No.

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

PETITION FOR A WRIT OF CERTIORARI

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

QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that an Executive Order can and did excuse an agency's failure to comply with the Administrative Procedure Act.

2. Whether the court of appeals erred in holding that a preliminary-injunction ruling is binding law of the case, contrary to this Court's settled rule 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," *Univ. of Tex.* v. *Camenisch*, 451 U.S. 390, 395 (1981).

PARTIES TO THE PROCEEDING

Petitioners, who were Plaintiffs-Appellants below, are Dr. James L. Sherley and Dr. Theresa Deisher.

Respondents, who were Defendants-Appellees below, are: Kathleen Sebelius, in her official capacity as Secretary of the Department of Health and Human Services; the United States Department of Health and Human Services; Dr. Francis S. Collins, in his official capacity as Director of the National Institutes of Health; and the National Institutes of Health.

In addition, the following were Plaintiffs in the district court but were dismissed from the litigation for lack of standing and did not participate in the court of appeals: Nightlight Christian Adoptions; Shayne Nelson; Tina Nelson; William Flynn; Patricia Flynn; Christian Medical Association; and Embryos.

TABLE OF CONTENTS

TABLE OF APPENDICES

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

ADMINISTRATIVE AND REGULATORY MATERIALS

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioners Dr. James L. Sherley and Dr. Theresa Deisher respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-30a) is reported at 689 F.3d 776. The opinion of the district court (App. 67a-111a) is reported at 776 F. Supp. 2d 1.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced at App. 112a-15a. Pertinent administrative and regulatory materials are reproduced at App. 116a-53a.

INTRODUCTION

The D.C. Circuit in this case upheld Guidelines issued by the National Institutes of Health ("NIH") providing for federal funding of certain types of human stem-cell research. That decision contravenes this Court's precedent and creates conflict and confusion among the circuits in two separate respects.

First, the D.C. Circuit held that NIH's refusal to address numerous comments that it received in promulgating the Guidelines was justified by an executive order (Executive Order 13,505) (the "Order"). That holding embraces a fundamentally mistaken

and unprecedented view of Executive power, authorizing the President to exempt agencies from the Administrative Procedure Act ("APA") at will. The D.C. Circuit's decision also conflicts directly with a decision of the Third Circuit holding that an executive order directing an agency to comply with "applicable law," as the Order did (App. 117a, § 4(a)), cannot excuse an agency's failure to comply with the APA's notice-and-comment procedures. This issue is of paramount practical importance. Agencies' duties to confront relevant comments and provide reasoned responses provide critical checks on administrative action in myriad rulemakings, but the decision below would allow agencies to evade those checks at the Executive's convenience.

Second, the court of appeals refused to confront the merits of a straightforward challenge to NIH's statutory authority to provide for funding of human embryonic stem-cell research, on the ground that a prior ruling at the preliminary-injunction stage foreordained the outcome. That holding likewise contravenes this Court's precedent and deepens already-existing confusion among the circuits regarding the scope of the law-of-the-case doctrine. This issue, too, is of immense practical importance, and lower courts are greatly in need of this Court's guidance. Further review is warranted.

STATEMENT

A. THE DICKEY-WICKER AMENDMENT

For sixteen years, federal law has banned federal funding of research in which human embryos are destroyed or knowingly subjected to harm. App. 4a. An appropriations rider, commonly known as the Dickey-Wicker Amendment, prohibits the use of federal funds for:

> (1) the creation of a human embryo or embryos for research purposes; or
>
> (2) research in which a human embryo or embryos are destroyed, discarded, or knowingly subjected to risk of injury or death greater than that allowed for research on fetuses in utero under 45 C.F.R. 46.204(b) and section 498(b) of the Public Health Service Act (42 U.S.C. 289g(b)).

Pub. L. No. 112-74, div. F, § 508, 125 Stat. 786, 1112 (2011).

"Congress enacted the Amendment 'in reaction to a 1994 NIH panel report,'" which "advocated federal funding of research 'designed to improve the process of in vitro fertilization, to determine whether embryos carried genetic abnormalities, and to isolate embryonic stem cells.'" App. 54a (*Sherley* v. *Sebelius* (*Sherley II*), 644 F.3d 388, 400 (D.C. Cir. 2011) (Henderson, J., dissenting)) (citation and emphases omitted). The Dickey-Wicker Amendment has been included in every Health and Human Services ("HHS") appropriations bill since 1996, and has not been altered in any material respect. App. 63a. Thus, Congress continues to prohibit federal funding for "research in which" an embryo is "destroyed, discarded, or knowingly subjected to risk of injury or death."

B. HISTORY OF GOVERNMENT POLICY ON HUMAN EMBRYONIC STEM-CELL RESEARCH

Since Dickey-Wicker's enactment, NIH has taken divergent views regarding whether the statute prohibits research on human embryonic stem cells. Initially, NIH took the position that the statute prohibited federal support even for DNA research on material derived from embryos, because the derivation

process placed the embryos at risk. In a 1996 letter to researchers who were using federally funded equipment to conduct tests on DNA derived from embryos, NIH took the position that the researchers "'[can]not engage in embryo related research,'" including "'analysis from DNA derived from a human embryo.'" App. 59a n.2 (citation omitted).

Four years later, NIH altered its position and issued Guidelines authorizing the funding of human embryonic stem-cell research. *See* 65 Fed. Reg. 51,976 (Aug. 25, 2000). The 2000 Guidelines were never implemented, however, because NIH formally withdrew them, *see* 66 Fed. Reg. 57,107 (Nov. 14, 2001), to allow for the implementation of President Bush's stem-cell policy.[1]

In 2001, President Bush announced a policy confining federal funding of human embryonic stem-cell research to research on existing cell lines derived from "embryos that ha[d] already been destroyed" prior to the policy's announcement. *Address to the Nation on Stem Cell Research From Crawford, Texas*, 37 Weekly Comp. Pres. Doc. 1149, 1151 (Aug. 9, 2001); *see also* Exec. Order No. 13,435, 72 Fed. Reg. 34,591 (June 22, 2007). From 2002 through 2009, Respondents took the position that this "moral line," 37 Weekly Comp. Pres. Doc. at 1151, was also a decisive legal line drawn by Dickey-Wicker. In 2002, then-HHS General Counsel Alex Azar II articulated the agency's legal justification for the Bush policy,

---

[1] *See* NIH, Office of the Dir., *Notice of Criteria for Federal Funding of Research on Existing Human Embryonic Stem Cells and Establishment of NIH Human Embryonic Stem Cell Registry* NOT-OD-02-005 (Nov. 7, 2001), *available at* http://grants.nih.gov/grants/guide/notice-files/NOT-OD-02-005.html.

concluding that it complied with Dickey-Wicker because, *inter alia*, it "'provide[d] no incentive for the destruction of additional embryos.'" App. 74a (citation omitted).

C. PROMULGATION OF THE GUIDELINES

In March 2009, President Obama signed Executive Order 13,505, which provided that NIH "may support and conduct responsible, scientifically worthy human stem cell research, including human embryonic stem cell research, to the extent permitted by law." App. 117a, § 2 (74 Fed. Reg. 10,667 (Mar. 11, 2009)). Specifically, the Order required HHS and NIH to "review existing NIH guidance and other widely recognized guidelines on human stem cell research" and "issue new NIH guidance on such research that is consistent with [the] order." *Id.*, § 3.

Six weeks later, Respondents published a notice of proposed rulemaking (the "Notice") containing draft Guidelines for human stem-cell research ("Draft Guidelines"). App. 119a (74 Fed. Reg. 18,578 (Apr. 23, 2009)). According to the Notice, the Guidelines' purpose would be to "ensure that NIH-funded research in this area is ethically responsible, scientifically worthy, and conducted in accordance with applicable law." *Id.* The Notice proposed to authorize federal funding of human embryonic stem-cell research and invited public comment. App. 119a-120a.

NIH received approximately 49,000 public comments, App. 132a (74 Fed. Reg. 32,170 (July 7, 2009)), more than 60 percent of which opposed federal funding of human embryonic stem-cell research. J.A. 303-04;[2] *see also* App. 6a. The comments addressed nu-

[2] "J.A." refers to the appendix filed in the court of appeals.

merous scientific and ethical problems that funding such research would entail and documented superior alternatives to it. J.A.58-62, 129-40, 144-47; *see also*, *e.g.*, Administrative Record 016673-77, 002965, 009191, Dkt. #66. The comments also identified serious medical risks associated with human embryonic stem-cell treatments, as well as inherent limitations on those cells' therapeutic potential. J.A.60-62, 129, 136, 144-47. Additionally, the comments detailed the substantial and verifiable medical results already achieved by adult stem-cell research, along with other characteristics that render adult stem cells a superior scientific and ethical alternative. *See* J.A.50, 58-59, 63, 129-36, 160-61. Although human embryonic stem cells have received widespread media attention, no successful medical treatments have been approved using them. J.A.129. In contrast, scientists have made dramatic breakthroughs in the use of adult stem cells, and these ethically unobjectionable research methods have generated the vast majority of scientific advances and all of the many thousands of successful medical treatments involving stem cells. J.A.51-52, 58-62, 129-36.

Respondents admit that they disregarded these comments, however, because in Respondents' view the Notice "'did not ask the public *whether* [NIH] should fund research on human embryonic cells,'" but rather "'*how* [NIH] should fund human embryonic stem cell research.'" J.A.303-04 (emphases added, citation omitted); *cf.* J.A.463-64 (Landis Decl. ¶¶ 11-13).

On July 7, 2009, Respondents published the final Guidelines. App. 131a. The Guidelines purport to implement the Executive Order by authorizing the federal funding of human embryonic stem-cell re-

search utilizing live human embryos that were created "for reproductive purposes" but are "no longer needed for [that] purpose." App. 136a. They also set forth the procedures by which live embryos must be selected for destruction if they are to be used in government-funded research. App. 135a-37a, 147a-52a. The Guidelines thus mark the first use of federal funds to incentivize and cause injury to, and destruction of, live human embryos.

D. PROCEDURAL HISTORY

Dr. James L. Sherley and Dr. Theresa Deisher, among others, brought this lawsuit against Respondents in 2009, alleging that the Guidelines violate the Dickey-Wicker Amendment and the APA.

Dr. Sherley and Dr. Deisher are adult-stem-cell researchers who do not conduct research on human embryos or use human embryonic stem cells. J.A.289, ¶ 2; J.A.296-97, ¶¶ 2-3. Dr. Sherley relies exclusively on research grants for funding, and most of the grants he receives are from NIH. J.A.290, ¶ 3. Dr. Sherley will continue to apply for NIH grants in the future, without which he would be unlikely to be able to continue his research. *Id.*, ¶ 5. Dr. Deisher also intends to apply for grants from NIH. J.A.296-97, ¶¶ 2-3.

Petitioners moved for a preliminary injunction, which the district court granted. App. 3a-4a.[3] The court concluded that the Guidelines violate the Dick-

[3] Prior to granting the preliminary injunction, the district court had dismissed for lack of standing. App. 3a. The D.C. Circuit reversed, holding that Drs. Sherley and Deisher had standing under the competitor-standing doctrine. *Id.* (citing *Sherley* v. *Sebelius*, 610 F.3d 69, 72-74 (D.C. Cir. 2010)).

ey-Wicker Amendment by allowing federal funding of research in which an embryo is destroyed. App. 3a.

In April 2011, a divided panel of the D.C. Circuit vacated the preliminary injunction. App. 4a (citing *Sherley II*). The majority expressly limited its analysis of Petitioners' likelihood of success to their claim that the Guidelines violate Dickey-Wicker's ban on funding "research in which a human embryo or embryos are destroyed." App. 40a-50a. Acknowledging that Petitioners had "raised a 'serious legal question' on the merits," App. 50a, the majority nonetheless accorded *Chevron* deference to Respondents' view of the term "research" and held that Petitioners were not likely to succeed on that claim, App. 43a-47a. The court declined to address Petitioners' separate claim that the Guidelines violate Dickey-Wicker's prohibition on funding "research in which a human embryo or embryos are … knowingly subjected to risk of injury or death," because that argument had not yet been addressed by the district court. App. 49a. For the same reason, the court did not rule on Petitioners' claim that NIH violated the APA by promulgating the Guidelines "'through an inadequate notice-and-comment process.'" *Id.* (citation omitted).

Judge Henderson dissented, concluding that the plain language of the Dickey-Wicker Amendment prohibited NIH from funding "research" on cells derived from "destroyed" human embryos. App. 53a. As she explained, the majority had "taken a straightforward case of statutory construction and produced a result that would make Rube Goldberg tip his hat." *Id.*; *see id.* (describing the majority's interpretation as "linguistic jujitsu").

On remand, the district court denied Petitioners' motion for summary judgment, granted Respondents' motion for summary judgment, and entered final judgment for Respondents. App. 4a, 67a-111a. With respect to Dickey-Wicker, the court concluded that it was bound by the court of appeals' decision as law of the case. App. 91a ("While it may be true that by following the Court of Appeals' conclusion as to the ambiguity of 'research,' this Court has become a grudging partner in a bout of 'linguistic jujitsu,' … such is life for an antepenultimate court.").

The court of appeals affirmed. App. 1a-30a. The court held that with respect to Petitioners' "first and principal argument" that the Guidelines violated Dickey-Wicker's prohibition against the destruction of embryos, "the law of the case is established against them." App. 7a. The court acknowledged the established rule that "'the decision of a trial or appellate court whether to grant or deny a preliminary injunction does not constitute law of the case for the purpose of further proceedings and does not limit or preclude the parties from litigating the merits.'" App. 9a (citation omitted). The court nevertheless concluded that the "generally recognized precedent for the preliminary-injunction exception to the law-of-the-case doctrine" was inapplicable here, because the prior decision was a "definitive, fully considered legal decision" made with the benefit of "full briefing and argument without unusual time constraints." App. 11a. Chief Judge Sentelle, who authored the opinion for the court, did not decide whether NIH's interpretation of the Dickey-Wicker Amendment was reasonable, but rather held that "the law of the case is established and we will not revisit the issue" of *Chevron* deference. App. 9a.

The court also rejected Petitioners' alternate argument that the Guidelines violated Dickey-Wicker because they authorized funding of "'research in which a human embryo or embryos are … knowingly subjected to risk.'" App. 13a (citation omitted). Conceding that no court had previously reached this issue, and that Petitioners could therefore "credibly argue" that it was "not within the law of the case," the court nonetheless held that "our result is … controlled by that doctrine." *Id.* Specifically, the court reasoned that "[l]aw of the case has established that *Chevron* deference applies," and "[a]s we have held before, the NIH interpretation of the statute's actual language is reasonable." App. 13a-14a.

Finally, the court rejected Petitioners' argument that "NIH violated the APA by issuing the Guidelines without addressing comments categorically objecting to ESC research," while "advocat[ing] funding other types of stem cell research instead." App. 14a. The Court held that NIH had no obligation to consider such comments, because "this recommended course of action is diametrically opposed to the direction of Executive Order 13,505, which NIH sought to 'implement' by issuing the Guidelines." App. 15a. The court reasoned that "NIH may not simply disregard an Executive Order," and that "[f]ollowing these commenters' lead would directly oppose the clear import of the Executive Order." App. 16a. Therefore, it was not "arbitrary and capricious" under the APA for NIH to "disregard comments" that "simply did not address any factor relevant to implementing the Executive Order." *Id.*

Judge Henderson concurred. While agreeing that "the law of the case prevents us from reconsidering [the court's earlier] holding," she "wr[o]te separately

for the record to point out that *Chevron* review is inapplicable to the Guidelines." App. 18a. Judge Henderson further reiterated her prior position that "[c]ontrary to the holding in *Sherley [II]*," the Dickey-Wicker Amendment "plainly *prohibits* federal funding that the Guidelines expressly *permit*—namely, the funding of human embryonic stem cell (hESC) research that is conducted after the destruction of the embryo." App. 21a.

Judge Brown also concurred. While she "heartily concur[red]" with Judge Henderson's conclusion that "*Chevron* does not apply and the court should have accorded no deference to NIH's interpretation," she would have affirmed NIH's interpretation of the statute on *de novo* review. App. 25a, 27a-28a.

Judge Brown noted that "[w]hen the dust settles and the votes are tallied, a majority of this panel supports two seemingly conflicting positions: (1) that law of the case doctrine prevents us from reconsidering the earlier ruling that applied *Chevron* and (2) that *Chevron* does not apply." App. 28a n.7. "Thus, the majority opinion stands only for the proposition that the earlier result need not be overturned—not that the decision was correct in all respects." *Id.*

REASONS FOR GRANTING THE PETITION

The APA requires federal agencies not only to solicit public comment before promulgating a new rule, but also to consider and respond on the record to relevant arguments and evidence presented by commenters. 5 U.S.C. §§ 553(b)-(c), 706(2)(A). Despite these clear statutory commands, the D.C. Circuit brushed aside NIH's failure to consider and respond to nearly 30,000 comments regarding its proposed Guidelines, solely on the ground that Executive Order 13,505 freed the agency from its duty to comply

with the APA. App. 15a-17a. That erroneous ruling warrants this Court's review. The court of appeals' conclusion that the President had the authority to exempt NIH from its statutory duties contradicts this Court's precedent concerning the scope of Executive power. If allowed to stand, the decision below would eviscerate the vital checks that Congress has imposed on agencies to ensure transparency, accountability, and rationality in administrative decision-making. The D.C. Circuit's holding also conflicts directly with a decision of the Third Circuit refusing to construe an executive order as authorizing an agency to disregard the APA—and departs from decades of case law establishing that where an executive order's text is clear, it controls. This Court's intervention is necessary both to resolve the circuit conflict and to correct the D.C. Circuit's explicit and indefensible conferral of Executive power to override a Congressional enactment.

The court of appeals also held that a preliminary-injunction ruling is binding law of the case if the preliminary ruling announced a "definitive legal conclusion" on what is later deemed a "fully developed record." App. 10a-11a. That holding directly conflicts with this Court's categorical ruling in *University of Texas* v. *Camenisch*, 451 U.S. 390, 395 (1981), 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." The D.C. Circuit's decision also deepens a conflict among the circuits, which have divided into four groups that each employ a different rule of law for determining the application of the law-of-the-case doctrine to preliminary-injunction rulings. This confusion cultivates the very uncertainty that the law-of-the-case doctrine is supposed to extirpate.

I. THE D.C. CIRCUIT'S HOLDING THAT EXECUTIVE ORDER 13,505 EXCUSED NIH'S DISREGARD OF THE APA CONTRAVENES THIS COURT'S PRECEDENT AND CREATES A CIRCUIT SPLIT.

The D.C. Circuit contradicted this Court's precedent, and created a circuit split, by holding that an executive order that does not even purport to authorize NIH to disobey the APA's requirements in promulgating the Guidelines nevertheless excused the agency from considering and responding to nearly 30,000 comments challenging its proposals. This Court's case law refutes the court of appeals' conclusion that the President may exempt agencies from their duty to obey undisputedly valid procedural requirements imposed by Congress. And the Third Circuit has squarely rejected the view that an executive order may silently absolve agencies of their obligations under the APA—consistent with other circuits' case law recognizing an executive order's unambiguous text as controlling. Only this Court's review can resolve these conflicts.

A. THE D.C. CIRCUIT'S HOLDING THAT THE PRESIDENT MAY AUTHORIZE AGENCIES TO DISREGARD THE APA CONFLICTS WITH THIS COURT'S PRECEDENT.

The D.C. Circuit's decision contradicts the bedrock principle that the President cannot nullify valid federal statutes or direct his subordinates to disobey them. In "'tak[ing] measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb,'" and his action can be upheld only if Congress itself has exceeded its own authority. *Medellín* v. *Texas*, 552 U.S. 491, 525 (2008) (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)). No claim is

or could be made that the APA exceeds congressional authority.

Even in his capacity as Commander-in-Chief, the President "may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers." *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 593 n.23 (2006). *A fortiori*, he cannot order an administrative agency—which is a "'creature of statute,' having 'no constitutional or common law existence or authority,'" *Atl. City Elec. Co.* v. *FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) (citation omitted), and which "literally has no power to act … unless and until Congress confers power upon it," *La. Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 374 (1986)—to ignore the undisputedly valid procedural limitations that Congress has imposed in the APA. Undoubtedly for that reason, Respondents disclaimed in the district court any argument that the Executive Order could trump NIH's duties under the APA, *see* Defs.' Mot. Summ. J. 36 (Dkt. #57) ("defendants do not dispute" that the "Executive Order did not override the requirements of the APA"), and did not argue otherwise on appeal, *see* C.A. Appellees' Br. 50.

The D.C. Circuit's decision upholding NIH's Guidelines, however, rests on precisely the opposite premise. In holding that the Order excused NIH from addressing comments critical of its proposal, the court of appeals necessarily concluded that the President *can* exempt agencies from the APA's requirements. App. 16a. There is no question that the APA obligated NIH to confront and respond to relevant objections and evidence that commenters presented. As the D.C. Circuit itself has long recognized, the public's right to provide input on rules before they take effect, *see* 5 U.S.C. § 553(b)-(c), is "'mean-

ingless unless the agency responds to significant points raised by the public.'" App. 14a (quoting *Home Box Office, Inc.* v. *FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977) (per curiam)). Moreover, by adopting a rule without confronting relevant comments, an agency acts arbitrarily and capriciously, defaulting on its separate duty to "examine the relevant data and articulate a satisfactory explanation for its action" that accounts for every "important aspect of the problem." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see* 5 U.S.C. § 706(2)(A). Each of those obligations required NIH to address the thousands of comments challenging the scientific and ethical merits of human embryonic stem-cell research. Indeed, the D.C. Circuit did not dispute—nor did Respondents below—that but for the Executive Order (as the court construed it), the comments that NIH disregarded were relevant and significant, and would have required a response.

Nevertheless, the court of appeals held that NIH did *not* act unlawfully by failing to consider and address these thousands of comments challenging the scientific and ethical merits of human embryonic stem-cell research, as the APA required, because the Executive Order excused NIH from doing so. NIH, the court concluded, was "bound … to carry out the President's directives"—which supposedly included an unstated directive to fund human embryonic stem-cell research without regard to scientific or ethical concerns—and comments opposing those directives therefore were not "relevant to implementing the Executive Order." App. 16a. Because the Executive Order had thus (on the D.C. Circuit's view) narrowed the range of relevant issues so as to exclude the scientific and ethical objections that such com-

ments raised, the court held that "it was not arbitrary or capricious for NIH to disregard" those comments, *id.*, and Section 553 did not require NIH to respond to them, *see* App. 15a-17a.[4] The agency, in short, could avoid confronting otherwise-relevant comments, which Congress had commanded it to consider and address, simply because the President said so.

That the President did not explicitly command NIH to flout a federal statute makes no difference. What the President cannot do directly—by ordering agency officials openly to disobey the APA and dispense with notice and comment—he cannot do *indirectly* by dictating the outcome of a rulemaking in advance and declaring all dissenting views and contrary data irrelevant. Nor can he circumvent the APA's ban on arbitrary or capricious agency action by instructing an agency to act in a way that plainly violates that standard. An executive order directing an agency to decide cases by flipping a coin, for example, would not save agency decisions made on that basis from invalidation by a court. Likewise, an executive order instructing an agency adopting a rule to ignore factors that are undisputedly relevant—or indeed, to ignore only arguments and evidence that take a *particular position* on issues relevant to the rulemaking—would not insulate the agency's action from judicial review.

---

[4] Petitioners challenged NIH's action as unlawful under the notice-and-comment requirements of 5 U.S.C. § 553(b)-(c) and as arbitrary and capricious, *id.* § 706(2)(A). *See*, *e.g.*, C.A. Appellants' Br. 43-44. The D.C. Circuit analyzed these two challenges together, reasoning that failure to respond to comments matters only if it shows that the agency acted arbitrarily and capriciously. App. 15a.

But on the D.C. Circuit's view, the President's command *is* enough to shield such actions from scrutiny, notwithstanding the APA's contrary requirements. That limitless view of Executive power cannot be reconciled with this Court's precedent, or indeed with any reasoned view of Executive authority. Review is necessary to correct the D.C. Circuit's fundamental error.

B. THE D.C. CIRCUIT'S COUNTER-TEXTUAL READING OF EXECUTIVE ORDER 13,505 CONFLICTS WITH OTHER CIRCUITS' PRECEDENT.

The D.C. Circuit's conclusion that Executive Order 13,505 absolved NIH of its statutory duty to consider and respond to thousands of comments is even less defensible because the Order itself did not even purport to do so. Nothing in its text authorizes the agency to ignore the APA's requirements; instead, the Order commanded compliance with those requirements and directed NIH to consider the very issues the discarded comments addressed. By construing the Order nonetheless to excuse NIH from confronting and responding to those comments, the D.C. Circuit's decision creates a circuit conflict with the Third Circuit, which has rejected the same argument. Its holding also breaks with the view shared by at least three other circuits—and, until now, by the D.C. Circuit itself—that an executive order's unambiguous text is controlling.

1. The D.C. Circuit's Holding That The Executive Order Excused NIH From Obeying The APA Conflicts Directly With A Decision Of The Third Circuit.

In *Natural Resources Defense Council, Inc.* v. *EPA* (*NRDC*), 683 F.2d 752 (3d Cir. 1982), the Third Circuit confronted—and rejected—the argument that

the D.C. Circuit accepted here, namely, that an agency's failure to abide by the APA's notice-and-comment procedures in adopting a rule was excused by an executive order containing language similar to that at issue here.

In *NRDC*, the EPA had promulgated, after notice and comment, final amendments to regulations under the Clean Water Act concerning the discharge of pollutants. *Id.* at 755. Before the amendments' effective date, the President issued Executive Order 12,291, which prescribed an array of substantive requirements and procedures for agency rulemakings—including, for example, that no agency action should be taken unless the agency determined that the societal benefits outweighed the costs. 683 F.2d at 755. As to rules that had been published in final form but that had not yet taken effect—including the EPA regulatory amendments at issue—Executive Order 12,291 directed agencies, "'[t]o the extent necessary to permit consideration in accordance with this Order,'" to "'suspend or postpone the effective dates'" of such rules (with certain exceptions). *Id.* (quoting Exec. Order No. 12,291, 46 Fed. Reg. 13,193, 13,196 (Feb. 19, 1981)). The Order permitted already-finalized rules to take effect on an interim basis, however, while the agency conducted the required analysis. *Id.* at 756. And it explicitly directed that in implementing the requirements for pending rules, agencies "shall comply with all applicable provisions of the Administrative Procedure Act, and with any other procedural requirements made applicable to the agencies by other statutes." 46 Fed. Reg. at 13,198.

Days before the EPA's amendments were to take effect, the EPA issued—*without* providing notice and

an opportunity for comment—an order "postponing [the amendments] indefinitely," citing Executive Order 12,291. 683 F.2d at 756. The plaintiff filed suit challenging the EPA's action, contending that the agency violated the APA by suspending the amendments' effective date without notice and comment. *Id.* at 757.

The Third Circuit held that the EPA's action violated the APA. 683 F.2d at 765-67. The EPA defended its failure to provide notice and comment solely on the basis of Executive Order 12,291. *Id.* at 765, 767. But as the Third Circuit explained, that order could not justify the EPA's failure because it did not even *purport* to permit agencies to bypass the APA's notice-and-comment requirements, but rather confirmed agencies' duty to comply with preexisting statutory requirements.

Analyzing the issue in a manner that is directly inconsistent with the D.C. Circuit's judgment here, the Third Circuit explained: "E.O. 12291 says nothing about the notice and comment requirements of the APA, and does not attempt to authorize an agency to act without complying with those requirements. Rather, E.O. 12291 specifically states that any action taken pursuant to it must be in compliance with applicable law." 683 F.2d at 765; *see also id.* at 765 n.24. Nor did the order's other provisions preclude the EPA from complying with the APA's procedures. *See id.* at 765-66. By its terms, therefore, Executive Order 12,291 could not excuse the EPA's failure to comply with the APA's notice-and-comment requirements. The court accordingly ordered the EPA's amendments reinstated as of their original effective date. *Id.* at 769.

The D.C. Circuit's holding that Executive Order 13,505 excused NIH's failure to respond to thousands of comments cannot be reconciled with the Third Circuit's decision. Like the executive order in *NRDC*, Executive Order 13,505 "says nothing about the notice and comment requirements of the APA," 683 F.2d at 765, much less purports to authorize NIH to issue the Guidelines without regard to those statutory requirements. *See* App. 116a-118a. Quite the contrary, it likewise expressly directs that it "shall be implemented consistent with applicable law," App. 117a, § 4—which includes the APA.

In fact, Executive Order 13,505 goes even further than the order in *NRDC* by specifically directing NIH to consider the very issues raised by the comments that the agency disregarded. As noted above, by providing that NIH "may support and conduct *responsible, scientifically worthy* human stem cell research," the Order obligated NIH to determine, before deciding to support a particular type of human stem-cell research, whether such research is indeed "scientifically worthy" and ethically "responsible." App. 117a, § 2 (emphasis added). NIH itself recognized as much in promulgating both the Draft and final Guidelines. It originally proposed (App. 126a, 129a), and ultimately adopted (App. 149a, 153a), provisions forbidding certain types of human embryonic stem-cell research on ethical grounds—including projects that involve cloning of animals, or that employ stem cells derived from embryos for which payments were offered.

Nor does the Executive Order explicitly impose any other obligation on NIH that practically foreclosed it from considering the comments' scientific and ethical objections to human embryonic stem-cell

research. The President directed that NIH "*may* support and conduct" such research (if that research satisfied the criteria set forth in the Order), not that it *must* do so. App. 117a, § 2 (emphasis added). In context, "'[t]he word "may" clearly connotes discretion'" rather than a command, particularly given the Order's repeated use of "shall" elsewhere to impose mandatory duties. *Martin* v. *Franklin Capital Corp.*, 546 U.S. 132, 136 (2005) (citation omitted). The Order thus did not compel NIH to fund that (or any other) type of stem-cell research. Instead, it merely removed preexisting limitations imposed by the prior Administration on NIH's ability to do so, thereby restoring to the agency both the discretion and the responsibility to determine whether and to what extent human embryonic stem-cell research met the Order's standards.

Under the Third Circuit's analysis, therefore, Executive Order 13,505 could not justify NIH's disregard of its duty under the APA to confront comments addressing the scientific and ethical merits of human embryonic stem-cell research, because by its terms the Order did not purport to do so, and instead underscored NIH's obligation to address such comments as the APA required. Yet the D.C. Circuit nonetheless concluded—based on its understanding of the "purpose" of Executive Order 13,505, App. 15a—that the Order absolved NIH of that duty. App. 15a-16a. That conclusion cannot be squared with the Third Circuit's analysis and holding in *NRDC*. This Court's review is necessary to resolve this conflict.

2. The D.C. Circuit's Holding Also Conflicts With Other Circuits' Precedent Recognizing That An Executive Order's Unambiguous Text Is Controlling.

By disregarding the text of Executive Order 13,505 in favor of its perceived "purpose," the D.C. Circuit's holding also diverges from the view shared by at least three other circuits that where an executive order's text is clear, it controls. In keeping with this Court's teaching that unambiguous text is controlling in federal statutes, *e.g., Harris Trust & Sav. Bank* v. *Salomon Smith Barney Inc.*, 530 U.S. 238, 254 (2000), and agency regulations, *e.g.*, *Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012), the Fourth, Ninth, and Federal Circuits have each recognized that an executive order's text is dispositive where it unambiguously addresses the issue in dispute. *See United States* v. *Ehsan*, 163 F.3d 855, 858-60 (4th Cir. 1998) (interpreting executive order based on its plain language, and holding rule of lenity inapplicable because order's text was "not ambiguous");[5] *Chen Zhou Chai* v. *Carroll*, 48 F.3d 1331, 1339 (4th Cir. 1995) (executive order's "plain language" demonstrated that it was not intended to confer a private right of action), *superseded on other grounds by* 8 U.S.C. § 1101(a)(42); *Sierra Club* v. *Peterson*, 705 F.2d 1475, 1478 (9th Cir. 1983) (executive order's "express language" made clear that state-law requirements applied to federal agency); *John C. Grimberg*

[5] *Ehsan* observed that its reading of the executive order's plain text aligned with the order's purpose, but it did not suggest that a contrary purpose could override unambiguous language. That the order's clear text was controlling is evident from the court's holding that the lack of ambiguity in the text foreclosed the defendant's reliance on the rule of lenity.

Co. v. *United States*, 869 F.2d 1475, 1477 (Fed. Cir. 1989) (executive order's "plain language" contradicted agency's interpretation of order). Indeed, the D.C. Circuit itself previously adhered to the same view. *See Sea-Land Serv., Inc.* v. *ICC*, 738 F.2d 1311, 1314 (D.C. Cir. 1984) (holding presumption against laws' retroactive application inapplicable because the "plain language of the Executive Order ma[de] clear" that it applied retroactively).

The D.C. Circuit departed from this fundamental principle of textual interpretation, however, by relying on Executive Order 13,505's perceived purpose to contradict its plain language. The court did not grapple with the Order's text requiring NIH to consider the scientific and ethical merits of the stem-cell research that it proposed to fund, and it ignored the Order's direction for NIH to comply with applicable law. The court also disregarded the Order's use of the word "may," rather than "must" or "shall," to confer discretion on NIH to fund human embryonic stem-cell research, rather than mandate that it do so. *See Martin*, 546 U.S. at 136. Instead, the D.C. Circuit concluded that the Order's "dominant purpose" of "expanding" funding for human stem-cell research generally, and removing limitations imposed on federal funding for such research by the Bush Administration, made it unnecessary for NIH to address comments that categorically opposed funding for one particular type of research, involving human embryonic stem cells. Even if that view of the Order's purpose were correct (and it is not), the court's reliance on that purpose in the face of the Order's plain language to the contrary contradicts the circuits' consensus view that an executive order's clear text should control.

* * *

The Third Circuit would have rejected NIH's claim that Executive Order 13,505 excused the agency from complying with the APA and addressing comments critical of NIH's preferred approach. And at least three other circuits would have applied an analysis—giving primacy to the Order's text—that leads to the same result. But the court below rejected those circuits' holdings by divining an unexpressed Presidential "purpose" to sanction NIH's disregard of the APA's requirements. This Court's review is necessary to resolve these conflicts.

C. THE QUESTION WHETHER AN EXECUTIVE ORDER CAN EXCUSE AN AGENCY'S NON-COMPLIANCE WITH THE APA IS HIGHLY IMPORTANT AND CLEANLY PRESENTED.

The question presented is of great importance for the myriad rulemaking proceedings that federal agencies initiate every year. The APA's requirements that agencies not only invite, but actually consider and respond to, relevant public comments "'ensure[s] that agency regulations are tested via exposure to diverse'" views and "'ensure[s] fairness to affected parties.'" *Prometheus Radio Project* v. *FCC*, 652 F.3d 431, 449 (3d Cir. 2011) (citation omitted). It also is critical to "'the quality of judicial review,'" as it provides "'affected parties an opportunity to develop evidence in the record to support their objections to the rule'"—evidence and objections for which the agency must account in a reasoned manner, providing the basis for a court's review. *Id.* (citation omitted).

If the D.C. Circuit's decision—to which other courts may look for guidance—is allowed to stand, however, it will leave those vital limitations a dead letter. If the President can excuse agencies in ad-

vance from the APA's requirements to confront relevant objections, simply by foreordaining the result of a rulemaking, then agencies will cease to follow those requirements whenever they present an obstacle to Executive policy. Executive orders dictating the conclusions that agencies should reach (or should not reach), thereby rendering contrary views irrelevant and not in need of a response, will precede any controversial rulemaking. Public comment in such proceedings will become an empty exercise. Indeed, commenters likely will cease to bother submitting arguments and evidence casting doubt on an agency's preferred outcome, if they are aware that the agency (armed with an executive order) can write off opposing views.

Meaningful judicial review of agencies' analysis of the relevant factors and data, in turn, will be frustrated, if not foreclosed entirely. In an era of ever-increasing administrative lawmaking, courts' ability to make certain that agencies actually have considered all sides of an issue, weighed the relevant evidence, and considered the consequences of their actions provides one of very few vital barriers against agency caprice. But the decision below enables agencies, with the President's permission, to sidestep that safeguard. Under the D.C. Circuit's holding, an agency may adopt rules without addressing inconvenient objections to which the agency has no answer—or at least no answer it wishes to offer on the record—so long as an executive order expressly or impliedly directed the agency to reach the result it did.

The D.C. Circuit's atextual approach in interpreting the Executive Order also severely undermines Executive accountability by making it difficult, if not

impossible, for the public to know whom to hold responsible for significant policy decisions—as this case well illustrates. The Executive Order here expressly entrusted NIH with determining which stem-cell research merits federal funding, purportedly removing political constraints. But now NIH defends its decision to support certain research on the ground that the Order itself dictated the outcome. The D.C. Circuit's purpose-driven analysis enables *both* the President and the agency to disclaim responsibility for the ultimate decision by pointing to the other.

This case provides an ideal vehicle for the Court to address the question presented. The issue of Executive Order 13,505's effect on NIH's APA obligations was pressed and passed upon below. And it is dispositive of Petitioners' APA challenge. There is no dispute that but for the Order, the comments that NIH disregarded were relevant, and Respondents concede that NIH made no effort to address them. Nor is there any question that if NIH's failure to address those comments violated the APA, the Guidelines must be vacated—a point that Petitioners pressed below, and that Respondents did not challenge. Finally, the question of the proper interpretation of the Order is not complicated by any claim that Respondents' reading—expressed in the Guidelines or later in court—is entitled to deference.[6]

The circuits need this Court's guidance regarding the interpretation and effect of executive orders. This case provides a prime opportunity to provide it.

---

[6] The district court held that such deference was warranted, but Petitioners disputed that holding on appeal, Respondents did not defend it, and the court of appeals explicitly declined to decide that issue. App. 16a-17a.

II. THE HOLDING BELOW THAT THE LAW-OF-THE-CASE DOCTRINE APPLIES TO PRELIMINARY-INJUNCTION RULINGS CONFLICTS WITH DECISIONS OF THIS COURT AND DEEPENS CONFUSION IN THE CIRCUITS ON AN IMPORTANT AND RECURRING ISSUE.

This Court held in *University of Texas* v. *Camenisch* that preliminary-injunction rulings are not law of the case and thus "are not binding" at the merits stage of a case. 451 U.S. at 395. The court below has adopted a rule of law that directly contravenes this Court's categorical holding, by concluding that a preliminary-injunction ruling is law of the case for the underlying merits. App. 13a. The D.C. Circuit's holding also deepens confusion on this issue in the circuits, which have divided into four groups that each employ a different standard for determining the application of the law-of-the-case doctrine to preliminary-injunction rulings.

A. THE HOLDING BELOW CONFLICTS WITH THIS COURT'S DECISIONS.

This Court held in *Camenisch* 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. That holding is necessary because preliminary-injunction rulings are not "tantamount to decisions on the underlying merits." *Id.* at 394. Conflating a preliminary-injunction ruling with a merits ruling for law-of-the-case purposes would "improperly equate[] 'likelihood of success' with 'success.'" *Id.* Such an approach would also "ignore[] significant procedural differences between preliminary and permanent injunctions," including that preliminary-injunction procedures "often" are "less formal" and proof is "less complete"

than when a case is decided on the merits. *Id.* at 394-95.

Indeed, this principle applies even if the court's ruling at the preliminary-injunction stage is framed in absolute terms as a resolution of the merits. Because a preliminary-injunction ruling does not and cannot resolve the merits, a court issuing or reviewing a preliminary-injunction ruling necessarily "'intimate[s] no view as to the ultimate merits.'" *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 934 (1975) (citation omitted). Consequently, any statements purporting to resolve the merits at the preliminary-injunction stage "*must*" be interpreted to "refer only to the *likelihood* that [a party] ultimately would prevail," and *cannot* be construed as having resolved the merits. *Id.* at 932 (emphases added).

Camenisch and *Doran* thus firmly establish that preliminary-injunction rulings are not law of the case for the underlying merits, regardless of the manner in which the court framed its preliminary ruling. The D.C. Circuit decision's contrary holding—which treats preliminary-injunction rulings as binding resolutions of the merits based on a parsing of the language used in expressing the preliminary ruling—directly conflicts with *Camenisch*'s well-reasoned rule and upends this Court's settled precedent. *See* App. 13a.

The D.C. Circuit attempted to justify its holding on the ground that the preliminary-injunction ruling in this case was a "definitive, fully considered legal decision" made on what it later deemed a "fully developed factual record." App. 11a. But those purported justifications only reinforce the conflict between the decision below and this Court's precedents.

That a court chooses to announce its preliminary ruling in terms that suggest a "definitive, fully considered legal decision" does not transform its statements on "likelihood of success" into binding rulings on the ultimate merits. That would be the exact opposite of what this Court stated in *Doran*. 422 U.S. at 932 ("[T]he District Court spoke in terms of actually holding the ordinance unconstitutional, but in the context of a preliminary injunction the court *must have intended to refer only to the likelihood* that respondents ultimately would prevail." (emphasis added)). And it would be in significant tension with the fundamental principle that a court may decide only those issues properly before it—particularly in an appeal from a preliminary-injunction ruling, where the court of appeals' jurisdiction is limited to the question of preliminary relief and the district court retains jurisdiction over the ultimate "merits" questions at issue. *See Swint* v. *Chambers Cnty. Comm'n*, 514 U.S. 35, 51 (1995) (on interlocutory review, appellate courts have jurisdiction over only interlocutory order and questions "inextricably intertwined" with it); *United Teacher Assocs. Ins. Co.* v. *Union Labor Life Ins. Co.*, 414 F.3d 558, 572 (5th Cir. 2005) ("[T]he filing of an appeal divests the district court of its control only 'over those aspects of the case involved in the appeal.'" (citation omitted)).

Nor does the D.C. Circuit's focus on what it deemed a "fully developed factual record" eliminate the inconsistency between its decision and *Camenisch*. Though this Court in *Camenisch* observed that preliminary injunctions are "often" issued with "less complete" evidence, that was but one of the "procedural differences" between preliminary and permanent injunctions that this Court enumerated. 451 U.S. at 394-95. Exalting the completeness of the

record, as the D.C. Circuit did, improperly elevates merely one part of *Camenisch*'s rationale to the status of a governing principle, while flouting *Camensich*'s categorical holding that preliminary-injunction rulings cannot resolve the merits.

B. THE HOLDING BELOW DEEPENS CONFUSION IN THE COURTS OF APPEALS.

The D.C. Circuit's holding that a preliminary-injunction ruling is law of the case if it is a "definitive legal conclusion" on what is later deemed a "fully developed record" also deepens a four-way disagreement among the courts of appeals.

The Tenth and Federal Circuits have directly followed *Camenisch*'s categorical rule that interlocutory rulings are not law of the case. *See*, *e.g.*, *Homans* v. *City of Albuquerque*, 366 F.3d 900, 904-05 (10th Cir. 2004) ("[A] decision as to the likelihood of success is tentative in nature and not binding at a subsequent trial on the merits. Were the opposite true, an unacceptable conflation of the merits decision and the preliminary inquiry would result." (citations omitted)); *SEB S.A.* v. *Montgomery Ward & Co.*, 594 F.3d 1360, 1368 (Fed. Cir. 2010), *aff'd*, 131 S. Ct. 2060 (2011).[7] Adhering to *Camenisch*'s rationale as well as its rule, these circuits recognize that an interlocutory decision's "holding [i]s limited to the conclusion that [a party] ha[s] shown a likelihood of success on the merits of his claim" and thus that it can have no law-of-the-case effect on the ultimate merits. *Homans*, 366 F.3d at 904-05.

---

[7] In dicta, the Federal Circuit recently considered, but did not adopt, a unique rule for separate *Markman* hearings. *Outside the Box Innovations, LLC* v. *Travel Caddy, Inc.*, _ F.3d _, 2012 WL 4215890, at *13 (Fed. Cir. Sept. 21, 2012).

The First, Fourth, Sixth, Eleventh, and D.C. Circuits, by contrast, have held that a preliminary-injunction ruling is law of the case as long as the original court decided the relevant issue and reviewed what is later deemed a full record. App. 11a; *Naser Jewelers, Inc.* v. *City of Concord*, 538 F.3d 17, 20 (1st Cir. 2008); *L.J.* v. *Wilbon*, 633 F.3d 297, 308 (4th Cir. 2011); *Nat'l Hockey League Players Ass'n* v. *Plymouth Whalers Hockey Club*, 419 F.3d 462, 470-71 (6th Cir. 2005); *This That & The Other Gift & Tobacco, Inc.* v. *Cobb Cnty.*, 439 F.3d 1275, 1284-85 (11th Cir. 2006) (per curiam). The First and D.C. Circuits reach this result by conditioning application of law-of-the-case doctrine for preliminary-injunction rulings on a definitive resolution of the relevant issue and a complete record; the Fourth, Sixth, and Eleventh Circuits reach this result by crafting an exception to the law-of-the-case doctrine for preliminary-injunction rulings when the record substantially develops after the original decision.

The Third and Eighth Circuits have staked out a third, more nuanced, position. They hold that a preliminary-injunction ruling is law of the case when the relevant issue was decided on a full record, unless the original court denied taking a considered position on the ultimate merits of the issue. *Pitt News* v. *Pappert*, 379 F.3d 96, 105 (3d Cir. 2004) (Alito, J.) ("[T]he [prior] panel was careful to state only that [plaintiff] 'ha[d] not shown *a likelihood of succeeding* on the merits of its claim.' Had the [prior] panel gone further and taken an unequivocal position on the merits, we would consider ourselves bound …." (citation omitted)); *see Entergy, Ark., Inc.* v. *Nebraska*, 241 F.3d 979, 987 (8th Cir. 2001) ("We *carefully considered* the Eleventh Amendment issue *before deciding it* in the course of the preliminary-injunction ap-

peal, and our holding … is now the law of the case." (emphases added)).

Petitioners would have prevailed under the Third Circuit's approach. In *Pitt News*, for example, the Third Circuit declined to give law-of-the-case effect to a prior decision that twice "was careful to state," 379 F.3d at 105, that the plaintiff "had not shown a likelihood of success," and titled its analysis "Likelihood [Plaintiff's] Claim Will Succeed," even though it also stated absolutely that the plaintiff's injury "does not amount to a violation of its First Amendment rights," *Pitt News* v. *Fisher*, 215 F.3d 354, 365-67 (3d Cir. 2000). Here, the D.C. Circuit gave law-of-the-case effect to a prior decision that thrice "was careful to state" its holding in "likelihood of success" terms and also titled its analysis "Likelihood of Success." App. 32a ("plaintiffs are unlikely to prevail"); App. 40a (titling analysis section "Likelihood of Success on the Merits"); App. 49a ("they have not shown they are more likely than not to succeed on the merits"); App. 52a ("plaintiffs have not shown they are likely to succeed on the merits").

The Fifth and Ninth Circuits profess a fourth approach. These circuits have held that a preliminary-injunction ruling is law of the case as to "pure issues of law," but not as to other issues. *Ranchers Cattlemen Action Legal Fund* v. *U.S. Dep't of Agric.*, 499 F.3d 1108, 1114 (9th Cir. 2007) ("[T]he district court should abide by 'the general rule' that our decisions at the preliminary injunction phase do not constitute the law of the case. Any of our conclusions on pure issues of law, however, are binding." (citations omitted)); *see Royal Ins. Co. of Am.* v. *Quinn-L Capital Corp.*, 3 F.3d 877, 880-81 (5th Cir. 1993) ("As to decisions of law, the interlocutory appeal will establish

law of the case," but "the interlocutory appeal normally will not establish law of the case on factual matters.").

In disagreeing over the application of the law-of-the-case doctrine to preliminary-injunction rulings, several courts of appeals have failed to adhere to this Court's approach in *Camenisch*. That approach correctly avoids "improperly equat[ing] 'likelihood of success' with 'success.'" 451 U.S. at 394. It also flows naturally from the doctrines that statements at the preliminary-injunction stage that purport to resolve the merits of a case ought to be viewed as dicta, *see Doran*, 422 U.S. at 932; *Homans*, 366 F.3d at 904-05 & n.5, and dicta is not law of the case, *see Arizona* v. *California*, 460 U.S. 605, 618 & n.8 (1983). The approach also protects litigants, who may not be able to advance their arguments fully in light of the timing, briefing, and other restrictions in preliminary-injunction proceedings. *See Camenisch*, 451 U.S. at 395.

C. THIS ISSUE IS IMPORTANT AND RECURRING.

This widespread disagreement among the circuits merits this Court's review. The law-of-the-case doctrine is designed to improve efficiency, promote finality, and protect the settled expectations of parties. *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988); *e.g.*, *Suel* v. *Sec'y of Health & Human Servs.*, 192 F.3d 981, 984-85 (Fed. Cir. 1999). Confusion among the circuits undermines these goals, because outcomes depend on the happenstance of geography.

This confusion is also problematic because of the increasing frequency of litigation over law-of-the-case issues. As one leading treatise puts it, "[l]aw-of-the-case doctrine seems to have exploded" recently from

an "effusion of applications." 18B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 4478 (2d ed. 2012). In addition to cases like this one, involving multiple appeals in the same circuit, the "effusion of applications" includes cases transferred among federal courts, *e.g.*, *Christianson*, 486 U.S. at 816, and cases removed or remanded between federal and state courts, *e.g.*, *Fairbank* v. *Wunderman Cato Johnson*, 212 F.3d 528, 530-33 (9th Cir. 2000).

One such application—cases involving multiple circuits—especially highlights the undesirability of circuit disagreement. Litigation of law-of-the-case doctrine in cases involving multiple circuits arises in several situations, including when cases are transferred between circuit or district courts, *e.g.*, *Christianson*, 486 U.S. at 816, or as part of multi-district litigation, *e.g.*, *In re Pharmacy Benefit Managers Antitrust Litig.*, 582 F.3d 432, 439-43 (3d Cir. 2009); *In re Ford Motor Co.*, 591 F.3d 406, 410-14 (5th Cir. 2009). *See generally* 28 U.S.C. § 1631; *id.* § 1407(a).

In these cases, the existing disagreement among the circuits regarding the law-of-the-case doctrine could result in the same decision having different law-of-the-case consequences in different jurisdictions. For example, in multi-district litigation, transferee district courts routinely decide common issues and then remand cases to transferor courts for decisions on individualized issues. *E.g.*, *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 220 (1996). When the common issues result in a preliminary-injunction ruling before remand, *e.g.*, *In re Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003), and circuits disagree about the law-of-the-case doctrine, the same decision of a transferee court could have different

consequences at later stages depending on the circuits in which the transferor courts sit.

When facing similar circuit-court confusion over other aspects of the law-of-the-case doctrine, this Court has acted to clarify the law. In *Christianson*, for example, it held that the "law of the case" doctrine applied to a dispute between the Federal and Seventh Circuits as to the proper jurisdiction for a lawsuit combining antitrust and patent issues. 486 U.S. at 800. More recently, in *Pepper* v. *United States*, 131 S. Ct. 1229 (2011), the Court resolved the scope of the law-of-the-case doctrine with respect to criminal resentencing. *See also United States* v. *Hatter*, 532 U.S. 557 (2001) (clarifying law-of-the-case effect of denials of discretionary review). This Court's review is similarly merited here.

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
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

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

October 10, 2012

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 23, 2012 Decided August 24, 2012

No. 11-5241

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

v.

KATHLEEN SEBELIUS, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., APPELLEES

Appeal from the United States District Court for the District of Columbia (No. 1:09-cv-01575)

Ryan J. Watson argued the cause for appellants. With him on the briefs were *Thomas G. Hungar, Thomas M. Johnson Jr., Samuel B. Casey, Steven H. Aden, and Blaine H. Evanson.*

Adam J. White was on the brief for *amici curiae* Robert George, et al. in support of appellants.

Beth S. Brinkmann, Deputy Assistant Attorney General, U.S. Department of Justice, argued the cause for appellees. With her on the briefs were *Tony West*, Assistant Attorney General, *Ronald C.*

Machen Jr., U.S. Attorney, and *Mark B. Stern, Stephanie R. Marcus, Abby C. Wright*, and *Helen L. Gilbert*, Attorneys. *R. Craig Lawrence*, Assistant U.S. Attorney, entered an appearance.

Neal Goldfarb and *Andrew T. Karron* were on the brief for *amici curiae* Coalition for the Advancement of Medical Research, et al. in support of appellees.

Before: SENTELLE, *Chief Judge*, HENDERSON and BROWN, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* SENTELLE.

Concurring opinion filed by *Circuit Judge* HENDERSON.

Concurring opinion filed by *Circuit Judge* BROWN.

SENTELLE, *Chief Judge*: Appellants are researchers in the field of adult stem cells who oppose the use of federal funding for the development of embryonic stem-cell research. In district court they filed a complaint seeking declaratory and injunctive relief against appellee Secretary of Health and Human Services' implementation of regulations allowing federal funding of such research. They appeal from a district court order entering summary judgment in favor of the defendant. Because we conclude that the district court committed no error, we affirm the order and judgment under review.

I. The Current Litigation

In August of 2009, appellants and others filed the complaint commencing this action against the Secretary of Health and Human Services and the Director of the National Institutes of Health (NIH),

seeking declaratory relief that NIH Guidelines authorizing the funding of research involving human embryonic stem cells was unlawful under 5 U.S.C. § 706(2)(A). In addition to this and other declaratory relief, the complaint sought to have the court enjoin the defendants and their agencies from implementing, applying, or taking any action pursuant to the guidelines, or otherwise funding any research involving human embryonic stem cells. The district court ruled that none of the several plaintiffs had standing to bring the action and therefore dismissed it. *See Sherley v. Sebelius*, 686 F. Supp. 2d 1 (D.D.C. 2009). We reversed as to the two appellants now before the court, researchers in the field of adult stem cells, concluding that they have standing as competitors to bring these claims. *Sherley v. Sebelius*, 610 F.3d 69, 72-74 (D.C. Cir. 2010). We remanded the case to the district court for further proceedings. *Id.* at 75. On remand, the district court determined that Congress had, in an Appropriations Act rider called the Dickey-Wicker Amendment, clearly "provide[d] that no federal funds shall be used for 'research in which a human embryo or embryos are destroyed, discarded, or knowingly subjected to risk of injury or death greater than that allowed for research on fetuses *in utero*'" under other regulatory and statutory regimes. *Sherley v. Sebelius*, 704 F. Supp. 2d 63, 70 (D.D.C. 2010) (quoting Pub. L. No. 111-8, § 508(a)(2)). The district court further concluded that the guidelines under litigation violated that statutory prohibition, that the plaintiffs demonstrated a strong likelihood of success on the merits, that the plaintiffs would suffer irreparable harm in the absence of preliminary injunction, that the balance of hardships weighed in favor of preliminary injunction, and that public interest weighed in favor of the issuance of a

preliminary injunction. The court therefore entered the preliminary injunction sought by plaintiffs. Defendants appealed.

On appeal, we determined that NIH had reasonably interpreted the Dickey-Wicker Amendment and vacated the preliminary injunction entered by the district court. *Sherley v. Sebelius*, 644 F.3d 388, 390 (D.C. Cir. 2011). After the second remand, the district court entered the summary judgment in favor of defendant now under review.

II. Background

The relevant facts are set forth in our opinion reviewing the preliminary injunction, *see Sherley*, 644 F.3d at 389-92, and in the two opinions of the district court, so we shall review them but briefly. Beginning in 1996, Congress has regularly included in appropriation bills a rider called the Dickey-Wicker Amendment, *see, e.g.*, Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, § 508. The Dickey-Wicker Amendment prohibits NIH from funding "(1) the creation of a human embryo or embryos for research purposes; or (2) research in which a human embryo or embryos are destroyed, discarded, or knowingly subjected to risk of injury or death greater than that allowed for research on fetuses in utero under 45 C.F.R. 46.204(b) and [42 U.S.C. § 289g(b)]." *Id.*

At the time of the adoption of the first Dickey-Wicker rider, scientists had not yet isolated embryonic stem cells (ESC), and the original enactment was apparently directed at another type of research performed on human embryos in the field of in vitro fertilization. *Sherley*, 644 F.3d at 390. By 1998, researchers had generated a stable line of ESCs available for further research. Although more mature

stem cells were and remain available, many researchers consider the ESCs far more valuable because they are pluripotent—that is, they can be developed into any of nearly 200 different types of human cells for use in a broad range of medical research.

Isolating ESCs for research requires that the cells be removed from a human embryo, cultured, and stabilized into a "stem cell line." This process of "derivation" destroys the embryo. The cells from this line may then be used for years by researchers, who differentiate the cells into whatever kinds of cells they need for a particular research project. Thus, the initial derivation process requires the destruction of a human embryo. The particular research projects using the earlier derived stem cells, however, does not involve the destruction of any further embryos.

It is this distinction between funding research projects directly involving the destruction of a human embryo and projects using embryonic stem cells derived from an earlier destruction that underlies the controversy giving rise to the present litigation. In 2001, President George W. Bush, for ethical reasons, declared that federal funds would be used in research on embryonic stem cells only if such cells were drawn from one of the sixty or so stem cell lines already existing at the time of President Bush's declaration. Address to the Nation on Stem Cell Research from Crawford, Texas, 37 WEEKLY COMP. PRES. DOC. 1149, 1151 (Aug. 9, 2001). President Bush later formalized this policy in an Executive Order. Exec. Order No. 13,435, 72 Fed. Reg. 34,591 (June 20, 2007).

So matters stood until 2009, when President Obama issued an Executive Order revoking Execu-

tive Order No. 13,433. Exec. Order No. 13,505, 74 Fed. Reg. 10,667 (Mar. 11, 2009). The Order stated that NIH "may support and conduct responsible, scientifically worthy human stem cell research, including human embryonic stem cell research, to the extent permitted by law." *Id.*

As required by the Executive Order and after notice and comment, NIH issued new "Guidelines for Human Stem Cell Research," 74 Fed. Reg. 32,170 (July 7, 2009) (Guidelines). The Guidelines "recognize the distinction, accepted by Congress, between the derivation of stem cells from an embryo that results in the embryo's destruction, for which Federal funding is prohibited, and research involving [ESCs] that does not involve an embryo nor result in an embryo's destruction, for which Federal funding is permitted." *Id.* at 32,173. Under the Guidelines, an ESC research project may receive NIH funding as long as it utilizes cells from lines (1) created by *in vitro* fertilization for reproductive purposes, (2) no longer needed for that purpose, and (3) voluntarily donated by the individuals who owned them—even if that line was derived after 2001. *Id.* at 32,174.

During the notice and comment proceedings, the current appellants filed comments opposing the use of federal funds for any embryonic stem-cell research. NIH did not respond to their comments. After the adoption of the guidelines, appellants brought the present action.

III. Analysis

We note at the outset that our review of the district court's grant of summary judgment in favor of the government is *de novo*. *See, e.g.*, *Calhoun v. Johnson*, 632 F.3d 1259, 1261 (D.C. Cir. 2011). Therefore, our duty is to undertake the same exami-

nation as did the district court. On summary judgment review in general, that requires the court to grant summary judgment in favor of the moving party if that party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. In this court, as in the district court, the APA governs the scope of administrative reviews such as the one before us. That Act requires a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Thus, we, as did the district court, must allow summary judgment for appellees, unless appellants have produced in the record at least enough support for their position to establish "a genuine dispute" as to some material fact from which we could discern that the adoption or implementation of the guidelines by the appellees was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." There is no serious dispute of fact in this case. Appellants advance three arguments for invalidating the NIH guidelines, each of which relies upon a proposition of law.

1. Dickey-Wicker

Appellants' first and principal argument is that the NIH guidelines violate the Dickey-Wicker ban on federal funding of "research in which a human embryo or embryos are destroyed." On this issue, the law of the case is established against them.

The purpose of the law-of-the-case doctrine is to ensure that "the *same* issue presented a second time in the *same case* in the *same court* should lead to the *same result*." *LaShawn A. v. Barry*, 87 F.3d 1389,

1393 (D.C. Cir. 1996). The courts are appropriately "'loathe' to reconsider issues already decided," except in the case of "extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Id.* (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983))). Appellants' argument before us in the preliminary-injunction review was the same as now. Specifically, they asserted then and assert now that the Dickey-Wicker ban "unambiguously" extends to any research project that uses ESCs. *Sherley*, 644 F.3d at 395. Their argument, now and before, is that if a funded research project involves the use of an ESC, then an embryo necessarily has been destroyed, and the ban of Dickey-Wicker has been violated. *See generally id.* at 393-94. Briefly put, appellants contend that all ESC research is "research" in which a human embryo or embryos are destroyed and, therefore, NIH's guidelines violate Dickey-Wicker by authorizing federal funding of such research. This is precisely the same argument we rejected in our review of the preliminary injunction order.

Applying *Chevron* analysis, *see Chevron U.S.A., Inc., v. NRDC*, 467 U.S. 837, 842-43 (1984), we held that NIH had reasonably interpreted Dickey-Wicker's ban on funding "research in which . . . embryos are destroyed" to allow federal funding of ESC research. *Sherley*, 644 F.3d at 393-96. We explained that "research" as used in Dickey-Wicker was a "flexible" (i.e., ambiguous) term. *Id.* at 394. It could be understood as the plaintiffs construed the term—an "extended process" that would include the initial derivation of stem cells. Or "research" could take on NIH's narrow interpretation as a "discrete project"

separate from derivation. *Id.* Given that ambiguity, we deferred under *Chevron* to NIH's permissible construction of Dickey-Wicker: "research" as used in Dickey- Wicker may reasonably be understood to mean a "discrete endeavor" that excludes the initial derivation of ESCs. *Id.* at 396 n.*. Under that interpretation, Dickey-Wicker permits federal funding of research projects that utilize already-derived ESCs—which are not themselves embryos—because no "human embryo or embryos *are* destroyed" in such projects. *Id.* at 393-96 (emphasis added). Plaintiffs' argument on this theory for relief is no different than it was in our prior review. Therefore, unless they have established some "extraordinary circumstance," *LaShawn A.*, 87 F.3d at 1393, the law of the case is established and we will not revisit the issue.

Appellants have offered an exception to the law-of-the-case doctrine which they argue should permit us to revisit the issue. As they point out, we have held that "the decision of a trial or appellate court whether to grant or deny a preliminary injunction does not constitute law of the case for the purpose of further proceedings and does not limit or preclude the parties from litigating the merits." *Berrigan v. Sigler*, 499 F.2d 514, 518 (D.C. Cir. 1974); *see also Belbacha v. Bush*, 520 F.3d 452, 458 (D.C. Cir. 2008). Therefore, appellants reason, we are not bound by our prior determination in the review of the grant of preliminary injunction. However, on the facts of this case, the exception to the law-of-the-case doctrine is inapplicable.

The generally recognized precedent for the preliminary injunction exception to the law-of-the-case doctrine arises from the nature of a preliminary injunction. That equitable remedy is a stopgap meas-

ure, generally limited as to time, and intended to maintain a status quo or "to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). In trial court, this would mean that a determination had been made without discovery or the other full range of exploratory and preparatory pretrial procedures and without a full trial on the merits. In appellate review, the court of appeals must often consider such preliminary relief without the benefit of a fully developed record and often on briefing and argument abbreviated or eliminated by time considerations. *See, e.g.*, *Cohen v. Brown Univ.*, 101 F.3d 155, 169 (1st Cir. 1996). Thus arose the exception to the law-of-the-case doctrine. An appellate court in a later phase of the litigation with a fully developed record, full briefing and argument, and fully developed consideration of the issue need not bind itself to the time-pressured decision it earlier made on a less adequate record.

Furthermore, independent of the preliminary-injunction exception, a decision in the preliminary-injunction context may fail to garner law-of-the-case effect simply because it fails to satisfy an element of the law-of-the-case rule itself: the requirement that a court must "affirmatively decide[ ]" an issue, explicitly or by necessary implication, to establish law of the case. *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995). The standard for granting a preliminary injunction essentially asks—in part—whether a plaintiff is "likely to succeed on the merits" of his claim. *See, e.g.*, *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). To the extent an appellate court predicts, without making a definitive legal conclusion, that the plaintiffs probably or likely will or will not succeed on the merits, it cannot be said that the

court "affirmatively decided" the issue such that it would bind an appellate court at a later stage of the litigation.

The question raised by this appeal is whether we should apply the preliminary-injunction exception to the law-of-the-case preclusion where the reasons for its application are absent. That is, where the earlier ruling, though on preliminary-injunction review, was established in a definitive, fully considered legal decision based on a fully developed factual record and a decision-making process that included full briefing and argument without unusual time constraints, why should we not follow the usual law-of-the-case jurisprudence? While we have not previously provided a definitive answer to that question, several other circuits and commentators have.

For example, in *Naser Jewelers, Inc. v. City of Concord*, 538 F.3d 17 (1st Cir. 2008), the First Circuit considered an appeal from summary judgment upholding a city ordinance against a First Amendment challenge. The circuit had previously affirmed the denial of preliminary injunction in the same case. In holding that the law-of-the-case doctrine applied, even though the first decision was in the denial of a preliminary injunction and the second appeal was from the entry of summary judgment, that circuit noted that "the doctrine applies when [the] court has previously ruled on a motion for preliminary injunction and 'the record before the prior panel was sufficiently developed and the facts necessary to shape the prior legal matrix were sufficiently clear.'" *Id.* at 20 (quoting *Cohen v. Brown Univ.*, 101 F.3d 155, 169 (1st Cir. 1996) (other citations, quotation marks, and alterations omitted)).

In *This That and The Other Gift and Tobacco, Inc. v. Cobb County*, 439 F.3d 1275, 1284-85 (11th Cir. 2006), the Eleventh Circuit reached a similar decision, citing its own precedent to the effect that prior clear legal conclusions reached at the preliminary injunction stage would be afforded law-of-the-case status. In *Entergy, Arkansas, Inc. v. Nebraska*, 241 F.3d 979, 987 (8th Cir. 2001), the Eighth Circuit afforded law-of-the-case status to an Eleventh Amendment issue "carefully considered" in deciding the course of the preliminary injunction appeal. And in *Royal Insurance Co. of America v. Quinn-L Capital Corp.*, 3 F.3d 877, 880-81 (5th Cir. 1993), the Fifth Circuit ruled to the same effect. One of the leading commentators on federal jurisprudence has stated, "A fully considered appellate ruling on an issue of law made on a preliminary injunction appeal, however, does become the law of the case for further proceedings in the trial court on remand and in any subsequent appeal." 18B Charles A. Wright et al., Fed. Prac. & Proc. Juris. § 4478.5 (2d ed.).

Appellants insist application of the preliminary injunction exception is mandated by circuit precedent. For this proposition, they rely on *Berrigan* and *Belbacha*. They note that in *Berrigan*, we stated, "The decision of a trial or appellate court whether to grant or deny a preliminary injunction does not constitute the law of the case for the purposes of further proceedings and does not limit or preclude the parties from litigating the merits, unless there has been an order of consolidation pursuant to Rule 65(a)(2), not the case here." 499 F.2d at 518. In *Belbacha*, we stated, "An order denying preliminary relief, however, 'does not constitute the law of the case,' although it can be 'persuasive.'" 520 F.3d at 458 (quoting *Berrigan*). No doubt these cases state the generally ap-

plicable rule for preliminary-injunction decisions. However, the case before us is factually distinguishable. The time constraints and limited record available to the court in those cases are not present here. We therefore follow the other circuits in concluding that the exception is not present either. Appellants' first argument fails.

2. Subjected to Risk

Appellants make a second argument that is intertwined with their first. They note that Dickey-Wicker also bans "research in which a human embryo or embryos are . . . knowingly subjected to risk of injury or death." § 508(a)(2). Even if the NIH guidelines do not violate the Dickey-Wicker ban on funding "research in which a human embryo or embryos are destroyed" (because law of the case accorded *Chevron* deference to NIH's interpretation), appellants maintain that the guidelines still run afoul of the "subjected to risk" language. They theorize that conducting a federally funded ESC research project increases the demand for more ESC lines, which in turn incentivizes the destruction of more embryos to create those lines, thus subjecting those embryos to risk. NIH responds that no embryos are subjected to risk of injury or death in any ESC research project using already derived ESCs and not otherwise involving the use of embryos.

Although appellants can credibly argue that this precise question of statutory interpretation is not within the law of the case, our result is nonetheless controlled by that doctrine. Law of the case has established that *Chevron* deference applies. It is established that "research" as used in Dickey-Wicker is an ambiguous term, and that NIH's interpretation of the term "research" as a discrete project rather than

an extended process is reasonable. Under that definition of "research," the destruction of embryos that occurs in the ESC derivation process is not a part of individual ESC research projects using already derived ESCs. Therefore, ESC research is no more "research in which . . . embryos are . . . subjected to risk" than it was "research in which . . . embryos are . . . destroyed." Appellants' theory shifts focus from the embryo destroyed in the past to embryos for which an ESC research project "incentivizes" future destruction. But none of those embryos are "destroyed" or "subjected to risk" *in* an ESC research project. The language of Dickey-Wicker does not ban funding for, *e.g.*, "research which provides an incentive to harm, destroy, or place at risk human embryos." As we have held before, the NIH interpretation of the statute's actual language is reasonable.

3. Failure to Reply to Comments

The plaintiffs finally contend that NIH violated the APA by issuing the Guidelines without addressing comments categorically objecting to ESC research, which the plaintiffs consider relevant to NIH's decision to expand the availability of ESC research funding. While this contention remains unfettered by decisions made in *Sherley II*, it fares no better than the Dickey-Wicker arguments.

APA Section 553 requires agencies to provide the public with notice of a proposed rulemaking, an opportunity to comment, and, "[a]fter consideration of the relevant matter presented," a "concise general statement" of the rule's basis and purpose. 5 U.S.C. § 553. We have said before that "the opportunity to comment is meaningless unless the agency responds to significant points raised by the public." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir.

1977). That said, an agency's failure to address a particular comment or category of comments is not an APA violation *per se*. *See, e.g.*, *Thompson v. Clark*, 741 F.2d 401, 408 (D.C. Cir. 1984) ("[APA § 553] has never been interpreted to require the agency to respond to every comment, or to analyze every issue or alternative raised by the comments, no matter how insubstantial."). We review an agency's response to comments under the same arbitrary-and-capricious standard to which we hold the rest of its actions. *See Home Box Office*, 567 F.2d at 35 n.58. Put simply, "The failure to respond to comments is significant only insofar as it demonstrates that the agency's decision was not based on a consideration of the relevant factors." *Covad Commc'ns v. FCC*, 450 F.3d 528, 550 (D.C. Cir. 2006) (quoting *Thompson*, 741 F.2d at 409).

The comments identified by appellants cited scientific and ethical problems with ESC research and categorically objected to funding any ESC research at all. They advocated funding other types of stem-cell research instead. Crucially, however, this recommended course of action is diametrically opposed to the direction of Executive Order 13,505, which NIH sought to "implement" by issuing the Guidelines, *see* 74 Fed. Reg. at 32,170. That Order makes it quite plain that its dominant purpose was to "remove" President Bush's 2001 "limitations" on funding human ESC research and to "expand" NIH support for human stem-cell research, "including human embryonic stem cell research." *See* 74 Fed. Reg. at 10,667, §§ 1-2 (titled "Removing Barriers to Responsible Scientific Research Involving Human Stem Cells"). Yet the comments at issue advocate ending all ESC research funding—even for research that has been eligible for funding for a decade under the

2001 restrictions. Following these commenters' lead would directly oppose the clear import of the Executive Order, which sought to remove limitations on ESC research and to expand NIH support for stem-cell research.

NIH may not simply disregard an Executive Order. To the contrary, as an agency under the direction of the executive branch, it must implement the President's policy directives to the extent permitted by law. *See Bldg. & Const. Trades Dept. v. Allbaugh*, 295 F.3d 28, 32-33 (D.C. Cir. 2002) (citing THE FEDERALIST NO. 72, at 463 (Alexander Hamilton) (Benjamin F. Wright ed., 1961)). Bound as it is to carry out the President's directives, NIH thus reasonably limited the scope of its Guidelines to implement the Executive Order. And because the Executive Order's entire thrust was aimed at expanding support of stem-cell research, it was not arbitrary or capricious for NIH to disregard comments that instead called for termination of all ESC research (including research that the executive branch has permitted since 2001). Such comments simply did not address any factor relevant to implementing the Executive Order.

While the district court also rejected the plaintiffs' APA claim, it did so by relying in part on its holding that NIH's interpretation of the Executive Order deserved deference under *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965). The plaintiffs claim that such deference is unwarranted for a variety of reasons. We have no reason to resolve this argument here. We need not rely on deference to NIH's interpretation of Executive Order 13,505 to conclude that NIH's choice to disregard the comments at issue was not arbitrary or capricious. NIH stated that the

scope of its Guidelines was to "implement Executive Order 13505," 74 Fed. Reg. at 32,174, and that Order plainly starts from the premise that NIH should continue to fund at least some ESC research. NIH's decision to dismiss comments seeking to reopen that premise for debate therefore did not demonstrate a failure to consider relevant factors.

Conclusion

For the above reasons, we affirm the district court's grant of summary judgment in favor of the government.

So ordered.

KAREN LECRAFT HENDERSON, *Circuit Judge*, concurring:

My colleagues correctly note that *Sherley v. Sebelius*, 644 F.3d 388 (D.C. Cir. 2011) (*Sherley I*), applied *Chevron* to uphold the National Institute of Health (NIH) Guidelines for Human Stem Cell Research, 74 Fed. Reg. 32,170 (July 7, 2009) (Guidelines). *See* Maj. Op. at 8. Although the law of the case prevents us from reconsidering that holding, I write separately for the record to point out that *Chevron* review is inapplicable to the Guidelines.

"Not every agency interpretation of a statute is appropriately analyzed under *Chevron*." *Ala. Educ. Ass'n v. Chao*, 455 F.3d 386, 392-93 (D.C. Cir. 2006). *Chevron* applies only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.' " *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)). In short, we accord *Chevron* deference only when reviewing an agency's "construction of a statutory scheme *it is entrusted to administer*." *Id.* at 227-28 (quoting *Chevron*, 467 U.S. at 844) (emphasis added). "[W]hen an agency interprets a statute other than that which it has been entrusted to administer, its interpretation is not entitled to [*Chevron*] deference." *Dep't of Treasury v. FLRA*, 837 F.2d 1163, 1167 (D.C. Cir. 1988). NIH's construction of the Dickey-Wicker Amendment falls outside the *Chevron* ambit because NIH was not charged with administering the Amendment, as is obvious from both its language and its substance.

First, the Amendment's language makes clear its administration is not within the exclusive province of

NIH or its parent agency, the Department of Health and Human Services. It has been enacted annually as a rider to an omnibus appropriations act, in a division governing "Departments of *Labor*, Health and Human Services, *and Education, and Related Agencies Appropriations*." Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, div. F., § 508(a), 125 Stat. 786, 1112 (2011) (emphasis added); *see also, e.g.*, Consolidated Appropriations Act of 2011, Pub. L. No. 111-117, div. D, § 509(a), 123 Stat. 3034, 3280-81 (2010) (same division title); Omnibus Appropriations Act of 2010, Pub. L. No. 111-8, § 509(a), div. F, 123 Stat. 524, 803 (2009) (same). Because each annual rider by its terms applies generally to multiple agencies, *Chevron* deference is not due any one agency's interpretation of its language. *See Proffitt v. FDIC*, 200 F.3d 855, 860 (D.C. Cir. 2000) ("When a statute is administered by more than one agency, a particular agency's interpretation is not entitled to Chevron deference."). In the past, we have "declined to defer to an agency's interpretation of a statute when more than one agency is granted authority to interpret the same statute," reasoning that "[i]n such cases, it cannot be said that Congress implicitly delegated to one agency authority to reconcile ambiguities or to fill gaps, because more than one agency will independently interpret the statute." *Salleh v. Christopher*, 85 F.3d 689, 692 (D.C. Cir. 1996) (citing, *e.g.*, *Rapaport v. U.S. Dep't of Treasury*, 59 F.3d 212, 216-17 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1073 (1996); *Benavides v. U.S. Bureau of Prisons*, 995 F.2d 269, 272 n.2 (D.C. Cir. 1993); *Prof'l Reactor Operator Soc'y v. U.S. Nuclear Regulatory Comm'n*, 939 F.2d 1047, 1051 (D.C. Cir. 1991)). *Sherley I* therefore erred in applying *Chevron* to NIH's interpretation.

Second, the Amendment, as a rider to a federal appropriations statute, is "not within [any agency's] area of expertise" and therefore a particular agency's interpretation thereof "receives no deference." *U.S. Dep't of Navy v. FLRA*, 665 F.3d 1339, 1348 (D.C. Cir. 2012); *see, e.g.*, *Ass'n of Civilian Technicians, Tony Kempenich Mem'l Ch. 21 v. FLRA*, 269 F.3d 1119, 1121 (D.C. Cir. 2001) (court does not defer to FLRA's "interpretation of the Department of Defense Appropriations Act, a statute not committed to the Authority's administration" but "reviews such purely legal questions de novo"). Indeed the rider's language reveals no express delegation of authority—implicit or explicit—to any agency to administer its provisions—which is unsurprising given that the rider itself confers no substantive authority on any agency to do anything; it simply—and plainly—prohibits the Departments of Labor, Health and Human Services and Education, as well as "[r]elated [a]gencies," from using the appropriated funds for the specifically enumerated purposes.

Because the Dickey-Wicker Amendment does not delegate administrative authority to the Department of Health and Human Services or to NIH, I believe that *Sherley I* incorrectly applied the *Chevron* framework. *See* 644 F.3d at 392 (D.C. Cir. 2011) ("We approach this issue under the familiar two-step framework of *Chevron* . . . ."). The court should instead have interpreted the statute de novo, according no deference to NIH's interpretation.* *See Ass'n of*

* Even so-called *Skidmore* deference is not available because it also applies only to an agency interpretation of a statute the agency administers. *See United States v. Mead Corp.*, 533 U.S. at 228 (under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), "[t]he fair measure of deference to an agency administering its

[Footnote continued on next page]

Civilian Technicians, 269 F.3d at 1121; *Proffitt*, 200 F.3d at 860; *see also Dep't of Treasury*, 837 F.3d at 1167 ("Because the FLRA's refusal to award back pay did not rest on an interpretation of its organic statute, but rather on its reading of the Back Pay Act—a general statute—the FLRA's interpretation is entitled to respect before this court, but we are not bound by its construction of the statute even if reasonable."). Had we done so, I believe we would have invalidated the Guidelines as contrary to the Amendment's plain and unambiguous text. *See Sherley I*, 644 F.3d at 400-02 (Henderson, J., dissenting) (*Sherley I Dissent*).

The Amendment prohibits federal funding of "research in which a human embryo or embryos are destroyed." Pub. L. No. 112-74 § 508(a)(1). Contrary to the holding in *Sherley I*, this ban plainly *prohibits* federal funding that the Guidelines expressly *permit*—namely, the funding of human embryonic stem cell (hESC) research that is conducted after the destruction of the embryo. *See* 74 Fed. Reg. at 32,174. This conclusion is compelled by the dictionary definition of "research" as a "systematic inquiry or investigation," which necessarily includes not only "the first sequence of hESC research [involving] the derivation of stem cells from the human embryo" but also "the succeeding sequences of hESC research." *Sherley I Dissent*, 644 F.3d at 401. The *Sherley I* majority, however, ignored the Amendment's plain meaning, manufacturing ambiguity where there was

---

[Footnote continued from previous page]
own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position") (footnotes omitted).

none. *Sherley I Dissent*, 644 F.3d at 399, 402-05. Nevertheless, *Sherley I*'s *Chevron* step-two analysis is the law of the case and we are bound thereby. *See* Maj. Op. at 7-12.

BROWN, *Circuit Judge*, concurring: Despite many points of agreement with my colleagues, I write separately because we converge from different paths and there are aspects of this case that—NIH's insouciance notwithstanding—should trouble the heart. Even Dr. James Thompson, the researcher credited with being the first to successfully derive human embryonic stem cells, has admitted: "If human embryonic stem cell research does not make you at least a bit uncomfortable, you have not thought about it enough." Gina Kolata, *Man Who Helped Start Stem Cell War May End It*, N.Y. TIMES, Nov. 22, 2007.

I. *Chevron* Deference

If this was ever a simple case it long ago ceased to be one. The judiciary, the executive branch, the scientific community, and numerous legal commentators have put forth disparate interpretations of the Congressional prohibition on the use of federal funds for stem cell research.[1] Legislators, too, express con-

---

[1] *See, e.g.*, *Sherley v. Sebelius*, 704 F. Supp. 2d 63 (D.D.C. 2009); Jenny Shum, *Moral Disharmony: Human Embryonic Stem Cell Patent Laws, WARF, and Public Policy*, 33 B.C. INT'L & COMP. L. REV. 153, 163 (2010) ("Essentially, the amendment rendered any scientific research on hESCs ineligible for federal funding."); Ronald Green, *Political Interventions in U.S. Human Embryo Research: An Ethical Assessment*, 38 J.L. MED. & ETHICS 220, 224 (2010) ("Dickey-Wicker not only prohibits research that risks or destroys an embryo–applying to embryos whether in vitro or in utero the same protections applied to fetuses and even more stringent protections than those afforded children–but it defines the embryo as any organism produced by fertilization, parthenogenesis, cloning, or any other means from one or more human gametes"); Maite S. Kollmann, *Taking the Moral High Road: Why Embryonic Stem Cell Research Should*

[Footnote continued on next page]

flicting views.[2] Disagreement is inevitable when what lies at the core of the dispute is a profound question about the boundaries of science—one that is irreducibly controversial because the slippery slope is precipitous in both directions. Ours, though, is not the legislative burden of bringing considered resolution to this contested question. We ponder a much narrower, much more prosaic query that serves only as a rough proxy for the metaphysics: does the Dickey-Wicker Amendment's prohibition on federal funding of "research in which a human embryo or embryos are destroyed" or "knowingly subjected to the risk of death or injury," Pub. L. No.112-74, sec. 508(a)(1–2), preclude federal funding for *all* human embryonic stem cell research? And how much deference, if any, should be accorded to the agency's view that stem

---

[Footnote continued from previous page]
Be Strictly Regulated, 2 FAULKNER L. REV. 145, 155 (2010) ("[NIH] General Counsel Rabb concluded that the Dickey-Wicker Amendment, which prohibited the use of funds allocated to the HHS for human embryo research, would not be applicable to research using hESCs 'because such cells are not a human embryo within the statutory definition.'").

[2] In the Senate hearing convened to respond to the district court's initial injunction in this case, Senator Wicker maintained that "if human embryonic stem cell research is to be done at all, it should be paid for with nontaxpayer funds." *The Promise of Human Embryonic Stem Cell Research: Hearing before S. Subcomm. on Appropriations*, Statement of Sen. Roger Wicker, 111th Cong. 3-4 (2010). In the same hearing, Senator Feinstein excoriated the District court's "alarming" decision as "an unprecedented and highly restrictive interpretation of the Dickey-Wicker amendment." *The Promise of Human Embryonic Stem Cell Research: Hearing before S. Subcomm. on Appropriations*, Statement of Sen. Dianne Feinstein, 111th Cong. 33 (2010).

cell research can be decoupled from the derivation of the stem cell line?

Every substantive decision in this case's checkered past has proceeded under the assumption that *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), controls the statutory interpretation. I thus welcome—and heartily concur with—the portion of Judge Henderson's concurring opinion dealing with this threshold determination. Like her, I conclude *Chevron* does not apply and the court should have accorded no deference to NIH's interpretation. *See AKM LLC dba Volks Constructors v. Sec. of Labor*, 675 F.3d 752, 764–69 (D.C. 2012) (Brown, J., concurring). But in this case, deference is not dispositive. Judge Henderson finds the Amendment's ban "plainly prohibits federal funding that the Guidelines expressly permit—namely, the funding of human embryonic stem cell (hESC) research that is conducted after destruction of the embryo." Concurrence at 4 (Henderson, J.). I am not so sanguine. Judge Henderson's reading is certainly plausible and undoubtedly consistent with the initial conclusion of the trial court that the language "reflects the unambiguous intent of Congress to enact a broad prohibition of funding research in which a human embryo is destroyed." *Sherley v. Sebelius*, 704 F. Supp. 2d 63, 70–71 (D.D.C. 2010). But it still does not tell us how to define "research" in light of the many layers of executive orders, agency interpretation, and legislative acquiescence with which we must now deal.

Congressional efforts to grapple with the ethical challenges arising from the extraordinary advances in biomedicine and biotechnology date back at least to the passage of the National Research Act in 1974.

See Pub. L. No. 93-348, 88 Stat. 342. Since then, there has been no shortage of committees, boards, and panels all dedicated to the study and consideration of the moral, legal, and ethical dimensions of using human subjects, or human cellular or genetic materials, in scientific experiments.[3] More recently, Congress passed the NIH Revitalization Act of 1993, Pub. L. 103-43, under which NIH established the Human Embryo Research Panel ("HERP"). While the bill's focus was human reproductive biology, HERP concluded that "[r]esearch involving the development of embryonic stem cells [done] with embryos resulting from IVF treatment for infertility or clinical research that have been donated" was "acceptable" and could receive federal funding. Human Embryo Research Panel, Volume I of the Report of the Human Embryo Research Panel, 75–76 (September 1994).[4]

Congress passed the Dickey-Wicker Amendment in 1996 partially in response to some of HERP's bolder recommendations, perhaps agreeing with the Washington Post that the Panel had gone "a step too

---

[3] The Ethics Advisory Board ("EAB"), for example, came into being in the late 1970s around the time scientists produced the first test-tube baby. The EAB focused on federal support for *in vitro* fertilization ("IVF") and embryo transfer. *See* Ethics Advisory Board, Report and Conclusions: HEW Support of Research Involving Human *In Vitro* Fertilization and Embryo Transfer 1-7 (May 4, 1979), available at http://bioethics.georgetown.edu/pcbe/reports/past_commissions/HE W_IVF_report.pdf. For a list of other prominent past commissions, see O. Carter Snead, *Science, Public Bioethics, and the Problem of Integration*, 43 U.C. DAVIS L. REV. 1529, 1539 n. 32 (2010).

[4] The panelists were foresighted as scientists had not yet derived human embryonic stem cells.

far." *See* Green, *supra*, at 224. The Amendment was not directed at the precise research at issue here,[5] but whatever the Amendment's original purpose, President Clinton's decision in 1999 to announce a policy of federal funding for embryonic stem cell research—and Congress's decision to pass the Amendment unchanged the following year—altered the interpretive calculus. *See* Joint Appendix at 523. In the same vein, Congress's decision to pass the Amendment unchanged for all eight years of the Bush Administration seems to confirm its acquiescence to *some* federal funding of research involving human embryonic stem cells.[6] Indeed, Congress supplemented this implicit approval of funding for embryonic stem cell research with contemporaneous Senate and House reports explicitly stating that the amendment "should not be construed to limit federal support for research involving human embryonic stem cells listed on an NIH registry and carried out in accordance with the policy outlined by the President." NIH Br. at 14 (quoting H.R. Rep. No. 107-229, at 180 (Oct. 9, 2001)).

For this reason, I am of the view that *de novo* review would not change the outcome of the prior decision to affirm NIH's interpretation of the act. I thus join in the judgment of the majority opinion though I would reach the decision using the more familiar clear error standard of review under which we must vacate the logic of the prior holding and supply our

---

5 *See* 142 CONG. REC. S429-01 (1996).

6 President Bush's policy was decidedly narrower than that of President Clinton, but it still authorized funding. Consequently, it must be said to violate the appellants' reading of the Dickey-Wicker Amendment.

own should we find that the prior decision was "clearly erroneous and would work a manifest injustice." *LaShawn v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (referencing *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988)). The facts in the record before us do not, however, rise to the level of these "extraordinary circumstances." *Id.* That we have only now, some four-years and multiple opinions later, questioned the propriety of Chevron strongly suggests that the decisions of the reasonable jurists considering these matters were not "clearly erroneous."[7]

II. Failure to Reply to Comments

Although it is difficult to take issue with any part of the majority's catechism on the agency's refusal to respond to thousands of comments, the whole seems somewhat problematic. Obviously, the opportunity to comment is meaningless unless the agency responds substantively to significant points raised by the public. But the law of this Circuit is clear: an agency is only required to respond to comments if, for example, it can be established that the comment is "relevant to the agency's decision and which, if adopted, would require a change in [the] agency's proposed rule, *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n. 58 (D.C. Cir. 1977), or that a failure to respond would "demonstrate[] that the agency's

---

[7] When the dust settles and the votes are tallied, a majority of this panel supports two seemingly conflicting positions: (1) that law of the case doctrine prevents us from reconsidering the earlier ruling that applied *Chevron* and (2) that *Chevron* does not apply. Thus, the majority opinion stands only for the proposition that the earlier result need not be overturned–not that the decision was correct in all respects.

decision was not based on a consideration of the relevant factors," *Covad Commc'ns Co. v. FCC*, 450 F.2d 186, 197 (D.C. Cir. 1993). In applying this test, however, the majority defines "relevance" as coextensive with the President's Executive Order and does so without imposing any clear limits on an agency's ability to ignore comments that contravene the executive's policy goals. I fear that without such boundaries there remains the distinct possibility that the executive power will expand at the expense of the APA's regulatory scheme and judicial review will be reduced to rubberstamping preordained results.

Clearly, if the Dickey-Wicker Amendment's prohibition was unambiguous, NIH could not ignore an entire class of interpretive views because a broad reading of "research" would run counter to the executive's agenda. Similarly, I do not think the agency could attempt to implement an expansive program Congress had explicitly rejected by deeming challenges to its authority irrelevant. But this is not the case here. As an initial matter, the comments Appellants argue were wrongfully ignored focus *not* on the text of Dickey-Wicker or the question of legislative authorization, but on the Executive Order's (and the Guidelines') requirement that only "responsible" and "scientifically worthy" research should be eligible for funding. Appellant Br. at 45. This is fundamentally a policy question and we must respect the Executive's ability to reasonably define the contours of the proposed rulemaking. Nor is there a conflict between branches in NIH's decision to couch their rejection in more absolute terms, *i.e.*, declaring all comments "advocating a blanket ban on all funding for hESC research . . . not relevant.'" *See* Joint App'x at 479–80. The NIH cannot be said to have acted arbitrarily and capriciously by refusing to re-open a

debate that, as a practical matter, has been foreclosed for more than a decade. Because I ultimately reach the same result, I thus concur with the majority's conclusion and leave the more technical questions of Executive Orders and deference for a later day.

The challenging—and constantly evolving—issues presented by bioethics are critical and complex. Striking the right balance is not easy and not, in the first instance, a task for judges. What must be defended is "the integrity of science, the legitimacy of government, and the continuing vitality" of concepts like human dignity.[8] Given the weighty interests at stake in this encounter between science and ethics, relying on an increasingly Delphic, decade-old single paragraph rider on an appropriations bill hardly seems adequate.

---

[8] Snead, *supra* n. 3, at 1604.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 6, 2010 Decided April 29, 2011

No. 10-5287

DR. JAMES L. SHERLEY, ET AL.,
APPELLEES

v.

KATHLEEN SEBELIUS, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,
APPELLANTS

Appeal from the United States District Court for the District of Columbia
(No. 1:09-cv-01575)

Beth S. Brinkmann, Deputy Assistant Attorney General, Department of Justice, argued the cause for appellants. With her on the briefs were *Ronald C. Machen Jr.*, U.S. Attorney, and *Mark B. Stern*, *Stephanie R. Marcus*, and *Abby C. Wright*, Attorneys. *Joel McElvain*, Senior Counsel, and *R. Craig Lawrence*, Assistant U.S. Attorney, entered appearances.

Jon E. Pettibone, *Neal Goldfarb*, and *Andrew T. Karron* were on the brief for *amici curiae* State of Wisconsin, et al. in support of appellants.

Robert P. Charrow and *Laura Metcoff Klaus* were on the brief for *amicus curiae* Regents of the University of California in support of appellants.

Thomas G. Hungar argued the cause for appellees. With him on the brief were *Bradley J. Lingo*, *Thomas M. Johnson, Jr.*, *Ryan J. Watson*, *Blaine H. Evanson*, *Samuel B. Casey*, and *Steven H. Aden*.

Dorinda C. Bordlee was on the brief for *amicus curiae* Maureen L. Condic in support of appellee.

Before: GINSBURG, HENDERSON, and GRIFFITH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GINSBURG.

Dissenting opinion filed by *Circuit Judge* HENDERSON.

GINSBURG, *Circuit Judge*: Two scientists brought this suit to enjoin the National Institutes of Health from funding research using human embryonic stem cells (ESCs) pursuant to the NIH's 2009 Guidelines. The district court granted their motion for a preliminary injunction, concluding they were likely to succeed in showing the Guidelines violated the Dickey-Wicker Amendment, an appropriations rider that bars federal funding for research in which a human embryo is destroyed. We conclude the plaintiffs are unlikely to prevail because Dickey-Wicker is ambiguous and the NIH seems reasonably to have concluded that, although Dickey-Wicker bars funding for the destructive act of deriving an ESC from an embryo, it does not prohibit funding a research project in which an ESC will be used. We therefore vacate the preliminary injunction.

I. Background

As we explained at an earlier stage of this case, stem cells have the potential of yielding treatments for a wide range of afflictions because scientists can cause them to function as any one of a number of specific types of cell. 610 F.3d 69, 70 (2010) (*Sherley I*). We there considered two different classes of human stem cells: adult stem cells, which are somewhat specialized, and ESCs, which are pluripotent, meaning they can develop into nearly any of the 200 types of human cell. In addition to these two established categories, we note the recent development of induced pluripotent stem cells, which are adult stem cells reprogrammed to a stage of development at which they are pluripotent. There is some debate as to which type of stem cell holds more promise of yielding therapeutic applications.

Adult stem cells can be found in the various tissues and organs of the human body. ESCs, by contrast, can be found only in a human embryo; isolating an ESC requires removing the "inner cell mass" of the embryo, a process that destroys the embryo. The stem cells among the 30 or so cells in the inner cell mass are then placed in a culture, where they will divide continuously without differentiating, thus forming a "stem cell line" of identical cells. An individual ESC may be removed from the line without disrupting either the multiplication process or the durability of the line. The removed cell may then be used in a research project — either by the investigator who extracted it or by another — in which the ESC will be caused to develop into the type of cell pertinent to that research. Most stem cell lines are maintained by one or another of several research

universities, which make them available for scientific use, usually for a small fee.

The plaintiffs in this case, Drs. James Sherley and Theresa Deisher, are scientists who use only adult stem cells in their research. They contend the NIH has, by funding research projects using ESCs, violated the Dickey-Wicker Amendment, which the Congress has included in the annual appropriation for the Department of Health and Human Services each year since 1996. Dickey-Wicker prohibits the NIH from funding:

> (1) the creation of a human embryo or embryos for research purposes; or (2) research in which a human embryo or embryos are destroyed, discarded, or knowingly subjected to risk of injury or death greater than that allowed for research on fetuses in utero under 45 C.F.R. 46.204(b) and section 498(b) of the Public Health Service Act (42 U.S.C. 289g(b)).

Pub. L. No. 111-117, § 509(a)(2), 123 Stat. 3034, 3280–81.

In 1996, when the Congress first passed Dickey-Wicker, scientists had taken steps to isolate ESCs but had not yet been able to stabilize them for research in the laboratory. The historical record suggests the Congress passed the Amendment chiefly to preclude President Clinton from acting upon an NIH report recommending federal funding for research using embryos that had been created for the purpose of in vitro fertilization. *See* O. Carter Snead, *Science, Public Bioethics, and the Problem of Integration*, 43 U.C. DAVIS L. REV. 1529, 1546 (2010). Dickey-Wicker became directly relevant to ESCs only in 1998, when researchers at the University of Wiscon-

sin succeeded in generating a stable line of ESCs, which they made available to investigators who might apply for NIH funding.

For that reason, on January 15, 1999, the General Counsel of the Department of Health and Human Services issued a memorandum addressing whether Dickey-Wicker permits federal funding of research using ESCs that had been derived before the funded project began; she concluded such funding is permissible because ESCs are not "embryos." After notice and comment, the NIH issued funding guidelines consistent with this opinion, *see* 65 Fed. Reg. 51,976 (2000), but the NIH did not fund any ESC research project while President Clinton was in office.

Early in 2001, President Bush directed the NIH not to fund any project pursuant to President Clinton's policy; later that year he decided funding for ESC research would be limited to projects using the approximately 60 then-extant cell lines derived from "embryos that ha[d] already been destroyed." *See* 37 WEEKLY COMP. PRES. DOC. 1149, 1151 (Aug. 9, 2001); *see also* Exec. Order No. 13,435, 72 Fed. Reg. 34,591 (2007); *Doe v. Obama*, 631 F.3d 157, 159 (4th Cir. 2011). Meanwhile, the Congress continued to reenact Dickey-Wicker each year of the Bush Administration.

Upon assuming office in 2009, President Obama lifted the temporal restriction imposed by President Bush and permitted the NIH to "support and conduct responsible, scientifically worthy human stem cell research, including human embryonic stem cell research, to the extent permitted by law." Exec. Order 13,505, 74 Fed. Reg. 10,667, 10,667 (2009). The NIH, after notice-and-comment rulemaking, then issued

the 2009 Guidelines, 74 Fed. Reg. 32,170–32,175 (July 7, 2009), which are currently in effect. In the Guidelines, the NIH noted "funding of the derivation of stem cells from human embryos is prohibited by . . . the Dickey-Wicker Amendment." *Id.* at 32,175/2. The Guidelines further addressed Dickey-Wicker as follows:

> Since 1999, the Department of Health and Human Services (HHS) has consistently interpreted [Dickey-Wicker] as not applicable to research using [ESCs], because [ESCs] are not embryos as defined by Section 509. This longstanding interpretation has been left unchanged by Congress, which has annually reenacted the Dickey [sic] Amendment with full knowledge that HHS has been funding [ESC] research since 2001. These guidelines therefore recognize the distinction, accepted by Congress, between the derivation of stem cells from an embryo that results in the embryo's destruction, for which Federal funding is prohibited, and research involving [ESCs] that does not involve an embryo nor result in an embryo's destruction, for which Federal funding is permitted.

Id. at 32,173/2.

In place of President Bush's temporal limitation, the 2009 Guidelines instituted specific ethical restrictions upon ESC research funded by the NIH: Such research may be conducted only upon stem cell lines derived from embryos that "were created using in vitro fertilization for reproductive purposes and were no longer needed for this purpose," and that "were donated by individuals who sought reproductive treatment . . . who gave voluntary written con-

sent for the human embryos to be used for research purposes," and who were not paid therefor. *Id.* at 32,174/2–3. Moreover, the research may use stem cell lines derived from an embryo donated after the effective date of the Guidelines only if the in vitro clinic had fully informed the donor of all possible options for disposing of the embryo and had taken other specified procedural steps to separate reproductive treatment from donation. *Id.*

After the 2009 Guidelines were issued, the Congress once again reenacted Dickey-Wicker as part of the appropriations bill for fiscal year 2010. The Congress has not enacted an appropriations bill for FY 2011, adopting instead a series of continuing resolutions that have carried Dickey-Wicker forward to the present. Neither party to this case has suggested the Congress might modify Dickey-Wicker for the remainder of FY 2011.

Drs. Sherley and Deisher and a number of others filed this suit in August 2009 and moved the district court for a preliminary injunction. Instead, the district court granted the Government's motion to dismiss the suit for want of standing. The plaintiffs appealed and we reversed in part, holding the doctors alone had standing because they competed with ESC researchers for NIH funding. *Sherley I*, 610 F.3d at 72–74.

On remand, the district court granted the doctors' motion and issued a preliminary injunction providing "that defendants and their officers, employees, and agents are enjoined from implementing, applying, or taking any action whatsoever pursuant to the [2009 Guidelines], or otherwise funding research involving human embryonic stem cells as contemplated in the Guidelines." Upon the Govern-

ment's motion, this court stayed the preliminary injunction pending appeal thereof. In the meantime, proceedings have continued in the district court, where the parties have cross-moved for summary judgment. The only question before us now, therefore, is the propriety of the preliminary injunction.

II. Analysis

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 376 (2008). "A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Id.* at 374.

We pause to consider how we are to treat these four factors. Before *Winter*, this court and others had allowed that a strong showing on one factor could make up for a weaker showing on another. *See Davenport v. Int'l Bhd. of Teamsters*, 166 F.3d 356, 360–61 (D.C. Cir. 1999); *see also Winter*, 129 S. Ct. at 392 (Ginsburg, J., dissenting) ("courts have evaluated claims for equitable relief on a 'sliding scale,' sometimes awarding relief based on a lower likelihood of harm when the likelihood of success is very high"). In *Davis v. Pension Benefit Guaranty Corp.*, 571 F.3d 1288, 1292 (2009), we noted that *Winter* "could be read to create a more demanding burden" than the sliding-scale analysis requires although, as we there observed, Justice Ginsburg does not think so, *see Winter*, 129 S. Ct. at 392. In *Davis*, however, we did not have to resolve the issue because we

would have reached the same conclusion under either approach. 571 F.3d at 1292.

In their concurring opinion in *Davis*, two judges expressed the view that "under the Supreme Court's precedents, a movant cannot obtain a preliminary injunction without showing *both* a likelihood of success *and* a likelihood of irreparable harm, among other things." *Id.* at 1296. They noted that the *Winter* Court seemed to treat the four factors as independent requirements and specifically to reject the Ninth Circuit's statement that a strong likelihood of success on the merits lessens the movant's burden to showing merely a "possibility" rather than a "likelihood" of irreparable harm. *Id.* (citing *Winter*, 129 S. Ct. at 374-76); *see also Nken v. Holder*, 129 S. Ct. 1749, 1763 (2009) (Kennedy, J., concurring) ("When considering success on the merits and irreparable harm, courts cannot dispense with the required showing of one simply because there is a strong likelihood of the other").

Like our colleagues, we read *Winter* at least to suggest if not to hold "that a likelihood of success is an independent, free-standing requirement for a preliminary injunction," *Davis*, 571 F.3d at 1296 (concurring opinion). Although the Fourth Circuit has read the same case to similar effect, *see Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 347 (2009), other circuits do not understand it to preclude continuing adherence to the sliding-scale approach, *see Alliance for the Wild Rockies v. Cottrell*, No. 09-35756, 2011 WL 208360, at *3–7 (9th Cir. Jan. 25, 2011); *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35–38 (2d Cir. 2010); *Hoosier Energy Rural Elec. Coop. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th

Cir. 2009). We need not wade into this circuit split today because, as in *Davis*, as detailed below, in this case a preliminary injunction is not appropriate even under the less demanding sliding-scale analysis.

We review the district court's balancing of the four factors for abuse of discretion. *Davis*, 571 F.3d at 1291. Insofar as the inquiry depends upon a question of law, our review is, of course, de novo. *Id.*; *Ark. Dairy Coop. Ass'n v. USDA*, 573 F.3d 815, 821 (D.C. Cir. 2009). In this case, our de novo review is central to the plaintiffs' likelihood of success on the merits, *see City of Las Vegas v. Lujan*, 891 F.2d 927, 931–32 (D.C. Cir. 1989), which success depends upon an issue of statutory interpretation.

A. Likelihood of Success on the Merits

In entering the preliminary injunction, the district court concluded the plaintiff doctors are likely to succeed in demonstrating the 2009 Guidelines are inconsistent with the limits upon funding in the Dickey-Wicker Amendment. 704 F. Supp. 2d 63, 70–72 (2010). We approach this issue under the familiar two-step framework of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984): If the Congress has "directly spoken to the precise question at issue," then we must "give effect to the unambiguously expressed intent of Congress"; if instead the "statute is silent or ambiguous with respect to the specific issue," then we defer to the administering agency's interpretation as long as it reflects "a permissible construction of the statute."

1. *Chevron* step one

We begin our review, of course, by looking to the text of Dickey-Wicker, which bars federal funding specifically for "research in which a human embryo

or embryos are destroyed, discarded, or knowingly subjected to risk of injury or death greater than that allowed for research on fetuses in utero" under the Public Health Service Act and a particular regulation of the Department of Health and Human Services. The district court held, and the plaintiffs argue on appeal, this provision unambiguously bars funding for any project using an ESC. They reason that, because an embryo had to be destroyed in order to yield an ESC, any later research project that uses an ESC is necessarily "research" in which the embryo is destroyed. For its part, the Government argues the "text is in no way an unambiguous ban on research using embryonic stem cells" because Dickey-Wicker is written in the present tense, addressing research "in which" embryos "are" destroyed, not research "for which" embryos "were destroyed."

The use of the present tense in a statute strongly suggests it does not extend to past actions. The Dictionary Act provides "unless the context indicates otherwise . . . words used in the present tense include the future as well as the present." 1 U.S.C. § 1. As the Supreme Court has observed, that provision implies "the present tense generally does not include the past." *Carr v. United States*, 130 S. Ct. 2229, 2236 (2010). The context here does not, as our dissenting colleague would have it, indicate a different understanding. To the contrary, as amicus the University of California urges in its brief, and as the Government emphasized at oral argument, NIH funding decisions are forward-looking, requiring the NIH to "determine whether what is proposed to be funded meets with its requirements." Therefore, a grant application to support research that includes

the derivation of stem cells would have to be rejected.*

The plaintiffs respond by reiterating their primary argument: Because "research" using an ESC includes derivation of the ESC, the derivation does not predate but is an integral part of the "research." The conclusion does not follow from the premise; at best it shows Dickey-Wicker is open to more than one possible reading.[**] The plaintiffs also argue we must read the term "research" broadly because the Congress, had it intended a narrower reading, would have used a term identifying a particular action, as it did in subsection (1) of Dickey-Wicker, which specifically bars the "creation" of an embryo for "research purposes." We see no basis for that inference. The definition of research is flexible enough to describe

---

* The plaintiffs urge us to adopt the district court's view that Dickey-Wicker incorporates the definition of "research" in the Human Subject Protection regulations: "a systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalizable knowledge." 45 C.F.R. § 46.102(d). The Government argues otherwise, but we need not resolve this debate because, as the Government also argues, that a project involves "research development" or is "'systematic' does not mean that it includes acts or processes," such as deriving ESCs, "that predated the federally funded research."

[**] The plaintiffs rely upon *Merck KGaA v. Integra Lifesciences I, Ltd.*, 545 U.S. 193, 202 (2005), but that case is inapposite; it involved a statute that protected from an infringement claim the use of patented materials "reasonably related to the development and submission of information" to the FDA in a regulatory proceeding. Although the Court concluded the statute protected the use of patented materials at all phases of research, the ruling did not depend upon an interpretation of the term "research," and does not bear upon our understanding of "research" in Dickey-Wicker. *See id*. at 202.

either a discrete project or an extended process, but this flexibility only reinforces our conclusion that the text is ambiguous.

2. *Chevron* step two

We turn, therefore, to *Chevron* step two, under which we must uphold the NIH's interpretation of Dickey-Wicker if it is but "reasonable." *See Chevron*, 467 U.S. at 844. Recall the relevant text is the prohibition against funding for "research in which a human embryo or embryos are destroyed." The NIH determined Dickey-Wicker does not bar its funding a project using an ESC that was previously derived because a stem cell is not an "embryo" and cannot develop into a human being. The plaintiffs do not dispute this much of the agency's reasoning.

The plaintiffs argue instead the NIH is not entitled to deference because it never offered an interpretation of the term "research." Their premise is not entirely correct: In the 2009 Guidelines the NIH expressly distinguished between the derivation of ESCs and "research involving [ESCs] that does not involve an embryo nor result in an embryo's destruction." 74 Fed. Reg. 32,173/2. Thus, although the Guidelines do not define the term "research," they do make clear the agency's understanding that "research involving [ESCs]" does not necessarily include the antecedent process of deriving the cells.

The plaintiffs, invoking our opinion in *Public Citizen, Inc. v. HHS*, 332 F.3d 654, 661 (2003), argue the agency's effort in this respect is insufficiently specific to warrant our deference. In the cited case we did not defer to HHS because the agency had not actually addressed the disputed portion of the statute; indeed, it had "[done] little more than repeat the statutory language" and had failed to offer any ex-

planation for its position that a Peer Review Organization could "inform" a Medicare beneficiary of its disposition of his complaint about a treating physician with a form letter lacking most of the pertinent information. *Id.* There was, in short, "no reasoning that we [could] evaluate for its reasonableness." *Id.* Here, in contrast, the NIH has explained how funding an ESC project is consistent with the Dickey-Wicker Amendment. The plaintiffs' objection that the NIH has not explicitly defined a word in the statute — an important word, to be sure — is mere cavil; it disregards the agency's use of the term, which implicitly but unequivocally gives "research" a narrow scope, thus ensuring no federal funding will go to a research project in which an embryo is destroyed. *See Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 420 (1992) (that agency's "interpretation of the word 'required'" was implicit "does not mean that we may not defer to that interpretation").

To this point the plaintiffs apparently respond that the NIH has, by treating derivation as part of "research," shown its understanding of Dickey-Wicker is unreasonable. Their argument is that, because the standard definition of "research" requires some kind of scientific inquiry, and deriving ESCs, standing alone, involves no such inquiry, the act of derivation can be deemed "research" only if it is part of a larger project. The plaintiffs refer us to 45 C.F.R. § 46.102(d), *supra* at 11 n.*; *see also, e.g.*, MERRIAM-WEBSTER DICTIONARY ONLINE, http://merriam-webster.com/dictionary/research (last visited Mar. 20, 2011) ("careful or diligent search"; "studious inquiry or examination; *especially*: investigation or experimentation aimed at the discovery and interpretation of facts, revision of accepted theories

or laws in the light of new facts, or practical application of such new or revised theories or laws"); OXFORD ENGLISH DICTIONARY ONLINE, http://www.oed.com/viewdictionaryentry/Entry/163432 (last visited Mar. 22, 2011) ("Systematic investigation or inquiry aimed at contributing to knowledge of a theory, topic, etc., by careful consideration, observation, or study of a subject"). The plaintiffs' premise is valid in part: Because the Guidelines state Dickey-Wicker bans funding for the derivation of ESCs and Dickey-Wicker bans only "research," it is clear the NIH treats the act of derivation as "research." The Government expressly confirmed this much at oral argument when counsel flatly stated "derivation is research." Less clear is whether the act of derivation, by itself, comes within a standard definition of research, that is, whether it involves any investigation or inquiry. On that score, the Government pointed out at oral argument that "stem cells are not pre-labeled cells that you can simply extract," and argued "the scientific process" of derivation, in which cells are "extracted and put into mediums where [they] can grow" before being examined and chemically treated, "itself involves experimentation."

Rather than rely upon that account of derivation qualifying as research, let us assume for the sake of the plaintiffs' argument derivation involves no scientific inquiry; it does not follow that the NIH may define derivation as "research" only if or insofar as the derivation is tethered to some later project using the derived cells. Although an understanding of "research" that includes the derivation of stem cells is not the ordinary reading of that term, it is surely as sensible as the plaintiffs' alternative, in which the derivation of a cell line is deemed part of every one of

the scores if not hundreds of subsequent research projects — although pursued by different scientists, perhaps many years later — to use one of the derived cells. To define derivation as "research," in other words, makes at least as much sense as to treat the one-off act of derivation as though it had been performed anew each time a researcher, however remote in time or place, uses a stem cell from the resulting line.* The fact is the statute is not worded precisely enough to resolve the present definitional contest conclusively for one side or the other.

Broadening our focus slightly, however, we can see the words surrounding "research" in the statute support the NIH's reading. Because the Congress wrote with particularity and in the present tense — the statute says "in which" and "are" rather than "for which" and "were" — it is entirely reasonable for the NIH to understand Dickey-Wicker as permitting funding for research using cell lines derived without federal funding, even as it bars funding for the derivation of additional lines.

Further, adding the temporal dimension to our perspective, we see, as the NIH noted in promulgating the 2009 Guidelines, the Congress has reenacted Dickey-Wicker unchanged year after year "with full knowledge that HHS has been funding [ESC] research since 2001," 74 Fed. Reg. 32,173/2, when President Bush first permitted federal funding for ESC projects, provided they used previously derived ESC

---

* Our dissenting colleague takes us to task for "read[ing] 'research' as if it were synonymous with 'research project,'" but we give it no such fixed meaning. Rather, our point is that "research," although susceptible to a broad definition, is also reasonably understood as a more discrete endeavor.

lines. As the plaintiffs conceded at oral argument, because this policy permitted the NIH to fund projects using ESCs, it would have been prohibited under their proposed reading of Dickey-Wicker. So, too, with the policy the Clinton Administration announced in 1999 and, of course, with the 2009 Guidelines promulgated by the Obama Administration. The plaintiffs have no snappy response to the agency's point that the Congress's having reenacted Dickey-Wicker each and every year provides "further evidence . . . [it] intended the Agency's interpretation, or at least understood the interpretation as statutorily permissible." *Barnhart v. Walton*, 535 U.S. 212, 220 (2002); *accord Lindahl v. OPM*, 470 U.S. 768, 782 n.15 (1985) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change" (internal quotation marks omitted)).*

3. Subsidiary Arguments

A few matters remain. First, we note, because the plaintiffs bring solely a facial challenge to the Guidelines, we have no occasion to consider their suggestion that the NIH might grant the researcher who derived an ESC line federal funds for research using it, which would link the act of derivation more closely to subsequent research and test the distinc-

* The parties' disagreement over whether the NIH's interpretation should be deemed "longstanding" is beside the point; this is not a situation in which we are asked to infer the Congress's assent from its inaction over a long period. Regardless how much time has passed, reenactment is evidence the Congress approves the agency's application of the statute. *Creekstone Farms Premium Beef L.L.C. v. USDA*, 539 F.3d 492, 500–501 & n.10 (D.C. Cir. 2008).

tion between them drawn by the NIH. However that case — were it ever to materialize — might play out is irrelevant here.* To prevail in their challenge to the Guidelines on their face the plaintiffs "must establish that no set of circumstances exists under which the [Guidelines] would be valid," *Reno v. Flores*, 507 U.S. 292, 301 (1993) (internal quotation marks omitted); it is not enough for the plaintiffs to show the Guidelines could be applied unlawfully, *see Air Transp. Ass'n of Am. v. DOT*, 613 F.3d 206, 213 (D.C. Cir. 2010); *see also Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606, 619 (1991) ("that petitioner can point to a hypothetical case in which the rule might lead to an arbitrary result does not render the rule 'arbitrary or capricious'").**

---

* The same is true of the plaintiffs' suggestion that a researcher might use federal funds to purchase ESCs; it is nothing more than another argument that the Guidelines could be applied unlawfully.

** As the dissent notes, a panel of this court once held this standard inapplicable to a facial statutory (as opposed to a facial constitutional) challenge to a regulation. *See Nat'l Mining Ass'n v. U.S. Corps. of Eng'rs*, 145 F.3d 1399, 1407-08 (D.C. Cir. 1998). That decision, however, was made in the mistaken belief that the "Supreme Court ha[d] never adopted a 'no set of circumstances' test to assess the validity of a regulation challenged as facially incompatible with governing statutory law." *Id.* at 1407. The Court had done just that several years earlier in *Flores*. Although *Flores* is not literally, therefore, an "intervening" decision of the Supreme Court, *see Amfac Resorts, L.L.C. v. DOI*, 282 F.3d 818, 827 (D.C. Cir. 2002), *vacated as not ripe sub nom. Nat'l Park Hospitality Ass'n v. DOI*, 538 U.S. 803 (2003), we have followed it since *National Mining, see, e.g., Air Transp. Ass'n*, 613 F.3d at 213; *Bldg. & Constr. Trades Dep't v. Allbaugh*, 295 F.3d 28, 33 (2002), and, bound as we are by a higher authority, do so again here.

The plaintiffs also argue the Guidelines transgress the prohibition in Dickey-Wicker against "research in which a human embryo or embryos are . . . knowingly subjected to risk of injury or death." To the extent this argument is distinct from the plaintiffs' principal argument that all ESC research is research in which an embryo is destroyed, it relies upon the proposition that ESC research "creat[es] demand for[] human embryonic stem cells," which "*necessitate[s]* the destruction of embryos." The district court did not address this theory in entering the preliminary injunction. Although ordinarily we "may affirm the judgment of the district court on the basis of a different legal theory," *Harbor Ins. Co. v. Stokes*, 45 F.3d 499, 501 (D.C. Cir. 1995) (summary judgment), the decision whether to grant a preliminary injunction is a matter of discretion, not a question of right, *see Winter*, 129 S. Ct. at 376–77. Not surprisingly, therefore, the plaintiffs have not identified, nor have we found, any precedent for upholding a preliminary injunction based upon a legal theory not embraced by the district court. In this as in every such case, it is for the district court to determine, in the first instance, whether the plaintiffs' showing on a particular claim warrants preliminary injunctive relief. For the same reason we do not pass upon the plaintiffs' argument they are likely to succeed on their claim under the Administrative Procedure Act that the NIH promulgated the Guidelines "through an inadequate notice-and-comment process."

Because those of the plaintiffs' legal arguments that are properly before us do not stand up well to analysis, it follows they have not shown they are more likely than not to succeed on the merits of their case. Indeed, were we to adopt the strict reading given *Winter* by our concurring colleagues in *Davis*,

our inquiry would end here. Under the sliding-scale approach, however, we must go on to determine whether the other three factors so much favor the plaintiffs that they need only have raised a "serious legal question" on the merits. *See Wash. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843–44 (D.C. Cir. 1977) ("a court, when confronted with a case in which the other three factors strongly favor interim relief may exercise its discretion to grant a stay if the movant has made a substantial case on the merits"). That much the plaintiffs have done. We turn therefore to another of the four factors, whether "the balance of equities tips in [the plaintiffs'] favor," *Winter*, 555 U.S. at 374. Because it does not, we need not consider either of the other two factors.

B. Balance of the Equities

The district court reasoned the "balance of hardships weighs in favor of an injunction" because, for ESC researchers, "the injunction would simply preserve the *status quo* and would not interfere with their ability to obtain private funding." 704 F. Supp. 2d at 72. On the other hand, the court thought it certain that increased competition would "threaten [the plaintiffs'] very livelihood." *Id.* at 72–73.

As we see it, however, a preliminary injunction would in fact upend the status quo. True, the plaintiffs compete with ESC researchers for funding — indeed, that is why they have standing to bring this case, *see Sherley I*, 610 F.3d at 71–74 — but they have been competing with ESC researchers since 2001. The 2009 Guidelines inflict some incremental handicap upon the plaintiffs' ability to compete for NIH money — they point to the additional time and money they must expend and have had to expend

since 2001 to meet the additional competition from researchers proposing to use ESCs — but it is necessarily uncertain whether invalidating the Guidelines would result in the plaintiffs getting any more grant money from the NIH. Accordingly, we cannot say that, if the plaintiffs are to litigate this case without the benefit of interim relief, then the 2009 Guidelines will place a significant additional burden upon their ability to secure funding for their research.

The hardship a preliminary injunction would impose upon ESC researchers, by contrast, would be certain and substantial. The injunction entered by the district court would preclude the NIH from funding new ESC projects it has or would have deemed meritorious, thereby inevitably denying other scientists funds they would have received. Even more problematic, the injunction would bar further disbursements to ESC researchers who have already begun multi-year projects in reliance upon a grant from the NIH; their investments in project planning would be a loss, their expenditures for equipment a waste, and their staffs out of a job. The record shows private funding is not generally available for stem cell research but even if, as the district court thought, private donors or investors would provide a reasonable alternative source of funds for ESC researchers, 704 F. Supp. 2d at 72, it remains unclear why such donors or investors would not similarly support the plaintiffs' research using adult stem cells and why the plaintiffs' "very livelihood" instead depends upon obtaining grants from the NIH.

All this is to say the balance of equities tilts against granting a preliminary injunction. That, combined with our conclusion the plaintiffs have not shown they are likely to succeed on the merits, leads

us to hold the district court abused its discretion in awarding preliminary injunctive relief.

III. Conclusion

Because the plaintiffs have not shown they are likely to succeed on the merits, we conclude they are not entitled to preliminary injunctive relief. We reach this conclusion under the sliding scale approach to the preliminary injunction factors; *a fortiori* we would reach the same conclusion if likelihood of success on the merits is an independent requirement. Therefore, the preliminary injunction entered by the district court must be and is

Vacated.

KAREN LECRAFT HENDERSON, *Circuit Judge*, dissenting:

The majority opinion has taken a straightforward case of statutory construction and produced a result that would make Rube Goldberg tip his hat. Breaking the simple noun "research" into "temporal" bits, Maj. Op. at 5, 6, 16, narrowing the verb phrase "are destroyed" to an unintended scope, *id.* at 11, dismissing the definition section of implementing regulations promulgated by the Department of Health and Human Services (HHS) (in case the plain meaning of "research" were not plain enough), *id.* at 11 n.*, my colleagues perform linguistic jujitsu. I must therefore respectfully dissent.

The Government appeals from the district court's entry of a preliminary injunction prohibiting it "from implementing, applying, or taking any action whatsoever pursuant to" the NIH Guidelines for Human Stem Cell Research (Guidelines), 32 Fed. Reg. 32,170 (July 7, 2009), "or otherwise funding research involving human embryonic stem cells as contemplated in the Guidelines." Order, *Sherley v. Sebelius*, 704 F. Supp. 2d 63 (D.D.C. Aug. 23, 2010) (No. 09-1575). "On a motion for a preliminary injunction, the district court must balance four factors: (1) the movant's showing of a substantial likelihood of success on the merits, (2) irreparable harm to the movant, (3) substantial harm to the nonmovant, and (4) public interest." *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009). We review the district court's weighing of the preliminary injunction factors for abuse of discretion and its findings of fact under the clearly erroneous standard. *Id.* To the extent its decision turns on a question of law, our review is de novo. *Id.* I believe that the plaintiffs,

researchers who use adult stem cells only, are likely to succeed on the merits of their challenge to the Guidelines and that the district court did not abuse its discretion in weighing the preliminary injunction factors in favor of granting the injunction. Accordingly, I would affirm.

I. Likelihood of Success on the Merits

The majority opinion sets out the background information describing the "derivation" of human embryonic stem cells (hESCs) from a human embryo—which action destroys the embryo—and the subsequent use of the hESCs in the hope of remedying many serious, and often fatal, diseases and debilitating physical conditions. I take no exception to that portion of the majority opinion except to the extent that it recites the "historical record suggests the Congress passed the [Dickey-Wicker] Amendment chiefly" to address matters other than hESC research. Maj. Op. at 4. The Government's brief suggests otherwise. After explaining that the Congress enacted the Amendment "in reaction to a 1994 NIH panel report," Appellants' Br. 21, it recites that the 1994 report advocated federal funding of research "designed to improve the process of *in vitro* fertilization, to determine whether embryos carried genetic abnormalities, *and to isolate embryonic stem cells*." *Id.* (second emphasis added). There is no reason to assume, therefore, the Congress did not consider hESC research when it first enacted the Dickey-Wicker Amendment (Amendment) in 1996.

The Amendment, reenacted annually as a rider to appropriations legislation, prohibits the expenditure of federal funds both for "the creation of a human embryo or embryos for research purposes" and for "research in which a human embryo or embryos

are destroyed." Consolidated Appropriations Act of 2010, Pub. L. No. 111-117, § 509(a), 123 Stat. 3034, 3280-81 (Dec. 16, 2009). It is the latter ban that the plaintiffs claim is violated by the 2009 Guidelines. Determining whether hESC research is "research in which a human embryo or embryos are destroyed" requires determining the meaning of "research." The plaintiffs contend that all hESC research constitutes research in which human embryos are destroyed and that the Amendment accordingly prohibits federal funding thereof. The Government counters that the derivation of hESCs and the subsequent use of those cells, although both research, are not part of the same—and prohibited—research. We construe the Amendment under the familiar two-step approach set forth in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). *Chevron* step one asks if the "Congress has directly spoken to the precise question at issue." *Id.* at 842. "We start with the plain meaning of the text, looking to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Blackman v. District of Columbia*, 456 F.3d 167, 176 (D.C. Cir. 2006) (internal quotation marks omitted). I believe we need go no further than *Chevron* step one here because the plain meaning of the Amendment is easily grasped. *See id.* ("If the [statute] has a plain and unambiguous meaning, our inquiry ends so long as the resulting statutory scheme is coherent and consistent." (internal quotation marks omitted)). Accordingly, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43.

The district court correctly looked to the dictionary definition of "research" as "diligent and system-

atic inquiry or investigation into a subject in order to discover or revise facts, theories, applications, etc." *Sherley v. Sebelius*, 704 F. Supp. 2d at 70 (citing Random House Dictionary); *see also* Maj. Op. at 14 (quoting Oxford English Dictionary Online ("Systematic investigation or inquiry aimed at contributing to knowledge of a theory, topic, etc., by careful consideration, observation, or study of a subject")). Research, then, comprises a systematic inquiry or investigation. And "systematic" connotes sequenced action. XVII Oxford English Dictionary 498 (2d ed. 1989) ("systematic": "Arranged or conducted according to a system, plan, or organized method . . . ."); *see also CACI Int'l, Inc. v. St. Paul Fire & Marine Ins. Co.*, 566 F.3d 150, 158-59 (4th Cir. 2009) (describing "systematic" behavior as "a series of acts" (internal quotation marks omitted)). The first sequence of hESC research is the derivation of stem cells from the human embryo. The derivation of stem cells destroys the embryo and therefore cannot be federally funded, as the Government concedes. *See* Maj. Op. at 14-15. I believe the succeeding sequences of hESC research are likewise banned by the Amendment because, under the plain meaning of "research," they continue the "systematic inquiry or investigation."

That the intent of the 1996 Congress, in enacting the Amendment, is to prohibit all hESC research—not just research attendant on the derivation of the cells—is clear by comparing the language used to ban federal funding for the creation of an embryo with the language the plaintiffs rely on. *See Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972) (rule that statutes *in pari materia* should be construed together "is but a logical extension of the principle that individual sections of a single statute should be construed together"); *Motion Picture Ass'n*

of Am. v. FCC, 309 F.3d 796, 801 (D.C. Cir. 2002) ("Statutory provisions *in pari materia* normally are construed together to discern their meaning."). While the Amendment prohibits federal financing of the "creation of a human embryo . . . for research purposes," it does *not* use parallel language in addressing the destruction of embryos. It bans federal funding of "research" rather than the "destruction of human embryos for research purposes." Research, then, is the express target of the ban the Congress imposed with respect to the destruction of a human embryo. This makes perfect sense because in 1996, according to the record, hESC research had barely begun. Deisher Decl. ¶ 7. The Congress, recognizing its scant knowledge about the feasibility/scope of hESC research, chose broad language with the plain intent to make the ban as complete as possible. Because the meaning of research is plain, and the intent of the Congress to ban the federal funding of hESC research is equally plain, I would stop at *Chevron* step one and enjoin the Guidelines as violative of the Amendment to the extent they allow federal funds to be used for hESC research.

If there *were* any uncertainty about the extent of the Amendment's ban, it would be erased by reading the Amendment's language in full, as the district court—again, correctly—did. The ban on federal funding of hESC research provides that federal funds may not be used for:

> [R]esearch in which a human embryo or embryos are destroyed, discarded, or knowingly subjected to risk of injury or death greater than that allowed for research on fetuses in utero under 45 CFR 46.204(b) and section

> 498(b) of the Public Health Service Act (42 U.S.C. 289g(b)).

Pub. L. No. 111-117, § 509(a)(2), 123 Stat. at 3280-81. The Amendment's incorporation of 45 C.F.R. § 46.204(b)—HHS's own regulation—relates to "[r]esearch involving pregnant women and fetuses," as section 46.204 is entitled. "Research," as used in section 46.204(b), means "a *systematic investigation, including research development*, testing and evaluation, designed to develop or contribute to generalizable knowledge." 45 C.F.R. § 46.102(d) (emphasis added); *see id.* § 46.202 ("definitions in § 46.102 [are] applicable to [§ 46.204]"). In expressly linking "research in which a human embryo or embryos are destroyed, discarded, or knowingly subjected to risk of injury or death" and "research on fetuses in utero under 45 CFR 46.204(b)," the Congress unambiguously manifested its intent that "research" as used in the Amendment is to have the same meaning as "research" used in section 46.204(b).[1] Moreover, the "presumption that a given term is used to mean the same thing throughout a statute" is "at its most vigorous when a term is repeated within a given sentence," as "research" is in the Amendment. *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Section 46.102(d) confirms that research involves sequenced action by defining it to include "development, testing and evaluation" sequences. "Research development" per-

---

[1] That the Amendment references section 46.204(b) in comparing the risk of injury or death to a human embryo does not affect the Amendment's incorporation of section 46.102(d)'s definition of research. Determining the level of risk permitted for "research on fetuses in utero under [section] 46.204(b)" necessarily requires construing "research" and section 46.102(d) defines "research."

fectly describes the first sequence of hESC research, that is, the derivation of the cells. The testing and evaluation sequences of hESC research cannot be performed without first conducting the research involved in deriving hESCs from the human embryo. The derivation of hESCs is, thus, the *sine qua non* developmental sequence on which all subsequent sequences of hESC research rest. Moreover, nothing in the record suggests that hESCs are derived for any purpose other than the testing and evaluation of those cells. That hESCs cannot be tested and evaluated unless and until they are derived from a human embryo, combined with the fact that derivation of hESCs is done solely as part of a "systematic investigation" of those cells, demonstrates that derivation is the necessary first sequence of hESC research. Because derivation of hESCs necessarily destroys a human embryo or embryos, and because derivation constitutes at least hESC research development under the Amendment, all hESC research is "research in which a human embryo or embryos are destroyed." Accordingly, the plaintiffs' challenge to the Amendment is likely to succeed because the Amendment prohibits the expenditure of federal funds to engage in hESC research in all of its sequences.

In my view, the majority opinion strains mightily to find the ambiguity the Government presses.[2]

---

[2] The Government may not have always taken this view of the Amendment. *See* Letter from Kate Berg, Deputy Scientific Director, NCHGR, to Wendy Fibison, Researcher at Georgetown University Medical Center (Oct. 10, 1996) (Joint Appendix 283) ("NIH position on embryo research" is federally funded researchers "[can]not engage in embryo related research" including certain types of "analysis from DNA derived from a human embryo"). *But see* Appellants' Reply Br. 7-8 (claiming

[Footnote continued on next page]

Treating "research" as composed of free-standing pieces, it concludes that the only piece that is banned is the derivation of the hESCs. The authority for this novel reading of "research" is not the dictionary but the Amendment's use of the phrase "in which a human embryo or embryos *are* destroyed" rather than "for which a human embryo or embryos *were* destroyed." Maj. Op. at 11 (emphases added).[3] The majority opinion correctly notes that the Dictionary Act, which provides that "unless the context indicates otherwise . . . words used in the present tense include the future as well as the present," 1 U.S.C. § 1, implies "that the present tense generally does not include the past," *Carr v. United States*, 130 S. Ct. 2229, 2236 (2010). That is not true, however, where, as here, "the context indicates otherwise." 1 U.S.C. § 1. *See Lindh v. Murphy*, 521 U.S. 320, 331 (1997) ("one has to strain to find . . . ambiguity" in reading statutory provision that "is applicable if a State *establishes* . . . a mechanism" to include State that *established* mechanism before statute's enactment (first emphasis added)); *Abercrombie v. Clarke*, 920 F.2d 1351, 1359 (7th Cir. 1990) (finding "abundantly clear that Congress intended the present tense language [in provisions of Financial Institutions Reform, Recovery, and Enforcement Act of 1989 providing for civil monetary penalties] to apply to

---

[Footnote continued from previous page]
Georgetown research, like derivation, "require[d] the removal of a cell from an embryo").

[3] The Government's suggested change in inflection can fairly be described as Clintonesque ("It depends upon what the meaning of the word 'is' is." H.R. Rep. No. 105-830, at 40 (Dec. 16, 1998) (quoting Grand Jury Testimony of President W.J. Clinton, *Jones v. Clinton*, No. 94-0290 (E.D. Ark. Apr. 12, 1999), at 57-58 (Aug. 17, 1998))).

past acts"), *cert. denied*, 502 U.S. 809 (1991); *Bell v. Maryland*, 378 U.S. 226, 236 (1964) ("very possibl[e]" that Maryland Court of Appeals would hold "the use of the present tense instead of the more usual future tense" in Maryland statute "to apply to past as well as future conduct"); *Coal. for Clean Air v. S. Cal. Edison Co.*, 971 F.2d 219, 225 (9th Cir. 1992) ("The present tense is commonly used to refer to past, present, and future all at the same time. We believe that Congress used the present tense word . . . because it did *not* wish to limit [the statute's] reach to either past or future disapprovals."); *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1108-09 (D. Minn. 1982) (provision allowing United States to seek injunction against any person "contributing to" handling, storage, treatment, transportation or disposal of solid or hazardous waste could be applied, at motion to dismiss stage, to past owner of inactive site who was no longer "contributing to the condition"); *cf. Carr*, 130 S. Ct. at 2244-45 (Alito, J., dissenting) (responding to majority's reliance on statute's use of present tense to reject statute's reach to past tense by noting that "modern legislative drafting manuals," including those used by both the United States Senate and House, "teach that, except in unusual circumstances, all laws . . . should be written in the present tense"); *Nickell v. Beau View of Biloxi, LLC*, No. 10-60204, — F.3d —, 2011 WL 1120792, at *4-5 (5th Cir. Mar. 28, 2011) (notwithstanding general rule, context indicated otherwise where inclusion of future events would conflict with statute of limitations and other time-limited rights conferred by statute); *see also Guidiville Band of Pomo Indians v. NGV Gaming, Ltd.*, 531 F.3d 767, 776 (9th Cir. 2008) ("[O]n its own terms the Dictionary Act . . . looks first to 'context,' and only if the 'context' leaves the mean-

ing open to interpretation does the default provision come into play."). There is no question that, here, context manifests that the present tense includes both the past as well as the future.[4] As already discussed, the derivation of hESCs constitutes *at least* research development, which, in *context*, means that it is "research in which a human embryo or embryos are [at any point] destroyed."

But it is not only the majority opinion's view of verb tenses that is wrong. My colleagues rest their *Chevron* step two analysis on the transformation of "research" into "research project" in the Amendment's text. In other words, it reads "research" as if it were synonymous with "research project." Maj. Op. at 2-5, 10-16, 20. But "research" is the overall "systematic investigation or inquiry" in a field—here, hESCs—of which each project is simply a part. Webster's Third New International Dictionary 1813 (1993) ("project" means "a definitely formulated *piece* of research" (emphasis added)). Without the majority opinion's misreading of "research" as "research project," the entire notion of pieces of research evap-

---

[4] Moreover, the Amendment combines the present tense "are" with the *past* participle "destroyed," that is, with "[a] verb form indicating past or completed action or time that is used as a verbal adjective." *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 39 (2008) (alteration in original) (quoting American Heritage Dictionary 1287 (4th ed. 2000)). Other statutes similarly use the present tense, especially a combination of "is" with a past participle, to signify conduct that has already occurred. *See*, *e.g.*, 10 U.S.C. § 6253 (Secretary of Navy "may replace . . . any medal of honor, Navy cross[etc.] awarded under this chapter that *is* stolen, lost, or destroyed or *becomes* unfit for use" (emphases added), that is, a medal which *has been* stolen, lost, or destroyed or become unfit for use before replacement).

orates—taking with it the "ambiguity" that sets *Chevron* step two in motion.[5]

Finally, it is of little moment that the Congress has reenacted the Amendment unchanged every year since 1996. While congressional reenactment ordinarily means the Congress intended to adopt an existing agency interpretation of the statute, *e.g.*, *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986), "[t]here is an obvious trump to the reenactment argument . . . in the rule that '[w]here the law is plain, subsequent reenactment does not constitute an adoption of a previous administrative construction,' " *Brown v. Gardner*, 513 U.S. 115, 121 (1994) (quoting *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991)). Moreover, "congressional silence lacks persuasive significance, particularly where administrative regulations are inconsistent with the controlling statute," *id.* (internal quotation marks and citations omitted), and "[a] regulation's age is no antidote to clear inconsistency with a statute," *id.* at 122.[6] Because I believe the Government's reading of the Amendment contravenes the Amendment's plain meaning, I am unpersuaded that the Congress, by simply reenacting the Amendment, has sanctioned that reading.[7]

---

[5] Likewise, the sequenced action inherent in "research," *supra* pp. 3-4, does not equate to individual research "projects."

[6] Moreover, the challenged Guidelines were not promulgated until 2009 so that congressional reenactment of the Amendment in the years *predating* 2009 signifies nothing in relation to the Guidelines.

[7] The majority opinion dismisses the plaintiffs' challenge that the Guidelines permit a researcher to use federal funds to purchase hESCs and even permit a federally-funded researcher to derive the cells himself. Maj Op. at 17-18. It concludes those

[Footnote continued on next page]

[Footnote continued from previous page]
possibilities do not affect the facial validity of the Guidelines because they do not demonstrate that "no set of circumstances exists under which the [Guidelines] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Whether *Salerno*'s "no set of circumstances" approach is properly applied in the absence of a constitutional challenge is not altogether settled in our Circuit. We have held "that the *Salerno* standard does not apply" when assessing "the validity of a regulation challenged as facially incompatible with governing statutory law." *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1407 (D.C. Cir. 1998). In *National Mining* we "confirm[ed] that the normal Chevron test" applies and "is not transformed into an even more lenient 'no valid applications' test just because the attack is facial." *Id.*; *accord Becker v. FCC*, 95 F.3d 75, 78 (D.C. Cir. 1996). Subsequently, however, we noted that *National Mining* "apparently overlooked *Reno v. Flores*, 507 U.S. 292 (1993)." *Amfac Resorts, LLC v. Dep't of the Interior*, 282 F.3d 818, 826 (D.C. Cir. 2002), *judgment vacated on other ground sub nom. Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803 (2003). In *Reno* the Supreme Court seemed to apply *Salerno*'s "no set of circumstances" test to an ultra vires challenge to a regulation. 507 U.S. at 300-01. *But see id.* at 309-15 (challenge to regulation does not succeed "if the regulation has a reasonable foundation, that is, if it rationally pursues a purpose that it is lawful for the [agency] to seek" (internal quotation marks and citation omitted)). As *Amfac* discusses, it is not clear whether the *Salerno* test applies to a purely statutory challenge or whether the standard set forth in *INS v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 188 (1991)—under which a regulation can be invalid even if it has some valid applicability—applies. *Amfac*, 282 F.3d at 827. *Amfac* acknowledges that it is of course bound by the decision of an earlier panel unless, *inter alia*, "an intervening Supreme Court decision alters the law of the circuit." 282 F.3d at 827. *Reno*, however, predates *National Mining*. *Amfac* does not resolve whether, "despite *Reno v. Flores*, *National Mining* . . . must stand as circuit law unless and until the full court overrules it." 282 F.3d at 827. *Cf. Air Transp. Ass'n of Am. v. U.S. Dep't of Transp.*, 613 F.3d 206, 213 (D.C. Cir. 2010) (applying *Reno* to
[Footnote continued on next page]

Accordingly, the plaintiffs have demonstrated to me a strong likelihood that they will prevail on the merits.

II. Remaining Factors

In addition to likelihood of success on the merits, the plaintiffs must also show "(2) irreparable harm to [them], (3) [no] substantial harm to the [Government], and (4) [the] public interest [is not harmed]," *Davis*, 571 F.3d at 1291, in order to obtain injunctive relief.

To demonstrate irreparable harm in the absence of an injunction, the plaintiffs' injury "[must be] of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (internal quotation marks omitted). We earlier held that these two plaintiffs do indeed suffer "an actual, here-and-now injury" from the Guidelines and that the probability they will "lose funding to projects involving [h]ESCs" is "substantial enough . . . to deem the injury to them *imminent*." *Sherley v. Sebelius*, 610 F.3d 69, 74 (D.C. Cir. 2010) (emphasis added). As the district court noted, moreover, their injury is irreparable because we "cannot compensate [them] for their lost opportunity to receive funds." *Sherley*, 704

[Footnote continued from previous page]
facial challenge of regulation without discussing *Amfac* or *National Mining*); *Bldg. & Constr. Trades Dep't, AFL-CIO v. Allbaugh*, 295 F.3d 28, 33 (D.C. Cir. 2002) (possibility agency could improperly apply executive order does not establish facial invalidity thereof). *See generally* Stuart Buck, Salerno vs. Chevron: *What to do About Statutory Challenges*, 55 Admin. L. Rev. 427 (2003).

F. Supp. 2d at 72. The majority opinion now dismisses their injury as "necessarily uncertain." Maj. Op. at 20. At the same time, my colleagues see no uncertainty in the harm to the Government if the injunction is affirmed. *Id.* I agree that enjoining the Guidelines would disrupt any hESC research projects that have already received federal funding and therefore harm the Government. Finally, I believe the district court correctly determined that enjoining the Guidelines would further the public interest. *See Sherley*, 704 F. Supp. 2d at 73 (" 'It is in the public interest for courts to carry out the will of Congress and for an agency to implement properly the statute it administers.' " (quoting *Mylan Pharms., Inc. v. Shalala*, 81 F. Supp. 2d 30, 45 (D.D.C. 2000))). As discussed *supra*, I believe the plaintiffs have made a strong showing of likelihood of success on the merits. Under the sliding scale approach that remains the law of our Circuit, *see* Maj. Op. at 8-9, "[i]f the movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor." *Davis*, 571 F.3d at 1291-92. Having concluded the plaintiffs have indeed made "an unusually strong showing" on the first factor, I cannot say the district court abused its discretion in balancing all of the factors in favor of granting preliminary injunctive relief.

For the foregoing reasons, I respectfully dissent.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DR. JAMES L. SHERLEY, *et al.*, Plaintiffs, v. KATHLEEN SEBELIUS, *et al.*, Defendants.	)	Civ. No. 1:09-cv-1575 (RCL)

MEMORANDUM OPINION

I. Introduction

Two scientists brought this lawsuit, asking this Court to find that the National Institutes of Health Guidelines for Human Stem Cell Research ("Guidelines") are invalid as a matter of law. The Court's initial dismissal of plaintiffs' case for lack of standing was reversed on appeal, and plaintiffs' Motion for Preliminary Injunction was reinstated. The Court promptly granted plaintiffs' Motion for Preliminary Injunction, but was again reversed on appeal, and the Court must now determine the merits of the case. Before the Court are plaintiffs' Motion for Summary Judgment, Pls.' Mot. Summ. J. [55], and defendants' Motion for Summary Judgment. Defs.' Mot. Summ. J. [58]. Having carefully considered the motions, oppositions, replies, supplemental briefing, the entire record in this case, and the applicable law, the Court will grant defendants' Motion for Summary Judg-

ment and deny plaintiffs' Motion for Summary Judgment. A review of the background of the case, the governing law, the parties' arguments, and the Court's reasoning in resolving those arguments follows.

II. Background

The human body comprises over 200 different cell types—muscle cells, skin cells, nerve cells, and so on—that perform all of its particular functions. AR at 588. These specialized cells, however, are all the descendants of a pool of unspecialized cells in the early human embryo, which divide, grow, and transform into all of the body's cells in a manner whose orderliness and complexity boggles the mind. *Id*. This case involves those unspecialized cells, called "embryonic stem cells," which can be transformed into any one of the hundreds of cell types found in the human body.

Embryonic stem cells are one of three types of human stem cells, with the other two being adult and induced pluripotent[1] stem cells. Embryonic stem cells are found in human embryos, and are made available for scientific research by a process—called "derivation"—that destroys the embryo. Once embryonic stem cells are derived, they can be used to create "lines" of stem cells that replicate indefinitely and provide a constant source of cells for research purposes. AR at 704. A second type of stem cell—adult stem cells—are, unlike embryonic stem cells,

---

[1] "Pluripotent" means, in the context of stem cells, capable of transforming into all of the cell types of the human body. Embryonic stem cells are naturally pluripotent. Induced pluripotent stem cells are mature cells that become pluripotent through scientific manipulation. AR at 84.

"limited to producing only certain types of specialized cells," and "are found in certain tissues in fully developed humans, from babies to adults." AR at 589. The third type of stem cell—induced pluripotent stem cells—are mature cells that have been "reprogrammed" using viruses so that their development reverses course, returning them to a condition similar to that of embryonic stem cells. AR at 718. Like embryonic stem cells, induced pluripotent stem cells can transform into hundreds of specialized human cells, although just how similar induced pluripotent stem cells are to embryonic stem cells remains unknown. *Id*.

Scientific interest in stem cells is driven by the recognition that, because they can be coaxed into forming particular body tissues, they hold the potential to advance medical science dramatically. AR at 587. Scientists hope to develop treatments for numerous diseases and conditions that continue to plague human beings—such as cancer, diabetes, and cardiovascular disease—by using stem cells to replace or rebuild damaged cells and tissues. *Id*. Since adult stem cells were first discovered in the 1950s, scientists have achieved success using such cells to develop treatments for human disease. AR at 593. But embryonic and induced pluripotent stem cells have only been available for scientific study since 1998, AR at 693, and so proven and safe therapeutic options involving these cell types are likely to require substantial additional research and time. AR at 600. Given the differences between the various stem cell types and their advantages and disadvantages as sources of potential therapies, the National Institutes of Health ("NIH") "believes that it is important to simultaneously pursue all lines of research." AR at 705.

Controversy has surrounded embryonic stem cell research since 1998, when scientists first succeeded in isolating and culturing stem cells from human embryos. In 1999, the NIH, finding that embryonic stem cells were "enormously important to science" and held "great promise for advances in health care," requested public comment on draft guidelines for funding embryonic stem cell research "in an ethical and legal manner." Draft National Institutes of Health Guidelines for Research Involving Human Pluripotent Stem Cells, 64 Fed. Reg. 67,576, 67,576 (proposed Dec. 2, 1999). The NIH recognized that the establishment of stem cell lines from embryos had "generated much interest among scientists and the public, particularly among patients and their advocates, especially with regard to the ethical issues related to this research." *Id*.

Funding embryonic stem cell research with taxpayers' dollars raised legal issues as well. Federal funding potentially conflicted with a Congressional law, first enacted in 1996, known as the "Dickey-Wicker Amendment." That Amendment, reenacted every year since 1996 without alteration, prohibits the NIH from funding:

> (1) the creation of a human embryo or embryos for research purposes; or
>
> (2) research in which a human embryo or embryos are destroyed, discarded, or knowingly subjected to risk of injury or death greater than that allowed for research on fetuses in utero under 45 CFR 46.204(b) and section 498(b) of the Public Health Service Act (42 U.S.C. 289g(b)).

Consolidated Appropriations Act, 2010, Pub. L. 111-117, § 509(a), 123 Stat. 3034, 3280–81 (2009). The

Dickey-Wicker Amendment defines "embryo" as "any organism, not protected as a human subject under 45 CFR 46 as of the date of the enactment of this Act, that is derived by fertilization, parthenogenesis, cloning, or any other means from one or more human gametes or human diploid cells." *Id*. at § 509(b).

Aware of possible conflict between the NIH's plan to fund embryonic stem cell research and the Dickey-Wicker Amendment, the Director of the NIH requested a legal opinion in 1998 from the Office of the General Counsel of the Department of Health and Human Services ("HHS") on "whether NIH funds may be used for research using human pluripotent stem cells."[2] 64 Fed. Reg. at 67,576. The NIH received that opinion in January 1999, in the form of a memorandum from government attorney Harriet S. Rabb. AR at 311. Ms. Rabb concluded that the NIH could legally fund embryonic stem cell research. *Id*. She wrote that although the Dickey-Wicker Amendment prohibited funding for research involving embryos, embryonic stem cells "are not a human embryo" as defined by the Amendment. *Id*. Ms. Rabb noted that the Dickey-Wicker Amendment defined an "embryo" as an "organism," and that scientific understanding recognized a distinction between the basic units of living creatures, such as stem cells, that cannot exist independently of the body for long, and organisms themselves, which perform on their own all of the life functions that allow them to grow and reproduce. AR at 312-13. She determined that stem cells "are not even precursors to human organisms," because stem cells can only de-

---

[2] The NIH, in referring to "human pluripotent stem cells," is talking about embryonic stem cells (which are pluripotent).

velop into different cell types within the human body, while embryos can potentially develop into human organisms. *Id*. Based on Ms. Rabb's legal advice, the Director of the NIH convened a Working Group of the Advisory Committee to the Director to develop "appropriate guidelines governing . . . research involving the use of pluripotent stem cells derived from early human embryos in excess of clinical need." 64 Fed. Reg. at 67,577.

The guidelines were published in August 2000. National Institutes of Health Guidelines for Research Using Human Pluripotent Stem Cells, 65 Fed. Reg. 51,976, 51,976 (Aug. 25, 2000). The NIH had received about 50,000 public comments from "members of Congress, patient advocacy groups, scientific societies, religious organizations, and private citizens" in response to its guidelines. *Id*. Some commenters argued that the guidelines conflicted with the Dickey-Wicker Amendment; that they were too restrictive; that they were unnecessary; or that research on human embryonic stem cells was itself unnecessary because adult stem cells were satisfactory substitutes. *Id*. In response to commenters who questioned the NIH's decision to fund embryonic stem cell research in addition to adult stem cell research, the NIH concluded that "it is important to simultaneously pursue all lines of promising research," and presented a number of differences between adult and embryonic stem cells that warranted research on the latter. *Id*. The final guidelines required applicants for NIH grants to provide assurance that the stem cells used in the research were derived from only certain human embryos. *Id*. at 51,979. Embryos slated for derivation had to be "created for the purposes of fertility treatment" and "in excess of the clinical need of the individuals seek-

ing such treatment." *Id*. Various other conditions in the guidelines were designed to ensure that the embryo donor's consent was voluntary and informed. *Id*. at 51,979–80.

A change in Presidential administrations resulted in a significant change to federal stem cell policy. In August 2001, President George W. Bush stated in an evening address to the nation that "[e]mbryonic stem cell research offers both great promise and great peril." Address to the Nation on Stem Cell Research from Crawford, Texas, 37 Weekly Comp. Pres. Doc. 1149 (Aug. 13, 2001), AR at 21. He recognized that this research "could help improve the lives of those who suffer from many terrible diseases." *Id*., AR at 19. He noted that the United States has a long history of advancing science and medicine, as well as a "proud record of upholding the highest standards of ethics" while expanding science's limits. *Id*. Embryonic stem cell research, President Bush stated, "raises profound ethical questions" because the derivation process destroys the embryo from which stem cells are derived, therefore "destroy[ing] its potential for life." *Id*. "Like a snowflake, each of these embryos is unique, with the unique genetic potential of an individual human being." *Id*.

Torn between his confidence in the healing power of science and his belief that "human life is a sacred gift from our Creator," President Bush made what many have called a "Solomonic" decision: to permit federal funding for embryonic stem cell research, but only for such research as involved stem cells derived from embryos that had already been destroyed, where "the life and death decision has already been made." *Id*., AR at 21. Like the previous administration, President Bush refused to impose a categorical

ban on embryonic stem cell research, but he substituted a temporal limitation in the place of the embryo-source and informed consent limitations reflected in the NIH's then-current guidelines. Federal funding was available only for embryonic stem cell research using stem cells derived from embryos that were destroyed before August 9, 2001—the date of President Bush's address to the nation. *Id*.

Since President Bush's policy continued to permit some federal funding for embryonic stem cell research, once again there were questions concerning whether even that, more restrictive, policy complied with the Dickey-Wicker Amendment. Dr. Ruth Kirchstein, then Acting Director of the NIH, received a legal opinion on the issue in January 2002 from HHS General Counsel Alex M. Azar II. AR at 303. Mr. Azar concluded that President Bush's policy was consistent with the plain language of the Dickey-Wicker Amendment. AR at 306. He looked to the ordinary and common meaning of the phrase "research in which" used in the text of the Amendment. *Id*. Mr. Azar cited to a dictionary that defined "in" as meaning "within the confines of; inside"; "within the area covered by"; "during the course of or before the expiration of"; "during or part of the act or process of"; "within the category or class of." AR at 307. He did not specifically define the term "research." Mr. Azar concluded that since President Bush's policy would provide federal funding only for stem cell lines created before his August 9, 2001 address and because it "provides no incentive for the destruction of additional embryos," the policy "does not provide federal funding for 'research in which [during the course of, during or part of the act or process of, or within the category or class of] embryos are destroyed, dis-

carded, or knowingly subjected to risk of injury or death . . . .'" *Id.*

The winds of Federal stem cell policy shifted again in 2008, with the election of Barack Obama as President. In March 2009, President Obama issued an Executive Order nullifying former President Bush's stem cell policy. Exec. Order No. 13,505, 74 Fed. Reg. 10,667, 10,667 (Mar. 11, 2009), AR at 12. The Order's purpose was to remove President Bush's limitations on the NIH's ability to fund and conduct human embryonic stem cell research, thereby "enhanc[ing] the contribution of America's scientists to important new discoveries and new therapies for the benefit of humankind." *Id.* President Obama authorized the NIH to "support and conduct responsible, scientifically worthy human stem cell research, including human embryonic stem cell research, to the extent permitted by law." *Id.* He directed the NIH to publish new guidelines on human stem cell research consistent with his Order within 120 days. *Id.*

Several weeks later, the NIH requested public comment on draft guidelines. Draft National Institutes of Health Guidelines for Human Stem Cell Research Notice, 74 Fed. Reg. 18,578, 18,578 (proposed Apr. 23, 2009). The NIH stated that the purpose of the draft guidelines was to implement President Obama's Executive Order, "to establish policy and procedures under which NIH will fund research in this area, and to help ensure that NIH-funded research in this area is ethically responsible, scientifically worthy, and conducted in accordance with applicable law." *Id.* The proposed guidelines would permit funding for embryonic stem cell research using stem cells derived from embryos created for re-

productive purposes and no longer needed for that purpose. *Id*. They also contained provisions ensuring that research funds would only go to research projects using stem cells that were derived from embryos that had been donated with the informed consent of the donor. *Id*. at 18,579. As such, these proposed guidelines represented a return to the policy and funding approach that existed before President Bush's administration.

The NIH, as it had back in 2000, received nearly 50,000 comments in response to its draft guidelines. National Institutes of Health Guidelines for Human Stem Cell Research, 74 Fed. Reg. 32,170, 32,170 (July 7, 2009). In its final Guidelines, the NIH responded to certain categories of public comments that it had received, including comments indicating that the informed consent procedures set out in the draft guidelines were duplicative with existing procedures or too cumbersome, that the allowable sources of embryonic stem cells should be expanded to embryos created solely for research purposes, and that the NIH's mechanisms for ensuring ongoing compliance with the guidelines were lacking. *Id*. at 32,171–74.

In the course of responding to comments seeking clarification of its statement in the draft guidelines that embryonic stem cells "are not themselves human embryos," 74 Fed. Reg. at 18,578, the NIH presented its longstanding interpretation of the Dickey-Wicker Amendment as not prohibiting federal funding for embryonic stem cell research because human embryonic stem cells "are not embryos" as defined by the Amendment. 74 Fed. Reg. at 32,173. The NIH stated further that the Guidelines "recognize the distinction, accepted by Congress, between the derivation of stem cells from an embryo that results in the

embryo's destruction, for which Federal funding is prohibited, and research involving [human embryonic stem cells] that does not involve an embryo nor result in an embryo's destruction, for which Federal funding is permitted." *Id*.

The NIH also received numerous comments objecting to any federal funding whatsoever for embryonic stem cell research. *See e.g.*, AR at 2644. Commenters sought a categorical ban on embryonic stem cell research either for ethical or scientific reasons, or both. The NIH did not respond to such comments, believing them to be outside the scope of the rulemaking. Defs.' Mot. Summ. J. [58] 37. The NIH made minor revisions to the draft guidelines in response to certain comments, and then published the final Guidelines, with an effective date of July 7, 2009. *Id*. at 32,170.

A legal challenge to the Guidelines came swiftly. In August 2009, a group of plaintiffs, including Drs. James L. Sherley and Theresa Deisher—both of whom are scientists performing research involving adult stem cells—filed a lawsuit in this Court against various defendants, including the National Institutes of Health. Plaintiffs claimed that the Guidelines violated the Dickey-Wicker Amendment and were promulgated in violation of the Administrative Procedure Act. Compl. [1] ¶1, 2. They sought declarations that the Guidelines are not in accordance with law, were promulgated without the observance of required procedures, are arbitrary and capricious, and that past acts by the NIH pursuant to the Guidelines, including previous decisions to fund embryonic stem cell research projects, are null and void. *Id*. at ¶79. They also sought to enjoin defendants from taking any future actions of any kind

pursuant to the Guidelines or otherwise funding embryonic stem cell research. *Id*. That same day, they filed a Motion for Preliminary Injunction seeking an immediate cessation of actions taken pursuant to the Guidelines. Pls.' Mot. Prelim. Inj. [3] 1.

Defendants filed a Motion to Dismiss, arguing that plaintiffs lacked standing under Article III of the Constitution and that they had failed to state a claim for which relief could be granted. Defs.' Mot. Dismiss [22] 2. This Court granted defendants' motion, concluding that no plaintiff met all of the requirements of standing and that therefore the Court lacked subject matter jurisdiction over the lawsuit. *Sherley v. Sebelius*, 686 F. Supp. 2d 1, 3 (D.D.C. 2009). With respect to Drs. Sherley and Deisher, the Court noted that they had alleged in their Complaint that the Guidelines had increased competition for limited NIH funds and would therefore make it more difficult for them to compete successfully for those funds. *Id.* at 6. The Court found, however, that mere "increased competition for funding is an insufficient injury to impart standing." *Id.*

Plaintiffs appealed, challenging only this Court's determination that Drs. Sherley and Deisher lacked standing. The Court of Appeals for the District of Columbia reversed, finding that both Dr. Sherley and Dr. Deisher had standing. *Sherley v. Sebelius*, 610 F.3d 69, 70 (D.C. Cir. 2010). It held that Drs. Sherley and Deisher suffered an "actual, here-and-now injury" because "the Guidelines have intensified the competition for a share in a fixed amount of money," with the result that "plaintiffs will have to invest more time and resources to craft a successful grant application." *Id*. at 74. The Court reversed this Court's Order dismissing plaintiffs' claims while

also reinstating plaintiffs' Motion for Preliminary Injunction. *Id*. at 75.

With plaintiffs' Motion for Preliminary Injunction ripe for decision, this Court promptly ruled and found that "the likelihood of success on the merits, irreparable harm to plaintiffs, the balance of the hardships, and public interest considerations each weigh in favor of a preliminary injunction." *Sherley v. Sebelius*, 704 F. Supp. 2d 63, 70 (D.D.C. 2010). In particular, this Court concluded that the Guidelines violated the Dickey-Wicker Amendment's prohibition on federal funding for "research in which a human embryo or embryos are destroyed." *Id*. at 70 (quoting Omnibus Appropriations Act 2009, Pub. L. No. 111-8, § 509(a)(2), 123 Stat. 524, 803 (2009)). This Court determined that the term "research" had "only one meaning, *i.e.*, 'a systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalizable knowledge.'" *Id*. (quoting 45 C.F.R. § 46.102(d)). Rejecting defendants' argument that "research" meant "a piece of research," this Court found that the Dickey-Wicker Amendment's prohibition "encompasses *all* 'research in which' an embryo is destroyed, not just the 'piece of research' in which the embryo is destroyed." *Id*. at 71. After concluding that embryonic stem cell research is research in which an embryo is destroyed according to the Dickey-Wicker Amendment, this Court held that the Guidelines violated that Amendment and that plaintiffs had shown a strong likelihood of success on the merits. *Id*. at 71–72. This Court applied the other preliminary injunction factors, found them to be satisfied, and granted plaintiffs' motion. *Id*. at 73.

Defendants sought and received a stay of this Court's injunction from the D.C. Circuit, which later vacated the injunction on appeal. *Sherley v. Sebelius*, No. 10-5287, 2011 WL 1599685, at *1 (D.C. Cir. Apr. 29, 2011). Contrary to this Court's conclusion, the Court of Appeals held that "plaintiffs are unlikely to prevail [on the merits] because Dickey-Wicker is ambiguous and the NIH seems reasonably to have concluded that, although Dickey-Wicker bars funding for the destructive act of deriving an [embryonic stem cell] from an embryo, it does not prohibit funding a research project in which an [embryonic stem cell] will be used." *Id*. The Court determined that the meaning of the word "research" is "flexible enough to describe either a discrete project or an extended process." *Id*. at *6.

Having determined the statute to be ambiguous, the Court of Appeals proceeded to step two of the framework set out in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which requires judicial deference to an agency interpretation of an ambiguous statute so long as it reflects a "permissible construction of the statute." 467 U.S. at 842–43. While noting that defendants had not defined "research" in so many words, the Court rejected plaintiffs' contention that defendants had not offered an interpretation warranting judicial deference by concluding that NIH's use of the term "research" implicitly gave it a narrow scope. *Sherley*, 2011 WL 1599685, at *6. After concluding that the NIH's implicit interpretation was reasonable, *id*. at *7–8, the Court held that plaintiffs had failed to show that they were likely to succeed on the merits and that the other preliminary injunction factors weighed against the award of a preliminary injunction. *Id*. at *10.

With the preliminary injunction order vacated by the Court of Appeals, the lawsuit returned to this Court for review of the parties' competing motions for summary judgment.

III. Standard of Review

Summary judgment is the appropriate mechanism for deciding whether agency action is supported by the administrative record and is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C.A. § 706(2)(A) (2011). The district court judge "sits as an appellate tribunal" in such cases. *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001). "The 'entire case' on review is a question of law." *Id*. Therefore, the usual summary judgment standard doesn't apply. Instead, it is the agency's role to resolve factual issues and reach a decision that is supported by the administrative record, and it is the judge's role to determine whether the evidence in the administrative record "permitted the agency to make the decision it did." *Stuttering Found. of Am. v. Springer*, 498 F. Supp. 2d 203, 207 (D.D.C. 2007) (quoting *Occidental Eng'g Co. v. I.N.S.*, 753 F.2d 766, 769 (9th Cir. 1985)).

IV. Analysis

Before the Court are plaintiffs' Motion for Summary Judgment and defendants' Motion for Summary Judgment. Plaintiffs argue that the Guidelines should be set aside because they violate the Dickey-Wicker Amendment and were promulgated in violation of the APA; plaintiffs contend that nothing in the D.C. Circuit's opinion vacating the preliminary injunction compels this Court to reach a different conclusion. Pls.' Supplemental Br. [82] 1. Defendants seek an award of summary judgment in their

favor, countering that the D.C. Circuit's opinion dealt a mortal wound to plaintiffs' Dickey-Wicker Amendment claims and that plaintiffs' APA claims likewise fail because they are premised upon a basic misunderstanding of what was at issue in the NIH's promulgation of the Guidelines. Defs.' Supplemental Mem. [81] 1, 10 n.4. The Court will discuss these and other arguments in the analysis that follows.

A. Standing

Defendants continue to press their claim that the Court lacks subject matter jurisdiction over this lawsuit because plaintiffs lack standing under Article III of the Constitution. Defs.' Mot. Summ. J. [58] 14–15. To establish standing, a plaintiff must identify an injury in fact that is actual or imminent and traceable to the challenged action of the defendant, and show as well that it is likely, and not merely speculative, that a favorable decision would redress the plaintiff's injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Sherley*, 610 F.3d at 72. A plaintiff claiming standing under the APA must also show that the requirements of prudential standing are satisfied by demonstrating that his or her claims fall "arguably within the zone of interests to be protected or regulated by the statute in question." *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488 (1998); *Sherley*, 610 F.3d at 74.

Defendants do not argue that plaintiffs' alleged injuries are not traceable to the Guidelines or redressable by this Court, or that plaintiffs cannot meet the requirements of prudential standing. Instead, defendants argue that plaintiffs' declarations "continue to show that they have suffered no injury as a result of the Guidelines." Defs.' Mot. Summ. J. [58] 13. With respect to Dr. Deisher, defendants say

that she "has still not even submitted a grant application to NIH," indicated "when she might actually submit an application," or shown "that the research she proposes would actually be accepted or deemed scientifically worthy." *Id*. at 13–14. Defendants argue that Dr. Deisher therefore has failed to show that she is an "active competitor for funding from NIH." Defs.' Reply Mem. [73] 3.

With respect to Dr. Sherley, defendants note that he has "at least alleged that he has submitted two applications to NIH . . . [and that] the guidelines 'will result in increased competition'," but "[he] still does not allege that he has expended any extra effort or lost any funding as a result of this supposed competition." Defs.' Mot. Summ. J. [58] 14. Responding to plaintiffs' claim that Dr. Sherley has in fact expended extra effort by submitting "more applications for funding than ever before in his career," Pls.' Combined Reply [72] 6, defendants say that the "mere submission of more applications, regardless of their merit, was not the injury predicted by the D.C. Circuit, which thought instead that a scientist would have to expend 'more time and resources to craft a *successful* grant application.'" Defs.' Reply Mem. [73] 4 (quoting *Sherley*, 610 F.3d at 74).

Plaintiffs generally respond by arguing that "the question of Plaintiffs' standing has been resolved by the D.C. Circuit's opinion." Pls.' Mot. Summ. J. [55] 12. They argue that the D.C. Circuit held that "the undisputed increased competition that Plaintiffs face as a result of the Guidelines—and not any loss of funding or injury *resulting* from the increased competition—is sufficient in and of itself to confer Article III standing." Pls.' Combined Reply [72] 4.

In its opinion reversing this Court's determination that plaintiffs' lacked standing, the D.C. Circuit explained that the doctrine of competitor standing "addresses the [injury-in-fact requirement of Article III standing] by recognizing that economic actors 'suffer [an] injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition' against them." *Sherley*, 610 F.3d at 72 (quoting *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 367 (D.C. Cir. 1998)). The Court of Appeals recognized the various ways in which increased competition could injure a plaintiff, including losing sales, being forced to lower prices, and "expend[ing] more resources to achieve the same sales." *Id*. Furthermore, "[b]ecause increased competition almost surely injures a seller in one form or another, he need not wait until 'allegedly illegal transactions . . . hurt [him] competitively' before challenging the . . . governmental decision that increases competition." *Id*. (quoting *La. Energy*, 141 F.3d at 367). A plaintiff must show "an actual or imminent increase in competition, which increase we recognize will almost certainly cause an injury in fact." *Id*. at 73.

Turning to Drs. Sherley and Deisher, the Court of Appeals found that the "Doctors have met the basic requirement for competitor standing." *Id*. at 74. Because there is a fixed amount of money available for research grants, and because the Guidelines will increase the number of grant applications involving embryonic stem cells, the "Guidelines have intensified the competition" for those limited funds. *Id*. Because of that competition, "plaintiffs will have to invest more time and resources to craft a successful grant application. That is an actual, here-and-now injury." *Id*.

This Court concludes that plaintiffs' reading of the D.C. Circuit's opinion is the correct one, and that plaintiffs have Article III standing. Defendants' arguments are based upon a basic misreading of the D.C. Circuit's opinion—namely, defendants contend that the Court concluded that plaintiffs must show not only an increase in competition but also specific injuries caused by that increased competition in order to satisfy the injury in fact requirement. But the Court of Appeals made clear that increased competition alone is "an actual, here-and-now injury" because "plaintiffs will have to invest more time and resources to craft a successful grant application." *Id*. The Court of Appeals was not, as defendants suggest, "predicting" that plaintiffs might, at some point in the future, have standing if they could show that the increased competition caused them to suffer specific injuries. It concluded that they had standing "here and now" because the Guidelines had changed the playing field, requiring plaintiffs to expend more resources than they would otherwise have had to expend in order to win a grant from the NIH. This "here and now" injury is as present today as it was when the D.C. Circuit held that plaintiffs had Article III standing. Defendants have not offered any evidence suggesting that the Guidelines' effect on the competition for NIH grants has changed or been negated by other factors.

Therefore the Court finds that plaintiffs have standing under the ruling of the District of Columbia Circuit Court of Appeals.

B. Whether the Guidelines Violate the Dickey-Wicker Amendment

The APA states that a reviewing court "shall . . . hold unlawful and set aside agency action, findings,

and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." § 706(2)(A). Plaintiffs argue that the Guidelines violate the Dickey-Wicker Amendment in two different ways. First, they argue that the Dickey-Wicker Amendment unambiguously prohibits federal funding for embryonic stem cell research because such research is "research in which a human embryo or embryos are destroyed . . . ." Pls.' Mot. Summ. J. [55] 13 (quoting Pub. L. No. 111-117, § 509(a)(2), 123 Stat. 3034, 3280–81 (2009)). Second, plaintiffs argue that federal funding for embryonic stem cell research is barred because it is "research in which a human embryo or embryos are . . . knowingly subjected to risk of injury or death . . . ." Pls.' Supplemental Br. [82] 3 (quoting § 509(a)(2), 123 Stat. at 3280– 81).

Defendants respond that the Guidelines do not violate the Dickey-Wicker Amendment because funding for embryonic stem cell research is not prohibited by the law. They claim that HHS has "consistently interpreted Dickey-Wicker as prohibiting federal funding for the 'derivation of stem cells from an embryo that results in the embryo's destruction,' but permitting federal funding for 'research involving [human embryonic stem cells] that does not involve an embryo nor result in an embryo's destruction.'" Defs.' Mot. Summ. J. [58] 15 (quoting 74 Fed. Reg. at 31,173, AR at 4). Defendants seek judicial deference to their interpretation of the Dickey-Wicker Amendment under the standard articulated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The D.C. Circuit has summarized the *Chevron* standard as follows:

> Under the *Chevron* analysis, judicial review of an agency's interpretation of a statute under its administration is limited to a two-step inquiry. At the first step, we inquire into whether Congress has directly spoken to the precise question at issue. If we can come to the unmistakable conclusion that Congress had an intention on the precise question at issue, our inquiry ends there; this Court naturally must give effect to the unambiguously expressed intent of Congress.
>
> However, if the statute before us is silent or ambiguous with respect to the specific issue before us, we proceed to the second step. At this stage, we defer to the agency's interpretation of the statute if it is reasonable and consistent with the statute's purpose; we are not free to impose our own construction on the statute, as would be necessary in the absence of an administrative interpretation.

Nuclear Info. Resource Serv. v. Nuclear Regulatory Comm'n, 969 F.2d 1169, 1173 (D.C. Cir. 1992) (en banc) (citations, internal quotation marks, and brackets omitted).

The Court will proceed to examine each of plaintiffs' Dickey-Wicker Amendment claims in the light of the Chevron standard and the D.C. Circuit's conclusions in *Sherley v. Sebelius*, No. 10-5287, 2011 WL 1599685, at *1 (D.C. Cir. Apr. 29, 2011).

1. "Research in which a human embryo or embryos are destroyed . . ."

a. Chevron step one

Chevron requires the Court to consider whether Congress, in the Dickey-Wicker Amendment, has

provided an answer to the following question: whether embryonic stem cell research is "research in which a human embryo or embryos are destroyed . . . ." § 509(a)(2), 123 Stat. at 3280–81. Plaintiffs argue that by funding embryonic stem cell research, the Guidelines violate this provision of the Dickey-Wicker Amendment. Pls.' Mot. Summ. J. [55] 13 (quoting § 509(a)(2), 123 Stat. at 3280–81). They contend that the statute's prohibition against "funding any 'research in which' embryos are destroyed necessarily encompasses *all* of the research project at issue, not merely a selected 'phase' or 'piece' of research." *Id*. at 16.

At the outset, the Court notes that the D.C. Circuit's opinion, vacating the award to plaintiffs of a preliminary injunction, constrains this Court on remand. As stated above, this Court initially agreed with plaintiffs' understanding of the Dickey-Wicker Amendment, finding that the term "research" in the statute bore only the broader meaning of a "systematic investigation, including research and development, testing and evaluation, designed to develop or contribute to generalizable knowledge." Sherley, 704 F. Supp. 2d at 70 (quoting 45 C.F.R. § 46.102(d)). On appeal, however, the D.C. Circuit rejected this Court's view, concluding that the text of the Dickey-Wicker Amendment is ambiguous. Sherley, 2011 WL 1599685, at *6. The D.C. Circuit stated clearly that the term "research" is "flexible enough to describe either a discrete project or an extended process," a fact that reinforces that Court's "conclusion that the text is ambiguous." *Id*. Therefore, absent a compelling reason to depart from that holding, the Court is constrained to adopt it at this stage of the proceedings.

Plaintiffs suggest that the Court may disregard the D.C. Circuit's opinion. They state that "although the D.C. Circuit majority did not find a likelihood of success on the argument that the Guidelines fund research in which embryos are destroyed, this Court is not precluded from granting Plaintiffs summary judgment based on that claim . . . ." Pls.' Supplemental Br. [82] 2. Plaintiffs cite *University of Texas v. Camenisch*, 451 U.S. 390 (1981), which 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." *Camenisch*, 451 U.S. at 395. This is because a "decision denying a preliminary injunction 'rests on nothing more than a tentative appraisal of the probable result on the merits,' and thus it generally 'do[es] not constitute law of the case.'" Pls.' Supplemental Br. [82] 9 (quoting *Wilcox v. United States*, 888 F.2d 1111, 1114 (6th Cir. 1989)).

Plaintiffs err in urging this Court, via an exception to the law-of-the-case doctrine, to disregard the D.C. Circuit's opinion. That doctrine doesn't apply here. The doctrine known as "law of the case" states that when a court decides upon a rule of law, that decision should continue to apply to the same issues in later stages of the same case. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815–16 (1988). The doctrine "promotes the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.'" *Id.* at 816 (quoting *Moore's Federal Practice* ¶ 0.404[1] (1984) 118). Since the law-of-the-case doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power," it is discretionary. *Id.* at 817 (quoting *Messinger v. Anderson*, 225 U.S. 436, 444 (1912)). However, courts should

follow the rule "in the absence of extraordinary circumstances . . . ." *Id*.

However, this isn't a situation where a court is asked to exercise its discretion by reconsidering a rule of law that it decided in a prior stage of the case. Nor are the facts of this case similar to *Camenisch*, where the district court's award of a preliminary injunction and finding that the plaintiff was likely to succeed on the merits were upheld on appeal. *Camenisch*, 451 U.S. at 392–93. Here, the Court of Appeals, vacating this Court's decision to award plaintiffs a preliminary injunction, ruled as a matter of law that the term "research" in the Dickey-Wicker Amendment is ambiguous. *Sherley*, 2011 WL 1599685, at *6. This situation is properly governed—not by the law-of-the-case doctrine and its exceptions—but by the "mandate rule," which posits that "[w]hen matters are decided by an appellate court, its rulings, unless reversed by it or by a superior court, bind the lower court." *Ins. Group Comm. v. Denver & R.G.W.R. Co.*, 329 U.S. 607, 612 (1947). Whereas the law-of-the case doctrine promotes finality and efficiency, the mandate rule promotes the additional interest of hierarchy. *See Doe v. Chao*, 511 F.3d 461, 465 (4th Cir. 2007); *see also* 18B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4478 (2d ed. 1987) (stating that "[t]he very structure of a hierarchical court system demands" that a lower court on remand be bound by the law of the case established on appeal). "This is not to say that appellate courts are somehow superior or always correct, but only that our system has been served well by the availability of review and the need for appropriate review to be final." *Doe*, 511 F.3d at 465.

The Court's determination that it is bound by the D.C. Circuit's conclusion that "research" in the Dickey-Wicker Amendment is ambiguous as a matter of law is buttressed by the fact that plaintiffs haven't offered any new information or reasoning that was unavailable to the D.C. Circuit and that would cause this Court to consider departing from that Court's holding as to the meaning of "research." This issue was carefully briefed and argued before both this Court and the Court of Appeals, and the only thing that has changed since this Court first considered the question of whether "research" in the statute is ambiguous is that the D.C. Circuit has made it abundantly clear that the term is ambiguous as a matter of law. While it may be true that by following the Court of Appeals' conclusion as to the ambiguity of "research," this Court has become a grudging partner in a bout of "linguistic jujitsu," *Sherley*, 2011 WL 1599685, at *10 (Henderson, J., dissenting), such is life for an antepenultimate court.

Therefore the D.C. Circuit's conclusion that the term "research" in the Dickey-Wicker Amendment is ambiguous binds this Court.

b. *Chevron* step two

Since the Dickey-Wicker Amendment doesn't answer the precise question at issue because "research" has been determined to be ambiguous in the statute, the Court must proceed to step two of *Chevron*, which requires deference to the NIH's interpretation of the Dickey-Wicker Amendment if it is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

Plaintiffs, however, argue that even if the Court concludes that the statute is ambiguous, defendants would not deserve judicial deference because they

have never "proffered an authoritative interpretation of 'research' that this Court could analyze for reasonableness under *Chevron*." Pls.' Mot. Summ. J. [55] 22. Plaintiffs argue that the only interpretation provided by defendants is their statement in the Guidelines that the Dickey-Wicker Amendment is not violated because embryonic stem cells "are not embryos" as defined by the Dickey-Wicker Amendment. *Id*. at 23 (quoting 74 Fed. Reg. at 32,173). Plaintiffs claim that it is irrelevant whether embryonic stem cells are or are not embryos, and that to receive deference defendants should have answered the question of whether the derivation of stem cells from embryos "occurs as part of [the] 'research' that receives funding." *Id*. Because, according to plaintiffs, defendants did not answer that question "in a rule carrying the force of law [], there is no interpretation to which this Court can defer." *Id*. Plaintiffs further argue that defendants' "*post hoc* litigation position" on the definition of "research" should receive no deference because it's not the product of the agency's expertise, Pls.' Combined Reply [72] 22–23, but merely a "definition cribbed from a dictionary." Pls.' Mot. Summ. J. [55] 24.

Defendants concede that the Guidelines do not themselves explicitly set out the definition of "research" relied upon for their interpretation of the Dickey-Wicker Amendment. Defs.' Opp'n [57] 30–31. However, they argue that they are not required to define every term of a statute to receive deference for their interpretation, *id*., and that the guidelines do in fact contain "an extensive interpretation of the application of Dickey-Wicker to [human embryonic stem cell] research." Defs.' Reply [73] 17. Defendants claim that their interpretation in the guidelines makes clear "[the NIH's] understanding of the term

research to permit a distinction between the stem cell extraction process and research using the stem cells that had already been derived." *Id*. 17–18. Defendants also defend their use of a dictionary to define "research" as "expressly permitted under step one [of *Chevron*] to assist the Court in understanding whether the relevant statutory language compels plaintiffs' interpretation." Defs.' Reply [73] 18.

The D.C. Circuit's opinion, unfortunately for plaintiffs, has taken the question of deference to the NIH's interpretation off the table. The Court of Appeals considered the question of deference to the NIH's interpretation of the Dickey-Wicker Amendment, and found that deference was due. *Sherley*, 2011 WL 1599685, at *8. The Court determined that the NIH's use of the term "research" in the Guidelines "implicitly but unequivocally gave [it] a narrow scope, thus ensuring no federal funding will go to a research project in which an embryo is destroyed." *Id*. at *6. On the question of whether NIH's implicit, narrower definition of "research" was reasonable, the Court of Appeals looked to the surrounding terms—such as Congress's use of "in which" and "are" instead of "for which" and "were"—as well as Congress's reenactment of the Dickey-Wicker Amendment year after year despite its knowledge that the NIH had been funding embryonic stem cell research since 2001, to conclude that the NIH's interpretation was "entirely reasonable." *Id*. at *8.

Once again, plaintiffs haven't offered any new information or reasoning that was unavailable to the D.C. Circuit and that would cause this Court to consider departing from that Court's decision to afford deference to defendants' interpretation. Plaintiffs' arguments reprise those made to, and ultimately re-

jected by, the Court of Appeals as it reviewed this Court's decision to grant a preliminary injunction. *See* Brief of Appellees at 35–37, *Sherley v. Sebelius*, No. 10-5287 (D.C. Cir. Oct. 28, 2010).

Therefore this Court, following the D.C. Circuit's reasoning and conclusions, must find that defendants reasonably interpreted the Dickey-Wicker Amendment to permit funding for human embryonic stem cell research because such research is not "research in which a human embryo or embryos are destroyed . . . ."

2. "Research in which a human embryo or embryos are . . . knowingly subjected to risk of injury or death . . ."

Plaintiffs also argue that embryonic stem cell research violates the Dickey-Wicker Amendment's prohibition on funding "research in which a human embryo or embryos are . . . knowingly subjected to risk of injury or death . . . ." Pls.' Combined Reply [72] 13 (citing § 509(a)(2), 123 Stat. at 3280–81). They assert that "the Guidelines . . . have created a need for additional, newly derived human embryonic stem cells, and thus for the destruction of additional human embryos. As a consequence, it is incontrovertible that by funding embryonic stem cell research, Defendants . . . are knowingly subjecting additional embryos to risk of death." Pls.' Mot. Summ. J. [55] 19.

Defendants acknowledge that the "court of appeals did not directly dispose of this argument," Defs.' Supplemental Mem. [81] 5, but suggest that the Court had its doubts about whether it is "distinct from the plaintiffs' principal argument that all [embryonic stem cell] research is research in which an embryo is destroyed . . . ." *Sherley*, 2011 WL

1599685, at *9. Defendants argue that "the language on which plaintiffs rely—referring to embryos that are 'knowingly subjected to risk of injury or death'—applies only to 'research in which' that harm will occur." Defs.' Supplemental Mem. [81] 5. Defendants understand the Dickey-Wicker Amendment only to bar funding for research projects "in which an embryo is knowingly subjected to a risk of harm in the context of the embryo's use in that particular project." *Id*. According to this interpretation, the Dickey-Wicker Amendment only bars funding for research projects "*actually involving* an embryo" and that pose "risk to that embryo, such as preimplantation genetic diagnosis[3] . . . ." Defs.' Reply [73] 11 n.8.

Plaintiffs respond that defendants' argument "requires a blatant rewriting of the statutory text" because it "depends upon adding the term 'involved' as a condition for the ban in the statute." Pls.' Supplemental Br. [82] 5. They believe that the Dickey-Wicker Amendment bans funding for research that knowingly subjects *any* embryos—involved in the research or not—to risk of injury or death. *Id*.

a. *Chevron* step one

Again following the *Chevron* two-step analysis, the Court must first determine whether the Dickey-Wicker Amendment provides a clear answer to the following question: whether embryonic stem cell re-

---

[3] Preimplantation genetic diagnosis ("PGD") is a procedure used with embryos fertilized in vitro to determine if they carry mutations predisposing them to hereditary diseases. AR at 84. PGD requires the removal of one cell from the embryo. AR at 696. PGD is ineligible for federal funding because it poses a risk of harm to embryos involved in the procedure. Defs.' Reply Mem. [73] 10 n.6.

search is "research in which a human embryo or embryos are . . . knowingly subjected to risk of injury or death . . . ." To answer this question, "the court must exhaust the traditional tools of statutory construction." *S. Cal. Edison Co. v. F.E.R.C.*, 195 F.3d 17, 22 (D.C. Cir. 1999). The starting point is the text itself, and the Court must consider the statutory language at issue as well as the language and design of the statute as a whole. *Id*. at 23.

The Court has already concluded that the term "research" in the Amendment is ambiguous, having either the narrow meaning of a discrete research project or the broader meaning of an extended process of research. Because that word is ambiguous, the Court already determined that the Dickey-Wicker Amendment's plain text did not answer the question of whether embryonic stem cell research is "research in which a human embryo or embryos are destroyed . . . ." The same is true here, in the case of the "subjected to risk" prong. If "research" is defined broadly as an extended process of research that includes the derivation step, then clearly embryonic stem cell research would be "research in which a human embryo or embryos are . . . knowingly subjected to risk of injury or death . . ." because derivation not only subjects embryos to risk, but results in their destruction. In fact, under the broad definition of "research," the most germane language in the Dickey-Wicker Amendment would be its prohibition on funding "research in which a human embryo or embryos are destroyed . . .," not its prohibition on funding research in which embryos are knowingly subjected to risk.

However, if "research" is defined narrowly as a research project or "piece" of research, federal funding of embryonic stem cell research would not violate

the Dickey-Wicker Amendment. The text contains limiting language that, in combination with a narrow definition of "research," compels this conclusion.

The key limiting words are the words that directly follow "research" in the statute: "in which." "In" means "contained or enclosed by; inside; within . . . ." *Webster's New World Dict. of the Am. Language, College Ed.* 1664 (1968); *see also Am. Heritage Dict., Second College Ed.* 3141 (1985) (defining "in" as "within the limits, bounds, or area of . . . ."). "Which," on the other hand, is a word that is "used as a relative pronoun preceded by *that* or a preposition in a clause that defines or restricts the antecedent . . . ." *Am. Heritage Dict.* at 1376. Taken together, the words "in which" restrict the types of research for which funding is prohibited to research that knowingly subjects a human embryo or embryos to risk of injury or death *within* the research. An example of such a prohibited piece of research would be, as defendants note, preimplantation genetic diagnosis. That research (unlike derivation) doesn't necessarily destroy human embryos, but it subjects them to some risk of injury or death *inside* that research. Therefore, the NIH cannot fund preimplantation genetic diagnosis. However, if human embryos are knowingly subjected to risk not *in* the research itself but *from* or *as a result of* it, federal funding would not be prohibited by the Dickey-Wicker Amendment because such research isn't "research *in which* a human embryo or embryos are . . . knowingly subjected to risk or injury or death . . . ." *See* Defs.' Supplemental Mem. [81] 5 ("[Congress] could have chosen the phrase '*from which*' had it meant the prohibition to extend beyond the discrete research project in question to reach any possible future incentive for destruction.").

If the ambiguous word "research" is interpreted to mean a "piece of research," it follows that embryonic stem cell research would not be "research in which a human embryo or embryos are . . . knowingly subjected to risk of injury or death" because embryonic stem cell research doesn't knowingly subject embryos to risk of injury or death *in* that research. It doesn't include or involve embryos such that they could be knowingly subjected to risk *in* the research. This is not, as plaintiffs contend, adding the word "involve" to the statute. Pls.' Supplemental Br. [82] 5. This reading emerges entirely from Congress's choice of the words "in" and "which." If Congress had intended to expand the types of prohibited research to include research "from which" or "as a result of which" embryos are subjected to risk, it had available to it prepositions other than "in" that would have made that intention effective. Congress could even have chosen a much more straightforward grammatical construction by prohibiting "research *that knowingly* subjects embryos to risk of injury or death."[4] Research can subject something to risk without involving it. But the awkward passive construction Congress chose appears tailor-made to accommodate the preposition "in" and the restrictions that it

---

[4] In fact, plaintiffs nearly concede that this alternative language would have achieved the result they seek when they say that "[b]y the statute's plain terms, any federally funded research *that subjects embryos to more than minimal risk* violates the funding ban . . . ." Pls.' Combined Reply [72] 13 (emphasis added). That, however, is not the statute's "plain terms": it prohibits federal funding for "research *in which* a human embryo or embryos are subjected to risk," § 509(a)(2), 123 Stat. at 3280-81 (emphasis added), not "research that subjects embryos to risk."

brings, as it was certainly not chosen for its literary merit.

Therefore the Court concludes that it must proceed to step two of *Chevron* because the plain text of the Dickey-Wicker Amendment doesn't answer the question of whether embryonic stem cell research is "research in which a human embryo or embryos are . . . knowingly subjected to risk of injury or death . . . ."

b. *Chevron* step two

Since the Dickey-Wicker Amendment doesn't answer the question of whether embryonic stem cell research is "research in which a human embryo or embryos are . . . knowingly subjected to risk," the Court must defer to the NIH's interpretation of the Amendment if it is based upon a permissible construction of the statute. *Chevron*, 467 U.S. at 843.

The Court has already concluded that deference is due to defendants' interpretation of the term "research" in the context of plaintiffs' first Dickey-Wicker Amendment claim. As noted by the Court of Appeals and discussed above, that narrow definition of "research" favored by the NIH is not explicitly set out in the Guidelines but follows implicitly from the NIH's determination that the Guidelines do not violate the Dickey-Wicker Amendment because embryonic stem cell research, unlike derivation, "does not involve an embryo [or] result in an embryo's destruction . . . ." 74 Fed. Reg. at 32,173. This statement by the NIH in the Guidelines would make no sense if the broader definition of research as an extended process of research were employed, since it would clearly make embryonic stem cell research merely a later step in a process of research that included the derivation step. Also, as the quotation from the

NIH's Guidelines makes clear, the NIH presented its view in the Guidelines that the Dickey-Wicker Amendment did not bar funding of embryonic stem cell research because that research "does not involve an embryo . . . ." 74 Fed. Reg. at 32,173 (emphasis added).

The conclusion that the NIH reasonably interpreted the Dickey-Wicker Amendment's "knowingly subjected to risk" language to permit federal funding for embryonic stem cell research follows naturally once "research" is narrowly defined. The NIH reasonably concluded that the Dickey-Wicker Amendment prohibited federal funding for research projects "in which" human embryos are knowingly subjected to risk, such as preimplantation genetic diagnosis, but did not prohibit research projects, such as embryonic stem cell research, that do not involve embryos and so cannot knowingly subject them to risk "in" the research. As stated in the Court's consideration of *Chevron* step one, Congress had available to it alternative formulations—such as "from which" or "as a result of which"—that would have indicated an intent to prohibit research projects that, while not involving embryos, nevertheless knowingly subjected them to risk. Congress, however, did not choose those words, preferring "in which" and leading the NIH to the reasonable conclusion that the Dickey-Wicker Amendment is only concerned with research involving embryos.

The Court also notes that plaintiffs' interpretation of the Dickey-Wicker Amendment's "knowingly subjected to risk" prong would require the Court to read the various prongs of the Amendment in inconsistent ways, despite the fact that each one shares the same key words: "research in which a human

embryo or embryos are . . . ." § 509(a)(2), 123 Stat. at 2380–81. Taking, for example, the "destroys" prong, the obvious reason why derivation cannot be funded and embryonic stem cell research can be is that derivation involves and destroys embryos while embryonic stem cell research does not. The whole definitional battle over the breadth of the term "research" was intended to determine where the embryo was involved. While it might be true that embryonic stem cell research, without involving embryos, could nevertheless cause their destruction, that involvement in the research is required to make out a violation of the Dickey-Wicker Amendment's "destroys" prong. Likewise, only research "in which" embryos are involved and discarded violates the "discarded" prong of the Amendment, not research that leads or contributes to that result without involving embryos. Plaintiffs' would have the final prong of the Amendment ("subjected to risk") constitute the only prong of the Amendment where embryos need not be involved, clashing with the requirements of the Amendment's previous prohibitions and the clear impact of the words "in which" on the meaning of the Amendment.

Furthermore, plaintiffs' view would lead to such a far-reaching construction of the Dickey-Wicker Amendment that it would prohibit federal funding for research entirely unrelated to embryos or embryonic stem cells if the research nevertheless posed some risk to embryos—for example, a research project involving dangerous chemicals or explosive gasses that was in the vicinity of an embryo storage facility—even if the risk of harm to the embryos was merely minimal. *See* Pls.' Combined Reply [72] 15–16. A tank of propane in an adjacent laboratory would be enough, no matter what sort of research the

scientists in that laboratory were engaged in. But the language of the statute doesn't bear this strange result. The availability to Congress of alternative formulations for the statute's prohibitions—such as using "from which" or "as a result of which" instead of "in which"—compels the conclusion that by choosing "in which," Congress intended to restrict in a reasonable way the types of research that run afoul of the Dickey-Wicker Amendment's prohibition on federal funding for "research in which a human embryo or embryos are . . . knowingly subjected to risk of injury or death . . . ."[5]

Therefore the Court finds that the NIH's conclusion that embryonic stem cell research is not "research in which a human embryo or embryos are . . . subjected to risk of injury or death . . ." is based upon a permissible construction of the statute and entitled to deference.

---

[5] Many of the words in the Dickey-Wicker Amendment—"destroy," "discard," "create"—do not strictly require the direct application of force. *See Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Oregon*, 515 U.S. 687, 701 (1995). Therefore if Congress had decided to prohibit federal funding for "research *that* destroys, discards, or knowingly subjects embryos to risk of injury or death," this Court would be inclined to favor a broader construction of the Amendment. Research could destroy, discard, or subject to risk embryos without directly involving them. But Congress specifically chose the narrower meaning by prohibiting funding of "research *in which* an embryo or embryos *are* . . . *knowingly subjected* to risk of injury or death . . . ." The text clearly indicates that it is "in" the research that embryos are destroyed, discarded, or subjected to risk of harm.

C. Whether the Guidelines Were Promulgated in Violation of the APA

Plaintiffs argue that even if the Guidelines do not violate the Dickey-Wicker Amendment, they must nevertheless be vacated because they were promulgated in violation of the Administrative Procedure Act. Pls.' Supplemental Br. [82] 6. Plaintiffs argue that defendants violated the APA's notice-and-comment requirements by (1) failing to respond to relevant and significant public comments, Pls.' Mot. Summ. J. [55] 26; and (2) entering the rulemaking period with an "unalterably closed mind." *Id*. at 31. Plaintiffs want the Guidelines set aside because, they argue, by failing to examine relevant data and articulate a satisfactory explanation for the decision to fund embryonic stem cell research, defendants acted arbitrarily and capriciously within the meaning of 5 U.S.C. § 706(2)(A).

Agency rulemaking must comply with section 553(b)-(c) of the APA, which requires notice of the proposed rulemaking, an opportunity for interested persons to comment on the proposed rule, and a "concise general statement" of the rule's basis and purpose. 5 U.S.C.A. § 553(b)-(c) (2011); *see also Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977). These requirements assist judicial review and also "provide fair treatment for persons affected by a rule." *Home Box Office*, 567 F.2d at 35. The agency must respond to "significant points raised by the public," *id*. at 35–36, but only if such comments, "if true, raise points relevant to the agency's decision and . . ., if adopted, would require a change in the agency's proposed rule . . . ." *Id*. at 35 n.58. The APA's procedural requirements would likewise be rendered meaningless if an agency member had "an

unalterably closed mind on matters critical to the disposition of the proceeding." *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1170 (D.C. Cir. 1979).

Plaintiffs argue that defendants violated the APA when they "completely ignored every public comment categorically objecting to funding of embryonic stem cell research, despite the fact that those comments plainly were relevant to the proposed rulemaking and raised significant questions about the ethical and scientific problems with such research." Pls.' Mot. Summ. J. [55] 26. Defendants agree that the APA requires that the NIH "respond to comments that are 'relevant to the agency's decision and which, if adopted, would require a change in an agency's proposed rule.'" Defs.' Mot. Summ. J. [58] 33 (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n.58 (D.C. Cir. 1977)). However, defendants argue that plaintiffs "fundamentally misunderstand what was at issue in the Guidelines." *Id*. at 34. Defendants, interpreting Executive Order 13,505, say that President Obama "directed NIH to prepare guidance that would describe standards for the responsible conduct of federally-funded [human embryonic stem cell] research," *id*. at 35, not to determine through rulemaking whether embryonic stem cell research should be federally funded at all. Defendants contend that the NIH was "duty-bound to follow the Executive Order unless it was statutorily prohibited from doing so." Defs.' Reply Mem. [73] 20 (citing *Bldg. & Constr. Trades Dep't, AFL-CIO v. Allbaugh*, 295 F.3d 28, 33 (D.C. Cir. 2002)).

Plaintiff's argument for notice-and-comment violations fails for two reasons: (1) because the NIH's notice of proposed rulemaking did not invite (and

therefore the NIH wasn't obligated to respond to) comments on the topic of *whether* to fund human embryonic stem cell research; and (2) because the President's Executive Order 13,505 required the promulgation of Guidelines for funding embryonic stem cell research, and the NIH wasn't obligated to consider comments that, if adopted, would cause it to disobey the President and create an unlawful rule.

As the D.C. Circuit has held, "[t]he whole rationale of notice and comment rests on the expectation that the final rules will be somewhat different and improved from the rules originally proposed by the agency." *Trans-Pacific Freight Conference v. FMC*, 650 F.2d 1235, 1249 (D.C. Cir. 1980). To that end, the NIH called for comment on draft guidelines that would "implement Executive Order 13505," "establish policy and procedures under which NIH will fund research in this area, and [] help ensure that NIH-funded research in this area is ethically responsible, scientifically worthy, and conducted in accordance with applicable law." 74 Fed. Reg. at 18,578. In its notice of proposed rulemaking, the NIH did not invite comments on the topic of whether embryonic stem cell research should be funded at all, nor was it obligated to do so simply because plaintiffs believe such comments are relevant. *See Cable & Wireless P.L.C. v. F.C.C.*, 166 F.3d 1224, 1235 (D.C. Cir. 1999) (rejecting a claim that the FCC ignored relevant comments because the comments at issue were not solicited in the notice of proposed rulemaking). Plaintiffs' comments would not, if adopted, lead to improvements in the Guidelines' scheme for funding ethically responsible and scientifically worthy embryonic stem cell research—they would lead instead to a wholesale ban on such funding. The NIH rightly disregarded comments that provided no assistance

regarding the task at hand: to create guidelines for funding embryonic stem cell research that would ensure that funded projects are ethically responsible and scientifically worthy.

Nor is the NIH's decision to disregard such comments surprising given that President Obama's Executive Order 13,505 required the NIH to promulgate guidelines for funding embryonic stem cell research. The NIH reasonably interpreted the Executive Order to demand new guidelines that would govern the funding of responsible and scientifically worthy embryonic stem cell research projects, and had it adopted the views of the commenters who categorically objected to such funding and banned it altogether, its rule would have violated the law.

As an initial matter, an agency is presumed to have special expertise in interpreting executive orders charged to its administration, and so judicial review must afford considerable deference to agency interpretations of such orders. *Udall v. Tallman*, 380 U.S. 1, 16–17 (1965); *Kester v. Campbell*, 652 F.2d 13, 15–16 (9th Cir. 1981). Therefore, to determine whether the NIH reasonably understood the scope of the rulemaking that led to the final Guidelines requires an examination of the President's Executive Order 13,505. "An executive order is, for many purposes, a form of presidential 'law'." *Meyer v. Bush*, 981 F.2d 1288, 1303 n.6 (D.C. Cir. 1993). A regulation that is inconsistent with an executive order that authorizes its promulgation is unlawful. *Itek Corp. v. First Nat'l Bank of Boston*, 704 F.2d 1, 7 (1st Cir. 1983) (citing *Peters v. Hobby*, 349 U.S. 331, 345–46 (1955)). Since the NIH is an executive agency subject to the President's supervisory authority, if it can lawfully implement an Executive Order, it

must do so. *Bldg. & Construction Trades Dep't*, 292 F.3d at 33. Executive Order 13,505 therefore establishes the issues—and comments—relevant to the NIH's promulgation of the Guidelines.

The Executive Order is titled "Removing Barriers to Responsible Scientific Research Involving Human Stem Cells." Exec. Order No. 13,505, 74 Fed. Reg. 10,667, 10,667 (Mar. 11, 2009) (AR at 12). The Order is short, and has five sections. Section 1 (titled "Policy") explains that human stem cell research, including embryonic stem cell research, may lead to advances in medical science and that the purpose of the Order is to remove limitations placed upon embryonic stem cell research by previous Presidential actions. *Id*. Section 2 (titled "Research") states that the "Secretary of Health and Human Services . . ., through the Director of NIH, may support and conduct responsible, scientifically worthy human stem cell research, including embryonic stem cell research, to the extent permitted by law." *Id*. Section 3 of the Order ("Guidance") orders the Secretary to issue new guidance on human stem cell research "that is consistent with this order." Section 4 ("General Provisions") states that the Order "shall be implemented consistent with applicable law," and contains some other provisions. Finally, Section 5 ("Revocations") orders that one of former President Bush's statements on stem cell policy would have no further effect and that one of his executive orders concerning embryonic stem cell research is revoked.

The purpose of President Obama's Order, as it clearly states, "is to remove . . . limitations" on the "authority of the Department of Health and Human Services, including the National Institutes of Health," "to fund and conduct human embryonic

stem cell research . . . ." *Id.* The "limitations" President Obama is talking about were the result of "Presidential actions"—specifically, the actions of then-President George W. Bush. President Obama nullified two such actions: (1) President Bush's statement of August 9, 2001, which permitted federal funding only for research using embryonic stem cell lines already in existence at the time of the statement, Address to the Nation on Stem Cell Research from Crawford, Texas, 37 Weekly Comp. Pres. Doc. 1149 (Aug. 13, 2001), AR at 21; and (2) Executive Order 13,435, 72 Fed. Reg. 34,591, 34,591 (Jun. 20, 2007), which supplemented President Bush's August 9, 2001 statement. *Id.*

It is crucial to note that even President Bush permitted federal funding of embryonic stem cell research. Address to the Nation, AR at 21. He did not categorically ban such funding, finding necessarily that some forms of embryonic stem cell research are ethically responsible and scientifically worthy. However, President Bush specifically limited the availability of federal funds to embryonic stem cell research projects involving stem cell lines that were already in existence and "where the life and death decision has already been made." *Id.*

President Obama's Order removes this specific temporal limitation, thereby permitting funding for embryonic stem cell research projects—whether they involve stem cells from already-destroyed embryos or embryos to be destroyed in the future. The Order was not, as plaintiffs suggest, an invitation from President Obama to adopt a policy even *more* restrictive than his predecessor's by categorically prohibiting funding for any embryonic stem cell research projects. The question of whether embryonic stem cell

research should be funded at all was not a question left on the table for the NIH by President Obama's Order. Indeed, had the NIH adopted plaintiffs' views and refused to consider funding any embryonic stem cell research projects, its regulation would have been inconsistent with the Executive Order and unlawful. *See Itek Corp.*, 704 F.2d at 7.

The consequences of President Obama's policy as presented in section 1 of the Executive Order are presented in its subsequent sections. Whereas before the Order issued, the NIH was prohibited from supporting human embryonic stem cell research using stem cell lines created after August 9, 2001 (pursuant to then-President Bush's policy), the NIH was now permitted to fund such research without regard to President Bush's temporal limitation. As President Obama stated, the "[NIH] may support and conduct responsible, scientifically worthy stem cell research, including human embryonic stem cell research, to the extent permitted by law." Exec. Order No. 13,505, AR at 12. By permitting the NIH to fund "responsible, scientifically worthy . . . human embryonic stem cell research," the Order's language assumes that embryonic stem cell research is, in at least some cases, responsible and scientifically worthy, and grants permission to the NIH to support only such embryonic stem cell research as is "responsible" and "scientifically worthy." *Id*. The Guidelines' embryo-source and informed consent restrictions—alongside its peer-review process—are, of course, the NIH's means of channeling federal funds to "responsible" and "scientifically worthy" embryonic stem cell research projects.

For these reasons, the NIH reasonably interpreted Executive Order 13,505, and operated consistently

with both it and the APA's requirements when it disregarded tens of thousands of public comments that sought an outright ban on embryonic stem cell research. The NIH reasonably concluded, as expressed in the notice of proposed rulemaking, that the fundamental policy question of whether to provide federal funds for embryonic stem cell research wasn't a question for it to decide. That policy question is not answered by any Congressional law, and it has fallen on three Presidential administrations to provide an answer. For all three such administrations, Democratic and Republican, the answer has been to permit federal funding. They have differed only as to the path forward.

This conclusion also disposes of plaintiffs' claim that the comments of Acting NIH Director Raynard Kington, before the comment period began, show that the NIH's top executive had an "unalterably closed mind" on a topic central to the rulemaking. Pls.' Mot. Summ J. [55] 32–33. Kington's observation in a newspaper article, following the issuance of President Obama's Executive Order, that the number of embryonic stem cell lines available to federally funded researchers would increase merely states the obvious. The entire purpose of the Executive Order was to remove President Bush's restrictions on the cell lines for which federal funding was available. The other newspaper remark attributed to Mr. Kington, where he stated that commenters who objected categorically to federal funding of embryonic stem cell research missed the point of the rulemaking, merely indicates Mr. Kington's reasonable understanding of the scope of the rulemaking as specified in Executive Order 13,505.

Therefore plaintiffs' APA claims fail as a matter of law.

V. Conclusion

For the reasons stated above, the Court will grant defendants' Motion [58] for Summary Judgment and deny plaintiffs' Motion [55] for Summary Judgment.

A separate Order consistent with this Memorandum Opinion shall issue this date.

Signed by Royce C. Lamberth, Chief Judge, on July 27, 2011.

APPENDIX D

5 U.S.C. § 553 provides:

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 706 provides:

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cit-

ed by a party, and due account shall be taken of the rule of prejudicial error.

The Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, div. F, § 508, 125 Stat. 786, 1112 (2011), provides in relevant part:

* * *

SEC. 508. (a) None of the funds made available in this Act may be used for—

(1) the creation of a human embryo or embryos for research purposes; or

(2) research in which a human embryo or embryos are destroyed, discarded, or knowingly subjected to risk of injury or death greater than that allowed for research on fetuses in utero under 45 CFR 46.204(b) and section 498(b) of the Public Health Service Act (42 U.S.C. 289g(b)).

(b) For purposes of this section, the term "human embryo or embryos" includes any organism, not protected as a human subject under 45 CFR 46 as of the date of the enactment of this Act, that is derived by fertilization, parthenogenesis, cloning, or any other means from one or more human gametes or human diploid cells.

* * *

APPENDIX E

Federal Register

Vol. 74, No. 46

Wednesday, March 11, 2009

PRESIDENTIAL DOCUMENTS

Title 3–

THE PRESIDENT

Executive Order 13505 of March 9, 2009

Removing Barriers to Responsible Scientific Research Involving Human Stem Cells

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Policy*. Research involving human embryonic stem cells and human non-embryonic stem cells has the potential to lead to better understanding and treatment of many disabling diseases and conditions. Advances over the past decade in this promising scientific field have been encouraging, leading to broad agreement in the scientific community that the research should be supported by Federal funds.

For the past 8 years, the authority of the Department of Health and Human Services, including the National Institutes of Health (NIH), to fund and conduct human embryonic stem cell research has been limited by Presidential actions. The purpose of this order is to remove these limitations on scientific inquiry, to expand NIH support for the exploration of

human stem cell research, and in so doing to enhance the contribution of America's scientists to important new discoveries and new therapies for the benefit of humankind.

Sec. 2. *Research*. The Secretary of Health and Human Services (Secretary), through the Director of NIH, may support and conduct responsible, scientifically worthy human stem cell research, including human embryonic stem cell research, to the extent permitted by law.

Sec. 3. *Guidance*. Within 120 days from the date of this order, the Secretary, through the Director of NIH, shall review existing NIH guidance and other widely recognized guidelines on human stem cell research, including provisions establishing appropriate safeguards, and issue new NIH guidance on such research that is consistent with this order. The Secretary, through NIH, shall review and update such guidance periodically, as appropriate.

Sec. 4. *General Provisions*. (a) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(b) Nothing in this order shall be construed to impair or otherwise affect:

(i) authority granted by law to an executive department, agency, or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity, by any party against the United States, its departments, agencies,

or entities, its officers, employees, or agents, or any other person.

Sec. 5. *Revocations*. (a) The Presidential statement of August 9, 2001, limiting Federal funding for research involving human embryonic stem cells, shall have no further effect as a statement of governmental policy.

(b) Executive Order 13435 of June 20, 2007, which supplements the August 9, 2001, statement on human embryonic stem cell research, is revoked.

THE WHITE HOUSE,
March 9, 2009.

APPENDIX F

Federal Register

Vol. 74, No. 77

Thursday, April 23, 2009

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Draft National Institutes of Health Guidelines for Human Stem Cell Research Notice

SUMMARY: The National Institutes of Health (NIH) is requesting public comment on draft guidelines entitled "National Institutes of Health Guidelines for Human Stem Cell Research" (Guidelines).

The purpose of these draft Guidelines is to implement Executive Order 13505, issued on March 9, 2009, as it pertains to extramural NIH-funded research, to establish policy and procedures under which NIH will fund research in this area, and to help ensure that NIH-funded research in this area is ethically responsible, scientifically worthy, and conducted in accordance with applicable law. Internal NIH procedures, consistent with Executive Order 13505 and these Guidelines, will govern the conduct of intramural NIH research involving human stem cells.

These draft Guidelines would allow funding for research using human embryonic stem cells that were derived from embryos created by *in vitro* fertilization (IVF) for reproductive purposes and were no

longer needed for that purpose. Funding will continue to be allowed for human stem cell research using adult stem cells and induced pluripotent stem cells. Specifically, these Guidelines describe the conditions and informed consent procedures that would have been required during the derivation of human embryonic stem cells for research using these cells to be funded by the NIH. NIH funding for research using human embryonic stem cells derived from other sources, including somatic cell nuclear transfer, parthenogenesis, and/or IVF embryos created for research purposes, is not allowed under these Guidelines.

NIH funding of the derivation of stem cells from human embryos is prohibited by the annual appropriations ban on funding of human embryo research (Consolidated Appropriations Act, 2009, Pub. L. 110–161, 3/11/09), otherwise known as the Dickey-Wicker Amendment.

According to these Guidelines, there are some uses of human embryonic stem cells and human induced pluripotent stem cells that, although those cells may come from allowable sources, are nevertheless ineligible for NIH funding.

For questions regarding ongoing NIH-funded research involving human embryonic stem cells, as well as pending applications and those submitted prior to the issuance of Final Guidelines, see the NIH Guide *http://grants.nih.gov/grants/guide/notice-files/NOT-OD-09-085.html*.

DATES: Written comments must be received by NIH on or before May 26, 2009.

ADDRESSES: The NIH welcomes public comment on the draft Guidelines set forth below. Comments

may be entered at: *http://nihoerextra.nih.gov/stem_cells/add.htm*. Comments may also be mailed to: NIH Stem Cell Guidelines, MSC 7997, 9000 Rockville Pike, Bethesda, Maryland 20892–7997. Comments will be made publicly available, including any personally identifiable or confidential business information they contain.

SUPPLEMENTARY INFORMATION: On March 9, 2009, President Barack H. Obama issued Executive Order 13505: *Removing Barriers to Responsible Scientific Research Involving Human Stem Cells*. The Executive Order states that the Secretary of Health and Human Services, through the Director of NIH, may support and conduct responsible, scientifically worthy human stem cell research, including human embryonic stem cell research, to the extent permitted by law.

The purpose of these draft Guidelines is to implement Executive Order 13505, issued on March 9, 2009, as it pertains to extramural NIH-funded research, to establish policy and procedures under which NIH will fund research in this area, and to help ensure that NIH-funded research in this area is ethically responsible, scientifically worthy, and conducted in accordance with applicable law. Internal NIH procedures, consistent with Executive Order 13505 and these Guidelines, will govern the conduct of intramural NIH research involving human stem cells.

Long-standing Department of Health and Human Services regulations for Protection of Human Subjects, 45 CFR part 46, establish safeguards for individuals who are the sources of many human tissues used in research, including non-embryonic human adult stem cells and human induced pluripotent

stem cells. When research involving human adult stem cells or induced pluripotent stem cells constitutes human subject research, Institutional Review Board review may be required and informed consent may need to be obtained per the requirements detailed in 45 CFR part 46. Applicants should consult *http://www.hhs.gov/ohrp/humansubjects/guidance/45cfr46.htm*.

As described in these draft Guidelines, human embryonic stem cells are cells that are derived from human embryos, are capable of dividing without differentiating for a prolonged period in culture, and are known to develop into cells and tissues of the three primary germ layers. Although human embryonic stem cells are derived from embryos, such stem cells are not themselves human embryos.

Studies of human embryonic stem cells may yield information about the complex events that occur during human development. Some of the most serious medical conditions, such as cancer and birth defects, are due to abnormal cell division and differentiation. A better understanding of the genetic and molecular controls of these processes could provide information about how such diseases arise and suggest new strategies for therapy. Human embryonic stem cells may also be used to test new drugs. For example, new medications could be tested for safety on differentiated somatic cells generated from human embryonic stem cells.

Perhaps the most important potential use of human embryonic stem cells is the generation of cells and tissues that could be used for cell-based therapies. Today, donated tissues and organs are often used to replace ailing or destroyed tissue, but the need for transplantable tissues and organs far out-

weighs the available supply. Stem cells, directed to differentiate into specific cell types, offer the possibility of a renewable source of replacement cells and tissues to treat diseases and conditions, including Parkinson's disease, amyotrophic lateral sclerosis, spinal cord injury, burns, heart disease, diabetes, and arthritis.

NIH currently funds ongoing research involving human embryonic stem cells as detailed under prior Presidential policy. Under that policy, Federal funds have been used for research on human embryonic stem cells where the derivation process was initiated prior to 9 p.m. EDT August 9, 2001, the embryo was created for reproductive purposes, the embryo was no longer needed for these purposes, informed consent was obtained for the donation of the embryo, and no financial inducements were provided for donation of the embryo.

These draft Guidelines would allow funding for research using only those human embryonic stem cells that were derived from embryos created by *in vitro* fertilization (IVF) for reproductive purposes and were no longer needed for that purpose. Funding will continue to be allowed for human stem cell research using adult stem cells and induced pluripotent stem cells. Specifically, these Guidelines describe the conditions and informed consent procedures that would have been required during the derivation of human embryonic stem cells for research using these cells to be funded by the NIH. NIH funding for research using human embryonic stem cells derived from other sources, including somatic cell nuclear transfer, parthenogenesis, and/or IVF embryos created for research purposes, is not allowed under these Guidelines.

Please note that, for NIH funded research using the permitted human embryonic stem cells, the requirements of the Department's protection of human subjects regulations, 45 CFR part 46, may or may not apply, depending on the nature of the research. For further information, see *Human Embryonic Stem Cells, Germ Cells and Cell Derived Test Articles:* OHRP Guidance for Investigators and Institutional Review Boards.

NIH funding of the derivation of stem cells from human embryos is prohibited by the annual appropriations ban on funding of human embryo research (Consolidated Appropriations Act, 2009, Pub. L. 110–161, 3/11/09), otherwise known as the Dickey-Wicker Amendment.

According to these Guidelines, there are some uses of human embryonic stem cells that, although those cells may come from allowable sources, are nevertheless ineligible for NIH funding.

In developing these draft Guidelines, the NIH consulted its Guidelines issued in 2000, as well as the thoughtful guidelines developed by other national and international committees of scientists, bioethicists, patient advocates, physicians and other stakeholders, including the U.S. National Academies, the International Society for Stem Cell Research, and others.

As directed by Executive Order 13505, the NIH shall review and update these Guidelines periodically, as appropriate.

The Draft Guidelines Follow:

National Institutes of Health Guidelines for Human Stem Cell Research

I. Scope of Guidelines

These Guidelines describe the circumstances under which human embryonic stem cells are eligible for use in extramural NIH-funded research, and they also include a section on uses of human embryonic stem cells or human induced pluripotent stem cells that are ineligible for NIH funding.

For the purpose of these Guidelines, "human embryonic stem cells" are cells that are derived from human embryos, are capable of dividing without differentiating for a prolonged period in culture, and are known to develop into cells and tissues of the three primary germ layers. Although human embryonic stem cells are derived from embryos, such stem cells are not themselves human embryos.

II. Guidelines for Eligibility of Human Embryonic Stem Cells for Use in Research

A. The Executive Order: Executive Order 13505, Removing Barriers to Responsible Scientific Research Involving Human Stem Cells, states that the Secretary of the Department of Health and Human Services (DHHS), through the Director of the NIH, may support and conduct responsible, scientifically worthy human stem cell research, including human embryonic stem cell research, to the extent permitted by law.

B. Eligibility of Human Embryonic Stem Cells Derived from Human Embryos: Human embryonic stem cells may be used in research using NIH funds, if the cells were derived from human embryos that

were created for reproductive purposes, were no longer needed for this purpose, were donated for research purposes, and for which documentation for all of the following can be assured:

1. All options pertaining to use of embryos no longer needed for reproductive purposes were explained to the potential donor(s).

2. No inducements were offered for the donation.

3. A policy was in place at the health care facility where the embryos were donated that neither consenting nor refusing to donate embryos for research would affect the quality of care provided to potential donor(s).

4. There was a clear separation between the prospective donor(s)'s decision to create human embryos for reproductive purposes and the prospective donor(s)'s decision to donate human embryos for research purposes.

5. At the time of donation, consent for that donation was obtained from the individual(s) who had sought reproductive services. That is, even if potential donor(s) had given prior indication of their intent to donate to research any embryos that remained after reproductive treatment, consent for the donation should have been given at the time of the donation. Donor(s) were informed that they retained the right to withdraw consent until the embryos were actually used for research.

6. Decisions related to the creation of human embryos for reproductive purposes were made free from the influence of researchers proposing to derive or utilize human embryonic stem cells in research. Whenever it was practicable, the attending physician

responsible for reproductive clinical care and the researcher deriving and/or proposing to utilize human embryonic stem cells should not have been the same person.

7. Written informed consent was obtained from individual(s) who sought reproductive services and who elected to donate human embryos for research purposes. The following information, which is pertinent to making the decision of whether or not to donate human embryos for research purposes, was in the written consent form for donation and discussed with potential donor(s) in the informed consent process:

a. A statement that donation of the embryos for research was voluntary;

b. A statement that donor(s) understood alternative options pertaining to use of the embryos;

c. A statement that the embryos would be used to derive human embryonic stem cells for research;

d. Information about what would happen to the embryos in the derivation of human embryonic stem cells for research;

e. A statement that human embryonic stem cells derived from the embryos might be maintained for many years;

f. A statement that the donation was made without any restriction or direction regarding the individual(s) who may receive medical benefit from the use of the stem cells;

g. A statement that the research was not intended to provide direct medical benefit to the donor(s);

h. A statement as to whether or not information that could identify the donor(s) would be retained prior to the derivation or the use of the human embryonic stem cells (relevant guidance from the DHHS Office for Human Research Protections (OHRP) should be followed, as applicable; see OHRP's *Guidance for Investigators and Institutional Review Boards Regarding Research Involving Human Embryonic Stem Cells, Germ Cells, and Stem Cell- Derived Test Articles and Guidance on Research Involving Coded Private Information or Biological Specimens*, or successor guidances); and

i. A statement that the results of research using the human embryonic stem cells may have commercial potential, and a statement that the donor(s) would not receive financial or any other benefits from any such commercial development.

C. Prior to the use of NIH funds:

Funding recipients must ensure that: (1) The human embryonic stem cells were derived consistent with sections II.A and B of these Guidelines; and (2) the grantee institution maintains appropriate documentation demonstrating such consistency in accordance with 45 CFR 74.53, which also details rights of access by NIH. The responsible grantee institutional official must provide assurances with respect to (1) and (2) when endorsing applications and progress reports submitted to NIH for projects that utilize these cells.

III. Research Using Human Embryonic Stem Cells and/or Human Induced Pluripotent Stem Cells That, Although the Cells May Come From Allowable Sources, Is Nevertheless Ineligible for NIH Funding

This section governs research using human embryonic stem cells and human induced pluripotent stem cells, *i.e.*, human cells that are capable of dividing without differentiating for a prolonged period in culture, and are known to develop into cells and tissues of the three primary germ layers. There are some uses of these cells that, although they may come from allowable sources, are nevertheless ineligible for NIH funding, as follows:

A. Research in which human embryonic stem cells (even if derived according to these Guidelines) or human induced pluripotent stem cells are introduced into non-human primate blastocysts.

B. Research involving the breeding of animals where the introduction of human embryonic stem cells (even if derived according to these Guidelines) or human induced pluripotent stem cells may have contributed to the germ line.

IV. Other Non-Allowable Research

A. NIH funding of the derivation of stem cells from human embryos is prohibited by the annual appropriations ban on funding of human embryo research (Consolidated Appropriations Act, 2009, Pub. L. 110–161, 3/11/09), otherwise known as the Dickey-Wicker Amendment.

B. NIH funding for research using human embryonic stem cells derived from other sources, including somatic cell nuclear transfer, parthenogenesis, and/or IVF embryos created for research purposes, is not allowed under these Guidelines.

Dated: April 17, 2009.

Raynard S. Kington,

Acting Director, NIH.

[FR Doc. E9–9313 Filed 4–22–09; 8:45 am]

BILLING CODE 4140–01–P

APPENDIX G

Federal Register

Vol. 74, No. 1287

Tuesday, July 7, 2009

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institutes of Health Guidelines for Human Stem Cell Research

SUMMARY: The National Institutes of Health (NIH) is hereby publishing final "National Institutes of Health Guidelines for Human Stem Cell Research" (Guidelines).

On March 9, 2009, President Barack H. Obama issued Executive Order 13505: *Removing Barriers to Responsible Scientific Research Involving Human Stem Cells*. The Executive Order states that the Secretary of Health and Human Services, through the Director of NIH, may support and conduct responsible, scientifically worthy human stem cell research, including human embryonic stem cell (hESC) research, to the extent permitted by law.

These Guidelines implement Executive Order 13505, as it pertains to extramural NIH-funded stem cell research, establish policy and procedures under which the NIH will fund such research, and helps ensure that NIH-funded research in this area is ethically responsible, scientifically worthy, and conducted in accordance with applicable law. Internal NIH policies and procedures, consistent with Executive

Order 13505 and these Guidelines, will govern the conduct of intramural NIH stem cell research.

DATES: *Effective Date*: These Guidelines are effective on July 7, 2009.

Summary of Public Comments on Draft Guidelines: On April 23, 2009 the NIH published draft Guidelines for research involving hESCs in the **Federal Register** for public comment, 74 FR 18578 (April 23, 2009). The comment period ended on May 26, 2009.

The NIH received approximately 49,000 comments from patient advocacy groups, scientists and scientific societies, academic institutions, medical organizations, religious organizations, and private citizens. The NIH also received comments from members of Congress. This Notice presents the final Guidelines together with the NIH response to public comments that addressed provisions of the Guidelines.

Title of the Guidelines, Terminology, and Background

Respondents felt the title of the NIH draft guidelines was misleading, in that it is entitled "National Institutes of Health Guidelines for Human Stem Cell Research," yet addresses only one type of human stem cell. The NIH notes that although the Guidelines pertain primarily to the donation of embryos for the derivation of hESCs, one Section also applies to certain uses of both hESCs and human induced pluripotent stem cells. Also, the Guidelines discuss applicable regulatory standards when research involving human adult stem cells or induced pluripotent stem cells constitutes human subject research. Therefore, the title of the Guidelines was not changed.

Respondents also disagreed with the definition of human embryonic stem cells in the draft Guidelines, and asked that the NIH define them as originating from the inner cell mass of the blastocyst. The NIH modified the definition to say that human embryonic stem cells "are cells that are derived from the inner cell mass of blastocyst stage human embryos, are capable of dividing without differentiating for a prolonged period in culture, and are known to develop into cells and tissues of the three primary germ layers."

Financial Gain

Respondents expressed concern that derivers of stem cells might profit from the development of hESCs. Others noted that because the stem cells eligible for use in research using NIH funding under the draft Guidelines are those cells that are subject to existing patents, there will be insufficient competition in the licensing of such rights. These respondents suggested that this could inhibit research, as well as increase the cost of any future clinical benefits. The Guidelines do not address the distribution of stem cell research material. It is, however, the NIH's expectation that stem cell research materials developed with NIH funds, as well as associated intellectual property and data, will be distributed in accordance with the NIH's existing policies and guidance, including "Sharing Biomedical Research Resources, Principles and Guidelines for Recipients of NIH Grants and Contracts" and "Best Practices for the Licensing of Genomic Inventions." *http://ott.od.nih.gov/policy/Reports.html* Even where such policies are not directly applicable, the NIH encourages others to refrain from imposing on the transfer of research tools, such as stem cells, any conditions that

hinder further biomedical research. In addition, the Guidelines were revised to state that there should be documentation that "no payments, cash or in kind, were offered for the donated embryos."

Respondents were concerned that donor(s) be clearly "apprised up front by any researchers that financial gain may come from the donation and that the donor(s) should know up front if he/ she will share in the financial gain." The Guidelines address this concern by asking that donor(s) was/were informed during the consent process that the donation was made without any restriction or direction regarding the individual(s) who may receive medical benefit from the use of the stem cells, such as who may be the recipients of cell transplants. The Guidelines also require that the donor(s) receive(s) information that the research was not intended to provide direct medical benefit to the donor(s); that the results of research using the hESCs may have commercial potential, and that the donor(s) would not receive financial or any other benefits from any such commercial development.

IRB Review Under the Common Rule

Respondents suggested that the current regulatory structure of IRB review under the Common Rule (45 CFR Part 46, Subpart A) addresses the core ethical principles needed for appropriate oversight of hESC derivation. They noted that IRB review includes a full review of the informed consent process, as well as a determination of whether individuals were coerced to participate in the research and whether any undue inducements were offered to secure their participation. These respondents urged the NIH to replace the specific standards to assure voluntary and informed consent in the draft Guidelines

with a requirement that hESC research be reviewed and approved by an IRB, in conformance with 45 CFR Part 46, Subpart A, as a prerequisite to NIH funding. Respondents also requested that the NIH create a registry of eligible hESC lines to avoid burdensome and repetitive assurances from multiple funding applicants. The NIH agrees that the IRB system of review under the Common Rule provides a comprehensive framework for the review of the donation of identifiable human biological materials for research. However, in the last several years, guidelines on hESC research have been issued by a number of different organizations and governments, and different practices have arisen around the country and worldwide, resulting in a patchwork of standards. The NIH concluded that employing the IRB review system for the donation of embryos would not ameliorate stated concerns about variations in standards for hESC research and would preclude the establishment of an NIH registry of hESCs eligible for NIH funding, because there would be no NIH approval of particular hESCs. To this end and in response to comments, these Guidelines articulate policies and procedures that will allow the NIH to create a Registry. These Guidelines also provide scientists who apply for NIH funding with a specific set of standards reflecting currently recognized ethical principles and practices specific to embryo donation that took place on or after the issuance of the Guidelines, while also establishing procedures for the review of donations that took place before the effective date of the Guidelines.

Federal Funding Eligibility of Human Pluripotent Cells From Other Sources

Respondents suggested that the allowable sources of hESCs potentially available for Federal funding be expanded to include hESC lines from embryos created expressly for research purposes, and lines created, or pluripotent cells derived, following parthenogenesis or somatic cell nuclear transfer (SCNT). The Guidelines allow for funding of research using hESCs derived from embryos created using in vitro fertilization (IVF) for reproductive purposes and no longer needed for these purposes, assuming the research has scientific merit and the embryos were donated after proper informed consent was obtained from the donor(s). The Guidelines reflect the broad public support for Federal funding of research using hESCs created from such embryos based on wide and diverse debate on the topic in Congress and elsewhere. The use of additional sources of human pluripotent stem cells proposed by the respondents involve complex ethical and scientific issues on which a similar consensus has not emerged. For example, the embryo-like entities created by parthenogenesis and SCNT require women to donate oocytes, a procedure that has health and ethical implications, including the health risk to the donor from the course of hormonal treatments needed to induce oocyte production.

Respondents noted that many embryos undergo Pre-implantation Genetic Diagnosis (PGD). This may result in the identification of chromosomal abnormalities that would make the embryos medically unsuitable for clinical use. In addition, the IVF process may also produce embryos that are not transferred into the uterus of a woman because they are deter-

mined to be not appropriate for clinical use. Respondents suggested that hESCs derived from such embryos may be extremely valuable for scientific study, and should be considered embryos that were created for reproductive purposes and were no longer needed for this purpose. The NIH agrees with these comments. As in the draft, the final Guidelines allow for the donation of embryos that have undergone PGD.

Donation and Informed Consent

Respondents commented in numerous ways that the draft Guidelines are too procedurally proscriptive in articulating the elements of appropriate informed consent documentation. This over-reliance on the specific details and format of the informed consent document, respondents argued, coupled with the retroactive application of the Guidelines to embryos already donated for research, would result in a framework that fails to appreciate the full range of factors contributing to the complexity of the informed consent process. For example, respondents pointed to several factors that were precluded from consideration by the proposed Guidelines, such as contextual evidence of the consent process, other established governmental frameworks (representing local and community influences), and the changing standards for informed consent in this area of research over time. Respondents argued that the Guidelines should be revised to allow for a fuller array of factors to be considered in determining whether the underlying ethical principle of voluntary informed consent had been met. In addition to these general issues, many respondents made the specific recommendation that all hESCs derived before the final Guidelines were issued be automatically eligible for Federal funding without further re-

view, especially those eligible under prior Presidential policy, i.e., "grandfathered." The final Guidelines seek to implement the Executive Order by issuing clear guidance to assist this field of science to advance and reach its full potential while ensuring adherence to strict ethical standards. To this end, the NIH is establishing a set of conditions that will maximize ethical oversight, while ensuring that the greatest number of ethically derived hESCs are eligible for Federal funding. Specifically, for embryos donated in the U.S. on or after the effective date of the Guidelines, the only way to establish eligibility will be to either use hESCs listed on the NIH Registry, or demonstrate compliance with the specific procedural requirements of the Guidelines by submitting an assurance with supporting information for administrative review by the NIH. Thus, for future embryo donations in the United States, the Guidelines articulate one set of procedural requirements. This responds to concerns regarding the patchwork of requirements and guidelines that currently exist.

However, the NIH is also cognizant that in the more than a decade between the discovery of hESCs and today, many lines were derived consistent with ethical standards and/or guidelines developed by various states, countries, and other entities such as the International Society for Stem Cell Research (ISSCR) and the National Academy of Sciences (NAS). These various policies have many common features, rely on a consistent ethical base, and require an informed consent process, but they differ in details of implementation. For example, some require specific wording in a written informed consent document, while others do not. It is important to recognize that the principles of ethical research, *e.g.*, voluntary informed consent to participation, have not

varied in this time period, but the requirements for implementation and procedural safeguards employed to demonstrate compliance have evolved. In response to these concerns, the Guidelines state that applicant institutions wishing to use hESCs derived from embryos donated prior to the effective date of the Guidelines may either comply with Section II (A) of the Guidelines or undergo review by a Working Group of the Advisory Committee to the Director (ACD). The ACD, which is a chartered Federal Advisory Committee Act (FACA) committee, will advise NIH on whether the core ethical principles and procedures used in the process for obtaining informed consent for the donation of the embryo were such that the cell line should be eligible for NIH funding. This Working Group will not undertake a *de novo* evaluation of ethical standards, but will consider the materials submitted in light of the principles and points to consider in the Guidelines, as well as 45 CFR Part 46 Subpart A. Rather than "grandfathering," ACD Working Group review will enable pre-existing hESCs derived in a responsible manner to be eligible for use in NIH funded research.

In addition, for embryos donated outside the United States prior to the effective date of these Guidelines, applicants may comply with either Section II (A) or (B). For embryos donated outside of the United States on or after the effective date of the Guidelines, applicants seeking to determine eligibility for NIH research funding may submit an assurance that the hESCs fully comply with Section II (A) or submit an assurance along with supporting information, that the alternative procedural standards of the foreign country where the embryo was donated provide protections at least equivalent to those provided by Section II (A) of these Guidelines. These

materials will be reviewed by the NIH ACD Working Group, which will recommend to the ACD whether such equivalence exists. Final decisions will be made by the NIH Director. This special consideration for embryos donated outside the United States is needed because donation of embryos in foreign countries is governed by the laws and policies of the respective governments of those nations. Although such donations may be responsibly conducted, such governments may not or cannot change their national donation requirements to precisely comply with the NIH Guidelines. The NIH believes it is reasonable to provide a means for reviewing such hESCs because ethically derived foreign hESCs constitute an important scientific asset for the U.S.

Respondents expressed concern that it might be difficult in some cases to provide assurance that there was a "clear separation" between the prospective donor(s)' decision to create embryos for reproductive purposes and the donor(s)' decision to donate the embryos for research purposes. These respondents noted that policies vary at IVF clinics, especially with respect to the degree to which connections with researchers exist. Respondents noted that a particular clinic's role may be limited to the provision of contact information for researchers. A clinic that does not have any particular connection with research would not necessarily have in place a written policy articulating the separation contemplated by the Guidelines. Other respondents noted that embryos that are determined not to be suitable for medical purposes, either because of genetic defects or other concerns, may be donated prior to being frozen. In these cases, it is possible that the informed consent process for the donation might be concurrent with the consent process for IVF treatment. Respondents also noted that the

initial consent for IVF may contain a general authorization for donating embryos in excess of clinical need, even though a more detailed consent is provided at the actual time of donation. The NIH notes that the Guidelines specifically state that consent should have been obtained at the time of donation, even if the potential donor(s) had given prior indication of a general intent to donate embryos in excess of clinical need for the purposes of research. Accordingly, a general authorization for research donation when consenting for reproductive treatment would comply with the Guidelines, so long as specific consent for the donation is obtained at the time of donation. In response to comments regarding documentation necessary to establish a separation between clinical and research decisions, the NIH has changed the language of the Guidelines to permit applicant institutions to submit consent forms, written policies or other documentation to demonstrate compliance with the provisions of the Guidelines. This change should provide the flexibility to accommodate a range of practices, while adhering to the ethical principles intended.

Some respondents want to require that the IVF physician and the hESC researcher should be different individuals, to prevent conflict of interest. Others say they should be the same person, because people in both roles need to have detailed knowledge of both areas (IVF treatment and hESC research). There is also a concern that the IVF doctor will create extra embryos if he/she is also the researcher. As a general matter, the NIH believes that the doctor and the researcher seeking donation should be different individuals. However, this is not always possible, nor is it required, in the NIH's view, for ethical donation.

Some respondents want explicit language (in the Guidelines and/or in the consent) stating that the embryo will be destroyed when the inner cell mass is removed. In the process of developing guidelines, the NIH reviewed a variety of consent forms that have been used in responsible derivations. Several had extensive descriptions of the process and the research to be done, going well beyond the minimum expected, yet they did not use these exact words. Given the wide variety and diversity of forms, as well as the various policy, statutory and regulatory obligations individual institutions face, the NIH declines to provide exact wording for consent forms, and instead endorses a robust informed consent process where all necessary details are explained and understood in an ongoing, trusting relationship between the clinic and the donor(s).

Respondents asked for clarification regarding the people who must give informed consent for the donation of embryos for research. Some commenters suggested that NIH should require consent from the gamete donors, in cases where those individuals may be different than the individuals seeking reproductive treatment. The NIH requests consent from "the individual(s) who sought reproductive treatment" because this/these individual(s) is/are responsible for the creation of the embryo(s) and, therefore, its/their disposition. With regard to gamete donation, the risks are associated with privacy and, as such, are governed by requirements of the Common Rule, where applicable.

Respondents also requested clarification on the statement in the draft Guidelines noting that "although human embryonic stem cells are derived from embryos, such stem cells are not themselves human

embryos." For the purpose of NIH funding, an embryo is defined by Section 509, Omnibus Appropriations Act, 2009, Public Law 111–8, 3/11/09, otherwise known as the Dickey Amendment, as any organism not protected as a human subject under 45 CFR Part 46 that is derived by fertilization, parthenogenesis, cloning or any other means from one or more human gametes or human diploid cells. Since 1999, the Department of Health and Human Services (HHS) has consistently interpreted this provision as not applicable to research using hESCs, because hESCs are not embryos as defined by Section 509. This longstanding interpretation has been left unchanged by Congress, which has annually reenacted the Dickey Amendment with full knowledge that HHS has been funding hESC research since 2001. These guidelines therefore recognize the distinction, accepted by Congress, between the derivation of stem cells from an embryo that results in the embryo's destruction, for which Federal funding is prohibited, and research involving hESCs that does not involve an embryo nor result in an embryo's destruction, for which Federal funding is permitted.

Some respondents wanted to ensure that potential donor(s) are either required to put their "extra" embryos up for adoption before donating them for research, or are at least offered this option. The Guidelines require that all the options available in the health care facility where treatment was sought pertaining to the use of embryos no longer needed for reproductive purposes were explained to the potential donor(s). Since not all IVF clinics offer the same services, the healthcare facility is only required to explain the options available to the donor(s) at that particular facility.

Commenters asked that donor(s) be made aware of the point at which their donation decision becomes irrevocable. This is necessary because if the embryo is de-identified, it may be impossible to stop its use beyond a certain point. The NIH agrees with these comments and revised the Guidelines to require that donor(s) should have been informed that they retained the right to withdraw consent for the donation of the embryo until the embryos were actually used to derive embryonic stem cells or until information which could link the identity of the donor(s) with the embryo was no longer retained, if applicable.

Medical Benefits of Donation

Regarding medical benefit, respondents were concerned that the language of the Guidelines should not somehow eliminate a donor's chances of benefitting from results of stem cell research. Respondents noted that although hESCs are not currently being used clinically, it is possible that in the future such cells might be used for the medical benefit of the person donating them. The Guidelines are meant to preclude individuals from donating embryos strictly for use in treating themselves only or from donating but identifying individuals or groups they do or do not want to potentially benefit from medical intervention using their donated cells. While treatment with hESCs is one of the goals of this research, in practice, years of experimental work must still be done before such treatment might become routinely available. The Guidelines are designed to make it clear that immediate medical benefit from a donation is highly unlikely at this time. Importantly, it is critical to note that the Guidelines in no way disqualify a donor from benefitting from the medical outcomes of

stem cell research and treatments that may be developed in the future.

Monitoring and Enforcement Actions

Respondents have expressed concern about the monitoring of funded research and the invocation of possible penalties for researchers who do not follow the Guidelines. A grantee's failure to comply with the terms and conditions of award, including confirmed instances of research misconduct, may cause the NIH to take one or more enforcement actions, depending on the severity and duration of the noncompliance. For example, the following actions may be taken by the NIH when there is a failure to comply with the terms and conditions of any award: (1) Under 45 CFR 74.14, the NIH can impose special conditions on an award, including but not limited to increased oversight/monitoring/reporting requirements for an institution, project, or investigator; and (2) under 45 CFR 74.62 the NIH may impose enforcement actions, including but not limited to withholding funds pending correction of the problem, disallowing all or part of the costs of the activity that was not in compliance, withholding further awards for the project, or suspending or terminating all or part of the funding for the project. Individuals and institutions may be debarred from eligibility for all Federal financial assistance and contracts under 2 CFR part 376 and 48 CFR subpart 9.4, respectively. The NIH will undertake all enforcement actions in accordance with applicable statutes, regulations, and policies.

National Institutes of Health Guidelines for Research Using Human Stem Cells

I. Scope of the Guidelines

These Guidelines apply to the expenditure of National Institutes of Health (NIH) funds for research using human embryonic stem cells (hESCs) and certain uses of induced pluripotent stem cells (See Section IV). The Guidelines implement Executive Order 13505.

Long-standing HHS regulations for Protection of Human Subjects, 45 CFR part 46, subpart A establish safeguards for individuals who are the sources of many human tissues used in research, including non-embryonic human adult stem cells and human induced pluripotent stem cells. When research involving human adult stem cells or induced pluripotent stem cells constitutes human subject research, Institutional Review Board review may be required and informed consent may need to be obtained per the requirements detailed in 45 CFR part 46, subpart A. Applicants should *consult http://www.hhs.gov/ohrp/humansubjects/guidance/45cfr46.htm*.

It is also important to note that the HHS regulation, *Protection of Human Subjects*, 45 CFR part 46, subpart A, may apply to certain research using hESCs. This regulation applies, among other things, to research involving individually identifiable private information about a living individual, 45 CFR 46.102(f). The HHS Office for Human Research Protections (OHRP) considers biological material, such as cells derived from human embryos, to be individually identifiable when they can be linked to specific living individuals by the investigators either directly or indirectly through coding systems. Thus, in cer-

tain circumstances, IRB review may be required, in addition to compliance with these Guidelines. Applicant institutions are urged to consult OHRP guidances at *http://www.hhs.gov/ohrp/policy/index.html#topics*.

To ensure that the greatest number of responsibly derived hESCs are eligible for research using NIH funding, these Guidelines are divided into several sections, which apply specifically to embryos donated in the U.S. and foreign countries, both before and on or after the effective date of these Guidelines. Section II (A) and (B) describe the conditions and review processes for determining hESC eligibility for NIH funds. Further information on these review processes may be found at *http://www.NIH.gov*. Sections IV and V describe research that is not eligible for NIH funding.

These guidelines are based on the following principles:

1. Responsible research with hESCs has the potential to improve our understanding of human health and illness and discover new ways to prevent and/or treat illness.

2. Individuals donating embryos for research purposes should do so freely, with voluntary and informed consent.

As directed by Executive Order 13505, the NIH shall review and update these Guidelines periodically, as appropriate.

II. Eligibility of Human Embryonic Stem Cells for Research With NIH Funding

For the purpose of these Guidelines, "human embryonic stem cells (hESCs)" are cells that are derived

from the inner cell mass of blastocyst stage human embryos, are capable of dividing without differentiating for a prolonged period in culture, and are known to develop into cells and tissues of the three primary germ layers. Although hESCs are derived from embryos, such stem cells are not themselves human embryos. All of the processes and procedures for review of the eligibility of hESCs will be centralized at the NIH as follows:

A. Applicant institutions proposing research using hESCs derived from embryos donated in the U.S. on or after the effective date of these Guidelines may use hESCs that are posted on the new NIH Registry or they may establish eligibility for NIH funding by submitting an assurance of compliance with Section II (A) of the Guidelines, along with supporting information demonstrating compliance for administrative review by the NIH. For the purposes of this Section II (A), hESCs should have been derived from human embryos:

1. That were created using in vitro fertilization for reproductive purposes and were no longer needed for this purpose;

2. That were donated by individuals who sought reproductive treatment (hereafter referred to as "donor(s)") and who gave voluntary written consent for the human embryos to be used for research purposes; and

3. For which all of the following can be assured and documentation provided, such as consent forms, written policies, or other documentation, provided:

a. All options available in the health care facility where treatment was sought pertaining to the embryos no longer needed for reproductive purposes

were explained to the individual(s) who sought reproductive treatment.

b. No payments, cash or in kind, were offered for the donated embryos.

c. Policies and/or procedures were in place at the health care facility where the embryos were donated that neither consenting nor refusing to donate embryos for research would affect the quality of care provided to potential donor(s).

d. There was a clear separation between the prospective donor(s)'s decision to create human embryos for reproductive purposes and the prospective donor(s)'s decision to donate human embryos for research purposes. Specifically:

i. Decisions related to the creation of human embryos for reproductive purposes should have been made free from the influence of researchers proposing to derive or utilize hESCs in research. The attending physician responsible for reproductive clinical care and the researcher deriving and/or proposing to utilize hESCs should not have been the same person unless separation was not practicable.

ii. At the time of donation, consent for that donation should have been obtained from the individual(s) who had sought reproductive treatment. That is, even if potential donor(s) had given prior indication of their intent to donate to research any embryos that remained after reproductive treatment, consent for the donation for research purposes should have been given at the time of the donation.

iii. Donor(s) should have been informed that they retained the right to withdraw consent for the donation of the embryo until the embryos were actually used to derive embryonic stem cells or until in-

formation which could link the identity of the donor(s) with the embryo was no longer retained, if applicable.

e. During the consent process, the donor(s) were informed of the following:

i. That the embryos would be used to derive hESCs for research;

ii. What would happen to the embryos in the derivation of hESCs for research;

iii. That hESCs derived from the embryos might be kept for many years;

iv. That the donation was made without any restriction or direction regarding the individual(s) who may receive medical benefit from the use of the hESCs, such as who may be the recipients of cell transplants;

v. That the research was not intended to provide direct medical benefit to the donor(s);

vi. That the results of research using the hESCs may have commercial potential, and that the donor(s) would not receive financial or any other benefits from any such commercial development;

vii. Whether information that could identify the donor(s) would be available to researchers.

B. Applicant institutions proposing research using hESCs derived from embryos donated in the U.S. before the effective date of these Guidelines may use hESCs that are posted on the new NIH Registry or they may establish eligibility for NIH funding in one of two ways:

1. By complying with Section II (A) of the Guidelines; or

2. By submitting materials to a Working Group of the Advisory Committee to the Director (ACD), which will make recommendations regarding eligibility for NIH funding to its parent group, the ACD. The ACD will make recommendations to the NIH Director, who will make final decisions about eligibility for NIH funding.

The materials submitted must demonstrate that the hESCs were derived from human embryos: (1) That were created using in vitro fertilization for reproductive purposes and were no longer needed for this purpose; and (2) that were donated by donor(s) who gave voluntary written consent for the human embryos to be used for research purposes.

The Working Group will review submitted materials, *e.g.*, consent forms, written policies or other documentation, taking into account the principles articulated in Section II (A), 45 CFR part 46, subpart A, and the following additional points to consider. That is, during the informed consent process, including written or oral communications, whether the donor(s) were: (1) Informed of other available options pertaining to the use of the embryos; (2) offered any inducements for the donation of the embryos; and (3) informed about what would happen to the embryos after the donation for research.

C. For embryos donated outside the United States before the effective date of these Guidelines, applicants may comply with either Section II (A) or (B). For embryos donated outside of the United States on or after the effective date of the Guidelines, applicants seeking to determine eligibility for NIH research funding may submit an assurance that the hESCs fully comply with Section II (A) or submit an assurance along with supporting information, that

the alternative procedural standards of the foreign country where the embryo was donated provide protections at least equivalent to those provided by Section II (A) of these Guidelines. These materials will be reviewed by the NIH ACD Working Group, which will recommend to the ACD whether such equivalence exists. Final decisions will be made by the NIH Director.

D. NIH will establish a new Registry listing hESCs eligible for use in NIH funded research. All hESCs that have been reviewed and deemed eligible by the NIH in accordance with these Guidelines will be posted on the new NIH Registry.

III. Use of NIH Funds

Prior to the use of NIH funds, funding recipients should provide assurances, when endorsing applications and progress reports submitted to NIH for projects using hESCs, that the hESCs are listed on the NIH registry.

IV. Research Using hESCs and/or Human Induced Pluripotent Stem Cells That, Although the Cells May Come From Eligible Sources, Is Nevertheless Ineligible for NIH Funding

This section governs research using hESCs and human induced pluripotent stem cells, *i.e.*, human cells that are capable of dividing without differentiating for a prolonged period in culture, and are known to develop into cells and tissues of the three primary germ layers. Although the cells may come from eligible sources, the following uses of these cells are nevertheless ineligible for NIH funding, as follows:

A. Research in which hESCs (even if derived from embryos donated in accordance with these

Guidelines) or human induced pluripotent stem cells are introduced into non-human primate blastocysts.

B. Research involving the breeding of animals where the introduction of hESCs (even if derived from embryos donated in accordance with these Guidelines) or human induced pluripotent stem cells may contribute to the germ line.

V. Other Research Not Eligible for NIH Funding

A. NIH funding of the derivation of stem cells from human embryos is prohibited by the annual appropriations ban on funding of human embryo research (Section 509, Omnibus Appropriations Act, 2009, Pub. L. 111– 8, 3/11/09), otherwise known as the Dickey Amendment.

B. Research using hESCs derived from other sources, including somatic cell nuclear transfer, parthenogenesis, and/or IVF embryos created for research purposes, is not eligible for NIH funding.

Dated: June 30, 2009.

Raynard S. Kington,
Acting Director, NIH.

[FR Doc. E9–15954 Filed 7–6–09; 8:45 am]

BILLING CODE 4140–01–P