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** Pro Hac Vice motion to be filed*

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.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(Violation of the Administrative Procedure Act, 5 U.S.C. § 706; *Ultra vires* action)

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Introduction

1. This is an action to enjoin the unlawful administration of the 2018 application and selection process for Teen Pregnancy Prevention Program ("TPP Program") grants by Defendants the United States Department of Health and Human Services ("HHS"), Secretary Alex M. Azar II, and Valerie Huber.

2. Congress created the TPP Program in 2009 to fund medically accurate programs to prevent teen pregnancy, with a particular emphasis 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." Congress specifically dedicated 75% of TPP Program grant funding to replicating such programs, with the other 25% committed to "research and demonstration grants to develop, replicate, refine, and test additional models and innovative strategies for preventing teenage pregnancy."

3. From 2010 through 2016, HHS implemented the TPP Program consistent with these Congressional directives. HHS awarded 75% of TPP Program grant funding to programs like those offered by Plaintiff Multnomah County (the "County"): replications of evidence-based programs that had been proven effective through rigorous, empirical evaluation. This initiative provided a wide range of sex education programs to hundreds of thousands of teens at high risk for teen pregnancy, in what Congress's bipartisan Commission on Evidence-Based Policymaking cited as a leading example of a "Federal program[] developing increasingly rigorous portfolios of evidence."

4. Despite the success of the TPP Program, and in the face of Congress's clear and unwavering directive that the bulk of the funding go to the replication of rigorously evaluated programs, certain officials within HHS now believe that the TPP Program created by Congress is

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a "sham" that should be "abolish[ed]." Accordingly, they have attempted to replace Congress's design with their own creation, which is as unsanctioned as it is incompatible with Congress's directives. First, they terminated the existing TPP Program grants two years early, an action that numerous courts have already declared unlawful. As that effort began to unravel, they switched tactics and purported to continue the TPP Program through a new Funding Opportunity Announcement ("FOA") that dramatically contradicts Congress's unambiguous directives.

5. The new criteria in the 2018 Tier 1 Funding Opportunity Announcement ("2018 Tier 1 FOA") violate the terms of the statute by shifting funds away from "replicating programs that have been proven effective through rigorous evaluation." Instead, the new FOA allows prospective grantees to choose *any* program, without any requirement that it have undergone any evaluation, let alone have been proven effective. The most important criterion is now adherence to an abstinence-only message that Congress consciously chose not to mandate in creating the TPP Program.

6. In addition to remaking the TPP Program in a way that conflicts with Congress's mandate, Defendants have declined to explain the basis for these changes, which sharply diverge from the agency's prior practice in funding TPP Program grants and directly conflict with evidence published by the agency. Further, Defendants' administration of the 2018 TPP Program grants competition violates HHS regulations proscribing political interference in the grantmaking process. Through these unlawful actions, Defendants are causing irreparable injury to the County and its residents because the County is forced to compete for these funds at an unlawful disadvantage and thus is imminently poised to lose a significant funding source. That loss of funding will result in the elimination of County staff positions and will deprive thousands

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of teens of access to the evidence-based, medically accurate comprehensive sexual education the County has offered and remains committed to offering in its schools and to its residents.

7. The changes to the FOA and the TPP Program—which violate the Administrative Procedure Act and are *ultra vires*—contravene the authorizing statute and HHS regulations, are arbitrary and capricious, and thwart Congress's fundamental objective in creating the TPP Program. Accordingly, the Court should declare the 2018 Tier 1 FOA unlawful and enjoin Defendants from using it to review applications and make grant awards.

Jurisdiction and Venue

8. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

9. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e) because Plaintiff Multnomah County resides in this district and there is no real property involved in the action, and because a substantial part of the acts or omissions giving rise to the claim occurred in this judicial district.

Parties

10. Plaintiff Multnomah County is a local government body formed under the laws of the State of Oregon that is home to 766,135 residents living in and around Portland, Oregon. The Multnomah County Health Department has broad-ranging responsibility for the health and well-being of the County's residents, including for educating the County's youth and their families about sexual health.

11. Defendant Alex M. Azar II is the Secretary of HHS. He is sued in his official capacity.

12. Defendant Valerie Huber is the Senior Policy Advisor for the Office of the Assistant Secretary for Health at HHS. She is sued in her official capacity.

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13. Defendant HHS is a federal agency headquartered in Washington, D.C. that administers the Teen Pregnancy Prevention Program.

Background

I. Congress Creates the Teen Pregnancy Prevention Program to Fund Rigorously Evaluated, Evidence-based Teen Pregnancy Interventions

A. Congress Creates the TPP Program in 2009

14. In 2006 and 2007, teen pregnancy rates began to climb after years of decline. In response, Congress mandated the creation of the Teen Pregnancy Prevention Program in 2009 to fund a wide array of evidence-based, scientifically rigorous approaches to combatting teen pregnancy.[1]

15. This was a deliberate shift from the previous two decades, when Congress had directed that the principal criteria for federal funding of sex education programs were that programs teach 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."[2] For years, Congress made such abstinence-only programs the main recipient of federal sex education funding without requiring evidence that funded programs were effective in reducing teen pregnancy, delaying sexual intercourse, or preventing other sexually risky behaviors.[3]

16. As of 2009, these abstinence-only programs consisted of three main funding sources. The first two, the Community-Based Abstinence Education ("CBAE") program and a portion of the Adolescent Family Life Act ("AFLA") program, provided grants to organizations

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[1] Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034, 3253 (2009).
[2] 42 U.S.C. § 710 (2017).
[3] Sexuality Info. & Educ. Council of the U.S., *A Brief History of Federal Funding for Sex Education and Related Programs*, http://www.siecus.org/index.cfm?fuseaction=page.viewPage&pageID=1341&nodeID=1.

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offering abstinence-only education programs. The third program, the Title V State Abstinence Education Block Grant Program ("Title V"), provided grants to states. In 2009, Congress appropriated $112 million for the two organization-focused programs, and $50 million for the state-focused program. Congress assigned HHS's Administration on Children, Youth, and Families ("ACF") to administer these programs.[4]

17. Unlike these programs, which focused on the ideology advanced by grant recipients, the TPP Program was intended to support evidence-based teen pregnancy prevention interventions, regardless of message or methodology, with the aim to "maximize the impact of federal dollars by funding programs that have demonstrated evidence of effectiveness, while also funding and evaluating new programs to continue building the evidence base."[5]

18. Accordingly, with the Consolidated Appropriations Act, 2010, Congress appropriated $110 million to HHS for fiscal year 2010 and mandated that the funds "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."[6]

19. Congress designed the TPP Program to prioritize replication of programs that had already been proven effective through rigorous evaluation, with a secondary focus on funding research into promising and innovative programs to determine whether they were effective. Accordingly, Congress directed that TPP Program funds be disbursed across two tiers of grants. For Tier 1 grants, Congress mandated that "not less than $75,000,000 shall be for replicating programs that have been proven effective through rigorous evaluation to reduce teenage

[4] Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, 123 Stat. 524 (2009).
[5] Sarah E. Oberlander & Lisa C. Trivits, *Building the Evidence to Prevent Adolescent Pregnancy: Contents of the Volume*, 106 Am. J. Pub. Health S6 (2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5049467/pdf/AJPH.2016.303442.pdf.
[6] Consolidated Appropriations Act, 2010, 123 Stat. at 3253.

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pregnancy, behavioral risk factors underlying teenage pregnancy, or other associated risk factors."[7] For Tier 2 grants, Congress mandated 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."[8] Congress also appropriated "$4,455,000 … to carry out evaluations (including longitudinal evaluations) of teenage pregnancy prevention approaches."[9]

20. Congress simultaneously appropriated funds for the Office of Adolescent Health ("OAH") within the Office of the Assistant Secretary for Health, which would oversee the TPP Program.[10]

21. At the same time, Congress eliminated funding for two of the abstinence-only grant programs, the CBAE program and the relevant portion of AFLA. Congress retained the separate appropriation for Title V abstinence-only grants.

B. *Congress Continuously Funds the TPP Program, While Separately Funding a Reduced Number of Abstinence-Only "Sexual Risk Avoidance" Programs*

22. From 2010 to the present, Congress has continued to appropriate between $100 and $110 million per year for the TPP Program with consistent statutory language.

23. Most recently, on March 23, 2018, with the Consolidated Appropriations Act, 2018, Congress fully funded the TPP Program for fiscal year 2018, directing that "$101,000,000 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."[11] The

[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*; H.R. Rep. No. 111-366, at 1043 (2009) (Conf. Rep.).
[11] Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348, 733 (2018).

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Consolidated Appropriations Act, 2018, mandates that "not more than 10 percent of the available funds shall be for training and technical assistance, evaluation, outreach, and additional program support activities, and of the remaining amount 75 percent 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 25 percent shall be available for research and demonstration grants to develop, replicate, refine, and test additional models and innovative strategies for preventing teenage pregnancy."[12]

24. At the same time that Congress has continuously funded the TPP Program in the same manner and with the same language, it has provided separate appropriations to support abstinence-only education through distinct funding streams administered by different components within HHS. It has continued the Title V program, appropriating $75 million to it in 2018.[13] It also created a second program in 2012 originally named the "Competitive Abstinence Education Grant Program" and later renamed the "Sexual Risk Avoidance Education Program" ("SRAEP"), for which it appropriated $25 million in 2018 "for making competitive grants which exclusively implement education in sexual risk avoidance (defined as voluntarily refraining from non-marital sexual activity)."[14]

[12] *Id.*
[13] Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 132 Stat. 64, 227 (Feb. 9, 2018), https://www.congress.gov/115/bills/hr1892/BILLS-115hr1892enr.pdf.
[14] Consolidated Appropriations Act, 2018, 132 Stat. at 736. In 2018, Congress also changed the name of the Title V State Abstinence Education Block Grant Program to "Sexual Risk Avoidance Education," giving the two programs the same name. To avoid confusion, Plaintiff will refer to the former as "Title V" and the latter as "SRAEP."

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25. In the Consolidated Appropriations Act, 2018, Congress directed that no more than one percent of any discretionary funds appropriated to HHS be "transferred" between appropriations and that no appropriation shall be increased by more than three percent.[15]

II. HHS Administers the TPP Program from 2010 to 2016 Consistent with Congressional Directives and Objectives

A. The 2010–2015 Grant Cycle

26. In preparation for implementing Congress's mandate to "replicat[e] programs that [had] been proven effective through rigorous evaluation," HHS contracted with Mathematica Policy Research ("Mathematica") in 2010 to undertake an independent, systematic review of the existing research literature on teen pregnancy prevention initiatives to identify programs that had documented positive impacts on teen pregnancy prevention, sexual transmitted infections ("STIs"), and other associated sexual risk behaviors. After analyzing the literature, Mathematica identified 28 evidence-based programs spanning a variety of approaches—including comprehensive sexual education programs that discuss abstinence within a more comprehensive framework of sexual health as well as a small number of programs that focus on abstinence—each of which showed evidence of a favorable, statistically significant program impact on at least one sexual behavior or reproductive health outcome.[16]

27. In April 2010, HHS, through OAH, issued two separate FOAs soliciting applications for Tier 1 and Tier 2 five-year grants. The Tier 1 grant projects were designed to replicate programs that had demonstrated positive impact on key sexual behavioral outcomes, including reduction of teen pregnancy and delay of sexual activity. The Tier 2 grant projects

[15] Consolidated Appropriations Act, 2018, 132 Stat. at 736.

[16] *See* Evelyn M. Kappeler & Amy Feldman Farb, *Historical Context for the Creation of the Office of Adolescent Health and the Teen Pregnancy Prevention Program*, J. Adolescent Health 54, S3-S9 (2014); Julieta Lugo-Gil et al., *Updated Findings from the HHS Teen Pregnancy Prevention Evidence Review: August 2015 Through October 2016* (Apr. 2018), https://tppevidencereview.aspe.hhs.gov/pdfs/Summary_of_findings_2016-2017.pdf.

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were designed to develop and rigorously test new and innovative approaches to prevent teen pregnancy.[17]

28. As relevant to this litigation, the 2010 Tier 1 FOA, "Teenage Pregnancy Prevention: Replication of Evidence-based Programs Funding Opportunity," announced $75 million in funds that "can 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."[18] The 2010 Tier 1 FOA defined "[e]vidence-based program models" as "[p]rogram models for which systematic empirical research or evaluation has provided evidence of effectiveness" and directed applicants to the "list[] of evidence-based program[s] which the Department has identified []as having met the standards to be considered effective and eligible for funding for replication."[19] The 2010 Tier 1 FOA, in turn, defined "[r]eplication" as "[r]eproduction of evidence-based program models that have been proven to be effective through rigorous evaluation."[20]

29. To meet the application criteria, prospective grantees were required either to choose from the list of 28 programs compiled by Mathematica and set out in an appendix to the FOA, or to propose to replicate a program not already reviewed by Mathematica. Any applicant choosing the latter option had to satisfy "a set of stringent criteria," including that the proposed

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[17] OAH et al., *Teenage Pregnancy Prevention: Replication of Evidence-based Programs Funding Opportunity Announcement and Application Instructions* 3 (Apr. 2, 2010), http://wayback.archive-it.org/3909/20140324182152/http://www.hhs.gov/ash/oah/grants/assets/funding_announcement_04012010.pdf ("2010 Tier 1 FOA"); OAH et al., *Teenage Pregnancy Prevention (TPP): Research and Demonstration Programs and Personal Responsibility Education Program (PREP) Funding Opportunity Announcement and Application Instructions* 3 (Apr. 8 2010), http://wayback.archive-it.org/3909/20140324182153/http://www.hhs.gov/ash/oah/grants/assets/foa_tpp_tier_2.pdf ("2010 Tier 2 FOA"); Kappeler & Farb, *supra* note 16, at S3.

[18] 2010 Tier 1 FOA at 3-4.

[19] *Id.* at 44.

[20] *Id.* at 45.

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program be reviewed by Mathematica in the first instance "using the same evidence review criteria that was used to identify the programs listed in" the appendix.[21] The 2010 Tier 1 FOA further instructed that in the event a proposed program "does not meet the evidence criteria, the application will be rejected and will not be considered."[22]

30. Applicants for funding through the 2010 Tier 1 FOA were also "required to maintain fidelity to the original evidence-based program model with minimal adaptations."[23] As the 2010 Tier 1 FOA explained, "[f]idelity" is "[t]he degree to which an intervention is delivered as designed" and the "[f]aithfulness with which a curriculum or program is implemented."[24] Significant adaptations would result in an applicant being ineligible for Tier 1 funding and, instead, "would entail applicants applying under Tier 2."[25]

31. The 2010 Tier 1 FOA provided that "[f]inal award decisions will be made by the Director of the Office of Adolescent Health."[26]

32. OAH funded 102 grantees through competitively awarded grants as part of the April 2010 FOAs—75 Tier 1 grants and 27 Tier 2 grants.[27] Between fiscal years 2010 and 2014, the grantees' projects reached more than half a million young people in 39 states and the District of Columbia, trained a combined 6,100 facilitators, and created 3,800 community partnerships.[28]

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[21] *Id.* at 6, 7.
[22] *Id.* at 7.
[23] *Id.*
[24] *Id.* at 44.
[25] *Id.* at 7.
[26] *Id.* at 32.
[27] Amy Feldman Farb & Amy L. Margolis, *The Teen Pregnancy Prevention Program (2010-2015): Synthesis of Impact Findings*, 106 Am. J. Pub. Health S9 (Sept. 2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5049454/.
[28] OAH, HHS, *Results from the OAH Teen Pregnancy Prevention Program*, https://www.hhs.gov/ash/oah/sites/default/files/tpp-cohort-1/tpp-results-factsheet.pdf.

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33. As provided for by Congress, a fundamental objective of the TPP Program was the evaluation of programs funded by Tier 1 and Tier 2 grants to continue to build the repository of evidence of which TPP Programs were effective, for which populations, and in which settings, and, equally important, which were not effective.[29] HHS's evaluation of the first cohort of TPP Program grantees concluded that the number of programs that demonstrated statistically significant results exceeded the norm for large-scale evaluation efforts in other fields.[30]

34. Apart from these TPP Program-specific evaluations, HHS maintained its contract with Mathematica to conduct an ongoing, periodic systematic review, the "TPP Evidence Review," of scholarly research literature on teen pregnancy prevention programs to identify programs that either met or did not meet the review criteria for evidence of effectiveness. In July 2014, as the first wave of grants was nearing its conclusion, HHS issued an installment of the TPP Evidence Review, updating and augmenting its list of programs showing evidence of effectiveness.[31]

35. During the 2010–2015 grant cycle, teen pregnancy rates declined and many—including HHS itself—cited the TPP Program as contributing to this trend.

36. The TPP Program has been widely lauded as a model of evidence-based policy making. The unanimous September 2017 report of the bipartisan Commission on Evidence-Based Policymaking, established by House Speaker Paul Ryan and Senator Patty Murray, showcased the TPP Program as an example of a federal program "developing increasingly

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[29] *Id.*; *see also* OAH, HHS, *TPP Program Grantees (FY2010-2014)*, https://www.hhs.gov/ash/oah/grant-programs/teen-pregnancy-prevention-program-tpp/about/tpp-cohort-1/index.html; Farb & Margolis, *supra* note 27, at S11.

[30] OAH, HHS, *TPP Program Grantees (FY2010-2014)*, *supra* note 29; Farb & Margolis, *supra* note 27, at S13.

[31] Brian Goesling et al., *Updated Findings from the HHS Teen Pregnancy Prevention Evidence Review: January 2011 Through April 2013* (July 2014), https://tppevidencereview.aspe.hhs.gov/pdfs/Summary_of_findings_2013.pdf.

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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."[32]

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

37. In January 2015, HHS, through OAH, issued new FOAs for a second cohort of five-year grants organized into two tiers and further subdivided as follows:

- **Tier 1A** – Capacity Building to Support Replication of Evidence-Based Teen Pregnancy Prevention Programs: "The goal of this FOA is to fund intermediary organizations to provide capacity building assistance (CBA) to at least 3 youth-serving organizations to replicate evidence-based TPP programs in a defined service area with demonstrated need."[33]
- **Tier 1B** – Replicating Evidence-Based Teen Pregnancy Prevention Programs to Scale in Communities with the Greatest Need: "The goal of this FOA is to have a significant impact on reducing rates of teen pregnancy and existing disparities by replicating evidence-based TPP programs to scale in at least 3 settings in communities and with populations at greatest need."[34]
- **Tier 2A** – Supporting New or Innovative Approaches: "The overall goal of this FOA … is to enable and support early innovation to advance adolescent health and prevent teen pregnancy."[35]

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[32] Comm'n on Evidence-Based Policymaking, *The Promise of Evidence-Based Policymaking* 94 (Sept. 2017), https://www.cep.gov/content/dam/cep/report/cep-final-report.pdf.
[33] OAH et al., *Capacity Building to Support Replication of Evidence-Based TPP Programs (Tier 1A) Funding Opportunity Announcement and Application Instructions* 3-4 (Jan. 10, 2015), https://www.hhs.gov/ash/oah/sites/default/files/tier1a-foafile.pdf ("2015 Tier 1A FOA").
[34] OAH et al., *Replicating Evidence-Based Teen Pregnancy Prevention Programs to Scale in Communities with the Greatest Need (Tier 1B) Funding Opportunity Announcement and Application Instructions* 3 (Jan. 10, 2015), https://www.hhs.gov/ash/oah/sites/default/files/tier1bfoafile.pdf ("2015 Tier 1B FOA").
[35] OAH et al., *Supporting and Enabling Early Innovation to Advance Adolescent Health and Prevent Teen Pregnancy (Tier 2A) Funding Opportunity Announcement and Application Instructions* 4 (Jan. 10, 2015), https://www.hhs.gov/ash/oah/sites/default/files/tier2a-foafile.pdf ("2015 Tier 2A FOA").

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- **Tier 2B** – Rigorous Evaluation of New or Innovative Approaches: "The purpose of this FOA is to increase the number of evidence-based TPP interventions available by rigorously evaluating new or innovative approaches for preventing teen pregnancy and related high-risk behaviors."[36]

38. As most relevant here, the 2015 Tier 1B FOA announced $60 million in funding for approximately 60 awards ranging from $500,000 to $2 million annually to replicate evidence-based programs to scale in at least three settings in high-risk communities and populations.[37] Consistent with both the language of the relevant appropriation for Tier 1 TPP Program grants and HHS's interpretation of that language in the 2010 Tier 1 FOA, the 2015 Tier 1B FOA defined "Evidence-Based Teen Pregnancy Prevention Programs" 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."[38]

39. The 2015 Tier 1B FOA directed applicants to choose an "evidence-based TPP program[] eligible for replication," which was further defined by HHS as a program that had shown evidence of effectiveness as part of the TPP Evidence Review *and* had been "assessed by the HHS TPP Evidence Review as being implementation ready, meaning that the program has clearly defined curricula and components, necessary staff supports and training, and specified guidelines and tools for monitoring fidelity."[39]

40. As with the prior FOA, the 2015 Tier 1B FOA set forth the list of 36 eligible evidence-based programs in an appendix. To aid prospective grantees in choosing a program

[36] OAH, *Rigorous Evaluation of New or Innovative Approaches to Prevent Teen Pregnancy (Tier 2B) Funding Opportunity Announcement and Application Instructions* 3 (Jan. 10, 2015), https://www.hhs.gov/ash/oah/sites/default/files/tier2b-foafile.pdf ("2015 Tier 2B FOA").
[37] 2015 Tier 1B FOA at 3, 39.
[38] *Id*. at 89.
[39] *Id.* at 11-12.

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suitable for replication in their communities, the appendix set forth information concerning outcomes of the programs (*e.g.*, the effect on sexual activity, contraceptive usage, or age of sexual initiation) and the durations of those outcomes, and also gave the programs either a "moderate" or "high" rating to indicate the degree of effectiveness. The appendix further made clear the specific populations and settings in which each program had shown evidence of success, explaining, for example, that the three programs identified as teaching abstinence education had shown positive results primarily in the youngest teens, aged 11 to 13 or those in 7th to 9th grades when delivered both in schools and community settings.[40]

41. The 2015 Tier 1B FOA further "required [grantees] to implement evidence-based TPP programs with fidelity and quality"[41] and awarded points to grantees based on, among other things, the "extent to which the applicant's plans for monitoring fidelity and managing adaptations are likely to result in implementation of evidence-based TPP programs with fidelity" as well as the applicant's experience "implementing evidence-based TPP programs on a large scale (i.e., at least 500 youth per year)" and in the target communities.[42] Applicants were also awarded points based on the extent to which their programs were culturally inclusive and non-stigmatizing for all teens.[43]

42. As with the 2010 Tier 1 FOA, final award decisions for the 2015 Tier 1B FOA were to be made by the OAH Director.[44]

43. In July of 2010, HHS funded 81 grantees across Tiers 1 and 2 (58 and 23 grants, respectively) whose projects were designed to serve more than 1.2 million youth across 39 states

[40] *Id.* at app. D.
[41] 2015 Tier 1B FOA at 21.
[42] *Id.* at 73, 74.
[43] *Id.* at 53, 73.
[44] *Id.* at 77.

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over the five-year grant period.[45] Plaintiff Multnomah County was one of these grantees, receiving a Tier 1B grant for $6.25 million over five years.

44. In July 2015, and again in July 2016, HHS disbursed the annual funding for the second cohort of 81 grantees in notices of award that were consistent with the terms of the five-year grants.

III. Defendants Set Out to End the TPP Program and Replace It with Grants for Abstinence-Only Content

A. Longstanding Opponents of Congress's TPP Program Are Given Authority Over the TPP Program

45. Since the inception of the TPP Program, Congress's program has been vehemently opposed by advocates of abstinence-only education.

46. One such opponent is Defendant Valerie Huber. Prior to her appointment at HHS, Ms. Huber worked as an advocate for abstinence-only education. Ms. Huber also directly opposed—and sought to eradicate—comprehensive sexual education from the nation's schools.

47. From 2004 to 2007, Ms. Huber ran the Ohio Department of Health's Abstinence Education Program, a public non-sectarian program into which she "infus[ed] her Christian beliefs" and through which she "advocat[ed] a different code of morality—the biblical standard of abstinence until marriage."[46] This biblical standard is incompatible with what she believes is "a mixed message about morality: 'Don't have sex, but if you do, use protection.'"[47] As she later explained, "the debate [about] what kind of sex education should be taught … should be the

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[45] Press Release, HHS, *HHS Awards Teen Pregnancy Prevention Program Grants* (July 6, 2015), http://wayback.archive-it.org/3926/20170127190334/https://www.hhs.gov/about/news/2015/07/06/hhs-awards-teen-pregnancy-prevention-program-grants; OAH, HHS, *Results from the OAH Teen Pregnancy Prevention Program*, *supra* note 28.

[46] *State of Ohio Hires Grace Brethren Abstinence Coordinator*, CE News (accessed Mar. 13, 2006), https://web.archive.org/web/20060302110959/https:/www.cenational.org/Publications/publicationsArticle.asp?IDNum=63.

[47] *Id.*

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entry point for Christian activism."[48] In her words, "[w]hether at the local school district level, the state legislative level, or at the federal level, … the requirement for Christians to apply Biblical principles to the culture in which they live is not up for debate."[49]

48. During Ms. Huber's tenure in Ohio, according to a report by the Case Western Reserve University School of Medicine, the Ohio program's abstinence-only curriculum contained "false information about contraceptives," misrepresented "religious convictions as scientific fact," and did not "portray the risks related to sexual activity in a scientifically accurate manner."[50] Ms. Huber left the Ohio Department of Health after it determined that she had committed "neglect of duty" by serving as an agent for a corporation to which she had awarded a two-year abstinence-only grant.[51]

49. After leaving the Ohio Department of Health, Ms. Huber became the Executive Director of the National Abstinence Education Association ("NAEA"), which subsequently changed its name to "Ascend." While at NAEA, Ms. Huber was instrumental in rebranding abstinence-only education as "sexual risk avoidance" ("SRA") education. Over the past several decades, many abstinence-only education programs have been proven not to be effective at delaying sexual intercourse and preventing unintended pregnancies and the spread of STIs for

[48] Valerie Huber, *A Historical Analysis of Public School Sex Education in America Since 1900* 123 (2009), http://digitalcommons.cedarville.edu/education_theses/21/.
[49] *Id.* at 124-25.
[50] Scott H. Frank, Case W. Reserve Univ. Sch. of Med., *Report on Abstinence-Only-Until-Marriage Programs in Ohio* 3 (June 2005), www.aidstaskforce.org/wp-content/uploads/2010/12/Abstinence_Report_June051.pdf.
[51] Letter from J. Nick Baird, Director of Health, Ohio Dep't of Health, to Valerie Huber (Jan. 31, 2006), https://www.documentcloud.org/documents/3878217-Valerie-Huber-Disciplinary-Letter.html.

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adolescents.[52] To escape this research, proponents of these programs have attempted to rebrand them as "sexual risk avoidance" programs and now talk in terms of promoting abstinence as the "optimal health behavior" and returning already sexually active teens to an abstinence, or "cessation," state.[53] These new euphemisms notwithstanding, the approach—to implement programs that teach that the only acceptable action is to voluntarily refrain from all sexual activity outside of marriage—remains the same.

50. As the NAEA explained under Ms. Huber's leadership, "SRA education is built on the premise that all non marital teen sexual activity is high-risk behavior" and therefore focuses on "voluntarily abstaining from all sexual activity, including, but not limited to sexual intercourse."[54] This stands in stark contrast to comprehensive sexual education programs, which NAEA describe as a "narrow, inadequate response to the problem of non-marital teen sex" that "may harm the sexual health of currently abstinent youth by stimulating their transition toward sexual activity."[55]

51. As the leader of the NAEA, Ms. Huber strongly opposed Congress's TPP Program. 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" and lacked "funds designated specifically for the primary prevention abstinence

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[52] *See, e.g.*, Santelli et al., *Abstinence-Only-Until-Marriage Policies and Programs: An Updated Position Paper of the Society for Adolescent Health and Medicine*, 61 J. Adolescent Health 400-01 (2017), https://www.jahonline.org/article/S1054-139X(17)30297-5/fulltext.

[53] Jesseca Boyer, Guttmacher Inst., *New Name, Same Harm: Rebranding of Federal Abstinence-Only Programs* (Feb. 28, 2018), https://www.guttmacher.org/gpr/2018/02/new-name-same-harm-rebranding-federal-abstinence-only-programs; Mark Peters, *Euphemism: Sexual Risk Avoidance*, Boston Globe (June 23, 2017), https://www.bostonglobe.com/ideas/2017/06/23/euphemism-sexual-risk-avoidance/cowYjFTOcIS7hmD0wtm64O/story.html.

[54] NAEA, *Sexual Risk Avoidance (SRA) Education: Considerations for Protecting Teen Health* 44 (June 2012), http://esteemjourney.com/wp-content/uploads/2018/05/SRA-Education-Report.pdf.

[55] *Id.* at 5, 9.

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education approach."[56] After failing in her efforts to convince Congress not to create the TPP Program, Ms. Huber repeatedly advocated for the TPP Program to be defunded and for all federal sex education dollars to be dedicated to abstinence-only programs—an effort to have federal funding be dictated by program content rather than empirical research that, as explained above, Congress has rejected every year since authorizing the TPP Program.

52. In a January 2017 interview with the *Associated Press*, prior to joining the Administration of President Donald J. Trump, Ms. Huber made her enmity towards comprehensive sexual education plain: "We don't like the term 'comprehensive sex education' because it (projects) that it provides an even-handed approach that gives young people all the information to make healthy choices, when it [in fact] normalizes teen sex, and puts the emphasis on reducing the risk, rather than eliminating it."[57] In Ms. Huber's view, "You can't blend the two (approaches)" of sexual risk avoidance and sexual risk reduction because of the "underlying differences in foundation and the measure for success."[58]

53. As revealed by documents obtained from HHS through a Freedom of Information Act request, Ms. Huber, both directly and through intermediaries, repeatedly lobbied political appointees at HHS in early 2017 to "[e]liminate" the TPP Program and OAH, both of which are Congressionally mandated.

54. In these documents, Ms. Huber made clear that her concerns with OAH and the TPP Program were the same she had had since their creation by Congress in 2010. Explaining

[56] Press Release, NAEA, *NAEA Opposes Consolidated Appropriations Act of 2010* (Dec. 10, 2009), https://web.archive.org/web/20100530124731if_/http:/www.abstinenceassociation.org:80/newsroom/pr_121009_naea_opposes_consolidated_appropriateions_act.html.
[57] Sara Israelsen-Hartley, *What's the Right Approach to Sex Ed Curriculum?*, Wash. Times (Jan. 8, 2017), https://m.washingtontimes.com/news/2017/jan/8/whats-the-right-approach-to-sex-ed-curriculum/.
[58] *Id.*

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that President Barack Obama had ended certain "Sexual Risk Avoidance (SRA – aka 'abstinence education') programs"—but not acknowledging that he did so only after Congress defunded them—Ms. Huber lobbied HHS officials within the Trump Administration in February 2017 to redirect funds "back to the risk avoidance message, from whence they came." According to Ms. Huber, the "TPP program diverted funds away from the SRA program. The TPP program should be ended, restoring the funds to SRA programs."

55. Falsely claiming that President Obama had "place[d] 100% of federal funding … on a sex education approach that normalizes teen sex," she argued that the "current federal sex education … on 'harm reduction' … normalizes risky behavior." Such programs, she explained, "place youth at risk and should be replaced with programs that seek to either: help youth avoid all risk by reinforcing skills for optimal health [or] help youth move from risky behaviors to risk-free behaviors." She therefore urged the Trump Administration to "[m]ove focused priority from 'teen pregnancy prevention' to 'sexual risk avoidance.'" To this end, Ms. Huber advocated that HHS "[i]mmediately" revise Funding Opportunity Announcements to "[e]nsure FOAs are not biased against those of faith and/or those who hold conservative values" and that grant review teams are "not philosophically opposed to traditional values and faith ideals."

56. Ms. Huber further urged the Trump Administration to "[a]bolish" the TPP Program because, among other things, the TPP Program is a "location for Planned Parenthood funding & staffing"; the longtime career Director of OAH had donated to a non-profit that supports comprehensive sexual education; and "HHS is now subjugated to the *teen sex promotion agenda* of OAH" (emphasis in original). Ms. Huber inveighed against the "[m]yth of 'evidence based programs,'" arguing that the "entire effort was a sham" and "[i]neffective & harmful"; and she accused OAH, without substantiation, of suppressing research results,

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"ignor[ing]" "multiple research protocols," and "promot[ing] a radical sex education agenda under the guise of 'science' and 'effectiveness.'"

57. On March 8, 2017, Ms. Huber met with political appointees at HHS to discuss what she termed a "time sensitiv[e]" request to "immediately halt" the TPP Program. She sent along a document ahead of that meeting reiterating her requests that the TPP Program be "[a]bolish[ed]" and that funds be returned to sexual risk avoidance education.

58. Less than three months later, on June 5, 2017, Ms. Huber was appointed to serve as Chief of Staff in the Office of the Assistant Secretary for Health at HHS, which oversees OAH and thus the TPP Program. Ms. Huber was subsequently promoted to Senior Policy Advisor for the Office of the Assistant Secretary for Health. From this position, Ms. Huber maintains authority over OAH and the TPP Program, both of which she has long sought to abolish.

59. Ms. Huber's appointment followed the appointment of other opponents of evidence-based programs to key positions at HHS, including Steven Valentine, presently the Deputy Chief of Staff in the Office of the Assistant Secretary for Health, and Teresa Manning, who served as the Deputy Assistant Secretary for the Office of Population Affairs until January 2018.

B. Defendants Unlawfully Terminate All of the 2015–2020 TPP Program Grants

60. On May 18, 2017, before Ms. Huber's appointment, OAH approved continued funding for the third year of the 2015–2020 TPP Program grants, including Plaintiff Multnomah County's grant.

61. That same month, as part of the annual budgeting process, HHS submitted its budget request to Congress for the 2018 fiscal year. In that request, HHS stated that it "will not

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make amounts available for Teenage Pregnancy Prevention activities in FY 2018" because the President's Budget "eliminates the TPP program."[59]

62. While HHS's political leadership tried to convince Congress to defund the TPP Program, it prepared to eliminate the grants even if Congress refused. During the first week of July 2017, approximately a month after Ms. Huber's hire, Defendants informed all 81 grantees that their grants would be terminated as of June 30, 2018, cutting the five-year grants short by two years. Neither OAH career staff nor the grantees themselves were given any reason for the agency's termination of the grants.

63. On information and belief, the political appointees identified above—Ms. Huber, Mr. Valentine, and Ms. Manning—made the decision to end the TPP Program despite the Congressional mandate that it be created and funded, improperly interfering in the grantmaking process and sidelining and overriding career OAH staff with expertise in evidence-based teen pregnancy interventions.

64. In late July 2017, 148 members of the House and 37 Senators sent letters to then-Secretary of HHS Tom Price inquiring into HHS's decision to terminate all of the TPP Program grants despite ongoing Congressional funding for the program. After HHS provided an incomplete response, in late November 2017, 27 Senators wrote again to then–Acting Secretary Eric Hargan to express their concerns.

65. Throughout the remainder of 2017 and early 2018, HHS provided various shifting, after-the-fact explanations for its decision to terminate the grants, including maintaining that the TPP Program was ineffective—an assertion career staff pointed out is erroneous and contradicted by the "very strong" evidence from the first cohort of TPP Program grantees

[59] HHS, *General Departmental Management* 4, 91, https://www.hhs.gov/sites/default/files/combined-general-department-management.pdf.

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published by HHS itself—and stating that the mass termination was a programmatic decision by the agency to refocus priorities.

66. For example, in August 2017, Ms. Huber appeared on the weekly radio show of Tony Perkins, the President of the Family Research Council, an organization that has lobbied for the TPP Program to be eliminated in favor of abstinence-only education and believes that "contraceptive-based or comprehensive sex education is destructive."[60] In discussing HHS's termination of the TPP Program grants, Ms. Huber stated that she was "very concerned" that the TPP Program "normalizes teen sex rather than normalizing sexual delay," was "ineffective," a "waste of taxpayer dollars," and a "current funding stream for Planned Parenthood."[61]

67. As noted above, on March 23, 2018, Congress once again reauthorized the TPP Program with language identical to that which it had used in prior years. Specifically rejecting the President's budget that would have eliminated the TPP Program and Ms. Huber's lobbying campaign to this same end, Congress appropriated funding for "medically accurate and age appropriate programs that reduce teen pregnancy and for the Federal costs associated with administering and evaluating such contracts and grants," including once again providing $68,175,000 in Tier 1 grants 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."[62]

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[60] Family Research Council, *Human Sexuality*, https://www.frc.org/human-sexuality.
[61] *Washington Watch with Tony Perkins: Bishop Harry Jackson, Valerie Huber, E. Calvin Beisner*, Family Research Council (Aug. 14, 2017), https://www.frc.org/wwlivewithtonyperkins/bishop-harry-jackson-valerie-huber-e-calvin-beisner.
[62] Consolidated Appropriations Act, 2018, 132 Stat. at 733.

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68. In February 2018, nine grantees filed suit in four district courts to challenge the premature termination of their grants. All four courts granted relief in favor of the grantees, and ordered HHS to process those grantees' applications for continued TPP Program funding.[63]

69. In April 2018, a class action was filed on behalf of grantees who, like Multnomah County, had not previously sued, in order to challenge HHS's early termination of the TPP Program grants. The court certified the class, granted summary judgment in favor of the class, and ordered HHS to process the class members' applications for continued TPP Program funding—a process the agency has maintained will take two months.[64]

C. *Defendants Issue the 2018 FOAs, Changing the Criteria for Awarding Tier 1 TPP Program Grants and Departing from the Statute and Congressional Intent*

70. The day after the first court enjoined Defendants' terminations, Defendants issued two new FOAs, attempting to repurpose the TPP Program to fund particular content, rather than—per Congress's plain mandate—programs shown to be effective through rigorous research.

71. The 2018 Tier 1 FOA announced up to $61 million for approximately 270 grants for 2 years ranging from $200,000 to $500,000 annually to serve high school students 15-19 years of age.[65] The 2018 Tier 2 FOA, "Phase I New and Innovative Strategies (Tier 2) to Prevent Teenage Pregnancy and Promote Healthy Adolescence," announced up to $22 million for approximately 75 awards ranging from $250,000 to $375,000 annually.[66]

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[63] *King Cnty. v. Azar*, 2018 WL 2411759, at *6 (W.D. Wash. May 29, 2018); *Policy & Research, LLC v. HHS*, 2018 WL 2184449, at *2-5 (D.D.C. May 11, 2018); *Healthy Teen Network v. Azar*, 2018 WL 1942171, at *1-4 (D. Md. Apr. 25, 2018); *Planned Parenthood of Greater Wash. & N. Idaho v. HHS*, 2018 WL 1934070, at *1-2 (E.D. Wash. Apr. 24, 2018).
[64] Mem. Op., *Healthy Futures of Tex. v. HHS*, No. 18-cv-992 (D.D.C. June 1, 2018).
[65] HHS, *Phase I Replicating Programs (Tier 1) Effective in the Promotion of Healthy Adolescence and the Reduction of Teenage Pregnancy and Associated Risk Behaviors* 16, 27-28 (Apr. 20, 2018) ("2018 Tier 1 FOA").
[66] HHS, *Phase I New and Innovative Strategies (Tier 2) to Prevent Teenage Pregnancy and Promote Healthy Adolescence* 25 (Apr. 20, 2018) ("2018 Tier 2 FOA").

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72. The 2018 Tier 1 FOA dramatically and impermissibly alters the criteria for participation in the TPP Program in numerous ways that conflict with the Consolidated Appropriations Act, HHS regulations, and Congressional intent.

73. In a stark and unlawful departure, the 2018 Tier 1 FOA does not require applicants to replicate programs that have been proven effective through rigorous evaluation. It deletes the definition of "Evidence-Based Teen Pregnancy Prevention Programs." It eliminates all references to Mathematica's TPP Evidence Review and the list of evidence-based programs culled from nearly a decade of analysis and evaluation sponsored by HHS as part of the TPP Program—even though HHS released a new installment of the TPP Evidence Review the very same week as Defendants issued the new FOAs, identifying 48 programs that had been "proven effective through rigorous evaluation."[67] Indeed, the phrase "evidence-based" appears nowhere in the FOA, and the words "proven" and "rigorous evaluation" only appear when describing evaluations that will occur *after* funding.[68]

74. Instead, the FOA declares that it will "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."[69] To accomplish this goal, the 2018 Tier 1 FOA instructs prospective grantees to "replicate a risk avoidance model or a risk reduction model that incorporates the common characteristics"[70] of one of two "tools"—either the "Center for Relationship Education's Systematic Method for Assessing Risk-Avoidance Tool (SMARTool)" or the "Tool to Assess the Characteristics of Effective Sex and STD/HIV Education Programs."[71]

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[67] Lugo-Gil et al., *supra* note 16.
[68] *See* 2018 Tier 1 FOA at 19.
[69] 2018 Tier 1 FOA at 17.
[70] *Id.* at 4.
[71] *Id.* at 12.

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75. Contrary to both the statute and the previous Tier 1 FOAs, neither of these tools is a "program[] that ha[s] been proven effective through rigorous evaluation." As both their names and content make clear, both are checklists of factors—that is, "tools"—to assist in the selection of a "program." Neither is itself a program, and replicating their "elements" is not the same as replicating a proven program.

76. The SMARTool is a "tool [that] can be used to assess a variety of sexual risk-avoidance curricula and programs," which is designed not as a replicable program but as a tool to "help organizations assess, select, and implement effective programs and curricula that support sexual risk avoidance."[72] It is intended to be "a resource to curriculum developers and educators and offers methods for comparing different curricula to one another."[73] It has not been evaluated as a program, nor does it incorporate any of the findings of the TPP Evidence Review or the TPP Program.[74]

77. The Tool to Assess the Characteristics of Effective Sex and STD/HIV Education Programs ("TAC") similarly describes itself as an "organized set of questions designed to help practitioners assess whether curriculum-based programs incorporated the common characteristics of effective programs."[75] The TAC's glossary defines a "program," in contrast to a tool like the TAC, 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."[76] Like the SMARTool, the TAC

[72] Ctr. for Relationship Educ., *SMARTool: Assessing Potential Effectiveness for Sexual Risk Avoidance Curricula and Programs* 6 (2010), https://www.myrelationshipcenter.org/getmedia/dbed93af-9424-4009-8f1f-8495b4aba8b4/SMARTool-Curricula.pdf.aspx.
[73] *Id.*
[74] 2018 Tier 1 FOA at 12.
[75] ETR & HTN, *Tool to Assess the Characteristics of Effective Sex and STD/HIV Education Programs* 1-2 (2007).
[76] *Id*. at 49.

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does not incorporate any findings from the TPP Evidence Review or the TPP Program—nor could it, given that it was created two years *before* the creation of the TPP Program.

78. Instead of requiring that programs be selected from the list of evidence-based programs already "proven effective" with youth, both the 2018 Tier 1 FOA and guidance issued by OAH concerning the FOA make clear that prospective grantees "have the freedom to choose *any* curriculum"[77] without regard to whether it has been proven effective, proven ineffective, or never rigorously evaluated, and without regard to whether the grantee has experience administering it or any other sexual education program.

79. The 2018 Tier 1 FOA also does not require "replication" of the selected curriculum. Applicants are told in the 2018 Tier 1 FOA that they must either make "necessary adaptations" or that "supplementary materials [should be] presented in tandem with an established curriculum,"[78] in order that the elements in the SMARTool or TAC be addressed.

80. Rather than fund "replicati[on] [of] programs that have been proven effective through rigorous evaluation," as Congress directed, the 2018 Tier 1 FOA funds research grants—the goal of Congress's smaller Tier 2 appropriation, not the larger Tier 1 appropriation. Recipients are required to engage in "[f]ormative and process/implementation evaluation" in the first year to "establish project merits," with the ultimate goal of a "summative outcome/impact evaluation" in the second year for certain chosen projects that will determine whether the "[f]ormative and process/implementation evaluation" was successful.[79] Indeed, the substance of

[77] HHS, *Fact Sheet: FY 2018 Funding Opportunity Announcements for Teen Pregnancy Prevention Program* (Apr. 20, 2018) (emphasis added), https://www.hhs.gov/ash/about-ash/news/2018/fy-2018-funding-opportunity-announcements-tpp-factsheet.html; OAH, HHS, *FAQs for Current FOAs*, https://www.hhs.gov/ash/oah/grant-programs/funding-opportunities/faqs-for-current-foas/index.html; 2018 Tier 1 FOA at 12-13.
[78] 2018 Tier 1 FOA at 12 (emphasis added).
[79] *Id.* at 17, 18.

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the 2018 Tier 1 FOA is nearly indistinguishable from the 2018 Tier 2 FOA; the latter, like the former, instructs applicants to choose any curriculum so long as it "implement[s] protective factors and/or either elements" from the SMARTool or the TAC and then to subject that curriculum to testing and evaluation.[80] Defendants have thus erased the distinction between the two statutorily separate grant tiers.

81. The 2018 Tier 1 FOA also changes the scoring metric for grantees. The newly added and single largest factor bearing on success of the application, "Realistic, Practical, and Meaningful Application of Project Expectations and Priorities" (25 out of 100 points), again departs from the TPP Program's mandated focus on science and evidence to require applicants to inject particular content into *all* proposed programs—namely, abstinence-only messages communicating that sexuality is not a normal and healthy aspect of human development. For example, to score well on this factor, applicants must "[c]learly communicate[] that teen sex is a risk" with negative physical, sociological, and economic consequences; integrate "optimal health into every component" of their projects; and provide "cessation support" for those already sexually active "to make healthier and risk-free choices in the future"[81]—all terms and concepts used by Ms. Huber and other opponents of comprehensive sexual education to speak of programs that teach *only* abstinence. Notwithstanding that the 2018 Tier 1 FOA purports to allow grant projects embracing either a sexual risk reduction or sexual risk avoidance model, in order to earn points for this factor, applicants must "[p]lace[] a priority" on promoting sexual risk avoidance, or abstinence-only, skills and information, without regard to whether these messages have ever been proven effective in this or any other setting.[82]

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[80] *See, e.g.*, 2018 Tier 2 FOA at 11, 13.
[81] 2018 Tier 1 FOA at 59, 60 (emphases omitted).
[82] *Id.* at 60.

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82. HHS has never provided a reasonable explanation for the radical changes in the 2018 Tier 1 FOA. HHS's only attempt at offering a justification was in a declaration by an HHS official submitted in a court case *after* the issuance of the 2018 Tier 1 FOA, in which the official stated that HHS staff spent a year reviewing the TPP Program and analyzing research and literature to "propose a new approach … consistent with the statute, but with a greater chance for success, given the broader research base,"[83] without providing any details or analysis of that research. The 2018 Tier 1 FOA itself contains no explanation of this research, why HHS adopted the "new approach" of abandoning evidence-based, rigorously evaluated programs in favor of requiring unproven, abstinence-only content, or how this approach squares with either the portfolio of effective programs amassed by the agency under the TPP Program or the successes to date in decreasing rates of teen pregnancy attributed to the TPP Program. In fact, one of the few scientific sources quoted in the 2018 Tier 1 FOA, *Our Future: A Lancet Commission on Adolescent Health and Wellbeing*, directly contradicts the FOA's new focus, concluding that there is "[h]igh-quality evidence that abstinence-only education is ineffective in preventing HIV, incidence of sexually transmitted infections and adolescent pregnancy" and that such education is "not recommended."[84] The *Lancet* report instead recommends comprehensive sexual education to "[e]nsure that all adolescents and young adults' rights to essential health information are met."[85]

83. On information and belief, the 2018 Tier 1 FOA was drafted in substantial part by Ms. Huber herself and not, as with the prior TPP Program FOAs, by OAH career staff.

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[83] Decl. of A. Michon Kretschmaier ¶ 6, *Choctaw Nation of Okla. v. Azar*, No. 18-cv-971 (D.D.C. May 10, 2018).

[84] George C. Patton et al., *Our Future: A* Lancet *Commission on Adolescent Health and Wellbeing* tbl.4 (June 11, 2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5832967/; 2018 Tier 1 FOA at 8.

[85] Patton, *supra* note 84, tbl.4.

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84. Contrary to the previous two Tier 1 FOAs, final award decisions will be made by the Director of the Office of Adolescent Health, "in consultation with the Assistant Secretary for Health,"[86] a political appointee whom HHS has inserted into the TPP Program grantmaking process. Award decisions, once issued, "are final and [applicants] may not appeal."[87]

85. The 2018 Tier 1 FOA thus abandons the TPP Program's statutory mandate of "replicating programs that have been proven effective through rigorous evaluation" in favor of supporting curricula with particular abstinence-only content, long championed by the agency's political leadership, without regard to the results of rigorous evaluation. As explained above, Congress has created multiple funding streams for abstinence-only education that are separate and distinct from the OAH-administered funding dedicated to evidence-based teen pregnancy prevention programs. The 2018 Tier 1 FOA has impermissibly transferred funds between these distinct appropriations so as to unlawfully increase the amount of federal funding for abstinence-only programs beyond what was provided for by Congress.

IV. The 2018 FOA Will Irreparably Injure the County and Its Residents

86. In 2015, Plaintiff Multnomah County competed for and was awarded a $6.25 million, five-year Tier 1B grant as part of the second cohort of TPP Program grantees in order to offer comprehensive sexual education through the Adolescents & Communities Together ("ACT") program. The ACT program is a collaborative effort between the Multnomah County Health Department and partners throughout the community to replicate evidence-based teen pregnancy prevention programs in middle and high schools and community settings with especially high concentrations of African-American, Latino, and Native American youth, populations with disproportionately high teen pregnancy rates. The ACT program was

[86] 2018 Tier 1 FOA at 63.
[87] *Id.* (emphasis omitted).

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specifically aimed at eradicating these disparities by replicating effective, evidence-based programming in these communities in a self-sustaining manner that could be perpetuated well into the future.

87. Within the Multnomah County Health Department, the ACT program is administered by the Youth Sexual Health Equity Program, whose core mission is to impart medically accurate, culturally inclusive comprehensive sexual education to students, families, and educators to assist youth in making informed choices about their own bodies, sexual health, and relationships. This mission aligns with the comprehensive sexual education that is mandated by the State of Oregon, which requires that sex education within the state "acknowledge the value of abstinence," but also "enhance students' understanding of sexuality as a normal and healthy aspect of human development" and "not, in any way, use shame or fear based tactics."[88]

88. Consistent with these values and directives, the County worked with local school districts and partners to select a combination of evidence-based, comprehensive sexual education programs from Appendix D of the 2015 Tier 1B FOA to replicate. The County partnered with three community organizations that serve the minority populations that are the focus of the ACT program—Native American Youth and Family Center, Latino Network, and Self Enhancement Inc.—as well as Planned Parenthood Columbia Willamette and the Boys and Girls Club of Portland Metropolitan Area. These community partners have worked within community sites, in after-school programs, and in teacher trainings to help replicate the selected programs in a manner that is both sensitive to and inclusive of differing cultural norms and approaches to sexuality education in the County's diverse classrooms, while remaining faithful to the values and mission of the County and Oregon's statewide mandate.

[88] Or. Admin. R. 581-022-1440 (2015), www.oregon.gov/ode/rules-and-policies/StateRules/Pages/OAR-Rule-581-022-1440.aspx.

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89. Since 2015, the ACT program has educated over 15,000 teens and trained 107 teachers in 32 middle and high schools throughout the County. The County has received numerous commendations from HHS for this work, both during its reviews by the agency and following a site visit by OAH personnel. In November 2017, after the termination of the County's grant, OAH featured ACT as an exemplar of a program "successfully" working to erase disparities in teen pregnancy rates among racial and ethnic minorities.

90. In July 2017, along with all other TPP Program grantees, the County received a notice of award for the third grant year and was informed, with no reasoning or explanation, that its grant would be terminated two years early, on June 30, 2018. The notice included a single sentence informing the County of the termination: "This award also shortens the project period to end on June 30, 2018 at the end of this budget year."

91. With its grant terminated two years early, the County has already been forced to adjust the ACT program in numerous ways, including curtailing the trainings for its teachers and leaving many teachers untrained, thus severely jeopardizing the County's ability to sustain the program going forward.

92. As indicated in its letter of intent filed with HHS on May 18, 2018, the County plans to submit an application for 2018 Tier 1 TPP Program grant funding by the June 29, 2018 deadline, to continue to replicate the same evidence-based, comprehensive sexual education programming it now offers in order to target the disparities in teen pregnancy rates among African-American, Latino, and Native American youth. But the 2018 Tier 1 FOA and the unlawful changes to the application criteria force the County to compete on unlawful terms for the 2018 TPP Program funds, placing it at a competitive disadvantage in multiple ways.

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93. First, under the 2018 Tier 1 FOA, Multnomah County can receive, at most, $500,000 annually—a fraction of its current yearly grant as part of the 2015 TPP Program. At the same time, a much larger pool of applicants than in prior TPP Program grant competitions is eligible to receive and poised to compete for these smaller grants. As discussed above, under the unlawful terms of the 2018 Tier 1 FOA, any applicant can apply for the funds with *any* curriculum, without needing to demonstrate particular experience or expertise in evidence-based programs, as had been the case in the 2015 Tier 1B FOA. With the relaxation of these application requirements, there is already significantly more interest in the 2018 Tier 1 FOA than in 2015: on May 8, 2018, 800 entities attended a webinar on the 2018 Tier 1 FOA, which is significantly more than the 500 entities that attended the 2015 webinar. As one official at the Family Research Council observed of the 2018 FOA competition, because of the changed criteria, groups that "previously could not apply for funding . . . can now apply and get funding."[89]

94. Consistent with its organizational mission and values, and the requirements of Oregon law, the County remains committed to continuing to train its teachers and educate its students using the same evidence-based, comprehensive sexual education programming that encourages abstinence, while at the same time openly and inclusively educating sexually active teens about contraceptives and healthy sexual relationships to assist them in making informed, protective choices and reducing the risk of unintended pregnancies and STIs. The 2018 Tier 1 FOA, however, further disadvantages the County by reserving the single biggest category of points (25 out of the 100 points available) for applications whose proposed curricula propound

[89] Jessie Hellmann, *Groups Working to Stop Teen Pregnancy Alarmed by Trump Shift*, Hill (Apr. 28, 2018), http://thehill.com/policy/healthcare/385287-groups-working-to-stop-teen-pregnancy-alarmed-by-trump-shift.

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abstinence-only "risk avoidance" content, rather than those offering comprehensive sexual education in which sexuality is portrayed as a normal and healthy aspect of human development. This messaging is at odds with the mission and values of the County and its community partners and is not the focus or priority of the rigorously evaluated programs being replicated by the County, thereby conferring a scoring advantage upon competitors who prioritize these messages and methods.

95. Indeed, the County *cannot* comply with these criteria as Ms. Huber has consistently defined them, because Oregon state law requires sexual education programs to "enhance students' understanding of sexuality *as a normal and healthy aspect of human development*."[90] As shown above, Defendants view comprehensive sexual education programs such as the County's as incompatible with "optimal health" and "[c]lear[] communicat[ion] that teen sex is a risk behavior," which must be an applicant's "priority" to compete on an even footing.[91] Defendants' opposition to programs that normalize any sexual activity outside of marriage disadvantages applicants that, like Multnomah County, must approach programming from that perspective.

96. Multnomah County will therefore suffer irreparable injury the moment it is first compelled to compete under the unlawful application criteria. Moreover, because of its inability to compete on equal footing, the County is also at imminent risk of being denied the grant funds allotted based on these criteria. Without continued funding for the program, the County will be forced to cut up to five staff positions and terminate the ACT program, depriving thousands of teens access to high-quality evidence-based comprehensive sexual education.

[90] Or. Admin. R. 581-022-1440 (2015), *supra* note 88 (emphasis added).
[91] 2018 Tier 1 FOA at 59-60.

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CLAIMS FOR DECLARATORY AND INJUNCTIVE RELIEF

Count One
5 U.S.C. § 706(2)(A)
The 2018 Tier 1 FOA Is Contrary to the Continuing Appropriations Act, 2018

97. Plaintiff Multnomah County incorporates by reference the foregoing paragraphs as if fully set forth herein.

98. The Administrative Procedure Act provides, among other requirements, that a court "shall … hold unlawful and set aside agency action … [that is] not in accordance with law." 5 U.S.C. § 706(2)(A).

99. The 2018 Tier 1 FOA is contrary to the Continuing Appropriations Act, 2018, for at least three reasons.

100. First, the 2018 Tier 1 FOA does not "replicat[e] programs that have been proven effective through rigorous evaluation," as required by statute. Instead, it permits applicants to obtain funds for programs that have never undergone—and may even have failed—rigorous evaluation.

101. Second, the 2018 Tier 1 FOA unlawfully transfers funds from the appropriation "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" to the separate and distinct appropriations for (a) "research and demonstration grants to develop, replicate, refine, and test additional models and innovative strategies for preventing teenage pregnancy"; and/or (b) the Sexual Risk Avoidance Education Program. It thereby violates the statutory prohibition on transferring more than 1% from an appropriation or increasing appropriations by more than 3%.

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102. Third, the 2018 Tier 1 FOA countermands the entire statutory purpose of the TPP Program to support rigorously evaluated, evidence-based teen pregnancy prevention initiatives, by disadvantaging applicants committed to offering evidence-based programming and privileging those offering unvetted and unscientific curricula.

103. As a result, Multnomah County faces increased competition for grant funding, is unlawfully disadvantaged in that competition, and faces an imminent risk of irreparable injury to its program and residents.

Count Two
5 U.S.C. § 706(2)(A)
The 2018 Tier 1 FOA Is Arbitrary and Capricious and an Abuse of Discretion

104. Plaintiff Multnomah County incorporates by reference the foregoing paragraphs as if fully set forth herein.

105. The Administrative Procedure Act provides, among other requirements, that a court "shall … hold unlawful and set aside agency action … [that is] arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A).

106. The 2018 Tier 1 FOA is arbitrary and capricious and Defendants have abused their discretion in at least three ways.

107. First, Defendants did not provide a reasoned explanation for the changes to the criteria in the 2018 Tier 1 FOA or the FOA's departure from the statute and past agency practice.

108. Second, the criteria in the 2018 Tier 1 FOA run counter to the evidence before the agency.

109. Third, Defendants prejudged the 2018 TPP Program competition with an unalterably closed mind and designed the 2018 Tier 1 FOA as a pretext for ending the TPP Program based on preconceived ideological animus.

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110. As a result, Multnomah County faces increased competition for grant funding, is unlawfully disadvantaged in that competition, and faces an imminent risk of irreparable injury to its program and residents.

Count Three
5 U.S.C. § 706(2)(A)
The 2018 Tier 1 FOA Is Contrary to HHS Regulations

111. Plaintiff Multnomah County incorporates by reference the foregoing paragraphs as if fully set forth herein.

112. The 2018 Tier 1 FOA is contrary to 45 C.F.R. § 87.3(l), which provides that "Decisions about awards of Federal financial assistance must be free from political interference or even the appearance of such interference and must be made on the basis of merit, not on the basis of the religious affiliation, or lack thereof, of a recipient organization."

113. Since at least February 2017, Defendants have engaged in impermissible political interference in multiple aspects of the administration of TPP Program grants, including but not limited to the cancellation of the 2015 TPP Program grants and the drafting and administration of the 2018 Tier 1 FOA.

114. The 2018 Tier 1 FOA has been designed to disadvantage applicants who do not share a particular, religiously affiliated view of sex education.

115. As a result, Multnomah County faces increased competition for grant funding, is unlawfully disadvantaged in that competition, and faces an imminent risk of irreparable injury to its program and residents.

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Count Four
***Ultra Vires* Action**

116. Plaintiff Multnomah County incorporates by reference the foregoing paragraphs as if fully set forth herein.

117. HHS, through its officials, may exercise only the authority conferred by statute.

118. HHS lacks statutory authority to make Tier 1 funding for the TPP Program available to grantees who are not "replicating programs that have been proven effective through rigorous evaluation." Yet that is what the 2018 Tier 1 FOA does, in permitting funding for any project, whether or not it has been empirically studied or shown to be effective.

119. Defendants' actions are patently outside of their statutory authority because the 2018 Tier 1 FOA is flatly incompatible with Congress's mandate for the TPP Program and contradicts the text, structure, and fundamental purpose of the TPP Program that 75% of the appropriated funds go to replicating rigorously evaluated programs. By creating a new spending program that has not been authorized by Congress and contains criteria irreconcilable with Congress's criteria, Defendants have violated the separation of powers and trenched upon Congress's Spending authority, and thereby acted *ultra vires*.

120. As a result, Multnomah County faces increased competition for grant funding, is unlawfully disadvantaged in that competition, and faces an imminent risk of irreparable injury to its program and residents.

WHEREFORE, Plaintiff Multnomah County prays that this Court:

1. Declare the 2018 Tier 1 FOA contrary to law, arbitrary and capricious, *ultra vires*, and invalid;

2. Enjoin HHS from using the 2018 Tier 1 FOA to review applications for Tier 1 TPP Program grant funding;

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3. Enjoin HHS from awarding or disbursing any funds pursuant to the 2018 Tier 1 FOA;

4. Award Plaintiff's costs, attorneys' fees, and other disbursements for this action; and,

5. Grant any other relief this Court deems appropriate.

Dated this 8th day of June, 2018.

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