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 PARTIAL SUMMARY JUDGMENT

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 partial motion for summary judgment (ECF No. 26) filed by Plaintiff National Family Planning & Reproductive Health Association ("Plaintiff").

BACKGROUND

The statutory, factual, and procedural background was provided in Defendants' motion to dismiss or, in the alternative, for summary judgment (*see* ECF No. 28 at 2–5). To avoid repeating duplicative information, Defendants respectfully refer the Court to Defendants' motion and incorporates the background section by reference as though fully set forth herein.

LEGAL STANDARD

Summary judgment is warranted "when 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(a). In cases challenging agency action under the Administrative Procedure Act ("APA"), the district court "sits as an appellate tribunal," and review "is based on the agency record and limited to determining whether the agency acted arbitrarily or capriciously." *Rempfer v. Sharfstein*, 583 F.3d 860, 865 (D.C. Cir. 2009) (quotation marks omitted). A reviewing court may set aside agency action that is "arbitrary, capricious, an abuse of discretion," "otherwise not in accordance with law," or "unsupported by substantial evidence." 5 U.S.C. § 706(2)(A), (E). Substantial evidence is that which "a reasonable mind might accept as adequate to support the [agency's] conclusion." *Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263 (D.C. Cir. 2016). This "requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence." *Epsilon Elecs., Inc. v. Dep't of Treasury*, 857 F.3d 913, 918, 925 (D.C. Cir. 2017) (cleaned up). "Under this highly deferential standard of review, the court presumes the validity of agency action and

must affirm unless the [agency] failed to consider relevant factors or made a clear error in judgment." *Nat'l Lifeline Ass'n v. FCC*, 983 F.3d 498, 507 (D.C. Cir. 2020) (cleaned up). So long as an agency "articulate[s] a satisfactory explanation for its action including a rational connection between the facts found and the choice made," *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted), a court may not "substitute [its] judgment for the agency's," even if it "might have reached a different conclusion in the first place." *Epsilon Elecs.*, 857 F.3d at 918.

ARGUMENT

Plaintiff argues that it is entitled to summary judgment because (1) HHS's withholding of Title X funds constitutes a final agency action for the purposes of the APA; and (2) Defendants violated governing statutes and regulations relating to grant awards and enforcing Title VI in HHS-funded programs. As discussed further below, and in Defendants' motion, Plaintiff does not seek review of final agency action, and the Court should not reach the merits of this matter based on the deficiencies identified in Defendants' motion. Thus, the Court should deny Plaintiff's motion.

As threshold matter, Plaintiff initially claimed to bring this action purportedly on behalf of fourteen of its members, but it only identified Essential Access Health and Missouri Family Health Council. *See* Compl. (ECF No. 1) ¶ 14. Now, for the first time, Plaintiff claims that it is bringing this action on behalf of fifteen of its members. *See* Pl.'s Mot. (ECF No. 26-1) at 1; *see also* Decl. of Clare M. Coleman (ECF No. 26-3) ¶ 22. Plaintiff, however, 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)). Therefore, the Court should not permit Plaintiff to add in an additional member through its summary judgment motion.

Putting that threshold issue aside, contrary to Plaintiff's assertions (*see* ECF No. 26-1 at 8–10), Plaintiff does not seek review of final agency action. As fully discussed in Defendants' motion, Plaintiff's challenges fail, at 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 441–59. HHS 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.* HHS requested this information so that HHS 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—HHS 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 HHS 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 HHS determines whether the entities are complying with their grant agreements' terms and conditions, which decision is "not directly reviewable." *See* 5 U.S.C. § 704. Because Plaintiff fails to identify any action that constitutes a final agency action under *Bennett*, 520 U.S. at 177–78, the Court should therefore dismiss the Complaint on this ground alone.

On the merits, Plaintiff claims Defendants violated governing statutes and regulations relating to grant awards and enforcing Title VI in HHS-Funded Programs. *See* Pl.'s Mot. (ECF No. 26-1) at 10–16. The Court, however, should not reach the merits of this matter based on the deficiencies identified above in Defendants' motion. This matter is subject to dismissal on several grounds, including: (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 (as described above) Plaintiff is not challenging a final agency action, and Plaintiff has other adequate alternative remedies, which forecloses relief under the APA.

Should the Court nonetheless find that it has jurisdiction over Plaintiff's claims and there is final agency action, the Court must independently assess the merits: it cannot grant Plaintiff's motion solely on the basis that the Court believes an argument was conceded. *Winston & Strawn,*

LLP v. McLean, 843 F.3d 503, 505 (D.C. Cir. 2016). That is because the "burden is always on the movant to demonstrate why summary judgment is warranted." *Id.* at 509 (quoting *Grimes v. District of Columbia*, 794 F.3d 83, 97 (D.C. Cir. 2015)). This Court "must determine for itself that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law, and then 'should state on the record the reasons for granting or denying the motion.'" *Winston & Strawn, LLP*, 843 F.3d at 509 (quoting Fed. R. Civ. P. 56(a)). Therefore, the Court will need to address Plaintiff's merits arguments. *Nabaya v. Dudeck*, 38 F. Supp. 86, 96 (D.D.C. 2014) (addressing movant's arguments on the merit even though *pro se* litigant did not respond to the arguments).

Here, the terms of the grant awards require the relevant grantees to comply with Title VI and VII of the Civil Rights Act and Executive Orders. In the March 31 Letters, HHS specifically notified each grantee of potential violations with the terms of the notice of award. *See* AR 441–59. The entities were also notified that the "grants regulation for the Department of Health and Human Services, 45 C.F.R. § 75.371(a), provides HHS may temporarily withhold cash payments pending correction of the deficiency by the grantee or more severe enforcement action." *See id.* Also, in accordance with the regulatory directives set forth in 45 CFR § 75.364(a), HHS explained it is conducting a compliance review and requested documentation from the entities. HHS "must have the right of access to any documents, papers, or other records of the [grantee] which are pertinent to the Federal award." 45 C.F.R. § 75.364(a).

For example, AccessMatters, one of the fourteen or fifteen entities that Plaintiff claims to represent but whose March 31 Letter Plaintiff chose *not* to include as an attachment to its Complaint. In that March 31 Letter, HHS specifically raised concerns about AccesMatters's compliance because their website had, until recently, publicly "indicate[d] AccessMatters [was]

practicing overt discrimination with respect to facilitated spaces segregated on the basis of race, and may be engaged in widespread practices across hiring, operations, and patient treatment that "unavoidably employ race in a negative manner." AR 441-43 (internal quotations and citation omitted). To suggest that the agency should continue to fund an entity that has publicly documented use of racially-segregated spaces, and that the agency cannot pause funding even long enough to request and receive confirmation that these practices are not, despite the entity's statements to the contrary, in effect prior to the issuance of funds is puzzling. Rather, before continuing funding, HHS has an obligation to ensure that entities are complying with the terms of the grant awards especially if there is publicly available information that suggests non-compliance.[1]

Indeed, HHS sent eight different letters to eight different sets of organizations receiving a Title X grant. *See* AR 441–59. These March 31 Letters did all have the effect of notifying the award recipients of a temporary pause, but these letters were each entity-specific to identify entity-specific concerns that led to the request for a response and documentation to confirm compliance. Plaintiff appears to gloss over the fact that HHS sent different letters to different sets of entities on March 31 to address different concerns. Also, Plaintiff to date has only identified alleged procedural issues with HHS temporarily withholding the Title X funding. Plaintiff has not, however, demonstrated or attempted to demonstrate any prejudice from the agency's alleged procedural error. Further, even assuming for the sake of discussion that Plaintiff's argument about the Title VI statutory regime is correct, that argument wholly fails to address that Plaintiff's members possibly violated terms of their agreements that required them to comply with Title VII

[1] Notably, any delay in Office of the Assistant Secretary for Health's decision to restore funding to certain grantees because those grantees did not submit complete responses for several months (assuming the July 18 responses are complete) cannot be attributed to Defendants.

and Executive Order 14218. Under these circumstances, the agency's actions are neither contrary to law, nor arbitrary and capricious.

If this Court were to conclude that HHS'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 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 an award of monetary relief (citing 5 U.S.C. § 706(2)).

Lastly, Plaintiff insists that it has a viable APA claim and to the extent the Court determines it does, the Court should not consider the background information, or anything alleged in Plaintiff's declaration besides paragraph 22, which identifies Plaintiff's purported members. As previously mentioned, Plaintiff only identified Essential Access Health and Missouri Family Health Council in its Complaint. Both of those entities had their Title X grant funding restored in June. Plaintiff does not dispute that those members have begun to receive funding, so Plaintiff's claims as to those members are moot. *See* Defs.' Supp. Pre-Motion Notice (ECF No. 22). Because Plaintiff did not identify any other members in its Complaint besides those two entities who have allegedly suffered an injury, Plaintiff lacked Article III standing. *Id.* At the July 15, 2025, hearing, the Court stated it did not want briefing on this issue and ordered Plaintiff to either file an amended complaint or declaration identifying the other members. Plaintiff did not follow the Court's instruction. Rather than amending its facially deficient Complaint, and rather than using a

declaration only to identify its purported members, Plaintiff has taken advantage of this Court's order with a declaration that attempts to include additional background information, which is not permitted. "[I]t is black-letter administrative law that a reviewing court cannot consider information that was unavailable to the agency when it made its decision." *Del. Dep't of Nat. Res. & Env't Control v. EPA*, 895 F.3d 90, 102 (D.C. Cir. 2018) (declining to consider material "produced months after" challenged action (cleaned up)); *Crocus Invs., LLC v. Fed. Mar. Comm'n*, No. 21-1199, 2022 WL 3012275, at *4 (D.C. Cir. July 29, 2022) ("evidence that postdates the administrative decision on review is not relevant to our assessment of the agency's reasoning"); *Doraiswamy v. Sec'y of Lab.*, 555 F.2d 832, 842 n.71 (D.C. Cir. 1976) ("We do not consider these steps or the results since they postdate the administrative decisions"). Plaintiff's declaration post-dates the challenged March 31 Letters and therefore the Court should not consider any information in the declaration except for paragraph 22.

CONCLUSION

For these reasons, the Court should deny Plaintiff's motion, grant Defendants' motion, and dismiss this action.

Dated: August 4, 2025

Respectfully submitted,

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