UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL FAMILY PLANNING AND REPRODUCTIVE HEALTH ASSOCIATION,

Plaintiff,

v.

ROBERT R. KENNEDY, JR., Secretary of Health and Human Services, et al.,

Defendants.

Civil Action No. 25-1265 (ACR)

REPLY IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

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Defendants Robert F. Kennedy, Secretary of Health and Human Services, Dorothy Fink, Acting Assistant Secretary for Health, and Amy L. Margolis, Deputy Director of the Office of Population Affairs (collectively, "Defendants" or the "Department"), respectfully file this reply in further support of their motion to dismiss or, in the alternative, for summary judgment (ECF No. 28) and in response to the opposition (ECF No. 31) filed by Plaintiff National Family Planning & Reproductive Health Association ("Plaintiff").

ARGUMENT

I. This Court Does Not Have Jurisdiction Over Plaintiff's Claims

A. This Court Lacks Jurisdiction over Plaintiff's Claims Because They Are Fundamentally Contractual.

Plaintiff attempts to distinguish their case from the Supreme Court's decision in *Department of Education v. California*, 132 F.4th 92, 96 (1st Cir. 2025), *stayed*, 145 S. Ct. 966 (2025), but the attempt fails. There, as here, "each grant award takes the form of a contract between the recipient and the government." *Id.* There, as here, the plaintiffs challenge the agency's "actions as insufficiently explained, insufficiently reasoned, and otherwise contrary to law." *Id.* at 97. There, as here, the plaintiffs sought "to once again make available [] federal funds for existing grant recipients"—without explicitly pleading damages or a breach of contractual terms. *Id.* And there, as here, the same result should follow: Plaintiff's Administrative Procedure Act ("APA") claims should be dismissed because this Court "lack[s] jurisdiction to order the payment of money under the APA" in this grant withholding case. *California*, 145 S. Ct. at 968.

The result *California* compels follows from a straightforward application of D.C. Circuit precedent. When a claim against the government is "essentially contractual," it must be pursued in the Court of Federal Claims under the Tucker Act, not in District Court under the APA's sovereign-immunity waiver. *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 967 (D.C. Cir. 1982). To

ferret out whether a claim is a "disguised" contract claim, courts look to "the source of the rights upon which the plaintiff bases its claims and upon the type of relief sought." *Id.* at 968. Both factors confirm that Plaintiff's claims are contractual in nature.

1. The ultimate source of Plaintiff's rights are the grant agreements.

To start, the source of rights underlying Plaintiff's claims are the grant agreements. Plaintiff conspicuously does not even acknowledge that, absent the grant agreements, their members would have no basis for their claims and no interest in continued funding. Indeed, Plaintiff contradicts itself: it claims no party has "cited to the terms of the grant agreements as [the] source of rights" and then a few lines later says the crux of its claim is that "HHS awarded Plaintiff's Affected Members *a grant* for a" certain period of performance, and that the procedural requirements at issue attached only "[o]nce HHS issued *that award*[.]" Pl.'s Opp'n (ECF No. 31) at 4–5 (emphases added). "The right to [funding] is created in the first instance by the contract[s]"—not by any regulatory, statutory, or constitutional provision. *Spectrum Leasing Corp. v. United States*, 764 F.2d 891, 894 (D.C. Cir. 1985). And though some other source of law "might impose procedural requirements on the government having some impact on the contract[s]," those laws "in no way create[] the substantive right to the remedy" Plaintiff seeks. *Id.*

Plaintiff's primary response on this score is that its claims depend on the interpretation of either a regulation or statute and thus are not contractual. *See* Pl.'s Opp'n (ECF No. 31) at 3–5. But this line of argument is foreclosed by *Spectrum Leasing* and *Ingersoll-Rand Co. v. United States*, 780 F.2d 74, 78 (D.C. Cir. 1985)—which Plaintiff seeks to ignore. Consider the latter, in which a contractor alleged that the Government violated the APA by terminating a contract in violation of federal regulations. *Ingersoll-Rand*, 780 F.2d at 77–78. The D.C. Circuit found the claim was nonetheless essentially contractual, as the contractor could "challenge the termination

based solely on contract principles"—i.e., the "question . . . could be phrased as whether the contract forbids termination under these conditions." *Id.* at 78. The D.C. Circuit further stated "[t]hat the termination also arguably violates certain other regulations does not transform the action into one based solely on those regulations." *Id.* So too here: the question could be whether the grant agreements permit the Department to temporarily withhold funding under the terms and conditions of the awards. As the D.C. Circuit held in *Ingersoll-Rand*, that question must be posed to, and answered by, the Court of Federal Claims. *See also Megapulse*, 672 F.2d at 967 n.34 ("[i]t is hard to conceive of a claim falling no matter how squarely within the Tucker Act which could not be urged to involve as well agency error subject to review under the APA" (citation omitted)).

2. Plaintiff seeks the classic contract remedy of specific performance.

Regardless of how Plaintiff attempts to frame their claim, the heart of Plaintiff's complaint demands an order compelling the Government to continue paying money under the grant agreements. *See, e.g.*, Compl. (ECF No. 1) at 34 (Prayer for Relief (A)) ("Declare unlawful and set aside the Agency's withholding of funding pursuant to the March 31 Letters"). Indeed, Plaintiff recently moved for an injunction to obtain on order from the Court that the agency hold the funds (*see* ECF No. 25), and Plaintiff contends that their members are suffering harm and will continue to suffer harm if funding is not restored, *see* Pl.'s Opp'n (ECF No. 31) at 11 (citing the Coleman Decl., which allegedly details harm caused by Defendants' withholding of grant funds). Plaintiff's other requests in their complaint cannot obscure that Plaintiff seeks the quintessentially contractual remedy of specific performance. *See Spectrum Leasing*, 764 F.2d at 894 (describing "an injunction requiring the government to pay monies owed" under a contract as "the classic contractual remedy of specific performance"). This confirms that this Court lacks jurisdiction over Plaintiff's claims. *See, e.g., U.S. Conf. of Cath. Bishops v. Dep't of State*, 770 F. Supp. 3d 155, 163 (D.D.C. 2025) (finding this factor "dispositive"). The whole point of channeling contract claims through the

Tucker Act is that the Government has not waived immunity with respect to specific performance; the Court of Federal Claims may only award damages. *See Spectrum Leasing*, 764 F.2d at 895. Thus, "[t]o prevent government contractors from avoiding this remedy restriction"—as Plaintiff is seemingly attempting to do here—"a complaint involving a request for specific performance must be resolved by the Claims Court." *Ingersoll-Rand*, 780 F.2d at 80.

Moreover, contrary to Plaintiff's assertion, Defendants do not ignore *Bowen v. Massachusetts*, 487 U.S. 879 (1988); rather, it is Plaintiff's reliance on *Bowen* that misses the point. *Bowen* concerned states' entitlement to federal funding directly under a statute, and in that context it addressed the APA's exclusion from the waiver of sovereign immunity of suits for "money damages," 5 U.S.C. § 702; *see Bowen*, 487 U.S. at 891–901. Plaintiff has no such statutory entitlement to the funds at issue here. Further, Plaintiff claims that the Court of Federal Claims cannot provide it the relief it requests, which includes equitable relief—namely, vacatur of the March 31 Letters, and a declaration that Defendants violated 45 C.F.R. § 75.371, 45 C.F.R. § 80.8, and 42 U.S.C. § 2000d-1. Pl.'s Opp'n (ECF No. 31) at 6. Plaintiff insists that "this type of equitable relief is routinely granted under the APA and it is not a contract remedy." *Id.* Contrary to Plaintiff's assertions, the Court of Federal Claims can craft meaningful relief that Plaintiff seeks. Indeed, the equitable relief Plaintiff seeks in this matter is tied and subordinate to a money judgment, and thus that court can grant equitable relief. *See Pauley Petrol., Inc. v. United States*, 591 F.2d 1308, 1315 (Fed. Cl. 1979) ("Defendant's . . . jurisdictional attack . . . is based on the incorrect premise that the Court of Claims has no equity jurisdiction…. Equitable doctrines can be employed incidentally to this court's general monetary jurisdiction either as equitable procedures to arrive at a money judgment, or as substantive principles on which to base the award of a money judgment." (citations omitted)). Also, "[t]he Court of Federal Claims has the authority

to interpret the meaning of federal statutes and regulations as well as to determine whether a federal agency has complied with applicable law." *Cartwright Int'l Van Lines, Inc. v. Doan*, 525 F. Supp. 2d 187, 196 (D.D.C. 2007). The remedies available in the Court of Federal Claims thus are "entirely adequate and not significantly different from the remedy provided by [District Court]." *Id.* at 197.

In sum, Plaintiff's contract-based claims seeking payment of funds under grant contracts can only be heard in the Court of Federal Claims, and the Complaint therefore should be dismissed.

B. Plaintiff's Claims Are Not Ripe for Review.

Plaintiff contends that its claims are ripe because it is challenging the Defendants' "final" decision to withhold funds pursuant to the March 31 Letters prior to, among other things, making an actual determination that Plaintiff's members failed to comply with the law, it asserts that no factual development is warranted, and it argues that its members' harms are not theoretical. *See* Pl.'s Opp'n (ECF No. 31) at 9–11. These contentions fail.

As a threshold matter, Defendants have not made a "final" decision to withhold the funds, nor have they made an actual decision that the entities have violated the law, as is evident from the language in the March 31 Letters. To the contrary, as those Letters reveal, the Title X grants at issue in this matter have been temporarily withheld based on possible violations of the terms and conditions set forth in the respective notices of award. *See* AR at 441–59. The Department requested that each grantee provide a response or documents, including, but not limited to, a statement of position, a copy of nondiscrimination policies, and a copy of any complaints or grievances alleging discrimination against a job applicant on the basis of race, for the Department to determine compliance. *Id.* The process remains ongoing and does so only with respect to the grantees who only purported to complete their response on July 18, 2025—over three months after the March 31 Letters.

Also, given that the September 30, 2025, lapse date will not arrive for approximately two months, Plaintiff's action is premature and not ripe, and contrary to Plaintiff's suggestion, Defendants have no intention of continuing this process indefinitely. There is more than enough time for Defendants to complete the review process and, if appropriate, restore the funding for the remaining entities. Indeed, in the period between the filing of the Complaint and the date of the filing of Defendants' dispositive motion, records have been received and reviewed by the Department and, without the need for the Court's intervention, funding already has been restored (or the Office of the Assistant Secretary for Health has communicated an intent to restore funding) to all entities that reasonably promptly responded to the Department's request for records and satisfied their obligations under 45 C.F.R. § 75.364. *See* Defs.' Mot. (ECF No. 28) at 3–5, 14. Further, the Department only very recently—on July 18, 2025—received a purportedly complete response from the remaining entities (*see id.*), and the Department has plenty of time to review and issue a determination before the fiscal year deadline.

Moreover, Plaintiff's harms are theoretical at best. Plaintiff has not precisely identified "how the remaining entities remain unable to provide Title X-funded services to an estimated 158,720 patients per year" or even which members "have been forced to lay off staff members, eliminate or reduce the provision of certain services, reduce hours, adjust their sliding fee scales (thereby rendering certain services more expensive or unaffordable for low-income patients), and/or shut down health centers entirely," *see* Coleman Decl. (ECF No. 26-3) ¶¶ 42–44. These generalized statements are insufficient and do not properly identify any concrete harm to the remaining entities resulting from funds' temporary withholding.

In sum, judicial intervention is currently unwarranted, and Plaintiff's action is premature.

II. Plaintiff's APA Claims Are Unreviewable and Fail on the Merits.

To the extent the Court determines that it has jurisdiction over this matter, Plaintiff's APA claims are subject to dismissal because Plaintiff fails to seek judicial review of a final agency action, there are other adequate alternative remedies available, Defendants' actions are committed to agency discretion, and, even if the withholding of the funds were reviewable under the APA, Plaintiff has not shown that the Department's actions were contrary to law or arbitrary and capricious.

Plaintiff claims that challenges "Defendants' withholding of funds absent any actual determination of non-compliance, and absent the provision of any advance notice of suspected non-compliance or any opportunity to voluntarily remedy an alleged issue" is improper, and argues that that action marks the "consummation of the agency's decisionmaking process" as to both (1) the backwards, cart-before-the-horse process by which the Agency would withhold funds; and (2) which sixteen specific grantees to withhold funds from. *See* Pl.'s Opp'n (ECF No. 31) at 12–16. Plaintiff is wrong.

Contrary to Plaintiff's assertion, and as previously demonstrated in Defendants' motion, Plaintiff's challenges fail, at a minimum, at the first step—Plaintiff has not challenged the consummation of the agency's decisionmaking process, as that process remains ongoing to this day (*see* ECF No. 28 at 16–21). The temporary withholding described in the March 31 Letters can hardly be considered "final agency action." As made clear from the March 31 Letters sent to each grantee, the Title X grants at issue in this matter were temporarily withheld based on possible violations of the terms and conditions set forth in the respective notices of award. *See* AR 441–61. The Department requested on March 31, 2025, that each grantee provide a response and documents, including but not limited to, a statement of position, a copy of nondiscrimination policies, and a copy of any complaints or grievances alleging discrimination against a job applicant

on the basis of race. *See id.* The Department requested this information so that it could determine each grantee's compliance with the terms and conditions of its respective grant award. *See id.* After receiving responses to the March 31 Letters—which responses varied in degree of completeness—the Department reviewed the information provided by the entities and sent a subsequent letter, on June 25, 2025, to each entity either notifying the grantee that its grant was restored, *see* Defs.' Ex. 2 (ECF No. 28-2), or that additional information was necessary, *see* Defs.' Ex. 3 (ECF No. 28-3). On July 23, 2025, additional entities were notified that it is the Office of the Assistant Secretary for Health's intent to restore their grants. Defs.' Ex. 6 (ECF No. 28-6). The only remaining entities are Planned Parenthood affiliates, which only provided a response on July 18, 2025, *see* Defs.' Ex. 5 (ECF No. 28-5).

This back-and-forth between the Department and the grantees is the model example of actions that do not "represent[ ] the culmination of the agency's decisionmaking," *Soundboard Ass'n v. FTC*, 888 F.3d 1261, 1271 (D.C. Cir. 2018), and are instead actions of "a merely tentative or interlocutory nature." *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). Thus, the March 31 Letters constitute a "preliminary" decision to temporarily withhold funds while the Department determines whether the entities are complying with their grant agreements' terms and conditions, which interim decision is "not directly reviewable." *See* 5 U.S.C. § 704. "[This decision] may be a step, which if erroneous will mature into a prejudicial result." *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 112 (1948). But there is no "mature" decision that properly is reviewable at this time. Because Plaintiff fails to identify any action that constitutes a final agency action under *Bennett*, 520 U.S. at 177–78, the Court should dismiss the Complaint on this ground.

Second, the APA likewise does not permit Plaintiff's APA claims because there are "existing procedures for review of agency action." *Bowen*, 487 U.S. at 903. As explained, Plaintiff can press its claims that the withholding of grant funding was unlawful in the Court of Federal Claims, which can provide "relief of the 'same genre.'" *Garcia v. Vilsack*, 563 F.3d 519, 22 (D.C. Cir. 2009) (citation omitted). Thus, Plaintiff's pivot to its request for adjacent declaratory and injunctive relief does not yield a different decision for the reasons already explained above.

Third, the APA claims fail because Plaintiff challenges the Department's decision to temporarily withhold the funding under Title X or otherwise challenge how the Department allocates and expends a lump-sum appropriation. That decision is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2); *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993). Plaintiff insists that it is not challenging a decision as to "how to allocate and expend federal funding," at all, *see* Pl.'s Opp'n (ECF No. 31) at 17, but Plaintiff's complaint reveals otherwise. Throughout the complaint, the restoration of the grants remains Plaintiff's focus. *See generally id.* The gravamen of Plaintiff's complaint is that grantees have not been paid the monies that purportedly are due under the grant agreements. *Id.* Simply put, Plaintiff brings this action to force the Department to administer funds to their members before a deadline (i.e., September 30) that remains well in the future.

Lastly, Plaintiff argues that it is entitled to summary judgment on its APA claims. Plaintiff claims that the Department's decisions were neither reasonable nor adequately explained because the Department (1) failed to explain its sudden departure from prior policy, its own prior understanding of the law, and its own regulations, and ignored significant reliance interests; (2) used an irrational, cart-before-the-horse process for the temporary withholding that is contrary to both law and the Agency's own regulations; and (3) utterly failed to consider the obvious harms

that such a decision would impose on Plaintiff's members, their staff, and Title X patients in multiple states across the country. *See* Pl.'s Opp'n (ECF No. 31) at 18–20. Contrary to Plaintiff's assertions in each March 31 Letter, however, Defendants gave "a satisfactory explanation" for withholding each grant. *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The March 31 Letters did all have the effect of notifying the award recipients of a temporary pause, but the letters were each entity-specific to identify entity-specific concerns that led to the request for a response and documentation to confirm compliance. In any event, if the Court were to conclude that the Department's actions violate the APA, the "appropriate course is simply to identify a legal error and then remand to the agency, because the role of the district court in such situations is to act as an appellate tribunal." *N. Air Cargo v. Postal Serv.*, 674 F.3d 852, 861 (D.C. Cir. 2012); *see Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("the proper course . . . is to remand to the agency for additional . . . explanation," not any type of injunction); *see also J&K Prods., LLC v. Small Bus. Admin.*, 589 F. Supp. 3d 95, 99 (D.D.C. 2022) (deciding that, if the Court determines that the Agency's decision was unlawful, then the proper remedy under the APA would be to remand the case to the Agency for further consideration consistent with the Court's opinion, not to award monetary relief (citing 5 U.S.C. § 706(2)).

III. Plaintiff's Ultra Vires Claim Fails.

Plaintiff fails to state an ultra vire*s* claim. The Supreme Court recently clarified the narrow scope of a non-statutory ultra vires claim, describing it as the judicial equivalent of a "Hail Mary pass—and in court as in football, the attempt rarely succeeds." *Nuclear Regul. Comm'n v. Texas*, 605 U.S. 665, 681 (2025) (citation omitted). The Supreme Court explained that ultra vires claims are "strictly limited" to the "painstakingly delineated procedural boundaries" of the Court's decision in *Leedom v. Kyne*, 358 U.S. 184 (1958). *See Nuclear Regul. Comm'n*, 605 U.S. at 681.

The *Kyne* exception applies only where an "agency has taken action entirely in excess of its delegated powers and contrary to a specific prohibition in a statute." *Id.*

Neither of these two exceptional circumstances applies here. Plaintiff merely attempts to "dress up a typical statutory-authority argument as an ultra vires claim." *Nuclear Regul. Comm'n*, 605 U.S. at 666. Plaintiff points to Title VI, but there is nothing in the statute that specifically prohibited the Department from temporarily withholding funds to ensure that a grantee is complying with the terms and conditions set forth in the notice of award. Contrary to Plaintiff's assertions (*see* Pl.'s Opp'n (ECF No. 31) at 22), Defendants temporarily withholding the funds to ensure compliance with the terms and the conditions of the grant awards does not equate to "refus[ing] to grant or to continue assistance." Indeed, the Department remains willing to continue funding, as evidenced by the fact that funding has been restored to several of Plaintiff's purported members. Also, the cases and language that Plaintiff relies on from *Schlafly v. Volpe*, 495 F.2d 273, 279 (7th Cir. 1974), and *Mayor & City Council of Balt. v. Mathews*, 562 F.2d 914, 922 (4th Cir. 1977) (*see* Pl.'s Opp'n (ECF No. 31) at 23), are not only out-of-circuit cases, but they also appear to deal with terminations of federal assistance, which is inapposite to this matter as the Department has not terminated the notice of awards or funding.

Additionally, ultra vires review is not available where "a statutory review scheme provides aggrieved persons with a meaningful and adequate opportunity for judicial review, or if a statutory review scheme forecloses all other forms of judicial review." *Nuclear Regul. Comm'n*, 605 U.S. at 681. Plaintiff here has an "alternative path to judicial review" in the Court of Federal Claims. *Id.* As explained already, "the [Tucker Act] statute provides . . . clear and convincing evidence that Congress intended to deny the District Court[s] jurisdiction to review" claims which are in essence contractual. *Bd. of Governors, Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 44

(1991). Allowing a contract claim to be reframed as an ultra vires action against the relevant executive official or agency would allow plaintiffs to easily circumvent the Tucker Act's remedial limits. *See Nuclear Regul. Comm'n*, 605 U.S. at 681 (explaining that ultra vires review is not an "easy end-run around the limitations of the Hobbs Act and other judicial-review statutes"). This Court should reject such a maneuver here.

CONCLUSION

For these reasons and those discussed in Defendants' opening brief, the Court should deny Plaintiff's motion for summary judgment and grant Defendants' motion to dismiss or, in the alternative, motion for summary judgment.

Dated: August 8, 2025

Respectfully submitted,

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