No. 25-1248 (L)

In the United States Court of Appeals for the Fourth Circuit

UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL., APPLICANTS

v.

STATE OF MARYLAND, ET AL.

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

BRIEF OF AMICI THE OVERSIGHT PROJECT AND DAN HUFF IN SUPPORT OF VACATING THE PRELIMINARY INJUNCTION

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CERTIFICATION

Pursuant to 4th Circuit Rule 26.1, Amici the Oversight Project certifies as follows:

The Oversight Project has no parent entity and no entity has a greater than 10 percent ownership interest in The Oversight Project. The Oversight Project is a 501(c)(4) nonprofit organization dedicated to preserving American freedom by ensuring government is and remains responsible, accountable and transparent.

Pursuant to Federal Rule of Appellate Procedure 29 (a)(4)(E) Amici certify that no party or their counsel participated in the drafting of this brief in whole or in part or funded this brief in whole or in part.

All parties consent to the filing of this brief.

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INTEREST OF *AMICI CURIAE*

1. The Oversight Project is a not-for-profit 501(c)(4) organization dedicated to preserving American freedom by ensuring government is and remains responsible, accountable, and transparent. The Oversight Project regularly litigates Freedom of Information Act and public records cases, files amicus briefs, and provides commentary on current events.

2. Dan Huff is a former Trump White House lawyer and served for nearly a decade as counsel to the Senate and House Judiciary Committees. He is a Fellow at the Oversight Project and a graduate of the Columbia Law School.

On February 10, 2025, he posted a thread on X raising the issue of injunction bonds that received over 1 million views. This was followed by an op-ed in *Fox Opinion* expanding on the point[1] and another in the *Wall Street Journal*.[2] Subsequent to the *Fox* op-ed, on March 11, 2024,

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[1] Dan Huff, *I Was a White House Lawyer*, Fox (Feb. 21, 2025), https://www.foxnews.com/opinion/i-white-house-lawyer-i-found-trumps-way-around-lefts-lawfare-roadblocks (last visited Apr. 23, 2025)

[2] Dan Huff, *Why Judge Boasberg's Deportation Order Is Legally Invalid*, WSJ (Mar. 31, 2025), https://www.wsj.com/opinion/why-boasbergs-order-is-legally-invalid-law-politics-injunction-bonds-8bd0f495 (last visited Apr. 23, 2025).

President Trump issued a memorandum directing agencies facing injunctions to demand appropriate bonds. *Ensuring the Enforcement of Federal Rule of Civil Procedure 65(c)*, The White House (Mar. 11, 2025).[3] Senate Judiciary Committee Chairman Senator Chuck Grassley echoed the point in a letter to Attorney General Pam Bondi citing the *Fox* op-ed. Letter from the Hon. Charles Grassley to the Hon. Pam Bondi (Mar. 14, 2025).[4]

INTRODUCTION AND SUMMARY OF ARGUMENT

1. District court judges are bound by the Federal Rules of Civil Procedure, which have the force of law. Federal Rule of Civil Procedure 65(c) ("Rule 65(c) or the "Rule") requires parties seeking temporary restraining orders or preliminary injunctions to have skin in the game. It permits judges to issue these orders "only if" the moving party posts sufficient bond "in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. Proc. 65(c).

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[3] https://www.whitehouse.gov/presidential-actions/2025/03/ensuring-the-enforcement-of-federal-rule-of-civil-procedure-65c/ (last visited Apr. 23, 2025).

[4]https://www.grassley.senate.gov/imo/media/doc/grassley_to_ag_bondi_-_federal_rule_of_civil_procedure_65c.pdf. (last visited Apr. 23, 2025).

a. The plain language of Rule 65(c) makes adequate bonds mandatory. Under the rule, only the Government may obtain an injunction without posting a bond. "There are no other exceptions." *Md. Dep't of Hum. Res. v. U.S. Dep't of Agric.*, 976 F.2d 1462, 1483 n. 20 (4th Cir. 1992). Bonds are a "condition precedent" to issuing injunctive relief. *Hopkins v. Willins*, 179 F.2d 136, 137 (3d Cir. 1949). "Failure to require a bond *before* granting preliminary injunctive relief is reversible error." *Md. Dep't of Hum. Res.*, 967 F.2d at 1484 (emphasis added). On the flip-side, a bond is the only method by which a party may recover its' damages resulting from being wrongfully enjoined. *See, e.g.*, *W.R. Grace & Co. v. Loc. Union 759*, 461 U.S. 757, 770 (1983); *Mead Johnson & Co. v. Abbott Lab'ys*, 201 F.3d 883, 888 (7th Cir. 2000).

The purpose of Rule 65(c) lines up perfectly with its mandatory language. As Justice Stevens explained, because "a preliminary injunction may be granted on a mere probability of success on the merits, generally the moving party must demonstrate confidence in his legal position by posting bond in an amount sufficient to protect his adversary from loss in the event that future proceedings prove that the injunction issued wrongfully." *Edgar v. MITE Corp.*, 457 U.S. 624, 649 (1982)

(Stevens, J., concurring). Thus, the bond is a plaintiff's "warranty that the law will uphold the issuance of the injunction." *Id.* The notion of a preliminary injunction and the corresponding bond as two parts of a bargain has a rich pedigree in historical equity practice and rules. *See, e.g.*, *Russell v. Farley*, 105 U.S. 433, 438–443 (1881).

b. To be sure, Circuits have split on whether the bond requirement is mandatory or discretionary.[5] But the view that the bond rule is discretionary and may be overcome by some free-floating public interest is badly flawed twice over. To start, the plain text of Rule 65(c) allows an injunction to issue "only if" bond is posted "in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. Proc. 65(c). Moreover, Congress specifically amended the Rule to make bonds mandatory. Prior language, in the 1911 Judiciary Act, had left

[5] *Compare Hope v. Warden York Cnty. Prison*, 972 F.3d 310, 322 (3d Cir. 2020) (bond required); *Phillips v. Chas. Schreiner Bank*, 894 F.2d 127, 131 (5th Cir. 1990) (similar), *with NACCO Materials Handling Grp. v. Toyota Material Handling USA, Inc.*, 246 F. App'x 929, 952– 53 (6th Cir. 2007) (bond not mandatory); *Int'l Ass'n of Machinists & Aerospace Workers v. E. Airlines, Inc.*, 925 F.2d 6, 9 (1st Cir. 1991) (similar); *BellSouth Telecommc'ns, Inc. v. MCImetro Access Transmission Servs., LLC*, 425 F.3d 964, 971 (11th Cir. 2005) (similar).

bonds in the discretion of the judge. Act of March 3, 1911, ch. 231, § 263, 36 Stat. 1162.

Regardless, such a misguided view is foreclosed by the law of the Circuit. *See, e.g.*, *Md. Dep't of Hum. Res.*, 976 F.2d at 1483 n. 20 (Rule 65(c) "subsumes such generic policy considerations" as the "'public interest'" in "encouraging plaintiffs to challenge agencies' interpretations of their governing statutes." (quoting *Nat'l Kidney Patients Ass'n v. Sullivan*, 958 F.2d 1127, 1135 (D.C. Cir. 1992)).

Moreover, even on its own terms, a public interest exception is unworkable because the term is inherently subjective. Those challenging a Government policy have no higher claim to serving the public interest than the millions of citizens who voted to implement that policy.

c. Importantly, the bond requirement applies only to *preliminary* relief. The courthouse doors are not shut to plaintiffs who cannot afford to post it. They can still—and do—challenge Administration policies on a highly expedited merits schedule. But they will have to *actually prove* their case instead of scoring a quick pretrial win that kills the Government's policy momentum and bleeds its resources even if it is later reversed.

Actually enforcing the bond requirement is an elegant solution to rising interbranch tension. When a court issues an injunction without requiring the mandatory bond, it is the court—not the Government—that has violated the law.

d. Similarly erroneous is the practice of certain courts of sidestepping the rule by setting nominal or *de minimis* bonds. Courts do have *some* discretion in setting the bond amount, but that discretion is limited. The Rule requires that the bond be "proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined." Fed. R. Civ. Proc. 65(c). That calculation is as far as a court's discretion goes. In practice, that cost is rarely zero and appellate courts have rejected attempts to treat it as such. *See, e.g.*, *Md. Dep't of Hum. Res.*, 976 F.2d at 1483.

2. Here, the District Court's preliminary injunction requires the Government to reinstate 24,000 fired probationary employees "it has determined it no longer requires, and there is no mechanism for the Government to recoup those salaries if it eventually prevails in this appeal." ECF No. 34 at 3. The District Court repeatedly acknowledged that "the Government will inevitably incur significant costs by retaining

on its payroll, at least temporarily, employees that it would have otherwise terminated." PI Op. at 66; *accord* PI Op. at 81; TRO Op. at 43, 51, 53.[6] This Court's Motions panel also concluded that "the Government is unlikely to recover the funds disbursed to reinstated probationary employees." Mot. Panel Order at 5.

This massive liability is precisely the situation for which Rule 65(c) was designed, yet the District Court required each Appellee to post just $100. *See* PI Op. at 82; TRO Op. at 53.

The District Court justified its *de minimis* bond on two grounds. First, the District Court reasoned that "nominal bond is common in public-interest litigation cases, as requiring plaintiffs to 'bear up front the total cost of the alleged governmental wrongdoing' will often be effectively to foreclose judicial review altogether." PI Op. at 82 (quoting TRO Op. at 54–55). This approach is clear error. It does violence to the text of Rule 65(c) and ignores this Circuit's rejection of extra judicial policy considerations and its conclusion as to the State of Maryland in a

[6] The District Court incorporated its TRO Opinion's analysis of Rule 65(c) into its PI Opinion. *See* PI Op. at 82.

factually similar case that substantial bond was required. *Md. Dep't of Hum. Res.*, 976 F.2d at 1483 n. 20.

Second, the District Court reasoned that "the potential cost of an improvidently granted TRO on the federal government is too complex to calculate in this expedited proceeding." TRO Op. at 53; *accord* PI Op. at 81 ("the Government has not provided the Court with any quantitative estimate as to the costs imposed on it by any injunction, and the Court is [in] no position to make such a calculation on its own"). This reasoning is upside down. *Appellees* sought the expedited proceeding and Appellants should not be faulted for that fact. In any event, *Maryland Department of Human Resources* is all but controlling and makes clear that regardless of the challenges and imprecision in setting a bond, a substantial bond is required in this case. Other persuasive Circuit authority is in accord. And it is not difficult to arrive at a rough baseline estimate of the damages here from a wrongful injunction using either public data or data *Appellees* placed in the record.

In sum, the preliminary injunction at issue here is invalid because the District Court did not follow the procedure required to issue it. Accordingly, it must be vacated.

ARGUMENT

I. The Plain Language Of Rule 65(c) Makes A Sufficient Bond Mandatory And A Condition Precedent To Issuing An Injunction Or TRO.

1. Rule 65(c) permits district courts to issue a preliminary injunction or TRO "only if" the movant posts bond:

> The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.

The Supreme Court has instructed "[w]e give the Federal Rules of Civil Procedure their plain meaning, . . . , and generally with them as with a statute, '[w]hen we find the terms . . . unambiguous, judicial inquiry is complete[.]'" *Pavelic & LeFlore v. Marvel Ent. Grp.*, 493 U.S. 120, 123 (1989) (citation omitted). The plain text of the Rule makes a bond mandatory and a legal prerequisite to issuing an injunction: "'[O]nly means only" and is a clear and unmistakable limitation on judicial authority. *United States v. Stines*, 34 F.4th 1315, 1322 (11th Cir. 2022) (quoting *United States v. Diaz-Gomez*, 680 F.3d 477, 480 (5th Cir. 2012)). Since an injunction may issue "only if" there is a bond, it is a "condition

precedent" to any injunctive relief. *Hopkins*, 179 F.2d at 137; *accord Dist. 17, United Mine Workers v. A & M Trucking, Inc.*, 991 F.2d 108, 111 (4th Cir. 1993) ("Failure to require a bond *before* granting preliminary injunctive relief is reversible error." (emphasis added)).

The text is also crystal clear as to how the amount of a bond must be calculated. Rule 65(c) limits a District Court's discretion in setting the amount of the mandatory bond to "an amount that the court considers proper *to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained*." Fed. R. Civ. Proc. 65(c) (emphasis added). To be sure, in isolation "proper" carries considerable discretion, but it is clearly modified and limited by the immediately following language—"to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." *See, e.g.*, *BedRoc. Ltd. LLC v. United States*, 541 U.S. 176, 183 (2004) (plurality op.) (court must construe broad statutory term per limiting statutory modifier); *Coyne-Delany Co., Inc. v. Cap. Dev. Bd. of Ill.*, 717 F.2d 385, 391 (7th Cir. 1983) ("The court is . . . told to require a bond or equivalent security in order to ensure that the plaintiff will be able to pay all or at least some of the damages that the defendant incurs from the preliminary injunction if it

turns out to have been wrongfully issued."). Thus, the plain text of the Rule requires not just a bond, but a *sufficient* bond.

The fact that Congress itself chose to create only one narrow exception to the bond requirement—"the security requirement exempts the United States or . . . an officer or agency thereof"'—reinforces its mandatory nature. *Md. Dep't of Hum. Res.*, 976 F.2d at 1483 (quoting Fed. R. Civ. Proc. 65(c)).[7] The existence of a statutory exception to Rule 65(c)'s command that an adequate bond is required confirms that no other exception exists. *See, e.g.*, *Andrus v. Glover Const. Co.*, 446 U.S. 608, 616–17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied in the absence of evidence of a contrary legislative intent.").

By a similar principle of construction, the bond must be sufficient "to pay the costs and damages sustained by any party found to have been

[7] The Federal Bankruptcy Rules also contain a narrow bespoke exception to the bond requirement. *See In Re Looney*, 823 F.2d 788, 792 (4th Cir. 1987) ("Bankruptcy Rule 7065 allows temporary restraining orders or preliminary injunctions to be issued in bankruptcy cases without compliance with Fed. R. Civ. Proc. 65(c), which requires the party moving for an injunction to give security. However, such injunctions are to be given 'on application of a debtor, trustee or debtor in possession.'" (quoting Bankr. R. 7065)).

wrongfully enjoined or restrained", as a contrary construction asserting discretion to set *de minimis* bond regardless of evidence of quantum, would negate Congress's mandatory language limiting district court discretion. Provisions should be interpreted so that "no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174 (2001). Thus, "proper" cannot be excised from the language that tightly cabins it.

2. The plain language of the Rule is further confirmed by its context vis-a-vis the "language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *see also* A. Scalia & B. Garner, Reading Law 167 (2012) ("Scalia & Gardner"). "A party injured by the issuance of an injunction later determined to be erroneous has no action for damages in the absence of a bond." *W.R. Grace & Co.*, 461 U.S. at 770. Moreover, "the amount of the bond provided . . . limits the amount of recovery." *First-Citizens Bank & Trust Co. v. Camp*, 432 F.2d 481, 484 (4th Cir. 1970). A*ccord Russell*, 105 U.S. at 437; *Coyne-Delany*, 717 F.2d at 393. Put differently "an error" in failing to set adequate bond "produces irreparable injury, because the damages for an

erroneous preliminary injunction cannot exceed the amount of the bond." *Mead Johnson*, 201 F.3d at 888.

Rule 65(c)'s requirement of adequate bond cannot be divorced from this context; the requirement of adequate bond is the flip-side of the limited remedy available for a party wrongfully enjoined. *See, e.g.*, *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 285 (4th Cir. 2002) (bond protects preliminarily enjoined defendant from otherwise irreparable harm); *cf. Dep't of Educ. v. California*, 145 S.Ct. 966, 968–69 (2025) (finding Government would suffer irreparable harm without a stay because "respondents have not refuted the Government's representation that it is unlikely to recover the grant funds once they are disbursed . . . and the District Court declined to impose bond."(citation ommited)). In effect a preliminary injunction is a bargain; "[t]he applicant 'consents to liability up to the amount of the bond, as the price' of a wrongful injunction." *Sprint Comm. Co. L.P v. CAT Comms. Inter., Inc.*, 335 F.3d 235, 240 n.5 (3d Cir. 2003) (cleaned up); *see also Edgar*, 457 U.S. at 649 (Stevens, J., concurring) (bond is the plaintiff's "warranty that the law will uphold the issuance of the injunction."); *Russell*, 105 U.S. at 438–442 (reviewing how equity practice in England and early

Colonial and American law developed a practice of conditioning preliminary relief on an undertaking to indemnify); *Sprint Comm.*, 225 F.3d at 240 (discussing how that bargain works in practice). In that sense the Rule is intended to "deter[] flimsy claims" by "forcing the plaintiff to consider the injury to be inflicted on its adversary in deciding whether to press ahead in its quest for a preliminary injunction." *Nat'l Kidney Patients Ass'n.*, 958 F.2d at 1134.

II. The Statutory History Confirms That Injunction Bonds Are Mandatory.

"[A] change in the language of a prior statue presumably connotes a change in meaning." Scalia & Garner at 256. Consideration of such "*statutory* history" is eminently proper. *Id.* Here, Congress specifically amended the Rule to make bonds mandatory.

Rule 65(c) dates to the Judicial Code of 1926. Its language came directly from the Clayton Act which provided that no injunction shall issue "except upon the giving of security" and explicitly repealed a provision in the Judiciary Act of 1911 placing injunction bonds "in the discretion of the court." Act of March 3, 1911, ch. 231, § 263, 36 Stat. 1162

Section 263 of the 1911 Act had provided that:

> Whenever notice is given of a motion for an injunction out of a District Court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion; and such order may be granted with or without security, *in the discretion of the court or judge*.

Id. (emphasis added). Congress explicitly repealed this section of law in 1914. *See* The Clayton Act, ch. 323, §§ 16–18, 38 Stat. 737-38 (1914). In its place, Congress provided that:

> [N]o restraining order or interlocutory order of injunction shall issue, *except upon* the giving of security by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby.

See *id.* (emphasis added). In 1926, Congress carried over substantially the same language into a new codification of the Judicial Code. The latest revision was in 2007, but the changes were always minor. The "language of the security requirement in Rule 65(c) is virtually the exact language adopted from the Judicial Code and has governed the bond requirement in federal courts since 1914." *See* Erin Connors Morton, *Security for Interlocutory Injunctions under Rule 65(c): Exceptions to the Rule Gone Awry*, 46 Hastings L.J. 1863, 1873 (1995) ("Morton").

The shift in 1914 from discretionary to mandatory language "is itself fair evidence that the bond was intended to be mandatory." *See* Dan B. Dobbs, *Should Security Be Required As a Pre-Condition to Provisional Injunctive Relief*, 52 N.C. L. Rev. 1091, 1099 (1974) ("Dobbs").

III. The District Court's Holding That There Is A Free-Floating Public Interest Exception Is Egregiously Wrong.

1. The District Court justified its refusal to set more than nominal bond by holding that "District courts have discretion to set the required security at a nominal amount . . . and this approach has long been followed in public-interest litigation cases." TRO Op. at 52; *accord* PI Op. at 82. The District Court arrived at this extraordinary atextual conclusion via a two-step analysis.

In its first step, the District Court latched onto isolated passages of two of this Court's opinions to support its claims to broad discretion to set a nominal bond. Initially, the District Court plucked out this Court's statement that: "[w]here the district court determines that the risk of harm is remote, or that the circumstances otherwise warrant it, the court may fix the amount of the bond accordingly. *In some circumstances, a nominal bond may suffice*." PI Op. at 81 (citing *Hoechst Diafoil v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 n.3 (4th Cir. 1999) (emphasis added));

accord TRO Op. at 52. Next, the District Court cited this Court's holding that: "the district court retains the discretion to set the bond amount as it sees fit or waive the security requirement," so long as it "expressly address[es] the issue of security before allowing any waiver" and does not "disregard the bond requirement altogether." PI Op. at 81–82 (quoting *Pashby v. Delia*, 709 F.3d 307, 332 (4th Cir. 2013) (citation omitted)).

In the second step, the District Court concluded that this putative discretion extended to this case because this case is a public interest case and "a nominal bond is common in public-interest litigation cases, as requiring plaintiffs to 'bear up front the total cost of the alleged governmental wrongdoing' will often be effectively to foreclose judicial review altogether." PI Op. at 82 (quoting TRO Op. at 54–55).

2. The District Court's analysis is badly flawed for at least three independent reasons.

a. First, the District Court entirely ignored this Court's opinion in *Maryland Department of Human Resources* which is factually apposite and all but controls here. There, Maryland sought and obtained a preliminary injunction blocking the Government from recovering food stamp overpayments to Maryland. *Md. Dep't of Hum. Res.*, 976 F.2d at

1467–68. The district court declined to require bond based on "Maryland's representation that the state could pay any judgment ultimately entered against it." *Id.* at 1483. This Court reversed in part because a substantial injunction bond was required as it was a "virtual certainly" that the Government "would suffer substantial monetary damages" in a case where even Maryland referred to the sums at issue as "staggering". *Id.* at 1483, 1483 n. 23. This Court was at pains to note in its analysis that while a District Court has some discretion, "Rule 65(c) 'subsumes such generic policy considerations' as the 'public interest' in 'encouraging plaintiffs to challenge agencies' interpretations of their governing statutes.'" *Md. Dep't of Hum. Res.*, 976 F.2d at 1483 n. 20 (quoting *Nat'l Kidney Patients Ass'n*, 958 F.2d at 1135). The District Court's failure to mention—let alone grapple with—this authority is fatal.

b. Second, nothing in *Hoechst Diafoil* or *Pashby remotely* calls into question the Court's opinion in *Maryland Department of Human Resources* or authorizes the District Court to ignore the "mandatory and unambiguous" text of Rule 65(c) for mere policy reasons. *Hoechst Diafoil*, 174 F.3d at 421.

The District Court's contrary conclusion relied on cherry-picking from this Court's cases. In *Hoechst Diafoil*, the District Court cited the opinion's language that nominal bond may be set where "the risk of harm is remote, or that the circumstances otherwise warrant it" but omitted the example given by this Court of where nominal bond may suffice—"fixing bond amount at zero in the absence of evidence regarding likelihood of harm." *Hoechst Diafoil*, 174 F.3d at 421 n.3. Nothing in *Hoechst Diafoil* remotely takes issue with the fact that the phrase "or the circumstances otherwise warrant it" is subject to the limiting language in *Maryland Department of Human Resources*. Indeed, *Maryland Department of Human Resources* itself *cabins* a district court's discretion to fix nominal bond as "circumstances otherwise warrant" with categorical examples of when a nominal bond may be appropriate such as "where the court acts merely to preserve its subject-matter jurisdiction" or "merely to ensure judicial review of administrative action." *Md. Dep't of Hum. Res.*, 976 F.2d at 1483 n. 24. Those two opinions must be read together. *See United States v. Bullis*, 122 F.4th 107, 115 (4th Cir. 2024) (panel opinions should be read harmoniously whenever possible). And of course it goes without saying that it would be remarkable indeed to read *Hoechst Diafoil* as

having both *sub silento* overruled *Maryland Department of Human Resources* and carved out a free-standing "public interest" exception to Rule 65(c)'s text without any analysis *whatsoever*.

The District Court's citation to *Pashby* fares no better. There, the district court had failed to consider the matter of bond at all and this Court remanded to allow consideration of the matter of bond while at the same time noting the unremarkable proposition (with citation to none other than *Hoechst Diafoil*) that "the district court retains the discretion to set the bond amount as it sees fit or waive the security requirement." *Pashby*, 709 F.3d at 332. *Pashby's* passing general descriptor must be read in light of *Maryland Department of Human Resources* and does not even remotely suggest that this Circuit made the fraught decision to cast aside a prior panel opinion, clear text, and statutory history in favor of free-floating notions of equity.

c. Third, the District Court's jump from general statements about its discretion to set bond to its holding that a nominal bond was appropriate because this case is a "public-interest litigation case[]" (PI Op. at 82) is devoid of reasoning. It rests entirely on citation to three district court cases and Wright & Miller and does not even begin to grapple with

the contrary text or statutory history to square those cases with the Fourth Circuit's rejection of broad policy rationales in *Maryland Department of Human Resources*. Indeed, the District Court's only analysis is its apparent conclusion that "it would be prohibitive to require plaintiffs to bear up front the total cost of the alleged governmental wrongdoing." TRO Op. at 53. Of course, that is demonstrably wrong. States have vast resources. *See, e.g.*, *Md. Dep't of Hum. Res.*, 976 F.2d at 1483 (district court declined to order bond based on "Maryland's representation that the state could pay any judgment ultimately entered against it."). They also have easy access to bonds. *Cf. Mead Johnson*, 201 F.3d at 888 (noting low cost for major corporations to post bond)). But even more to the point, *Maryland Department of Human Resources* flatly precludes this line of reasoning; this Court was clear that the State of Maryland *should* have been required to post a sizable bond as part and parcel of the preliminary injunction it obtained precluding the Government from recovering overpayments. *Md. Dep't of Hum. Res.*, 976 F.2d at 1483, 1483 n. 24.

d. Even if the District Court were not bound by *Maryland Department of Human Resources* and this Court's insistence on

adherence to Rule 65(c)'s text, the rationale underlying the cases cited by the District Court is hopelessly flawed both legally and as a matter of prudence.

For the first forty years following Congress amending the Rule to make it mandatory, courts (unsurprisingly) "uniformly required a bond as a condition precedent to issuing a preliminary injunction or TRO." *See Morton* at 1878. The pivot began with just two sentences in a Sixth Circuit opinion:

> The rule leaves it to the District Judge to order the giving of security in such sum as the court considers proper. This would indicate plainly that the matter of requiring security in each case rests in the discretion of the District Judge.

See Urbain v. Knapp Brothers Manufacturing Co., 217 F.2d 810, 815–16 (6th Cir. 1954). That is it. "There was no other discussion of the point, by way of analysis, legislative history, or precedent, which, indeed, seems to have been wholly lacking." *See Dobbs* at 1101; *accord Morton* at 1879. Of course, the *Urbain* court's description of the rule was misleading. The directive is not to set the bond in "such sum as the court considers proper." It is to set the bond in such "sum as the court deems proper, *for the payment of such costs and damages as may be incurred"* by a wrongfully enjoined party. Fed. R. Civ. Proc. 65(c) (emphasis added).

Despite its glaring defects, *Urbain* opened the floodgates to litigants across the country eager for grounds to ignore the Rule. *See e.g., Ferguson v. Tabah*, 288 F.2d 665, 675 (2d Cir. 1961) (citing *Urbain* for the proposition that courts have "wide discretion" to require no bond).

In particular, certain courts felt emboldened to fashion a free-floating public interest exception via judicial fiat. They were cheered on by activists who complained that the bond requirement "effectively blocks the litigation of public interest suits by preventing public interest plaintiffs from obtaining preliminary injunctions." *See* Reina Calderon, *Bond Requirements Under Federal Rule of Civil Procedure 65(c): An Emerging Equitable Exemption for Public Interest Litigants*, 13 B.C. Environmental Affairs Law Rev. 125, 135 (1985). They urged courts to exempt such plaintiffs "whenever necessary to ensure judicial access." *Id.* at 139.

Boiled down, cases claiming there is a public interest exception are quite literally simply about judges disagreeing with Congress's policy call to make bonds mandatory. *See, e.g.*, *Powelton Civic Home Own. Ass'n v. Dept. of Hous. and Urb. Dev.*, 284 F.Supp. 809, 840–41 (E.D. Pa. 1968) ("We cannot accept the proposition that Rule 65(c) was intended to raise

virtually insuperable financial barriers insulating the agency's decisions from effective judicial scrutiny."). But the Rule is clear that bonds are mandatory, and courts "have no judicial authority to substitute [their] political judgment for that of the Congress." *Fiallo v. Bell*, 430 U.S. 787, 798 (1977).

There is no room for free ranging consideration of the public interest precisely because Congress *itself* balanced the public interest in the Rule:

> [T]he district court suggested that the "public interest" favors encouraging plaintiffs to challenge agencies' interpretations of their governing statutes. *Id.* But this completely overlooks a key purpose of the *bond* and the presumption of enforceability—to make plaintiffs consider the damage they may inflict by pressing ahead with a possibly losing claim. The presumption expresses a judgment that already subsumes such generic policy considerations as the public interest in providing judicial interpretations of statutes.

Nat'l Kidney Patients Ass'n, 958 F.2d at ; *accord Md. Dep't of Hum. Res.*, 976 F.2d at 1483 n. 20.

More fundamentally, there is no moral case for a public interest exception because the term is subjective.

For example, liberal activists would say that suing the Government to block mass firings or deportations is in the public interest, but suing

to stop vaccine mandates or climate change cost estimates is not. Conservatives would say precisely the opposite. It is entirely in the eye of the beholder and therefore unworkable.

Moreover, the claimed exception disregards the public's interest in implementing the policies for which they voted. Those seeking to block a Government policy have no greater claim to acting in the public interest than the millions of citizens who voted to implement that policy in a hard-fought election.

This attitude is palpable in the lead case that the District Court cited to support the exception. *See State of Alabama ex rel. Baxley v. Corp of Eng'rs of U.S. Army*, 411 F.Supp. 1261, 1276 (N. D. Ala. 1976) ("This court is *simply unwilling* to close the courthouse door in public interest litigation by imposing a burdensome security requirement on plaintiffs who otherwise have standing to review governmental action." (emphasis added)).

Because a public interest exception finds no warrant in the text and statutory history, and there is no neutral principle by which it could be administered, it must be rejected.

IV. The District Court Erred In Calculating A *De Minimus* Bond.

1. Separate and apart from its conclusions concerning so-called public interest litigation, the District Court reasoned that nominal bond was appropriate under its discretion to calculate the "amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. Proc. 65(c). Specifically, the District Court held that "the potential cost of an improvidently granted TRO on the federal government is too complex to calculate in this expedited proceeding" (TRO Op. at 53) and faulted the Government for failure to provide the "Court with any quantitative estimate as to the costs imposed on it by any injunction" because "the Court is [in] no position to make such a calculation on its own". PI Op. at 81.

2. Again, the District Court committed multiple errors.

a. To start, the District Court again failed to even consider *Maryland Department of Human Resources* which again is all but dispositive. There, on a remarkably similar record this Court expressly held that "[t]he district court's refusal to require a bond cannot be defended as the reasonable exercise of discretion to set a 'sum as the court

deems proper.'" It did not matter that the potential damage to the Government was unclear; what mattered was that that the potential damage to the Government was admittedly "staggering" and "substantial" and therefore a commensurate "staggering" or "substantial" bond was required. *Md. Dep't of Hum. Res.*, 976 F.2d at 1483. Whatever the calculation, a nominal bond was a clear abuse of discretion. *Id.*

b. This Court's reasoning makes sense and is followed by sister Circuits. *Appellees* rushed to court to obtain "expedited" relief. They received such relief and the "bargain" in obtaining such relief is posting appropriate security. The Government can hardly be faulted for coming up with "soft" numbers as the *Appellees* were the ones who insisted on rushing to the courthouse. The putative need for expedition "did not justify ignoring a cost that was sure to be large, even if the total was hard to determine on short notice." *Mead Johnson*, 201 F.3d at 887. As Judge Easterbrook has explained, in such a rushed proceeding where numbers a**re** "soft," the appropriate course is to use the best available information and set a bond that "err[s] on the high side" because:

> If the district judge had set the bond at $50 million, as Abbott requested, this would not have *entitled* Abbott to that sum; Abbott still would have had to prove its loss, converting the "soft" numbers to hard ones. An error in setting the bond too high thus is not

> serious. (The fee for a solvent firm such as Mead Johnson or its parent Bristol-Myers Squibb Co. to post a bond, a standby letter of credit, or equivalent security is a very small fraction of the sum involved). . . . Unfortunately, an error in the other direction produces irreparable injury, because the damages for an erroneous preliminary injunction cannot exceed the amount of the bond.

Mead Johnson, 201 F.3d at 888. Courts have repeatedly applied this logic to require a substantial bond when the harm to the restrained party is vast while accepting that its calculations may well be imprecise. *See, e.g.*, *Nat'l Kidney Patients Ass'n.*, 958 F.2d at 1129 (rejecting $1000 *de minimis* bond and remanding to the district court to set an "an appropriate bond" stating that Medicare had already paid over $18 million to vendors under the injunction, an amount for which the $1000 bond was "clearly inadequate to ensure repayment"); *Fleet Feet v. Nike Inc.*, 419 F.Supp.3d 919, 949 (M.D.N.C. 2019) (rejecting quantum evidence from enjoined party but holding "[n]o doubt, however, the injunction will cost Nike money, and the injunction will cause Nike significant problems with its campaign. A substantial bond is appropriate."), *vacated as moot*, 986 F.3d 458 (4th Cir. 2021).

Moreover, to the extent that the enjoined party has failed to provide detailed quantification of undoubtedly significant potential damages from a wrongful injunction, the solution is not to throw up one's hands and

blame the party hauled into court on an expedited schedule, but rather to calculate the admittedly substantial amount *sua sponte* from the record as the Court directed in *Maryland Department of Human Resources* (*see, e.g.*, *Material Handling Sys., Inc. v. Cabrera*, 572 F.Supp.3d 375, 399–400 (W.D. Ken. 2021)) or in the extreme case apply the presumption of a "high side" bond and order supplementation of the record to allow the court to discharge its duty to set appropriate bond. *See, e.g.*, *Builders World, Inc. v. Marvin Lumber & Ceder, Inc.*, 482 F.Supp.2d 1065, 1078 (E.D. Wis. 2007).

c. Here there is ample evidence in the record and in publicly available information from which the District Court could have discharged its duty under *Maryland Department of Human Resources* to set an appropriate substantial bond. Merely looking at public data subject to judicial notice proves the calculation is not complex. The Government pay scale is public.[8] Simply multiply the lowest wage in that table ($22,360) by the number of affected employees and the minimum duration of the order expressed as a fraction of a year to find the lowest

[8] *See* OPM 2025 GS Salary Table, https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2025/GS.pdf (last visited Apr. 23, 2025).

limits of the harm to the Government. The Government's cost in the case would be $48 million a month. While that figure vastly understates the cost to the Government and is admittedly back of the napkin math it would at least *attempt* to appropriately exercise the District Court's discretion over quantum.

Moreover, the record *does* contain detailed evidence of the harm to the Government from being wrongfully enjoined as part of Appellees' effort to establish standing. The District of Columbia estimated that, as a result of federal job cuts, its individual income tax withholding revenues will decline by "$94.7 million in FY 2026" and by an average of $139.7 million per year through FY2029. JA210. The D.C. individual income tax rate starts at 4%.[9] Thus, by D.C.'s own math they are expecting the Government to pay at least $2.3 billion less in federal wages to D.C. residents annually. Accordingly, by Appellees' own estimates, the costs to the Government from the injunction they seek reversing these job cuts is a minimum of $197 million per month. At this

[9] *See* https://otr.cfo.dc.gov/page/dc-individual-and-fiduciary-income-tax-rates (last visited Apr. 23, 2025).

preliminary stage, such "soft" numbers are more than sufficient for setting bond. *Mead Johnson*, 201 F.3d at 887.

The District Court erred; a massive bond is required.

V. Because The District Court Refused To Impose A Proper Bond, The District Court's Injunction Is Invalid.

The District Court's failure to set adequate bond renders its inunction invalid for failing to comply with Rule 65(c)'s condition precedent. *See, e.g.*, *Md. Dep't of Hum. Res.*, 976 F.2d at 1483. The ordinary remedy is vacatur; however this Court does have discretion to remand without vacatur where it finds the preliminary injunction was otherwise proper. *See Pashby*, 709 F.3d at 332. Vacatur is required here where there are substantial questions as to the propriety of the preliminary injunction. *See* Mot. Panel Order at 4–5.

CONCLUSION

The District Court failed to comply with Rule 65(c) and set an adequate bond. Accordingly, the preliminary inunction must be vacated.

Dated: April 23, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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/s/ Samuel Everett Dewey

CERTIFICATE OF SERVICE

The undersigned certifies that, on this 23d day of April 2025 I filed the foregoing motion using this Court's Appellate CM/ECF system, which effected service on all parties.

/s/ Samuel Everett Dewey