used in subsequent grant determinations to "justify" the approval of awards that use "a rate different from the negotiated rate." 2 C.F.R. § 200.414(c)(1), (3).

Plaintiffs theorize that the Policy Flash is unlawful because, in their view, the Department's authority is limited to approving deviations only in "narrow" circumstances, and the Department therefore cannot approve a policy that would authorize the use of non-negotiated rate for the "vast majority" of grants. Br. 36-37. But the regulation plainly permits the agency to use a rate different than the negotiated rate for a "class of Federal awards." That term is defined by regulation to include "a group of Federal awards . . . to a specific type of recipient or group of recipients"—*i.e.*, grants to institutions of higher education. 2 C.F.R. § 200.1. As *Massachusetts* recognized, this means that the Department can use a rate that differs from the negotiated rate for a "finite subset of all federal awards." 2026 WL 26059, at *10. That includes awards to institutions of higher education, which are not the only recipients of the Department's grants.

Plaintiffs identify nothing in the regulation to support their view that grants to institutions of higher education are too numerous to constitute a "class of Federal awards." Certainly, the term "deviation" itself imposes no such substantive restriction; a deviation is a "change from a customary or agreed-on course of action" that is "noticeabl[y] different[t] from what is expected." *Deviation*, Black's Law Dictionary (12th ed. 2024), Westlaw. And though plaintiffs assert that a deviation cannot be too extreme, they offer no workable test for discerning what kinds of deviations would or would not fall within the latitude that they concede the regulation allows.

Plaintiffs fare no better in arguing (Br. 38, 41-42) that the Policy Flash violates Subsection (c)(4)'s requirement that "[t]he Federal agency must include, in the notice of funding opportunity, the policies relating to indirect cost rate reimbursement." 2 C.F.R. § 200.414(c)(4). Plaintiffs urge that the purpose of this requirement is to ensure that potential grantees are aware of the amount of indirect-cost reimbursement they can receive "*before* they even apply for an award," which prohibits the agency from changing those terms during the course of an award. Br. 39; *see also Massachusetts*, 2026 WL 26059, at *11. But by its terms, this argument cannot invalidate the Policy Flash's announcement of a prospective policy that applies to future grants for which no notice of funding opportunity has yet issued.

Even as to existing grants, nothing in the text of Subsection (c)(4) purports to derogate from the Department's express authority to "use a rate different from the negotiated rate . . . when approved by the awarding Federal agency in accordance with paragraph (c)(3)." 2 C.F.R. § 200.414(c)(1); *see also id.* pt. 200, app. III(C)(7) (noting that an agency may decline to "use the negotiated rates in effect at the time of the initial award throughout the life of the Federal award" so long as it complies with 2 C.F.R. § 200.414(c)(1)). Nor does it prohibit the agency from announcing that it is taking separate action to terminate grants that are inconsistent with new agency priorities or policies. That question is instead addressed by the terms of separate regulations governing grant terminations. *Id.* § 200.340(a), (b). Subsection (c)(4) does not displace those provisions or otherwise limit an agency's power to terminate an award.

Plaintiffs also briefly assert (Br. 42) that the Policy Flash violates Subsection (f), which sets forth a de minimis rate that recipients of federal grants "that do not have a current Federal negotiated indirect cost rate . . . may elect" to use in lieu of negotiating such a rate. 2 C.F.R. § 200.414(f). Plaintiffs note that Subsection (f) states that "[r]ecipients and subrecipients are not required to use the de minimis rate." *Id.* But this merely reflects that recipients do not have to elect the de minimis rate, and may instead negotiate an indirect cost rate that will be used as the default rate across agencies under Subsection (c)(1) unless a different rate is "required by Federal statute or regulation," or is "approved by the awarding Federal agency in accordance with paragraph (c)(3)." *Id.* § 200.414(c)(1). In other words, Subsection (f) provides an alternative default rate for certain grant recipients. It does not abrogate the Department's authority to "use a rate different from the negotiated rate" so long as it complies with the procedural requirements of Subsection (c)(3).

Finally, plaintiffs do not support their view of the regulatory requirements through reliance (Br. 42-43) on inapplicable appropriations riders that limit the NIH's use of appropriated funds. As an initial matter, the appropriations riders on which plaintiffs rely do not apply to the Department of Energy, and at the time of the Policy Flash, Congress had not enacted similar restrictions on the Department's funds. Moreover, contrary to plaintiffs' characterization, the appropriations riders do not demonstrate that Congress believes the relevant indirect cost regulations to prohibit agencies from approving the use of a rate that differs from the negotiated rate for grants to institutions of higher education. To the contrary, as this Court explained in *Massachusetts*, the NIH appropriations riders direct NIH to apply its indirect cost regulation in the same manner that it did in fiscal year 2017, and "categorically preclude[]" NIH from implementing the regulation in a manner that would substantially expand the "fiscal effect of the approval of . . . deviations from negotiated rates." *Massachusetts*, 2026 WL 26059, at *6, *8 (second alteration in original) (quotation marks omitted). The imposition of these restrictions demonstrates that Congress understood that NIH's substantively identical regulation could lawfully be used to approve the use of a rate other than the negotiated rate for a large subset of grants in the absence of any further limitations.

On January 23, 2026, after plaintiffs' response brief was filed, President Trump signed into law the Commerce, Justice, Science; Energy and Water Development; and Interior and Environment Appropriations Act. Pub. L. No. 119-74. Section 313 of that Act directs that the Department of Energy, in making Federal financial assistance, "shall continue to apply the indirect cost rates, including negotiated indirect cost rates, as described in section 200.414 of title 2, Code of Federal Regulations, including with respect to the approval of deviations from the negotiated indirect cost rates, to the same extent and in the same manner as was applied in fiscal year 2024." *Id.* § 313. The Department recognizes that this legislation supersedes the Policy Flash at issue, and on January 27, 2026, the Department issued a new guidance stating that the Policy Flash is "no longer in effect" as of the effective date of this legislation. Dep't of Energy, *supra*. However, the appropriations rider postdates the Policy Flash and therefore has no bearing on the lawfulness of the Policy Flash when issued.

2. The Policy Flash also survives arbitrary-and-capricious review. "'The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency.'" *Sorreda Transp., LLC v. U.S. Dep't of Transp.*, 980 F.3d 1, 3 (1st Cir. 2020) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). The APA requires only that agency action be "reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021). That requirement is minimal; a court must "uphold [even] a decision of less than ideal clarity if the agency's path may reasonably be discerned." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-14 (2009) (quotation marks omitted). And where, as here, the agency action reflects a change in policy, "it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better." *Id.* at 515. To the extent that the agency's change in course unsettles any "serious reliance interests," the agency need only acknowledge and address those interests and explain why it is nonetheless pursuing its chosen policy. *Id.*

The Policy Flash satisfies those minimal burdens. *See* Opening Br. 47-54. The Policy Flash sets out the logic and factual basis underpinning NIH's decision to announce a new default policy governing indirect cost reimbursement. There, the Department explained how indirect cost rates have "typically" worked at the time of the notice. ADD.54. The Department acknowledged that there are reliance interests, explaining that it is "cognizant that many grant recipients use indirect cost payments to effectuate research funded by the Department's grant awards." ADD.53. And the Department explained why it was nevertheless adopting a new approach despite those reliance interests: reducing payment of indirect costs would permit the Department to focus its payments on the direct costs of the research it is funding—a more "appropriate use" in the Department's view. ADD.53 ("[I]ndirect cost payments . . . are not for the Department's direct research funding."). The Department also explained that the new policy would "improve efficiency and curtail costs where appropriate" in order to strike a policy-based "balance" between "the financial needs of grant recipients with the Department's obligation to responsibly manage federal funds." ADD.53.

Plaintiffs' response brief highlights, at great length and in considerable detail, (Br. 43-51), the significant extent to which they disagree with the Department's policy change. Those arguments do not, however, identify any legal defect in the Supplemental Guidance. When it comes to the wisdom *vel non* of an agency's announced policy, "reviewing courts must exercise appropriate deference to agency decisionmaking and not substitute their own judgment for that of the agency." *FDA v. Wages & White Lion Invs., LLC*, 604 U.S. 542, 567 (2025).

Plaintiffs acknowledge (Br. 49-51) that the Department listed reasons for its policy change but echo the district court's assertion that the Policy Flash is arbitrary because the Department failed to elaborate as to how reducing the money spent on indirect costs "would lead to that money being put to more appropriate and efficient uses." ADD.25. But in conducting arbitrary and capricious review, this Court must credit "any rationale that 'may reasonably be discerned' from the agency's decision," not only those rationales plaintiffs agree are sufficiently thorough. *Diaz-Valdez v. Garland*, 122 F.4th 436, 443 (1st Cir. 2024) (quoting *Garland v. Ming Dai*, 593 U.S. 357, 369 (2021)). It is thus sufficient that the Policy Flash states that the agency's changed approach is based upon a desire to "responsibly manage federal funds." ADD.53. As the Policy Flash explains, although indirect cost payments "effectuate research funded by the Department's grant awards, these payments are not for the Department's direct research funding." ADD.53. And because the Department has limited funds to spend on grant awards, it is self-evident that lowering the amount of money spent on indirect costs permits the Department to spend a greater proportion of its available funds on direct research costs or other "appropriate use[s]." ADD.53. That explanation satisfies the APA's minimal requirements.

Plaintiffs also echo the district court's concern that the Department failed to consider plaintiffs' reliance interests on the status quo, Br. 44-47, arguing that the Department failed to consider the effect this policy would have on their ability to continue to conduct research. But as discussed in the government's opening brief (at 50-51), nothing in the APA requires—or even allows—the Department to assume the intrusive function of instructing private universities about how best to obtain replacement funding, adjust their budgets or restructure their research operations in light of budget shortfalls. It is enough for the Department to acknowledge that institutions of higher education had long been the beneficiaries of generous indirect-cost funding, but to conclude that a policy change is nevertheless warranted for rational reasons, as the agency did here. *See Fox Television Stations*, 556 U.S. at 515; *see also American Petroleum Inst. v. U.S. Dep't of Interior*, 81 F.4th 1048, 1066 (10th Cir. 2023) ("Though an agency must adequately consider any '"legitimate reliance"' on an existing policy, such reliance is not 'necessarily dispositive' to the agency's decision"; "[a]n agency may conclude, for instance, that reliance interests were 'entitled to no or diminished weight' or outweighed by 'other interests and policy concerns.'" (emphasis omitted) (quoting *Department of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30-32 (2020))).

Moreover, plaintiffs' assertion that the Policy Flash does not account for grantees' reliance interests does not—and cannot—apply to plaintiffs' challenge to the portion of the Policy Flash that applies to future grants. In arguing to the contrary, plaintiffs assert that Negotiated Indirect Cost Rate Agreements are "negotiated for a period of several years," and that universities structure their affairs on the understanding that any future grant funding will "continue to allow them to recover" at that memorialized rate. Br. 46 & n.7 (quotation marks omitted). But even if plaintiffs have structured their affairs in this manner, they cannot have legally protectible reliance interests in the terms of grants that have not yet been awarded and that they may never obtain. *See National Org. of Veterans' Advocs., Inc. v. Secretary of Veterans Affs.*, 927 F.3d 1263, 1267-69, 1269 n.4 (Fed. Cir. 2019) (holding that amendment to regulations "d[id] not defeat veterans' reliance interests" because the amendment "applied only prospectively"). And that is particularly true where, as here, the governing regulation expressly permits awarding agencies to use rates other than the negotiated rate, at least insofar as the agency publicizes the policy that will justify that deviation in advance of using that different rate. The law does not guarantee that any future grants will reflect the same terms awardees may have previously enjoyed. There thus can be no argument that this aspect of the Policy Flash is arbitrary and capricious.

B. The Policy Flash Is Not Impermissibly Retroactive

Finally, the Policy Flash is not impermissibly retroactive. As discussed, the Policy Flash announces a policy for indirect cost reimbursement that applies only prospectively: it establishes a rate that will serve as the "default" rate for future grants to institutions of higher institutions. The Policy Flash does not change the rate of reimbursement for any costs incurred prior to its effective date. Rather, as to existing grants, the Policy Flash states only that the Department will take future action to terminate existing grants that do not comply with the new policy. The Policy Flash thus is plainly prospective in character. *See Martin v. Hadix*, 527 U.S. 343, 360 (1999) (finding no retroactivity problem in a statute to the extent it provided that, "going forward," attorneys "will earn a lower hourly rate than [they] had earned in the past").

That is true even though grant recipients may well have assumed that negotiated indirect-cost rates would continue indefinitely. As a legal matter, an enactment "does not operate 'retrospectively' merely because it . . . upsets expectations based in prior law." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 (1994) (citation omitted). Plaintiffs' arguments about prejudice from a midstream change in funding based on a new agency policy (Br. 53) simply parallel the attorneys' arguments in *Martin*, which two dissenting justices found persuasive but the majority did not. *Cf. Martin*, 527 U.S. at 369-70 (Ginsburg, J., concurring in part and dissenting in part) (lamenting that application of statute to pending case would "significantly alter[] the consequences of the representation on which the lawyer has embarked"). Though recipient institutions may well have made plans in reliance on existing rate arrangements, that suggests only that the Department's policy change has "impaired the future value of past bargains." *National Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 670 (D.C. Cir. 2009). Such "so-called secondary retroactivity," does not present a retroactivity problem. *Landgraf*, 511 U.S. at 293 n.3 (Scalia, J., concurring in the judgments) ("[T]he presumption against retroactivity is not violated by interpreting a statute to alter the future legal effect of past transactions . . . ." (citations omitted)). Rather, it implicates reliance interests to be considered under APA arbitrary-and-capricious standards. *See National Petrochemical & Refiners Ass'n v. EPA*, 630 F.3d 145, 158-59 (D.C. Cir. 2010).

Plaintiffs' retroactivity assertions are thus not only wrong but also underscore the contractual nature of this dispute. If plaintiffs truly believe that the Department has acted in a manner that has changed the "legal consequences [of completed] events," *Landgraf*, 511 U.S. at 270—*i.e.*, that the government has breached plaintiffs' contractual rights—the remedy they should pursue is the one that Congress has provided for in such circumstances. *See supra* pp. 5-10. The APA does not allow them to bypass that remedy.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

BRETT A. SHUMATE
Assistant Attorney General

AUGUST E. FLENTJE
/s/ Jennifer L. Utrecht
JENNIFER L. UTRECHT
Attorneys, Appellate Staff
Civil Division, Room 7710
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 353-9039

February 2026

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,269 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Calisto MT 14-point font, a proportionally spaced typeface.

/s/ Jennifer L. Utrecht
Jennifer L. Utrecht

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2026, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system.

/s/ Jennifer L. Utrecht
Jennifer L. Utrecht