No. 12-454

IN THE

Supreme Court of the United States

DR. JAMES L. SHERLEY AND
DR. THERESA DEISHER,
Petitioners,

v.

KATHLEEN SEBELIUS, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

SAMUEL B. CASEY
JUBILEE CAMPAIGN
LAW OF LIFE PROJECT
801 G Street, N.W., Suite 521
Washington, D.C. 20001
(202) 587-5652

STEVEN H. ADEN
MATTHEW S. BOWMAN
ALLIANCE DEFENDING FREEDOM
801 G Street, N.W., Suite 509
Washington, D.C. 20001
(202) 393-8690

THOMAS G. HUNGAR
Counsel of Record
THOMAS M. JOHNSON, JR.
JONATHAN C. BOND
MICHAEL F. MURRAY
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
thungar@gibsondunn.com

Counsel for Petitioners
[Additional Counsel Listed on Inside Cover]

BLAINE H. EVANSON
ANDREW G. PAPPAS
BRANDON J. STOKER
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000

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REPLY BRIEF FOR PETITIONERS

The decision below violates the separation of powers and this Court's precedents by endowing the President with authority to override statutory requirements for agency rulemaking. And it creates a circuit conflict by enabling him to do so through executive orders that say no such thing. Both conflicts warrant this Court's review.

Respondents attempt to minimize both conflicts, but they do not dispute the relevant holdings of this Court or of other circuits. They argue instead that the D.C. Circuit did not hold that Executive Order 13,505 could supersede the Administrative Procedure Act ("APA"). But that claim contradicts the language and logic of the decision below. The court held that the Order excused NIH from considering 30,000 comments—which it otherwise undisputedly had to address—by dictating the rulemaking's outcome and thereby rendering contrary comments irrelevant. That holding impermissibly allows the Executive to opt out of the APA, and cannot be reconciled with this Court's or other circuits' precedents.

The D.C. Circuit's erroneous holding that a preliminary-injunction ruling is law of the case on the ultimate merits independently warrants review because it contravenes this Court's holding in *University of Texas* v. *Camenisch* that preliminary-injunction-stage "conclusions of law … are not binding at trial on the merits," 451 U.S. 390, 395 (1981), and exacerbates existing disagreement among the circuits. Respondents' attempt to square the decision below with *Camenisch*'s categorical holding ignores half of this Court's rationale and elevates the other half to the status of a governing rule. Respondents do not dis-

pute that the circuits' views conflict, and their claim that the decision below is consistent with other circuits' divergent standards misreads the opinions.

Respondents attempt to avoid review of either issue by contending that Petitioners lack standing. The court of appeals correctly rejected that argument, recognizing that under this Court's precedents the increased competition that Petitioners face under the Guidelines in seeking NIH funding constitutes a concrete, immediate injury-in-fact. Respondents' purported vehicle problem is illusory.

I. THE D.C. CIRCUIT'S HOLDING THAT EXECUTIVE ORDER 13,505 OVERRODE THE APA CONTRADICTS DECISIONS OF THIS COURT AND OTHER CIRCUITS.

A. The Decision Below Conflicts With This Court's Precedents By Allowing The President To Supersede A Federal Statute.

The D.C. Circuit departed from this Court's precedents by holding that an executive order excused NIH from complying with the APA. Respondents do not dispute that this Court's decisions squarely foreclose the conclusion that the President may authorize agencies to ignore valid constraints imposed by Congress. *Cf.* Pet. 13-14. Federal statutes are not suggestions, and the President cannot override them unless they exceed Congress's authority. *See*, *e.g.*, *Medellín* v. *Texas*, 552 U.S. 491, 525 (2008). The APA undisputedly does not.

Instead, Respondents contend that the court of appeals did not actually hold that Executive Order 13,505 (App. 116a) excused NIH from complying with the APA. Opp. 11. But Respondents' own description of the decision below belies that claim. In their account, the D.C. Circuit held, as Respondents them-

selves had argued, *see* C.A. Appellees' Br. 48-51, that despite the APA's requirements, NIH could ignore 30,000 otherwise undisputedly relevant comments because the Order dictated the "course of action" that NIH was to follow in the rulemaking—namely, "broadening, not narrowing, the scope of its funding for embryonic-stem-cell research"—and "d[id] not contemplate" curtailing such funding. Opp. 11, 14. Comments opposing funding for such research on scientific and ethical grounds thus "were not relevant" and required no response. *Id.* at 11. Under the D.C. Circuit's holding, therefore, the President *may* excuse agencies from responding to, or even considering, evidence and arguments that contradict his preferred policy. He need only decree in advance the result the agency must reach in the rulemaking, and the agency's APA obligations magically disappear.

That holding transforms agencies' statutory duty to confront relevant public input into an optional protocol that the President can waive at will. Indeed, it allows him to free agencies from addressing the comments with which the APA is most concerned: comments that, "if adopted, would require a change in [the] agency's proposed rule," or that "cast doubt" on the agency's position. *Home Box Office, Inc.* v. *FCC*, 567 F.2d 9, 35 n.58 (D.C. Cir. 1977) (per curiam). Under the D.C. Circuit's holding, for example, the President could permit the Environmental Protection Agency to sidestep scientific data that fatally undermine the rationale for a proposed pollution regulation—simply by ordering EPA to issue that regulation. He could similarly excuse the Department of Transportation from providing a reasoned response to evidence that disproves the basis of a proposed vehicle-safety standard—by commanding its adoption. In these and many other cases, com-

ments presenting countervailing evidence would be (on the D.C. Circuit's reasoning) irrelevant to the rulemaking—and the agency could ignore them—solely because they contradict the President's preferred policy.

Respondents' claim that the President may "set the substantive policymaking agenda for Executive agencies" (Opp. 13) misses the point. The question decided below, and presented here, is not whether the President can prescribe agencies' rulemaking priorities; he could and did direct NIH to "issue new NIH guidance" on "human stem cell research," App. 117a. Rather, it is whether the President can nullify the APA by authorizing agencies engaged in rulemakings to disregard comments relevant to those rulemakings but inconsistent with his preferred policy outcomes.

The D.C. Circuit held that he can. It concluded that the President can dictate not only the *question* the agency must ask, but the *answer* it must give—which means that he can excuse an agency from "examin[ing] the relevant data" that undermine its proposals, and from "articulat[ing] a satisfactory explanation for its action" despite contrary comments. *Motor Vehicle Mfrs. Ass'n of the U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). That extraordinary holding—now binding precedent in the circuit that hears more administrative-law cases than any other—cannot be squared with this Court's decisions or the constitutional structure.

B. The Decision Below Creates A Circuit Split By Construing The Order, Contrary To Its Terms, To Override The APA.

Respondents' attempt to downplay the conflict between the decision below and other circuits' deci-

sions fails for the same reason. Respondents do not deny that the Third Circuit has squarely held that an executive order cannot authorize disobeying the APA when it does not even *purport* to do so. *Cf.* Pet. 17-21; *Natural Res. Def. Council, Inc.* v. *EPA* (*NRDC*), 683 F.2d 752, 765-67 (3d Cir. 1982). Nor, understandably, do they contend that the Order explicitly directed NIH to disregard the APA, as it expressly instructed NIH to *obey* "applicable law." App. 117a.

Respondents' effort to reconcile *NRDC* instead rests entirely on their contention that the D.C. Circuit did not hold that the Order authorized NIH to disobey the APA. As explained above, *supra* at 2-4, that claim is false. The decision below upheld the Guidelines despite NIH's disregard of thousands of otherwise-relevant comments, based solely on an executive order that did not purport to excuse noncompliance with the APA. That conclusion directly contradicts *NRDC*'s holding and reasoning.

Respondents likewise fail to explain away the broader conflict between the decision below and other circuits' decisions regarding interpretation of executive orders. *Cf.* Pet. 22-23. Respondents do not dispute that under binding Fourth, Ninth, and Federal Circuit precedent, an executive order's clear text is controlling. They claim instead that the decision below adhered to the Order's "plain language." Opp. 15. But the D.C. Circuit said otherwise: Its analysis turned explicitly on the Order's supposed "direction," "dominant purpose," and "thrust." App. 15a-16a.

That the D.C. Circuit purported to derive that "purpose" from the Order's text (Opp. 15) is beside the point. It parted ways with other circuits by elevating a supposed purpose over the Order's unambiguous *operative* provisions. Where the Order said

NIH "may" fund certain stem-cell research, App. 117a, the decision below concluded that it meant "*must*." Where the Order directed NIH to evaluate whether research is ethically "responsible" and "scientifically worthy" before deeming it eligible for funding, *id.*, the decision below divined an instruction to *ignore* those criteria for one favored type of research. And where the Order commanded NIH to obey "applicable law," *id.*, the decision below found authority for NIH to *flout* a federal statute. *See* App. 15a-17a. That is the antithesis of plain-language interpretation, and it is directly at odds with other circuits' holdings.[1]

* * *

Respondents, in short, cannot reconcile the decision below with this Court's or other circuits' rulings. Nor can they deny the stakes of allowing it to stand. At minimum it creates confusion and uncertainty, as lower courts will struggle to discern whether and when agencies may rely on implications from executive orders to circumvent the APA's mandates. And in the many cases where it will govern, the D.C. Circuit's ruling eviscerates the procedural and substantive checks that Congress imposed to ensure rationality and accountability in administrative decision-

[1] Respondents err in contending (Opp. 15) that this conflict does not warrant review because the D.C. Circuit *previously* followed the majority rule. The D.C. Circuit's binding precedent *now*, established in this case, is that an executive order's purpose can trump its clear text. That it once held otherwise merely makes its error here more egregious. *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam), has no bearing, as it involved a purely intra-circuit dispute. *Id.* at 901-02. Here the D.C. Circuit's holding conflicts with *other* circuits' decisions and with this Court's precedents.

making. This Court should grant review to remedy this direct affront to the separation of powers.

II. THE D.C. CIRCUIT'S LAW-OF-THE-CASE HOLDING CONFLICTS WITH THIS COURT'S AND OTHER CIRCUITS' DECISIONS.

A. The Decision Below Conflicts With Decisions Of This Court.

The D.C. Circuit's conclusion that its preliminary-injunction ruling established the law of the case on the underlying merits contradicts this Court's precedents. *Camenisch* explicitly held that "the findings of fact and *conclusions of law* made by a court granting a preliminary injunction *are not binding* at trial on the merits." 451 U.S. at 395 (emphases added). A court cannot evade that categorical rule by casting its preliminary-injunction ruling as definitively resolving the merits: Such rulings "must" be interpreted to "refer only to the likelihood that [a party] ultimately would prevail." *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 932 (1975).

Respondents attempt to avoid *Camenisch*'s categorical holding by eliding one of its two rationales and elevating the other to a governing rule. *Camenisch* explicitly rested on *two* rationales: (1) preliminary-injunction rulings are not "tantamount to decisions on the underlying merits" because that would "improperly equat[e] 'likelihood of success' with 'success,'" and (2) there are "significant procedural differences" between preliminary and permanent injunctions, including, for example, that preliminary injunctions are "often" granted in "haste." 451 U.S. at 394-95. Respondents ignore the first rationale, attempting to limit *Camenisch*'s holding to "hasty" preliminary-injunction rulings. Opp. 19. But *Camenisch* announced an across-the-board rule, recogniz-

ing that "haste" "often" *but not always* accompanies preliminary-injunction rulings, and is only *one* of several "procedural differences" between preliminary and permanent injunctions. 451 U.S. at 394-95.[2]

Rewriting *Camenisch* as Respondents suggest, moreover, would effectively empower courts to enter final judgment at the preliminary-injunction stage, which *Camenisch* made clear is "inappropriate." 451 U.S. at 395. It also would contradict *Doran*'s holding that a preliminary-injunction ruling necessarily "'intimate[s] no view as to the ultimate merits.'" 422 U.S. at 934 (citation omitted); *see also id.* at 932. And it would conflict with the fundamental rule that courts can decide only the issues before them, by enabling courts to go beyond adjudicating *likelihood* of success on the merits, to deciding *actual* success. *See*, *e.g.*, *Swint* v. *Chambers Cnty. Comm'n*, 514 U.S. 35, 51 (1995).

Nothing in this Court's decisions supports such sweeping judicial empowerment. Contrary to Respondents' assertion (at 18), *Thornburgh* v. *American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), *overruled on other grounds by Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833 (1992), says nothing about whether a court reviewing a preliminary-injunction ruling may decide the underlying merits. It addressed whether the "abuse of discretion" standard is "a limit on judicial power." *Id.* at 757. And Respondents' claim (Opp. 19) that adhering to *Camenisch* would prevent preliminary-injunction rulings regarding the underlying merits

[2] Respondents' claim (at 19) that Petitioners selectively quote *Camenisch* is thus ironic, as the omitted clause explains *Camenisch*'s first rationale, which Respondents ignore.

from having precedential effect simply begs the question.

B. The D.C. Circuit's Holding Deepens Circuit Court Confusion.

Respondents do not dispute that the courts of appeals disagree regarding application of law-of-the-case doctrine to preliminary-injunction rulings. Opp. 20-21. They claim instead that the decision below does not conflict with any of the other circuits' approaches. That is incorrect.

Respondents contend that the Tenth and Federal Circuits, which faithfully apply *Camenisch*'s categorical rule and *both* of its rationales, have not addressed the issue in this case. Opp. 20-21. But Respondents mischaracterize those courts' decisions just as they misread *Camenisch*. Respondents assert that *Homans* v. *City of Albuquerque*, 366 F.3d 900 (10th Cir. 2004), is limited by its statement that a motions panel's decision is "often tentative" due to haste. Opp. 21. But Respondents ignore *Homans*'s other rationale: The Tenth Circuit (echoing *Camenisch*) explained that the prior decision "constituted an interlocutory ruling, and its holding was limited to the conclusion that Homans had shown a likelihood of success on the merits." 366 F.3d at 904. The same is true of *SEB S.A.* v. *Montgomery Ward & Co.*, 594 F.3d 1360 (Fed. Cir. 2010), *aff'd sub nom. Global-Tech Appliances, Inc.* v. *SEB S.A.*, 131 S. Ct. 2060 (2011). Respondents inaccurately claim that *SEB* turned on the state of the record when the prior decision was rendered. Opp. 21. The court itself did not so limit its categorical holding, and the language Respondents quote appears in a parenthetical describing another case that inferentially supported *SEB*'s categorical conclusion. *See* 594 F.3d at 1367-68.

Respondents are also mistaken that the decision below is "consistent with" the Third and Eighth Circuits' decisions, which examine whether the preliminary-injunction court actually decided the merits. Opp. 21. The D.C. Circuit did not adopt that approach here, which would have led to the opposite conclusion, because the preliminary-injunction ruling did not purport to decide the ultimate merits, but only Petitioners' "likelihood" of prevailing. Pet. 32; App. 32a, 40a, 52a. Respondents cannot claim that Petitioners seek fact-bound review (Opp. 21) of the court of appeals' application of a rule that it did not apply.

C. This Court's Review Is Necessary.

Respondents are incorrect that review of the law-of-the-case issue is "unnecessary" because (in their view) Petitioners' claims based on the Dickey-Wicker Amendment "lack merit" given the deference supposedly due to NIH's interpretation. Opp. 22. Indeed, Respondents' reliance on deference principles itself refutes their argument. But for the law-of-the-case holding, a majority of the panel below would have held *Chevron* deference inapplicable here, and rightly so. App. 18a-20a (Henderson, J., concurring); App. 23a-25a (Brown, J., concurring). And on de novo review, NIH's interpretation would fail, given the "linguistic jujitsu" it requires, including "[b]reak[ing] the simple noun 'research' into 'temporal' bits." App. 53a (Henderson, J., dissenting) (citation omitted); *see generally* App. 54a-65a (Henderson, J., dissenting). It is readily apparent that the D.C. Circuit's erroneous law-of-the-case holding affected the outcome here.

III. PETITIONERS HAVE STANDING.

Respondents attempt to avoid any review of the decision below by reviving their failed theory that Petitioners lack standing. As the court of appeals correctly held, that theory is meritless. *Sherley* v. *Sebelius* (*Sherley I*), 610 F.3d 69, 74 (D.C. Cir. 2010). By unlawfully permitting applicants conducting human embryonic stem-cell research to vie for the same funding, the Guidelines subject Petitioners to increased competition, which by itself satisfies Article III. *See id.*; *see also* App. 50a; *Ass'n of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 153-54 (1970); *Adams* v. *Watson*, 10 F.3d 915, 921 (1st Cir. 1993).

Contrary to Respondents' assertion (Opp. 23), there is nothing speculative about Petitioners' injury. As the *Sherley I* panel recognized, "[t]here can be no doubt the Guidelines will elicit an increase in the number of grant applications involving ESCs; indeed, *the Government never suggests otherwise*." 610 F.3d at 74 (emphasis added). Respondents argue that NIH's case-by-case review process makes it impossible to know *ex ante* whether Petitioners will ultimately experience a net decrease in funding, and that Petitioners must point to particular grant applications that would have succeeded but for the Guidelines. Opp. 23-24. But as a direct result of the "intensified … competition for a share in a fixed amount of money, [Petitioners] will have to invest more time and resources to craft a successful grant application. That is an actual, here-and-now injury." *Sherley I*, 610 F.3d at 74. Dr. Sherley, for example, has been forced by this increased competition to alter his grant-application methods and to submit more applications for funding than ever before in his career.

C.A. J.A. 498-500. To be sure, Petitioners "will suffer an *additional* injury whenever a project involving ESCs receives funding that" Petitioners otherwise would have received. *Sherley I*, 610 F.3d at 74 (emphasis added). But that "additional" injury is unnecessary to satisfy Article III.[3]

Respondents are also incorrect that Petitioners, after establishing standing at the pleading stage, failed to demonstrate it at the summary-judgment stage. Opp. 23. Petitioners submitted declarations that substantiated their allegations. C.A. J.A. 289-297, 498-504. Moreover, the critical fact was and remains undisputed: As in *Sherley I*, 610 F.3d at 74, Respondents still do not deny that the Guidelines result in more grant applications competing for the same finite pool of funds. Having injured Petitioners by subjecting them to illegal competition, Respondents cannot hide behind Article III.

[3] Respondents' claim (at 24) that Petitioners' subsequent grant applications described in their declarations cannot retroactively supply standing thus misses the point. Petitioners were injured when they filed suit by increased competition; their subsequent experiences merely reflect the ongoing effects of that injury.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SAMUEL B. CASEY
JUBILEE CAMPAIGN
LAW OF LIFE PROJECT
801 G Street, N.W., Suite 521
Washington, D.C. 20001
(202) 587-5652

STEVEN H. ADEN
MATTHEW S. BOWMAN
ALLIANCE DEFENDING FREEDOM
801 G Street, N.W., Suite 509
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THOMAS G. HUNGAR
Counsel of Record
THOMAS M. JOHNSON, JR.
JONATHAN C. BOND
MICHAEL F. MURRAY
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
thungar@gibsondunn.com

BLAINE H. EVANSON
ANDREW G. PAPPAS
BRANDON J. STOKER
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000

Counsel for Petitioners

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