UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AMERICAN COUNCIL OF LEARNED SOCIETIES,
633 Third Avenue, 8th Floor New York, NY 10017,

AMERICAN HISTORICAL ASSOCIATION,
400 A Street SE Washington, DC 20003,

MODERN LANGUAGE ASSOCIATION,
85 Broad Street, New York, NY 10004,

Plaintiffs,

v.

WILLIAM ENGLISH, in his official capacity as Acting Chairman of the National Endowment for the Humanities,
400 7th St SW, Washington, DC 20506,

NATIONAL ENDOWMENT FOR THE HUMANITIES,
400 7th St SW, Washington, DC 20506,

UNITED STATES DOGE SERVICE,
736 Jackson Pl NW Washington, DC 20503,

AMY GLEASON, in her official capacity as Acting Administrator of the United States DOGE Service,
736 Jackson Pl NW Washington, DC 20503,

NATE CAVANAUGH, in his official capacity as an employee of the U.S. DOGE Service or the General Services Administration,
1800 F St NW Washington, DC 20006,

JUSTIN FOX, in his official capacity as an employee of the U.S. DOGE Service or the General Services Administration,
1800 F St NW Washington, DC 20006,

Defendants.

No. 25 Civ. 3657 (CM)

THE AUTHORS GUILD, WILLIAM GOLDSTEIN, ELIZABETH KADETSKY, VALERIE ORLANDO, KATALIN BALOG, BENJAMIN HOLTZMAN, LEE JASPERSE, and NICOLE JENKINS, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

NATIONAL ENDOWMENT FOR THE HUMANITIES;

WILLIAM ENGLISH, in his official capacity as Acting Chairman of the National Endowment for the Humanities;

UNITED STATES DOGE SERVICE;

AMY GLEASON, in her official capacity as Acting Administrator of the United States DOGE Service;

NATE CAVANAUGH, in his official capacity as an employee of the U.S. DOGE Service or the General Services Administration; and,

JUSTIN FOX, in his official capacity as an employee of the U.S. DOGE Service or the General Services Administration,

Defendants.

No. 25 Civ. 3923 (CM)

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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Defendants National Endowment for the Humanities ("NEH"); William English, in his Official Capacity as Acting Chairman of the National Endowment for the Humanities; United States DOGE Service; Amy Gleason, in her Official Capacity as Acting Administrator of the United States DOGE Service; Nate Cavanaugh, in his official capacity as an employee of the General Services Administration; and Justin Fox, in his official capacity as an employee of the General Services Administration (the "Government")[1] respectfully submit this memorandum of law in opposition to the Authors Guild Plaintiffs' motion for preliminary injunction. Case No. 25 Civ. 3293, ECF No. 170.[2]

PRELIMINARY STATEMENT

Plaintiffs in *The Authors Guild v. National Endowment for the Humanities* (the "Plaintiffs" or "Authors Guild Plaintiffs") have prevailed in this class action challenging the Government's termination of NEH-awarded grants in April 2025. Pursuant to the permanent injunction entered on May 7, 2026, NEH has rescinded the termination of the grants and is working with grantees to restart their projects and resume funding. Plaintiffs have now moved for a preliminary injunction to reserve 15% of the reinstated grant funds for an attorney's fees award pursuant to the common fund doctrine. Plaintiffs do not specify how exactly this sum—which amounts to approximately

[1] When a public officer who is a party in an official capacity ceases to hold office while the action is pending, the officer's successor is automatically substituted as a party. Fed. R. Civ. P. 25(d). Michael McDonald is no longer the Acting Chairman of the National Endowment for the Humanities, and William English, who now holds that position, is automatically substituted as a defendant in his place. Additionally, Nate Cavanaugh and Justin Fox no longer occupy the positions in which they were sued in their official capacities, and there is no successor to those positions. Accordingly, the United States should be substituted for these officials as a defendant. *See Berenson v. Biden*, 791 F. Supp. 3d 398, 405 (S.D.N.Y. 2025) (substituting United States for defendant sued in their official capacity who no longer held position but for whom no successor had been named).

[2] Unless otherwise indicated, docket numbers cited are those in Case No. 25 Civ. 3657 (CM).

$7.5 million[3]—would be removed from the grant payments that will otherwise be owed to grantees, the vast majority of whom are class members who did not choose to retain Plaintiffs' counsel and have had no opportunity to object to this proposal, as they resume work under their grants. While Plaintiffs can certainly seek attorneys' fees directly from the Government pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412, Plaintiffs are not entitled to the preliminary injunction they seek through this motion.

First, Plaintiffs are unlikely to succeed on the merits of their argument that the common fund doctrine should apply in this case, due to the substantial legal and equitable concerns implicated by Plaintiffs' proposal to reserve a percentage of the grantees' funds for attorneys' fees. Plaintiffs' requested relief would deprive grantees of funding that may be essential to the successful completion of their projects, and would violate appropriations laws and grant regulations governing NEH's use of public funds that have been earmarked for grant awards. Troublingly, moreover, none of the class members other than the named Plaintiffs opted to be represented by Plaintiffs' counsel, and under Plaintiffs' proposal they will have no opportunity to object before a portion of their grant funds are set aside. Second, Plaintiffs have not shown irreparable harm absent injunctive relief. The 15% reservation of grant funds is not the only avenue for Class Counsel to be compensated for their efforts, because Plaintiffs can seek an attorneys' fees award directly from the Government pursuant to EAJA. The remaining factors—public interest and balance of the equities, which merge when the Government is the party opposing a motion for preliminary injunctive relief, *see Nken v. Holder*, 556 U.S. 418, 435–36

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[3] While the total amount of reinstated grant awards is approximately $100 million, the Authors Guild Plaintiffs will not seek a fee award with respect to the roughly $51 million in outstanding grant awards for members of the plaintiff organizations in the *ACLS* case. *See* Pls.' Br. at 9 n.3. Accordingly, the Authors Guild Plaintiffs request a 15% reservation of approximately $49 million in outstanding grant funds, amounting to approximately $7.5 million.

(2009)—also weigh in favor of the Government. Accordingly, Plaintiffs' motion for a preliminary injunction should be denied.

BACKGROUND

The Authors Guild Plaintiffs commenced this action on May 12, 2025 to challenge the termination in April 2025 of approximately 1,400 grants previously awarded by NEH. *The Authors Guild, et al. v. National Endowment for the Humanities, et al.*, No. 25 Civ. 3923, ECF No. 1. On May 14, 2025, the Court consolidated the Authors Guild Plaintiffs' action with *American Council of Learned Societies v. McDonald*, No. 25 Civ. 3657, ECF No. 52. On May 23, 2025, the Authors Guild Plaintiffs moved for a preliminary injunction. ECF Nos. 65-74. On May 27, 2025, the Authors Guild Plaintiffs filed an Amended Complaint. ECF No. 75. On May 30, 2025, Defendants moved to dismiss the consolidated actions. ECF No. 76.

On June 27, 2025, the Court ordered the parties to submit supplemental briefing on "how the Supreme Court's June 27, 2025 opinion in *Trump v. CASA* impacts the requests for relief in these cases[.]" ECF No. 105. In their supplemental brief, the Authors Guild Plaintiffs requested "preliminary certification" of two proposed classes pursuant to Federal Rule of Civil Procedure 23(b)(2): (1) the "Individual Grantee Class," comprised of "[a]ll individual NEH grant recipients whose grants were terminated as part of the Mass Termination"; and (2) the "Subrecipient Class," comprised of "[a]ll NEH grant subrecipients whose sponsors' grants were terminated as part of the Mass Termination." ECF No. 107 at 11-13; *see* Authors Guild Amended Complaint, ECF No. 75 ¶¶ 135–143.

On July 25, 2025, the Court granted in part and denied in part Plaintiffs' motion for a preliminary injunction and granted in part and denied in part Defendants' motion to dismiss. ECF No. 116. The Court enjoined the Government from re-obligating the terminated grant funds and directed "that these funds be 'escrowed' until we can hold a trial." *Id.* at 80-81. The Court also extended this preliminary relief to the proposed classes, finding that Plaintiffs' argument "appears sufficient, on its own, to provide a common legal question to all purported class-members, on which the named plaintiffs' claims are typical, and in connection with which Defendants acted against all members in the same manner." *Id.* at 79.

After the parties engaged in discovery, the Authors Guild Plaintiffs filed a Second Amended Complaint on March 4, 2026 (ECF No. 240) and filed a motion for class certification on March 5, 2026 (ECF Nos. 242-245). That motion proposed classes different than the classes the Court previously considered in connection with Plaintiffs' motion for a preliminary injunction. Rather than the Individual Grantee Class and a Subrecipient Class proposed in connection with the motion for preliminary injunction, the Authors Guild Plaintiffs sought to certify a single class consisting of "all NEH grant recipients whose grants were awarded on or after January 20, 2021 and terminated as part of the Mass Termination," with a "DEI" subclass consisting of members whose grants were marked for termination for "DEI," and a "Biden-era" subclass consisting of members whose grants were terminated without being marked as "DEI." ECF No. 243 at 6.

Between March and April 2026, the parties cross-moved for summary judgment as to three claims: (1) whether the Government engaged in viewpoint discrimination in violation of the First Amendment in terminating the grants, (2) whether the Government acted *ultra vires* without statutory authorization and displaced NEH Acting Chairman Michael McDonald and the statutorily authorized grantmaking process to effectuate the terminations, and (3) whether the terminations violated the grantees' equal protection rights. ECF Nos. 246-290. On May 7, 2026, the Court granted summary judgment in Plaintiffs' favor as to all three claims and certified the Authors Guild Plaintiffs' proposed classes. ECF No. 291. The Court entered a permanent injunction requiring the Government to rescind all termination notices and treat them as without legal effect, and prohibiting it from "reallocat[ing], obligat[ing], or otherwise dispos[ing] of funds associated with those awards on the basis of the Mass Termination or the unlawful grounds adjudicated in this Opinion and Order." *Id.* at 142. On May 29, 2026, the Authors Guild Plaintiffs filed the instant motion for a preliminary injunction requiring NEH to reserve 15% of grant disbursements to class members pending the adjudication of Plaintiffs' anticipated motion for fees. ECF No. 170-1 ("Pls.' Br.") at 8.

LEGAL STANDARDS

Plaintiffs intending to seek an attorneys' fees award under the common fund doctrine may seek a preliminary injunction ordering defendants to set aside a portion of funds pending a determination of whether attorneys' fees should be awarded. *See Savoie v. Merchants Bank*, 84 F.3d 52, 56, 58 (2d Cir. 1996). "A preliminary injunction 'is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.'" *Students for Fair Admissions v. U.S. Military Acad. at West Point*, 709 F. Supp. 3d 118, 129 (S.D.N.Y. 2024) (quoting *Grand River Enterprises Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007)); *see also Winter v. NRDC*, 555 U.S. 7, 24 (2008) ("A preliminary injunction is an extraordinary remedy never awarded as of right."). To demonstrate its entitlement to this "extraordinary and drastic remedy," a movant must clearly demonstrate: "(1) irreparable harm absent injunctive relief, (2) a likelihood of success on the merits, [] (3) public interest weighing in favor of granting the injunction," and (4) "that the balance of equities tips in his or her favor." *A.H. by & through Hester v. French*, 985 F.3d 165, 176 (2d Cir. 2021) (quotation marks and footnotes omitted). Where, as here, a movant seeks "to modify the status quo by virtue of a 'mandatory preliminary injunction' (as opposed to seeking a 'prohibitory preliminary injunction' to maintain the status quo)," the "standard for obtaining preliminary injunctive relief is higher." *A.H.*, 985 F.3d at 176 (quoting *Yang v. Kosinski*, 960 F.3d 119, 127 (2d Cir. 2020)). "In this circumstance, the movant must . . . make a *strong* showing of irreparable harm and demonstrate a *clear or substantial* likelihood of success on the merits." *Id.* (emphasis added; quotation marks omitted).

ARGUMENT

Plaintiffs are not entitled to injunctive relief because they do not make a clear showing that they are likely to succeed on the merits of their claims, that they will be harmed irreparably absent an injunction, or that the balance of the equities and the public interest weigh in their favor.

I. Plaintiffs Do Not Demonstrate a Likelihood of Success on the Merits

A. The Common Fund Doctrine Does Not Apply

Plaintiffs are unlikely to succeed in demonstrating that an attorneys' fees award under the common-fund doctrine is appropriate in this case. Under that doctrine, "[a] party recovering a fund for the benefit of others, in addition to himself, may recover his costs, including his attorney's fees, from the fund itself or directly from the other parties enjoying the benefit." *Savoie*, 84 F. 3d at 56 (citing *Christensen v. Kiewit-Murdock Inv. Corp.*, 815 F.3d 206, 210 (2d Cir. 1987)). As Plaintiffs acknowledge, "the common fund doctrine often applies in cases with a money damages award or a monetary settlement[.]" Pls.' Br. at 14; *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("[A] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole."). But this case does not involve money damages. Throughout this litigation, Plaintiffs have consistently characterized this action as seeking only injunctive relief, rather than money damages. *See* ECF No. 65-1 at 14 ("this lawsuit . . . seeks only declaratory and injunctive relief."); ECF No. 247 at 50 ("Damages, of course, are unavailable to Plaintiffs on their claims here."); Pls.' Br. at 10

("Plaintiffs did not request money damages"). Indeed, one of the primary issues throughout this litigation was whether this action belonged in the Court of Federal Claims pursuant to the Tucker Act because Plaintiffs' requested relief was effectively a request to reinstate the grants and resume payments thereunder. *See* ECF No. 278 at 21. In response, Plaintiffs consistently argued that the Tucker Act did not deprive the Court of jurisdiction to hear Plaintiffs' claims or grant relief because Plaintiffs "are not seeking [] an order" directing NEH to pay Plaintiffs their grant funds. ECF No. 247 at 46-47. Accordingly, the entire premise of Plaintiffs' jurisdictional argument rested on the fact that this case sought injunctive relief, rather than monetary damages. Plaintiffs cannot now argue that the grant awards are effectively akin to a fund of money damages for purposes of obtaining fees. There is, quite simply, no common fund from which to distribute attorneys' fees in this case.

To be sure, courts have, in certain circumstances, extended the common fund doctrine to cases involving only non-monetary injunctive relief when the litigation "conferred a substantial benefit on the members of an ascertainable class and where it is possible to spread the costs proportionately among the members of the class." *Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores*, 54 F.3d 69, 71 (2d Cir. 1995) (citation omitted). "This exception is premised on the equitable principle that 'persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense.'" *Id.* (quoting *Boeing*, 444 U.S. at 478). Plaintiffs identify several cases where courts have applied a percentage of the fund award under the common benefit doctrine, including cases involving the federal government. Pls.' Br. at 16. Two of the cases concerned attorneys' fees awards paid out of monetary settlements with the government and are therefore inapplicable here. *See Swedish Hosp. v. Shalala*, 1 F.3d 1261, 1272 (D.C. Cir. 1993) (upholding district court award of 20% of common fund monetary settlement as attorneys' fees in action challenging the Department of Health and Human Services' photocopying reimbursement policy); *Nat'l Veterans Legal Servs. Program v. United States*, 724 F. Supp. 3d 1, 31 (D.D.C. 2024) (awarding attorneys' fees under lodestar method for common fund monetary settlement in action challenging Public Access to Court Electronic Records (PACER) fees). And while the two other cases Plaintiffs cite involved injunctive relief of some type, they did not involve a situation like that at issue here, where the funds are to be paid out to grant holders over time as they perform work on their grants. Rather, these cases involved a reserve of funds that was either specifically set aside to compensate plaintiffs or would otherwise have been paid to plaintiffs from a defendant's funds. *Compare, e.g., In re Black Farmers Discrimination Litig.*, 953 F. Supp. 2d 82, 85-86 (D.D.C. 2013) (awarding attorneys' fees from $100 million common fund established through Congressional appropriations to resolve administrative claims for plaintiffs seeking recovery from the U.S. Department of Agriculture under 2008 Farm Bill); *Sprague v. Ticonic Nat. Bank*, 307 U.S. 161, 163 (1939)(district court could award costs from common fund of bank bond proceeds to plaintiff who successfully "enforced the fiduciary obligation" of the defendant bank to maintain plaintiff's trust deposits secured by the bonds). The Government is not aware of any case in which a court has applied the common fund doctrine in a circumstance comparable to that at issue here, where Congressionally-appropriated funds to be paid to grantees over time pursuant to their grant agreements and in exchange for work on their grants would be reduced by a substantial percentage.

Furthermore, the Court's certification of an injunctive relief class pursuant to Federal Rule of Civil Procedure 23(b)(2) means that none of the grantees (other than the named Plaintiffs) have any recourse to challenge the proposed 15% reservation. *Hecht v. United Collection Bureau, Inc.*, 691 F.3d 218, 222 (2d Cir. 2012) ("Absent class members have a due process right to notice and an opportunity to opt out of class litigation when the action is 'predominately' for money damages . . . . Rule 23 protects that right by providing a parallel statutory requirement of notice and the opportunity to opt out for class certified under subdivision (b)(3)."). While class members would have an opportunity, pursuant to Rule 23(h), to object to Class Counsel's ultimate motion for fees, Plaintiffs' requested preliminary injunction would set aside a portion of class members' grant funds in the very near future, and well before any attorneys' fees motion is filed or decided. *See* Pls.' Br. at 6 ("This motion is necessary because Plaintiffs expect that [NEH] will resume making grant payments in the very near future – before time for appeal has run and, therefore, before a fee request can be filed or adjudicated . . . . Plaintiffs respectfully request a preliminary injunction requiring NEH to reserve 15% of grant disbursements to class members to ensure the availability of funds for any award the Court may issue.").

Plaintiffs have not sought a notice and opt-out period in connection with their requested preliminary injunction, and do not propose a specific mechanism for how NEH should reserve the 15% portion of the grant funds (such as reducing the total grant award by 15%, reducing each payment installment to grantees by 15%, or reducing the final payments to grantees by 15%). Plaintiffs have indicated that they are open to discussing different options to implement the 15% reservation from the class members' grant payments. But any mechanism will necessarily impact at least some grant holders before a motion for fees would be adjudicated. Taking 15% from each grant payment would impact each grant holder immediately. Even in a situation where NEH delayed the 15% reservation until issuing the grantees' final payment or payments, however, this reservation would disproportionately harm certain grantees and impact whether grantees are able to complete their projects. Grantees would be required to complete their project with substantially less funding than they were awarded without any notice or opportunity to object or opt-out.

Grantees who have only a few months remaining in their performance period (and who therefore may be entitled to receive a final payment before the adjudication of a final fee award) may decide not to complete their projects at all given the reduction in their final payments.

Finally, Plaintiffs argue that the 15% reservation is reasonable because "the named plaintiffs fully support the anticipated request" and that the percentage of Plaintiffs' requested fees "will be substantially lower than the 25% contingency percentage to which all the named plaintiffs agreed at the start of the case." Pls.' Br. at 6, 19. While the named plaintiffs may unsurprisingly agree with an approach that reduces their own fees by spreading them to other class members, that in itself does not make it reasonable to impose a 15% reduction on class members who have not had an opportunity to consent or object to that arrangement.

Given these unprecedented features of the injunctive relief granted here, the common fund doctrine should not apply in this case.

B. Plaintiffs' Requested Relief Violates Federal Law

The injunctive relief at issue in this case is the reinstatement of NEH's grant funding to grantees. Federal appropriations laws closely regulate NEH's use of funds that have been obligated for particular uses, and Plaintiffs' 15% fee reservation request cannot be squared with these statutory and regulatory requirements. As Plaintiffs acknowledge, the grant awards at issue in this case represented "over $100 million in congressionally appropriated funds already awarded to scholars and institutions across the country." Pls.' Br. at 8-9. Under the applicable regulations, public funds may only be used for the purposes for which they were established. *See* 31 U.S.C. § 1301(a) ("[A]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."). Here, Congress authorized NEH's chairperson to use these funds to administer grants pertaining to: "the pursuit of a national policy for the promotion of progress and scholarship in the humanities"; "research and teaching potential of the

United States in the humanities"; "training and workshops in the humanities"; "programs and research" with "substantial scholarly and cultural significance"; and programs and research that "reach, or reflect the diversity and richness of our American cultural heritage," including "a minority, inner city, rural, or tribal community." 20 U.S.C. § 956(c); *see also e.g.,* Pub. L. No. 117-328, 136 Stat. 4459, 4817 (Dec. 29, 2022) (NEH's annual appropriations "shall be available for" specific activities, including "support of activities in the humanities . . . and for administering the functions of the [National Foundation on the Arts and the Humanities Act of 1965]" and "carry[ing] out the matching grants program pursuant to section 10(a)(2) of the Act"); Pub. L. No. 118-42, 138 Stat. 25, 281-82 (Mar. 9, 2024) (same).

By awarding funding to particular grants, NEH obligates those funds to specific awards for specific project purposes. NEH lacks the statutory authority to "reprogram" or use the obligated funds for a different purpose (such as attorneys' fees incurred in litigation) without congressional approval. *See, e.g.,* Joint Explanatory Statement of Division E – Department of the Interior, Environment, and Related Agencies Appropriations Act at 1, 2024, https://docs.house.gov/billsthisweek/20240304/FY24%20INT%20Conference%20JES%20scan%203.1.24.pdf ("Each department and agency funded in this Act is directed to follow the directions set forth in this Act and the accompanying statement and to not reallocate resources or reorganize activities except as provided herein or otherwise approved by the House and Senate Appropriations Committees through the reprogramming process as referenced in this Act."). Under the definitions set forth in the NEH's appropriations bills, "reprogramming" includes "any significant departure from the program described in the agency's budget justifications." *Id.* at 5. The use of grant funds to pay for attorneys' fees incurred in this litigation would represent a "significant departure" from NEH's stated budget justifications.

While federal grant regulations allow recipients to spend award funds on certain costs incurred in connection with fulfilling their grant obligations, these costs must be "necessary," "reasonable," and "allocable" to the project. 2 C.F.R. § 200.403(a). A blanket 15% reservation of each grant for attorneys' fees would certainly not be allocable to those grants, and in many instances may not be reasonable. For example, for grant recipients who only have a few months remaining in their grant performance periods, a 15% reservation for attorneys' fees may represent a disproportionate expenditure relative to the remaining scope of the project and would therefore be unreasonable. Moreover, federal regulations place the onus on recipients to ensure that any costs incurred are reasonable and proportional to the needs of the grants. *See, e.g.,* 2 C.F.R. § 200.400(a) (requiring grant recipients to ensure "efficient and effective administration of the Federal award through sound management practices"); § 200.400(b) (grant recipients are "responsible for administering [the award] in a manner consistent with Federal statutes, regulations, and the terms and conditions" of the grant). The grantee class members cannot ensure compliance with these regulations if their grant funds are used to pay attorneys' fees and the recipients themselves had no insight into how these costs were incurred and had no opportunity to review and approve any such expenses.

At least one court in this Circuit has found that even under the common benefit doctrine, an attorneys' fees award should not be "derived from the pockets of the claimants-beneficiaries" when doing so would violate federal law. In *Jordan v. Fusari*, plaintiffs brought a civil rights class action challenging the constitutionality of the state of Connecticut's unemployment compensation benefits statute. 422 F. Supp. 1179, 1180-81 (D. Conn. 1975). The parties reached a settlement and the court awarded 10% of the benefits paid to the class as attorneys' fees. *Id.* at 1181. The defendant was ordered to deduct this amount from each claimant's award and pay the sums to plaintiff's counsel on a monthly basis. *Id.* The defendant subsequently requested reconsideration of and appealed the attorneys' fees award, arguing that deducting attorneys' fees from each claimant's benefits violated federal and state law. On appeal, at the request of the Second Circuit, the U.S. Department of Labor submitted "definitive views" that under federal law, "moneys in the unemployment fund of a state are to be used 'solely in the payment of unemployment compensation'" rather than attorneys' fees. *Jordan v. Fusari*, 496 F.2d 646, 649 (2d Cir. 1974) (quoting 26 U.S.C. § 3304(a)(4); 42 U.S.C. § 503(a)). This argument gave the Second Circuit panel "substantial pause," and the case was remanded to the district court for reconsideration. *Id.* at 649, 650. On remand, the district court found that while the common benefit doctrine applied, "money to compensate plaintiff's counsel may not be derived from the pockets of the claimants-beneficiaries." *Jordan*, 422 F. Supp. at 1183. Instead, "when pecuniary benefits have been conferred upon a class, but the payment of fees by that class is inappropriate, a defendant may be held liable for fees under a common benefit approach." *Id.* Accordingly, the court awarded attorneys' fees based on plaintiff's counsel's lodestar (rather than a percentage of plaintiff's recovery) to be paid by the defendant from sources other than the class members' unemployment compensation benefits. *Id.* at 1183-85 (citing *Brewer v. School Bd. of City of Norfolk*, 456 F.2d 943, 951-52 (4th Cir. 1972) (ordering defendant school district to pay attorneys' fees when charging beneficiaries of injunctive relief ordering defendant to provide free busing would "defeat the purpose of relief"); *Holodnak v. Avco Corp.*, 381 F. Supp. 191, 206 (D. Conn. 1974), *rev'd in part on other grounds* 514 F.2d 285 (2d Cir. 1975) (imposing attorneys' fee award on defendant employer when imposing such an award on union employees who received benefit of litigation would frustrate the purpose of the injunctive relief)). Similarly here, the allocation of a portion of the class members' grant funds for the payment of attorneys' fees would violate federal appropriation and NEH's grant regulations. Plaintiffs are therefore unlikely to succeed in showing that the Court should award attorneys' fees from the class members' grant funds, rather than requiring Plaintiffs to seek fees based on counsel's lodestar directly from the Government pursuant to EAJA.

C. Plaintiffs' Requested Relief Would Not Be Equitable

Finally, "it is within the court's equitable discretion to award fees and costs under the common benefit doctrine." *In re Estate of Maniaci-Canni*, No. 10 Civ. 958 (AKT), 2013 WL 5314348, at *4 (E.D.N.Y. Sept. 10, 2013) (citing *Victor v. Argent Classic Convertible Arbitrage Fund L.P.*, 623 F.3d 82, 86 (2d Cir. 2010)). Courts in this Circuit have declined to apply the common benefit doctrine when an attorneys' fees award would not serve the equitable purposes of the doctrine. *See, e.g., Sylla v. Amazon Labor Union*, 820 F. Supp. 3d 180, 199 (E.D.N.Y. 2026) (declining common fund attorneys' fee award when award would not be equitable because costs could not be proportionally spread among the beneficiaries); *Ferreira v. Local No. 145 Serv. Trades, Chauffeurs, Salesmen & Helpers, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. (Teamsters Loc. Union No. 145)*, 633 F. Supp. 133, 135 (D. Conn. 1985) (declining attorneys' fees under common benefit doctrine when such an award "would not distribute the cost of the suit fairly and evenly among the beneficiaries"); *In re Estate of Maniaci-Canni*, 2013 WL 5314348, at *8 (declining to award attorneys' fees when "the equitable considerations which would warrant recovery under the common benefit doctrine . . . are not present in this case.").

In this case, it would not be equitable to award Plaintiffs attorneys' fees by reserving 15% of the grantees' awards. As an initial matter, Plaintiffs' 15% reservation would amount to approximately $7.5 million. A fee award in that amount would almost certainly far exceed the actual fees and expenses counsel incurred in this case, which took only approximately one year to litigate, and the Court should not allow counsel to be disproportionately enriched at the expense of the grantees. In addition, as the Court found in its Decision and Order on the Government's motion to dismiss, the grant awards are contracts that contain numerous terms and conditions regarding the receipt and use of grant money. ECF No. 116 at 45-47. These contracts require grantees to perform specific work over specific periods in exchange for public funds. Reserving 15% of the grant funds for attorneys' fees would require the grantees to complete the agreed-upon scope of work with only 85% of the funds they were awarded. This reduction in funding would directly impact the grantees' ability to successfully complete their projects and require them to complete their project with fewer resources. Such a reduction would also disproportionately harm certain grantees – such as individual grantees or smaller institutions – who may lack resources to complete their projects without the full funding and who are unable to secure additional funding to compensate for the 15% reduction. Moreover, if grantees are unable to complete portions of their project due to the reduction in funding, the Government would receive less of the public benefit of humanities research and scholarship than it bargained for in awarding the grant funding.

The Court of Appeals for the District of Columbia's decision in *Puerto Rico v. Heckler*—which Plaintiffs cite but do not discuss at any length, *see* Pls.' Br. at 2, 12—does not support a different result. 745 F.2d 709 (D.C. Cir. 1984). In that case, the Commonwealth of Puerto Rico successfully challenged the exclusion of a group of U.S. territories from health planning grants disbursed by the Department of Health and Human Services ("HHS"). *Id.* at 711. The district court's final judgment ordered HHS to disburse each territory's proportionate share of the grant funding, and Puerto Rico sought attorneys' fees to be paid out from each territory's grant disbursements under the common benefit doctrine. *Com. of Puerto Rico v. Schweiker*, 550 F. Supp. 472, 476 (D.D.C. 1982), *aff'd sub nom. Puerto Rico v. Heckler*, 550 F. Supp. 472 (D.C. Cir.);

Heckler, 745 F.2d at 712-13. On appeal, HHS argued that the governing grant statute prohibited the fee award because litigation costs to secure a grant were not among the statutorily enumerated uses for grant funds. *Id.* at 712. The court rejected that argument, finding that without the litigation, Puerto Rico and the other similarly situated territories would not have received any grant funds in the first place, and upheld the district court's award of fees under the common fund doctrine. *Id.*

Heckler is distinguishable from this case for several reasons. First, the relief granted in that case was the disbursement of a fixed grant amount, rather than the reinstatement of contracts that required the grantees to complete specific projects within a specific time period in exchange for receiving public funds. Second, this case involves individual grantees and academic institutions rather than U.S. territories, and therefore the equitable concerns arising from the reduction of these recipients' grant funding are distinct from the circumstances present in *Heckler*. Finally, as discussed above, the class members in this case have no opportunity to opt out or object to this reduction of their grant awards. By contrast, *Heckler* involved only five jurisdictions other than Puerto Rico, and the district court provided those jurisdictions with notice and an opportunity to object to the attorneys' fees award. *Id.* at 713 ("The district court, after providing for notice to, and receiving no objection from, the five jurisdictions affected, determined that Puerto Rico's request was reasonable . . . .").

D. Even Under the Common Benefit Doctrine, Any Attorneys' Fees Award Should be Based on Plaintiffs' Lodestar, Rather than a Percentage of the Benefit

Even if the Court were to apply the common benefit doctrine in this case, Plaintiff's anticipated request for a "modest percentage" of the benefit to the class (Pls.' Br. at 6) is inappropriate where, as here, the Court has granted only injunctive relief. Instead, Plaintiffs should be awarded fees based on their lodestar for actual hours billed and expenses incurred, particularly when their requested percentage (15%, for a total of approximately $7.5 million) would generate a fee award that almost certainly far exceeds counsel's actual billed hours and expenses. Plaintiffs selectively quote the American Law Institute's *Principles of the Law of Aggregate Litigation*'s section stating that "a percentage-of-the-fund approach should be the method utilized in most common-fund cases, with the percentage being based on both the monetary and nonmonetary value of the judgment or settlement" to justify the relief they seek. § 3.13(b) (Mar. 1, 2010). But the section they cite begins with "Subject to subsection (c)", which states that "Other than its use as a cross-check, *or in its use in cases seeking solely injunctive or declaratory relief*, the lodestar method should be limited to (1) situations in which fees will be awarded under a fee-shifting statute . . . or (2) cases in which the court makes a specific finding that the percentage method would be unfair or inapplicable based on the specific facts of the case." *Id.* at § 3.13(c) (emphasis added).

Indeed, even under the "common benefit" doctrine, courts have awarded fees based on an assessment of plaintiffs' counsel's lodestar (*i.e.*, the actual hours reasonably incurred, multiplied by a reasonable hourly rate) rather than a percentage of the fund. *See Donovan v. CSEA Local Union 1000, Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO*, 784 F.2d 98, 105-06 (2d Cir. 1986) (awarding attorneys' fees under common benefit doctrine based on attorneys' time billed in challenge to union election procedures); *New Leadership Committee v. Davidson*, 23 F. Supp. 2d 301, 303-304 (E.D.N.Y. 1998) (awarding attorneys' fees under common benefit doctrine based on attorneys' time billed in challenge to union practices under the Labor Management Reporting and Disclosure Act and the Labor Management Relations Act); *Jordan*, 422 F. Supp. at 1182-83 (awarding attorneys' fees under common benefit doctrine based on attorneys' time billed in civil rights class action challenging constitutionality of unemployment compensation statute).

For these reasons, Plaintiffs are unlikely to succeed on the merits of their argument that attorneys' fees should be awarded from a percentage of the class members' grant funds under the common benefit doctrine.[4]

II. Plaintiffs Have Not Shown Irreparable Harm

Plaintiffs have also failed to show irreparable harm. Irreparable harm is injury that is neither remote nor speculative[.]" *New York v. U.S. Dep't of Homeland Security*, 969 F.3d 42, 86 (2d Cir. 2020). "Only when the threatened harm would impair the court's ability to grant an effective remedy is there really a need for preliminary relief." *Rodriguez ex rel. Rodriguez v. DeBuono*, 175 F.3d 227, 235 (2d Cir. 1999) (quotation marks omitted).

Plaintiffs contend that they would suffer irreparable harm absent relief because "if the funds are not held in reserve, Plaintiffs would have no practical means of recovering any court-authorized fee award except through individualized efforts against hundreds of class members." Pls.' Br. at 26. Not so. As Plaintiffs themselves elsewhere acknowledge, Class Counsel can recoup their fees by pursuing an EAJA fee award directly against the government pursuant to 28 U.S.C. § 2412, rather than seeking funds from the class members' grant funds. Pls.' Br. at 25-26. In fact, Plaintiffs specifically contemplate seeking such a fee award and asking "that any such award offset (*i.e.*,

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[4] Because the Government contends that the common fund doctrine simply does not apply in this case, the Government does not address Plaintiffs' argument that they are entitled to fees from the common fund pursuant to the factors set forth in *Goldberger v. Integrated Res.*, 209 F.3d 43, 47 (2d Cir. 2000). Pls.' Br. at 7, 18-26. However, the Government disputes Plaintiffs' mischaracterizations of discovery in this case. For example, Plaintiffs claim that the Government "tried to withhold" an email "crucial to Plaintiffs' *ultra vires* claim," from the Acting NEH Chairman to DOGE-affiliated individuals stating that "it's your decision" to terminate grants. Pls.' Br. at 10-11. Plaintiffs assert that the Government withheld this email under the deliberative process privilege, and that the contents of this email was revealed only through counsel's efforts. Pls.' Br. at 10-11, 23. That is false. The Government never redacted the "it's your decision" portion of the email – either in the Administrative Record or in discovery – and subsequently voluntarily produced a full version of the email without any redactions.

reduce) the common-fund award, further decreasing the percentage-of-recovery award and associated multiplier." *Id.*

While courts have found that plaintiff's counsel may suffer irreparable harm without the reservation of a portion of a common fund because of the impracticality of "attempt[ing] to seek recovery from each of the" benefiting class members, Pls. Br.' at 26, that concern is not implicated where, as here, Plaintiffs are statutorily authorized to seek attorneys' fees directly from the defendant. Courts applying the common fund or common benefit doctrines seek to ensure that the class beneficiaries bear the cost of the attorney fee award, given the equitable concerns of unjust enrichment of the class and the general American principle that each party should bear its own costs in a litigation. *See Savoie*, 84 F.3d at 58 (acknowledging that plaintiffs' counsel "could not seek [attorneys'] fees from the Bank, absent a finding of bad faith, because a fee award against the Bank would not result in a pass-through of the costs to the trust customers who benefitted, at least in part, from the lawsuit."); *Ferreira*, 633 F. Supp. at 135 ("Under the American Rule 'each party in a lawsuit ordinarily shall bear its own attorney's fees unless there is express statutory authorization to the contrary.'") (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983)). But in this case, Plaintiffs are statutorily authorized to seek fees directly from the Government pursuant to EAJA. *Savoie*, 84 F.3d at 56 ("The common fund doctrine does not apply, however, when fees are sought from the assets of the losing party, and the fee award would not come from a common fund nor be assessed against persons who have derived benefit from the lawsuit."). Accordingly, Plaintiffs have not shown irreparable harm.

III. The Balance of the Equities and Public Interest Weigh Against Relief

The final two factors, balance of the equities and the public interest, also weigh in the Government's favor. *See Nken v. Holder*, 556 U.S. 418, 435–36 (2009) (final two factors merge when the government is the party opposing a motion for preliminary injunctive relief). "In determining whether the balance of the equities tips in the plaintiff's favor and whether granting the preliminary injunction would be in the public interest, the Court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief, as well as the public consequences in employing the extraordinary remedy of injunction." *Bionpharma Inc. v. CoreRx, Inc.*, 582 F. Supp. 3d 167, 178 (S.D.N.Y. 2022) (quotation marks omitted).

As an initial matter, because Plaintiffs cannot establish the first two factors necessary to obtain a preliminary injunction, "it is clear they cannot make the corresponding strong showings [on the second two factors] required to tip the balance in their favor." *Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1295 (D.C. Cir. 2009). The final two factors weigh in the Government's favor for other reasons. First, to support their assertion that the balance of hardships weighs in their favor, Plaintiffs reiterate their argument that "[i]f the funds are not reserved, Class Counsel will be without practical recourse to recover any award this Court authorizes." Pls.' Br. at 26. As discussed above, that argument is insufficient to meet the exacting standard needed to obtain a preliminary injunction. *See supra* Part II.

Second, Plaintiffs contend that "[t]he only burden on NEH will be the mechanics of accounting for the reserved funds." Pls.' Br. at 26. While it is true that there would be mechanical challenges involved in withholding a portion of each grantees' funds, and Plaintiffs do not explain how they propose NEH should do so, this argument ignores the greater legal context. As discussed above, reserving funds that were publicly appropriated for humanities grant awards to pay Class Counsel's attorneys' fees award would violate federal law and the terms of each grantee's agreement. *See supra* Part I. Plaintiffs further fail to acknowledge the impact that the 15%

reservation would have on the grantees themselves and their ability to complete their envisioned projects with only 85% of the funds they were previously awarded.

Accordingly, the balance of equities and the public interest militate against Plaintiffs' requested preliminary injunction.

CONCLUSION

For the foregoing reasons, the Court should deny the Authors Guild Plaintiffs' motion for a preliminary injunction.

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Respectfully submitted,

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