IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

SOCIETY OF GENERAL INTERNAL MEDICINE, ET AL., Plaintiffs, v. ROBERT F. KENNEDY, JR., ET AL., Defendants.	Case No.: 8:25-cv-02751-BAH

REPLY IN FURTHER SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes:

Regulations:

Rule:

Defendants, by and through undersigned counsel, hereby submit this reply in further support of their Motion to Dismiss, ECF No. 33 (the "Motion"), and in response to Plaintiffs' memorandum of law in opposition thereto, ECF No. 34 ("Opposition" or "Opp.").[1]

I. Plaintiffs Fail to Plead Sufficient Facts Showing That They Are Entitled to Relief.

A. The Court Should Not Accept as True Plaintiffs' Allegation That AHRQ Shut Down Its Grant Program in July 2025, Which Is Contradicted by Judicially Noticeable Facts.

AHRQ did not shut down its grant program in July 2025. Publicly available data from the HHS TAGGS database (attached as Exhibit A to Defendants' opening brief, *see* ECF No. 33-2) shows that AHRQ awarded 75 continuation grants totaling nearly $40 million in September 2025. This fact is properly subject to judicial notice.

Under Federal Rule of Evidence 201, "courts at any stage of a proceeding may 'judicially notice a fact that is not subject to reasonable dispute,' provided that the fact . . . 'can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.'" *Zak v. Chelsea Therapeutics Int'l, Ltd.*, 780 F.3d 597, 607 (4th Cir. 2015) (quoting Fed. R. Evid. 201). The Fourth Circuit has repeatedly recognized that information published on official government websites—like the TAGGS data—falls within this category. *United States v. Garcia*, 855 F.3d 615, 621 (4th Cir. 2017) ("This court and numerous others routinely take judicial notice of information contained on state and federal government websites."); *Murphy v. Capella Educ. Co.*, 589 F. App'x 646, 654 & n.7 (4th Cir. 2014) (taking judicial notice of information posted on federal government website); *Hall v. Virginia*, 385 F.3d 421, 424 n.3 (4th Cir. 2004) (approving the consideration of "publicly available [statistics] on the official redistricting website of the Virginia

[1] Capitalized terms used but not defined herein shall have the meaning ascribed to them in the Memorandum of Law in Support of Defendants' Motion to Dismiss, ECF No. 33-1 ("Mem.").

Division of Legislative Services" at the motion to dismiss stage).[2] Plaintiffs do not dispute the authenticity of the TAGGS data[3]; they merely downplay its significance. *See*, *e.g.*, Opp. at 11 (acknowledging "the brief restart of grant activity" but it "was limited to 75 *continuation* grants").

The TAGGS data establishes that AHRQ continued awarding grants after July 2025, directly contradicting Plaintiffs' allegation that the program was shut down. Contrary to Plaintiffs' argument that it is improper to use the TAGGS data to refute allegations in the Complaint (Opp. at 9-10), it is well-established that courts should not accept as true allegations that are contradicted by judicially noticeable facts. The Fourth Circuit has repeatedly stated:

> Although we accept the well-pleaded factual allegations of a complaint as true, and we draw reasonable inferences therefrom in the plaintiff's favor, we do not blindly accept "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences," ***nor do we accept "allegations that contradict matters properly subject to judicial notice***."

Stratton v. Mecklenburg Cnty. Dep't of Soc. Servs., 521 F. App'x 278, 288 (4th Cir. 2013) (quoting *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002)) (emphasis added). *See also Sopkin v. Mendelson*, 746 F. App'x 157, 160 (4th Cir. 2018) (refusing to accept as true plaintiff's allegations that were contradicted by matters subject to judicial notice); *Murphy*, 589 F. App'x at 654 & n.7 (affirming dismissal of claim where statistics posted on federal government website, which were subject to judicial notice, contradicted the plaintiff's allegations in the complaint); *Massey v. Ojaniit*, 759 F.3d 343, 353 (4th Cir. 2014) (on a motion to dismiss, "[l]ike the district court, we are required to accept all well-pleaded allegations of Massey's complaint as true and draw all

[2] *See also*, *e.g.*, *Williams v. Long*, 585 F. Supp. 2d 679, 691 (D. Md. 2008) (Grimm, J.) ("Public records and government documents are generally considered not to be subject to reasonable dispute, and this includes public records and government documents available from reliable sources on the Internet.") (quoting *U.S. EEOC v. E.I. DuPont*, Case No. 03-cv-1605, 2004 WL 2347559, at *1 (E.D. La. Oct. 18, 2004)).

[3] Nor could Plaintiffs credibly do so. It is *Plaintiffs* who relied upon the HHS TAGGS website, referring to it as "a publicly available, official source of HHS grants," in alleging that AHRQ had shut down its grant program and stopped issuing grants. *See* ECF No. 4-1 at 6-7, 8; Compl. ¶ 36.

reasonable factual inferences in his favor. . . . Nevertheless, we are not obliged to accept allegations that 'represent unwarranted inferences, unreasonable conclusions, or arguments,' or that 'contradict matters properly subject to judicial notice or by exhibit.'") (quoting *Blankenship v. Manchin,* 471 F.3d 523, 529 (4th Cir. 2006)).

The cases relied on by Plaintiffs—*Clatterbuck v. City of Charlottesville*, 708 F.3d 549 (4th Cir. 2013) and *Zak v. Chelsea Therapeutics Int'l*, 780 F.3d 597 (4th Cir. 2015)—in no way suggest otherwise. Opp. at 9. In *Clatterbuck*, the district court impermissibly considered as "facts" statements of opinion that had been made by citizens at city council meetings regarding the purpose of legislation. 708 F.3d at 557-58. Unsurprisingly, the Fourth Circuit found that "the opinion of an individual citizen about an ordinance does not qualify as a fact of public record proper for judicial notice." *Id.* at 558. In *Zak*, the district court considered the content of SEC filings as establishing "facts" subject to judicial notice. 780 F.3d at 607. The Fourth Circuit held that "[e]ven if the SEC documents and their contents could have been reviewed in accordance with [Federal Rule of Evidence] 201, the district court . . . incorrectly construed the information contained in the SEC documents"—in other words, the SEC documents "fail[ed] to establish" the facts that the district court found. *Id.* at 607-08.

Unlike *Clatterbuck* and *Zak*, Defendants here are not asking the Court to consider as "fact" statements of opinion made in the continuation awards, but rather, simply the fact that the awards were made. *See Massey*, 759 F.3d at 352-53 (holding that the district court's consideration of a public trial transcript "did not run afoul of *Clatterbuck*" because the court "viewed the transcript as a 'complete account of the testimony and evidence offered at trial' . . . and recognized that the transcript's presence in the record meant that certain 'facts (i.e. the nature of the testimony and evidence offered at trial) are not in dispute'" and "refrained from deciding any issue of the 1999

trial and 'form[ed] no judgment as to the credibility of any witness'"; further noting "we independently consider those same documents" in reviewing the dismissal). In recognizing the undisputed (and indisputable) fact that AHRQ granted numerous continuation awards in September 2025, the Court is not "weighing evidence" one way or another, as Plaintiffs contend (Opp. at 10). The TAGGS data does not introduce a competing factual narrative—it refutes the factual predicate for each count in the Complaint (*see* Mem. at 9-10). Accordingly, to the extent that the basis of Plaintiffs' claims is that AHRQ entirely shut down its grant program in July 2025, such claims lack any non-speculative[4] factual foundation and should be dismissed. *Id.* at 9-11.

Lastly, Plaintiffs argue that the TAGGS data merely shows "events that took place *after* the filing of the complaint," and therefore that the September 2025 grant awards are irrelevant to the allegations as of August 21, 2025, the date that the Complaint was filed. Opp. at 9-10. This argument disregards the nature of the allegation—which is that in July 2025 AHRQ shut down its grant program. Plaintiffs have emphasized that "***the action at issue here [is]: the halting of grantmaking going forward***." ECF No. 15 at 3 (further lamenting that "Defendants have presented no evidence that grantmaking is ongoing, nor generally rebutted the evidence Plaintiffs presented about the halt.") (emphasis added). This core allegation is simply not true—it is not true now, nor could it have been true at the time of the Complaint. AHRQ cannot have "halted" grantmaking "going forward" if it continued awarding substantial grants shortly thereafter.

B. Plaintiffs' Remaining Allegations Do Not State a Claim.

In arguing against a mootness argument that was not made, Plaintiffs reveal what is left of

[4] Plaintiffs suggest that ARHQ's "one-time rush of grantmaking was a blip" and that nothing "precludes them from otherwise (or again) halting AHRQ's grantmaking altogether." Opp. at 11. There is nothing nefarious about the timing of the awards—which was immediately prior to the September 30, 2025 lapse in appropriations and makes complete sense. The notion that AHRQ just rushed to award $40 million in annual contribution grants, yet now intends to shut down the entire grant program, is absurd—at best, it is pure speculation. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 567, 570 (2007) (in light of "obvious alternative explanation" for alleged misconduct, "the plaintiffs here have not nudged their claims across the line from conceivable to plausible" and "their complaint must be dismissed").

their claims absent the allegation that AHRQ entirely shut down its grant program. Plaintiffs' remaining allegations "relate[] to the processing of applications for *new* awards" and "Plaintiffs' claims related to impoundment." Opp. at 11-12. Although the Court could certainly find that aspects of this case have been rendered moot as a result of AHRQ's resumption of grant-making, the doctrine of mootness is not a perfect fit because these aspects of the Complaint continue to present a live dispute—although not one that can survive a motion to dismiss.

Plaintiffs' claims related to AHRQ's alleged failure to process applications for *new* awards should be dismissed because (1) Plaintiffs lack standing to bring such claims (Mem. at 9-11; *infra* at 5-8); (2) Plaintiffs do not identify a discrete and final agency action that is subject to APA review (Mem. at 13-18; *infra* at 8-10); (3) Plaintiffs impermissibly seek to compel agency action (*i.e.*, the award of new grants and/or the processing of all applications for new grants) that the agency is not required to take (Mem. at 18-19; *infra* at 10-11); (4) Defendants have not violated any applicable law (Mem. at 19-24; *infra* at 11-14); and (5) whether to award a new grant (including the process of evaluating a grant application) and the timeline for doing so are committed to agency discretion by law and not subject to APA review (Mem. at 29-30; *infra* at 15). Plaintiffs' claims related to impoundment should be dismissed for the foregoing reasons and because Plaintiffs cannot rely upon alleged violations of the Appropriations Acts or the ICA to support an APA contrary-to-law claim (Mem. at 24-28; *infra* at 13-15), and Plaintiffs are not within the zone of interests that the ICA was intended to protect (Mem. at 28-29; *infra* at 14).

II. Plaintiffs Have Not Established Standing to Bring Their Claims.

Nothing in Plaintiffs' Opposition changes the standing analysis—they have not satisfied their burden of showing (among other things) a concrete injury. *See* Mem. at 11-13.

First, regarding the alleged injury of having not received timely responses to grant

applications, Grantees are *not* entitled to a response to their applications (as explained in Mem. at 20-23), and the Court need *not* assume that they are, as Plaintiffs claim (Opp. at 13). This is a legal conclusion that is not entitled to the assumption of truth—for standing or for any other purpose. *See*, *e.g.*, *Beck v. McDonald*, 848 F.3d 262, 270 (4th Cir. 2017) (in affirming district court's dismissal for lack of standing, explaining that at the pleading stage, the court accepts as true the plaintiff's allegations regarding standing for which there is sufficient factual matter to render them plausible on their face, but "[w]e do not, however, apply the same presumption of truth to 'conclusory statements' and 'legal conclusions' contained in [the] complaint").[5]

Regardless, even if applicants were entitled to a prompt response, a bare statutory violation does not suffice to establish concrete harm for standing purposes. *See* Mem. at 11-12 (citing *O'Leary v. TrustedID, Inc.*, 60 F.4th 240, 243 (4th Cir. 2023)). Furthermore, the harm in not receiving a response on an application *is* an informational injury, requiring Plaintiffs to show that they suffered a harm that AHRQ's regulations were aimed at preventing. They have not done so. *See* Mem. at 12 (citing *Dreher v. Experian Info. Sols.*, 856 F.3d 337, 345 (4th Cir. 2017)).

Second, Plaintiffs' "lost opportunity to compete" theory is fundamentally overbroad. In their view, merely submitting a grant application—*regardless of the applicant's likelihood of success*—confers standing to sue and to compel a federal agency to take action, even where that action is wholly discretionary. Worse still, the named Plaintiffs are associations that (allegedly) have some members with pending applications, yet they ask this Court to order AHRQ to consider all grant applications—including those submitted by nonmembers who have no connection to this case, those (members and nonmembers) who have not alleged any likelihood of success, and those

[5] *Cooksey v. Futrell*, 721 F.3d 226, 235-39 (4th Cir. 2013), cited by Plaintiffs (Opp. at 13), concerns showing injury-in-fact on a motion to dismiss in the context of a First Amendment claim and how that requirement intersects the professional speech doctrine. It has no application to this case.

(members and nonmembers) who may have already secured alternative funding or abandoned their projects. The cases recognizing standing based on a lost opportunity to compete do not extend so broadly. *See Child Trends, Inc. v. U.S. Dep't of Educ.*, 787 F. Supp. 3d 81, 95 (D. Md. 2025) ("Plaintiffs note that they are established entities in this field, with a long track record of successful participation in the programs, and thus they have a probable expectation of competitiveness in bidding for grants and contracts."); *Global Health Council v. Trump*, 153 F.4th 1, 11-12, 21 (D.C. Cir. 2025) (where plaintiffs' grant funds were frozen and they were "almost entirely financially dependent on funding from foreign-aid appropriations," "we may infer financial harm and redressability to establish Article III standing as to impoundment").[6]

In particular, Plaintiffs make no allegations that applicants for new grants whose submissions have not yet undergone peer review have any likelihood of receiving funding. Article III requires more. A fundamental principle of standing doctrine is that "plaintiffs must demonstrate standing ***for each claim that they press*** and ***for each form of relief that they seek*** (for example, injunctive relief and damages)." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021) (emphasis added). Accordingly, to the extent Plaintiffs' claims rest on AHRQ's failure to process these grant applications and seek relief in the form of requiring AHRQ to initiate peer review, Plaintiffs have not demonstrated standing for those claims or that form of relief.

Third, Plaintiffs' alleged wasted time does not satisfy Article III standing for the reasons discussed in Defendants' opening brief. Mem. at 13. The case Plaintiffs cite involves wasted time caused by having to answer illegal robocalls. Opp. at 14 (citing *Mey v. Got Warranty, Inc.*, 193 F. Supp. 3d 641, 648 (N.D.W. Va. 2016)). Here, the causal chain Plaintiffs seek to establish runs

[6] *See also Coal. of MISO Transmission Customers v. Fed. Energy Regulatory Comm.*, 45 F.4th 1004, 1015 (D.C. Cir. 2022) (plaintiff had "submitted 'considerable documentation' demonstrating its capability and experience" in the project and that it had previously competed for and won similar government contracts); *LSP Transmission Holdings II, LLC v. Fed. Energy Regulatory Comm*, 45 F.4th 979, 990 (D.C. Cir. 2022) (same).

backward: Plaintiffs expended effort, and then Defendants allegedly acted unlawfully. Wasted effort that predates the alleged legal violation is not "fairly traceable" to it. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Furthermore, the effort spent in applying for a grant is at the applicant's own risk and is generally not compensable. *See* 2 C.F.R. § 200.458 ("Pre-award costs . . . are allowable only to the extent that they would have been allowed if incurred after the start date of the Federal award and only with the written approval of the Federal agency.").[7]

III. Plaintiffs Do Not Challenge a Discrete or Final Agency Action.

A. Plaintiffs Do Not Identify a Discrete Agency Action.

With respect to Counts I-IV, Plaintiffs argue in their Opposition that "Defendants' complete halt of AHRQ's statutorily required grant program and grant-review process" constitutes a "rule," which is defined in the APA as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." Opp. at 15-16 (quoting 5 U.S.C. § 551(4)). Plaintiffs point to one thing in support of their contention that AHRQ has instituted such a rule: an email dated July 23, 2025 from an "AHRQ staffer" (*id.* at 19) to a group of grantees who had been waiting for an answer on their applications for continuation awards. *Id.* at 15-16; *see also* Compl. ¶ 34. The email stated:

> We are ***currently*** unable to process grant awards and ***are evaluating options*** for our grant program. With the permanent separation of these staff, FY2025 ***funding of non-competing applications*** is ***uncertain***.

ECF No. 4-7 (Exhibit 5 to PI Motion, which attaches the July 23, 2025 email as Exhibit A); *see also* Compl. ¶ 34. The author of this email had no authority to set forth any AHRQ policy, nor

[7] The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, contained in 2 C.F.R. Part 200, are applicable to AHRQ grants. *See* 42 C.F.R. § 67.19.

was he purporting to set forth or describe any policy in the July 2025 email. The email is a non-public statement about operational capacity, not a policy directive of the kind that satisfies the APA's definition of a "rule." 5 U.S.C. § 551(4).[8] Moreover, it is clear in light of recent events that no such policy exists. This email concerns *continuation* grants (which are "non-competing"); not new grants. *See* Compl. ¶ 34. And, as has been discussed at length, AHRQ processed and awarded dozens of continuation grants totaling $40 million since this email was sent in July 2025.

With respect to Count V, concerning the alleged failure by AHRQ to process all pending grant applications, Plaintiffs again point to an amorphous "decision to cut off all AHRQ grantmaking activity" as the agency action they are challenging. Opp. at 17. As explained above, this is not a discrete agency action. To the extent that Plaintiffs mean to direct their challenge at an aggregation of every failure by AHRQ to "process" a grant application (of which there could be hundreds, and which means different things for different stages of the application process), that claim likewise seeks sweeping reform of an agency program and contravenes the "case-by-case approach" to judicial review that the APA requires. *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 894 (1990). *See* Mem. at 15-16; *see also Alabama-Coushatta Tribe of Tex. v. United States*, 757 F.3d 484, 486, 491-92 (5th Cir. 2014) (where plaintiff sought to challenge the agency's approval of all "drilling leases and permits to third parties," the Fifth Circuit held that it lacked jurisdiction under the APA to hear such a "blanket challenge to all of the Government's actions with respect to all permits and leases" that was directed at "the way the Government administers these programs and not to a particular and identifiable action taken by the Government").

B. Plaintiffs Do Not Identify a Final Agency Action.

As explained above, Plaintiffs fail to identify any decision by AHRQ to end its grant

[8] *See*, *e.g.*, *Walmart Inc. v. U.S. Dep't of Just.*, 21 F.4th 300, 309 (5th Cir. 2021) (rejecting "expansive reading of the definition of 'rule'" under APA, which would draw in non-public statements by an individual government agent).

program (which has not occurred), let alone a decision that "'mark[s] the consummation of the agency's decision-making process' and determines 'rights or obligation[s]' . . . with 'direct and appreciable legal consequences.'" *Mayor & City Council of Baltimore v. Consumer Fin. Prot. Bureau*, 775 F. Supp. 3d 921, 938–39 (D. Md. 2025) (holding that Plaintiffs failed to show a final agency decision; "[i]nstead, they challenge a disembodied and unrealized decision . . . , without any evidence that such a decision has been reached at all or generated any legal consequences"). The Court should reject Plaintiffs' arguments otherwise for the reasons discussed in Defendants' opening brief. *See* Mem. at 16-18.

IV. All of Plaintiffs' Claims Seek to Compel Agency Action Allegedly Unlawfully Withheld and Are Properly Considered Under Section 706(1) of the APA, Rather Than Section 706(2).

Regarding Counts I-IV, Plaintiffs claim that stopping action (in Plaintiffs' words, the "halt of AHRQ's statutorily required grant program and grant-review process," Opp. at 19-20) constitutes an affirmative act by the agency that can be vacated pursuant to Section 706(2) of the APA. In plain English, however, Plaintiffs are alleging an unlawful failure to act that they are asking the Court to compel, which is properly brought under Section 706(1) of the APA and is subject to the limitations set forth in *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004) (holding that a court may only compel action that is "legally required" and constitutes "a precise, definite act about which an official has no discretion whatsoever").

In support of their argument that Counts I-IV are properly considered under Section 706(2) of the APA, Plaintiffs cite *Biden v. Texas*, 597 U.S. 785 (2022) (Opp. at 20), but that case involved affirmative agency conduct that is not present in this case. *See Texas*, 597 U.S. at 790-91, 807-08 (APA review of agency-issued memoranda that terminated program). Plaintiffs also cite *All. to Save Mattaponi v. U.S. Army Corps of Eng'rs*, 515 F. Supp. 2d 1 (D.D.C. 2007). Opp. at 20. In

that case, the D.C. court considered an APA claim under Section 706(2) that challenged the EPA's failure to veto a permit—because the failure to veto constituted the agency's indirect approval of the permit, it therefore amounted to "consummated 'agency action' that APA views as final, notwithstanding the fact that the agency 'did' nothing." 515 F. Supp. 2d at 10. There is no similar "failure to act" at issue here that could be considered the functional equivalent of a final agency action. *See* Mem. at 13-19; *supra* at 8-10.

Regardless, no matter how Plaintiffs' claims are construed, there is no final, discrete agency action that can support any kind of APA claim. *See Norton*, 542 U.S. at 62 ("Sections 702, 704, and 706(1) all insist upon an 'agency action,' whether as the action complained of (in §§ 702 and 704) or as the action to be compelled (in § 706(1)).").

V. Defendants Have Not Violated the PHS Act or AHRQ Regulations.

First, regarding the awarding of new grants, Plaintiffs do not allege any current violation of any statutory provision. Opp. at 20-22. They merely speculate that, given the operational status of AHRQ's grant program, AHRQ may fail "to carry out [its statutory] obligations ***in the future***." Opp. at 21 (emphasis added). This is not a valid claim. *See* Mem. at 19-20.[9]

Second, regarding the processing of grant applications, as explained in Defendants' opening brief, the applicable statutes and regulations only require that when, in its discretion, AHRQ decides to award a grant, it may only do so following applicable mandatory procedures (including peer review). Mem. at 20-23. The Fourth Circuit's statutory interpretation in *Lovo v. Miller*, 107 F.4th 199, 212 (4th Cir. 2024) is directly analogous. Mem. at 21-22.

Contrary to Plaintiffs' argument (Opp. at 24), Defendants' interpretation is perfectly

[9] Plaintiffs' claims in this respect should also be dismissed for lack of standing—because Plaintiffs' "allegations of *possible* future injury are not sufficient" to constitute injury in fact (*see Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013))—and/or because such claims are not ripe (*see Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 732 (1998)).

consistent with (indeed, supported by) the regulations requiring that AHRQ may only approve new grant applications that have been recommended after peer review. The regulations regarding peer review are intended to ensure that AHRQ and its Director do not hand out unmeritorious grants to friends, cronies, political allies, or others based on personal relationships instead of scientific value. That is why the regulations specify detailed criteria for peer review group membership and review standards. For example, 42 C.F.R. § 67.15 requires that members of the peer review group be selected "based upon their training and experience in relevant scientific and technical fields" and that they be screened for conflicts of interest. 42 C.F.R. § 67.15(a)(2) & (d). That regulation also sets forth specific "review criteria" that peer review groups must utilize to "address the scientific and technical merit of the proposed project." *Id.* § 67.15(a)(4)(ii), (c). Plaintiffs' interpretation of the regulations as requiring peer review of all applications under all circumstances disregards the context in which those regulations exist.

Plaintiffs also point to other regulatory schemes in which they agree that an agency need only conduct peer review where it has decided to award a grant (Opp. at 24)—but this serves to illustrate that federal grant regulations commonly have such requirements. Ironically, Plaintiffs cite 42 U.S.C. § 284n(a)(3), which provides that a "grant may be made . . . only if the application for a grant has undergone technical and scientific peer review . . . or has been reviewed by an advisory council." But the PHS Act governing AHRQ has a nearly identical provision: "The Director may not approve an application described in subsection (a)(1) unless the application is recommended for approval by a peer review group established under subsection (c)." 42 U.S.C. § 299c-1(b).[10]

[10] Defendants further note that AHRQ has, during past Administrations, declined to review applications submitted in response to a NOFO. *See* Notice of Cancellation of AHRQ RFA-HS-13-009 dated Apr. 30, 2013, which states "This Notice is to inform the scientific community of the cancellation of the [NOFO]. ***Applications submitted will not be***

Significantly, Plaintiffs do not grapple with the fact that the statutes and regulations do not impose any particular timeline on AHRQ's processing of grant applications. Mem. at 22-23. The pace at which AHRQ evaluates grant applications is discretionary, and the Court lacks jurisdiction to compel AHRQ to act on Plaintiffs' desired timeline. *Id.* (citing cases). Given this, as a practical matter, it is difficult to comprehend what an order compelling AHRQ to process all grant applications would look like and how it could be enforced absent the Court entangling itself in the day-to-day operations of AHRQ. Such an order would necessarily dictate AHRQ's competing priorities and how it spends its lump sum appropriations. *See Norton*, 542 U.S. at 66-67 (orders compelling compliance with "broad statutory mandates" would require the court, in determining whether "compliance was achieved," to become enmeshed in "day-to-day agency management," yet the APA does not permit "pervasive oversight by federal courts over the manner and pace of agency compliance with such congressional directives").

VI. Defendants Have Not Violated the Appropriations Acts.

Defendants did not violate the Appropriations Acts through the alleged "cessation of AHRQ's grant program." Compl. ¶ 48. *See* Mem. at 23-25. The Appropriations Acts provide a lump sum appropriation to AHRQ. There is no statutory mandate requiring AHRQ to spend any particular amount of its appropriations on grants or requiring AHRQ to spend its appropriations on anything at all. The lack of statutory mandate sets this case apart from *In re Aiken Cnty.*, cited by Plaintiffs (Opp. at 25), in which then-Judge Kavanaugh held that agencies "must follow statutory *mandates* so long as there is appropriated money available." 725 F.3d 255, 259 (D.C. Cir. 2013).

Further, Congress is not required to insert the phrase "sums not exceeding" into an

reviewed," *available at* https://grants.nih.gov/grants/guide/notice-files/NOT-HS-13-007.html (last visited Mar. 31, 2026) (emphasis added).

appropriations statute in order to indicate that the agency need not spend its entire appropriation. Those words have no special significance, and Plaintiffs point to nothing suggesting that they do.[11] "[A] fundamental principle of appropriations law is that where 'Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions[.]" *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 608 n.7 (2007) (quoting *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993)). Plaintiffs are improperly inserting a statutory mandate into the Appropriations Acts that does not exist.

VII. Plaintiffs Cannot Rely Upon the ICA to Support an APA Contrary-to Law Claim.

As explained in Defendants' opening brief, the ICA precludes judicial review under the APA (Mem. at 25-28), and Plaintiffs fall outside the zone of interests the ICA is designed to protect (*id.* at 28-29). Nothing in Plaintiffs' Opposition changes those conclusions. Opp. at 27-29. Plaintiffs rely primarily on the ICA provision stating that "[n]othing contained in this Act . . . shall be construed as—(3) affecting in any way the claims or defenses of any party to litigation concerning any impoundment." 2 U.S.C. § 681(3). *See* Opp. at 27, 28. But Plaintiffs' reading turns that provision on its head. If an alleged violation of the ICA could supply the basis for an APA contrary-to-law claim, the ICA would create a cause of action Plaintiffs would not otherwise possess. That is precisely what the statute forbids: it preserves existing claims and defenses; it

[11] The fact that Congress included "not to exceed" language in other appropriations does not mean anything. Opp. at 25-26. Using Plaintiffs' logic, one can easily find appropriations that contain mandatory language, suggesting that Congress knows how to provide for a statutory mandate and did not do so here. By way of example, immediately above AHRQ's appropriation in the 2024 Appropriations Act is an appropriation for "Health Surveillance and Program Support," which provides that "of the amount made available under this heading, $72,090,000 *shall be used* for the projects, *and in the amounts*, specified in the table titled 'Community Project Funding . . . ." 2024 Appropriations Act, 138 Stat. 460, at page 661 (emphasis added).

does not create new ones.[12]

VIII. The Actions Plaintiffs Challenge Are Committed to Agency Discretion by Law and Therefore Are Not Subject to APA Review.

Whether to award grants is committed to AHRQ's discretion by law. Mem. at 29-30. AHRQ's regulations specifically provide that "the Administrator ***may*** award grants" for projects, which "***in the judgment of the Administrator***" will best promote the purposes underlying AHRQ's governing laws and the agency's priorities. 42 C.F.R. § 67.17(a). *Compare Webster v. Doe*, 486 U.S. 592, 600 (1988) (finding that statute providing for termination of an agency employee "whenever the Director 'shall *deem* such termination necessary or advisable in the interests of the United States'" "fairly exudes deference to the Director, and appears to us to foreclose the application of any meaningful judicial standard of review"). In their Opposition, Plaintiffs agree that AHRQ "has discretion over *which* grants to award," but argue that AHRQ "has no discretion to decline to award grants entirely." Opp. at 30. But Defendants are *not* declining to award grants entirely. *See* ECF No. 33-3 (Exhibit A).

Plaintiffs further acknowledge that AHRQ "has discretion over how to allocate a lump-sum appropriation" but "does not have discretion to refuse to spend funds out of that appropriation entirely" because "an agency is not free simply to disregard statutory responsibilities." Opp. at 30. As discussed (*supra* at 11-14), no statutory responsibility has been disregarded.

CONCLUSION

For the foregoing reasons and those discussed in Defendants' opening brief, Defendants' Motion should be granted and the Complaint dismissed with prejudice.

[12] Plaintiffs also cite *Bacardi & Co. Ltd. v. U.S. Pat. & Trademark Off.*, 104 F.4th 527, 533 (4th Cir. 2024), *see* Opp. at 27-28, in which the Fourth Circuit held that the Lanham Act did not preclude judicial review under the APA. The *Bacardi* court distinguished *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984), because the Lanham Act allowed participation in proceedings before the PTO by the plaintiffs in that case (who were trademark challengers), and "no mismatch of exhaustion obligations exists here as in Block." 104 F.4th at 533. Thus, the two characteristics that make this case so much like *Block* (*see* Mem. at 25-27) were absent in *Bacardi*.

Dated: March 31, 2026

Respectfully submitted,

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