Nos. 26-1829, 26-1832, 26-1996

In the United States Court of Appeals for the Second Circuit

AMERICAN COUNCIL OF LEARNED SOCIETIES *et al.*,

Plaintiffs-Appellees-Cross-Appellants,

v.

MICHAEL MCDONALD, in his official capacity as Chairman of the National Endowment for the Humanities, *et al.*,

Defendants-Appellants-Cross-Appellees.

On Appeal from the United States District Court for the Southern District of New York

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES-CROSS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring that the Constitution applies as robustly as its text and history require and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The National Endowment for the Humanities (NEH) is a federal agency that awards competitive grants to fund scholarly humanistic work. In March and April 2025, staffers from the federal Department of Government Efficiency Service (DOGE) "expressly employed" classifications based on race, ethnicity, national origin, religion, sex, and sexual orientation to identify and then terminate more than 1,400 previously awarded NEH grants worth over $100,000,000. *Am. Council of Learned Soc'ys v. Nat'l Endowment for the Humans.*, No. 25-cv-3657, 2026 WL 1256545, at *1, *55 (S.D.N.Y. May 7, 2026) (*ACLS*). As the district court rightly determined, these terminations violate the Fifth Amendment's equal-protection

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. Counsel for all parties have consented to the filing of this brief.

guarantee. Constitutional text and history, as well as the Supreme Court's longstanding equal-protection jurisprudence, make that clear.

When DOGE staffers set out to identify which NEH grants to terminate, they first used manual keyword searches of grant descriptions for terms including "BIPOC (Black, Indigenous, People of Color)," "Minorities," "Native," "Tribal," "Indigenous," "Immigrant," "LGBTQ," "Homosexual," and "Gay." *Id.* at *55. Those searches reflected an effort to pick out grants implicating only certain races, sexual orientations, and other protected traits. *See* Declaration of Yinka Onayemi, Ex. 1 at 62, *ACLS*, 2026 WL 1256545, Dkt. No. 248-1 (noting that there were no searches for "white," "Caucasian," or "heterosexual"); *see also ACLS*, 2026 WL 1256545, at *56 (describing "systematic disparities in how [DOGE] treated projects involving different national origins," including terminating grants "involving countries in Africa, Asia, or South America, while retaining grants involving Western European subjects"). DOGE staffers also used ChatGPT to identify "grants involving DEI," which process "repeatedly classified grants as DEI precisely because they involved *specific* races, ethnicities, religions, or genders." *ACLS*, 2026 WL 1256545, at *55 (emphasis added). DOGE directly adopted the ChatGPT-generated classifications. *See id.* at *61. The district court determined that the manual searches "constructed and applied explicit classifications based on protected characteristics and used them as the operative criteria for revoking federal grants,"

and the AI-assisted searches "made [hundreds of] classification[s] solely because a grant involved a particular race, gender, or other protected trait." *Id.* at *55.

Plaintiffs challenged the grant terminations that resulted from these searches as, among other injuries, a violation of the Fifth Amendment right to equal protection. *See id.* at *54-61. The Fifth Amendment's equal-protection component is coextensive with the Fourteenth Amendment's Equal Protection Clause, *see Collier v. Barnhart*, 473 F.3d 444, 448 (2d Cir. 2007), which precludes the government from "deny[ing] to any person . . . the equal protection of the laws," U.S. Const. amend. XIV, § 1.

Because the two Amendments impose "indistinguishable" obligations on government actors, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217 (1995), the history of the Fourteenth Amendment is directly probative of the breadth of the Fifth Amendment's equal-protection guarantee. That history shows an effort to remedy not only widespread violence and discrimination against Black Americans, but also the documented violence and discrimination faced by white allies who found themselves targeted based on their support for and association with Black Americans.

Consistent with this history, the Supreme Court has not restricted Fourteenth Amendment liability to discrimination based on one's own constitutionally protected traits. For example, the Court has recognized affiliation-based discrimination as an

equal-protection violation, including in scenarios where discrimination occurs based on the protected traits of one's companions or intimate partners. *See Palmore v. Sidoti*, 466 U.S. 429, 430-31, 434 (1984) (husband); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970) (companions); *cf. Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1983) (intimate partner or spouse). The government objects that Plaintiffs have not argued "that any analysis" of the terminated NEH grants "was done *based on the race of the grantee*." Opening Br. 37 (emphasis added). But because the constitutional promise of equal protection has never been limited to those targeted for their own protected traits, that observation cannot end the analysis.

Moreover, contemporary equal-protection doctrine bars the government from using race and other protected traits as grounds for adverse action. The Supreme Court recently explained that the Equal Protection Clause "commands" that "race may never be used as a 'negative.'" *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 218 (2023) (*SFFA*). But that is precisely what happened leading up to the grant terminations at issue here. As the district court found, DOGE used references to race and other constitutionally protected traits as the "operative criteria for revoking federal grants." *ACLS*, 2026 WL 1256545, at *55. Government classifications based on such traits are subject to either strict or intermediate scrutiny. *See infra* Section II.A. Yet the government nowhere argues

that its grant-termination protocol could survive such searching review, instead urging only that heightened scrutiny does not apply. *See* Opening Br. 36-43.

The government's principal argument is that its classification of grants made distinctions based on their "content or viewpoint," not on any protected trait. *Id.* at 38. But the Supreme Court previously identified a similar sorting scheme as an "explicitly racial classification" that therefore merited "the 'most rigid scrutiny'" and "'b[ore] a far heavier burden of justification' than other classifications." *Hunter v. Erickson*, 393 U.S. 385, 389, 392 (1969) (quoting first *Korematsu v. United States*, 323 U.S. 214, 216 (1944); and then *McLaughlin v. Florida*, 379 U.S. 184, 194 (1964)). In *Hunter*, the Court held that an amendment to Akron's city charter that subjected housing laws dealing with race, color, religion, national origin, or ancestry (and only those laws) to additional procedural hurdles violated the Fourteenth Amendment. *See id.* at 389-93. The same logic applies to DOGE's actions, which subjected grants dealing with race and other protected traits to termination of their NEH-approved funding. And the constitutional violation here is even more apparent than in *Hunter*: whereas the amendment there "dr[ew] no distinctions among racial and religious groups," *id.* at 390, the searches DOGE used for termination identified only those grants that reference *certain* racial and other groups, *see ACLS*, 2026 WL 1256545, at *9, *56, *58.

DOGE's classification and termination of NEH grants based on constitutionally protected traits violated the Fifth Amendment right to equal protection under the law. This Court should affirm the district court's grant of a permanent injunction.

ARGUMENT

I. The Text and History of the Fourteenth Amendment Demonstrate the Breadth of the Fifth Amendment's Parallel Guarantee of Equality Under the Law.

The Fourteenth Amendment contains a fundamental guarantee. Its text bars "any State" from "deny[ing] to any person . . . the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Fifth Amendment extends that guarantee to the federal government through the equal-protection component of its Due Process Clause. *See Bolling v. Sharpe*, 347 U.S. 497, 498-500 (1954); U.S. Const. amend. V. As a result, federal courts' "approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Collier*, 473 F.3d at 448 (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975)). The history and scope of the Fourteenth Amendment's Equal Protection Clause are thus instructive as to the substance of the Fifth Amendment's parallel right to equal protection.

In shaping the Fourteenth Amendment's equal-protection right, its Framers drew on their experiences during Reconstruction. They had seen firsthand that state

governments could not be trusted to respect fundamental liberties or basic notions of equality under the law for all persons—nor to protect their citizens from mistreatment and violence inflicted by private actors. A pattern of state-sponsored discrimination and state neglect fueled by racial prejudice made it essential to guarantee the equal protection of the laws to all persons. *See* Joint Comm. on Reconstruction, *Report of the Joint Committee on Reconstruction*, H.R. Rep. No. 39-30, at xvii (1866) (detailing findings that, in the aftermath of the war, many people in the South refused "to place the colored race . . . upon terms even of civil equality" or "tolerat[e] . . . any class of people friendly to the Union, be they white or black"). In demanding constitutional changes "to secure the civil rights of all citizens of the republic," *id.* at xviii, the Joint Committee on Reconstruction that drafted and proposed the Fourteenth Amendment highlighted state failures to protect Black Americans, describing the dire reality that "deep-seated prejudice against color . . . leads to acts of cruelty, oppression and murder, which the local authorities are at no pains to prevent or punish," *id.* at xvii.

The Joint Committee also documented widespread discrimination and violence faced by white allies targeted because of their support for and association with Black Americans. In Virginia, a man who "rented his farm to a freedman" faced "threats to burn his house in consequence." *Id.* pt. 2, at 21. Teachers who served Black communities were refused housing and faced threats of violence; one

teacher was taken from his bed to a stream to be "held under the water some time" and "threatened [that], if he did not leave the county in three days, he would be shot dead." *Id.* at 43; *see id.* at 86 (reporting threats to shoot teachers); *id.* at 143 ("[P]ersons coming to places to teach blacks were not permitted to rent a place either for a school or for their own personal occupation."); *id.* at 154 (reporting threats to "shoot[] every teacher they sent there"). In North Carolina, a group of "some fifteen or twenty guerillas" was "stealing horses and cattle, and committing ravages on the white Union inhabitants." *Id.* at 179. In Arkansas, a superintendent of freedmen was "bruised considerably, and warned to leave." *Id.* pt. 3, at 169. When white community members were "disposed to give evidence" on behalf of Black Mississippians, they feared that "militia men would come . . . and hang them" in retaliation. *Id.* at 143. One minister, James Sinclair, lost his church and was threatened with hanging after he delivered an "abolition sermon." *Id.* pt. 2, at 167. And during the Civil War, abolitionists faced expulsions and attempted lynchings for their beliefs. *Id.* pt. 3, at 128.

Soon after the Fourteenth Amendment was ratified, federal courts confirmed that its language swept broadly. As the Supreme Court recognized in 1873, "[w]e do not say that no one else but the negro can share in this protection . . . . And so if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested

may not be of African descent." *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72 (1873).

The Supreme Court's later cases have upheld the promise of the Equal Protection Clause's text and history, confirming that its scope is not limited to individuals who face adverse treatment for their own protected traits. In 1970, for example, the Court recognized that a petitioner would successfully "ma[k]e out a violation of her Fourteenth Amendment rights" if she showed she faced adverse treatment "because she was a white person in the company of" Black companions. *Adickes*, 398 U.S. at 152. In *Palmore v. Sidoti*, the Court sustained an equal-protection challenge brought by a white woman denied custody of her child because her new husband was Black. *See* 466 U.S. at 430-31, 434. As the Court explained, she faced adverse treatment by the state-court system based not on her own race—but because of her husband's race and her association with him. *Id.* at 432 ("Taking the [state] court's findings and rationale at face value, it is clear that the outcome would have been different had petitioner married a Caucasian male of similar respectability."). And beyond the Equal Protection Clause, in response to Bob Jones University's ban on interracial dating, the Court declared in a tax case that "discrimination on the basis of racial affiliation and association is a form of racial discrimination." *Bob Jones*, 461 U.S. at 605.

Here, the government stresses that Plaintiffs "have not contended . . . that any analysis was done *based on the race of the grantee*." Opening Br. 37 (emphasis added). But because the equal-protection guarantee has never been confined to those targeted for their own protected traits, that observation cannot end the inquiry. As the next Section discusses, well-established equal-protection doctrine bars the government from using protected-trait classifications to terminate federal grants.

II. Equal-Protection Doctrine Forbids the Government from Using Protected Traits as Grounds for "Negative" Action.

As a general matter, the government may not use race or other constitutionally protected traits to impose negative consequences. DOGE identified the NEH grants at issue in this case by searching their descriptions for references to race, religion, ethnicity, national origin, sex, and sexual orientation, then terminated them shortly thereafter. *See ACLS*, 2026 WL 1256545, at *9-13. Binding equal-protection doctrine forbids this sort of government action.

A. "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239 (1976). Just recently, the Supreme Court recognized the "twin commands of the Equal Protection Clause," namely "that race may never be used as a 'negative' and that it may not operate as a stereotype." *SFFA*, 600 U.S. at 218; *cf. United States v. Virginia*, 518 U.S. 515, 533-34 (1996) (contemplating the government's use of sex in certain narrow cases but rejecting its

use to "create or perpetuate . . . inferiority"). As Justice Thomas explained, "every time the government . . . makes race relevant to the provision of burdens," "it demeans us all." *SFFA*, 600 U.S. at 261-62 (Thomas, J., concurring) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part and dissenting in part)).

The government's actions here fly in the face of these straightforward constitutional "commands." *Id.* at 218 (majority opinion). As Defendants acknowledge, "[t]he Constitution generally discourages, rather than encourages, the use of explicit racial classifications." Opening Br. 36. But the government's targeted searches in this case facilitated exactly such classifications. As the district court found, DOGE staffers "constructed and applied explicit classifications based on protected characteristics"—including race, sex, and other constitutionally protected traits—"and used them as the operative criteria for revoking federal grants" that had previously been approved. *ACLS*, 2026 WL 1256545, at *55. Such protected traits were straightforwardly "used as a 'negative.'" *SFFA*, 600 U.S. at 218.

The Supreme Court's "acceptance of race-based state action has been rare for a reason." *SFFA*, 600 U.S. at 208. The Court has described "discrimination on the basis of race" as "'odious in all aspects,'" and explained that evidence of such discrimination can cause "a systemic loss of confidence" in government decision-

making. *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 223, 225 (2017) (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)). Government classifications based on "race, alienage, or national origin" are "so seldom relevant to the achievement of any legitimate state interest" that actions "grounded in such considerations are deemed to reflect prejudice and antipathy" of the sort the Fourteenth Amendment was ratified to guard against. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

Accordingly, such government classifications—and the differential treatment they facilitate—"are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest." *Id.*; *see Burlington N.R.R. Co. v. Ford*, 504 U.S. 648, 651 (1992) (identifying religion as a "suspect line[]" for government classification). Similarly, government "classifications based on gender also call for a heightened standard of review" because "[t]hat factor generally provides no sensible ground for differential treatment." *Cleburne*, 473 U.S. at 440; *see J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143 (1994) ("[G]ender simply may not serve as a proxy for bias."); *Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012) (applying intermediate scrutiny to classifications based on sexual orientation).

DOGE's classifications and terminations based on race, ethnicity, religion, and national origin cannot "survive [the] daunting two-step examination known in our cases as 'strict scrutiny.'" *SFFA*, 600 U.S. at 206. The government does not suggest otherwise, arguing only that the grant terminations satisfy rational-basis

review, *see* Opening Br. 41, which they do not, *see ACLS*, 2026 WL 1256545, at *58-61. Nor has it identified any "compelling interests that permit resort to race-based government action." *SFFA*, 600 U.S. at 207 (cataloguing "only two" such interests, *viz*. "remediating specific, identified instances of past discrimination" and "avoiding imminent and serious risks to human safety in prisons"). Under the Equal Protection Clause, "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Id.* at 217 (alteration in original) (quoting *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003)). And the classifications and terminations based on sex and sexual orientation fare no better under intermediate scrutiny, which demands an "exceedingly persuasive" justification that is "genuine, not hypothesized or invented *post hoc* in response to litigation." *Virginia*, 518 U.S. at 533.

B. Recognizing that Defendants' grant terminations violate the Fifth Amendment's right to equal protection coheres with longstanding case law in the parallel Fourteenth Amendment context. The government attempts to frame its classification of NEH grants as making "distinction[s] based on the content or viewpoint of the grant, rather than based on race or any other protected characteristic." Opening Br. 38. But more than half a century ago, the Supreme Court identified a similar sorting scheme as an "explicitly racial classification" and recognized that the government triggers "the 'most rigid scrutiny'" when it invokes

racial classifications to allocate adverse treatment. *Hunter*, 393 U.S. at 389, 392 (quoting *Korematsu*, 323 U.S. at 216).

In *Hunter v. Erickson*, the Supreme Court struck down an amendment to the Akron city charter that subjected housing laws dealing with "race, color, religion, national origin or ancestry" to an additional popular-referendum vote before they could take effect, while permitting all other housing laws to take effect without that hurdle. *Id.* at 387 (quotation marks omitted). The *Hunter* Court explained that this "explicitly racial classification treating racial housing matters differently from other . . . housing matters" violated the Equal Protection Clause. *Id.* at 389.

Hunter recognized that a charter amendment classifying laws based on the protected traits they reference and then assigning adverse treatment—namely, an extra procedural hurdle—based on that classification ran afoul of the Constitution's equal-protection guarantee. The grant terminations in this case follow the same structure. DOGE classified existing NEH grants based on the protected traits their descriptions referenced and then assigned adverse treatment—namely, termination—based on that classification. In *Hunter*, "[o]nly laws to end housing discrimination based on race, color, religion, national origin or ancestry" were required to "run [the charter amendment's] gantlet." *Id.* at 390 (quotation marks omitted). Similarly, it was precisely NEH grants that studied topics relating to race, sex, and other constitutionally protected traits that were flagged for termination

through DOGE's process. Although *Hunter* concerned the classification of municipal laws rather than federal grants, the logic is the same: the government triggers heightened scrutiny by using protected-trait classifications to assign adverse treatment.

Significantly, even though the challenged amendment in *Hunter* "dr[ew] no distinctions among racial and religious groups" such that "Negroes and whites, Jews and Catholics are all subject to the same requirements if there is housing discrimination against them which they wish to end" via local law, the Court held that the government's differential treatment of all race-, religion-, and national-origin-based laws was unconstitutional. *Id.* at 390. Here, however, the challenged conduct lacked even that veneer of equal application. Rather than "draw[ing] no distinctions among racial and religious groups," *id.*, DOGE staffers' targeted searches used keywords and prompts (*e.g.*, "BIPOC," "Black," "Native") that surfaced grants referencing only *certain* racial and other groups and subjected only those identified grants to termination, *see ACLS*, 2026 WL 1256545, at *9, *55-56, *58; *see also* Opening Br. 41-42 (acknowledging "searching for racial terms" and "grants that focus on particular racial or other subgroups").

Under *Hunter*, "[b]ecause the core of [equal protection] is the prevention of meaningful and unjustified official distinctions based on race," the government's use of race-based searches to terminate grants must be subject to strict scrutiny. 393

U.S. at 391-92. And because the government proffers no justification sufficient to satisfy *any* level of scrutiny, its use of a full suite of constitutionally protected traits to classify and terminate federal grants cannot stand.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's grant of a permanent injunction.

Respectfully submitted,

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Dated: November 16, 2026

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 3,544 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Dated: November 16, 2026

/s/ Brianne J. Gorod
Brianne J. Gorod

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November, 2026, I electronically filed the foregoing document using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: November 16, 2026

/s/ Brianne J. Gorod
Brianne J. Gorod