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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

MULTNOMAH COUNTY, an existing county government and a body politic and corporate,

Plaintiff,

v.

ALEX M. AZAR II, in his official capacity as Secretary, U.S. Department of Health and Human Services; VALERIE HUBER, in her official capacity as the Senior Policy Advisor for the Office of the Assistant Secretary for Health; and U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants.

Civil No. 3:18-cv-01015-HZ

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND PARTIAL SUMMARY JUDGMENT

Request for Oral Argument

Expedited Hearing Requested

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LOCAL RULE 7-1 CERTIFICATION

Pursuant to District of Oregon Local Rule 7-1, Plaintiff Multnomah County certifies that its counsel has conferred in good faith with Defendants in an effort to resolve the issues raised by this motion, but the parties have been unable to do so. During that conference and in subsequent correspondence, the parties discussed this motion and Plaintiff's request for an expedited hearing. The parties have filed a stipulated motion with a proposed briefing schedule and a request that argument be scheduled to allow the Court sufficient time to issue a decision by August 31, 2018.

MOTION

Plaintiff respectfully moves for a preliminary injunction to prevent Defendants from implementing the 2018 Tier 1 Funding Opportunity Announcement pending adjudication of this case on its merits, and for partial summary judgment on Counts One, Two, and Four of the First Amended Complaint. This motion is supported by the following memorandum and the declarations of Jeffrey Dubner, Veronica Leonard, Lisa Saunders, and Kim Toevs.

SUPPORTING MEMORANDUM

INTRODUCTION

In 2009, Congress created the Teen Pregnancy Prevention Program ("TPPP" or the "Program") to address rising teen pregnancy rates. Because past efforts were not always supported by evidence—and, in fact, were sometimes counterproductive—Congress chose to fund only "medically accurate and age appropriate programs that reduce teen pregnancy" through TPPP. Recognizing that there was a wide body of scientific literature regarding effective programs, Congress explicitly committed the majority of its appropriation to "replicating programs that have been proven effective through rigorous evaluation to reduce teenage pregnancy, behavioral risk factors underlying teenage pregnancy, or other associated risk factors." The first eight years of the Program have been an unparalleled success, touted by Defendant U.S. Department of Health and Human Services ("HHS") and Congress's bipartisan Commission on Evidence-Based Policymaking, and bringing significant positive results for grantees like Plaintiff Multnomah County (the "County") that have replicated programs in furtherance of Congress's objective.

But in the view of the political appointees currently overseeing the Program, "evidence based programs" are a "[m]yth" and TPPP is a "sham" that "should be ended." To that end, in 2017, the Administration's budget proposed that the Program be defunded, but Congress rejected that suggestion and chose to reauthorize and appropriate funds for 2018. Having failed to persuade Congress, Defendants now unlawfully seek to end TPPP on their own. Last year, Defendants terminated all 81 ongoing TPPP grants, an effort that all four courts to consider the issue have held unlawful. In April, the day after courts began vacating those terminations, Defendants issued new Funding Opportunity Announcements ("FOAs") that purported to continue TPPP on terms that dramatically contradict Congress's

unambiguous directive. Despite Congress's command that three-quarters of the funding go to "replicating programs that have been proven effective through rigorous evaluation," Defendants have designated *all* available funds for programs that have never undergone—or may have even failed—the rigorous evaluation that Congress required.

This case challenges this latest effort, which violates the Administrative Procedure Act ("APA") in several respects. The new criteria in the 2018 Tier 1 Funding Opportunity Announcement, *see* Ex. 1 ("2018 Tier 1 FOA" or "new FOA"), contradict Congress's directives and transfer funds to other appropriations at the expense of the Program, violating TPPP's authorizing appropriation and the Purpose Statute, 31 U.S.C. § 1301. The new FOA also violates the Appropriations Clause, U.S. Const., art. I, § 9, cl. 7, by unconstitutionally intruding on Congress's exclusive power to decide how federal funds will be spent.

In addition to these statutory and constitutional flaws, the new FOA is arbitrary, capricious, an abuse of HHS's discretion, and an *ultra vires* action beyond Defendants' authority. It reverses HHS's prior practice without explanation, relies on factors Congress did not intend HHS to consider, ignores important aspects of the problem Congress set out to address, is incompatible with the evidence before the agency, and is the product of Defendants' prejudgment and unalterably closed mind.

For all these reasons, the new FOA is unlawful and HHS must be enjoined from using it to select grantees and award funding. HHS has agreed not to award any funds under the new FOA until September 1, 2018, but after that date HHS may disburse funds at any time—at which point it will be impossible to award a full remedy to the County, leaving it irreparably injured for this and other reasons. Accordingly, the County respectfully requests that the Court preliminarily enjoin implementation of the 2018 Tier 1 FOA pending

adjudication of the County's claims, or proceed directly to the merits and grant partial summary judgment to the County.

FACTUAL BACKGROUND

This case concerns the legality of the 2018 Tier 1 FOA. To understand the full context for that FOA, it is necessary to briefly recount TPPP's history and Defendants' attempts to eliminate the Program prior to their issuance of the new FOA.

I. Congress Creates the Teen Pregnancy Prevention Program

From the 1980s through 2009, federal funding for sexual education was largely restricted to programs that taught that abstinence from all sexual activity outside of marriage is "the expected standard for all school age children" and that any "sexual activity outside of the context of marriage is likely to have harmful psychological and physical effects." *E.g.*, 42 U.S.C. § 710. Congress did not require that HHS review the evidence of such programs' efficacy when disbursing funds.

In 2009, Congress defunded two programs awarding competitive abstinence-only grants and created the Teen Pregnancy Prevention Program in their place to "fund medically accurate and age appropriate programs that reduce teen pregnancy." Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034, 3253 (2009) ("2010 CAA"). Congress appropriated $110 million for the first year of the Program, mandating that "not less than $75,000,000" "shall be for replicating programs that have been proven effective through rigorous evaluation to reduce teenage pregnancy, behavioral risk factors underlying teenage pregnancy, or other associated risk factors," and that "not less than $25,000,000 shall be available for research and demonstration grants to develop, replicate, refine, and test additional models and innovative strategies for preventing teenage pregnancy." *Id.* Congress required any remaining amount "be available for training and technical assistance, evaluation,

outreach, and additional program support activities." *Id.* Simultaneously, Congress appropriated funds for the Office of Adolescent Health ("OAH") within the Office of the Assistant Secretary for Health at HHS, which would oversee TPPP. *Id.*; H.R. Rep. No. 111-366, at 1043 (2009) (Conf. Rep.).

Since 2010, Congress has appropriated between $100 and $110 million each year for the TPPP, maintaining the same 75/25 split between "replicating programs that have been proven effective through rigorous evaluation" and "research and demonstration grants." Most recently, despite a Presidential request to eliminate TPPP (discussed below), Congress continued the Program in identical form for fiscal year 2018, appropriating $101 million and requiring that not more than 10 percent go to "training and technical assistance, evaluation, outreach, and additional program support activities," with 75 percent of the remaining balance going to "replicating programs that have been proven effective through rigorous evaluation" and 25 percent going to "research and demonstration grants." Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348, 733 (2018) ("2018 CAA").

Since 2012, Congress has also funded a separate, smaller appropriation for competitive abstinence-only grants. This program, originally named the "Competitive Abstinence Education Grant Program" and later renamed the "Sexual Risk Avoidance Education Program" ("SRAEP"), currently provides $25 million in funding "for making competitive grants which exclusively implement education in sexual risk avoidance (defined as voluntarily refraining from non-marital sexual activity)." 2018 CAA, 132 Stat. at 733.

II. 2010–2016: HHS Implements TPPP Within Statutory Requirements

A. The 2010–2015 Grant Cycle

In 2010, in preparation for carrying out Congress's command to fund the "replicat[ion] [of] programs that have been proven effective through rigorous evaluation,"

2010 CAA, 123 Stat. at 690, HHS contracted with Mathematica Policy Research to undertake an independent, systematic review of the existing research literature on teen pregnancy prevention initiatives, called the "TPP Evidence Review." HHS asked Mathematica to identify programs that had documented positive effects concerning teen pregnancy prevention, sexual transmitted infections ("STIs"), and other associated sexual risk behaviors. Mathematica identified 28 such programs. *See* Ex. 2 at 12. These programs spanned a variety of approaches, including both abstinence education programs and comprehensive sexual health education, as well as youth development programs and programs for delivery in clinical settings and for special populations. *Id.* at 19.

OAH issued two FOAs in April 2010, inviting applications for five-year "Tier 1" and "Tier 2" grants. As required by Congress's appropriation, Tier 1 grants provided $75,000,000 "for the purpose of replicating evidence-based programs that have been proven through rigorous evaluation to reduce teenage pregnancy, behavioral risks underlying teenage pregnancy, or other associated risk factors." Ex. 3 at 3. Further keeping with the appropriation, Tier 2 grants provided $25,000,000 "for research and demonstration grants to develop, replicate, refine, and test additional model[s] and innovative strategies for preventing teenage pregnancy." Ex. 4 at 3.

As relevant here, the 2010 Tier 1 FOA tracked the appropriations language, explaining that funding could "only be provided to applicants who seek to replicate evidence-based programs that have been shown to reduce teenage pregnancy, behavioral risk factors underlying teenage pregnancy, or other associated risk factors." Ex. 3 at 3-4. It defined "[e]vidence-based program models" to mean "[p]rogram models for which systematic empirical research or evaluation has provided evidence of effectiveness." *Id.* at 44. Applicants could replicate programs that were identified by Mathematica's "independent,

systematic review of the evidence base" as effective, or replicate other program models if they met "a set of stringent criteria," including that Mathematica review such applications under the "same evidence review criteria" as in its previous independent review. *Id.* at 6-7.

Both FOAs contained numerical review criteria by which applications would be scored. Ex. 3 at 29-32; Ex. 4 at 29-31. Neither FOA awarded any points based on the specific content of the program, much less its ideology. Both FOAs provided that final award decisions will be made by the Director of the Office of Adolescent Health, either solely or in collaboration with the Commissioner of Administration on Children, Youth and Families. Ex. 3 at 32; *see* Ex. 4 at 31.

In this first grant cycle, OAH funded 102 grantees, primarily with five-year project periods running until 2015. The funded programs served half a million young people in 39 states and the District of Columbia, trained 6,100 facilitators, and created 3,800 community partnerships. Ex. 5 at 1-2. Over the life of the grants, "the pace of progress in reducing teen pregnancy and teen parenthood … accelerated." *Id.* at 2. From 2010 to 2015, "the teen birth rate in the U.S. declined 29%," *id.*—nearly as much as it did over the entire 15 years from 1991 to 2006, *see* H.R. Rep. 111-220, at 12 (2009). Both HHS and the bipartisan Commission on Evidence-Based Policymaking have touted the program as a leading example of evidence-based policymaking. *See*, *e.g.*, Ex. 6 at 4 (describing the Program's "increasingly rigorous portfolio[] of evidence"); Ex. 7 at 5 (finding that "[t]he number of evaluations demonstrating statistically significant positive impacts on behavioral outcomes represents a larger proportion than found in large evaluation efforts from other fields").

B. The 2015–2020 Grant Cycle Prior to Its Unlawful Termination

As the first five-year grants neared the end of their project periods in 2015, OAH announced a second round of five-year grants. As it did during the first grant cycle, OAH

issued "Tier 1" grants to "replicat[e] evidence-based TPP programs" and "Tier 2" grants to develop and evaluate "new or innovative approaches." Ex. 8 at 3 (capitalization altered). OAH further divided the grants into Tier 1A/1B and Tier 2A/2B/2C grants to provide more guidance to applicants and emphasize particular areas of need. *See id.*

In keeping with Congress's directives, the 2015 application process involved the same key requirements as the 2010 FOAs. As most relevant here, the Tier 1 FOAs required that all grants replicate "evidence-based TPP programs," defined as "[p]rograms identified by HHS as having undergone a rigorous evaluation [and] been shown to be effective at preventing teen pregnancies, sexually transmitted infections, and/or sexual risk behaviors." Ex. 8 at 79; Ex. 9 at 89. As in the previous cycle, final award decisions would be made by the OAH Director. *See* Ex. 8 at 66; Ex. 9 at 77.

HHS awarded 81 grants, adhering to Congress's requirement that 75% of the grant funding go to replications of proven programs and 25% go to researching new or innovative programs. *See* HHS, *Current Teen Pregnancy Prevention Program (TPP) Grantees*, https://www.hhs.gov/ash/oah/grant-programs/teen-pregnancy-prevention-program-tpp/current-grantees/index.html. As in the previous cycle, and like countless HHS grants, the second round of grants provided for a five-year period of performance funded in annual budget periods once Congress had appropriated the funds for each year. *See generally Policy & Research, LLC v. HHS*, --- F. Supp. 3d ----, 2018 WL 2184449, at *3-4, 10-11 (D.D.C. May 11, 2018) (explaining five-year grants), *appeal filed*, No. 18-5190 (D.C. Cir.).

III. Defendants Set Out to End TPPP

A. A Longstanding Opponent of TPPP Is Appointed to Oversee the Program

Notwithstanding TPPP's success, certain advocates of abstinence-only education believe Congress never should have established it. One such advocate is Defendant Valerie

Huber, who currently oversees the Program. Prior to her appointment at HHS, Ms. Huber dedicated her career to advocacy for abstinence-only education and to the eradication of comprehensive sexual education from the nation's schools.

From 2007 to 2017, Ms. Huber served as the Executive Director of the National Abstinence Education Association ("NAEA"), a trade association for abstinence-only organizations that subsequently changed its name to "Ascend." While at NAEA, Ms. Huber was instrumental in rebranding abstinence-only education as "sexual risk avoidance" ("SRA") education. *See* Valerie Huber, *From First Blush to Sexual Chaos*, at approx. 58:30-59:05, YouTube (Mar. 3, 2015), www.youtube.com/watch?v=b8orU7_ISKM ("[W]e are moving away from the word abstinence. … [W]e're actually in the process of rebranding even our organization.").

As part of this rebranding, abstinence-only advocates coined euphemisms such as "optimal health behavior" (i.e., abstaining from all sexual activity outside of marriage) and "cessation" (i.e., ceasing all sexual activity if already sexually active). *See, e.g.*, Ex. 10 at 13 (defining "optimal health outcome" as "wait[ing] for marriage before engaging in sex"); *id.* at 38 ("The optimal health outcome is sexual delay, preferably until marriage."). As NAEA explained, "SRA education is built on the premise that all non marital teen sexual activity is high-risk behavior" and therefore focuses on "voluntarily refraining from all sexual activity, including, but not limited to sexual intercourse." *Id.* at 10 (emphasis omitted). In an SRA program, "all themes and topics within the program [must] encourage and empower teens to choose or regain a lifestyle that avoids all sexual risk." *Id.* at 37.

Ms. Huber contrasts programs incorporating SRA principles and optimal health goals with "teen pregnancy prevention" programs, which she calls "comprehensive sex education" or "sexual risk reduction." *Id.* at 3, 5, 19; *see also, e.g.*, Ex. 11 at 5 (defining

"'[c]omprehensive' sex education" as a "[r]isk reduction approach" often used as a synonym for "pregnancy prevention"). Such programs are incompatible with SRA principles, Ms. Huber believes, because they "normalize[] teen sex, and put[] the emphasis on reducing the risk, rather than eliminating it." Ex. 12 at 2. For that reason, "[y]ou can't blend the two." *Id.* According to Ms. Huber, only SRA programs should be funded. *See, e.g.*, Ex. 10 at 2 ("Discontinue federal funding for any programs that compromise teen health by normalizing sexual activity outside of marriage."); *id.* at 37 ("Any program that perpetuates the view that sexual experimentation is an acceptable risk behavior for teens should receive no taxpayer funds.").

In 2009, Ms. Huber wrote "in strong opposition to" Congress's "funding for a new Teenage Pregnancy Prevention (TPP) program" because it did not "place heavy emphasis on risk avoidance." *See* Ex. 13 at 1. After failing in her efforts to prevent TPPP from being created, Ms. Huber continued advocating for Congress to defund the Program and dedicate all federal sex education dollars to abstinence-only programs. *See, e.g.*, Ex. 10 at 37.

In the spring of 2017, while she was still leading Ascend, Ms. Huber repeatedly lobbied HHS to eliminate both TPPP and OAH, notwithstanding that both are creations of Congress. *See* Ex. 14; Ex. 15. In documents that Ms. Huber provided before a meeting with HHS officials, she opined that TPPP and OAH were "[u]nnecessary from the start, except to drive a harmful agenda that normalizes teen sex and a false 'evidence based' narrative," and therefore "should be immediately abolished." Ex. 15 at 8. In one document, she asserted that "evidence based programs" were a "[m]yth," and "the entire effort was a sham." *Id.* at 8, 9. In another, she argued "[h]arm reduction programs still place youth at risk and should be replaced" and that TPPP is a "radical approach" that is a "funding stream for Planned Parenthood and other pro-teen-sex groups." Ex. 14 at 3, 7.

Ms. Huber claimed that President Obama set a "precedent" by "eliminat[ing] 169 Sexual Risk Avoidance (SRA—aka 'abstinence education') programs," omitting the fact that *Congress* eliminated the funding for the cancelled programs. Ex. 15 at 8. Citing this "precedent," she urged HHS to "immediately halt the TPP program and redirect funds back to the risk avoidance message, from whence they came. The TPP program should be ended, restoring the funds to SRA programs." *Id.*; *see also* Ex. 14 at 4 ("Defund the *Teen Pregnancy Prevention (TPP) Program* and restore this funding to SRA programs.").

Ms. Huber met with HHS officials on or about March 8, 2017, with a "time sensitiv[e]" request to "immediately halt" TPPP. Ex. 15 at 2, 8. Two months later, Defendant Alex Azar, the Secretary of HHS, submitted a budget that proposed to "eliminate[] the TPP program." Ex. 16 at 6. Congress ultimately rejected this request, providing the 2018 appropriation described above.

On June 5, 2017, Ms. Huber was appointed Chief of Staff in the Office of the Assistant Secretary of Health ("OASH") at HHS, which oversees OAH and TPPP. Ms. Huber was subsequently named Senior Policy Advisor for OASH. In that position, her portfolio includes OAH and TPPP, both of which she has long sought to abolish.

B. Defendants Unlawfully Terminate the 2015–2020 TPPP Grants

Less than a month after Ms. Huber's appointment, HHS informed all 81 current grantees that their grants would be terminated as of June 30, 2018, shortening their five-year periods by two years—even though HHS had already approved year-three funding two weeks before Ms. Huber's appointment. *See* Ex. 17 at 1; Ex. 18 at 1-2. OAH staff were not involved in the decision and the grantees were given no reason for the terminations. *See, e.g.*, Ex. 19 at 2 ("OAH has not been part of the discussions. … I reminded him that OAH were not aware of the grant action until the last minute … .").

In response to public criticism and Congressional concern, Defendants issued shifting post hoc explanations for the terminations. *See King Cnty. v. Azar*, No. 18-cv-242, 2018 WL 2411759, at *7 (W.D. Wash. May 29, 2018). Internally, OAH staff warned that those explanations recited facts that were false and misrepresented the data assembled by HHS in its years of administering the program. *See* Ex. 20 at 3-5.

Numerous grantees sued to enjoin the terminations, resulting in five consecutive injunctions by four different judges unanimously finding the terminations unlawful and requiring Defendants to process the plaintiff grantees' applications for the fourth year of funding under lawful standards.[1] The last case was a class action on behalf of all remaining grantees, including the County. *See Healthy Futures of Tex.*, 2018 WL 2471266, at *7. To date, HHS has filed an appeal in two cases; the deadline to notice an appeal remains pending in the others. HHS has represented that it will process class members' year-four continuation applications by August 20, 2018. *See* 2d Decl. of Sean M. Sherman, *Policy & Research*, ECF No. 30-1 ¶ 3 (D.D.C. June 7, 2018).

C. Defendants Issue the 2018 FOAs

The day after the first court held the terminations unlawful, Defendants launched a new tactic for ending TPPP, issuing FOAs (the "2018 FOAs") that purported to implement the Program but in reality nullified Congress's choices. *See* Ex. 1; Ex. 21.

As before, the 2018 FOAs provide "Tier 1" and "Tier 2" grants, with the Tier 1 grants receiving approximately 75% of the funding. But unlike previous TPPP FOAs, the 2018 Tier 1 FOA does not implement Congress's directive to "replicat[e] programs that have

[1] *See Healthy Futures of Tex. v. HHS*, No. 18-cv-992, 2018 WL 2471266 (D.D.C. June 1, 2018); *King Cnty.*, 2018 WL 2411759, at *6; *Policy & Research*, 2018 WL 2184449, at *2-5; *Healthy Teen Network v. Azar*, No. 18-cv-468, 2018 WL 1942171, at *1-4 (D. Md. Apr. 25, 2018), *appeal filed* June 22, 2018; *Planned Parenthood of Greater Wash. & N. Idaho v. HHS*, No. 18-cv-55, 2018 WL 1934070, at *1-2 (E.D. Wash. Apr. 24, 2018).

been proven effective through rigorous evaluation to reduce teenage pregnancy, behavioral risk factors underlying teenage pregnancy, or other associated risk factors." 2018 CAA, 132 Stat. at 733. Instead, the new FOA allows applicants to "choose any curriculum," whether or not it has been rigorously evaluated or proven effective, as long as it "addresses all of the key elements" in either of two "tools" designed to help educators select programs. Ex. 22 at 3, 11; *see also* Ex. 1 at 35; Ex. 23; Ex. 24. In the 2018 FOAs, the phrase "evidence-based" does not appear at all, the definition of "Evidence-Based Teen Pregnancy Prevention Programs" has been deleted, and even the words "proven" and "rigorous evaluation" only appear when describing evaluations to be conducted *after* the programs are funded. *See* Ex. 1 at 19, 21-23. Nor does the 2018 Tier 1 FOA refer to HHS's TPP Evidence Review—its list of proven programs—despite HHS issuing a new version of the Review just days earlier. *See* Ex. 25.

In addition to this departure from Congress's plan, the 2018 Tier 1 FOA also requires applicants to "emphasize" and "place a priority on" SRA principles that, as discussed above, require teaching that refraining from all sexual activity until marriage is the only acceptable behavior and preclude comprehensive sexual health education. Ex. 1 at 14-16. For example, all applicants must weave "optimal health into every component of the project," *id.* at 14, even though Defendants are still in the process of "creating an optimal health model" and "asking … what does optimal health look like for a public health approach," Ex. 26 (00:55–1:15). The largest share of points in the scoring criteria (25 out of 100 points) are based on these new, extra-statutory factors. Ex. 1 at 59-60. HHS did not provide any explanation for these radical departures from prior FOAs.

The stated purpose of the 2018 Tier 1 FOA is not to replicate proven programs but "to fund the *evaluation* of replication strategies that focus on protective factors shown to prevent teen pregnancy, improve adolescent health, and address youth sexual risk

holistically." Ex. 1 at 17 (emphasis added). Recipients are expected to engage in "[f]ormative and process/implementation evaluation" in the first year, with the ultimate goal of a "summative evaluation" in the second year that will determine whether the "[f]ormative and process/implementation evaluation" was successful. *Id.* at 17-18, 20.

Additionally, the 2018 FOAs change the grantmaking process to interpose the Assistant Secretary for Health, for whom Ms. Huber serves as Senior Policy Advisor, in the job of "mak[ing] final award selections," while simultaneously purporting to deny any right to appeal award decisions for any reason. Ex. 1 at 63; Ex. 21 at 56-57.

IV. The County's Replication of Proven TPPP Programs

The County applied for and was awarded a five-year, $6.25 million Tier 1 grant in 2015 to replicate teen pregnancy prevention programs shown through empirical research to be effective. Toevs Decl. ¶ 4. Through its Adolescents & Communities Together ("ACT") program, the County is in the midst of replicating evidence-based comprehensive sexual education programs in settings with high concentrations of African-American, Latino, and Native American youth, populations that have disproportionately high rates of teen pregnancy. *Id.* ¶¶ 4-6. In keeping with the mission of the County's Youth Sexual Health Equity Project, the missions of its partners, and Oregon state law requirements for sexual education, ACT provides students with medically accurate, evidence-based sexual education that acknowledges abstinence within a wider, comprehensive framework where students are equipped with information and skills to make informed decisions regarding their bodies, including whether or not to become sexually active. *Id.* ¶¶ 2-3, 5; *see also* Leonard Decl. ¶¶ 2-5; Saunders Decl. ¶¶ 2-4.

Like every other grantee in the 2015 TPP Program, the County's grant was terminated without explanation in July 2017, despite HHS's acclaim for the County's

performance under the grant and positive results. Toevs Decl. ¶¶ 6-7; Leonard Decl. ¶¶ 3-4; Saunders Decl. ¶ 3.

The County plans to apply for the 2018 Tier 1 FOA, for which applications are due on June 29, 2018, in order to continue serving these at-risk populations either through the existing ACT program (if the County's year-four funding is continued) or by expanding its evidence-based programs into additional settings, like juvenile detention facilities, residential treatment centers, and foster care, where the same populations are overrepresented. Toevs Decl. ¶ 9. Yet it cannot compete on equal footing under the FOA's changed criteria. *Id.* ¶¶ 10-12. Consistent with its commitment to replicate evidence-based, effective programs and the dictates of Oregon state law, the County cannot "emphasize" or "prioritize" untested SRA content, as required by the new FOA. *Id.* ¶¶ 11-12. The County thus faces an impossible choice of compromising its program and objectives to comply with unlawful criteria that contradict its mission and that of its partners, as well as Oregon law, or else forgoing funding that would allow it to continue or expand its services to the County's at-risk youth. *Id.* ¶ 13; *see also* Leonard Decl. ¶¶ 2-5; Saunders Decl. ¶ 54.

STANDARD OF REVIEW

To obtain a preliminary injunction, a party must establish (1) a likelihood of success on the merits; (2) that irreparable harm is likely in the absence of preliminary relief; (3) that the balance of equities tips in the party's favor; and (4) that a preliminary injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The Ninth Circuit applies a sliding scale in which these elements "are balanced, so that a stronger showing of one element may offset a weaker showing of another." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). An injunction is appropriate "where the likelihood of success is such that serious questions going to the merits [are] raised and the balance of

hardships tips sharply in plaintiff's favor." *Id.* at 1131. When the government is a party, the balance of equities factor merges with the public interest factor. *See Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

Summary judgment is appropriate where the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Where the questions are purely legal in nature, a court can resolve a challenge to a federal agency's action on a motion for summary judgment. *See Fence Creek Cattle Co v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010).

ARGUMENT

The Court should enjoin Defendants from implementing the 2018 Tier 1 FOA for at least four reasons. *First*, the 2018 Tier 1 FOA is contrary to Congress's appropriation in the Continuing Appropriations Act of 2018 and unlawfully transfers funds from one appropriation to others in violation of the Purpose Statute, 31 U.S.C. § 1301(a), and the Appropriations Clause. *Second*, the 2018 Tier 1 FOA is arbitrary and capricious because HHS reversed its prior practice without explanation, relied on factors not intended by Congress, acted contrary to the evidence before the agency, and entirely failed to consider important aspects of the problem. *Third*, Defendants have abused their discretion by prejudging the issue with an unalterably closed mind. *Fourth*, the 2018 Tier 1 FOA is *ultra vires* because HHS lacked authority to condition Congressionally directed grant funding in this manner.

The Court should therefore grant partial summary judgment to the County and enjoin implementation of the 2018 Tier 1 FOA. If the County's motion for partial summary judgment cannot be resolved before September 1, the Court should enter a preliminary injunction to prevent irreparable harm and ensure that the County has a complete remedy.

I. The 2018 Tier 1 FOA Violates the APA

A. The 2018 Tier 1 FOA Violates the APA Because It Is Contrary to the 2018 CAA, the Purpose Statute, and the Appropriations Clause

1. The 2018 Tier I FOA Does Not Replicate Programs That Have Been Proven Effective Through Rigorous Evaluation.

"[T]he TPP program is a creature of Congress." *Healthy Teen Network*, 2018 WL 1942171, at *1. HHS, the agency executing the TPPP appropriation, must therefore "distribute [its] funds among some or all of the permissible objects" specified by Congress. *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984) (Scalia, J.). If the agency's action is "untethered to Congress's approach," it must be vacated. *Nat. Res. Def. Council v. EPA*, 777 F.3d 456, 469 (D.C. Cir. 2014). "[W]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1312-13 (9th Cir. 1992) (quoting *Raleigh & Gaston Ry. Co. v. Reid*, 80 U.S. (13 Wall.) 269, 270 (1871)).

TPPP's appropriation is "not an unrestricted sum of money to use for any purpose that might fall within HHS's broad mandate, but rather directs the agency to use the funds to support proven or innovative medically accurate methods of preventing teenage pregnancy." *Healthy Teen Network*, 2018 WL 1942171, at *9. More specifically, Congress directed HHS to spend 75% of its TPPP funds on "*replicating programs that have been proven effective through rigorous evaluation* to reduce teenage pregnancy, behavioral risk factors underlying teenage pregnancy, or other associated risk factors," and the remaining 25% on "*research and demonstration grants* to develop, replicate, refine, and test additional models and innovative strategies for preventing teenage pregnancy." 2018 CAA, 132 Stat. at 733 (emphases added). This gives courts "authority to ensure that when making [funding] decision[s] HHS considers statutory restrictions." *Healthy Teen Network*, 2018 WL 1942171, at *9.

The 2018 Tier 1 FOA conflicts with these statutory restrictions and must be set aside under the APA, 5 U.S.C. § 706(2)(A). In the 2018 CAA, Congress required HHS to "replicate"—that is, "duplicate" or "repeat," *Merriam-Webster's Collegiate Dictionary* (11th ed.)—programs that have been (a) subjected to rigorous evaluation, and (b) found effective by those rigorous evaluations. Instead, in the 2018 Tier 1 FOA, HHS has unilaterally chosen to repurpose Congress's appropriation to support programs without regard to whether they have been proven effective through rigorous evaluation, and to require that every program include untested content. The agency's decisions violate the plain text of the 2018 CAA. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

Most obviously, in direct contravention of the statute, the 2018 Tier 1 FOA does not require applicants to show that their program has been rigorously evaluated or proven effective. Instead, the new FOA explicitly allows applicants to "choose any curriculum." Ex. 22 at 3, 11; Ex. 27 at 2. Indeed, the new FOA does not require programs to have been subjected to *any* evaluation prior to funding, rigorous or otherwise. It mentions "rigorous evaluation" or "proven" effectiveness only when discussing evaluations that will take place *after* programs are selected and funded. *See* Ex. 1 at 19-21.

Moreover, the new FOA conflicts with Congress's command that applicants "replicate" programs, instead *requiring* "adaptations" where necessary to meet the untested, extra-statutory factors Defendants have imposed—no matter how significantly this changes the programs as designed and evaluated. *Id.* at 12. The new FOA requires applicants to "emphasize priorities" of Defendants' own choosing—SRA messages that preclude content "normalizing" sexual activity, Ex. 10 at 37—whether or not the programs being replicated

were designed to contain that specific content. Ex. 1 at 14-16. Nor could *any* program that incorporates "optimal health into every component," Ex. 1 at 14, 59, possibly replicate a program (let alone a proven one), given that the optimal health model *does not yet exist*. *See* Ex. 26 (00:55) (explaining that HHS is currently "creating an optimal health model").[2]

Indeed, the 2018 Tier 1 FOA does not require applicants to replicate programs at all. Instead, programs need only "replicate the effective *elements* of either the 9 key elements for effective risk avoidance programs or 17 key elements of effective risk reduction programs" listed in one of two tools used to evaluate programs, the "Center for Relationship Education's Systematic Method for Assessing Risk-Avoidance Tool" (or "SMARTool") and the "Tool to Assess the Characteristics of Effective Sex and STD/HIV Education Programs" (or "TAC"). Ex. 1 at 12, 35 (emphasis added); *see also, e.g.*, *id.* at 59.

These "tools" are not programs and replicating their "elements" is not the same thing as replicating a program. They are merely checklists of factors to assist in the design or selection of programs, as the tools themselves explain. The TAC, by its very name, is a "Tool to Assess … Programs," not a program. *See* Ex. 23 at 6. It defines a "[p]rogram" as a "*set of activities* packaged in a purposeful way with the goal of preventing a problem, treating a problem, and/or supporting an individual or a group." *Id.* at 54. The TAC itself, by contrast, is an "organized *set of questions* designed to help practitioners assess whether curriculum-based programs incorporated the common characteristics of effective programs." *Id.* at 6-7 (emphasis added); *see also id.* at 16-42 (recommending questions to ask when selecting or designing a program).

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[2] *See also* Ex. 26 (1:15) ("We are asking this question: What does optimal health look like for a public health approach that far too often gets caught up in political and ideological controversy? How can public health strategies inform the way we talk to teens about sex? … How can we promote optimal health and not merely teen pregnancy prevention?").

The SMARTool is similarly a "tool" that "can be used to assess a variety of sexual risk-avoidance curricula and programs." Ex. 24 at 7; *see also, e.g.*, *id.* at 6 ("The [SMARTool] is a research-based tool *designed to help organizations assess, select, and implement effective programs and curricula* that support sexual risk avoidance." (emphasis added)). It is not a program itself, but rather provides "guidance on both programs and curricula." *Id.* at 9.

Copying the elements of effective programs is not the same as selecting a rigorously evaluated program, as the tools make clear. The TAC explains that the "most promising approach is to review those curricula that have previously been demonstrated to be effective with populations of youth similar to [the target population] and that match the needs and resources of [the target] community and then to select one." Ex. 23 at 10. That is precisely what the 2010 and 2015 FOAs did, but Defendants chose to abandon this approach in the new FOA. The TAC specifically cautions that Defendants' new approach, merely aping the characteristics identified in the tools, "cannot serve as a substitute for a rigorous impact evaluation study demonstrating positive changes in sexual behavior." *Id.*[3]

Had Congress wanted to fund programs that merely contained some elements of successful programs, it could have done so—but it chose instead to "replicat[e] programs that have been proven effective through rigorous evaluation." 2018 CAA, 132 Stat. at 733. In ignoring this controlling command, the 2018 Tier 1 FOA is contrary to law and must be set aside. 5 U.S.C. § 706(2)(A).

[3] The SMARTool similarly notes the difference between "evidence-based *programs* and promising approaches or evidence-based *practices*." Ex. 24 at 7. Evidence-based *programs* "have been formally evaluated, resulting in evidence that suggests the curriculum and/or program increases the possibility of desired outcomes for a demographically similar target audience." *Id.* at 8. By contrast, "[p]rograms using promising approaches or evidence-based practices" merely "contain components that are consistent with previously evaluated theories or methods." *Id.*

2. The 2018 Tier 1 FOA Unlawfully Transfers Funds from One Appropriation to Another and Augments Appropriations

In the Purpose Statute, Congress has long provided that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." 31 U.S.C. § 1301(a). As HHS itself has explained, public funds "may be used only for the purpose for which they were appropriated." *Pa. Dep't of Pub. Welfare v. Sebelius*, 674 F.3d 139, 154 (3d Cir. 2012) (quoting brief filed by HHS); *see also, e.g.*, *Dep't of HHS Detail of Office of Cmty. Servs. Emps.*, 64 Comp. Gen. 370, 377 (1985) (acknowledging "the rule prohibiting unlawful augmentations of agency appropriations"). Even where "separate appropriations" "shar[e] similar purposes," appropriations for one purpose cannot be used to fund the other. *Pa., Dept. of Pub. Welfare*, 674 F.3d at 154. When Congress sets out specific purposes for sub-amounts of a larger appropriation, "[i]t is just as if … the several sums mentioned in the proviso had been separately appropriated for the several specific purposes mentioned." *Appropriation-Contracts*, 21 Op. Atty. Gen. 414, 415 (1896).

Congress *did* allow HHS to use a portion of its appropriations for another purpose—but only a portion. The 2018 CAA provided that no more than "1 percent of any discretionary funds … which are appropriated for the current fiscal year for HHS in this act may be transferred between appropriations, [and] no such appropriation shall be increased by more than 3 percent by any such transfer." 2018 CAA, 132 Stat. at 736. Beyond this, HHS lacks authority to use Tier 1 funding for any purpose other than "replicating programs that have been proven effective through rigorous evaluation." 2018 CAA, 132 Stat. at 733.

In violation of the Purpose Statute and the 2018 CAA, HHS is using the Tier 1 TPP appropriation to augment two other appropriations: the Tier 2 TPP appropriation for evaluating new and innovative approaches to reducing teen pregnancy, and the SRAEP program for making abstinence-only SRA grants.

First, HHS is transferring money to the Tier 2 appropriation, which authorizes HHS to fund "research and demonstration grants to develop, replicate, refine, and test additional models and innovative strategies for preventing teenage pregnancy." 2018 CAA, 132 Stat. at 733. HHS's sole stated purpose in the 2018 Tier 1 FOA is "to fund the *evaluation* of replication strategies that focus on protective factors shown to prevent teen pregnancy, improve adolescent health, and address youth sexual risk holistically." Ex. 1 at 17 (emphasis added). The 2018 Tier 1 FOA explicitly funds "rigorous evaluation and testing," *id.* at 19, rather than funding programs that have already gone through such evaluation. The first one to two years of each grant will require a "[f]ormative … evaluation" and be dedicated to "establish[ing] project merit," among other goals. *Id.* at 4, 17. The entire two-year grant builds up to a "summative outcome/impact evaluation" which will have "intermediate results on behavior, attitudes, and intentions." *Id.* at 18, 20.

Indeed, the 2018 Tier 1 FOA is effectively indistinguishable from its Tier 2 counterpart. The stated purpose of the 2018 Tier 1 FOAs is identical to that of the 2018 Tier 1 FOA, save for the deletion of the word "replication." *See* Ex. 21 at 13. Both FOAs instruct applicants to choose any curriculum so long as it implements "protective factors" and/or either elements from the SMARTool or the TAC, and then directs them to subject that curriculum to testing and evaluation. *See* Ex. 1 at 12-14, 19; Ex. 21 at 11, 13-14. And both FOAs require grantees to carry out a "[f]ormative and process/implementation evaluation" followed by a "summative outcome/impact evaluation." Ex. 1 at 17, 18; Ex. 21 at 13, 15.

Second, Defendants are repurposing the TPPP appropriation to expand the pool for SRA grants funded by SRAEP, a separate appropriation with a separate funding allotment. *See* 2018 CAA, 132 Stat. at 733 ("[O]f the funds made available under this heading, $25,000,000 shall be for making competitive grants which exclusively implement education

in sexual risk avoidance."). Under the terms of the 2018 Tier 1 FOA, only applicants who implement SRA education are eligible, because only applicants who implement SRA education will satisfy Defendants' "priorities." *See* Ex. 1 at 14-16, 59-60. The new FOA thus carries out the explicit intention of Defendant Huber to redirect TPPP funds exclusively to SRA programs, expressed just before she began terminating TPPP grants. *See supra* ___; *see also Masterpiece Cakeshop, Ltd. v. Col. Civil Rights Comm'n*, --- S. Ct. ---, 2018 WL 2465172, at *12 (June 4, 2018) (finding contemporaneous statements by governmental decisionmakers, inter alia, to be probative of their intent). Having failed to convince Congress to adopt their policy preferences, Defendants now attempt to establish them by fiat, redesigning the Program to exclusively fund SRA programs and thereby unlawfully transferring the TPPP appropriation and augmenting the SRAEP appropriation.

HHS's use of Tier 1 funding to make Tier 2 and SRAEP grants transfers far more than 1 percent from the Tier 1 appropriation, and augments the appropriations for Tier 2 and SRAEP grants by far more than 3 percent. It thus violates the transfer restrictions imposed of the 2018 CAA and 31 U.S.C. § 1301, and must be set aside. 5 U.S.C. § 706(2)(A).

3. The 2018 Tier 1 FOA Violates the Appropriations Clause

For similar reasons, the 2018 Tier 1 FOA is contrary to law because it violates the Appropriations Clause. U.S. Const., art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law … ."). The Appropriations Clause "plays a critical role in the Constitution's separation of powers among the three branches of government and the checks and balances between them." *United States v. McIntosh*, 833 F.3d 1163, 1175 (9th Cir. 2016). As the Supreme Court explained, "[h]owever much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned. Any other course would give to the

fiscal officers a most dangerous discretion." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 425 (1990) (quoting *Reeside v. Walker*, 52 U.S. (11 How.) 272, 291 (1850)). Congress "possess[es] the power to decide how and when any money should be applied for these purposes. If it were otherwise, the executive would possess an unbounded power over the public purse of the nation; and might apply all its moneyed resources at his pleasure." *Id.* at 427 (quoting 2 Commentaries on the Constitution of the United States § 1348 (3d ed. 1858) (Story, J.)).

In directing Tier 1 funds to unproven, exclusively SRA programs without statutory authorization, Defendants have violated the Appropriations Clause. The Clause exists "to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." *Id.* at 428. Here, Congress has painstakingly made those judgments about how to apportion federal funds among sexual education programs. As described above, in 2010 Congress chose to eliminate two programs that provided abstinence-only grants, in favor of the evidence-based TPPP. In 2012, it determined to recreate a funding stream dedicated to abstinence-only SRA programs, but at a distinctly lower level. And it determined that 75% of the TPPP funding should go to replications, and only 25% to research grants. Congress has maintained this approach for nearly a decade, even in the face of the President's request to cancel the Program.

By countermanding Congress's decision, the 2018 Tier 1 FOA violates not just statutory requirements but constitutional requirements, striking at the heart of the separation of powers. It is therefore contrary to law and must be set aside. 5 U.S.C. § 706(2)(A), (B).

B. The 2018 Tier 1 FOA Is Arbitrary and Capricious

The 2018 Tier 1 FOA must also be set aside as arbitrary and capricious. *Id.* § 706(2)(A). Agency action is arbitrary and capricious if the agency "has [1] relied on factors

which Congress has not intended it to consider, [2] entirely failed to consider an important aspect of the problem, [3] offered an explanation for its decision that runs counter to the evidence before the agency, or [4] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Before taking action, an "agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Id.* (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

This last requirement is particularly important when an agency departs from a prior policy, in which case it must provide a "reasoned explanation … for disregarding facts and circumstances that underlay or were engendered by the prior policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009). The APA "requires an agency to provide more substantial justification when its new policy rests upon factual findings that contradict those which underlay its prior policy.'" *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015) (quoting *Fox*, 556 U.S. at 515). At a minimum, "the agency must at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy.'" *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting *Fox*, 556 U.S. at 515). "[A]n unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." *Id.* at 2125 (alteration adopted and internal quotation marks omitted). If the agency "implicitly departs from its prior precedent and provides no explanation for doing so," "[c]ourts will not assume an agency has engaged in reasoned decision making." *Modesto Irrigation Dist. v. Gutierrez*, 619 F.3d 1024, 1034 (9th Cir. 2010) (alteration adopted and internal quotation marks omitted).

In issuing the 2018 Tier 1 FOA, HHS committed nearly every one of the sins identified in *State Farm*. It failed to issue a reasoned explanation for its action; it failed to consider important aspects of the problem before it; it relied on factors that Congress did not intend the agency to consider; it acted counter to the evidence before it. Accordingly, the 2018 Tier 1 FOA is arbitrary and capricious and must be set aside.

First, the 2018 Tier 1 FOA reverses course without providing a "reasoned explanation … for disregarding facts and circumstances that underlay or were engendered by the prior policy," much less "show[ing] that there are good reasons for the new policy." *Fox*, 556 U.S. at 515, 516. The new FOA is completely silent as to the justification for its 180-degree turn from the previous FOAs. It neither mentions nor explains why the TPP Evidence Review should be abandoned; why the requirement that programs be proven effective through rigorous evaluation has been jettisoned, or how that squares with the 2018 CAA; how the incorporation of "elements" of two tools equates to replication of programs; why Defendants' favored SRA messages should be superimposed over all programs; or numerous other changes Defendants made in purporting to rewrite Congress's program to their liking. This is quintessential arbitrary and capricious action. *See id.*; *see, e.g.*, *Policy & Research*, 2018 WL 2184449, at *13 ("The most striking thing about the agency action that Plaintiffs challenge in this case is the fact that HHS *provided no explanation whatsoever* for its decision to [terminate] Plaintiffs' grants.").[4]

Second, as shown above, the 2018 Tier 1 FOA relies on factors that Congress chose not to incorporate into TPPP. Most pointedly, it requires adherence to SRA precepts,

[4] *See also, e.g.*, *King County*, 2018 WL 2411759, at *7 ("HHS's failure to articulate *any* explanation for its action, much less a reasoned one based on relevant factors, exemplifies arbitrary and capricious agency action meriting reversal."); *City of Los Angeles*, 293 F. Supp. 3d 1087, 1099 (C.D. Cal. 2018) (enjoining grant conditions where Defendants did not "base[] [their] conclusion on any findings or data").

contravening Congress's determination that TPPP focus on the products of rigorous evaluation rather than any particular content or ideology. At the same time, the key factor Congress explicitly required HHS to consider—whether a program had already been proven effective through rigorous evaluation—is nowhere to be found in the new FOA's selection criteria. By ignoring Congress's core factor in favor of their own, extra-statutory factor, Defendants acted arbitrarily and capriciously. *State Farm*, 463 U.S. at 43.

Third, Defendants' abandonment of congressional requirements, the TPP Evidence Review, and rigorous evaluation in favor of its ideologically preferred SRA content is inconsistent not only with the statute but with the evidence Defendants compiled in the FOA. Most notably, HHS has spent nearly a decade undertaking the TPP Evidence Review, "a comprehensive and objective assessment of the relative strengths and weaknesses of the teen pregnancy prevention literature." Ex. 28 at 6. The review has examined several hundred studies of teen pregnancy prevention programs and found only 48 programs for which rigorous evaluation had shown evidence of a positive, statistically significant impact on at least one relevant outcome. *See* Ex. 25 at 1. HHS released the latest edition of the TPP Evidence Review the very same week it issued the new FOA. *See* Ex. 25.

Yet with no explanation, the 2018 Tier 1 FOA discards the TPP Evidence Review altogether. It ignores the TPP Evidence Review's finding that only four dozen specific programs had been proven effective through rigorous evaluation. Worse, it allows Defendants to award funds to programs that have already been proven *ineffective* through rigorous evaluation. This overruling of the evidence in the record is by design: Defendant Huber explicitly called the TPP Evidence Review a "sham" and a "[m]yth." Ex. 14 at 6, 7.

The new FOA's contradiction of the record before the agency goes well beyond the TPP Evidence Review. Even the sources the new FOA cites confirm that the SRA

requirements that Defendants have imposed on all programs have not been proven effective through rigorous evaluation. For example, the FOA cites an article in *Lancet*, a prestigious, peer-reviewed medical journal, that explicitly found "[h]igh-quality evidence that abstinence-only education is ineffective in preventing HIV, incidence of sexually transmitted infections and adolescent pregnancy" and concluded that "[a]bstinence-only education is not recommended," Ex. 29 at 3 (cited in Ex. 1 at 8). By contrast, the *Lancet* article reports "high quality evidence" of multiple beneficial impacts from comprehensive sexual education and recommended it as part of "[e]nsur[ing] that all adolescents and young adults' rights to essential health information are met." *Id.* Numerous other sources cited in the 2018 Tier 1 FOA reach similar conclusions,[5] not to mention sources cited in the previous FOAs.[6]

Fourth, Defendants "entirely failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43. When an agency does not consider "whether [a statutory] requirement would be satisfied," it acts arbitrarily and capriciously. *Hoag Mem'l Hosp. Presbyterian v. Price*, 866 F.3d 1072, 1081 (9th Cir. 2017). Here, Congress's design requires

[5] *See, e.g.*, Ex. 30 at 11 ("[I]t is imperative that programs go beyond basic informational sessions on sexually transmitted infections and pregnancy talks and prepare youth who choose to be sexually active, to engage in 'safe sex.' Youth should not only be taught how to properly use methods that decrease the odds of pregnancy and STI's, but they should be provided with the tools necessary to obtain these methods as well."); Ex. 31 at 3 (favorably citing TPP Evidence Review); Ex. 32 at 11 ("[I]t is important to educate adolescents of both genders about the importance of consistent contraception use.").

[6] *See, e.g.*, Ex. 33 at 2 ("Two-thirds of the 48 comprehensive programs that supported both abstinence and the use of condoms and contraceptives for sexually active teens had positive behavioral effects. Specifically, over 40 percent of the programs delayed the initiation of sex, reduced the number of sexual partners, and increased condom or contraceptive use; almost 30 percent reduced the frequency of sex (including a return to abstinence); and more than 60 percent reduced unprotected sex. Furthermore, nearly 40 percent of the programs had positive effects on more than one of these behaviors."); *id.* at 4 ("Several abstinence programs, including abstinence-until-marriage programs, have been *rigorously* evaluated with large experimental designs and found to have no overall impact on delay in initiation of sex, age of initiation of sex, return to abstinence, number of sexual partners, or condom or contraceptive use."). Notably, this author was the lead developer of the TAC, which Defendants purport to embrace in the 2018 Tier 1 FOA.

HHS to consider "(1) whether the program is aimed at preventing teenage pregnancy; (2) whether the program is medically accurate and age appropriate; [and] (3) whether the program has achieved proven results." *Healthy Teen Network*, 2018 WL 1942171, at *9. But as shown above, Defendants have removed—without acknowledgment—whether programs have been proven effective through rigorous evaluation from consideration.

Moreover, as shown by the evidence discussed above, Defendants' new requirement that all programs prioritize SRA content was imposed without regard to whether it is likely to "prevent[] teenage pregnancy." Simultaneously, Defendants *deleted* portions of the 2015 FOA that evaluated demographic disparities and other correlates of teen pregnancy. The 2018 Tier 1 FOA makes no mention of the racial, ethnic, geographic, or urban/rural variation among teen pregnancy rates, and eliminates *all* findings and discussion of LGBT youth (*see* Ex. 1 at 6-8)—despite HHS finding that these demographic categories correlate with massive differences in teen pregnancy rates (Ex. 8 at 9-10). Similarly, the new FOA cuts all recognition of the correlation between teen pregnancy and having been the victim of dating violence and childhood abuse. Ex. 1 at 6-8; *compare with* Ex. 8 at 12. In other words, Defendants have knowingly and inexplicably *weakened* their evaluation of the core mission that Congress assigned to them.

Any one of these flaws would require vacatur under the APA. In combination, they overwhelmingly compel the conclusion that Defendants must be enjoined from using the 2018 Tier 1 FOA to distribute the funds Congress has made available through TPPP.

C. The 2018 Tier 1 FOA Is an Abuse of Discretion

Agency action is an abuse of discretion when the officials responsible had "an unalterably closed mind on matters critical to the disposition of the proceeding." *Alaska Factory Trawler Ass'n v. Baldridge*, 831 F.2d 1456, 1467 (9th Cir. 1987); *see also, e.g., Habeas*

Corpus Res. Ctr. v. DOJ, No. 08-cv-2649, 2009 WL 185423, at *9 (N.D. Cal. Jan. 20, 2009) (enjoining rule); *Nehemiah Corp. of Am. v. Jackson*, 546 F. Supp. 2d 830, 847-48 (E.D. Cal. 2008) (disqualifying official from rulemaking). A plaintiff must provide "clear and convincing" evidence to make the requisite showing. *Alaska Factory*, 831 F.2d at 1467.

Ms. Huber's long-running campaign to eliminate the TPPP and the record evidence cited above demonstrate that Defendants' decisions have been the product of an unalterably closed mind. Ms. Huber has advocated against the TPPP since before Congress created it. *See, e.g.*, Ex. 13 at 1. Just before her appointment, she repeatedly lobbied HHS to "abolish" or "eliminate" the TPPP because, in her view, evidence-based programs are a "[m]yth" and a "sham." Ex. 14 at 6, 7; Ex. 15 at 8, 9. Less than a month after she was appointed to her present post, HHS unlawfully terminated all of the 2015 grants. Huber then publicly criticized the Program as a "waste of taxpayer dollars" and "a current funding stream for Planned Parenthood," which reflected a "cross agenda" to support family planning clinics. *See Washington Watch with Tony Perkins*, Family Research Council (Aug. 14, 2017) (19:30-20:00, 22:15-22:30), www.frc.org/wwlivewithtonyperkins/bishop-harry-jackson-valerie-huber-e-calvin-beisner. She has consistently taken the position that funding should be taken away from groups offering comprehensive sexual education—and particularly from Planned Parenthood, one of the County's subgrantees, *see, e.g.*, Ex. 14 at 3—and returned to the abstinence-only groups that Congress defunded nearly a decade ago, and for whom she lobbied at the NAEA. *See, e.g.*, Ex. 15 at 8.

Courts within the Ninth Circuit have found far lower showings of prejudgment to prove that officials had an "unalterably closed mind," or at least to raise serious questions warranting a preliminary injunction. *See Habeas Corpus Res. Ctr.*, 2009 WL 185423, at *9 (enjoining rule where official's "professional background suggest[ed] that she may have had a

conflict of interest," congresspeople exerted pressure, and "the evidence suggest[ed] … the DOJ was never open to suggestions from members of [affected interests]); *Nehemiah*, 546 F. Supp. 2d at 847-48 (disqualifying official from participating in rulemaking where a news article said that agency head was "very much against" a rule and "intend[ed] to approve the new rule by the end of the year even if the agency receives critical comments"). Here, where a record spanning nearly a decade shows an official's prejudgment of a grantmaking process, unlawful termination of existing grants, and explicit prejudice against specific grant recipients, abuse of discretion standard is clearly and convincingly shown.

D. The 2018 Tier 1 FOA Is *Ultra Vires* and Violates the Separation of Powers

"An agency 'has no power to act … unless and until Congress confers power upon it.'" *City of Los Angeles v. Sessions*, 293 F. Supp. 3d 1087, 1095-96 (C.D. Cal. 2018) (quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)), *appeal filed*, No. 18-55599 (9th Cir.). "When agencies 'act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires.'" *Id.* (quoting *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013)). The *ultra vires* doctrine is applicable in the grantmaking context to enjoin an agency that exceeds its authority in changing grant criteria dictated by Congress. *See City of Los Angeles*, 293 F. Supp. 3d at 1098 (agency imposition of grant considerations not authorized by Congress was "ultra vires as a matter of law").

Here, HHS lacks authority to disregard Congress's clear mandate that the bulk of TPPP funds go to programs "proven effective through rigorous evaluation," 2018 CAA, 132 Stat. at 733, and to instead direct funds to programs that have never been evaluated. This is not a mere "[g]arden-variety error[] of law or fact." *Griffith v. Fed. Labor Relations Auth.*, 842 F.2d 487, 493 (D.C. Cir. 1988). Rather, after Congress intentionally rebuffed their multiple and longstanding attempts to eliminate the Program, Defendants deliberately flouted

Congress's statutory directive to continue TPPP on unchanged terms. Defendants' attempt to rewrite these terms "exceed statutory authority, and, consequently, the efforts to impose [these terms] violate the separation of powers doctrine and are *ultra vires*." *City of Chicago v. Sessions*, 264 F. Supp. 3d 933, 943 (N.D. Ill. 2017), *aff'd*, 888 F.3d 272 (7th Cir. 2018).

II. The County Will Suffer Irreparable Harm Absent an Injunction

The County and its residents will suffer an array of competitive, operational, organizational, and programmatic injuries in the absence of an injunction. Each of these harms is imminent and irreparable, and each is sufficient in its own right to warrant a preliminary injunction.

First, the County is being forced to compete under the 2018 Tier 1 FOA on unequal footing, and a "rule putting plaintiffs at a competitive disadvantage constitutes irreparable harm." *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 411 (9th Cir. 2015); *see City of Los Angeles*, 293 F. Supp. 3d at 1100 (holding that Los Angeles "will suffer irreparable competitive harm if [government] Defendants are not enjoined from imposing [unlawful grant conditions] in future cycles" and "monetary damages cannot ensure that Los Angeles will compete on a level playing field in future grant cycles").

The County will be disadvantaged from the moment the grants competition begins on June 29, 2018. The changed terms of the new FOA have intensified the competition by allowing programs that do not qualify under a statutorily compliant FOA to apply. *See* Ex. 34 ¶ 9 ("More than 800 entities participated [in a webinar on May 8], which is a substantial increase from the 500 participating in the 2015 webinar."); *see also* Ex. 35 at 2 ("[G]roups that previously could not apply for funding—faith groups or groups that weren't willing to do the vivid descriptions that were required under the previous programming—can now apply and get funding."). Defendants have combined this increased competition with smaller

awards; the current maximum annual award, $500,000, was the *minimum* award during the 2015 cycle. *Compare* Ex. 1 at 4, 27 *with* Ex. 9 at 4, 39.

This stark competitive disadvantage is compounded by the fact that the County must compete under the 2018 Tier 1 FOA with one hand tied behind its back. Toevs Decl. ¶¶ 11-13. The new FOA requires all applicants to "place a priority" on, and "emphasiz[e]," sexual risk avoidance, basing a quarter of the competition points on the extent to which applicants adhere to this unproven model. Ex. 1 at 14, 15, 59-60. But such content conflicts with the evidence-based, comprehensive sexual education programs that the County seeks to implement through the ACT program either as it exists now or as expanded into new settings, and is not consistent with either the mission and values shared by the County and its community partners, or with the dictates of Oregon state law. Toevs Decl. ¶¶ 9-12; Leonard Decl. ¶ 5; Saunders Decl. ¶ 4. These aspects of the 2018 Tier 1 FOA thus further stack the competition against the County and in favor of groups who are not so constrained.

Second, the County is already suffering harm from the choice it faces to either accede to the unlawful criteria in the 2018 Tier 1 FOA—which would compromise its mission and values, undermine its community relationships, and place the County at odds with state law—or compete on unequal footing—which would risk forgoing a major funding source. Toevs Decl. ¶ 13. The County will suffer harm either way, and this Hobson's choice itself is irreparable harm. *See Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1057-58 (9th Cir. 2009) (finding irreparable harm likely where plaintiff faced a "kind of Hobson's choice," consisting of a range of poor options that would result in "loss of customer goodwill" or incurring costs that "will disrupt and change the whole nature of its business in ways that most likely cannot be compensated with damages alone"); *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 537-38 (N.D. Cal. 2017) ("A plaintiff can suffer a constitutional

injury by being forced to comply with an unconstitutional law or else face financial injury or enforcement action." (citing *Am. Trucking Ass'ns, Inc.*, 559 F.3d at 1058-59)).

Third, the County faces the imminent prospect of losing its remedy. If Defendants award money pursuant to the new FOA before the Court rules, it will be impossible to unwind the resulting awards and recompete the 2018 funds under lawful criteria. "[O]nce the relevant funds have been obligated, a court cannot reach them in order to award relief." *City of Houston v. HUD*, 24 F.3d 1421, 1426 (D.C. Cir. 1994); *see also id.* at 1427 ("[T]o avoid having its case mooted, a plaintiff must … seek a preliminary injunction preventing the agency from disbursing those funds.").[7] While the Court could enjoin future awards, it could not undo the disbursements unlawfully redirecting Congress's 2018 appropriation. Moreover, the 2018 Tier 1 FOA purports to cut off any post-competition remedy, stating that awards "are final and [applicants] may not appeal." Ex. 1 at 63.

Fourth, the unlawful FOA places the County at imminent risk of losing funding for its adolescent sexual health programming, which would damage the County, its residents, and its partners. Toevs Decl. ¶ 14; Leonard Decl. ¶ 6; Saunders Decl. ¶ 5. A loss of this funding would compel the County to lay off up to five staff members, not expand the ACT program into new settings, or even cut the program, depriving thousands of teens of access to high-quality, evidence-based sexual education and jeopardizing the enormous gains the County has already made with its most at-risk student populations. Toevs Decl. ¶ 14. Courts

[7] *See also Ambach v. Bell*, 686 F.2d 974, 986 (D.C. Cir. 1982) ("Once the chapter 1 funds are distributed to the States and obligated, they cannot be recouped. It will be impossible in the absence of a preliminary injunction to award the plaintiffs the relief they request if they should eventually prevail on the merits."); *cf., e.g., Johnson v. Couturier,* 572 F.3d 1067, 1085 (9th Cir. 2009) (affirming preliminary injunction freezing disputed assets where there was an "inability to recover monetary damages, if relief [was] not granted").

have repeatedly recognized that denials of federal funding resulting in these types of harms are irreparable injuries.[8]

III. The Balance of Equities and Public Interest Merit an Injunction

Considered together, the balance of equities and public interest factors strongly warrant judicial intervention. The County, the populations it serves, and the public at large would all be harmed if this Court does not enjoin the 2018 Tier 1 FOA. *See Planned Parenthood of Greater Wash.*, 2018 WL 1934070, at *13-15; *Healthy Teen Network*, 2018 WL 1942171, at *1 n.1; Toevs Decl. ¶ 14. More generally but no less compellingly, the "public interest exists in ensuring that the government complies with its obligations under the law and follows its own procedures." *Medina v. U.S. Dep't of Homeland Sec.*, No. 17-cv-218, 2018 WL 2214085, at *12 (W.D. Wash. May 15, 2018) (citing *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)); *see also League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (finding "substantial public interest 'in having governmental agencies abide by the federal laws that govern their existence and operations'" (quoting *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994))). And the public assuredly has an interest in large sums of money being disbursed from the public fisc on lawful terms.

By contrast, the burden of an injunction on HHS would be minimal, as it would merely require the agency to do what it is already obliged to do—abide by Congress's

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[8] *See, e.g.*, *Planned Parenthood of Indiana, Inc. v. Comm'r of Indiana State Dept. of Health*, 699 F.3d 962, 980 (7th Cir. 2012) (irreparable harm where loss of funding would cause provider to lay off employees, close multiple clinics, and stop serving many patients); *Planned Parenthood of Greater Wash.*, 2018 WL 1934070, at *13 (unlawful termination of TPPP grants irreparably harmed the "youth [grantees] serve, their staff, the communities, and Plaintiffs' reputation within those communities"; "remedies available at law, such as monetary damages, are inadequate to compensate for the injury to the youth and communities that Plaintiffs serve"); *see also, e.g.*, *Doe v. Trump*, 288 F. Supp. 3d 1045 (W.D. Wash. 2017) (irreparable harm from "need to lay-off employees, reduce services, cancel established programs, lose institutional knowledge, and ultimately lose goodwill with volunteers and community partners" (citing *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 841 (9th Cir. 2001))).

unwavering directive that TPP Program funds be provided to rigorously evaluated, effective programs—and has already done for close to a decade. Any burden, moreover, is purely of HHS's own making, since it chose to compete TPPP funds under the 2018 Tier 1 FOA *at the same time* that the agency is under multiple court orders to process the 2015 TPP Program grantees' applications to use these *same funds* to continue their illegally terminated grants. As one of these courts observed, "the agency was on notice that the unexplained and indiscriminate action that it took when [it terminated the grants] was on shaky legal ground, yet HHS apparently decided to recompete the TPPP grant funding anyway, thereby knowingly exposing itself and third parties to the risk that future lawsuits or rulings relating to other similarly situated TPPP grantees would upend the newly minted recompetition process." *Healthy Futures of Texas*, 2018 WL 2471266, at *6. An injunction would do nothing more than ensure that the agency moves forward on solid legal ground.

CONCLUSION

For the foregoing reasons, the Court preliminarily enjoin Defendants from awarding grants under the 2018 Tier 1 FOA until this case can be fully resolved on the merits, and grant partial summary judgment to the County permanently enjoining Defendants from doing so.

Respectfully submitted this 22nd day of June, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of June, 2018, I electronically filed the foregoing document with the Clerk of the United States District Court District of Oregon using the CM/ECF system which will send notification of such filing to all parties who are registered with the CM/ECF system.

DATED this 22nd day of June, 2018.

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