UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

MULTNOMAH COUNTY,

Plaintiff,

v.

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

Defendants.

Civil Action No. 3:18-cv-01015-YY

Oral Argument: August 13, 2018, 10:00 AM (Telephonic)

DEFENDANTS' MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

Defendants respectfully move under Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 56 to dismiss the operative complaint, or, in the alternative, for summary judgment in favor of Defendants. In support of this Motion, Defendants refer the Court to the attached Memorandum of Points and Authorities. A certified index of the administrative record, as well as designated excerpts from the record cited in the Memorandum and not previously submitted in Plaintiff's motion, is submitted herewith. Defendants will lodge the complete administrative record as a physical exhibit with the Court in due course.

Pursuant to District of Oregon Local Rule 7-1, Defendants certify that their counsel has conferred in good faith with Plaintiff in an effort to resolve the issues raised by this motion, but the parties have been unable to do so.

Dated: July 13, 2018

Respectfully submitted,

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS OR FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND PRELIMINARY INJUNCTION

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INTRODUCTION

Grant-making is a core Executive Branch function. Consistent with that function, Congress placed few restrictions on the U.S. Department of Health and Human Services ("HHS") when it created the Teen Pregnancy Prevention Program ("TPP Program"). HHS used that authority in 2010 and 2015 to impose grant eligibility criteria and prioritize applications in ways that Congress did not expressly articulate. But Plaintiff Multnomah County's claims in this case would pull up the ladder of policy discretion and prohibit HHS from making similar program choices, now or in the future. The County points to no case in which a court has dictated the terms of a funding opportunity announcement. This one should not be the first.

The County receives a TPP Program grant with a five-year "project period" that started in 2015. It is eligible to continue receiving funding under that grant, due to rulings in prior litigation, and the County will receive funding by August 20. *See Healthy Futures of Texas v. HHS*, No. 1:18-cv-00992-KBJ, Minute Order, ECF No. 31 (D.D.C. June 8, 2018) ("Nothing in Plaintiffs' … motion to enforce the Court's judgment establishes that HHS is presently failing to comply with this order.") In order to obligate remaining funding, outside of what current grantees will receive, HHS released the Fiscal Year 2018 TPP Tier 1 Funding Opportunity Announcement ("2018 FOA") to solicit grant applications. The County alleges that the 2018 FOA violates the Administrative Procedure Act ("APA") and moved for partial summary judgment and a preliminary injunction to prevent awards from issuing under the 2018 FOA.

At the outset, the County's claims pose three jurisdictional problems. First, the County lacks Article III standing because its alleged harm will not be redressed by the relief it requests: vacating the current FOA. That would leave the County with no money from the FOA—actually

worse off than it is now, since it applied for funds. Moreover, these FY 2018 funds must be spent by September 30 or they revert to the Treasury, and there is no time to spend them except through this FOA. Second, the FOA does not represent "final agency action" under the APA because it is the first step in the agency's decisionmaking process for making grant awards. The actual decision occurs later, when grants are awarded. Third, the 2018 FOA is (like FOAs generally) committed to the agency's discretion as a matter of law, and therefore not reviewable. Dismissal of the County's entire action for these threshold reasons is appropriate.

Even if jurisdiction existed, the administrative record shows that all of HHS's actions have been lawful and reasonable. The FOA satisfies Congress's simple mandate by limiting awards to projects that "replicat[e] programs that have been proven effective through rigorous evaluation to reduce teenage pregnancy" and its associated risk factors. 2018 FOA, Dubner Decl., Ex. 4 (ECF No. 33) at 4. The County seeks to impose a rigid, policy-laden understanding of what sorts of projects are eligible for funding. This is not supported by the broad text of the appropriation or HHS's past practice. HHS's judgment regarding what those factors should be is entitled to deference and, as noted above, unreviewable. And because the 2018 FOA is supported by the appropriation, the FOA is not an *ultra vires* action, does not violate the so-called "purpose statute" of 31 U.S.C. § 1301, conforms to the Appropriations Clause of the Constitution, and adheres to separation of powers principles.

Far from being the product of arbitrary and capricious action, HHS amply justified its modifications to the 2018 FOA, which were well within its discretion. After expressing concerns over the outcomes of projects funded under HHS's previous approach, HHS proposed modified criteria for programs based on reviews of effective sex education projects. The County asserts that HHS has improperly wandered from past agency practice and imposed what it terms

"abstinence-only" education requirements on all applicants. But this is incorrect and inapposite. Past policy choices within the agency's statutory discretion by definition do not bind future administrations from making different policy choices within the statute's scope. And HHS has not mandated a one-size-fits-all approach. It allows applicants to pursue both "sexual risk reduction" and "sexual risk avoidance" approaches to teen pregnancy prevention, while ensuring all programs emphasize optimal health, clearly communicate the widely understood risks of certain behaviors, and provide tools to reduce or avoid those risks. Nor do the beliefs of a single HHS official with whom the County personally disagrees, Valerie Huber, render the 2018 FOA an abuse of discretion or a violation of HHS regulations regarding religious discrimination. The extra-record materials the County relies upon do not undermine the presumption that agency officials with strong public policy views or personal beliefs will nonetheless carry out the law.

In short, the County has no legal entitlement to a particular set of funding criteria amenable to its policy preferences and goals. Congress entrusted HHS with the task of using its expertise to set those criteria, and neither Plaintiff nor the Court is well-suited to supplant it. Accordingly, the Court should grant Defendant's motion to dismiss or, alternatively, enter judgment in HHS's favor on the County's claims and deny a preliminary injunction.

STATEMENT OF FACTS

I. The TPP Program Appropriation

Congress has appropriated money to HHS annually for "grants to public and private entities to fund medically accurate and age appropriate programs that reduce teen pregnancy" since 2010. *See* Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, 132 Stat. 348, 733 (2018). There are two funding categories, referred to as Tier 1 and Tier 2. After program support expenses, three-quarters of the appropriation goes to Tier 1 projects for "replicating

programs that have been proven effective through rigorous evaluation to reduce teenage pregnancy, behavior risk factors underlying teenage pregnancy, or other associated risk factors." *Id.* Remaining funds go to Tier 2 projects for "research and demonstration grants to develop, replicate, refine, and test additional models and innovative strategies for preventing teenage pregnancy." *Id.* The County has not challenged the Tier 2 FOA in this case.

II. TPP Program Funding Opportunity Announcements In 2010 And 2015

The TPP Program appropriation does not dictate what qualifies as a "program" or how HHS should determine whether a "program" has been "proven effective through rigorous evaluation." Twice in the past, however, HHS has issued FOAs for Tier 1 TPP Program competitive grants, in 2010 and 2015. In both announcements, HHS asked applicants to replicate program models shown effective at reducing teen pregnancy or one of its risk factors. 2015 Tier 1B FOA, Dubner Decl. Ex. 9, at 11; *see also* 2010 Tier 1 FOA, Dubner Decl. Ex. 3, at 5. The "program models" HHS made available for replication included "sexuality education," "youth development," and "abstinence education" models. 2015 Tier 1B FOA at 88.

In 2010, HHS worked with an outside group, Mathematica Policy Research, to review social science literature and select promising program models. 2010 Tier 1 FOA at 6. In 2015, HHS used the TPP Evidence Review to identify eligible program models. 2015 Tier 1B FOA at 11-12. The Evidence Review defined a program model as having evidence of effectiveness if it had a "positive, statistically significant impact on" teen pregnancy or an outcome related to teen pregnancy, including sexual activity, number of sexual partners, contraceptive use, and sexually transmitted infections. FAQs, Review Procedures & Criteria, Teen Pregnancy Prevention Evidence Review, U.S. Department of Health & Human Services, https://tppevidencereview

.aspe.hhs.gov/Faq.aspx (last visited July 13, 2018). A program is considered "effective" even if it "also affect[s] other types of adolescent health-risk behaviors." *Id.* Programs with a "high" or "moderate" evidence rating were eligible for replication in the 2015 FOA.

The success of the TPP Program has been a subject of intense debate. In a 2016 press release, the Office of Adolescent Health ("OAH") within HHS praised the fidelity of implementation of projects by TPP Program grantees, as well as the reach of the programs and the diversity of participating students, and noted that "[f]our of the evidence-based programs were effective at changing behavior when tested in new-settings and/or with new populations." Results from The OAH Teen Pregnancy Prevention Program, Dubner Decl., Ex. 5. But OAH's review found that eight studies were unable to replicate the results their project models had achieved, while seven studies deemed "inconclusive" also showed no positive outcomes. *See* Teen Pregnancy Prevention Program Facts, Press Release, Aug. 28, 2017, AR000029-31 (citing Summary of Findings From TPP Program Grantees (FY2010-2014), Office of Adolescent Health (2016), AR000024-28); Amy Feldman Farb & Amy L. Margolis, *The Teen Pregnancy Prevention Program (2010-2015): Synthesis of Impact Findings*, 106 Am. J. Pub. H. S9 (2016) (noting "four evaluations" that "found statistically significant positive behavior impacts"), Dubner Decl. Ex. 7. HHS officials noted in 2016 that across both tiers, projects with positive impacts represented "a larger proportion than found in large evaluation efforts from other fields." Farb & Margolis at S12. But the experimental Tier 2 programs achieved more positive outcomes than did Tier 1 programs. Farb & Margolis, S13 fig. 2 (36% for Tier 2, 21% for Tier 1).

Among the four Tier 1 projects coded as "replications," three reported mixed results in terms of effectiveness. *See* Teen Pregnancy Prevention Program Facts, AR000029. For instance, one implementation of the Carrera Program considered a "replication" found that

"[y]outh in 6th and 7th grades attending the program were less likely to report ever having sex after the first year of the program" versus a control group, but after the second and third years of the program, "the rates of ever having sex were similar across groups." Summary of Findings at 1 (describing Carrera programs), AR000024; Farb & Margolis at S13. HHS highlighted these issues in a 2017 press release and stated that if "Congress continue[s] to fund the TPP Program, decisions by the Department will be guided by science and a firm commitment to giving all youth the information and skills they need to improve their prospects for optimal health outcomes." Teen Pregnancy Prevention Program Facts, AR000030. A meta-analysis of the first TPP Program cohort found "[n]o strong evidence that any program or individual characteristics affected" outcomes for participants. Randall Juras et al., *Panel Paper: Meta-Analysis of Federally Funded Teen Pregnancy Prevention Programs*, Association for Public Policy Analysis & Management (Nov. 2, 2017), AR000017.

III. The 2018 Tier 1 Funding Opportunity Announcement

Congress funded the TPP Program in the 2018 Consolidated Appropriations Act.[1] HHS released a new Tier 1 FOA for the TPP Program on April 20, 2018, with the goal of "replicat[ing] and scal[ing] up programs that include the protective factors shown to be effective in the prevention of risk behaviors, including teen pregnancy." 2018 Tier 1 FOA at 5. Subject to available funds, HHS will issue grants under the authority of this FOA no earlier than September 1, 2018, in order to meet its fiscal year deadline of September 30 for obligating funds.

The 2018 FOA envisions a two-phase process. In Phase I, the agency will "establish project merit, fidelity to the program guidelines, feasibility, and capability of generating

[1] It did not enact proposed language that would have required HHS to fund grants "in the same manner as those grants were funded in fiscal year 2016." S. 1771, 115th Cong. (2018).

preliminary data." 2018 FOA at 4. In Phase II, HHS will "build upon results achieved in Phase I," and may require applicants to "modif[y] in scope or direction" before additional funding is awarded. *Id.* The FOA challenged here only addresses "Phase I," where the agency will "evaluate replication strategies that focus on protective factors shown to prevent teen pregnancy, improve adolescent health and address youth sexual risk holistically[.]" *Id.* at 17.

In Phase 1, applicants may replicate a "sexual risk avoidance" program developed by a non-profit corporation, the Center for Relationship Education ("CRE"), or a "sexual risk reduction" program developed by another non-profit corporation, ETR. *Id.* at 12. CRE "provides guidance on both programs and curricula" for educators by "gaug[ing] the degree to which each curriculum meets your organization's goals" and "identif[ies] community activities that could augment program effectiveness as the curriculum and program are implemented." The Center for Relationship Education, *Systematic Method for Assessing Risk-Avoidance Tool*, Dubner Decl. Ex. 24, at 9 ("CRE"). ETR is "designed to help practitioners assess whether curriculum-based programs have incorporated the common characteristics of effective programs." Douglas Kirby et al., *Tool to Assess the Characteristics of Effective Sex and STD/HIV Education Programs* (2007), Dubner Decl., Ex. 24, at 1-2, 4 ("ETR").

HHS's announcement also includes "additional expectations that should be implemented by all recipients throughout the two-year project period." 2018 FOA at 14. These expectations include emphasis on priorities that comport with public health protocols for addressing negative risk behaviors, evaluation and testing of programs, use of appropriate educational materials for different age groups and settings, staff training, communications strategy, partnerships and collaboration with outside groups, and a plan for sustainability. *Id.* at 14-26. Of particular note, HHS's "public health" priorities include an emphasis on "optimal health," or "the best possible

outcomes for an individual's physical, emotional and social health"; a "clear[] communicat[ion] that teen sex is a risk behavior"; "providing information and practical skills to assist youth in successfully avoiding sexual risk"; and "provid[ing] affirming and practical skills for those engaged in sexual risk to make healthier and risk-free choices in the future." *Id.* at 14-16. The Centers for Disease Control and Prevention ("CDC") considers teen sex to be a risk behavior. 2018 FOA at 7 (citing CDC, *High School Youth Risk Behavior Survey: U.S. 2015 Results*, https://nccd.cdc.gov/ youthonline/App/Results.aspx?LID=XX (last visited July 13, 2018)).

This focus on "sexual risk" is not new. The "reduc[tion]" of "behavioral risk factors underlying teenage pregnancy, or other associated risk factors," is the statutory goal of the TPP Program. "Sexual risk" refers to "any behavior that increases one's risk for any of the unintended consequences of sexual activity, including, but not limited to pregnancy." 2018 FOA, App'x B, at 96. The 2015 Tier 1B FOA was also intended to replicate programs "shown to be effective at preventing … sexual risk behaviors." 2015 Tier 1B FOA, App'x B, at 89. And the 2010 Tier 1 FOA also funded "youth development programs that seek to reduce teenage pregnancy and a variety of risky behaviors through a broad range of approaches." 2010 Tier 1 FOA at 5.

IV. The TPP Program Grant Evaluation Process

The TPP Program FOAs reflect a standard procedural approach used by HHS in the administration of grants. *Compare* 2015 Tier 1B FOA 76-77, *with* 2018 FOA at 62-63. After HHS screens applications to ensure compliance with program requirements, independent panels, composed of outside experts, score the applications using the criteria set forth in the FOA. 2018 FOA, at 63. In 2018, applications will be scored on the demonstrated need of communities and populations served; realistic, practical, and meaningful application of project expectations and priorities; technical approach; capacity and partnerships; project management and experience;

performance measures and evaluation plan; and reasonableness of budget. The scoring criteria set forth many factors HHS considers in the course of making awards that are not mentioned in the TPP Program appropriation, and HHS modified them in 2015 and 2018.

Of particular relevance to the County's claim are the scoring factors for "Realistic, Practical, and Meaningful Application of Project Expectations and Priorities." Under these criteria, applicants are evaluated by how well their program addresses all of the key elements of either risk-reduction or risk-avoidance programs as identified by ETR or CRE. 2018 Tier 1 FOA at 59. Applicants are also scored on the degree to which the proposal "comport[s] with public health protocols for addressing negative risk behaviors," by (1) "weaving the goal of optimal health into every components of the project," which is defined as "the best possible outcomes for an individual's physical, emotional and social health"; (2) "communicat[ing] that teen sex is a risk behavior"; (3) providing "skills to avoid risk"; and (4) "providing cessation support" so teens can "make healthier and risk-free choices in the future." *Id.* at 59-60.

Grant awards are determined in the third step, which involves deciding which TPP Program grant applications to fund and the amount of each grant. *Id.* at 63. Final award determinations will be made by the Director of the Office of Adolescent Health, Evelyn M. Kappeler, in consultation with the Assistant Secretary of Health ("ASH"), Admiral Brett P. Giroir. *Id.* In addition to the criteria on which the scoring is based, the FOA notes that the Director, in consultation with the ASH, can take into consideration other factors that are not a part of the scoring system, such as geographic distribution and diversity in target audiences. *Id.*

V. Multnomah County

The County is a current recipient of a TPP Program grant that it received through the 2015 Tier 1B FOA with a five-year project period. Am. Compl. ¶ 86 (ECF No. 28). Although

the County's complaint recites the history of a dispute with HHS over the shortening of this "project period" during the summer of 2017, that issue has been resolved by litigation elsewhere. HHS is complying with an order issued in the U.S. District Court for the District of Columbia that requires the agency to "accept and process [Plaintiff's] non-competing continuation applications" as it has done in past years. *Healthy Futures*, No. 1:18-cv-00992, Order, ECF No. 29 (D.D.C. June 1, 2018). HHS has committed to processing the awards of all current TPP Program grantees by August 20.

Despite already securing funding for its current programs, the County filed this suit on June 8, 2018, to contest the legality of the 2018 Tier 1 FOA. It alleges that because the 2018 FOA is open to a greater number of applicants, it can only receive "a fraction of its currently yearly grant as part of the 2015 TPP Program" that is sustaining its current educational program. Am. Compl. ¶ 93. But, as noted, the County does not need to participate in the 2018 FOA to sustain current programs; it filed a *non-competing* application to renew the award it received in FY 2015, FY 2016, and FY 2017, and that award cannot be diluted by other applicants.

The County therefore amended its complaint just before filing its motion to claim that it is seeking to expand its current programs by participating in the competition. Am. Compl. ¶ 92. The County avers that it is institutionally committed to "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." *Id.* ¶¶ 94. The 2018 FOA, in the County's view, favors "applications whose proposed curricula propound abstinence-only 'risk avoidance' content." *Id.* But, as mentioned, the 2018 Tier 1 FOA does not define "risk avoidance" in "abstinence-only" terms, and the FOA

allows applicants to select either a "risk reduction" or a "risk avoidance" model, just as the 2015 Tier 1B FOA allowed applicants to choose from a variety of different models. 2015 Tier 1B FOA, App'x D, at 95-100.

ARGUMENT

I. Standard Of Review

Defendants move for dismissal of this case under Rule 12 or, in the alternative, summary judgment pursuant to Rule 56. Under Rules 12(b)(1) or 12(b)(6), dismissal is appropriate if, assuming the truth of all well-pleaded factual allegations, the County has failed either to establish this Court's jurisdiction or to state a claim upon which relief can be granted as a matter of law. Summary judgment is proper if a movant "shows that there is no genuine dispute as to any material fact and [that it] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

II. The Court Should Grant Defendants' Motion To Dismiss Or For Summary Judgment

The County's case should be dismissed in its entirety on Rule 12 grounds because it lacks Article III standing, the FOA is not final agency action, and the 2018 FOA's priorities are committed to the agency's discretion by law. Furthermore, even if the Court were to review the substance of the 2018 FOA, defendant is entitled to summary judgment. Because the guidelines comport with Congress's minimal guidance to HHS, the agency is not acting in violation of the TPP Program appropriation and Plaintiff's various appropriations-related claims must fail. Finally, HHS has shown a reasonable basis for its change of course in the 2018 TPP FOA and its actions easily satisfy the deferential standard for APA review of agency action.

A. The County Fails To Plead Article III Standing

The "constitutional minimum of standing" requires not only an "injury in fact" and a

causal connection between that injury and the challenged conduct of the defendant, but that the injury alleged can be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). The County asserts that it has been harmed because the 2018 FOA forces it to compete for funding on terms that are unlawful. But the amended complaint asks the Court to void the 2018 FOA and prevent remaining TPP Program funds from being spent pursuant to it. Am. Compl. at p. 39 (prayer for relief).

These allegations do not establish standing because the County's proposed relief does not redress its alleged injury. If the Court grants the County's request to void the 2018 FOA no entity will get any of those funds because the FOA will be void. This will not remedy Plaintiffs' alleged injury of being unlawfully deprived of funding by an improper competition. Moreover, these funds were appropriated in FY 2018 and must be spent by September 30, 2018. If the FOA is voided, it will be impossible to draft and promulgate a new FOA, receive applications, process those applications, and issue new awards by that date. The "psychic satisfaction" Plaintiff may receive from nobody receiving these funds "is not an acceptable Article III remedy." *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 107 (1998). Because the County's proposed remedy would not truly redress its concerns, its complaint should be dismissed.

B. The APA Precludes Judicial Review Of The Funding Announcement

The APA provides "an express limited sovereign immunity waiver for suits seeking non-monetary relief against the United States." *White v. Univ. of California*, 765 F.3d 1010, 1024 (9th Cir. 2014). Two of those limitations provide a basis for dismissal. First, agency actions can only be challenged if they are "final." 5 U.S.C. § 704. But the agency's announcement of funding criteria is an initial, and entirely voluntary, step in the agency's decisionmaking process that does not constitute final agency action. Second, decisions on the terms and conditions of

grant awards under the TPP Program are presumptively committed to agency discretion as a matter of law. *Id.* § 701(a)(2). The County can point to no legal standard that would allow the Court to meaningfully review the agency's actions. Accordingly, its complaint is subject to dismissal under Rule 12.

1. The Funding Announcement Is Not Reviewable Final Agency Action

The APA defines final "'agency action' [as] includ[ing] the whole or a part of . . . relief, or the equivalent or denial thereof." *Id.* § 551(13). In turn, "'relief' includes the whole or a part of an agency['s] . . . grant of money." *Id.* § 551(11)(A). Final agency action must meet two criteria: "First, the action must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal citations omitted). The County's challenge does not satisfy either of those criteria.

Whether a change to an agency's grant application process is a final agency action depends, in part, on whether that change alone is outcome determinative. Even when "Congress has specified the specific project to which funds should be allocated, the [agency] does not take a final agency action until it completes its review of the grant application and decides to disburse the appropriated funds."[2] *Rattlesnake Coal. v. EPA*, 509 F.3d 1095, 1104 (9th Cir. 2007); *see also Citizens Alert Regarding Env't v. EPA*, 102 F. App'x 167, 168 (D.C. Cir. 2004) (holding

[2] An exception, not applicable here, exists when the agency lacks discretion in awarding grant funds, such as in mandatory grants, or when there is a change to a grant's threshold eligibility criteria. *See, e.g.*, *State ex rel. Becerra v. Sessions*, 284 F. Supp. 3d 1015, 1031-32 (N.D. Cal. 2018) (holding the addition of criteria to a mandatory grant program was final agency action).

that until the agency "completes its review and reaches a decision [on the grant award], there has been no final agency action . . . and the matter is not ripe for judicial review.").

The 2018 FOA is the first step in the agency's decisionmaking process for grant awards, and does not mark its consummation. Several steps must follow the FOA for a grant to be awarded. After an initial screening by HHS to ensure applications meet minimum requirements, the applications are scored by an "independent review panel" comprised of "experts in their fields" who are "drawn from academic institutions, non-profit organizations, state and local government, and Federal government agencies." 2018 FOA at 63. Based on the scores and comments provided by the panel, the Director of OAH, in consultation with the ASH, makes final award decisions.

The FOA does not determine rights and obligations, nor do legal consequences flow from it. Because HHS does not "complete its review of the grant application and decide to disburse the funds" until after the scoring takes place, the mere issuance of the 2018 TPP Tier 1 FOA and the review of applications under it does not determine rights and obligations. Rather, the FOA is an interlocutory determination from which no legal consequences flow. *See Bennett*, 520 U.S. at 117-18; *see also* 5 U.S.C. § 704 (explaining that "preliminary, procedural, or intermediate" agency actions are not directly reviewable, but may be reviewed on final agency action). Because scores from the FOA are not final, *a fortiori*, the criteria given to those panels to generate the scores have no legal effect and cannot be final agency action.

2. The 2018 FOA Is Not Reviewable Because It Reflects Grant Making Policy Preferences Committed to Agency Discretion by Law

The 2018 FOA is also unreviewable because actions that are "committed to agency discretion by law" are excepted from review under 5 U.S.C. §701(a)(2). The APA presumes

agency action is judicially reviewable, but "[t]his is 'just' a presumption." *Lincoln v. Vigil*, 508 U.S. 182, 190-91 (1993) (citing *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 349 (1984)). The Supreme Court has held that review under the APA is inappropriate where "'a court would have no meaningful standard against which to judge the agency's exercise of discretion,'" *Lincoln*, 508 U.S. at 191 (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)), including situations where the agency decision "'involves a complicated balancing of a number of factors which are peculiarly within its expertise.'" *Lincoln*, 508 U.S. at 191 (quoting *Heckler*, 470 U.S. at 831).

An agency's allocation of appropriated funding is typically committed to agency discretion by law, because "the very point" "is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way." *Lincoln*, 508 U.S. at 192; *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 748-51 (D.C. Cir. 2002) (finding agency regulations unreviewable when Congress has delegated broad discretion to an agency in how to manage funds for a particular program); *Los Coyotes Band of Cahuilla & Cupeño Indians v. Jewell*, 729 F.3d 1025, 1038 (9th Cir. 2013) (applying *Lincoln*); *Serrato v. Clark*, 486 F.3d 560, 568-70 (9th Cir. 2007) (same); *Alan Guttmacher Inst. v. McPherson*, 597 F. Supp. 1530 (S.D.N.Y. 1984) (declining jurisdiction over review of decision by agency not to renew an Agency for International Development grant). There are no judicially manageable standards to evaluate the policy criteria an agency uses to administer funds where the statute leaves those criteria to the agency's discretion.

The County's contention that the TPP Program is exempt from this rule is foreclosed by other recent cases. In *Policy & Research, LLC v. U.S. Dep't of Health & Human Servs.*, the District Court for the District of Columbia found "that HHS's decision to stop funding for Plaintiffs' projects, *and to recompete the funds associated with those projects*, is the type of

agency action that is presumptively unreviewable." --- F. Supp. 3d ----, 2018 WL 2184449, at *8 (D.D.C. May 11, 2018) (emphasis added). In *Healthy Futures*, the Court reached the same outcome respecting plaintiffs' claim for continuation funds "for the reasons set forth in *Policy & Research*." No. 1:18-cv-00992-KBJ, 2018 WL 2471266, at *6-7 (granting summary judgment).

The County cannot overcome the presumption that these funding decisions are not reviewable. Unlike in *Healthy Futures*, where the Court deemed the decision to end the 5-year "project periods" of the County's preexisting grant to be reviewable because a regulation specifically set forth criteria ending a project period, there is no regulation setting forth the criteria to include in TPP Program FOAs, and the appropriation statute itself contains scant guidance. It merely requires HHS to fund "medically accurate" and "age appropriate" programs that "replicat[e] programs that have been proven effective through rigorous evaluation to reduce teenage pregnancy, behavioral risk factors underlying teenage pregnancy, or other associated risk factors." Such spare language does "little to narrow the universe of funding options open to" HHS and provides no standard for this court to apply in reviewing HHS's FOA. *Guttmacher*, 597 F. Supp. at 1533. In an extreme case, the TPP Program appropriation language "might … permit a court to decide whether a project was particularly inappropriate for funding" and "weed[] out" such projects, but it "provides no basis for review" of the many criteria HHS might use to carry out Congress's very generic mandate. *Id.* at 1536.

Choosing projects requires "a complicated balancing of a number of factors which are peculiarly within the Secretary's expertise." *Milk Train*, 310 F.3d at 751-52 (internal quotation marks and citation omitted); *cf. Cal. Human Dev. Corp. v. Brock*, 762 F.2d 1044, 1052 (D.C. Cir. 1985) (Scalia, J., concurring) (quoting *Heckler*, 470 U.S. at 823)) ("[T]he allocation of grant funds among various eligible recipients, none of which has any statutory entitlement to them, is

traditionally a matter 'committed to agency discretion by law.'").[3] The Court should therefore dismiss the County's complaint for lack of jurisdiction under § 701(a)(2).

C. The County's Claims Fail on the Merits

Even if judicial review were appropriate, the County's APA claims fail on the merits and their requested remedy is barred by law. First, the TPP Program appropriation leaves HHS with significant flexibility to spend money on "replicating programs that have been proven through rigorous evaluation to reduce teenage pregnancy … or other associated risk factors." The approach HHS chose in the 2018 FOA is consistent with the 2018 Consolidated Appropriations Act, and does not violate either the Purpose Statute, 31 U.S.C. § 1301(a), prohibitions on so-called *ultra-vires* action, or the Appropriations Clause. Second, the FOA adequately explains the agency's new approach to selecting TPP Program grantees, and the FOA is not "arbitrary and capricious" agency action. Third, the County cannot meet the high threshold for showing an abuse of discretion, or religious discrimination by the agency.

1. The 2018 FOA Implements Congress's Mandate To Fund Projects That Replicate Effective Teen Pregnancy Prevention Programs

a. The Plain Text Of The Statute Supports HHS's Interpretation

The 2018 FOA requires applicants to select a curriculum that "address[es] and replicate[s] each of the elements" of effective sexual risk avoidance or sexual risk reduction programs as defined by either the CRE or ETR, respectively. 2018 Tier 1 FOA at 12. Both programs reflect systematic review of existing research on sex education. CRE at 7 ("[CRE]

[3] Grants decisions in the medical or research fa field fall within this exception. *See, e.g.*, *Apter v. Richardson*, 510 F.2d 351, 355 (7th Cir. 1975) ("medical merits of NIH decisions on training grants may be committed to the unreviewable discretion of the agency"); *Kletschka v. Driver*, 411 F.2d 436, 443 (2d Cir. 1969) (not "feasible" to review agency decisions "awarding or refusing to award research grants," which "involves a determination . . . [on] the relative merits of the many proposed research projects for which funds are sought").

team and its expert consultants have systematically reviewed existing risk-avoidance research, defined components of effective programming, described critical areas of curricular development, and identified training processes that support sexual risk-avoidance programs."); ETR at 2-3 (describing ETR's efforts to identify the "common characteristics of programs found to be effective in changing behaviors," including a "systematic review of 83 studies of HIV prevention and sex education programs"). The 2018 FOA accordingly fulfills Congress's mandate to HHS of "replicating programs that have been proven effective through rigorous evaluation to reduce teenage pregnancy" and its associated risk factors.

The County asserts that the 2018 FOA violates Congress's directive because it "supports programs without regard to whether they have been proven effective through rigorous evaluation." Pl.'s Br. 17, ECF No. 29. Its argument rests on the unstated premise that the term "program" should be construed narrowly to track the "evidence-based curriculum" or "youth development programs" that applicants were asked to replicate in the 2010 and 2015 TPP Tier 1 FOAs. The County contends that HHS must use the term "program" in the sense that the CRE and ETR documents use it. *Id.* at 17-18. But there is no reason for such a limited reading of that term. Rather, when "'a word is not defined by statute, [courts] normally construe it in accord with its ordinary or natural meaning'" and "may refer to standard English language dictionaries" in order to do so. *United States v. Ezeta*, 752 F.3d 1182, 1185 (9th Cir. 2014) (quoting *Smith v. United States*, 508 U.S. 223, 228 (1993)).

Here, because neither Congress nor HHS has defined the term "program" in a binding manner, the ordinary meaning of the term "program" applies. And a "program," in ordinary English usage, is simply any "plan or system under which action may be taken toward a goal." "Program," Merriam Webster's Collegiate Dictionary (11th ed.), https://www.merriam-

webster.com/dictionary/program (last visited July 11, 2018). HHS did not err in determining that the "essential elements" outlined in the FOA constitute "programs." Projects incorporating those "elements" have been "proven effective through rigorous evaluation" by outside groups to reduce teen pregnancy and its associated risk factors, and HHS acted within its statutory authority by asking applicants to "replicate" these "programs." *See* ETR at 5 ("programs that incorporate all these characteristics are quite likely to reduce sexual risk-taking"). Thus, the 2018 aligns with the appropriations text by asking applicants to replicate "programs."

But even if its crabbed understanding of "program" is adopted, the County's argument still misses the mark. Both the risk-avoidance and risk-reduction elements set forth in the 2018 FOA evolved from broader studies of sex education to determine the common elements of effective curricula, like those identified by the TPP Evidence Review. The "programs" set forth in the 2018 FOA define the elements of such curricula. Therefore, even if one assumes that Congress had the County's narrow definition of "program" in mind when it appropriated these funds, the 2018 TPP Tier 1 FOA satisfies the statute because applicants will be "replicating" the many "programs proven effective" to reduce teen pregnancy and its associated risk factors.

The County's understanding of what it means to "replicate" a "program" also proves too much. In 2010, HHS instructed potential Tier 1 TPP grantees to select "evidence-based curriculum and youth development programs" that were "eligible for replication" in preparing their applications; many of those programs were also available for replication in 2015. 2010 Tier 1 FOA at 6. But a curriculum is not a "program," either. A curriculum is a key component of a successful "program," but both CRE and ETR recognize that it is just a component. CRE at 9; ETR at 34. The 2010 and 2015 FOAs reflect this distinction by referring to these curricula as "program *models*." 2010 Tier 1 FOA at 5 ("The purpose of this FOA is to support the replication

of evidence-based program models …."); 2015 Tier 1B FOA at 14, App'x D. In past FOAs, HHS understood "replicating programs" to mean "delivering the program model as it was originally designed and evaluated" into "new settings" with "new populations" and "new evaluation designs compared with the old studies," rather than an attempt to exactly replicate the original intervention. Farb & Margolis at S13. Instead of adopting a technical interpretation of the FOA that significantly cabins the agency's discretion (and brings HHS's past practice into doubt), the Court should recognize the breadth of Congress's conferral of discretion on HHS in implementing this program.

The County also objects to HHS's request that applicants explain how they will "weave the goal of optimal health into every component of the project." Pl.'s Br. at 12. For purposes of the application, this "optimal health" standard simply requires applicants to reflect the goal of achieving "the best possible outcomes for an individual's physical, emotional, and social health" into its programs. 2018 FOA at 86; *see* Michael P. O'Donnell, "Definition of Health Promotion 2.0: Embracing Passion, Enhancing Motivation, Recognizing Dynamic Balance, and Creating Opportunities," 24 Am. J. Health Promot. iv (2009) (cited at 2018 Tier 1 FOA at 15 n.1), AR000006-7. In the past, HHS has considered similar extra-statutory factors as relevant to whether it would select applicants for awards. 2015 Tier 1B FOA at 14-15, 73 ("The applicant [should] describe[] its plan for ensuring all programs are implemented in a safe and supportive environment for youth and their families, including ensuring inclusivity, integrating key positive youth development practices, and using a trauma-informed approach."). Like the many other factors HHS has considered when issuing awards in the past, the "optimal health" requirement does not violate Congress's mandate.

b. HHS's Interpretation Of The TPP Program Appropriation Merits Deference

Although HHS's interpretation of its authority under the TPP Program appropriation is clearly correct, the agency's determination is nonetheless entitled to deference under the doctrine of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). "[A]n agency's interpretation may merit some deference whatever its form." *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001). The weight given to such statutory interpretations depend on the "thoroughness evident in the [agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Skidmore*, 323 U.S. at 140. Such deference is appropriate here, as well.

"The absence of statutory guidance" in the TPP Program appropriation means that HHS has "flexibility to implement a broad interpretation of [its] term[s]" and militates in favor of *Skidmore* deference. *Nat'l Res. Def. Council, Inc. v. F.A.A.*, 564 F.3d 549, 564 (2d Cir. 2009). That presumption is especially strong in the context of government funding decisions, which are "notoriously unsuitable for judicial review" because "they involve the inherently subjective weighing of the large number of varied priorities which combine to dictate the wisest dissemination of an agency's limited budget." *Cmty. Action of Laramie Cnty., Inc. v. Bowen*, 866 F.2d 347, 354 (10th Cir. 1989). In addition, HHS has accumulated substantial expertise in this area over time. In 2010, HHS informally determined that applicants should propose replicating specific "program models" and developed a system for identifying which models had been proven "effective" through "rigorous evaluation." It stayed fairly close to this approach in 2015. For the 2018 FOA, HHS reconsidered this approach and proposed a new set of programs that track the "elements of effective sexual risk avoidance [or reduction] programs," as

determined through a rigorous assessment of successful projects by groups outside the agency. Although that approach marks a departure from HHS's limited past practice, it is consistent with the broad mandate of the statute and the flexibility HHS has exercised in the past. It would be strange if the changes to 2018 FOA were not entitled to deference simply because HHS considered lessons learned from prior grants and changed its approach to the problem.

2. The County's Various Appropriation-Based Arguments Lack Merit

The County raises a slew of appropriations-related arguments. First, it asserts that the 2018 FOA violates 31 U.S.C. § 1301(a), which limits spending of appropriated funds "to the objects for which the appropriations were made except as otherwise provided by law," because it transfers money to programs covered by "Tier 2" of the TPP Program or to an entirely separate appropriation for grants that "exclusively implement education in sexual risk avoidance (defined as voluntarily refraining from non-marital sexual activity)." Pl.'s Br. 20-22. Second, the County argues that HHS has "violate[d] the Appropriations Clause" of the Constitution by "directing Tier 1 funds to unproven, exclusively SRA programs without statutory authorization." *Id.* at 22-23. Third, the County avers that by issuing the 2018 FOA, HHS engaged in *ultra vires* action and breached separation of powers principles. *Id.* at 30-31. Each argument fails.

a. The 2018 FOA Does Not Transfer Funds To The Tier 2 TPP FOA

The County avers that the 2018 Tier 1 FOA is "effectively indistinguishable from its Tier 2 counterpart," but misrepresents both the Tier 1 and Tier 2 announcements in the process. The Tier 2 FOA asks applicants to develop "new and innovative strategies" that "address protective factors and/or key elements of effective programs recognized by social science to affect adolescent risk behaviors." 2018 Tier 2 TPP FOA at 3, 11; *see also id.* at 7-8 (listing these protective factors, such as "[h]ealthy relationships" and "[l]ow family conflict"). Thus, while the

Tier 2 FOA does invoke the same programs for sexual risk reduction and sexual risk avoidance that HHS asked applicants to replicate in Tier 1, a Tier 2 applicant can propose programs that focus on a subset of the elements of either "program," or on one of the "protective factors" described elsewhere, in a way that Tier 1 applicants cannot.

The County also calls attention to the agency's statements in both the Tier 1 and Tier 2 announcements that the initial phase of funding is designed to "evaluat[e] … replication strategies that focus on protective factors shown to prevent teen pregnancy, improve adolescent health, and address youth sexual risk holistically." Pl.'s Br. 21 (emphasis omitted). The County argues that such evaluation is only permissible under Tier 2, because programs in Tier 1 should "have already gone through such evaluation." *Id.* But Tier 1 applicants are not being asked to test unproven strategies in a manner inconsistent with the Tier 1 appropriation, and Congress did not prevent HHS from collecting information about funded projects in order to assess which "replication strategies" are actually working. Nor should this approach be unfamiliar to the County, as the 2010 and 2015 Tier 1 FOAs imposed similar requirements. 2015 Tier 1B FOA at 73-74; TPP 2010 Tier 1 FOA at 11 ("The OAH plans for a mixture of evaluation strategies to address the question of whether replications of evidence-based programs are effective"). The County's objections are nothing more than a retooled version of its statutory argument regarding the meaning of "program," and this second pass should similarly be rejected.

b. The 2018 FOA Does Not Transfer Funds To The SRAE Program

The County objects that the 2018 FOA reallocates TPP Program funds to a separate appropriation for "competitive grants which exclusively implement education in sexual risk avoidance (defined as voluntarily refraining from non-marital sexual activity)," known as the Sexual Risk Avoidance Education Program ("SRAE"). Pl.'s Br. 4. The County asserts that

"only applicants who implement SRA education" are eligible for a grant under the new Tier 1 TPP FOA because those are the only applicants who can satisfy HHS's program priorities, and therefore, it is effectively granting awards under the SRAE program. *Id.* at 22.

This argument ignores the substance of the 2018 FOA and the SRAE appropriation. Unlike the SRAE program, where Congress defined "sexual risk avoidance" as "sexual abstinence," the new FOA defines "[s]exual [r]isk" more broadly. 2018 FOA at 86. Moreover, applicants for funding under the 2018 FOA can propose replication of successful "sexual risk reduction" programs that would not qualify for SRAE program funding. HHS notes that proposed projects should "clearly communicate[] that teen sex is a risk behavior," provide "skills to avoid risk," and "provid[e] cessation support," 2018 FOA at 59-60, but these general guidelines do not comport with SRAE's mandate to "exclusively" teach "refraining from non-marital sexual activity." Indeed, HHS has told applicants, in response to questions regarding whether they can "include contraceptive education in their proposed project," that "any curriculum" can be used "so long as it replicates the evidence-based elements of one of the two programs." FAQs for Current Funding Opportunity Announcements, Dubner Decl., Ex. 22, at 6. Because the 2018 FOA applies standards different from those Congress insisted upon in the SRAE program, it does not unlawfully divert funds from TPP to SRAE.

The County's argument that the Tier 1 TPP FOA merely siphons funds to the SRAE program is principally based on Ms. Huber's past opposition to "sexual risk reduction" and her efforts to oppose renewal of the TPP Program in 2017. Pl.'s Br. at 8. But the County lacks evidence sufficient to support this conclusion. Documents and comments made years before Ms. Huber joined HHS, such as a 2012 NAEA report on "sexual risk avoidance" education (Dubner Decl., Ex. 10), a 2015 YouTube video (Pl.'s Br. at 8), and a 2009 masters' thesis (Dubner Decl.,

Ex. 11), are not part of the administrative record the agency directly or indirectly considered. *Thompson v. United States Dep't of Labor*, 885 F.2d 551, 555-56 (9th Cir. 1989). The County cannot supplant the FOA's actual definitions of terms such as "sexual risk" and "optimal health" by pointing to such materials. Even Ms. Huber's statements made in 2017 urging Congress to revoke funding for the TPP Program have no bearing on the 2018 FOA's qualifying criteria. These are distinct issues and must be treated as such.

The County's invocation of *Masterpiece Cakeshop, Ltd. v. Col. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), is likewise misplaced. Unlike that case, the statements at issue here were not made by the actual decisionmaker, were not made in a formal adjudicatory process, were not contemporaneous with the agency action at issue, and are not part of the administrative record that the Court is bound to consider. They fall well short of demonstrating the 2018 FOA is an improper transfer of funds to the SRAE program.

c. The 2018 FOA Is Not The Product Of Ultra Vires Action

The County also alleges that the Tier 1 FOA is an *ultra vires* use of agency power because the County has "exceed[ed] its authority in changing grant criteria dictated by Congress" after Congress did not agree to defund the program. Pl.'s Br. 30-31. But, as explained above, HHS acted within the broad scope of the TPP Program authorization to reassess its program and issue new funding criteria. The County relies heavily on recent litigation in unrelated grant programs not even administered by HHS, including *City of L.A. v. Sessions*, 293 F. Supp. 3d 1087 (C.D. Cal. 2018), and *City of Chi. v. Sessions*, 264 F. Supp. 3d 933, 943 (N.D. Ill. 2017), *aff'd*, 888 F.3d 272 (7th Cir. 2018), to advance its *ultra vires* argument. But the statutes at issue in both cases imposed detailed limits on grantmaking discretion. *City of L.A.*, 293 F. Supp. 3d at 1096 (holding that Attorney General could not impose conditions for "preferential consideration"

beyond specific factors Congress enumerated in 34 U.S.C. § 10381(c)); *City of Chi.*, 264 F. Supp. 3d at 942-43 (striking down conditions imposed on a so-called "formula grant" program because, unlike "discretionary grant[]" program enacted alongside it, Congress "withheld [] authorization" to impose new conditions on top of the criteria in the formula). The TPP Program statute does not impose such requirements, and HHS's funding announcements over the years have incorporated numerous criteria for evaluating applications that Congress did not explicitly authorize. Because the 2018 FOA is well within its statutorily delegated authority under the TPP Program appropriation, the County's claim that this action is *ultra vires* should be rejected.

3. The 2018 TPP Tier 1 FOA Is Not A Product of Arbitrary And Capricious Agency Action

Even if the Court finds jurisdiction to review the 2018 FOA, HHS's changes to the FOA are neither "arbitrary" nor "capricious." 5 U.S.C. § 706(2)(A). This very deferential standard requires just a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). "'[A] court is not to substitute its judgment for that of the agency,' and should 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.'" *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513–14 (2009) (internal citation omitted). When agency action implicates policy considerations, "it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *Id.* at 515. The record robustly establishes that the 2018 FOA is "within the bounds of reasoned decisionmaking," compelling denial of the County's motion. *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 105 (1983).

a. HHS Adequately Explained the Reasoning Behind The 2018 TPP Tier 1 FOA

The County faults HHS with not doing enough to explain its "180-degree turn from the previous FOAs." Pl.'s Br. at 25. But HHS highlighted the mixed outcomes of the 2010 TPP Tier 1 programs in justifying its decision to take a different approach with the TPP Program moving forward. Teen Pregnancy Prevention Program Facts, AR000029. HHS's meta-analysis of these programs showed that there was little evidence that any specific program affected outcomes. Juras at 10, AR000017. The programs set forth in the 2018 FOA are grounded in reviews of social science literature regarding sexual risk avoidance and sexual risk reduction education. ETR at 5 (noting that projects incorporating all 14 elements will "quite likely" lead to successful outcomes); CRE at 7 (describing "review" of "exist[ing] risk-avoidance literature" in order to "define[] components of effective programming"). HHS explained the reasons for its emphasis on certain public health factors intended to target risk behaviors that have been recognized by the CDC. 2018 FOA at 6-8, 14-16. In this field that lacks mathematical precision, HHS has nonetheless adequately explained its rationale for the issuance of the 2018 FOA.

b. HHS Did Not Rely On Inappropriate Factors

The County next accuses HHS of "requir[ing] adherence to SRA precepts" and undermining "Congress's determination that TPPP focus on the products of rigorous evaluation rather than any particular content or ideology." Pl.'s Br. 25-26. But the TPP Program appropriation does not limit the agency's ability to take additional considerations into account once it has determined that a proposed project "replicat[es] programs … proven effective … to reduce teenage pregnancy" or its associated risk factors. And the 2018 TPP Tier 1 FOA adequately explains why its public health considerations are consistent with Congress's stated

goals for the TPP Program and does not mandate conformity to a single approach to sex education.

The FOA highlights measurable decreases in the percentage of teens who have engaged in sexual intercourse and in the number of teens who report having sex in the last three months. 2018 FOA at 6-7. Teenage sex is considered "risk factors" for teenagers by the CDC. *Id.* at 15. HHS's efforts to "reinforce[e] [the] healthy choices" of the "majority of teens from every ethnicity [that] have not had sex" by encouraging applicants to clearly communicate sexual risk, provide skills to avoid those risks, and provide cessation support in their proposals are related to the TPP Program's goal of funding projects that reduce the "associated risk factors" of teen pregnancy. Unlike the SRAE program, TPP defines "sexual risk" and "optimal health" broadly, and the points of emphasis in the TPP FOA do not transform it into an "abstinence-only" program. HHS's requirements are germane to the purposes of the TPP Program, and it is reasonable for HHS to consider them.

c. HHS Has Not Abandoned The "Rigorous Evaluation" Requirement

Next, the County attacks HHS's choice not to rely on the TPP Evidence Review in the 2018 TPP Tier 1 FOA. It regards the TPP Evidence Review as synonymous with Congress's directive that HHS fund projects "replicating programs proven effective" at reducing teenage pregnancy and its associated risk factors. But Congress never mandated the standards HHS applied in the past for determining whether or not a "program" was "effective" and what constituted "rigorous evaluation" of a "program." And HHS has provided a sufficient basis for its choice not to rely upon projects singled out by the TPP Evidence Review.

HHS explained in 2017 that it was concerned about the "strong evidence of negative impact or no impact" for programs from the TPP Evidence Review replicated in the TPP

Program. By a two-to-one margin, participants in Tier 1 of the TPP Program who were able to produce a viable data set were unable to replicate prior results. Farb & Margolis at S13 Fig. 2. Just over a third of funded projects were coded as "inconclusive" because they "had challenges that resulted in an invalid test of the program," but "none of [them] demonstrated positive behavioral impacts," either. *Id.* at S12. These interventions were actually *less* likely to demonstrate positive results than HHS's Tier 2 TPP Program, which did not require applicants to adhere to curricula cleared by the Evidence Review. *Id.* And, as HHS's narrative description of the projects shows, the outcomes HHS considered a "replication" were not unambiguously successful. *See* Teen Pregnancy Prevention Program Facts, AR000029; Summary of Findings, AR000024-28. Rather than fund more of the same replication studies, HHS has chosen a different path in the 2018 FOA.

The County disagrees with HHS's assessment of the success of these replication studies. But "[e]ven if [the Court] found [the County's] interpretation of the overall scientific evidence more persuasive, that would not be enough to declare the alternative agency interpretation arbitrary and capricious." *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1301 (9th Cir. 2003). "Agencies may change course," and it suffices, for purposes of the Court's review, that the "change of course … is based on new evidence or otherwise based on reasoned analysis." *Ctr. for Biological Diversity v. Zinke*, 868 F.3d 1054, 1061 (9th Cir. 2017).

The County's attack on the FOA's public health priorities is similarly meritless. Relying in part on documents HHS cited in the FOA, it suggests that any requirement that grantees be clear about communicating sexual risk, provide skills to avoid sexual risk, and provide cessation support is tantamount to imposing an "abstinence-only education." Pl.'s Br. 26-27. Nonetheless, as explained above, the County exaggerates these requirements based on materials that are not a

part of the administrative record that the Court is bound to consider. Applicants are allowed to submit applications that follow a "sexual risk reduction" strategy which "clearly focus[es] on one or more specific behaviors that directly affect pregnancy or STD/HIV," which can include "abstinence" and "contraceptives." ETR at 21-22. And HHS adequately explained why its emphasis on these factors is timely and justified for all applicants. 2018 FOA at 6-7, 15.

d. HHS Has Not Excluded Important Considerations Required By The TPP Program Appropriation

Finally, the County alleges that HHS has not "consider[ed] an important aspect of the problem" by omitting specific evaluations of "demographic disparities and other correlates of teen pregnancy," such as dating violence and child abuse, that were discussed in the 2015 TPP FOA. Pl.'s Br. at 27-28. But the only criteria Congress mandated in the TPP Program appropriation are that HHS select "medically accurate and age appropriate" programs that have been "proven effective through rigorous evaluation" to reduce teen pregnancy or its associated risk factors. The appropriation neither requires nor forbids consideration of the specific types of information HHS highlighted in the 2015 FOA. Indeed, the 2010 FOA made no mention of certain factors the County now contends it is legally mandatory for the FOA to address, such as domestic violence, sexual abuse, and LGBT inclusivity. And the 2015 TPP FOA does not discuss other populations, such as homelessness or incarceration, that the 2018 FOA addresses in more detail. *See* 2018 FOA at 7-8. How HHS weighs and considers the countless factors bearing on teen pregnancy falls well within its unreviewable discretion under § 701(a)(2) of the APA.

The County's argument also fails on its premises. Far from ignoring disparities, the 2018 FOA instructs applicants to "select a population(s) within a community that has a teen birth rate, STD rate, sexual activity rate or other measure of sexual risk that is either at or above the

national average." 2018 FOA at 5-6. Applications are scored on whether they "seem[] likely to … "reduc[e] disparities," just as they were in the 2015 Tier 1B FOA. *Compare id.* at 60 *with* 2015 Tier 1B FOA at 72 (requiring applications to describe impact on "existing disparities in the community"); *see also* 2018 FOA at 85-86 (defining "health disparity" as a "health difference that is closely linked with social, economic, and/or environmental disadvantage" which "adversely affect groups of people … based on their racial or ethnic group … gender … sexual orientation or gender identity, [and] geographic location …."). With respect to domestic violence, the FOA recognizes that "family conflict [is] associated with … teen pregnancy." 2018 FOA at 10. And with respect to dating violence, HHS recognized that "[y]outh who form safe, healthy relationships are … less likely to engage in risky behaviors," citing the CDC's initiative on teen dating violence. *Id.* at 9, 81 (citing Centers for Disease Control & Prevention, *Dating Matters: Strategies to Promote Healthy Teen Relationships*, https://www.cdc.gov/violenceprevention/datingmatters/, AR000001-5). The new FOA reflects HHS's awareness of important correlates of teen pregnancy and is neither arbitrary nor capricious.

4. The 2018 FOA Does Not Constitute An Abuse of Discretion Due to Biased Decisionmaking Or Violate 45 C.F.R. 87.3(*l*)

The County contends that the new 2018 FOA constitutes an abuse of discretion because it has adduced clear and convincing evidence that "demonstrate[s] that Defendants' decisions have been the product of an unalterably closed mind" because of Ms. Huber's opposition to the TPP Program in her work prior to joining HHS. Pl.'s Br. at 29. The cases the County relies upon have held that a "*decision-maker* … should be disqualified" if "there has been a clear and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding." *Alaska Factory Trawler Ass'n v. Baldridge*, 831 F.2d

1456, 1467 (9th Cir. 1987) (emphasis added) (rejecting claim of bias against administrator that served in two levels of administrative process). But Ms. Huber is not the "decision-maker" here. Initial scoring decisions on the applications will be made by "[a]n independent review panel [that] will evaluate applications that meet the responsiveness criteria." 2018 TPP Tier 1 FOA at 63. And the "final award selections" will be made by other HHS officials. *Id.*

Even so, the County cannot meet its burden. The vast majority of statements it points to as evidence of Ms. Huber's bias were made before she accepted a role at HHS and are not a part of the administrative record. *See* Pl.'s Br. 7-10, 29. As to the few comments Ms. Huber made while working for HHS (at Pl.'s Br. 29), "mere proof that [an agency official] has … expressed strong views … cannot overcome" the presumption that agency officials will faithfully carry out the law. *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1208 (D.C. Cir. 1980). Courts have rejected "unalterably closed mind" arguments where, as here, "an agency administrator who had previously served as the chairman of a group advocating for the precise agency policy at issue in the case, and who after his appointment remarked that there was 'no question' that the policy should be implemented." *Miss. Comm'n on Env'tl Quality v. EPA*, 790 F.3d 138, 184 (D.C. Cir. 2015) (summarizing *C&W Fish Co., Inc. v. Fox*, 931 F.2d 1556 (D.C. Cir. 1991)). Even if Ms. Huber's efforts to deauthorize the TPP Program were directly coupled to the new FOA, the County's evidence falls short of the standard necessary to prevail on this claim.

Likewise, the County's claim that HHS violated regulations prohibiting decisions "on the basis of the religious affiliation, or lack thereof, of a recipient organization" should be rejected. 45 C.F.R. § 87.3(*l*). The County suggests that its claim has merit because the 2018 FOA is "designed to disadvantage applicants who do not share a particular, religiously affiliated view of sex education." Am. Compl. ¶ 115. But the 2018 FOA follows materially the same

merit-based review procedures as previous FOAs which do not weigh religion either explicitly or implicitly. And, as discussed, the 2018 FOA's "public health priorities" do not mandate so-called "abstinence education" to which the County objects.

But even if the 2018 FOA were understood to impose "abstinence education" standards, that would not constitute religious discrimination. The Supreme Court has held that such programs, if implemented with the goal of "eliminate[ng] or reduc[ing] … social and economic problems caused by teenage sexuality, pregnancy, and parenthood," are not "inherently religious." *Bowen v. Kendrick*, 487 U.S. 589, 602, 605 (1988). The fact that religious beliefs "happen[] to coincide" with these views does not mean that advancing them constitutes religious discrimination. *Harris v. McRae*, 448 U.S. 297, 319 (1980) (rejecting Establishment Clause claims). Virtually all policy positions would fail that test. The County's complaint includes allegations about Ms. Huber's personal beliefs and actions prior to joining HHS, *see* Am. Compl. ¶¶ 47-48, but that has evidence has no bearing on whether the 2018 FOA is the product of religious discrimination, and has been rejected in other contexts. *See also Planned Parenthood of Greater Wash. & N. Idaho v. U.S. Dep't of HHS*, No. 18-cv-0055-TOR, 2018 WL 1934070, at *17 n.4 (E.D. Wash. Apr. 24, 2018) (rejecting consideration of "the individual actions or beliefs" of HHS officials in assessing Establishment Clause claims). For these reasons, judgment on Count 3 in HHS's favor is appropriate.

III. The County Is Not Entitled To a Preliminary Injunction

The County's motion requests a preliminary injunction to prevent HHS from disbursing funds after September 1, 2018, pursuant to the 2018 TPP Tier 1 FOA, to the extent that "the County's motion for partial summary judgment cannot be resolved before September 1." Pl.'s Br. at 15. A preliminary injunction is an extraordinary remedy that "does not follow as a matter

of course from a plaintiff's showing of a likelihood of success on the merits." *Benisek v. Lamone*, 138 S. Ct. 1942, 1943-44 (2018). Rather, the court "must also consider whether the movant has shown 'that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" *Id.* at 1944 (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)). It cannot show that its request meets this high standard.

The County's clearest allegation of irreparable harm is that it is "at imminent risk of losing funding for its adolescent sexual health programming." Pl.'s Br. 33. But that issue has been resolved by the judgment in *Healthy Futures*. If the County believes HHS is not in compliance with the order issued in *Healthy Futures*, the remedy is not to pursue a collateral action under the APA where relief is limited. *See generally Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("[T]he proper course" for remedying APA violations, "except in rare circumstances, is to remand to the agency for additional investigation or explanation.").

The County is also not being "forced to compete under the 2018 Tier 1 FOA on unequal footing," Pl.'s Br. 31-32, or to choose between forgoing TPP Program funding and forsaking its values, *id.* at 32-33. It seeks additional funds to expand its programs. That undermines its case for irreparable harm on several fronts. To begin with, the County's "voluntary decision" to compete is a "self-inflicted" harm that cannot be redressed by a preliminary injunction. *Ctr. for Competitive Politics v. Harris*, 296 F. Supp. 3d 1219, 1226 (E.D. Cal. 2017) (finding no irreparable harm from decision "to forego the privilege of soliciting funds as a tax-exempt entity, rather than comply with a law [plaintiff] deems unconstitutional"). Moreover, if the County's alleged disadvantage constitutes some sort of injury, "that does not necessarily make it an *irreparable* [injury]"; otherwise, any allegation of illegality would be cause for a preliminary

injunction. *Sabino County Tours, Inc. v. USDA Forest Serv.*, 298 F. Supp. 3d 60, 75-76 (D.D.C. 2018) (holding, in context of competitive government bidding, that unfair bidding conditions do not constitute irreparable harm unless the bidder is completely excluded from the competition). Mere "speculat[ion]" that an application will be unsuccessful "does not constitute irreparable injury sufficient to warrant granting a preliminary injunction." *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988). Because there is no underlying irreparable harm, the Court should not order a stay pursuant to *City of Houston, Texas v. Dep't of Housing & Urban Development*, 24 F.3d 1421 (D.C. Cir. 1994).

The balance of equities also does not favor an injunction. The County's argument, Pl.'s Br. 34-35. HHS has a legal imperative to obligate all TPP Program funds by the end of the fiscal year, regardless of whether the funding conditions at issue here are found unlawful, and independent of any obligation on the agency's party to comply with orders to process continuation applications. 31 U.S.C. § 1301(c); Consolidated Appropriations Act, § 5. The County's proposed relief would impose a significant burden to HHS's ability to comply with these competing legal obligations. And while the County is already in line to receive $1.3 million in TPP Program funding regardless of the outcome of this litigation, it will be depriving the agency of the opportunity to fund other promising approaches to preventing teen pregnancy. The extraordinary relief of a preliminary injunction is not called for under such circumstances.

CONCLUSION

The Court should grant Defendant's motion to dismiss or for summary judgment and deny Plaintiff's motion for partial summary judgment and a preliminary injunction.

Dated: July 13, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ *Michael J. Gerardi*
MICHAEL J. GERARDI