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Members of Congress

IN THE UNITED STATES DISTRICT COURT

FOR THE 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.

Case No. 3:18-cv-01015-YY

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are 20 members of the One Hundred Fifteenth Congress, which has appropriated funds for the Teen Pregnancy Prevention Program ("TPPP") at issue in this action. The members of Congress joining this brief are:

- Rep. Pramila Jayapal
- Rep. Barbara Lee
- Rep. Jerrold Nadler
- Rep. Diana DeGette
- Rep. Judy Chu
- Rep. Peter DeFazio
- Rep. Eliot L. Engel
- Rep. Carolyn B. Maloney
- Rep. Earl Blumenauer
- Rep. Gregory Meeks
- Rep. Gwen Moore
- Rep. Yvette Clarke
- Rep. Suzan DelBene
- Rep. Joaquin Castro
- Rep. Grace Meng
- Rep. Mark Pocan
- Rep. Marc Veasey
- Rep. Kathleen Rice
- Rep. Adriano Espaillat
- Rep. Jamie Raskin

A number of *amici* were members of the House of Representatives when the TPPP was first funded and have served in the House of Representatives for subsequent reauthorizations of the program. *Amici* therefore provide a unique perspective on the TPPP, its legislative history, and Congress's intent to fund medically accurate, evidence-based programs to reduce teen pregnancy rates.

Further, as members of Congress, *amici* have a strong interest in ensuring that the Executive Branch implements programs, including the TPPP, consistent with authorizing legislation, and that it obligates and expends funds consistent with Congressional appropriations.

Litigation concerning allegedly improper and unlawful program implementation, such as the instant action before this Court, is therefore at the core of *amici*'s interest. *Amici* also possess particular expertise in the appropriations process—and the legislative process more generally—that can assist this Court in resolving questions of statutory construction that may arise in this action.

PRELIMINARY STATEMENT

Congress has authorized and funded the TPPP in 2009 and every year since—with the active participation of the *amici* members of the House of Representatives—for the express purpose of funding "medically accurate and age appropriate programs that reduce teen pregnancy," with the bulk of funds each year directed towards "replicating programs that have been proven effective through rigorous evaluation." Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034, 3253 (2009); *see also* Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348, 733 (2018). Congress's considered decision to promote programs with demonstrably positive effects on teen pregnancy departed from earlier approaches to teen pregnancy prevention, which funded abstinence-only programs regardless of their demonstrated effects. *See* HHS Administration for Children & Families Fiscal Year 2010, *Justification of Estimates for Appropriations Committees* 101, 406 (hereinafter "FY 2010 *Justification of Estimates*") (explaining the "redirect[ion]" of funds from abstinence-only programs to broader initiatives was a reflection of "the Administration's efforts to target funds for a broader teen pregnancy prevention initiative using evidence-based models") (emphasis added).

But recent actions of the Department of Health and Human Services ("HHS"), which administers the TPPP grants, have upended the TPPP's implementation and defied the clear

intent of Congress. In April 2018, HHS announced two new grant solicitations, called Funding Opportunity Announcements ("FOAs"), that establish new criteria for receipt of TPPP funds. *See* HHS, *Announcement of Availability of Funds for Phase I Replicating Programs (Tier 1) Effective in the Promotion of Healthy Adolescence and the Reduction of Teenage Pregnancy and Associated Risk Behaviors* (2018) (hereinafter "2018 Tier 1 FOA"), https://www.grantsolutions.gov/gs/preaward/previewPublicAnnouncement.do?id=61741; HHS, *Announcement of the Availability of Funds for Phase I New and Innovative Strategies (Tier 2) to Prevent Teenage Pregnancy and Promote Healthy Adolescence* (2018) (hereinafter "2018 Tier 2 FOA"), https://www.grantsolutions.gov/gs/preaward/previewPublicAnnouncement.do?id=61742. Under these FOAs, grant recipients would not be required to "replicat[e] programs that have been proven effective through rigorous evaluation." Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348, 733 (2018). The FOAs also prioritize abstinence-based programs, whether or not they are evidence-based.

For the reasons set forth below, *amici* respectfully submit that 2018 Tier 1 FOA is unlawful and *ultra vires*—and therefore should be enjoined.

ARGUMENT

I. CONGRESSIONAL INTENT TO FUND EVIDENCE-BASED PROGRAMS THROUGH THE TPPP IS CLEAR

From the outset, Congress has made clear its intent that the TPPP fund data-driven, evidence-based programs, with an emphasis on programs proven effective through scientific methodology. *See* Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034, 3253 (2009) (providing funds for "medically accurate and age appropriate programs that reduce teen pregnancy" and directing a majority of funds to programs that have been "proven effective through rigorous evaluation" to reduce teen pregnancy and associated risk factors). Before

Congress authorized the TPPP, teen pregnancy rates were climbing at an alarming rate, drawing into question the government's prior approach to teen pregnancy prevention, which had focused on unproven abstinence-only programs. *See* H.R. Rep. No. 111-220, at 89 (2009) ("In 2006, over 435,000 infants were born to mothers aged 15 to 19 years and . . . 80 percent of these births were unintended."); *A Brief History of Federal Funding for Sex Education & Related Programs*, Sexuality Info. & Educ. Council of U.S., http://www.siecus.org/index.cfm?fuseaction=page.viewPage&pageID=1341&nodeID=1 (last visited July 25, 2018).[1]

The statutory language with which Congress responded in its 2010 Consolidated Appropriations Act admits no ambiguity. The TPPP was to direct funds to evidence-based approaches, focusing on "medically accurate" programs, including, specifically, programs that "have been proven effective through rigorous evaluation." Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034, 3253 (2009); *see also id.* ("$110,000,000 shall be for making competitive contracts and grants to public and private entities to fund medically accurate and age appropriate programs that reduce teen pregnancy and for the Federal costs associated with administering and evaluating such contracts and grants, of which 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.") (emphasis added); *see also* FY 2010 *Justification of Estimates* at 2 (citing a 2007 study on the ineffectiveness of abstinence-only programs to justify funding for the TPPP initiative). Over the next eight years—up through the most recent 2018 Consolidated

[1] A 2007 study of abstinence-only programs revealed that such programs had no impact on participants' likelihood of engaging in sexual activity. *See* Christopher Trenholm et al., Mathematica Policy Research, Inc., HHS 100-98-0010, *Impacts of Four Title V, Section 510 Abstinence Education Programs – Final Report*, at xvii (Apr. 2007) ("Program and control group youth were equally likely to have remained abstinent."), https://files.eric.ed.gov/fulltext/ED496286.pdf.

Appropriations Act—Congress continued to reauthorize funding for these evidence-based teenage pregnancy prevention programs in amounts ranging from $98,000,000 to $110,000,000. Adrienne L. Fernandes-Alcantara, Cong. Research Serv., R45183, *Teen Pregnancy: Federal Prevention Programs* 6, 21 (2018).[2]

The legislative history of the statute is similarly telling. Both HHS's submission to Congress to justify TPPP funding and the relevant House and Senate Committee Reports concerning the TPPP emphasize that funds were being appropriated to support <u>evidence-based</u> programs to address teen pregnancy, <u>not</u> unproven abstinence-only programs.

A. HHS Justification of Estimates for the Appropriations Committees

When HHS submitted its Justification of Estimates for the Appropriations Committees for fiscal year 2010, which was relied upon by Congress in authorizing and appropriating funds for the TPPP, HHS emphasized that the TPPP would focus on evidence-based programming, not reflexively fund abstinence education. HHS sought to redirect funds from its Administration on Children and Families (ACF) Abstinence Education Program to an initiative designed to support evidence-based models that provide medically accurate information about ways to reduce the risk of pregnancy and sexually transmitted diseases:

> This language is revised to authorize a new Teen Pregnancy Prevention initiative that uses evidence-based models. The budget does not provide funds for the Community-Based Abstinence Education program.

FY 2010 *Justification of Estimates* at 57; *see also id.* at 2, 101 (citing a 2007 study on the

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[2] The breakdown of funding has generally followed the formula that ten percent of funds go to training and program support and, of the remainder, seventy-five percent go to grants "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 twenty-five percent go to "research and demonstration grants to develop, replicate, refine, and test additional models and innovative strategies for preventing teenage pregnancy." Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 2010, 123 Stat. 3034, 3253 (2009). HHS has referred to these as Tier 1 and Tier 2 grants, respectively, in its solicitations for grant applications.

ineffectiveness of abstinence-only programs, noting that this redirection of funds reflects "the Administration's efforts to target funds for a broader teen pregnancy prevention initiative using evidence-based models and promising practices").

Importantly, the funds would support programs whose positive results could be replicated. The bulk of funding was designated to "replicate the elements of one or more teenage pregnancy prevention programs that have been proven through rigorous evaluation to delay sexual activity, increase contraceptive use (without increasing sexual activity), or reduce teenage pregnancy."[3] *Id.* at 58. Money was also allocated for "research and demonstration grants to develop, replicate, refine, and test additional models and innovative strategies for preventing teen pregnancy," *id.*, thus building the evidence on what works to prevent teen pregnancy, Press Release, HHS, American Journal of Public Health: Building the Evidence Base to Prevent Teen Pregnancy (Sept. 30, 2016), https://www.hhs.gov/ash/oah/news/news-releases/2016-american-journal-of-public-health/index.html (OAH is "committed to learning from research and evaluation, using data and evaluation results, and encouraging practitioners to do the same"). The principle governing disbursement of these funds was clear: programs needed a rigorously evaluated record of success, and future programs would be developed through research and testing.

The goal of these efforts was to maximize the impact of federal dollars by funding programs that have demonstrated evidence of effectiveness, rather than unproven, ideologically-motivated programs. *See generally* Sarah E. Oberlander & Lisa C. Trivits, *Building the Evidence*

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[3] Mathematica Policy Research, which leads the TPP Evidence Review for HHS, reviews "criteria for evidence of effectiveness," which "require programs to show evidence of at least one favorable, statistically significant impact on at least one sexual risk behavior or reproductive health outcome of interest." Julieta Lugo-Gil et al., HHS, *Updated Findings from the HHS Teen Pregnancy Prevention Evidence Review: August 2015 through October 2016* at 1 (Apr. 2018), https://tppevidencereview.aspe.hhs.gov/pdfs/Summary_of_findings_2016-2017.pdf.

to Prevent Adolescent Pregnancy: *Contents of the Volume*, 106 Am. J. Pub. Health (Supp. 1) S6 (2016), https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2016.303442; Evelyn M. Kappeler & Amy Feldman Farb, *Historical Context for the Creation of the Office of Adolescent Health and the Teen Pregnancy Prevention Program*, 54 J. Adolescent Health S3, S3 (2014), https://www.jahonline.org/article/S1054-139X(13)00778-7/pdf (explaining that the plan originally designed at the Office of Management and Budget was to "create evidence-based social policy initiatives to improve policymaking and program outcomes" and to design "new initiatives to build rigorous data"). HHS placed this carefully crafted initiative within the ambit of the ACF and sent the proposal to Congress.

B. House and Senate Committee Reports

Reports of the House Committee on Appropriations and the Senate Committee on Appropriations, as well as the conference report, leave no doubt that Congress intended to fund programs scientifically proven to be effective. *See Thornburg v. Gingles*, 478 U.S. 30, 43 n.7 (1986) ("We have repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill.") (citations omitted). First, on July 22, 2009, the House Committee on Appropriations issued its report approving the ACF's creation of a Teenage Pregnancy Prevention initiative. H.R. Rep. 111-220, at 176 (2009). In its approval, the House Committee noted the shortcomings of the programs in place at that time:

> The Committee is deeply concerned that teenage birth rates have begun to rise after 14 years of decline. In 2006, teenage birth increased for the first time since 1991, following a 34-percent decline over that period. Preliminary data indicates this increase may have continued in 2007. Studies have found that the overwhelming majority of teenage pregnancies are unplanned.

Id. Accordingly, the House Committee designated $75,000,000 for "evidence-based programs that have shown through rigorous evaluation . . . to reduce teenage pregnancy, delay sexual activity, or increase contraceptive use." *Id*. Notably, the House Committee did not dismiss the

potential of abstinence education, pointing out that "[m]ost evidence-based programs that have been proven effective at reducing risk factors associated with teenage pregnancy are those that encourage abstinence as the safest choice and also discuss contraceptive use as a way to avoid pregnancy and sexually transmitted infections." *Id.* The House Committee's intent is thus clear that any program receiving funding must be evidence-based and no preordained advantage should be accorded to particular types of programs.

Second, the Senate Committee on Appropriations then considered the proposal and released its report on August 4, 2009. Although it declined to fund the program in the ACF, the Committee noted that it:

> applauds the administration for developing a new teen pregnancy proposal that focuses on evidence-based, effective interventions. The Committee has funded this initiative in the Office of the Secretary [of HHS] due to the public health expertise necessary to implement evidence-based approaches to reducing teen pregnancy and sexually transmitted infections, including HIV.

S. Rep. No. 111-66, at 150 (2009). The Senate Committee would further provide funding to establish the Office of Adolescent Health, tasked with implementing a new initiative supporting evidence-based approaches. *Id.* at 158. It also echoed the House in emphasizing evidence of effectiveness, rather than the ideology: "The Committee notes that programs formerly receiving abstinence education funding are eligible for funding under this new initiative, provided they meet the evidence-based criteria." *Id.* at 150 (emphasis added).

Finally, as further evidence of Congress's careful consideration of an evidence-based approach to the TPPP, the conference report released on December 8, 2009 announced that "[t]he conference agreement includes funding for a new Teenage Pregnancy Prevention program." H.R. Rep. No. 111-366, at 1040-41 (2009). The conferees recognized that the TPPP would fund

"a wide range of evidence-based programs." *Id* at 1043.[4]

Throughout, the legislative history makes clear that Congress had specific intent when it called for "programs that have been proven effective through rigorous evaluation," and that intent must be given effect. For instance, the House Committee on Appropriations 2010 Report explicitly defined "rigorous evaluation" as "randomized controlled trials." *See* H.R. Rep. 111-220, at 176 (2009) (explaining that funding must be allocated to "evidence-based programs that have shown through rigorous evaluation, defined as randomized controlled trials").[5] Additionally, the Senate Report of the Committee on Appropriations made clear that "proven effective" would require evidence-based analysis. S. Rep. No. 111-66, at 160 (2009) ("It is the Committee's intent that a wide range of evidence-based programs should be eligible for funding under this initiative . . . . As one example, the Committee notes that a foster care program for severely delinquent teens has been shown to produce a sizeable, statistically significant decrease in female youths' teen pregnancy rates.").

From the start, Congress was abundantly clear about its intent to fund, primarily, programs that were proven effective, and secondarily, promising evidence-based approaches, and this intent has been reflected in the language of subsequent appropriations statutes. This intent is also clear from the legislative history of the TPPP's authorization, including HHS's request for funding for the program and the House and Senate Committee reports.

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[4] Congress has continued to fund abstinence-only education. *See* Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 132 Stat. 64, 224-27 (2018); Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348, 733 (2018). By establishing separate revenue sources for these programs, Congress has further emphasized its intent that the TPPP funds are not designated for unproven abstinence-only education.

[5] Indeed, the TPPP was created against the backdrop of a movement by the government to "[b]uild[] rigorous evidence to drive policy" and "provid[e] more money to programs that generate results backed up by strong evidence." *See* Peter Orszag, Office of Mgmt. & Budget, Exec. Office of the President, OMBlog, *Building Rigorous Evidence to Drive Policy* (June 8, 2009), https://obamawhitehouse.archives.gov/omb/blog/09/06/08/BuildingRigorousEvidencetoDrivePolicy/.

II. PRIOR FUNDING OPPORTUNITY ANNOUNCEMENTS COMPLIED WITH STATUTORY DIRECTIVES

From 2010 to 2016, HHS administered the TPPP in a manner consistent with Congressional directives and objectives—and, accordingly, Congress repeatedly reauthorized the program under the same terms. At the outset, in 2009 and 2010, HHS engaged Mathematica Policy Research to undertake an independent, systematic evaluation of the existing research literature on teen pregnancy prevention initiatives (the "Evidence Review") in order to identify programs "proven effective through rigorous evaluation to reduce teenage pregnancy, behavioral risk factors underlying teenage pregnancy, or other associated risk factors," as Congress required for Tier 1 grants. Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034, 3253 (2009). HHS defined a set of rigorous standards governing satisfactory evidence of effectiveness. *See* HHS, *Teen Pregnancy Prevention Evidence Review: Frequently Asked Questions*, https://tppevidencereview.aspe.hhs.gov/Faq.aspx (last updated Dec. 2017). From approximately 1,000 potentially relevant studies, Mathematica identified 28 programs with a documented, favorable, and statistically significant impact on at least one sexual risk behavior or reproductive health outcome of interest (sexual activity, number of sexual partners, contraceptive use, STIs, or pregnancy). *See* Mathematica Policy Research, HHS, *Identifying Programs That Impact Teen Pregnancy, Sexually Transmitted Infections, and Associated Sexual Risk Behaviors: Review Protocol Version 1.0*, at 7-8 (2010), https://tppevidencereview.aspe.hhs.gov/pdfs/PPRER_Protocol_7-27-2011.pdf. HHS and Mathematica have continued this work since 2010, releasing updates to the Evidence Review on a near annual basis. *See* Mathematica Policy Research, HHS, *Teen Pregnancy Prevention Evidence Review*, https://tppevidencereview.aspe.hhs.gov/ReviewProtocol.aspx (last visited July 25, 2018).

In April 2010, HHS issued two FOAs 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." HHS, *Teenage Pregnancy Prevention: Replication of Evidence-based Programs (Tier 1)* 3 (2010) (hereinafter "2010 Tier 1 FOA"), http://wayback.archiveit.org/3909/20140324182152/http://www.hhs.gov/ash/oah/grants/assets/funding_announcement_04012010.pdf. Likewise tracking Congress's specific language, 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." HHS, *Teenage Pregnancy Prevention: Research and Demonstration Programs (Tier 2) and Personal Responsibility Education Program* 3 (2010) (hereinafter "2010 Tier 2 FOA"), http://wayback.archiveit.org/3909/20140324182152/http://www.hhs.gov/ash/oah/grants/assets/funding_announcement_04012010.pdf.

Further, under the 2010 Tier 1 FOA, funding could go only to replication of "evidence-based programs that have been shown to reduce teenage pregnancy, behavioral risk factors underlying teenage pregnancy, or other associated risk factors." 2010 Tier 1 FOA 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 either replicate programs identified by Mathematica's "independent, systematic review of the evidence base" as effective, or replicate other programs 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 2010 FOAs scored applications based on numerous criteria, but neither awarded any points based solely on the specific content of a program—much less its ideology. *See* 2010 Tier

1 FOA at 29-32; 2010 Tier 2 FOA at 29-31. Rather than program content, the criteria emphasized the importance of furthering evidence-based initiatives.[6] Applying these criteria, HHS awarded 102 grants primarily for five-year projects. HHS, *About the Teen Pregnancy Prevention (TPP) Program*, https://www.hhs.gov/ash/oah/grant-programs/teen-pregnancy-prevention-program-tpp/about/index.html (last visited July 24, 2017).

In 2015, in conjunction with an update to the Evidence Review, HHS issued FOAs for Tier 1 and Tier 2 that were further subdivided into Tier 1A and 1B FOAs and Tier 2A and Tier 2B FOAs. *See generally* HHS, *Announcement of Availability of Funds for Capacity Building to Support Replication of Evidence-Based TPP Programs (Tier 1A)* (2015) (hereinafter "2015 Tier 1A FOA"), https://www.hhs.gov/ash/oah/sites/default/files/tier1a-foafile.pdf; HHS, *Announcement of Availability of Funds for Replicating Evidence-Based Teen Pregnancy Prevention Programs to Scale in Communities with the Greatest Need (Tier 1B)* (2015) (hereinafter "2015 Tier 1B FOA"), https://www.hhs.gov/ash/oah/sites/default/files/tier1b-foafile.pdf; HHS, *Announcement of Availability of Funds for Supporting and Enabling Early Innovation to Advance Adolescent Health and Prevent Teen Pregnancy (Tier 2A)* (2015) (hereinafter "2015 Tier 2A FOA"), https://www.hhs.gov/ash/oah/sites/default/files/tier2a-foafile.pdf; HHS, *Announcement of Availability of Funds for Rigorous Evaluation of New or Innovative Approaches to Prevent Teen Pregnancy (Tier 2B)* (2015) (hereinafter "2015 Tier 2B FOA"), https://www.hhs.gov/ash/oah/sites/default/files/tier2b-foafile.pdf. Consistent with the

[6] For example, among the scoring criteria for Tier 1 FOA was whether the "applicant includes a description of how the evidence-based program model will be implemented with fidelity to the original intervention." 2010 Tier 1 FOA at 30. Tier 2 applicants could earn points for "demonstrat[ing] how they will carefully document the intervention for possible replications by others." 2010 Tier 2 FOA at 29. And for Tier 2 applicants "proposing to test evidence-based program models with significant adaptations, the applicant [should] include[] a description of how an evidence-based program model will be implemented with a rationale for the proposed adaptations." *Id.*

statutory language, the 2015 Tier 1A and 1B FOAs focused on replicating existing evidence-based programs that had been determined to be effective, while the 2015 Tier 2A and 2B FOAs focused on growing the list of proven evidence-based programs. Thus, the Tier 1 FOAs required that all grants replicate "Evidence-Based Teen Pregnancy Prevention 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." 2015 Tier 1A FOA at 79; 2015 Tier 1B FOA at 89. Similarly, the Tier 2 FOAs solicited applications with the goal of "expanding the evidence base for the field of TPP by funding rigorous evaluations of innovative interventions designed to address gaps in the existing evidence, reduce disparities in teen pregnancy and associated sexual and reproductive health outcomes, and/or serve high-need populations." 2015 Tier 2B FOA at 3-4. As in 2010, none of these FOAs awarded any points to applicants based on the specific content or ideological underpinnings of a proposed program or curriculum. *See* 2015 Tier 1A FOA at 61-65; 2015 Tier 1B FOA at 71-76; 2015 Tier 2A FOA at 53-58; 2015 Tier 2B FOA at 71-78. HHS awarded numerous grants for five-year projects in 2015. *See generally Policy & Research, LLC v. HHS*, No. 18-cv-00346 (KBJ), 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. June 21, 2018).

The 2010 and 2015 FOAs were both faithful to Congress's purposes and generated widely lauded results. Between fiscal years 2010 and 2014, "the teen birth rate in the U.S. declined 29%." HHS, *Results from the OAH Teen Pregnancy Prevention Program* 2, https://www.hhs.gov/ash/oah/sites/default/files/tpp-cohort-1/tpp-results-factsheet.pdf. The unanimous September 2017 report of the bipartisan Commission on Evidence-Based Policymaking, established by House Speaker Paul Ryan and Senator Patty Murray, highlighted

the TPPP as an example of a federal program "developing increasingly rigorous portfolios of evidence," where "[e]vidence building was woven into the program from the start, including a full range of studies from implementation assessments to impact evaluations, using random assignment when appropriate." Comm'n on Evidence-Based Policymaking, *The Promise of Evidence-Based Policymaking* 94 (Sept. 2017).

Accordingly, Congress has continued to fund the TPPP since 2010, so far allocating to the TPPP a combined $922,500,000. *See* Adrienne L. Fernandes-Alcantara, Cong. Research Serv., R45183, *Teen Pregnancy: Federal Prevention Programs* 21 (2018).

III. THE 2018 FOAs CONTRAVENE CONGRESSIONAL INTENT TO IMPLEMENT AND DEVELOP EVIDENCE-BASED PROGRAMS

Despite Congress's unambiguous intent in authorizing, reauthorizing, and funding the TPPP, the two 2018 FOAs issued by HHS establish new criteria for receipt of TPPP funds that flout Congressional intent. These new FOAs undermine the basic objective of the TPPP to support programs that are evidence-based, and specifically, programs that have been proven effective and innovate through research and testing.[7]

Although Congress has directed seventy-five percent of TPPP funds available after funding of training and program support for "replicating programs that have been proven effective through rigorous evaluation to reduce teen pregnancy," Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348, 733 (2018), the 2018 FOA for these funds—the

[7] Despite Congress's continued TPPP appropriations, HHS recently attempted to derail the program a different way, by terminating grants. Courts have repeatedly found these unilateral terminations of TPPP funds to be unlawful. *See Planned Parenthood of Greater Wash. & N. Idaho v. HHS*, No. 2:18-cv-0055-TOR, 2018 WL 1934070, at *1-2 (E.D. Wash. Apr. 24, 2018), *appeal filed*, No. 18-35533 (9th Cir. June 26, 2018); *King County v. Azar*, No. C18-0242-JCC, 2018 WL 2411759, at *6-8 (W.D. Wash. May 29, 2018); *Policy & Research, LLC v. HHS*, No. 18-cv-00346 (KBJ), 2018 WL 2184449, at *2-5 (D.D.C. May 11, 2018), *appeal filed* (D.C. Cir. June 21, 2018); *Healthy Teen Network v. Azar,* Civ. A. No. CCB-18-468, 2018 WL 1942171, at *1-4 (D. Md. Apr. 25, 2018), *appeal filed*, No. 18-709 (4th Cir. June 26, 2018).

2018 Tier 1 FOA—does not require that applicants use their grants for this purpose. Unlike the 2010 and 2015 FOAs, which complied with statutory directives, the 2018 Tier 1 FOA no longer requires that programs be "evidence-based"—indeed, the phrase "evidence-based" has been removed from the 2018 FOAs entirely. *Compare* 2010 Tier 1 FOA at 5, *with* 2018 Tier 1 FOA, 2018 Tier 2 FOA. There is no reference in the 2018 Tier 1 FOA, as there was in 2010, to "[e]vidence-based program models," for which "systematic empirical research or evaluation has provided evidence of effectiveness." *Compare* 2010 Tier 1 FOA at 44, *with* 2018 Tier 1 FOA. Nor are fund recipients required to replicate programs "identified by HHS as having undergone a rigorous evaluation" to demonstrate their effectiveness, as they were in 2015. *Compare* 2015 Tier 1A FOA at 79, *and* 2015 Tier 1B FOA at 89, *with* 2018 Tier 1 FOA. Moreover, neither of the 2018 FOAs reference the TPP Evidence Review, HHS's own authoritative document regarding evidence-based programming, nor does the 2018 Tier 1 FOA require that funding recipients replicate programs identified by that review as effective or that they meet similarly stringent evidence-review criteria. *See* 2018 Tier 1 FOA; 2018 Tier 2 FOA.

In sharp contrast to the language used by Congress, the 2018 Tier 1 FOA's stated purpose is "to fund the <u>evaluation of replication strategies</u> that focus on protective factors shown to prevent teen pregnancy, improve adolescent health, and address youth sexual risk holistically." 2018 Tier 1 FOA at 17 (emphasis added). Rather than requiring replication of a proven approach, the 2018 Tier 1 FOA directs that "evaluation should take place before and during the project's implementation in order to ensure . . . ongoing quality improvement of both project design and performance," and "[r]ecipients are expected to continuously improve the quality of the project." *Id.* This plainly contradicts Congress's directive that the Tier 1 funds are to be used solely for program replication.

Strikingly, the 2018 Tier 1 FOA does not require grant recipients to implement any evidence-based programs. Instead, it solicits applications for projects to implement a "model that incorporates the common characteristics outlined in" one of two tools: (1) the Center for Relationship Education's Systematic Method for Assessing Risk-Avoidance Tool ("SMARTool") or (2) the Tool to Assess the Characteristics of Effective Sex and STD/HIV Education Programs ("TAC"). 2018 Tier 1 FOA at 3-4. Far from prescribing any particular curricula, these tools appear to be mechanisms for assessing and implementing programs. SMARTool describes itself as a "tool designed to help organizations assess, select, and implement effective programs and curricula that support sexual risk avoidance." Ctr. for Relationship Educ., *SMARTool: Assessing Potential Effectiveness for Sexual Risk Avoidance Curricula and Programs* 6 (15 of PDF) (2010), https://www.myrelationshipcenter.org/getmedia/dbed93af-9424-4009-8f1f-8495b4aba8b4/SMARTool-Curricula.pdf.aspx. Similarly, the TAC is "an organized set of questions designed to help practitioners assess whether curriculum-based programs have incorporated the common characteristics of effective programs." Douglas Kirby et al., Healthy Teen Network, *Tool to Assess the Characteristics of Effective Sex and STD/HIV Education Programs* 1 (2007), http://www.health.state.mn.us/divs/idepc/dtopics/stds/stded.pdf. These tools do not themselves appear to be programs, let alone "programs that have been proven effective through rigorous evaluation"; nor do they appear capable of replication in any meaningful way.

Further, the 2018 FOAs steer grants to abstinence-only programs, regardless of whether such programs are evidence-based. Both 2018 FOAs describe "Sexual Risk Avoidance" as "the natural approach for an emphasis on sexual delay" and "Sexual Risk Reduction" as "the natural approach for an emphasis on cessation support," 2018 Tier 1 FOA at 15; 2018 Tier 2 FOA at 12-13. They assign up to 100 points to applicants based on various criteria and assign the most

points (25 points in Tier 1, and 30 points in Tier 2) based on alignment of the proposal with the FOA's "priorities." *See* 2018 Tier 1 FOA at 58-60; 2018 Tier 2 FOA at 53-54. These priorities include "[c]learly communicat[ing] that teen sex is a risk"; integrating "optimal health into every component of the project"; and providing "cessation support" for those who are already sexually active "to make healthier and risk-free choices in the future." 2018 Tier 1 FOA at 14-16; *accord* 2018 Tier 2 FOA at 12-13. This favoring of abstinence-based programs, in conjunction with the absence of any requirement that the TPPP funds be used to replicate programs that have been proven effective, defies Congress's intent to support evidence-based programs.

Because the 2018 Tier 1 FOA violates Congress's clear intent, as manifested in the text of the Consolidated Appropriations Act and relevant legislative history, *amici* respectfully submit that the FOA is contrary to law and *ultra vires*. *See* 31 U.S.C. § 1301(a) (2018) ("Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."); U.S. Const., art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"); *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 428 (1990) (explaining that the Appropriations Clause is meant 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"); *Chevron, U.S.A., Inc. v. Nat'l 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."). Accordingly, *amici* respectfully urge the Court to enjoin defendants from awarding funds under the 2018 Tier 1 FOA. *See* 5 U.S.C. § 706(2)(A) (2018).

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully submit that plaintiff's motion for a preliminary injunction and partial summary judgment should be granted.

DATED this 27th day of July, 2018.

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