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)

OPPOSITION TO PLAINTIFF'S MOTION FOR AN ORDER DIRECTING DEFENDANTS TO HOLD FUNDS PENDING RESOLUTION OF THE MERITS OF THIS CASE

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 "HHS"), respectfully file this opposition to the motion for an order directing Defendants to hold funds pending resolution of the merits of this case (ECF No. 25) filed by Plaintiff National Family Planning & Reproductive Health Association ("Plaintiff").

BACKGROUND

On March 31, 2025, the Office of the Assistant Secretary for Health ("OASH") notified fourteen[1] alleged members of Plaintiff, including Essential Access Health and Missouri Family Health Council, that, pursuant to 45 C.F.R. § 75.371, disbursements under the members' Title X grant awards were being temporarily withheld based on possible violations of the terms and conditions of the respective awards. *See* Compl. ¶ 4. Since the filing of the Complaint, OASH notified Adagio Health, Converge, Essential Access Health, and Missouri Family Health Council on June 25, 2025, that their Title X funding would be restored, and notified AccessMatters, Bridgercare, and Maine Family Planning on July 23, 2025, that their funding would be restored.[2]

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[1] Plaintiff now claims fifteen alleged members received the March 31 notification; notably, however, Plaintiff may not amend the complaint through a motion other than one seeking leave to amend. *See Pennsylvania ex rel. Zimmerman v. Pepsico, Inc*., 836 F.2d 173, 181 (3d Cir. 1988) ("'It is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss.'") (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984); *Morgan Distrib. Co. v. Unidynamic Corp.*, 868 F.2d 992, 995 (8th Cir. 1989) (same); *Manna v. Dep't of Just.*, 106 F. Supp. 16, 19 (D.D.C. 2015) (same); *accord United States ex rel. Williams v. Martin-Baker Aircraft Co.*, 389 F.3d 1251, 1259 (D.C. Cir. 2004) (unless a party offers an "'indication of the particular grounds on which amendment is sought'" and "tender[s] a proposed amendment," the district court properly should decline to consider such a proposal (citations omitted)).

[2] Defendants mistakenly noted that as of July 28, 2025, AccessMatters, Bridgercare, and Maine Family Planning should have started to receive funding again, *see* ECF No. 28 at 4; however, undersigned was notified on July 29, 2025, that the notices of award for these entities are currently undergoing review to be finalized. While OASH has communicated OASH's intent

Defs.' Mot. (ECF No. 28) at 3–5. The only entities to whom OASH has not communicated an intent to unfreeze funding are certain Planned Parenthood affiliates ("the July Entities"); notably, those eight affiliates chose to complete their response to OASH's inquiries only on July 18, 2025, after completely ignoring the June 25, 2025, inquiries ("June Letters") (*see* Defs.' Ex. 3 (ECF No. 28-3)) sent by OASH. HHS has calculated the current amount attributable to the eight July Entities that allegedly are members of Plaintiff to be $16,929,646. Plaintiff have moved the Court for an order directing Defendants to hold funds pending resolution of the merits of this case, *see* ECF No. 25.

ARGUMENT

Plaintiff requests pursuant to 31 U.S.C. § 1502(b) "that this Court exercise its statutory and equitable power to order Defendants to hold the funds at issue [] beyond the statutory lapse date of September 30, 2025, and throughout the pendency of this case, until final judgment on the merits." Pl.'s Mot. (ECF No. 25) at 4. Plaintiff's motion is premature and improper under the circumstances here, and Plaintiff has not even attempted to meet its burden to obtain an injunction. Thus, for the reasons discussed below, the Court should deny Plaintiff's motion.

First, in seeking an order requiring Defendants to hold the funds, Plaintiff relies on cases reasoning that courts may authorize the expenditure of funds "after the funds have expired for obligational purposes." 1 GAO, Principles of Federal Appropriations Law 5-85, 2004 WL 5661416 at *2 (Jan. 2024) (GAO Redbook); *see also* Pl.'s Mot. (ECF No. 25) at 5–6. "As long as the suit is filed prior to the expiration date," as the current suit was, "the court acquires the necessary jurisdiction and has the equitable power to 'revive' expired budget authority." *Id.* at *4;

to restore these three grantees' funding, the funding will not be accessible unless and until OASH issues them notices of award. These three entities' grants total approximately $8,849,973.

see City of Houston v. Dep't of Hous. & Urban Dev., 24 F.3d 1421, 1426 (D.C. Cir. 1994); *see also Nat'l Ass'n of Reg'l Councils v. Costle*, 564 F.2d 583, 588 (D.C. Cir. 1977) (describing authority to "reallocate funds which had been illegally awarded to the wrong category of recipients" and to redirect funds that have already been obligated). Most recently, however, in *Goodluck v. Biden*, 104 F.4th 920, 926–28 (D.C. Cir. 2024), the D.C. Circuit identified *Costle* and similar 1970s cases as reflecting a "much more freewheeling approach to the law of remedies" than now is allowed under current Supreme Court precedents such as *United States v. Oakland Cannabis Buyers' Co-op*, 532 U.S. 483 (2001), which teaches that "a court sitting in equity cannot ignore the judgment of Congress, deliberately expressed in legislation," *id.* at 497. Thus, decisions like *Costle* and the cases Plaintiff relies on should not be extended to this case, especially because Defendants have moved to dismiss Plaintiff's complaint (including for lack of jurisdiction), and if the fiscal year lapses, it is Congress that should determine the proper use of funds.

Further, Section 1502(b) provides that "a provision of law requiring that the balance of an appropriation or fund be returned to the general fund of the Treasury at the end of a definite period does not affect the status of lawsuits or rights of action involving the right to an amount payable from the balance." 31 U.S.C. § 1502(b). Here, Plaintiff makes no attempt to show that they have a "right to an amount payable from the balance" within the meaning of that statute. Plaintiff seeks to challenge OASH's temporary withholding of disbursements; however, the mere existence of such challenges is not sufficient to give them either a "right to an amount payable" or a right to a Court order. Moreover, insofar as any of the remaining members has a "right to an amount payable" by the Government, the proper forum for enforcement of such a right to a monetary amount would be the Court of Federal Claims pursuant to the Tucker Act, not this Court.

Moreover, Plaintiff asserts, without any support, that the Court of Federal Claims cannot provide it the relief it requests, which includes vacatur of the March 31 letters; a declaration that Defendants violated 45 C.F.R. § 75.371, 45 C.F.R. § 80.8, and 42 U.S.C. § 2000d-1; and permanent injunctive relief prohibiting Defendants from violating these laws. Pl.'s Mot. (ECF No. 25) at 3. Contrary to Plaintiff's assertions, the Court of Federal Claims can craft meaningful relief. 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 Petroleum, Inc. v. United States*, 591 F.2d 1308, 1315 (Fed. Cir. 1979) ("Defendant's . . . jurisdictional attack . . . is based on the incorrect premise that the [United States] Court of [Federal] 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 International 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.

Second, given that the September 30, 2025, lapse date will not arrive for approximately two months, Plaintiff's request is premature. There is more than enough time for Defendants to complete the review process and, if appropriate, restore the funding for the remaining July Entities that have undeniably delayed the review process because, by their own admission, they submitted incomplete responses to the March 31 Letters and then ignored the June 25 Letters' request for records, notwithstanding 45 C.F.R. § 75.364. *See* Defs.' Ex. 5 (ECF No. 28-5). 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 HHS, and, without the need for a Court order, funding already has been restored (or OASH has communicated an intent to restore funding) to all entities that reasonably promptly responded to HHS'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, HHS only very recently received a purportedly complete response from the remaining entities, i.e., the July Entities, on July 18, 2025 (*see id.*), and HHS has plenty of time to review and issue a determination before the fiscal year deadline.[3] Thus, a Court order is not warranted at this juncture and Plaintiff's request is premature.

Lastly, to obtain an injunction, a movant must establish that the requested relief is necessary to prevent an irreparable injury that is "certain" and "of such imminence that there is a 'clear and present' need for equitable relief." *Olu-Cole v. E.L. Haynes Pub. Charter Sch.*, 930 F.3d 519, 529 (D.C. Cir. 2019); *see also Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam) (same for a stay). Tellingly, Plaintiff has not even attempted to demonstrate entitlement to an injunction. Regardless, to the extent Plaintiff alleges any harm, it amounts to purely economic harm and purely economic loss; even when large sums of money are involved, it typically will not constitute irreparable injury. *See Wis. Gas*, 758 F.2d at 674 (noting it is "well settled that economic loss does not in and of itself constitute irreparable harm"); *Emily's List v. Fed. Election Comm'n*,

[3] Plaintiff states that "Defendants should not be permitted to run out the clock on the current Title X appropriation, which lapses on September 30, 2025, at which time the funds may revert to the U.S. Treasury." Mot. (ECF No.25) at 2–3. Defendants are not running the clock out. To be clear, it is Plaintiff that waited until July 22, 2025, to file the instant motion, months after the Complaint was filed in April. And it was certain of Plaintiff's members, the July Entities, that delayed responding to HHS's letters and only recently provided an alleged complete response on July 18, 2025. Defendants are not responsible for Plaintiff's litigation strategy or its members' delayed responses.

362 F. Supp. 2d 43, 52 (D.D.C. 2005). And Plaintiff may not rely on "bare allegations" that the business will not survive. *Wis. Gas Co.*, 758 F.2 at 674. Instead, Plaintiff must substantiate its allegation of harm by showing that this threat to the business's viability is "certain to occur in the near future as a direct result of the threatened action." *Power Mobility Coal. v. Leavitt*, 404 F. Supp. 2d 190, 204 (D.D.C. 2005); *see also Wis. Gas Co.*, 758 F.2d at 674. That Plaintiff has not done. Moreover, 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, e.g.,* Pl.'s Decl. of Clare M. Coleman (ECF No. 26-3) ¶¶ 42–44. These generalized statements are insufficient. *See Wis. Gas Co.*, 758 F.2d at 674 ("the movant [must] substantiate the claim that irreparable injury is likely to occur" and "provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future"). Plaintiff has not submitted audited financial statements or other detailed materials to demonstrate the impact of the temporary withholding of funds on the remaining entities' viability, any dollar amount that allegedly would drive them out of business, or any declarations from the remaining members that allegedly have been harmed to demonstrate the particular harms that such entities may be suffering and that would support the extraordinary relief that is sought on such entities' behalf. Accordingly, Plaintiff's "bare allegations" are insufficient to support a finding of irreparable harm.

Also, to obtain an injunction, a movant must establish likelihood of success on the merits. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *accord Sherley v. Sebelius*, 644

F.3d 388, 392 (D.C. Cir. 2011). As thoroughly discussed in Defendants' motion, Plaintiff's Complaint is subject to dismissal because (1) this Court lacks jurisdiction over Plaintiff's claims because Plaintiff's claims are fundamentally contractual and must be heard by the Court of Federal Claims; (2) Plaintiff's claims are not ripe for judicial review; (3) Plaintiff's APA claims are unreviewable because Plaintiff is not challenging a final agency action, and Plaintiff has other adequate alternative remedies, which forecloses relief under the APA; and, (4) Plaintiff failed to sufficiently plead an *ultra vires* claim. Thus, Plaintiff is unlikely to succeed on the merits.

CONCLUSION

For these reasons, the Court should deny Plaintiff's motion.

Dated: August 1, 2025

Respectfully submitted,

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