IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PLANNED PARENTHOOD OF GREATER NEW YORK, *et al.*,

Plaintiffs,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Defendants.

Case No. 1:25-cv-02453-BAH

DEFENDANTS' CROSS-MOTION TO DISMISS

Defendants— the U.S. Department of Health and Human Services, and HHS Secretary Robert F. Kennedy, Jr., in his official capacity—cross-move the Court to dismiss this action for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6), for the reasons explained in the attached memorandum of points and authorities. A proposed order is attached.

Dated: September 10, 2025

Respectfully submitted,

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DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' SUMMARY JUDGMENT MOTION AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION TO DISMISS

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INTRODUCTION

After twice moving unsuccessfully for preliminary relief regarding guidance documents issued by the Office of the Assistant Secretary for Health ("OASH") of the U.S. Department of Health and Human Services ("HHS") relating to the Teen Pregnancy Prevention Program ("TPP Program"), Plaintiffs have now lodged a premature motion for summary judgment in this case. The motion runs contrary to this Court's Local Rules and seeks judgment on matters outside the administrative record that have no bearing on a case arising under the Administrative Procedure Act ("APA"). For those reasons alone, the Court should deny Plaintiffs' motion. But even if Plaintiffs' motion was proper, Plaintiffs' challenge to the "OASH Teen Pregnancy Prevention Program Policy Notice," or "Policy Notice," fails for several threshold reasons.

First, Plaintiffs' claims are not ripe for review in this Court, both as a matter of imminent injury-in-fact as required for Article III standing and as a prudential matter. Plaintiffs have been awarded continuation funding for their grant programs by HHS, and HHS has not taken the necessary steps to initiate enforcement actions. Their facial challenge all but assumes HHS will take these actions against Plaintiffs, but HHS has in no way limited its enforcement discretion through issuing the Policy Notice. Both the requirement of an imminent injury-in-fact under Article III, and the prudential ripeness doctrine, counsel in favor of dismissing this action and waiting for HHS to take the enforcement steps that would make Plaintiffs' injury more concrete and develop a record under which the Court could meaningfully resolve any resulting dispute between the parties.

Second, Plaintiffs have failed to establish that the relief they seek in this Court will redress their purported injuries. Recent Supreme Court decisions have held that the Court of Federal Claims has exclusive jurisdiction over cases seeking the enforcement of an obligation by the government to disburse money under the terms of a grant agreement." *Nat'l Insts. of Health v. Am. Pub. Health Ass'n*, 606 U.S. ----, 2025 WL 2415669 (Aug. 21, 2025) ("*APHA*"); *Dep't of Educ. v. California*, 145 S. Ct. 966 (2025). As pled in their complaint, Plaintiffs' seek both vacatur of the Policy Notice and injunctive relief that would prevent HHS from "giving effect to the new

requirements" in the Policy Notice, but Plaintiffs' summary judgment motion only seeks vacatur of the Policy Notice. By limiting themselves to that remedy, Plaintiffs may be able to avoid the Court of Federal Claims, but then the relief sought will not redress their injuries, as HHS would remain at liberty to take enforcement actions against individual grantees based on the terms and conditions of their grants even in the absence of the Policy Notice.

Third, the Policy Notice is not final agency action reviewable under the APA. The Policy Notice articulates HHS's interpretation of the terms and conditions of Plaintiffs' grants, including longstanding requirements that grantees must comply with applicable executive orders and Supreme Court decisions. HHS has not even arguably taken the actions required by governing regulations to initiate an enforcement action against Plaintiffs for breach of their grant obligations, and until those events occur, Plaintiffs have no cause of action under the APA.

Plaintiffs' substantive arguments for vacating the Policy Notice are no better. The Policy Notice is consistent with, and not proscribed by, the appropriations statute that Congress has reauthorized annually since 2010. It also provides reasonable explanations that satisfy the APA's minimal standard of review. Plaintiffs' motion drops a First Amendment claim pled in the original complaint, and does not cure the many threshold problems with their Fifth Amendment claim. Finally, Plaintiffs have not shown they are able to make out an ultra vires claim.

For these reasons, the Court should deny Plaintiffs' motion for summary judgment, grant Defendants' motion to dismiss, and enter judgment for Defendants in this case.

BACKGROUND

I. HHS's Procedures For Enforcing Compliance With Grant Terms

The TPP Program is subject to Part 75 of Title 45 of the Code of Federal Regulations, which defines the rights and obligations of both HHS and the grantee. Notice of Funding Opportunity ("2023 NOFO") at 60, ECF No. 3-2. HHS is required to incorporate into the terms of its grants "national policy requirements," including those flowing from "executive order[s]." 45 C.F.R. § 75.210(b)(1)(ii) (2016); *see also id.* 75.300(a) (2024). HHS is also required to "follow all applicable Supreme Court decisions in administering its award programs." *Id.* § 75.300(d).

Part 75 articulates the remedies available to HHS if a grantee is not in compliance with the terms and conditions of its grant. HHS has a number of remedies available if an "entity fails to comply with Federal statutes, regulations, or the terms and conditions of a Federal award." *Id.* § 75.371 (2014). It may "impose additional conditions," and "[i]f the HHS awarding agency or pass-through entity determines that noncompliance cannot be remedied by imposing additional conditions," HHS can take other steps, such as withholding of cash payments, disallowance of program costs, suspension of the award in whole or in part, and withholding of federal funding. *Id.* HHS can also terminate an award, in whole or in part, for "fail[ure] to comply with the terms and conditions of the award." *Id.* § 75.372 (a)(1) (2020).

The regulations outline the process HHS follows if it chooses to exercise its enforcement discretion to take corrective action after an adverse determination by the agency. HHS, "[u]pon taking any remedy for non-compliance . . . must provide the non-Federal entity an opportunity to object and provide information and documentation challenging the suspension or termination action[.]" *Id.* § 75.374(a) (2014); *see also id.* § 75.373(a) ("The HHS awarding agency or pass-through entity must provide to the non-Federal entity a notice of termination."). For the TPP Program, those procedures are defined by part 50, subpart D of Title 42 of the Code of Federal Regulations. Upon the provision of written notification of an adverse determination by HHS, the grantee has thirty days to object and provide information contesting the action. 42 C.F.R. § 50.406(a) (1998). Assuming it is reviewable, the matter will be referred to a review committee appointed pursuant to the regulation. *Id.* § 50.406(d)–(g). After taking in additional evidence, the review committee renders a written decision. *Id.*§ 50.406(h).

II. The TPP Program Appropriation

Since 2010, Congress has appropriated money to HHS annually for "grants to public and private entities to fund medically accurate and age-appropriate programs that reduce teen pregnancy." *See, e.g.*, Further Consolidated Appropriations Act, 2024, Pub. L. No. 118-47, 138 Stat. 460, 670–71 (2024) ("TPP Appropriation"). There are two funding categories, referred to as Tier 1 and Tier 2. After program support expenses, three-quarters of the TPP Appropriation goes

to Tier 1 projects for "replicating programs that have been proven effective through rigorous evaluation to reduce teenage pregnancy, behavior[] risk factors underlying teenage pregnancy, or other associated risk factors." *Id.* Tier 2 projects, which are not at issue in this case, are earmarked for "research and demonstration grants to develop, replicate, refine, and test additional models and innovative strategies for preventing teenage pregnancy." *Id.*

HHS solicited applications for TPP Program grant funds in April 2023 through the 2023 NOFO. Applicants could request funding from $350,000 to $2 million per year for a period of up to five years (the period of performance). *Id.* at 4. Applications for TPP Program funds go through a formalized agency review process laid out in the 2023 NOFO before final decisions are made and funds are awarded. After initial selection for funding, for each year of the approved period of performance, grant recipients are required to submit a noncompeting continuation application for funds. *Id.* at 16. That application requires grantees to submit a "progress report for the current budget year, [a] work plan, [and] budget and budget justification for the upcoming year." *Id.* at 16–17, 56. HHS awards continuation funding based on "availability of funds, satisfactory progress of the project, grants management compliance, including timely reporting, and continued best interests of the government." *Id.* at 56.

As part of the registration process to receive funding, the 2023 NOFO required applicants to certify that they will comply "with all applicable requirements of all other federal laws, executive orders, regulations, and public policies governing financial assistance awards[.]" *Id.* at 61–62. Applicants are also required to submit Standard Form 424B, which requires a certification that the applicant "[w]ill comply with all applicable requirements of all other Federal laws, executive orders, regulations, and policies governing this program." SF 424B at 2 (assurance 18), Gerardi Decl. Ex. 1. The Notice of Award provided to Tier 1 funding recipients who prevail in the competitive process further states that "[t]he recipient must comply with all terms, conditions, and requirements outlined in this Notice of Award, including[] . . . [a]ll requirements imposed by program statutes and regulations, Executive Orders, and HHS grant administration regulations, as applicable. . . ." *See, e.g.*, Sample Notice of Award for PPCCC at 5–6, ECF No. 14-1.

III. HHS Guidance for 2025 Continuation Award Applications

In January 2025, HHS issued guidance for funding recipients to apply for continuation awards in the third year of funding, to cover July 1, 2025 through June 30, 2026. Jan. Guidance for Non-Compete Awards, ECF No. 3-2. The January 2025 guidance set an application deadline of April 15, 2025. *Id.* at 2, 15. Among other requirements, the January 2025 guidance instructed applicants to provide a project narrative for work to be performed in the upcoming year, including a brief summary of any proposed changes to the project work plan from the previous budget year, and a work plan to address expectations set forth in the 2023 NOFO. *Id.* at 5.

HHS provided updated guidance to applicants on March 31, 2025 ("March 2025 Guidance"). Ex. F, ECF No. 22-8. The March 2025 guidance largely mirrored the guidance HHS provided in January 2025, but advised applicants that they are "expected to review and be aware of current Presidential Executive Orders[,]" and encouraged recipients to "revise their projects, as necessary, to demonstrate that the [non-competing continuation] award application is aligned with current Executive Orders." *Id.* at 4. The 2025 Guidance states that "[r]ecipients should review and be aware of all current Presidential Executive Orders; however, the following may be of most relevance to the work of the TPP program":

- Executive Order 14168, *Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government*;
- Executive Order 14190, *Ending Radical Indoctrination in K-12 Schooling*;
- Executive Order 14187, *Protecting Children From Chemical and Surgical Mutilation*;
- Executive Order 14151, *Ending Radical and Wasteful Government DEI Programs and Preferencing*;
- Executive Order 14173, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity*.

Id. at 4-5. The 2025 Guidance further instructed applicants to include in the project narrative accompanying their applications a "[d]escription of changes made to align with Executive Orders, if applicable," including "the steps taken to review the project and identify the

modifications proposed." *Id.* at 5. It provided examples of changes that recipients may make to align their projects, such as "selecting a different evidence-based program for implementation, making adaptations to existing curriculum, and updating policies, staffing, and training, etc." *Id.* It also instructed applicants to provide a brief summary of any proposed substantial changes to the project work plan from the previous budget period; to provide a work plan that "address[es] the expectations outlined in the [2025 Guidance], to the extent aligned with Presidential Executive Orders;" and to "submit program materials to [the Office of Population Affairs] for review" by uploading them as an appendix through the online portal for grant applications. *Id.* at 5, 15.

IV. Plaintiffs' Funding Applications and the First Litigation

Plaintiffs are three not-for-profit organizations that received Tier 1 funding awards for a period of up to five years pursuant to the 2023 NOFO. *See* Compl. ¶ 50, ECF No. 1. They are Planned Parenthood of Greater New York (PPGNY); Planned Parenthood of the Heartland, Inc. (PPH); and Planned Parenthood California Central Coast (PPCCC). All three Plaintiffs filed continuation applications by the applicable deadline. The authorized representatives who signed these applications on behalf of Plaintiffs all had to agree that they "will comply with all required certifications and assurances" and "will comply with terms and conditions when accepting an award." HHS Grants Policy Statement at 17 (Oct. 1, 2024), available at https://www.hhs.gov/sites/default/files/hhs-grants-policy-statement-october-2024-archived.pdf. PPGNY claims it only made "minor edits to the Program Narrative, Work Plan, Logic Model, Needs Assessment, and Budget Narrative language to note site types, site names, and site locations and on April 15, 2025, PPGNY uploaded its non-competing continuation award application for year three of the current grant cycle and included language indicating that it was making such modifications under protest as to the new EO 'alignment' requirement, and without certifying compliance with the new EO 'alignment' requirement." Ex. E, Decl. of Wendy Stark ("Stark Decl.") ¶¶ 23–24, ECF No. 3-6. The two other plaintiffs relate a similar process. Ex. D, Decl. of Jenna Tosh ("Tosh Decl.") ¶¶ 37–39, ECF No. 22-6 (describing PPCCC's application); Ex. E, Decl. of Christine Cole ("Cole Decl.") ¶¶ 22–23, ECF No. 22-7 (describing PPH's application).

After applying, Plaintiffs filed the complaint in *PPGNY I* on May 1, 2025, along with a motion for a preliminary injunction. The Court denied the motion. *See generally PPGNY I*.

Plaintiffs received notice that their applications were approved for funding on July 2, 2025. Stark Decl. ¶ 25; Tosh Decl. ¶ 40. Attached to the emails providing this notice was the "Policy Notice" challenged here, which was intended to "clarify OASH policy for Teen Pregnancy Prevention Program (TPP Program) grant recipients." Off. of the Ass't Sec'y for Health, U.S. Dep't of Health & Human Servs., *OASH Teen Pregnancy Prevention Program Policy Notice* ("Policy Notice") at 1 (July 1, 2025) ECF No. 22-9. The awards are effective July 2, and Plaintiffs received them on July 8. Stark Decl. ¶ 26; Tosh Decl. ¶ 41. Plaintiffs also met with HHS officials on July 8 who provided them with a document stating "Project Officer (PO) will continue to work with the grantee to support them in meeting the expectations of this grant under the priorities of the current administration while remaining within scope of the project. If a change in scope is needed, the grantee will work with the PO and Grants Management." Stark Decl. ¶ 27; *see also* Tosh Decl. ¶ 42 (similar message delivered in "workplan assessment" PPCCC received on July 8). Plaintiffs voluntarily dismissed *PPGNY I* on July 11, 2025.

V. The July 1, 2025 Policy Notice

Plaintiffs filed their complaint in this action on July 29, 2025. ECF No. 1. The claims in this case center around the Policy Notice, which was issued before Plaintiffs chose to dismiss *PPGNY I*. OASH issued the Policy Notice "in light of recent Presidential Executive Orders, Supreme Court decisions, current court orders, and the [March 2025] guidance" in order to "further clarify these expectations for TPP Program grantees." Policy Notice at 2. After quoting the authorizing language from congressional appropriation for the TPP Program, the notice addresses four topics.

First, in line with Executive Order 14190 (one of the executive orders explicitly referenced in the March 2025 guidance), the Policy Notice discusses the potential impact of the Supreme Court's decision in *Mahmoud v. Taylor*, 606 U.S. ----, 145 S. Ct. 2332 (2025), on the TPP Program. *Mahmoud* held that public schools place a burden on the fundamental rights of parents to freely

exercise their religion in accordance with the First Amendment if public schools "require[] teachers to instruct young children" with materials that "explicitly contradict their parents' religious views" without providing parents notice and an opportunity to opt their children out of the instruction. *Id.* at 2353-56. Following *Mahmoud*, the Policy Notice states that "TPP Program grant recipients are expected to provide parents advance notice (including relevant specifics) and the ability to opt out of any content or activities, especially those related to sexuality, that may burden their religious exercise." Policy Notice at 3.

Second, in discussing the "scope of the TPP Program," the Policy Notice reiterates the requirements of the statute and points out that it "makes no mention of ideological content such as the content at issue in *Mahmoud*, gender ideology, or discriminatory equity ideology (as such terms are defined in Executive Order 14190),"[1] and does not "require, support, or authorize teaching minors about such content." *Id.* at 4. It then describes content that "may" fall "outside the scope of the TPP Program," such as "content that encourages, normalizes, or promotes sexual activity for minors," or content on "the eroticization of birth control methods, creating more pleasurable sexual experiences, or foreplay techniques." *Id.*

Third, the Policy Notice clarifies some pre-existing definitions of terms that appear in either the TPP Program statute or the 2025 Guidance. OASH had previously noted that "age appropriate" materials are ones "suitable to particular ages or age groups of children and adolescents, based on developing cognitive, emotional, and behavioral capacity typical for the age or age group." *Id.* The Policy Notice, consistent with this definition, further clarifies that this definition should not be understood as including "material that depicts, describes, exposes, or presents obscene, indecent, or sexually explicit content," which "may include" the sorts of outside-the-scope materials discussed in the prior section. *Id.* at 5. Likewise, the Policy Notice clarifies

[1] For these definitions, which are found in Executive Orders referenced in the Policy Notice and the 2025 Guidance, *see* Exec. Order No. 14190 §§ 2(a) (incorporating definitions from Executive Order No. 14168), 2(b) (defining "discriminatory equity ideology"), 90 Fed. Reg. 8853 (Jan. 29, 2025); Exec. Order No. 14168 § 2(f) (defining "gender ideology), 90 Fed. Reg. 8615 (Jan. 20, 2025).

that the term "medically accurate" should be understood, in the context of "pharmaceutical or health-related recommendations," to "include information on a full range of health risks, so that minors and their parents or guardians can make fully informed decisions," and provides examples of materials that may not be "medically accurate." *Id.* at 5. The Policy Notice also explains that a number of terms should "not be construed to exceed the scope" of the TPP Program statute or to permit unlawful discrimination. *Id.*

Finally, the Policy Notice states that OASH might initiate enforcement actions against grantees found not to be in compliance with the TPP Program statute and the terms of Plaintiffs' grant instruments. As discussed above, those enforcement tools require, as an initial step, the provision of written notice by HHS as to the basis for finding a grantee in violation of the terms and conditions of its grant, which then entitles the affected entity to submit additional evidence and receive further review. As of this writing, OASH has not made any finding that any Plaintiff violated the terms of its grant instrument—much less a final determination as to whether to bring an enforcement action against any particular grantee (as many grantees, including Plaintiffs, made changes to their curricula in response to the March 2025 guidance), what requirements any hypothetical enforcement action would focus on, or what enforcement tools HHS would use. All Plaintiffs had Notices of Award issued to them, and two of them (PPGNY and PPCCC) have drawn down funds awarded to them pursuant to their notices. Decl. of Eric West ¶¶ 7–8 ("West Decl.").

VI. This Litigation

Plaintiffs' complaint advances four claims (Counts I, III, IV, and V) on which they now move for summary judgment. Count I alleges that the Policy Notice violates Plaintiffs' purported rights under the Due Process Clause. *Id.* ¶¶ 129–45. Counts III and IV allege that, in issuing the March 2025 guidance, HHS acted arbitrarily and capriciously, and in violation of the law, and therefore violated the APA. *Id.* ¶¶ 154–77. And Count V alleges that HHS's issuance of the Policy Notice alongside the notices of award was *ultra vires*. *Id.* ¶¶ 178–85. (Plaintiffs have dropped Count II of the Complaint, related to the First Amendment. *See* Mem. in Supp. of Pls.' Mot. for Summ. J. ("Pls.' MSJ") 2 n.1, ECF No. 22-1.) The complaint prays that the Court "declar[e]

unlawful the new requirements imposed in the [Policy Notice]"; order Defendants to "refrain from relying on the [Policy Notice] in making determinations about Plaintiffs' current and ongoing funding"; vacate the Policy Notice under 5 U.S.C. § 706; and enter permanent injunctive relief that prevents Defendants "from implementing, maintaining, or giving effect to the new requirements in the [Policy Notice]." Compl. at 50 (prayer for relief). They only remedy Plaintiffs seek in their motion for summary judgment is vacatur of the Policy Notice. Pls.' MSJ at 37–38.

STANDARD OF REVIEW

Judgment under Civil Rule 56 is only appropriate if the moving party "shows that there is no genuine dispute as to any material fact and [that it] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. "[I]n cases where review is based on an administrative record," such as this one, "the Court is not called upon to determine whether there is a genuine issue of material fact, but rather to test the agency action against the administrative record. As a result, the normal summary judgment procedures requiring the filing of a statement of undisputed material facts [are] not applicable." D.D.C. L.R. 7(h) (comment). In seeking judgment on grounds outside the administrative record, prior to adjudication of a motion to dismiss, Plaintiffs' motion under Rule 56 is improper and should, at a minimum, be denied without prejudice as premature.

The Court should also grant Defendants' cross-motion because Plaintiffs have not established subject-matter jurisdiction over this case. To survive a Rule 12(b)(1) motion, the party asserting subject matter jurisdiction—here Plaintiffs—bear "the burden of establishing it." *Jenkins v. Howard Univ.*, 123 F.4th 1343, 1347 (D.C. Cir. 2024) (quoting *Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006)). In considering assertions of subject matter jurisdiction, courts "assume the truth of all material factual allegations in the complaint and 'construe the complaint liberally, granting plaintiff[s] the benefit of all inferences that can be derived from the facts alleged.'" *Am. Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011) (quoting *Thomas v. Principi*, 394 F.3d 970, 972 (D.C. Cir. 2005)). At the same time, however, courts "need not accept inferences drawn by a plaintiff if those inferences are unsupported by facts alleged in the complaint, nor must the Court accept a plaintiff's legal conclusions." *Arabzada v. Donis*, 725 F.

Supp. 3d 1, 9 (D.D.C. 2024) (citing *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015)).

The Court may also dismiss this case pursuant to Rule 12(b)(6). A complaint must contain "sufficient factual matter" to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A complaint that "tenders 'naked assertion[s]' devoid of 'further factual enhancement'" warrants dismissal. *Id.* (quoting *Twombly*, 550 U.S. at 557). Although a court must accept well-pleaded factual allegations as true and construe them in the light most favorable to the plaintiff, it need not accept "legal conclusions" or "mere conclusory statements." *Id.* In the D.C. Circuit, HHS's "final agency action argument is properly considered under Rule 12(b)(6)," rather than as a jurisdictional argument. *Nycal Offshore Dev. Corp. v. Haaland*, No. 19-966, 2021 WL 6049915, at *6 n.5 (D.D.C. Dec. 21, 2021) (collecting decisions).

These standards are especially difficult for Plaintiffs to overcome in the context of a facial challenge. To prevail, they must demonstrate that any and all potential applications of the Policy Notice to their grant programs are unlawful. *Bondi v. VanDerStok*, 145 S. Ct. 857, 869–70 (2024) ("Because at least some weapon parts kits satisfy both of subsection (A)'s tests, § 478.11 is not facially invalid."). As explained below, Plaintiffs fail to meet that demanding standard.

ARGUMENT

I. Plaintiffs Lack Standing and Ripeness To Assert Their Claims

Standing is a central component of Article III's case-or-controversy requirement. The doctrine demands that plaintiffs have "a personal stake in the outcome of the controversy [so] as to warrant his invocation of federal-court jurisdiction." *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (citation omitted). In cases seeking to enjoin the government, standing also serves important separation-of-powers concerns, such as ensuring federal court do not exercise "general legal oversight of the other branches of Government." *Murthy v. Missouri*, 603 U.S. 43, 76 (2024) (citation omitted); *see also TransUnion LLC v. Ramirez*, 594 U.S. 413, 423–24 (2021).

At its "irreducible constitutional minimum," the doctrine requires a plaintiff, as the party

invoking the Court's jurisdiction, to establish three elements: (1) a concrete and particularized injury-in-fact, either actual or imminent, (2) a causal connection between the injury and defendants' challenged conduct, and (3) a likelihood that the injury suffered will be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). The party invoking federal court jurisdiction "bears the burden of establishing each of those elements." *Hecate Energy LLC v. FERC*, 126 F.4th 660, 665 (D.C. Cir. 2025).

A. Plaintiffs' Alleged Injuries Lack Sufficient Imminence

Plaintiffs must show that they have suffered injury-in-fact—"actual or imminent, not speculative" harm, "meaning that the injury must have already occurred or be likely to occur soon." *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 381 (2024). For injury to be imminent, it must be "certainly impending"; mere "allegations of possible future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (citation modified). In other words, injury cannot be established through "a 'highly attenuated chain of possibilities' predicated on 'guesswork as to how independent decisionmakers will exercise their judgment.'" *Indus. Energy Consumers of Am. v. FERC*, 125 F.4th 1156, 1163 (D.C. Cir. 2025) (quoting *Clapper*, 568 U.S. at 410).

That showing cannot be made here. As in *PPGNY I*, Plaintiffs are concerned about future actions HHS may take with respect to their grant programs. Their concerns are even more attenuated now than they were in the previous case, because HHS granted Plaintiffs' applications for continuation funding and issued Notices of Award to them in July. Whereas Plaintiffs in *PPGNY I* relied upon uncertainty as to whether their applications would be accepted, that uncertainty no longer exists in this case. Moreover, two of the three Plaintiffs have drawn down funds pursuant to their notice of award. West Decl. ¶¶ 7–8. To change the status quo under which Plaintiffs have access to their grant funding, HHS would have to take affirmative enforcement steps against Plaintiffs that have yet to be taken. Plaintiffs' pleadings and moving papers fail to establish that the injuries-in-fact that could arise if HHS takes these steps are anything more than a "possible future injury" at this stage, as opposed to the "certainly impending" injury necessary for standing purposes. *Clapper*, 568 U.S. at 409 (cleaned up).

B. This Case Is Not Ripe For Review

For many of the same reasons, Plaintiffs' claims are also not ripe. A claim is not ripe for adjudication if it rests upon "'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Trump v. New York*, 592 U.S. 125, 131 (2020) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)); *see also Nat'l Treasury Emps.' Union v. Vought*, No. 25-5091, --- F. 4th ----, 2025 WL 2371608, at *14 (D.C. Cir. Aug. 15, 2025) ("*NTEU*") (concluding a "posited shutdown decision" was unripe for review). The constitutional ripeness requirement overlaps with the "injury in fact" requirement of standing. *See Trump*, 592 U.S. at 134; *see also Medimmune, Inc. v. Genetech, Inc.*, 549 U.S. 118, 128 n.8 (2007) (recognizing that in some cases, "standing and ripeness boil down to the same question").

Plaintiffs' claims lack constitutional ripeness for the same reasons that Plaintiffs lack standing. Moreover, even if the Court were to determine that the constitutional ripeness requirements are met, the Court should dismiss Plaintiffs' claims as prudentially unripe. Prudential ripeness requires courts to consider (1) "the fitness of the issues for judicial decision," and (2) "the hardship to the parties of withholding court consideration." *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003) (citing *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 148–49 (1967)). Plaintiffs' claims meet both prongs of this test. First, the Policy Notice is a document of general applicability, and HHS must follow its grant regulations in order to take any specific enforcement actions against particular grantees. Whether any actions will take place against specific grantees, and what the "exact scope" of any such actions will be, "is thus unclear," and "judicial review 'is likely to stand on a much surer footing in the context of a specific application.'" *NTEU*, 2025 WL 2371608, at *14 (quoting *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164 (1967)). Second, because Plaintiffs have been issued notices of award, there is no hardship in delaying review until HHS changes course to revoke those awards. If Plaintiffs' "fears come to pass, they may 'protect all of their rights and claims by returning to court when the controversy ripens.'" *Id.* (quoting *Atl. States Legal Found. v. EPA*, 325 F.3d 281, 285 (D.C. Cir. 2003)).

Refraining from judicial review of a guidance document until an agency exercises its

discretion to actually bring an enforcement action "is par for the course, even in cases where plaintiffs' lives and livelihoods depend on the prompt receipt of agency services." *NTEU*, 2025 WL 2371608, at *14. There is no reason for this Court to deviate from that standard process here. As such, it should dismiss the complaint as unripe on either jurisdictional or prudential grounds.

C. Vacatur Alone Will Not Redress Plaintiffs' Purported Injuries

Even if the Court concludes there is a cognizable injury-in-fact in this case, and that it is ripe for judicial review, the Court should nonetheless dismiss this case for lack of jurisdiction because Plaintiffs' injuries are not redressable by the relief they seek in their motion for summary judgment. Plaintiffs' complaint seeks injunctive relief that would require "Defendants to refrain from relying on the [Policy Notice]" and enjoin "Defendants from implementing, maintaining, or giving effect to the new requirements in the [Policy Notice,]" as well as mandatory status reports to monitor HHS's compliance with the Court's injunction. Compl. at 50 (prayer for relief). But their summary judgment motion only seeks vacatur of the Policy Notice. Pls.' MSJ at 37–38.

That remedy alone would not accomplish anything of substance for Plaintiffs. The Policy Notice is a guidance document that sets forth HHS's understanding of what the terms and conditions of Plaintiffs' grants already require. As such, HHS would still be free to pursue enforcement proceedings against any grantee that it believed to be in violation of the terms and conditions of its grant, so long as it relies on the terms of the grants themselves. Program participants would remain "in limbo" because the agency officials who issued the Policy Notice remain in office and have the authority to take such actions. *Id.* at 38.

But if Plaintiffs sought a more efficacious remedy, such as those spelled out in the complaint, they run into another jurisdictional problem: federal district courts cannot "enforce a contractual obligation to pay money" over which the Court of Federal Claims has exclusive jurisdiction. *Dep't of Ed. v. Cal.*, 145 S. Ct. at 968 (quoting *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212 (2002)). As the Supreme Court recently explained in *APHA*, federal law "does not provide the District Court with jurisdiction to adjudicate claims 'based on' . . . research-related grants or to order relief designed to enforce any "'obligation to pay money'"

pursuant to those grants." *APHA*, 2025 WL 2415669, at *1. TPP Program grants are indisputably the sort of "research-related" grants to which this rule would typically apply.

In her concurrence in the *APHA* case, Justice Barrett noted that notwithstanding the clear jurisdictional bar on district court actions to challenge "grant terminations," district courts would likely have jurisdiction to entertain an APA claim challenging "agency guidance." *APHA*, 2025 WL 2415669, at *2 (Barrett, J., concurring in the partial grant of the application for stay). Plaintiffs seek to situate their relief within this exception. But if they attempt to limit themselves to a "vacatur" so as to fit within Justice Barrett's exception, the Court cannot fashion meaningful relief and Plaintiffs' claims flunk the "redressability" requirement of Article III.

Accordingly, the Court should dismiss this case for lack of jurisdiction. If Plaintiffs are merely asking the Court to "undo" the Policy Notice via vacatur, then this dispute is effectively a request for an advisory opinion from the Court on the Policy Notice in advance of any actual enforcement decision by HHS. District courts have no standing to entertain such disputes. But if vacatur is understood as preventing HHS from taking actions to enforce grant terms and conditions even if those actions do not purport to rely on the Policy Notice itself, then Plaintiffs are actually seeking to enforce HHS's obligations to continue to disburse grant funds to Plaintiffs, and this dispute belongs in the Court of Federal Claims, not this Court.

II. Plaintiffs' Motion Is Procedurally Improper

A. Plaintiffs Are Not Entitled To Summary Judgment On Materials Outside The Administrative Record

Before it even reaches any substantive issues, the Court should deny Plaintiffs' motion without prejudice because it is premature and procedurally improper.[2] Unless the Court adopts Defendants' threshold arguments to dismiss the case, the Court must resolve an APA case "on the

[2] Defendants explicitly objected to this procedure during the parties' required meet and confer prior to Plaintiffs' filing their opposed motion for a schedule. *See* Gerardi Decl., Ex. 2. The Court granted that motion before Defendants could respond to it. Defendants are therefore presenting their objections to this procedure at the first available opportunity.

full administrative record that was before the [agency] at the time [it] made its decision," not on a record generated by Plaintiffs. *Am. Bioscience, Inc. v. Thompson*, 243 F.3d 579, 582 (D.C. Cir. 2001) (second alteration in original) (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402,420 (1971)). This Court's local rules reaffirm that course of proceeding. D.D.C. L.R. 7(h) (comment).

Courts in this district do, on occasion, permit supplementation of the administrative record with materials not certified by the agency, but only in cases "when there has been a strong showing of bad faith or improper behavior or when the record is so bare that it prevents effective judicial review." *Com. Drapery Contractors, Inc. v. United States*, 133 F. 3d 1, 7 (D.C. Cir. 1998) (citation omitted); *Off. of Foreign Assets Control v. Voices in Wilderness*, 382 F. Supp. 2d 54, 63 (D.D.C. 2005) (denying motion for discovery in an APA case). This standard is demanding; were it otherwise, "every challenge to administrative action would turn into a fishing expedition into the motives of the defendant agency." *Id.* at 63. Plaintiffs have not even purported to meet that standard. Moreover, as a procedural matter, invocation of these exceptions to the administrative record rule assumes (1) that the Court has resolved the threshold question of whether the action is reviewable under the APA at all; (2) that the government has had an opportunity to lodge what it considers to be the administrative record with the Court and the plaintiffs; and (3) that the parties, after reviewing that submission, have had an opportunity to brief the issue of whether the record should be supplemented, by discovery or otherwise. Although HHS has now moved to dismiss and lodged the certified contents of the administrative record with the Court as required by the Local Rules, these prerequisite steps have not been completed. As such, denial of Plaintiffs' motion is warranted. Plaintiffs, of course, would be free to move for summary judgment again under the proper procedures at an appropriate time.

B. Plaintiffs Are Not Entitled To Summary Judgment On The Basis Of An Expert Declaration That Is Outside The Administrative Record

Plaintiffs attached to their motion a declaration from Dr. Jodi Kantor, a professor of public health who advances a variety of expert opinions about the meaning of the TPP Program statute

and the consistency of various aspects of the Policy Notice with her understanding of the goals and purposes of the TPP Program. ECF No. 22-3. But a district court sitting in review of agency action in an APA case "may not look to [extra-record] evidence as a basis for questioning the agency's scientific analyses or conclusions." *Ctr. for Biological Diversity v. U.S. Off. of Surface Mining Reclamation & Enf't*, No. CV 23 - 3343 (SLS), 2025 WL 1503802, at *14 (D.D.C. May 27, 2025) (alteration in original) (quoting *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 993 (9th Cir. 2014)). Courts sometimes consider expert declarations from those outside the government when those declarations are, themselves, part of the administrative record. For instance, in *American Wild Horse Preservation Campaign v. Salazar*, 859 F. Supp. 2d 33 (D.D.C. 2012) (Howell, J.), the Court refused to strike expert declarations that were cited and relied upon in timely filed comments opposing an agency decision such that they were "already known" to the agency and "should have been considered as part of the AR." 859 F. Supp. 2d at 42. Dr. Kantor's declaration, by contrast, postdates the Policy Notice by nearly two months. As such, the Court should not consider it in evaluating Plaintiffs' motion for summary judgment.

III. Plaintiffs Have Not Raised Appropriate APA Claims

A. The Policy Notice Is Not Final Agency Action.

The APA generally authorizes judicial review only of final agency actions. 5 U.S.C. § 704. "An agency action is final only if it is *both* 'the consummation of the agency's decision-making process' *and* a decision by which 'rights or obligations have been determined' or from which 'legal consequences will flow.'" *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 250 (D.C. Cir. 2014) (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)). Practical consequences alone do not mean a reviewable, final agency action is at stake under *Bennett*'s two-part formula. *Ctr. For Auto Safety v. NHTSA*, 452 F.3d 798, 810–11 (D.C. Cir. 2006); *see also Air Brake Sys., Inc. v. Mineta*, 357 F.3d 632, 645 (6th Cir. 2004) (collecting cases). The Policy Notice firmly fits within the category of non-final agency actions.

Like the 2025 Guidance that preceded Plaintiffs' initial lawsuit, the Policy Notice is intended to "further clarify [the] *expectations* for TPP Program grantees." Policy Notice 2

(emphasis added). The Policy Notice does not make Plaintiffs categorically ineligible for continued funding, determine that any Plaintiff violated a term of its grant instrument, guarantee that HHS will bring any enforcement action against any Plaintiff, or otherwise limit HHS's enforcement discretion. Indeed, it is uncontested that Plaintiffs were awarded their year three funds in July. *See* Compl. ¶ ¶ 10-12. The Policy Notice is another interlocutory step in the agency's decision-making process of how to reconcile the directives of recently issued Executive Orders and the Supreme Court's decision in *Mahmoud* with the TPP Program, and the incorporation of that guidance into Plaintiffs' grant awards neither determines the legal rights and obligations of Plaintiffs nor results in any immediate legal consequences. As such, it is not a proper topic of APA review.

The non-final nature of the Policy Notice comes into sharper relief when considered in the context of HHS's regulations. For example to terminate a grant (one of many possible remedies available to HHS), HHS is required to provide to grantees a notice of termination, 45 C.F.R. § 75.373; to give grantees "an opportunity to object and provide information and documentation challenging [any] suspension or termination action," as required by § 75.374; and to provide written notification to the grantee after a review committee has considered the grantees' objections and additional information, 42 C.F.R. § 50.406(a). The Policy Notice acknowledges the possibility of *future* enforcement actions, but HHS has not even arguably taken the legal steps necessary to initiate such an action against any TPP Program grantee, including Plaintiffs. Absent such steps, which are necessary to bring policy guidance and enforcement discretion to bear in a tangible way on Plaintiffs, the two-part formula of *Bennett* is not satisfied. Ultimately, the final agency action doctrine does not speak to "whether judicial review will be available" in the long run, "but rather whether judicial review is available now." *Nat'l Mining Ass'n*, 758 F.3d at 253. And even if one assumes that HHS will eventually take the sort of enforcement action Plaintiffs fear, that doctrine counsels in favor of the Court withholding review until the agency consummates its decision-making and actually takes action with respect to the grantees.

No case Plaintiffs cite has found a document like the Policy Notice to be "final agency

action." *U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590, 593–94 (2016) ("approved jurisdictional determination" by agency as to whether particular parcel contains "waters of the United States" was final agency action); *Abbott Lab'ys*, 387 U.S. at 151 (regulation published in Federal Register after notice and comment was final agency action); *Frozen Food Exp. v. United States*, 351 U.S. 40, 41–42 (1956) (order to determine meaning of a statutory term entered after a public hearing was final agency action). *CropLife America v. EPA*, 329 F.3d 876 (D.C. Cir. 2003), on which Plaintiffs rely heavily, does not do so either. In fact, it underscores the differences between reviewable final agency action and unreviewable preparatory steps. In *CropLife*, the agency issued a press release that announced it would no longer consider certain studies in its regulatory decisionmaking that the agency had considered for many years. 329 F.3d at 876, 879–80. By contrast, HHS's action here is "a preliminary step . . . to enforcement" of the TPP Program statute that makes no determination that Plaintiffs' programs are out of compliance, and in no way cabins HHS's future enforcement discretion. *Ass'n of Irritated Residents v. EPA*, 494 F.3d 1027, 1034 (D.C. Cir. 2007).

In assessing finality, it is not relevant, as Plaintiffs allege, that the Policy Notice "imposes new requirements and does not simply reiterate Plaintiffs' pre-existing obligations." Pls.' MSJ at 14. To be sure, HHS strongly disagrees with this assertion: the agency seeks to enforce the terms and conditions of Plaintiffs' grant agreements, commitments they renewed when they signed their applications for continued funding. Even so, the Policy Notice is still a guidance document that "neither determine[s] rights or obligations nor occasion[s] legal consequences." *Ctr. For Auto Safety*, 452 F.3d at 807. Of course, once an agency "applies . . . policy guidelines in a particular situation, it must be prepared to support the policy," but APA review is not available until that day arrives. *Id.* For instance, in *Ctr. For Auto Safety*, plaintiffs challenged policy guidelines NHTSA had articulated in letters to manufacturers and trade associations regarding so-called "regional recalls." *Id.* at 800. The D.C. Circuit held that even though the guidance "reflect[s] the agency's views on the legality" of certain courses of action, that "does not change the character of the guidelines from a policy statement to a binding rule." *Id.* at 808. Likewise, in *National Mining*

Ass'n v. McCarthy, the D.C. Circuit did not entertain a challenge to "Final Guidance" provided by EPA that "recommend[ed] that States impose more stringent conditions for issuing permits," even though the agency conceded the guidance marked "the consummation of EPA's decisionmaking process" and it "signal[led] likely future permit denials by EPA," because the guidance on its own did not bind regulated parties. 758 F.3d at 246, 250–52. So too here. "If and when" HHS terminates funding for a TPP Program grantee for noncompliance with the terms and conditions of its grant, the grantee "at that time may challenge the [termination] as unlawful," but not before. *Id.* at 247.

The Policy Notice is intended to assist grantees in conforming to their grant obligations. It is neither "the consummation of the agency's decisionmaking process" as to whether they have, nor "a decision by which [their] 'rights or obligations have been determined' or from which 'legal consequences will flow.'" *Nat'l Mining Ass'n*, 758 F.3d at 250 (quoting *Bennett*, 520 U.S. at 177–78). As such, it does not meet the APA's requirements for final agency action, and the Court should dismiss this case for Plaintiffs failure to plead and prove the existence of such an action.

B. The Policy Notice Is Consistent With The TPP Program Statute

Plaintiffs advance three theories as to why the Policy Notice is purportedly inconsistent with "Congress's Directives for the TPP Program." Pls. MSJ 15–19. "Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024). And "[t]he starting point" for that analysis "is the language of the statute itself," with a focus on "the most natural reading of the statute." *Ardestani v. INS*, 502 U.S. 129, 135 (1991). If a term is "not defined in the statute … 'we give the term its ordinary meaning.'" *Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 85 (2018) (quoting *Taniguich v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 566 (1997)). The "modality" of giving terms "their ordinary usage, albeit with the commonsense understanding that meaning can only be ascribed to language when it is taken in context . . . is particularly apt when the meaning of an annual appropriations bill hangs in the balance," because the interpretation "presumptively appl[ies] only during the fiscal year to which the bill pertains." *Atl. Fish Spotters Ass'n v. Evans*, 321 F.3d 220, 224 (1st Cir. 2003). In making this assessment, courts may look to

past agency interpretations of a statute for assistance, but are not bound by them. *Loper Bright*, 603 U.S. at 402.

As explained below, the Policy Notice is not contrary to law, and the Court should dismiss Plaintiffs' claims based on a contrary to law theory for failure to state a claim. If the Court concludes this claim cannot be resolved absent the administrative record, it should deny Plaintiffs' motion for summary judgment as premature.

1. The Potential For Program Revisions Is Not Unlawful

Plaintiffs assert that the Policy Notice contravenes the TPP Program appropriation for "Tier 1" grants because "some grantees" may need to "revise their TPP Program curricula" to comply with the terms and conditions of their grants and the TPP Program statute. Pls.' MSJ 15–18. But it is common ground to the parties here that "replicate," in this context, does not mean "exact copy," and that revisions to programs previously shown to be effective are not in violation of the "replication" requirement for Tier 1 eligibility. *See, e.g.*, 2023 NOFO at 9 (describing permissible "adaptations" to programs). Indeed, Plaintiffs themselves proposed revisions to their programs when applying for their continuation awards. Cole Decl. ¶ 22; Stark Decl. ¶ 24; Tosh Decl. ¶ 37. And Plaintiffs have not carried their burden of showing that any "revisions" HHS may ultimately request are inconsistent with "replicating" the programs at issue. Past guidance by HHS on this topic (which was relied upon by Plaintiffs' expert) distinguished between the "core components" of a program—those that are "critical to a program's ability to produce outcomes"—and non-core components, and explained that while modifications to non-"core components" "might be allowable in many situations," adaptations to "core components" are "*probably* not permissible" and "*likely* considered a major adaptation." OASH, Off. of Population Affairs, *Core Components of Teen Pregnancy Prevention Programs* 3–4 (April 20, 2023) (emphasis added). Moreover, determining which parts of a program are "core," and which are not, can be a highly contextual exercise, and one that does not need to be grounded in empirical data about the program. *Id.* at 3

("core" determination could be based on "theory" or a "hypothes[is]").[3] Properly understood, "replication" does not categorically bar program changes, including changes to so-called "core component[s]" of programs.

At this stage, HHS has not initiated any proceedings to enforce the Policy Notice against Plaintiffs' programs, and Plaintiffs have not shown that HHS would require the sort of changes that would prevent Plaintiffs' programs from "replicating" a program previously demonstrated to have success at reducing teen pregnancy. But even if that were not the case, it would not mean HHS is necessarily violating the law. As the March 2025 guidance explains, grantees could choose to "select[] a different evidence-based program for implementation" if a program cannot be replicated consistent with the terms of their grants. Ex. B at 5. As such, the possible need for revisions is not contrary to the statute.

2. The Policy Notice Is Not Unlawful For Excluding Instruction Outside The TPP Program's Scope

Plaintiffs aver that the Policy Notice imposes an unlawful prohibition on instruction that "normalizes . . . sexual activity for minors." Pls.' MSJ 17–18. The prohibition is unlawful, in Plaintiffs' view, because it limits TPP Program funding to abstinence-only programs, which they believe are not "effective" in preventing teenage pregnancy. *Id.* For starters, this premise is incorrect. The TPP Program statute does not prohibit abstinence-only programs, and HHS has historically made those programs eligible for replication if they otherwise met the criteria for Tier I TPP Program funding. *See* Amy Feldman Farb & Amy L. Margolis, *Teen Pregnancy Prevention Program (2010-2015): Synthesis of Findings*, 106 AM. J. PUB. H. S9, at S9 (2016) (noting Tier I cohort included "abstinence education" programs). Even so, judging solely on the basis of the Policy Notice before HHS has taken any enforcement steps, there is no tension between the Policy

[3] Experts are not even unanimous as to how "replication" should be defined. Brian A. Nosek & Timothy M. Errington, *What is replication?*, PLOS Biology at 2 (Mar. 27, 2020) ("According to common understanding, replication is repeating a study's procedure and observing whether the prior finding recurs. This definition of replication is intuitive, easy to apply, and incorrect."), available at https://pmc.ncbi.nlm.nih.gov/articles/PMC7100931/pdf/pbio.3000691.pdf.

Notice and comprehensive sex education. The Policy Notice is more broadly concerned with "instruction outside the scope of the TPP Program" that "is not related to, or counter to the aim of, reducing teen pregnancy, such as content that encourages, normalizes, or promotes sexual activity for minors." Policy Notice at 4. There is no reason why educators could not instruct on pregnancy prevention, including contraceptive techniques, while also avoiding instruction that "encourages, normalizes, or promotes" sexual activity in the first place. *See, e.g.*, 2023 NOFO 12 ("The effects of healthy parent-child communication on sexual decision-making among youth is well-documented. Many adolescents believe it is easier to postpone sexual activity and avoid unintended pregnancy if they can have open and honest conversations about these topics with their parents[.]" (endnote omitted)).

3. The Policy Notice Does Not Impose Requirements That Are Medically Inaccurate

Plaintiffs allege that the Policy Notice is inconsistent with other requirements of the TPP Program Appropriation, such as the requirement that programs be "medically accurate." Pls.' MSJ at 18–19. The Policy Notice does not repudiate, but merely "clarifies," OASH's longstanding interpretation of "medically accurate." Policy Notice at 6. Plaintiffs only dispute one aspect of this clarifying definition: its statement that information is not "medically accurate" if it "denies the biological reality of sex or otherwise fails to distinguish appropriately between males and females." *Id.* Plaintiffs assert that this claim "erases the existence of intersex and transgender individuals and is contrary to widely available and accepted, and peer-reviewed scientific evidence." Pls.' MSJ at 18–19.

Plaintiffs have not shown there is an irreconcilable conflict between the idea that intersex and transgender individuals "exist," and the statements (1) that sex is a "biological reality" and (2) that there are distinctions between "males and females," such that the Policy Notice should be found unlawful for being "medically accurate." Not even the sources Plaintiffs cite go this far. For instance, the Pediatric Endocrine Society article Plaintiffs rely upon to advance this argument criticizes the definition of "female" and "male" in Executive Order 14168, but the Society's

extensive discussion of the "genetic," "gonadal," and "anatomic" factors underlying a person's "biological" sex is consistent with the idea that sex is a "biological reality," even if some individuals are born with an intersex condition or identify with a sex that is not aligned with these biological factors. Pediatric Endocrine Society, *The Biological Reality of Sex and Intersex* (Feb. 11, 2025). The concepts of intersex conditions and transgender individuals would themselves be incoherent if one could not "distinguish appropriately" between biological traits of males and females, as the Endocrine Society statement does. *Id.* ("[M]ost (but not all) of the time, people with a male biological sex have a penis and testes and do not have a uterus or a vagina."). As such, absent some specific enforcement action about content in Plaintiffs' programs, the Court should reject Plaintiffs' assertion that the Policy Notice is not "medically accurate."

Even if there is disagreement as to the Policy Notice's views on these issues, HHS is entitled to some degree of leeway in its determination of what is, and is not, "medically accurate" information. Plaintiffs claim a consensus in favor of their views on this topic, but "medical accuracy" is not solely a function of consensus, and it is a bedrock principle of administrative law that "[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989). Even post-*Chevron*, HHS is "authorized to exercise a degree of discretion" (the exercise of which could be reviewed through an arbitrary and capricious claim) in determining what views are "medically accurate." *Loper Bright*, 603 U.S. at 394–95. Nothing in the TPP Appropriation requires acceptance of Plaintiffs' view of the science on this issue, and as such, HHS has not acted contrary to law.

C. Plaintiffs' Arbitrary and Capricious Claim Fails

There is also no merit to Plaintiffs' assertions that the Policy Notice is arbitrary and capricious. Pls. MSJ 19–34. "[R]eview under [the arbitrary and capricious] standard is deferential," requiring a "court simply [to] ensure[] that the agency has acted within a zone of reasonableness and … reasonably considered the relevant issues and reasonably explained the

decision." *F.C.C. v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021). Agencies need not provide "detailed justifications for every change" they make. *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 250 (2012) ("*Fox II*"). Rather, "it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which [HHS's] conscious change of course adequately indicates." *Planned Parenthood of N.Y.C., Inc. v. U.S. Dep't of Health & Human Servs.*, 337 F. Supp. 3d 308, 342 (S.D.N.Y. 2018) (quoting *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("*Fox I*")).

As noted above, the Court has no authority to review non-final agency actions like the Policy Notice, and cannot undertake arbitrary and capricious review on a record that the Plaintiffs' assembled from their employees and an outside expert—as opposed to the record on which the agency's action was based. Those are grounds enough to deny summary judgment on this claim at this time. But even setting aside these threshold and procedural defects, HHS engaged in reasoned decision making in the Policy Notice.

1. The Policy Notice Is Not So Vague Or Ambiguous As To Be Arbitrary And Capricious

Plaintiffs first assert that the Policy Notice is "so vague that it is arbitrary and capricious." Pls.' MSJ 20–25. They argue that the Notice imposes a variety of "content mandates" of uncertain scope, and that Plaintiffs cannot discern what it means to "align" their programs with executive orders. The Policy Notice explains—consistent with the 2023 NOFO and the March 2025 guidance—that applicants are expected to be aware of recent policy developments contained in executive orders and Supreme Court decisions, and notes that "compliance with this PPN may require some grantees to revise their TPP Program curricula and content." Policy Notice 6. Issuing a policy statement about an agency's high-level policy objectives, followed by potential specific future enforcement decisions applying that general statement to concrete facts, is a routine way for agencies to go about making and implementing policy decisions, as the many cases discussed above in the context of final agency action attest. *See, e.g.*, *supra* at 12–13 (discussing *Nat'l Mining Ass'n* and *Ctr. For Auto. Safety*). Plaintiffs seek more explanation from the agency about its

guidance, but general policy guidance is not intended to speak to the specifics of dozens of programs. That is why, as explained above, the Court lacks jurisdiction over this case due to the absence of reviewable final agency action. It was reasonable for HHS to proceed first with a general guidance document before initiating an enforcement action that would identify any aspects of Plaintiffs' programs that are not in compliance with the terms and conditions of their grants.

Plaintiffs' specific concerns fare no better. They assert that the Policy Notice contains mandates that "lack clear standards," but ignore definitions within the Policy Notice itself. For instance, the Policy Notice relies on a definition of the term "discriminatory equity ideology" found in an executive order, and refers to the Supreme Court's *Mahmoud* decision for an explanation of the types of "ideological content" that the TPP Program statute does not authorize. Policy Notice at 4. Nor is the Policy Notice's focus on "age appropriate" material so vague as to be arbitrary and capricious. The guidance that teaching materials not include "obscene, indecent, or sexually explicit content" is no more or less vague than the original requirement that materials be "age appropriate." Moreover, the Policy Notice gives examples of the types of conduct that might be deemed to "promote[] sexual activity for minors." *Id.* at 5; *see also id.* at 3 (discussing this conduct in paragraph before "Definitions" header). Nowhere does the Policy Notice suggest that educators cannot discuss sexual activity and anatomy. Plaintiffs claim that HHS objected to definitions in prior NOFOs without explaining why, but the Policy Notice lists the questionable definitions and why they needed clarification in light of "the statutory language and Congressional intent of the TPP Program." *Id.* at 4.

Plaintiffs also fault HHS for not providing more specifics about what compliance with *Mahmoud v. Taylor* would entail, which was decided just days prior to the deadline for granting Plaintiffs' continuation awards. But the sort of opt outs from instruction that *Mahmoud* held to be constitutionally required in some circumstances are not unusual. Indeed, many TPP Program participants are likely already required by law to comply with such a rule as a matter of state law. *See, e.g.*, SIECUS, *Policy Brief Re. Sex Ed & Parental Consent* (last updated Sep. 2018), https://perma.cc/YX8N-VHQU (thirty-four states and the District of Columbia give parents a right

to opt out of sex education programs); *see also Mahmoud*, 145 S. Ct. at 2363 (giving examples of states that permit "broad opt outs from discrete aspects of the public school curriculum").

Plaintiffs next contend that the Policy Notice is vague as to what it means to "align" their programs with executive orders. Pls.' MSJ at 24-25. But this argument is semantic, not substantive. The term "align" is hardly obscure. In this context, it is meant in the ordinary sense of the term: grantees should "come into precise adjustment or correct relative position" with policies set forth in executive orders. Merriam-Webster, *Align*, https://perma.cc/32DJ-EUDH (last accessed September 10, 2025). Nor is this use of the term novel in the context of these grants. The 2023 NOFO frequently uses the terms "align" or "alignment" to describe the responsibilities of grantees. *See, e.g.*, 2023 NOFO 8, 10, 24–28, 36, 43. Any vagueness concerns are also ameliorated by the design of the TPP Program itself, which contemplates review and consultation on project adaptations. *Id.* at 17. Finally, the Policy Notice is not vague or ambiguous considering what it is: a guidance document directed to all TPP Program participants setting forth a general view on policy. And if HHS concludes that a grantee is not complying with a program requirement, HHS's procedures require it to provide appropriate written notice in conjunction with taking enforcement measures. The Policy Notice is not arbitrary and capricious on vagueness grounds.

2. The Policy Notice Does Not Consider Factors Congress Did Not Intend

Plaintiffs accuse HHS of introducing factors "not intended by Congress," such as "protect[ing] children from harmful ideologies," without explaining how those preferences advance the statute's goals. Pls.' MSJ at 25–27 (citation omitted). But HHS did explain that it views the funding of programs that dwell on these factors as beyond the mandate of the TPP Program itself, Policy Notice at 4, which is limited to funding "medically accurate and age appropriate programs that reduce teen pregnancy, behavioral risk factors underlying teenage pregnancy, or other associated risk factors." TPP Program Appropriation, 138 Stat. at 670–71. And that conclusion is not contrary to Congress's requirements that programs funded through this appropriation be "medically accurate," "age appropriate," and compliant with the specific requirements of the Tier I program, which seeks to fund replication studies. Nor has HHS, for the

reasons explained earlier, "short-circuited the tiered evidence approach" by insisting that sex is a "biological reality." Pls.' MSJ at 26 (citation omitted).

3. The Policy Notice Does Not Ignore Important Aspects Of The Problem

Plaintiffs also fault HHS for not considering various aspects of the "problem" prior to issuing the Policy Notice. *Id.* at 27. These claims lack merit.

First, Plaintiffs claim that HHS has failed to consider the need of sex educators to discuss sex with their students, suggesting that concerns about materials that are sexually "explicit" or that "normalize" teenage sexual activity are, in fact, attempts to ban such discussions. *Id.* (citation omitted). This assumes, without foundation, that there is no space between "obscene, indecent, or sexually explicit content" and "content that encourages, normalizes, or promotes sexual activity for minors," on the one hand, and the sort of "medically accurate" and "age appropriate" pregnancy prevention education materials that the TPP Program is designed to fund, on the other. The Policy Notice is not a prohibition on discussing sex.

Second, Plaintiffs fault HHS for not considering how a prior focus on "equity" and "inclusivity" may have helped reduce teen pregnancy. *Id.* The Policy Notice does not actually repudiate prior program definitions of "health equity" and "inclusivity"; it merely notes that these terms "should not be construed to exceed the statutory scope of the TPP program, as described above, or to permit unlawful diversity, equity, or inclusion-related discrimination." Policy Notice 5. No matter how effective something might be at achieving program goals, the agency cannot fund programs that are not compliant with the statute or that violate the terms and conditions of HHS's grants by running afoul of the Executive Branch's legitimate choices as to what types of programs should, and should not, be funded. *Cf. Alan Guttmacher Inst. v. McPherson*, 597 F. Supp. 1530, 1536 (S.D.N.Y. 1984) (although a funding statute's requirements might give court authority to reject "a project [that] was particularly inappropriate for funding," judicial review under the APA of the approval of specific projects funded by the government is unavailable when the statute does not "give courts any guidance in sorting among the many projects consistent with the goals stated"), *aff'd*, 805 F.2d 1088 (2d Cir. 1986).

Third, Plaintiffs aver that HHS has not "grapple[d] with Congress's directives governing the TPP Program." Pls.' MSJ at 28. To the contrary, an entire section of the Policy Notice is directed to nothing but the statutory scope of the TPP Program and a consideration of what types of content is, and is not, authorized by it. Policy Notice at 3–4. Plaintiffs use the "replication" requirement as an example of this, but as discussed above, a requirement to "replicate" (1) does not mean programs cannot be revised at all, and (2) does not force HHS to fund a program that cannot be replicated consistent with the lawful terms and conditions of Plaintiffs' grants.

Finally, Plaintiffs acknowledge that HHS considered the reliance interests of current program participants teaching programs that HHS approved for use in 2023, Policy Notice at 5–6, but claim Defendants did not do so in a proper way. Pls.' MSJ at 28–29. In harmony with the deferential arbitrary and capricious standard, agencies must "assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *Dep't of Homeland Sec'y v. Regents of the Univ. of Cal.*, 591 U.S. 1, 33 (2020). But agencies are not required to accede to reliance interests. They can conclude reliance is "unjustified," is "entitled to no or diminished weight" because it is based on "unlawful" actions, or is outweighed by other considerations. *Id.* at 31–32.

The Policy Notice is not necessarily the end of HHS's consideration of reliance interests. The agency could, in the context of an enforcement action, consider the reliance interests of specific grantees and adjust its enforcement approach to account for those interests. Plaintiffs' contention that the Policy Notice, as a facial matter, failed to adequately consider these interests should be rejected. HHS considered, and weighed, these interests, but concluded "the need to comply with the statutory requirements of the TPP Program, Presidential Executive Orders, and the U.S. Constitution outweighs such burdens," citing to the regulations governing Plaintiffs' grants that they agree to abide by when applying for funding. Policy Notice 6; HHS Grants Policy Statement 17. These claims are neither "novel" nor "unsupported," Pls.' MSJ at 29, and easily meet the APA's standard of reasoned deliberation.

4. The Policy Notice Does Not Run Counter To The Evidence

Next, Plaintiffs assert that the Policy Notice runs "counter to the evidence" because the agency's decisions ignore evidence (1) that "present programming has been proven effective at reducing teen pregnancy and plainly furthers Congress's statutory mandate," and (2) that the Policy Notice's statements on "medical[] accura[cy]" run "counter to widely available scientific evidence." Pls.' MSJ at 30–31. As to the first point, the Policy Notice nowhere takes a position on the effectiveness of programs that are currently available for replication in the TPP Program. Plaintiffs assume that HHS is repudiating "effective" interventions through its allegedly abstinence-only, anti-normalizing requirement, but as discussed, the Policy Notice does not impose an "abstinence-only requirement," and, in any event, the TPP Program has never excluded abstinence-only programs based on their approach to sex education if they are otherwise proven effective. As to the second, for the reasons described in section II.B.3, *supra*, Plaintiffs' outside-the-record sources do not establish that HHS has abused its discretion in clarifying the definition of the term "medically accurate."

5. HHS's Reasons For Issuing The Policy Notice Satisfy The APA

Plaintiffs allege that HHS violated the *Fox I* standard by not providing "good reasons" or "good cause" for the guidance outlined in the Policy Notice. Pls.' MSJ at 31–34. *Fox I* held that agencies "need not demonstrate to a court's satisfaction"—or to Plaintiffs, for that matter—"that the reasons for the new policy are *better* than the reasons for the old one." *Fox I*, 556 U.S. at 515. Rather, the Court ought to approach the question of whether an agency has given "good" reasons for changes as it approaches all questions under arbitrary and capricious review: with significant deference to the agency's ability to choose between policies that are available to it as a matter of law. Among the "good" reasons for changing policies are that "new administrations are entitled to reevaluate and modify agency practices, even longstanding ones." *People for the Ethical Treatment of Animals v. U.S. Dep't of Agric.*, 918 F.3d 151, 158 (D.C. Cir. 2019); *see also Motor Vehicles Ass'n of the U.S., Inc. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) ("A change in administration brought about by the people

casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs[.]").

So understood, Plaintiffs' arguments that HHS's reasons are not "good" lack merit. They are largely duplicative of Plaintiffs' other arbitrary and capricious arguments on topics like the "alignment" of TPP Program grants with executive orders, the clarification of prior program definitions, the choice to curtail programming that teaches various ideologies, the consideration of Plaintiffs' reliance on prior agency approval of their programs, and other issues. Two overarching themes pervade Plaintiffs' criticisms. First, Plaintiffs ignore that the Policy Notice did not completely repudiate prior program definitions and standards; rather, the definitions have been "clarified." Although any enforcement actions might bring conflicts between these clarifications and Plaintiffs' programs into focus, such conflict is not apparent from the Policy Notice on its face. Second, Plaintiffs, wherever possible, assume the most restrictive reading of the Policy Notice, such as their arguments that the Policy Notice forbids discussions of sex, or that policy norms critical of "gender ideology" would completely prohibit educators from discussing "gender" or "gender roles" in sex education classes. Pls.' MSJ at 34 (citations omitted). If any future HHS enforcement actions bear out those concerns, Plaintiffs can seek judicial review. But, in this facial challenge, the deferential standard of arbitrary and capricious review militates against a reading of the Policy Notice that presumes application in ways that Plaintiffs believe are illegal. *See VanDerStok*, 145 S. Ct. at 869 (regulation not found to be facially invalid where "at least some weapon parts kits satisf[ied]" both prongs of the regulation's text).

The Policy Notice is not a proper subject for judicial review because it is not a final agency action. But if the Court chooses to engage in such review, HHS has met the APA's standard of rationality. As such, it should deny Defendants' request for summary judgment.

D. Plaintiffs Are Unlikely to Prevail on Their Fifth Amendment Claim

Plaintiffs raise, in abbreviated form, the "void for vagueness" claim arising under the Fifth Amendment to the Constitution that they briefed more fulsomely at the preliminary injunction stage. Pls.' MSJ 34-36. As Defendants explained at the time, this claim fails for many reasons.

First, Plaintiffs have pled their constitutional claim as arising under the APA (as the APA contemplates), and like all APA claims, the Court cannot entertain the claim absent a final agency action. *See* 5 U.S.C. § 704; *id.* § 706(2)(b) (litigants may challenge actions "contrary to constitutional right, power, privilege, or immunity"). Second, the Fifth Amendment has historically been limited to claims about either statutes or so-called "primary conduct," and "courts have resisted" applying "due process principles to government contracts" outside "the employment context" due to the lack of a constitutionally protected property interest in the fulfillment of such contracts. *New Vision Photography Program, Inc. v. Dist. of Columbia*, 54 F. Supp. 3d 12, 29 (D.D.C. 2014); *see also id.* ("The Supreme Court 'has never held that government contracts for goods and services create property interests protected by due process.'" (citation omitted)); *Redondo-Borges v. U.S. Dep't of Hous. & Urb. Dev.*, 421 F.3d 1, 10 (1st Cir. 2005) ("We have held with a regularity bordering on the echolalic that a simple breach of contract does not amount to an unconstitutional deprivation of property."). The Due Process Clause has little, if any, application "when the Government is acting as patron rather than as sovereign," where the effects "of imprecision are not constitutionally severe." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 589 (1998). Third, even if a "void for vagueness" claim could be brought in this context, the Policy Notice passes constitutional muster for all of the reasons given above as to why the Policy Notice is not arbitrary and capricious. Accordingly, the Court should dismiss Plaintiffs' Fifth Amendment count for failure to state a claim.

E. Plaintiffs Are Unlikely to Prevail on their Ultra Vires Claim

Ultra vires review is "a doctrine of last resort," *Schroer v. Billington*, 525 F. Supp. 2d 58, 65 (D.D.C. 2007), and the equivalent of "a Hail Mary pass—and in court as in football, the attempt rarely succeeds," *Nyunt v. Chairman, Broad. Bd. of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009). More specifically, ultra vires review of agency action is only available when an agency's error is "patently a misconstruction of [statute;]" "when the agency has disregarded a specific and unambiguous statutory directive[;]" or "when the agency has violated some specific command of a statute." *Griffith v. Fed. Lab. Rels. Auth.*, 842 F.2d 487, 493 (D.C. Cir. 1988) (citations omitted).

"Garden-variety errors of law or fact are not enough." *Id.*

Providing guidance to grant recipients that they should align their programs with executive orders—particularly when grantees applied for and accepted funds in the first place with the understanding that such compliance was required—is hardly the type of fundamental error that justifies ultra vires review. Plaintiffs fail to point to anything "specific and unambiguous" in Congress's appropriation of funds for the TPP program that prohibits the Policy Notice, because none exists; therefore Plaintiffs' ultra vires claim fails.

Plaintiffs' ultra vires claim faces another insurmountable hurdle. Both the Supreme Court and D.C. Circuit have made clear that an ultra vires claim is unavailable where an alternative remedial forum exists in which a plaintiff may pursue the challenge. *See Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 43 (1991) (non-statutory review is available only when a party would be "wholly deprive[d] . . . of a meaningful and adequate means of vindicating its statutory rights"); *Lepre v. Dep't of Lab.*, 275 F.3d 59, 72 (D.C. Cir. 2001) (a "critical" requirement for ultra vires review is "the lack of any alternative means of judicial review for the plaintiffs"); *see also Nyunt*, 589 F.3d at 449. If HHS ultimately takes enforcement action against Plaintiffs' programs, they may pursue relief at that time. The potential for review after a decision to terminate funding thus provides a plausible alternate avenue for Plaintiffs to pursue relief. The Court should therefore dismiss Plaintiffs' ultra vires claim.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion for summary judgment; grant Defendants' cross-motion to dismiss, and enter judgment in favor of Defendants.

Dated: September 10, 2025

Respectfully submitted,

BRETT A. SHUMATE
Assistant Attorney General
Civil Division

MICHELLE R. BENNETT
Assistant Director, Federal Programs Branch

/s/ Michael J. Gerardi
MICHAEL J. GERARDI
(D.C. Bar No. 1017949)
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Michael.J.Gerardi@usdoj.gov

Counsel for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PLANNED PARENTHOOD OF GREATER NEW YORK, *et al.*,

Plaintiffs,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Defendants.

Case No. 1:25-cv-02453-BAH

DECLARATION OF MICHAEL J. GERARDI

I, Michael J. Gerardi, declare as follows:

1. I am a Senior Trial Counsel in the Civil Division of the Department of Justice.
2. Attached as Exhibit 1 to this declaration is a true and correct copy of form SF-424B. Signed versions of this form submitted by Plaintiffs with their 2023 TPP Program grant applications are part of the certified administrative record in this case.
3. Attached as Exhibit 2 to this declaration is a true and correct copy of an e-mail exchange between counsel of record in this case regarding the summary judgment briefing procedures and schedule, dated August 7 – 8, 2025.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States that the foregoing declaration as is true and correct to the best of my knowledge, information, and belief.

Executed on September 10, 2025, in Washington, D.C.

/s/Michael J. Gerardi
Michael J. Gerardi

EXHIBIT 1

OMB Number: 4040-0007
Expiration Date: 07/31/2028

ASSURANCES - NON-CONSTRUCTION PROGRAMS

NOTE: Certain of these assurances may not be applicable to your project or program. If you have questions, please contact the awarding agency. Further, certain Federal awarding agencies may require applicants to certify to additional assurances. If such is the case, you will be notified.

As the duly authorized representative of the applicant, I certify that the applicant:

1. Has the legal authority to apply for Federal assistance and the institutional, managerial and financial capability (including funds sufficient to pay the non-Federal share of project cost) to ensure proper planning, management and completion of the project described in this application.

2. Will give the awarding agency, the Comptroller General of the United States and, if appropriate, the State, through any authorized representative, access to and the right to examine all records, books, papers, or documents related to the award; and will establish a proper accounting system in accordance with generally accepted accounting standards or agency directives.

3. Will establish safeguards to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of personal or organizational conflict of interest, or personal gain.

4. Will initiate and complete the work within the applicable time frame after receipt of approval of the awarding agency.

5. Will comply with the Intergovernmental Personnel Act of 1970 (42 U.S.C. §§4728-4763) relating to prescribed standards for merit systems for programs funded under one of the 19 statutes or regulations specified in Appendix A of OPM's Standards for a Merit System of Personnel Administration (5 C.F.R. 900, Subpart F).

6. Will comply with all Federal statutes relating to nondiscrimination. These include but are not limited to: (a) Title VI of the Civil Rights Act of 1964 (P.L. 88-352) which prohibits discrimination on the basis of race, color or national origin; (b) Title IX of the Education Amendments of 1972, as amended (20 U.S.C.§§1681-1683, and 1685-1686), which prohibits discrimination on the basis of sex; (c) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. §794), which prohibits discrimination on the basis of handicaps; (d) the Age Discrimination Act of 1975, as amended (42 U. S.C. §§6101-6107), which prohibits discrimination on the basis of age; (e) the Drug Abuse Office and Treatment Act of 1972 (P.L. 92-255), as amended, relating to nondiscrimination on the basis of drug abuse; (f) the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (P.L. 91-616), as amended, relating to nondiscrimination on the basis of alcohol abuse or alcoholism; (g) §§523 and 527 of the Public Health Service Act of 1912 (42 U.S.C. §§290 dd-3 and 290 ee- 3), as amended, relating to confidentiality of alcohol and drug abuse patient records; (h) Title VIII of the Civil Rights Act of 1968 (42 U.S.C. §§3601 et seq.), as amended, relating to nondiscrimination in the sale, rental or financing of housing; (i) any other nondiscrimination provisions in the specific statute(s) under which application for Federal assistance is being made; and, (j) the requirements of any other nondiscrimination statute(s) which may apply to the application.

7. Will comply, or has already complied, with the requirements of Titles II and III of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91-646) which provide for fair and equitable treatment of persons displaced or whose property is acquired as a result of Federal or federally-assisted programs. These requirements apply to all interests in real property acquired for project purposes regardless of Federal participation in purchases.

8. Will comply, as applicable, with provisions of the Hatch Act (5 U.S.C. §§1501-1508 and 7324-7328) which limit the political activities of employees whose principal employment activities are funded in whole or in part with Federal funds.

9. Will comply, as applicable, with the provisions of the Davis-Bacon Act (40 U.S.C. §§276a to 276a-7), the Copeland Act (40 U.S.C. §276c and 18 U.S.C. §874), and the Contract Work Hours and Safety Standards Act (40 U.S.C. §§327-333), regarding labor standards for federally-assisted construction subagreements.

10. Will comply, if applicable, with flood insurance purchase requirements of Section 102(a) of the Flood Disaster Protection Act of 1973 (P.L. 93-234) which requires recipients in a special flood hazard area to participate in the program and to purchase flood insurance if the total cost of insurable construction and acquisition is $10,000 or more.

11. Will comply with environmental standards which may be prescribed pursuant to the following: (a) institution of environmental quality control measures under the National Environmental Policy Act of 1969 (P.L. 91-190) and Executive Order (EO) 11514; (b) notification of violating facilities pursuant to EO 11738; (c) protection of wetlands pursuant to EO 11990; (d) evaluation of flood hazards in floodplains in accordance with EO 11988; (e) assurance of project consistency with the approved State management program developed under the Coastal Zone Management Act of 1972 (16 U.S.C. §§1451 et seq.); (f) conformity of Federal actions to State (Clean Air) Implementation Plans under Section 176(c) of the Clean Air Act of 1955, as amended (42 U.S.C. §§7401 et seq.); (g) protection of underground sources of drinking water under the Safe Drinking Water Act of 1974, as amended (P.L. 93-523); and, (h) protection of endangered species under the Endangered Species Act of 1973, as amended (P.L. 93-205).

12. Will comply with the Wild and Scenic Rivers Act of 1968 (16 U.S.C. §§1271 et seq.) related to protecting components or potential components of the national wild and scenic rivers system.

13. Will assist the awarding agency in assuring compliance with Section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. §470), EO 11593 (identification and protection of historic properties), and the Archaeological and Historic Preservation Act of 1974 (16 U.S.C. §§469a-1 et seq.).

14. Will comply with P.L. 93-348 regarding the protection of human subjects involved in research, development, and related activities supported by this award of assistance.

15. Will comply with the Laboratory Animal Welfare Act of 1966 (P.L. 89-544, as amended, 7 U.S.C. §§2131 et seq.) pertaining to the care, handling, and treatment of warm blooded animals held for research, teaching, or other activities supported by this award of assistance.

16. Will comply with the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. §§4801 et seq.) which prohibits the use of lead-based paint in construction or rehabilitation of residence structures.

17. Will cause to be performed the required financial and compliance audits in accordance with the Single Audit Act Amendments of 1996 and OMB Circular No. A-133, "Audits of States, Local Governments, and Non-Profit Organizations."

18. Will comply with all applicable requirements of all other Federal laws, executive orders, regulations, and policies governing this program.

19. Will comply with the requirements of Section 106(g) of the Trafficking Victims Protection Act (TVPA) of 2000, as amended (22 U.S.C. 7104) which prohibits grant award recipients or a sub-recipient from (1) Engaging in severe forms of trafficking in persons during the period of time that the award is in effect (2) Procuring a commercial sex act during the period of time that the award is in effect or (3) Using forced labor in the performance of the award or subawards under the award.

SIGNATURE OF AUTHORIZED CERTIFYING OFFICIAL	TITLE
APPLICANT ORGANIZATION	DATE SUBMITTED

Standard Form 424B (Rev. 7-97) Back

EXHIBIT 2

From: Devany, Bonnie
To: Gerardi, Michael J. (CIV)
Cc: Bennett, Michelle (CIV); Tutt, Andrew; Nestler, Emily; valentina.defex@ppfa.org; Melissa Shube; Hoover, Jack; Yablon, Daniel
Subject: [EXTERNAL] RE: PPGNY v. HHS next steps
Date: Friday, August 8, 2025 4:41:45 PM
Attachments: image001.png

Hi Michael,

Thank you for sharing your position. I am working with our clients to see if we can accommodate your upcoming vacation plans, so we likely won't file anything until Monday. We will nevertheless note with the Court that Defendants oppose our motion.

To clarify, no, we do not anticipate two rounds of summary judgment briefing.

Lastly, if Defendants move under Local Rule 40.5(c)(3), please note our position in your motion as follows:

Plaintiffs oppose this motion insofar as it is precluded by Local Rule 40.5(c)(3), which, as noted in the comment, "eliminated the provision . . . that permitted a party to appeal to the Calendar and Case Management Committee an individual judge's decision with respect to whether cases are related because the Court does not believe it is appropriate for a party to be able to seek review of a decision of one judge of this Court by three of that judge's co-equal colleagues."

Thanks so much and enjoy your weekend,

Bonnie

Bonnie Devany* (she/her)

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Bonnie.Devany@arnoldporter.com
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*Admitted only in Texas; practicing law in the District of Columbia during the pendency of her application for admission to the D.C. Bar and under the supervision of lawyers in the firm who are members in good standing of the D.C. Bar.

From: Gerardi, Michael J. (CIV) <Michael.J.Gerardi@usdoj.gov>
Sent: Friday, August 8, 2025 2:08 PM

To: Devany, Bonnie <Bonnie.Devany@arnoldporter.com>
Cc: Bennett, Michelle (CIV) <Michelle.Bennett@usdoj.gov>; Tutt, Andrew <Andrew.Tutt@arnoldporter.com>; Nestler, Emily <emily.nestler@ppfa.org>; zzz.External.valentina.defex@ppfa.org <valentina.defex@ppfa.org>; Melissa Shube <melissa.shube@ppfa.org>; Hoover, Jack <Jack.Hoover@arnoldporter.com>; Yablon, Daniel <Daniel.Yablon@arnoldporter.com>
Subject: RE: PPGNY v. HHS next steps

External E-mail

Bonnie, thanks for your e-mail and for giving us time to confer about your request. We will oppose a motion to the Court to request this schedule. Because the point of this is to effectively confer about these issues, I want to lay out our reasons for opposition.

First, we don't agree that there is a need to deviate from the normal procedures for litigating an APA case now that your clients have had two opportunities to move for emergency relief related to the third-year non-competitive grants in the TPP Program. In particular, because (as the Court noted at the TRO hearing) there are serious concerns about whether your complaint alleges a final agency action, it doesn't make sense to do summary judgment before such threshold issues can be aired in a motion to dismiss. It also appears your proposal contemplates two rounds of summary judgment briefing (an initial round, and then a second round based on submission of the administrative record after the first motion is resolved). If I've misunderstood what you intend, please correct me, but we should not do summary judgment before an administrative record is lodged.

Second, although I appreciate the schedule gives us two weeks to respond, the timeline straddles Labor Day weekend, which will likely conflict with leave schedules in DOJ and HHS. In particular, I am on leave the week of September 1 and the opposition deadline falls in the middle of that leave. I see no reason why this schedule could not be pushed out two weeks so that the briefing period doesn't straddle Labor Day, assuming the Court agrees this procedure is warranted.

Finally, Defendants intend to move, pursuant to Local Rule 40.5(c)(2), for referral of this case to the Calendar and Case Management Committee for such action as it deems appropriate. We assume you'll oppose, but please confirm that's correct.

MJG

From: Devany, Bonnie <Bonnie.Devany@arnoldporter.com>
Sent: Friday, August 8, 2025 9:39 AM
To: Gerardi, Michael J. (CIV) <Michael.J.Gerardi@usdoj.gov>
Cc: Bennett, Michelle (CIV) <Michelle.Bennett@usdoj.gov>; Tutt, Andrew <Andrew.Tutt@arnoldporter.com>; Nestler, Emily <emily.nestler@ppfa.org>; valentina.defex@ppfa.org; Melissa Shube <melissa.shube@ppfa.org>; Hoover, Jack <Jack.Hoover@arnoldporter.com>; Yablon, Daniel <Daniel.Yablon@arnoldporter.com>
Subject: [EXTERNAL] Re: PPGNY v. HHS next steps

Hi Michael,

I completely understand. Please let me know what time you think you can get back to us.

Many thanks,

Bonnie

From: Gerardi, Michael J. (CIV) <Michael.J.Gerardi@usdoj.gov>
Sent: Friday, August 8, 2025 9:11:36 AM
To: Devany, Bonnie <Bonnie.Devany@arnoldporter.com>
Cc: Bennett, Michelle (CIV) <Michelle.Bennett@usdoj.gov>; Tutt, Andrew <Andrew.Tutt@arnoldporter.com>; Nestler, Emily <emily.nestler@ppfa.org>; zzz.External.valentina.defex@ppfa.org <valentina.defex@ppfa.org>; Melissa Shube <melissa.shube@ppfa.org>; Hoover, Jack <Jack.Hoover@arnoldporter.com>; Yablon, Daniel <Daniel.Yablon@arnoldporter.com>
Subject: Re: PPGNY v. HHS next steps

External E-mail

Hi Bonnie,

Acknowledging receipt of this. I was traveling home from a work trip to California yesterday and did not arrive back home until around 2 AM yesterday. Consequently, I need a little more time than 11 AM to respond to your proposal. But I will get back to you today.

Get Outlook for iOS

From: Devany, Bonnie <Bonnie.Devany@arnoldporter.com>
Sent: Thursday, August 7, 2025 4:43:58 PM
To: Gerardi, Michael J. (CIV) <Michael.J.Gerardi@usdoj.gov>
Cc: Bennett, Michelle (CIV) <Michelle.Bennett@usdoj.gov>; Tutt, Andrew <Andrew.Tutt@arnoldporter.com>; Nestler, Emily <emily.nestler@ppfa.org>; valentina.defex@ppfa.org <valentina.defex@ppfa.org>; Melissa Shube <melissa.shube@ppfa.org>; Hoover, Jack <Jack.Hoover@arnoldporter.com>; Yablon, Daniel <Daniel.Yablon@arnoldporter.com>
Subject: [EXTERNAL] RE: PPGNY v. HHS next steps

Hi Michael,

Apologies, I just realized September 1 is Labor Day. Below is a revised proposed schedule accounting for the holiday:

August 18 – Plaintiffs to file Motion for Summary Judgment
September 3 – Defendants to file opposition

September 9 – Plaintiffs to file Reply

Bonnie Devany* (she/her)

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*Admitted only in Texas; practicing law in the District of Columbia during the pendency of her application for admission to the D.C. Bar and under the supervision of lawyers in the firm who are members in good standing of the D.C. Bar.

From: Devany, Bonnie
Sent: Thursday, August 7, 2025 4:09 PM
To: Gerardi, Michael J. (CIV) <michael.j.gerardi@usdoj.gov>
Cc: Bennett, Michelle (CIV) <michelle.bennett@usdoj.gov>; Tutt, Andrew <Andrew.Tutt@arnoldporter.com>; Nestler, Emily <emily.nestler@ppfa.org>; zzz.External.valentina.defex@ppfa.org <valentina.defex@ppfa.org>; Melissa Shube <melissa.shube@ppfa.org>; Hoover, Jack <Jack.Hoover@arnoldporter.com>; Yablon, Daniel <Daniel.Yablon@arnoldporter.com>
Subject: PPGNY v. HHS next steps

Hi Michael,
I hope you're well. Given the exigencies of this case, I wanted to reach out about scheduling as soon as possible. Below is the proposed schedule Plaintiffs plan to file tomorrow with the Court. Can you please let us know by 11:00 am tomorrow whether the government opposes?

August 18 – Plaintiffs to file Motion for Summary Judgment
September 1 – Defendants to file opposition
September 8 – Plaintiffs to file Reply

If the case is not resolved on this summary judgment briefing schedule, we'll request that the government provide the administrative record 30 days after the resolution of Plaintiffs' Motion for Summary Judgment.

Thanks so much,
Bonnie

Bonnie Devany* (she/her)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PLANNED PARENTHOOD OF GREATER NEW YORK, *et al.*,

Plaintiffs,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Defendants.

Case No. 1:25-cv-02453-BAH

DECLARATION OF ERIC WEST

I, Eric West, declare as follows:

1. I am the Acting Chief Grants Management Officer for the Office of the Assistant Secretary for Health ("OASH"). I oversee the day-to-day operations related to grantmaking for OASH. This includes grants management; supervising Grants Management Specialists; financial oversight of several large grant programs; issuing Notices of Awards; and monitoring drawdowns. I have served in that capacity since April 2025. I have been employed in grants management with OASH since 1999. My duties in this role include financial oversight over the Teen Pregnancy Prevention Program ("TPP Program").
2. Processing continuation funding for TPP grantees takes a minimum of four weeks and all funds must be awarded by the close of the fiscal year, September 30, 2025.
3. The amount of continuation funding possible for each plaintiff based on their previous year's grant award is as follows: $1,091,185 for Planned Parenthood of Greater New

York; $773,619 for Planned Parenthood of the Heartland, Inc.; and $798,636 for Planned Parenthood California Central Coast.

4. OASH uses a system, Payment Management System ("PMS"), which centralizes payment for grants. Once HHS obligates funds, those funds are transferred into PMS to be used by grantees. PMS permits OASH to monitor grantee drawdowns.
5. As part of my regular duties, I oversee staff who regularly monitor PMS and can prepare reports for review.
6. On September 10, 2025, I reviewed and confirmed PMS reports for the plaintiffs in the above-captioned lawsuit.
7. Planned Parenthood of Greater New York was awarded their continuation funding on July 2, 2025. To date, they have made four draw downs on their award. On July 2, 2025, PPGNY made two withdrawals of $203,381.09 each. Also on July 2, 2025, they repaid two payments of $203,381.09, resulting in a net drawdown of zero for that day. PPGNY then withdrew $102,020.51 on August 15, 2025, and $159,550.53 on August 26, 2025.
8. Planned Parenthood of Central California Coast was awarded their continuation funding on July 2, 2025. To date, they have made one draw down on their award. They withdrew $2,183.00 on July 28, 2025.
9. Planned Parenthood of the Heartland, Inc. has not made any draw downs on their award.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States that the foregoing declaration as is true and correct to the best of my knowledge, information, and belief.

Executed on September__10__, 2025, in Rockville, MD

Eric West
Acting Chief Grants Management Officer
Office of the Assistant Secretary for Health

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PLANNED PARENTHOOD OF GREATER NEW YORK, *et al.*,

Plaintiffs,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Defendants.

Case No. 1:25-cv-02453-BAH

[PROPOSED] ORDER

Before the Court is Plaintiffs' Motion for Summary Judgment, ECF No. 22, and Defendants' Cross-Motion to Dismiss, ECF No. 24. Having considered the memoranda filed in support and opposition to these motions, as well as all supporting materials filed on the docket in this matter and any oral argument of the parties, the Court hereby orders that Plaintiffs' motion for summary judgment is **DENIED**; that Defendants' cross-motion to dismiss is **GRANTED**; and that this civil action is hereby **DISMISSED**, with prejudice.

SO ORDERED.

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BERYL A. HOWELL
United States District Judge